STATE OF MICHIGAN

COURT OF APPEALS

In re MANUEL J. MOROUN and DAN STAMPER.

MICHIGAN DEPARTMENT OF TRANSPORTATION,

Plaintiff-Appellee,

v

DETROIT INTERNATIONAL BRIDGE COMPANY and SAFECO INSURANCE COMPANY OF AMERICA,

Defendants,

and

MANUEL J. MOROUN and DAN STAMPER,

Appellants.

FOR PUBLICATION
February 6, 2012
9:00 a.m.

No. 308053
Wayne Circuit Court
LC No. 09-015581-CK

Before: WILDER, P.J., and K. F. KELLY and FORT HOOD, JJ.

K. F. KELLY, J.

Appellants, Manuel J. Moroun (Moroun) and Dan Stamper (Stamper), appeal as of right from the trial court's January 12, 2012, order directing appellants be imprisoned in the Wayne County Jail until the defendant Detroit International Bridge Company (DIBC) fully complied with the trial court's opinion and order of February 1, 2010. Moroun is a director of DIBC and Stamper is its President. Previously, on November 3, 2011, the trial court found DIBC in civil contempt for failing to comply with the February 1, 2010, order, which had been entered in the underlying lawsuit filed by plaintiff Michigan Department of Transportation (MDOT) against DIBC and Safeco Insurance Company, the surety to the performance bond. We find appellants' due process rights were not violated and that the trial court was clearly acting within its inherent and statutory powers to order DIBC's key decision-makers incarcerated pending DIBC's compliance with the trial court's order. However, the commitment order requiring "full" compliance cannot stand because appellants do not have the immediate ability to completely

finish construction and thus "purge" DIBC of the contempt. Because the contempt order does not provide appellants with the "keys to the jailhouse," we vacate that portion of the trial court's contempt order which continues incarceration until DIBC has "fully complied" and remand the case to the trial court. On remand, the trial court shall craft an order, with particularity, of what "act or duty" appellants are required to perform both to ensure that DIBC will begin and continue compliance with its February 1, 2010, order as well as enabling appellants to purge themselves of the contempt finding against DIBC. Accordingly, we affirm in part, vacate in part, and remand for further proceedings consistent with this opinion.

I. BASIC FACTS AND PROCEDURAL HISTORY

The underlying lawsuit arises from the Ambassador Bridge Gateway Project, which is intended to facilitate the flow of traffic between the United States and Canada over the Ambassador Bridge by constructing interstate freeway connections to the Bridge. DIBC owns and operates the Bridge. Appellant Stamper is the president of DIBC and is extensively involved in the operation and construction activities at the Bridge and in the defense of this lawsuit. Appellant Moroun has a living trust that is a minority shareholder of DIBC Holdings, Inc., which, in turn, owns DIBC. Moroun is also a director on the boards for DIBC and DIBC Holdings.

In April 2004, MDOT and DIBC executed an agreement, which required DIBC to construct Part A of the project in accordance with MDOT specifications and standards; plans and designs were attached to the contract as exhibits. DIBC was responsible for 100 percent of the costs associated with Part A, including construction and property acquisition costs. Because DIBC was unable to acquire all of the property interests needed to complete Part A, the contract was amended in February 2006, whereby MDOT assumed responsibility to acquire, through the power of eminent domain if necessary, the property interests encompassed by a portion of Part A. On March 12, 2007, a performance bond was executed, which provided that DIBC and Safeco "are held and firmly bound unto" MDOT in the penal sum of $34,664,650 and that "the condition of this obligation is such that if the above named principal shall and will, well and faithfully, and fully, do execute and perform all of the obligations contained in the attached documents identified as Exhibits A through Exhibit E, listed below." Exhibit E was described in the bond as "Plans for DIBC portion of the Ambassador Bridge/Gateway Project (Part A, DIBC portion) per MDOT/DIBC agreement as amended." In November 2007, MDOT and DIBC also executed a maintenance agreement, whereby DIBC agreed to maintain and operate certain physical features or structures located on a portion of M-85, including a truck road and related infrastructure, and a gate system. The parties also agreed that DIBC could utilize M-85, the 1-75 off ramp, and an access easement road in emergency situations, under certain conditions and limitations set forth in the agreement.

On June 24, 2009, MDOT filed a lawsuit against DIBC and Safeco alleging that DIBC did not perform the construction in accordance with the agreements. Among other claims, MDOT alleged DIBC was constructing Part A according to a "Conflicting Design," a plan not approved by MDOT, the Federal Highway Administration or the city of Detroit, which included: (1) constructing permanent toll booths in the location where it had agreed to construct an access easement drive; (2) installing facilities including auto fueling pumps in the location where it agreed to construct DIBC Ramp S04, the ramp over 23rd Street for traffic to Canada; (3)

installing facilities including underground fuel tanks in the location where it agreed to construct the two-lane truck road and DIBC Ramp S05, the ramp over 23rd street carrying truck traffic to the interstate highways; and (4) constructing Pier 19 at a location that blocks construction of the two-lane truck road from the truck plaza, as well as one of the "special return routes." MDOT sought a cease and desist order regarding ongoing construction activities by DIBC, reimbursement for costs associated with contractual breaches of the parties' agreements, an order of specific performance to direct DIBC to engage in construction consistent with the project, damages incurred as a result of DIBC's actions, and any other appropriate equitable and monetary relief.

On October 29, 2009, MDOT filed a motion for partial summary disposition pursuant to MCR 2.116(C)(10), seeking a partial judgment ordering DIBC to construct the two-lane access road for the project. Two weeks later, on November 13, 2009, MDOT filed a second motion for partial summary disposition and an order for specific performance pursuant to MCR 2.116(C)(10), seeking a partial judgment ordering DIBC to construct the necessary roads, ramps and bridges to connect the 1-75/1-96 freeways directly to the Ambassador Bridge in accordance with the agreed design for those structures. In response to these motions, DIBC essentially argued that the parties developed a "flexible" plan, that they merely committed to a "design concept" and that they did not memorialize any particular plan or agreement regarding the design or construction of particular roads, structures or improvements. DIBC submitted the affidavit of appellant Stamper to support its assertion that there was never "an immutable, final, agreed set of plans."

On February 1, 2010, the trial court issued an opinion and order granting both motions, and granting MDOT's request for specific performance. The trial court found that MDOT and DIBC had "agreed on a design for DIBC's Part A of the project," as reflected in the agreements and incorporated into the performance bond, and that DIBC had not constructed Part A according to the agreed-upon design. In doing so, the trial court rejected DIBC's arguments that it was not restricted by the contract to a particular design and that it could unilaterally substitute different access routes. The trial court further noted that "DIBC ha[d] constructed permanent structures and facilities in conflict with the designs for the easement, road, and ramps." Accordingly, the trial court directed DIBC, among other things, to "remove structures that have been constructed in the path of the access road and recorded easement and complete construction of its portion of the Gateway Project in accordance with the plans attached to the Performance Bond and the Maintenance Agreement."

On February 19, 2010, DIBC filed an emergency application seeking leave to appeal from the court's opinion and order granting partial summary disposition, along with motions for immediate consideration and for a stay of the order. This Court denied DIBC's interlocutory application for leave to appeal "for failure to persuade the Court of the need for immediate appellate review" and denied the motion for stay. *Michigan Dep't of Trans* v *Detroit Int'l Bridge Co,* unpublished order of the Court of Appeals, entered March 17, 2010 (Docket No. 296567).

DIBC then filed a motion in the trial court seeking revisions, clarification and amendment of the order because the order did not address the issue of material and nonmaterial changes, the latter for which (DIBC claimed) MDOT's approval was not needed. At a hearing conducted on

April 23, 2010, the trial court ruled that its order was enforceable, that a timetable for the completion of construction submitted by DIBC was unsatisfactory and that DIBC's motion for revision and/or clarification and/or amendment was frivolous.

Four days later, the trial court issued an order to show cause, directed at DIBC and Stamper, to appear in court on May 10, 2010, to explain why DIBC should not be held in civil contempt for failing to comply with the terms of the February 1, 2010, opinion and order. On the same day, DIBC filed an application with the Supreme Court, as well as a motion for stay and a motion for immediate consideration, seeking leave to appeal from this Court's denial of its application filed in Docket No. 296567. The Supreme Court initially granted a stay, but subsequently denied DIBC's application for leave to appeal and vacated the stay. *Michigan Dep't of Trans* v *Detroit Int'l Bridge Co,* 486 Mich 937; 782 NW2d 199 (2010).

The trial court rescheduled the show cause hearing for June 10, 2010, and then for September 23, 2010, but due to DIBC's attempt to remove the lawsuit to federal district court, each hearing was adjourned. The trial court was finally able to conduct the show cause hearings in December 2010, over the course of three days. Appellant Stamper appeared and testified at the hearings. On January 10, 2011, the trial court ruled that it was finding by clear and unequivocal evidence that: (1) DIBC was not complying with the terms and provisions of the February 1, 2010, order; (2) the failure to comply impaired the authority and impeded the functioning of the court; (3) DIBC's acts and omissions occurred outside of the presence of the court; and (4) DIBC was in civil contempt. The trial court found that the timetable submitted by DIBC, which provided a completion date in June 2013, was completely unacceptable especially when at least 60 to 70 percent of the work had been completed, and directed DIBC to submit a detailed timetable that would ensure full compliance with the February 1, 2010, order within one year. The trial court also directed DIBC to submit biweekly reports regarding all scheduled work and work in progress. The trial court further ordered Stamper to be imprisoned in the Wayne County Jail until DIBC began to comply with the February 1, 2010 order. Stamper was released later in the day once it was reported to the trial court that DIBC was beginning to comply with the order to remove structures.

DIBC again filed an application seeking leave to appeal the February 1, 2010, opinion and order as well as the January 10, 2011, order of contempt. This Court denied DIBC's interlocutory application "for failure to persuade the Court of the need for immediate appellate review" and denied the motion for stay. *Michigan Dep't of Trans* v *Detroit Int'l Bridge Co,* unpublished order of the Court of Appeals, entered March 18, 2011 (Docket No. 302330). DIBC did not seek leave from the Supreme Court.

In June 2011, MDOT filed an ex parte motion for continuation of contempt proceedings under MCR 3.606(A) for DIBC's continuing violation of the court's February 1, 2010, opinion and order. In its motion, MDOT claimed that DIBC had not removed any conflicting structures and had not constructed any public roads, as ordered by the court. In support of the motion, MDOT submitted an affidavit of Victor Judnic. On June 13, 2011, the trial court issued a show cause order directed at Stamper and DIBC, to personally appear and show cause why DIBC should not be held in civil contempt for failure to comply with the terms and provisions of the February 1, 2010, opinion and order. DIBC's resident agent was served with the order. Stamper was also personally served with the order, appeared at the hearing as directed, and provided

testimony in defense of the civil contempt charge against DIBC at subsequent hearings conducted in September and October 2011.

The trial court issued an opinion and order on November 3, 2011, which found, by clear and unequivocal evidence, that DIBC was in violation of the February 1, 2010, order, and therefore, ruled that DIBC was, again, in civil contempt of the court. The trial court stated that the project site plan that was illustrated in the C-1 drawing "identifies the major components" part of the Gateway Agreement, and that DIBC was responsible for constructing "various components" shown in the C-1 drawing, which included the SOl Bridge for outbound traffic to Canada and the "4/3 lane" road under the SOl Bridge. After setting forth the background and proceedings of the matter, the court summarized the testimony from the hearing, and then set forth the following findings of fact:

> DIBC has provided plans for construction and has constructed parts of a design that is not in agreement with the approved design. DIBC's request for a variance for the alternate design has been denied by MDOT. The proposed substitute design materially changes the approved design. The proposed construction plans leave out important parts of the approved design including the two-lane access road and special return routes shown on the C-1 drawing and the Maintenance Agreement. Additionally, DIBC has not removed various conflicting structures that are in the path of roads shown in the approved design.
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> The C-1 drawing in Exhibit E to the Performance Bond required DIBC to construct a four lane road that proceeds in a southerly direction under SOl and between its piers. The C-l drawing shows the four lanes making a turn to the west, paralleling Fort Street and then narrowing to three lanes. The as-built plans submitted by DIBC, show that piers of SOl (piers 11, 12, and 13) are in conflict with the four lane road that passes under SOl. DIBC did not submit preliminary and final construction plans to MDOT for approval, prior to the start of construction of SOl as required by the Gateway Agreement. DIBC constructed a two lane road that proceeds in a southerly direction under SOl between the piers conflicting with the C-l drawing. Cars using those two lanes may stop for fueling, stop at the duty free store or proceed to SOl. Truck traffic is routed in a southwesterly direction at pier 11, through newly constructed toll booths toward a truck fueling area. The car fueling area is in the path of the 4/3 lane road shown in C-1. SOl as presently constructed, is not in compliance with the February 1, 2010 Order of this Court. Mr. LaCross and Mr. Anderson acknowledged that SOl was not constructed in conformity with C-1 of the Exhibit E to the Performance Bond.
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> DIBC has sought approval for variances, including approval for nonconforming as-built plans for SOl from MDOT; however, those requests have not been approved. DIBC has not submitted construction plans that satisfy the requirements of the plans attached to the Performance Bond and the Maintenance Agreement for the access road and the truck road. The truck road from Canada is a two lane road that carries truck traffic in a westerly direction, parallel to Fort Street. The truck road continues to the S02 Bridge to S32 to convey truck traffic

> onto the freeways. Pier 19 conflicts with the proposed truck road. Plans have not been submitted for the correction of piers 11, 12, 13 and the relocation of pier 19.

With respect to sanctions, the trial court listed options it was considering to coerce compliance with the February 1, 2010, order: (1) requiring DIBC's surety, Safeco, to take over the responsibility for completing the project; (2) having MDOT or another construction company complete DIBC's portion of the project; (3) *financial sanctions and/or imprisonment*; and (4) appointment of a receiver to stand in the place of the owner of DIBC, Manuel "Matty" Moroun, and its officers with authority to make decisions regarding the implementation of the February 1, 2010, order. The trial court indicated that it would make this sanction determination at a hearing on January 12, 2012, and directed DIBC (in the interim) to remove conflicting structures and perform construction in accordance with the C-1 drawing. The trial court also directed appellant Moroun and "the top company officer for DIBC" to appear before the court on January 12, 2012, on the sanctions issue.

DIBC filed an application seeking leave to appeal the November 3, 2011, order and a motion for immediate consideration. This Court denied the interlocutory application "for failure to persuade the Court of the need for immediate appellate review" and denied the motion for stay. *Michigan Dep't of Trans* v *Detroit Int'l Bridge Co*, unpublished order of the Court of Appeals, entered January 10, 2012 (Docket No. 307306).

In the meantime, Moroun filed a motion to be excused from appearing at the January 12, 2012 hearing. Moroun's motion stated that it was intended to inform the trial court that he was not the owner of DIBC and that he was not the decision-maker with respect to the Gateway Project, and further asserted:

> Mr. Moroun is not the owner of DIBC. DIBC is owned by DIBC Holding, Inc. ("DIBC Holdings"). The Manuel J. Moroun Trust Dated March 23, 1977 As Amended and Restated on August 28, 1996, is a minority owner of DIBC Holdings. Mr. Moroun is a member of DIBC's board of directors, and he has not been a statutory officer of DIBC during any pertinent time. While Mr. Moroun has been informed about the Ambassador Bridge Gateway Project ("Gateway Project") and this Court's order regarding the Gateway Project, from the inception, authority over the Gateway Project -and subsequently this litigation has been the responsibility of Dan Stamper, DIBC's president for over 20 years.

MDOT filed a response to the motion, asserting that Moroun should not be excused from the hearing on the sanctions for the contempt order since he is a director and owner of DIBC Holdings, Inc, which is the sole owner of DIBC, which was under the trial court's authority and jurisdiction. MDOT also asserted that Moroun and Stamper were directors of DIBC and that they constituted a majority in control of DIBC. MDOT also pointed out that Stamper testified at the show cause hearing that he reported to the board of directors, which included Moroun.

The parties, and appellants, along with their attorneys, appeared at the hearing conducted on January 12, 2012. In denying Moroun's motion to be excused, the trial court stated:

> In addition, the claim that Manuel Moroun has no control or authority is not supported by the record of this case. Mr. Moroun has the power, the authority to make sure that there is compliance with the February 1, 2010 Order of this Court. The request to excuse Mr. Moroun from this hearing is therefore denied.

After discussing several options for sanctions, the trial court stated that DIBC "is best equipped to complete the project at this time" because it has the power, the resources, and the knowledge to comply with the court's order, and that the "key decision makers," who were Manuel Moroun, Stamper and Matthew Moroun, had the responsibility to ensure DIBC fully complied with the order. The trial court then directed DIBC to pay the maximum fine of $7,500 and MDOT's costs and reasonable attorney fees, and directed appellants imprisoned in the Wayne County Jail until DIBC complies with the February 1, 2010. The trial court also entered an opinion and order incorporating these rulings. In relevant part, the order provides:

> IT IS ORDERED THAT Manuel "Matty" Moroun and Dan Stamper shall be imprisoned in the Wayne County Jail until the Detroit International Bridge Company complies with the February 1, 2010 Order of this Court.
>
> IT IS ORDERED THAT the imprisonment of Manuel "Matty" Moroun and Dan Stamper shall cease when the DIBC has fully complied with the February 1, 2010 Order of this Court or they no longer have the power to comply with the February 1, 2010 Order of this Court.

Finally, the trial court continued the matter to February 9, 2012, "for further review of the status of the project and the appearance of the Vice President of DIBC, Matthew Moroun."

Appellants filed a claim of appeal, along with a motion for release pending appeal, which this Court denied On January 12, 2012. The following day, appellants filed motions for peremptory reversal, for a stay, and for immediate consideration. This Court denied the motion for peremptory reversal, but granted the motion for stay and allowed appellants' release and expedited the appeal by shortening the briefing schedule and scheduling the matter for oral argument.

II. JURISDICTION

Appellants claim that their appeal is as of right, citing MCR 7.203(A), MCR 7.204, and MCR 7.202(6)(a). MDOT asserts "this Court does *not* have jurisdiction . . . as claimed by both DIBC and its corporate officials, because the January 12, 2012 order is not a final order appealable by right." MDOT makes no further argument, however, believing that "[i]t appears this Court has treated the corporate officials' claim of appeal as an application for leave to appeal under MCR 7.203(B) the January 12, 2012 Opinion and Order, [] and granted it." We clarify that we have not treated this appeal as on application for leave; instead, we find that appellants may appeal as of right.

Here, DIBC, a party to the underlying lawsuit, was held in *civil* contempt of court, which must be distinguished from *criminal* contempt; whereas the former is coercive, the latter is punitive. *In re Contempt of Dougherty*, 429 Mich 81, 95; 413 NW2d 393 (1987). Criminal contempt is a "crime" and, therefore, a final order from which a contemnor may appeal as of

right. See MCL 600.308(1); MCR 7.203(A); MCR 7.202(b). *In re Dudzinski Contempt*, 257 Mich App 96, 667 NW2d 68 (2003); *In re Contempt of Robertson*, 209 Mich App 433, 436, 531 NW2d 763 (1995). However, civil contempt is not a final order for purposes of appellate review. See MCL 600.308(2); MCR 7.202(a).

Civil contempt is clearly at issue in this case where the trial court sought to compel DIBC's compliance with its February 1, 2010, court order. Thus, an appeal by DIBC from the civil contempt order, must be made by application, not as of right. However, the same is not true for the individual appellants Moroun and Stamper, who are "non-parties" who have not been held in contempt but instead have been sanctioned for DIBC's contempt. Even if a final order against DIBC had been issued, appellants would not have the ability to appeal as of right because they do not have party status. Thus, limiting appellants to only seek leave to appeal by application would be tantamount to preventing a sanctioned individual from appellate review of a trial court's imposition of sanctions. We do not believe an individual's right should be so constrained, especially in this context where the most severe sanction – incarceration – is utilized to coerce compliance with a trial court's order.

Under federal law, "[t]he right of a nonparty to appeal an adjudication of contempt cannot be questioned" even absent a final order. *United States Catholic Conference v Abortion Rights Mobilization Inc*, 487 US 72, 76; 108 S Ct 2268; 101 L Ed 2d 69 (1988) (in the context of finding a witness in contempt). We have also previously treated an appeal from non-parties held in civil contempt of court as an appeal by right, though the issue was never specifically raised or discussed. See as examples *Droomers v Parnell*, unpublished opinion per curiam of the Court of Appeals, issued June 30, 2005 (Docket No. 253455) (nonparty officers of a corporation); *Migda v Maciejewski*, unpublished opinion per curiam of the Court of Appeals, issued April 10, 2001 (Docket No. 210779) (an attorney who represented a party in an underlying matter). Although appellants have not been held in contempt, but rather sanctioned as decision-makers to enforce DBIC's compliance with the court's order, we find the same principles apply. This matter is properly before us as a claim of appeal.

III. DUE PROCESS

Appellants contend that they were not afforded due process because they were never put on notice that they were in jeopardy of being imprisoned as a result of DIBC's civil contempt. We disagree. Whether a person has been afforded due process is a question of law, which is reviewed de novo. *In re Henry*, 282 Mich App 656, 668; 765 NW2d 44 (2009).

A trial court has the inherent and statutory authority to enforce its orders. MCL 600.611, MCL 600.1711, MCL 600.1715. In civil contempt proceedings, a trial court employs its contempt power to coerce compliance with a present or future obligation, including compliance with a court order, and/or to reimburse the complainant for costs incurred by contemptuous behavior. *Porter v Porter*, 285 Mich App 450, 455; 776 NW2d 377 (2009). "Civil contempt proceedings seek compliance through the imposition of sanctions of indefinite duration, terminable upon the contemnor's compliance or inability to comply." *DeGeorge* v *Warheit*, 276 Mich App 587, 592; 741 NW2d 384 (2007).

The trial court must carry out the proper procedures before it can issue an order holding a party or individual in contempt of court. *In re Contempt of Auto Club Ins Ass'n,* 243 Mich App 697, 711; 624 NW2d 443 (2000). As opposed to a criminal contempt proceeding, where some, but not all, of the due process safeguards of an ordinary criminal trial are utilized, a civil contempt proceeding only requires "rudimentary" due process, i.e., "notice and an opportunity to present a defense." *Porter,* 285 Mich App at 456-457; see also *International Union, United Mine Workers of America* v *Bagwell,* 512 US 821, 831; 114 S Ct 2552; 129 L Ed 2d 642 (1994) ("Because civil contempt sanctions are viewed as nonpunitive and avoidable, fewer procedural protections for such sanctions have been required.")

Appellants assert that they are not DIBC and that "the fiction" underlying the trial court's January 12, 2012, order is that they are "tantamount to DIBC" and "stand in its place vis a vis the contempt proceedings." They also cite case law supporting the proposition that a corporation is a separate entity from its individual shareholders, shareholders and directors. However, appellants have overlooked that a corporation may only act through its officers and agents. See *In re Kennison Sales & Engineering Co, Inc,* 363 Mich 612, 617; 110 NW2d 579 (1961), quoting *Stowe v Wolverine Metal Specialties Co,* 242 Mich 624, 628-630; 219 NW 714 (1928). "When a court acquires jurisdiction over a corporation as a party, it obtains jurisdiction over the official conduct of the corporate officers so far as that conduct may be involved in the remedy against the corporation which the court is called upon to enforce." *Stowe,* 242 Mich at 629, quoting *Tolleson* v *People's Savings Bank,* 85 Ga 171; 11 SE 599 (1890). Courts will also disregard the separate existence of corporate entities when it is "used to defeat public convenience, justify wrong, protect fraud, or defend crime." *Paul* v *University Motor Sales Co,* 283 Mich 587, 602; 278 NW 714 (1938).

Because individuals who are officially responsible for the conduct of a corporation's affairs are required to obey a court order directed at the corporation, these same individuals may be sanctioned if they fail to take appropriate action within their power to ensure that the corporation complies with the court order. *Wilson v United States,* 221 US 361, 376; 31 S Ct 538; 55 LEd 771 (1911). In *Wilson,* the United States Supreme Court stated:

> A command to [a] corporation is in effect a command to those who are officially responsible for the conduct of its affairs. If they, apprised of the writ directed to the corporation, prevent compliance or fail to take appropriate action within their power for the performance of the corporate duty, they, no less than the corporation itself, are guilty of disobedience and may be punished for contempt. [*Id.* at 376).]

See also *Electrical Workers Pension Trust Fund of Local Union 58, IBEW* v *Gary's Electrical Service Co,* 340 F3d 373, 380 (CA 6, 2003) and *Ex parte Chambers,* 898 SW2d 257, 260 (Texas 1995). Accordingly, we reject appellants argument that they may not be held accountable for failing to ensure DIBC's compliance with the trial court's order.

Appellants further argue that they were not given notice to show cause why they should not be personally sanctioned, or given an opportunity to be heard, in violation of the United States and Michigan Constitutions, and the notice requirements of MCL 600.l711(2) and MCR 3.606(A). When the contempt is committed outside the court's direct view (i.e., "indirect

contempt"), as in the case here, MCL 600.1711(2) allows a trial court to punish the contemnor by fine or imprisonment, or both, "after proof of the facts charged has been made by affidavit or other method and opportunity has been given to defend." Also, for indirect contempt, the trial court must also follow MCR 3.606(A), which requires that on a proper showing on ex parte motion supported by affidavits, the trial court to (1) order the accused person to show cause, at a reasonable time specified in the order, why that person should not be punished for the alleged misconduct; or (2) issue a bench warrant for the arrest of the person.

Appellants' citation to *In re Contempt of Auto Club Ins Ass'n,* as support for their argument that the trial court was required to name them in the show cause order is not persuasive. This decision is distinguishable because the persons accused of contempt, the attorneys, were capable of committing the contemptuous actions on their own, whereas the converse is not true with respect to a corporation being accused of contempt. Appellants were responsible to ensure DIBC's compliance with the February 1, 2010, opinion and order, regardless of whether they were parties to the underlying litigation or whether they were named in the trial court's opinion and order. The trial court found DIBC in civil contempt. The trial court found that appellants were the key decision-makers at DIBC, with the responsibility to ensure that DIBC complied with the court's order. Contrary to their claim on appeal, there is sufficient evidence in the record to support this finding.

With respect to Moroun, he represented that he is a director at DIBC and that his trust is a minority shareholder in DIBC Holdings, which owns DIBC. Moreover, Moroun does not dispute that his living trust holds the majority of voting shares in DIBC Holdings, which owns DIBC. Moroun also acknowledged that he had been informed about the Gateway Project and the court's order regarding the Gateway Project, but claimed that authority over the Gateway Project and the litigation "has been the responsibility of Dan Stamper." He did not otherwise affirmatively assert that he had no authority or responsibility over DIBC or its affairs, and any such assertion does not appear credible.

Furthermore, the November 3, 2011, opinion and order finding DIBC in contempt affirmatively discussed the possible civil contempt sanctions, including imprisonment, and directed Moroun to appear at the sanction hearing. Moroun filed a motion to be excused from the hearing, which, from our perspective, was an attempt to avoid the possibility that he could be subject to being sanctioned for DIBC's civil contempt. Accordingly, we find that Moroun was provided notice that he could be subjected to being sanctioned as a coercive sanction for DIBC's contempt, and an opportunity to be heard on the matter.

With respect to Stamper, he was listed on the show cause order, was present throughout the contempt hearings, and actively participated in DIBC's defense. He was also previously imprisoned for DIBC's civil contempt in January 2011. Because there is no dispute regarding Stamper's authority over the company and the project, we find that he had notice that he could be subjected to incarceration as a coercive sanction for DIBC's civil contempt, and was provided an opportunity to be heard on the matter.

IV. IMPRISONMENT SANCTION

Appellants argue that their imprisonment was an improper use of the civil contempt power and was invalid as a matter of law because the trial court's order did not give them the "keys to their cells." We disagree with appellants to the extent that they argue that incarceration was an improper use of the trial court's civil contempt power; however, we agree with appellants that the trial court erred in requiring their continued incarceration until DIBC "fully complied with" the February 1, 2010, order. We review a trial court's issuance of a contempt order for an abuse of discretion, and the factual findings for clear error. *Porter*, 285 Mich App at 454-455. "Reversal is warranted only when trial court's decision is outside the range of principled outcomes." *Id.* at 455. To the extent that this Court must examine questions of law related to the trial court's contempt decision, our review is de novo. See *DeGeorge*, 276 Mich App at 591. The interpretation and application of the court rules and statutes are also reviewed de novo. *In re Mason*, 486 Mich 142, 152; 782 NW2d 747 (2010).

Confinement or imprisonment may be imposed whether the contempt is civil or criminal in nature. *Borden v Borden*, 67 Mich App 45, 48; 239 NW2d 757 (1976). In the civil context, the confinement must be conditional. See MCL 600.1715. "The critical feature that determines whether the remedy is civil or criminal in nature is not when or whether the contemnor is physically required to set foot in a jail but whether the contemnor can avoid the sentence imposed on him, or purge himself of it, by complying with the terms of the original order." *Hicks ex rel Feiock v Feiock*, 485 US 624, 635 n 7; 108 S Ct 1423; 99 L Ed 2d 721 (1988). Civil contempt imposes a term of imprisonment which ceases when the contemnor complies with the court's order or when it is no longer within his or her power to comply. *Borden*, 67 Mich App at 48. MCL 600.1715 provides:

> (1) Except as otherwise provided by law, punishment for contempt may be a fine of not more than $250.00, or imprisonment which, except in those cases where the commitment is for the omission to perform an act or duty which is still within the power of the person to perform shall not exceed 30 days, or both, in the discretion of the court.
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> (2) If the contempt consists of the omission to perform some act or duty which is still within the power of the person to perform, *the imprisonment shall be terminated when the person performs the act or duty or no longer has the power to perform the act or duty which shall be specified in the order of commitment* and pays the fine, costs, and expenses of the proceedings which shall be specified in the order of commitment. [Emphasis added.]

Where the purpose of the sanction is to make a party or person comply, the trial court, in exercising its discretion, must "consider the character and magnitude of the harm threatened by continued contumacy, and the probable effectiveness of any suggested sanction in bringing about the result desired." *In re Contempt of Dougherty*, 429 Mich at 98, quoting *United States v United Mine Workers*, 330 US 258, 303-304; 67 S Ct 677; 91 LEd 884 (1947). Clearly, the trial court considered the effectiveness of other sanctions before choosing incarceration to coerce compliance with its order, and provided the following reasons for rejecting other alternatives that were suggested by MDOT:

> One of the options considered was to require DIBC's surety Safeco to take over the responsibility for completing the project. A default has been taken against Safeco. However, even without the default, Safeco as surety is liable for the responsibilities of its principle [sic] DIBC, which includes completing the project and monetary damages. On July 8, 2011, Safeco was ordered to submit a detailed plan that may be implemented to complete DIBC's portion of the Gateway Project. MDOT as well as DIBC were given an opportunity to respond to Safeco's plan. A fair review of the information submitted by the parties in response to Safeco's plan makes it clear that this project would be bogged down with further litigation in addition to needless delays if Safeco was ordered to take on the construction at this time. Requiring Safeco to take on the construction obligations of DIBC is not the best option available at this time.
>
> The use of an independent contractor to complete DIBC's portion of the project would also be challenging. There are funding considerations, oversight concerns, probable litigation, as well the contractor's need to assess the construction requirements which could prove to be a formidable task for a contractor new to the project. The contractor would be required to arrange for the completion of construction drawings for review and approval by MDOT. The assessment and coordination of the construction needed would require interaction with other entities resulting in further delays. The use of an independent contractor would further delay the completion of the project and would therefore not be the best option to use to complete the project.
>
> The use of a receiver would likely produce many of the same problems as those anticipated by the use of an independent contractor. At the Court's direction, the parties presented briefs discussing their positions regarding the appointment of a receiver. In addition, a hearing was conducted on December 1, 2011, at which time representatives from MDOT, DIBC, and Safeco were allowed to make oral presentations. Based on the information that has been presented, it appears that the appointment of a receiver at this time would generate a number of issues resulting in additional delays. There are funding issues that would likely bring about additional litigation and delays. There are also the concomitant problems of safeguarding the funds and coordinating construction activities. The receiver would be required to hire design consultants, develop plans for approval by MDOT and obtain bids for construction contracts. Appointing a receiver at this time would likely greatly prolong the time required for the completion of the project. The appointment of a receiver at this time would not be the best option to complete this project.

The trial court further found that DIBC had the power, resources, and knowledge to complete its portion of the Project in accordance with the February 1, 2010, order and that the decision makers of DIBC did not intend to carry out construction of its portion of the project in conformity with the February 1, 2010, without "imposing meaningful coercive measures." We

cannot say that the trial court's decision to utilize coercive measures, including incarceration, over other alternatives fell outside the range of principle outcomes, or that the decision constituted an abuse of discretion.[1]

The trial court's January 12, 2012, order provides the following with respect to appellants' conditional imprisonment:

> IT IS ORDERED THAT Manuel "Matty" Moroun and Dan Stamper shall be imprisoned in the Wayne County Jail until the Detroit International Bridge Company complies with the February 1, 2010 Order of this Court.
>
> IT IS ORDERED THAT the imprisonment of Manuel "Matty" Moroun and Dan Stamper shall cease when the DIBC has fully complied with the February 1, 2010 Order of this Court or they no longer have the power to comply with the February 1, 2010 Order of this Court.

Because the purpose of civil contempt is to enforce compliance with an order, rather than to punish for disobedience, the contemnor may not be incarcerated beyond the time that he is able to comply with the court's order. *People v Kearns*, 38 Mich App 561, 563; 196 NW2d 805 (1972), quoting *Spalter v Wayne Circuit Judge*, 35 Mich App 156, 161; 192 NW2d 347 (1971). "Civil contempt seeks to coerce compliance, to coerce [the contemnor] to do what he is able to do but refuses to do." In other words, the contemnor "carries the keys to his prison in his own pocket." *Borden*, 67 Mich App at 48. In *Bagwell, supra*, 512 US at 828, the Supreme Court further explained:

> The paradigmatic coercive, civil contempt sanction . . . involves confining a contemnor indefinitely until he complies with an affirmative command such as an order to pay alimony, or to surrender property ordered to be turned over to a receiver, or to make a conveyance. Imprisonment for a fixed term similarly is coercive when the contemnor is given the option of earlier release if he complies. In these circumstances, the contemnor is able to purge the contempt and obtain his release by committing an affirmative act, and thus, carries the keys of his prison in his own pocket. [citations and quotations omitted.]

We cannot uphold the trial court's commitment order where the condition for release requires DIBC to "fully" comply with the February 1, 2010, order as it failed to identify "the act or duty" which must be performed before the incarceration may be terminated. MCL 600.1715(2). While appellants may have the present immediate ability to commence and

[1] While it is clear that appellants take issue with the order, nevertheless, appellants are not at liberty to disregard the order based on their subjective belief that it was wrong. *Porter*, 285 Mich App 465. "A party must obey an order entered by a court with proper jurisdiction, even if the order is clearly incorrect, or the party must face the risk of being held in contempt and possibly being ordered to comply with the order at a later date." *Kirby v Mich High Sch Athletic Ass'n*, 459 Mich 23, 40; 585 NW2d 290 (1998); *In re Henry*, 282 Mich App at 680.

continue construction, they do not have the present immediate ability to actually finish the construction in accordance with the directives set forth in the February 1, 2010, opinion and order for a period of six to twelve months. Therefore, the condition does not permit appellants to use the keys to obtain their release until the project is completed, or, in other words, "to avoid the sentence" and purge the contempt. Our decision does not preclude further civil contempt sanctions, including imprisonment that was similar to the one imposed by the trial court in January 2011. However, we leave this decision to discretion of the trial court to identify the act or duty appellants will be required to perform, that will coerce the initiation and continuation of compliance with the February 1, 2010, order within the confines of the case law and the statute for civil contempt sanctions.

V. JUDICIAL DISQUALIFICATION

Finally, appellants argue that further proceedings should be held before a different judge because the judge acted as both accuser and finder of fact and has become personally embroiled in the litigation. There has been no motion to disqualify the judge; therefore, there is no ruling for us to review. See *Henry*, 282 Mich App at 679, citing MCR 2.003. We further find that there is no merit to appellants' position that the judge acted as an accuser and finder of fact by imposing a sentence that was not personally requested by MDOT. The judge provided an adequate explanation as to why other alternatives would not bring about compliance with its order.

VI. CONCLUSION

Accordingly, we find that appellants were afforded rudimentary due process, but that the conditional confinement did not allow appellants to avoid the sentence by purging the contempt. Therefore, we affirm in part, vacate in part, and remand for further proceedings consistent with this opinion. We do not retain jurisdiction. In light of the trial court's scheduled February 9, 2012 hearing, this opinion is to have immediate effect. MCR 7.215(F)(2).

/s/ Kirsten Frank Kelly

STATE OF MICHIGAN

COURT OF APPEALS

In re MANUEL J. MOROUN and DAN STAMPER.

MICHIGAN DEPARTMENT OF TRANSPORTATION,

Plaintiff-Appellee,

V

DETROIT INTERNATIONAL BRIDGE COMPANY and SAFECO INSURANCE COMPANY OF AMERICA,

Defendants,

and

MANUEL J. MOROUN and DAN STAMPER,

Appellants.

FOR PUBLICATION
February 6, 2012

No. 308053
Wayne Circuit Court
LC No. 09-015581-CK

Before: WILDER, P.J., and K.F. KELLY and FORT HOOD, JJ.

WILDER, P.J. (*concurring in part and dissenting in part*)

I

I agree that this Court has jurisdiction of the claim of appeal filed in this action by appellants Manuel J. Moroun (Moroun) and Dan Stamper (Stamper) for the reason that, as nonparties to the underlying action by the Michigan Department of Transportation (MDOT) against the Detroit International Bridge Company (DIBC), the order which punished Moroun and Stamper for the civil contempt of DIBC is a final order appealable by right. MCR 7.202(6)(a)(i); *US Catholic Conference v Abortion Rights Mobilization, Inc*, 487 US 72, 76; 108 S Ct 2268; 101 L Ed 2d 69 (1988).

II

Additionally, I agree that the trial court's January 12, 2012, order did not specify with particularity what action or actions Stamper and Moroun were required to take such that they were able immediately to purge themselves of the contempt finding made by the trial court against DIBC. First, no contempt finding was made against Moroun and Stamper. Only DIBC was found to be in contempt. Thus, any act to be performed by Moroun and Stamper was not to purge themselves of some unstated act in defiance of the trial court's order, but instead was to purge DIBC of contempt. Second, there is considerable ambiguity as to what the trial court intended by requiring Moroun and Stamper to remain imprisoned until DIBC had "fully complied" with the trial court's February 1, 2010, order. In this regard, counsel for MDOT acknowledged during oral argument that it was unclear precisely what particular actions by Moroun and Stamper would satisfy the trial court's directive that DIBC fully comply with the February 1, 2010, order. Moreover, as also acknowledged by counsel for MDOT, it is unclear to what extent the trial court's review of progress reports it ordered to be filed biweekly by DIBC and reports of a court-appointed monitor would impact the trial court's determination that DIBC had sufficiently complied with the February 1, 2010, order, such that Moroun and Stamper could be determined to have done enough to have purged DIBC of contempt.[1] For these reasons, I agree that any directive by the trial court must enable the contemnor "to purge the contempt and obtain his release by committing an affirmative act," or in other words, a civil contemnor carries "the keys of the prison in his own pocket."[2] *Int'l Union, United Mine Workers of America v Bagwell*, 512 US 821, 828; 114 S Ct 2552; 129 L Ed 2d 642 (1994).

III

I disagree, however, with the conclusion in the lead opinion that there was sufficient notice to Moroun and Stamper.

A

There is no question that officers and agents of a corporation are bound to follow orders that are directed towards a corporation, even if those officers and agents are not named in the

[1] Having seen no order that seals any part of the court record (there may be valid reasons to seal aspects of the record, such as to protect proprietary information, or for matters of public safety or national/international border security, but no such finding has been made), I am unaware of the reason why these reports, reviewed and presumably considered by the trial court in its deliberations, should not be docketed in the register of actions and available in the court record transmitted to this Court pursuant to MCR 7.210(G).

[2] Pertinent to this point, during oral argument, counsel for Moroun and Stamper represented to this Court that every day from January 13, 2012, to February 1, 2012, Stamper had presented new engineering plans, from a new engineering firm, to the court-appointed monitor in an effort to comply with the trial court's February 1, 2010, order, but the monitor had refused to examine the plans.

order itself. See *In re Kennison Sales & Eng Co*, 363 Mich 612, 618; 110 NW2d 579 (1961); *Ex parte Chambers*, 898 SW2d 257, 260 (Tex, 1995). Thus, Stamper as president of DIBC and Moroun as a director of DBIC were bound by the orders of the trial court directing certain action by DBIC, and they were required to avoid conduct that contributed to or caused DIBC to violate the trial court's February 1, 2010, order. By ordering them incarcerated, it is clear that the trial court concluded that Moroun and Stamper did or failed to do something which contributed to or caused the contumacious conduct of DIBC.[3] However, neither the June 9, 2011, ex parte motion filed by MDOT, the trial court's June 13, 2011, order to show cause, nor the show cause proceedings commenced on July 7, 2011, identified what conduct of Moroun or Stamper contributed to or caused DIBC to be in contempt of the trial court's February 1, 2010, order. In addition, the show cause order did not make Moroun and Stamper parties to the contumacious conduct of DIBC. I would conclude that these are due process errors requiring the trial court's sanctions against Moroun and Stamper to be vacated.

B

1

In a civil contempt proceeding, "rudimentary" due process is required. *Porter v Porter*, 285 Mich App 450, 456-457; 776 NW2d 377 (2009). Specifically, this requires "notice and an opportunity to present a defense, and the party seeking enforcement of the court's order bears the burden of proving by a preponderance of the evidence that the order was violated." *Id.* at 457.

MCL 600.1711(2), addressing indirect contempt, provides:

> When any contempt is committed other than in the immediate view and presence of the court, the court may punish it by fine or imprisonment, or both, after proof of the facts charged has been made by affidavit or other method and opportunity has been given to defend.

MCR 3.606(A)(1), also governing contempt outside of the immediate presence of the court, provides in part that the court shall "order the *accused person* to show cause, at a reasonable time specified in the order, why *that person* should not be *punished* for the alleged misconduct." (Emphasis added.)

Accordingly,

[3] I acknowledge Moroun and Stamper's plea that, if an appellate court agreed on the merits with DIBC's contention that it is not in violation of the executory contract between it and MDOT, on the basis that it agreed to a design concept for the project and never reached "an immutable, final, agreed set of plans" with MDOT, an appellate court might also conclude that DIBC's conduct was not contumacious. However, because the February 1, 2010, order is not a final order, MCR 7.202(6)(a)(i), that issue is not before us.

> [i]f the contemptuous behavior occurs in front of the court, i.e., it is "direct" contempt, there is no need for a separate hearing before the court imposes any proper sanctions because "all facts necessary to a finding of contempt are within the personal knowledge of the judge." If the contemptuous conduct occurs outside the court's direct view, i.e., it is "indirect" contempt, the court must hold a hearing to determine whether the alleged contemnor actually committed contempt. This hearing must follow the procedures established in MCR 3.606 and afford some measure of due process before the court can determine whether there is sufficient evidence of contempt to warrant sanctions. [*In re Contempt of Auto Club Ins Ass'n*, 243 Mich App 697, 712-713; 624 NW2d 443 (2000) (footnotes omitted).]

2

This Court interprets court rules according to the same principles that govern the interpretation of statutes. *Ligons v Crittenton Hosp*, 490 Mich 61, 70; 803 NW2d 271 (2011). "Our goal when interpreting and applying statutes or court rules is to give effect to the plain meaning of the text. If the text is unambiguous, we apply the language as written without construction or interpretation." *Id.* Moreover, if there is any conflict between the requirements of MCL 600.1711(2) and MCR 3.606, the court rule prevails. *In re Contempt of Henry*, 282 Mich App 656, 667; 765 NW2d 44 (2009). A trial court's substantial compliance with MCR 3.606(A)(1) is sufficient. See *People v Saffold*, 465 Mich 268, 273; 631 NW2d 320 (2001).

C

The plain and unambiguous language of MCR 3.606(A)(1) requires that, on a proper showing on an ex parte motion supported by affidavits, *the accused person* should be ordered to show cause why *that person* should not be punished for the alleged contempt. Here, the ex parte motion, without referencing anyone in particular, asserted that "DIBC" did certain acts or failed to perform certain acts. Also, the June 13, 2011, order to show cause stated the following:

> To: Dan Stamper, President
> Detroit International Bridge Company
>
> YOU ARE ORDERED to personally appear before this Court . . . on Thursday, July 7, 2011 at 9:00 a.m. and show cause why *the Detroit International Bridge Company* should not be held in civil contempt for failure to comply with the terms and provisions of this Court's February 1, 2010 Opinion and Order. [Emphasis added.]

The averments in the ex parte affidavit and the form of the show cause order are insufficient to comply or substantially comply with the requirement that Moroun and Stamper be given notice that they personally could be punished insofar as it pertained to DIBC's compliance with the trial court's February 1, 2010, order. Moroun's and Stamper's conduct was not mentioned in the ex parte affidavit or in the June 9, 2011, hearing pertaining to the ex parte affidavit. In addition, Moroun was not mentioned whatsoever in the show cause order, and Stamper's identification in the order only directed him to show cause concerning DIBC's

conduct. Moreover when the show cause proceedings commenced on July 7, 2011, the trial court did not advise Stamper at that time that his personal conduct could be considered contumacious and was a subject of the show cause hearings, and no statement was made on the record during the show cause proceedings that Moroun's conduct was the subject of the hearings.[4]

While these facts are not in dispute, the lead opinion overlooks these procedural defects by appearing to conclude that, because of Stamper and Moroun's status as "key decision makers," i.e., fiduciaries of DIBC, notice that their personal conduct and personal liberty were the subject of the show cause hearing was obviously implied. But MCR 3.606(A)(1) does not permit constructive notice of the nature of the contempt proceedings and the alleged contumacious conduct – it requires actual notice. In my judgment, the lead opinion's interpretation of MCR 3.606(A)(1), allowing such constructive notice, runs afoul of the plain meaning of the court rule. See *Robertson v DaimlerChrysler Corp*, 465 Mich 732, 758-759; 641 NW2d 567 (2002).

Although there is no precedent directly on point in Michigan, the rationale for interpreting MCR 3.606(A)(1) to require all persons subject to a show cause order, including corporate officers and directors, to be personally notified that they could be subject to punishment for contemptuous conduct, is supported by case law from other jurisdictions that have addressed this very question. The principle that these other jurisdictions espouse can be summed up as follows: "An officer of a corporation who participates in the disobedience of a court mandate is punishable for contempt *provided he has been made a party to the contumacious conduct and due notice has been given to him*." *In re Snider Farms, Inc*, 125 BR 993, 999 (Bankr ND Ind, 1991), quoting 17 Am Jur 2d, Contempt, § 61 (emphasis added); see also *Spuncraft, Inc v Lori Jay Mfg Co*, 47 Misc 2d 780, 781; 263 NYS2d 211 (1965).

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[4] See, for example, Michigan Judicial Institute (MJI), Contempt of Court Benchbook 4d, Appendix C, a procedural checklist for conducting civil contempt proceedings, including a pretrial hearing at which the trial court is recommended to, *inter alia*:

> □ Inform the alleged contemnor of the charges.
>
> □ Inform the alleged contemnor that the charge must be proven by a preponderance of the evidence, or that evidence of the alleged contempt must be "clear and unequivocal."
>
> □ **Inform the alleged contemnor of the possible sanctions**. . . .
>
> * * *
>
> □ Ask the alleged contemnor how he or she wishes to plead.
>
> □ Set a date for trial if necessary. The alleged contemnor must be given a reasonable opportunity to prepare a defense or explanation. . . . [Emphasis added.]

Although this MJI Benchbook and checklist are not authoritative, the MJI is a training division of the State Court Administrative Office of the Michigan Supreme Court.

In *Dole Fresh Fruit Co v United Banana Co*, 821 F2d 106 (CA 2, 1987), the district court found three officers of the corporate defendant in civil contempt. The circuit court reversed, holding that, even though the individuals were within the scope of the underlying order, it was improper to hold the individuals in contempt when it appeared that only the corporate defendant was a party to the contempt proceedings. *Id.* at 110. The circuit court stressed that the three individuals did not know that they were "personally" going to be held in contempt. *Id.* This factual scenario is nearly identical with the scenario in the present case, where both Stamper and Moroun were never notified that they could be individually punished.[5]

Although the lead opinion does not agree, I would find that *In re Contempt of Auto Club*, 243 Mich App 697, does support the above principles. In that case, this Court reversed the trial court's finding of contempt against the defendant corporation because the corporation was not afforded notice. *Id.* at 718. The plaintiff instituted contempt proceedings against defense counsel *personally*, not the corporation defendant. *Id.* at 717. But, at the conclusion of the show cause hearing, the trial court found both the attorney *and* the corporation in contempt. *Id.* Thus, this Court concluded that the corporation was "denied its right to know the substance of the charges against it." *Id.* This Court further noted,

> The contempt hearing also failed to give [the defendant corporation] notice that *it was being charged with contempt* because the trial court's order appeared to concern [the defense] attorneys as individuals. The first time it became clear that the trial court intended to hold [the corporation] in contempt was in [its] order, after the trial court had already done so. This completely denied [the corporation] an opportunity to prepare or present a defense. [*Id.* (footnotes omitted, emphasis added).]

Just as the defendant in *In re Contempt Auto Club* was deprived of notice because it was never notified that it could be punished for contempt, the same can be said here of Moroun and Stamper.

D

In summary, I would find that the unambiguous plain language and meaning of MCR 3.606(A)(1) requires that, regardless of a person's status as a corporate officer or director of a corporation subject to a show cause order, that officer or director is entitled to direct rather than

[5] The lead opinion suggests that Moroun was provided sufficient notice by virtue of the trial court's November 3, 2011, opinion and order. However, this "notice" was no notice at all. This "notice" occurred *after* the trial court already conducted the show cause hearing and found that DIBC was in contempt. If any such notice was to be effective, it had to occur *before* the show cause hearing, in order to allow Moroun "an opportunity to present a defense." *Porter*, 285 Mich App at 457. Indeed, without specific advance notice that the show cause hearing might result in sanctions imposed against them, any alleged "opportunity to present a defense" available to Moroun and Stamper at the various show cause hearings was illusory. Who would present a defense without knowing he or she was being accused?

implied notice to appear to show cause why *he or she* should not be held in contempt or punished for specified contumacious conduct. Because such notice was not provided in the instant case, I would conclude that the contempt proceedings as they pertain to Moroun and Stamper were fatally flawed as violative of due process of law, and I would vacate the contempt sanctions imposed against them.

IV

Finally, I also dissent from the panel's decision to give the opinions immediate effect pursuant to MCR 7.215(F)(2). The panel has issued three authored opinions on questions of the necessary due process of law to be accorded to corporate officials in a show cause proceeding against a corporation, where these questions have not been previously, directly addressed by Michigan precedent. Under these circumstances, I believe that exceptional issuance of our decisions is unwarranted.

/s/ Kurtis T. Wilder

STATE OF MICHIGAN

COURT OF APPEALS

In re MANUEL J. MOROUN and DAN STAMPER.

MICHIGAN DEPARTMENT OF TRANSPORTATION,

Plaintiff-Appellee,

V

DETROIT INTERNATIONAL BRIDGE COMPANY and SAFECO INSURANCE COMPANY OF AMERICA,

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MANUEL J. MOROUN and DAN STAMPER,

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FOR PUBLICATION
February 6, 2012

No. 308053
Wayne Circuit Court
LC No. 09-015581-CK

Before: WILDER, P.J., and K. F. KELLY and FORT HOOD, JJ.

FORT HOOD, J. (*concurring in part and dissenting in part*).

I join in and concur with the majority's decision in all respects except the imprisonment sanction.[1] Because I conclude that the trial court did not abuse its discretion with regard to the propriety of the penalty for civil contempt, I would affirm the lower court's decision in its entirety.

[1] With regard to appellants' contention that they were unaware that they would be imprisoned for the contempt of DIBC, I would only add that a party cannot claim lack of notice when the assertion is belied by the pleadings it files in the case. See *DeGeorge v Warheit*, 276 Mich App 587, 592-593; 741 NW2d 384 (2007).

Individuals who conspire with others to violate court orders are equally liable and subject to contempt proceedings. *ARA Chuckwagon of Detroit, Inc v Lobert*, 69 Mich App 151, 159; 244 NW2d 393 (1976). When an order is entered by the court, it must be obeyed until it is judicially vacated. *Id*. at 161. The validity of the order is determined by the courts, not the parties. *Id*. "Our jurisprudence has long recognized the inherent power of a court of record to punish, by contempt citation, a party for wilful, continuous, and contemptuous disobedience of its orders." *Id*. at 162-163.

The circuit court has the authority to punish by fine or imprisonment, or both, any neglect, violation of duty, or misconduct by "[p]arties to actions, attorneys, counselors, and all other persons for disobeying any lawful order, decree, or process of the court." MCL 600.1701(g). Contempt committed outside the immediate view and presence of the court may be punished by fine or imprisonment, or both, after proof of the facts charged have been made by affidavit or other means and an opportunity to defend has been given. MCL 600.1711(2). MCL 600.1715[2] addresses the punishment and termination of contempt:

> (1) Except as otherwise provided by law, punishment for contempt may be a fine of not more than $7,500.00, or imprisonment which, except in those cases where the commitment is for the omission to perform an act or duty which is still within the power of the person to perform shall not exceed 93 days, or both, in the discretion of the court. . . .
>
> (2) If the contempt consists of the omission to perform some act or duty that is still within the power of the person to perform, the imprisonment shall be terminated when the person performs the act or duty or no longer has the power to perform the act or duty, which shall be specified in the order of commitment and pays the fine, costs, and expenses of the proceedings which shall be specified in the order of commitment.

"The issuance of an order of contempt rests in the sound discretion of the trial court and is reviewed only for an abuse of discretion." *In re Contempt of Henry*, 282 Mich App 656, 671; 765 NW2d 44 (2009). "We review for an abuse of discretion a trial court's decision to hold a party or individual in contempt." *In re Contempt of Dudzinski*, 257 Mich App 96, 99; 667 NW2d 68 (2003). The trial court's factual findings are reviewed for clear error, and questions of law are reviewed de novo. *Porter v Porter*, 285 Mich App 450, 454-455; 776 NW2d 377 (2010). "Clear error exists when this Court is left with the definite and firm conviction that a mistake was made." *In Re Contempt of Henry*, 282 Mich App at 669. "The abuse of discretion standard

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[2] Issues involving statutory interpretation present questions of law reviewed de novo. *Klooster v City of Charlevoix*, 488 Mich 289, 295-296; 795 NW2d 578 (2011). "The primary goal of statutory interpretation is to give effect to the intent of the Legislature." *Briggs Tax Serv, LLC v Detroit Pub Sch*, 485 Mich 69, 76; 780 NW2d 753 (2010). To determine the legislative intent, the court must first examine the statute's plain language. *Klooster*, 488 Mich at 296. If the language of the statute is clear and unambiguous, it is presumed that the Legislature intended the meaning plainly expressed in the statute. *Briggs*, 485 Mich at 76.

recognizes that there will be circumstances where there is no single correct outcome and which require us to defer to the trial court's judgment; reversal is warranted only when the trial court's decision is outside the range of principled outcomes." *Porter*, 285 Mich App at 455.

"The power to hold a party, attorney, or other person in contempt is the ultimate sanction the trial court has within its arsenal, allowing it to punish past transgressions, compel future adherence to the rules of engagement, i.e., the court rules and court orders, or compensate the complainant." *In re Contempt of Auto Club Ins Ass'n*, 243 Mich App 697, 708; 624 NW2d 443 (2000).

> [W]e define[] contempt of court as a willful act, omission, or statement that tends to . . . impede the functioning of a court. . . . [T]he primary purpose of the contempt power is to preserve the effectiveness and sustain the power of the courts. Because the power to hold a party in contempt is so great, it carries with it the equally great responsibility to apply it judiciously and only when the contempt is clearly and unequivocally shown. [*Id*. (citations, quotations, and footnotes omitted).]

"Civil contempt proceedings seek compliance through the imposition of sanctions of indefinite duration, terminable upon the contemnor's compliance or inability to comply." *DeGeorge v Warheit*, 276 Mich App 587, 592; 741 NW2d 384 (2007). On the contrary, criminal contempt is designed to punish past disobedient conduct by imposing an unconditional and definite sentence. *Id*. Although civil contempt is primarily coercive in nature to compel compliance by the contemnor, the civil sanction may also have a punitive effect. *Id*. Confinement or imprisonment may be imposed whether the contempt is civil or criminal in nature. *Borden v Borden*, 67 Mich App 45, 48; 239 NW2d 757 (1976).

> Civil contempt imposes a term of imprisonment which ceases when defendant complies with the court's order or when it is no longer within his power to comply. Civil contempt seeks to coerce compliance, to coerce the defendant to do what he is able to do but refuses to do. The defendant carries the keys to his prison in his own pocket. Criminal contempt, on the other hand, imposes a definite term of imprisonment as punishment for a past offense. [*Id*.]

Contempts are not necessarily wholly civil or altogether criminal because it is not easy to classify a particular act as suitable to either one of these two classes. *Gompers v Bucks Stove & Range Co*, 221 US 418, 441; 31 S Ct 492; 55 L Ed 797 (1911). The *Gompers* Court offered the following test to determine the character of the punishment and held that any indirect overlapping consequences did not alter the nature of the contempt:

> It is not the fact of punishment but rather its character and purpose that often serve to distinguish between the two classes of cases. If it is for civil contempt the punishment is remedial, and for the benefit of the complainant. But if it is for criminal contempt the sentence is punitive, to vindicate the authority of the court. It is true that punishment by imprisonment may be remedial, as well as punitive, and many civil contempt proceedings have resulted not only in the imposition of a fine, payable to the complainant, but also in committing the defendant to prison.

> But imprisonment for civil contempt is ordered where the defendant has refused to do an affirmative act required by the provisions of an order which, either in form or substance, was mandatory in its character. Imprisonment in such cases is not inflicted as a punishment, but is intended to be remedial by coercing the defendant to do what he had refused to do. The decree in such cases is that the defendant stand committed unless and until he performs the affirmative act required by the court's order. . . .
>
> It is true that either form of imprisonment has also an incidental effect. For if the case is civil and the punishment is purely remedial, there is also a vindication of the court's authority. On the other hand, if the proceeding is for criminal contempt and the imprisonment is solely punitive, to vindicate the authority of the law, the complainant may also derive some incidental benefit from the fact that such punishment tends to prevent a repetition of the disobedience. But such indirect consequences will not change imprisonment which is merely coercive and remedial, into that which is solely punitive in character, or vice versa. [*Id*. at 441-443.]

Similarly, Michigan law provides that when conditional and coercive confinement is imposed, the contempt proceeding is civil. *Borden*, 67 Mich App at 49. Michigan statutes also hold that a "commitment to coerce performance may properly continue so long as it is within the power of the contemnor to comply with the court order." *Id*.; see also MCL 600.1715.

Furthermore, Michigan law recognizes two types of civil contempt sanctions, coercive and compensatory. *In re Contempt of Rochlin*, 186 Mich App 639, 646; 465 NW2d 388 (1990). In *United States v United Mine Workers*, 330 US 258, 303-304; 67 S Ct 677; 91 L Ed 884 (1947), the United States Supreme Court explained the underlying rationale behind the two types of civil contempt sanctions:

> Where compensation is intended, a fine is imposed, payable to the complainant. Such fine must of course be based upon evidence of complainant's actual loss, and his right, as a civil litigant, to the compensatory fine is dependent on the outcome of the basic controversy.
>
> But where the purpose is to make the defendant comply, the court's discretion is otherwise exercised. It must then consider the character and magnitude of the harm threatened by the continued contumacy, and the probable effectiveness of any suggested sanction in bringing about the result desired.

The long-standing rule is that "a contempt proceeding does not open to reconsideration the legal or factual basis of the order alleged to have been disobeyed and thus become a retrial of the original controversy." *United States v Rylander*, 460 US 752, 756; 103 S Ct 1548; 75 L Ed 2d 521 (1983) (further citation omitted). "Because civil contempt sanctions are viewed as nonpunitive and avoidable, fewer procedural protections for such sanctions have been required." *International Union, United Mine Workers of America v Bagwell*, 512 US 821, 831; 114 S Ct 2552; 129 L Ed 2d 642 (1994). Consequently, civil contempt "may be imposed in an ordinary civil proceeding upon notice and an opportunity to be heard. Neither a jury trial nor proof

beyond a reasonable doubt is required." *Id*. at 827. Due process does not require a full blown evidentiary hearing, and contempt sanctions may even be imposed on the basis of uncontroverted affidavits. *United States v Ayres*, 166 F3d 991, 995 (CA 9, 1999); see also MCL 600.1711(2).

> The paradigmatic coercive, civil contempt sanction . . . involves confining a contemnor indefinitely until he complies with an affirmative command such as an order to pay alimony, or to surrender property ordered to be turned over to a receiver, or to make a conveyance. Imprisonment for a fixed term similarly is coercive when the contemnor is given the option of earlier release if he complies. In these circumstances, the contemnor is able to purge the contempt and obtain his release by committing an affirmative act, and thus carries the keys of his prison in his own pocket. [*Bagwell*, 512 US at 828 (citations and quotations omitted).]

When civil contempt occurs, the trial court has inherent and statutory authority to order conditional imprisonment. *Harvey v Lewis*, 10 Mich App 709, 717; 160 NW2d 391 (1968). "Theoretically, imprisonment for civil contempt might be *forever* so long as it is within the contemnor's power to comply with the court order he refuses to carry out[.]" *Id*. (emphasis added). The determination regarding the propriety of contempt is contingent on the facts and circumstances of the individual case. See *Spallone v United States*, 493 US 265, 267, 279-280; 110 S Ct 625; 107 L Ed 2d 644 (1990); *In re Simmons*, 248 Mich 297, 305-306; 226 NW 907 (1929); *Stowe v Wolverine Metal Specialties Co*, 242 Mich 624, 630; 219 NW 714 (1928); *Wells v Wells*, 144 Mich App 722, 732; 375 NW2d 800 (1985). When selecting the appropriate contempt sanction, the court must use the least possible power necessary to achieve the proposed end. *Spallone*, 493 US at 276. However, if the least possible contempt sanction approach fails to produce compliance within a reasonable period of time, additional sanctions may be imposed. *Id*. at 280.

Because the objective of civil contempt is to enforce compliance with the court's order rather than punishment for a refusal to obey, one convicted and sentenced for civil contempt may not be incarcerated beyond the time that he is able to comply with the court's order. *Spalter v Wayne Circuit Judge*, 35 Mich App 156, 161; 192 NW2d 347 (1971). "The contemnor must have the ability to comply with the court's order and the possibility of terminating his confinement and purging himself of contempt by complying." *Borden*, 67 Mich App at 49. "Promised future compliance with prior judicial orders is a common and appropriate method of purging contempt. Since future compliance is the court's objective in civil contempt proceedings, an assurance of such compliance by one deemed worthy of belief is a sensible basis for terminating coercive sanctions." *Williams Int'l Corp v Smith*, 144 Mich App 257, 266; 375 NW2d 408 (1985) (citations omitted), rev'd on other grounds 429 Mich 81 (1987). The court is vested with broad discretion to determine the appropriate conditions from which the contemnor may purge the contempt. *Midlarsky v D'Urso*, 133 AD2d 616; 519 NYS2d 724 (1987). The appellate court reviews the denial of a motion to purge a contempt order for an abuse of discretion. *Consolidated Rail Corp v Yashinsky*, 170 F3d 591, 594 (CA 6, 1999).

Appellants contend that, because the completion of the project will take approximately nine to twelve months, they do not have the ability to "immediately" purge the contempt, and therefore, they do not have the keys to their jail cell. Appellants further contend that the trial court was obligated to impose the least restrictive sanction to compel compliance. Curiously,

appellants fail to identify the least restrictive sanction or impetus that would prompt them into action on behalf of DIBC.[3]

As indicated, the propriety of the contempt sanction is contingent on the facts and circumstances in each individual case, and although the least restrictive sanction should be imposed, a graduated penalty is appropriate when necessary. See *Spallone*, 493 US at 276, 280; *Wells*, 144 Mich App at 732. The trial court is granted the broad discretion to determine the appropriate conditions from which the contemnor may purge the contempt. *Midlarsky*, 133 AD2d at 616. Pursuant to Michigan case law, full compliance with the contempt order is not necessarily required; rather, a promise of future compliance or a good faith attempt may be sufficient to purge the contempt. *Williams Int'l Corp*, 144 Mich App at 266.

In the present case, the facts and circumstances justified the order of confinement pending completion of the Ambassador Bridge Gateway Project. The extensive and lengthy record demonstrates that the trial court ordered completion of the project. Rather, than comply with the trial court's order, DIBC filed multiple claims of appeal, and the case was removed to federal court on two occasions. DIBC did not obtain any relief from the trial court's order,[4] but nonetheless failed to comply with the trial court's order. Unable to obtain compliance, the trial court held a contempt hearing during which appellant Stamper testified. The trial court determined that civil coercive sanctions were necessary to ensure compliance, and defendant Stamper as president of DIBC was ordered imprisoned, but was released within a short period of time when DIBC restarted work on the project. However, since that time, DIBC did not comply with the trial court's order. This order has not been declared invalid, and consequently, the trial court has inherit contempt power to punish the willful, continuous, and contemptuous disobedience of its orders. *ARA Chuckwagon*, 69 Mich App at 162-163. Although the court has the obligation to consider the least restrictive penalty, in the present case, the court graduated its punishment in light of the history of delay and noncompliance. Under the circumstances, I cannot conclude that the order of contempt until completion of the project constituted an abuse of discretion.

Furthermore, the contention that appellants are without means or knowledge to immediately purge the contempt is without merit. The design of coercive civil contempt sanctions is to achieve compliance, to force the contemnor to do what he refuses to do. *Borden*, 67 Mich App at 48. "Civil contempt proceedings seek compliance through the imposition of

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[3] Our order granting a stay of the lower court's decision only applied to appellants' imprisonment, and there was no stay of the payment of fines or the ordered completion of the Ambassador Bridge Gateway Project in accordance with the February 1, 2010 order of the trial court. When questioned at oral argument about the progress with regard to the remainder of the trial court's order, counsel for appellants answered that there was the mere filing of the claim of appeal. During rebuttal, co-counsel asserted that they had submitted plans, but they were refused.

[4] The federal court concluded that DIBC had engaged in "the most creative schemes and maneuvers to delay compliance with a court order."

sanctions of *indefinite* duration, terminable upon the contemnor's compliance or inability to comply." *DeGeorge*, 276 Mich App at 592. "The power to hold a party, attorney, or other person in contempt is the ultimate sanction the trial court has within its arsenal, allowing it to punish past transgressions, compel future adherence to the rules of engagement, i.e., the court rules and court orders, or compensate the complainant." *In re Contempt of Auto Club Ins Ass'n*, 243 Mich App at 708. DIBC's conduct rose to the height of contempt. According to the factual findings of the trial court, it not only failed to comply with the trial court's order, but engaged in a process designed to render the project stagnant. This comes at a great cost to MDOT as well as the local community where the construction commenced, and the trial court must be entitled to utilize the ultimate sanction within its arsenal. *Id*. However, appellants have the right to move the trial court to purge the contempt, *Spalter*, 35 Mich App at 166, and can be released before the full completion by future promises or good faith efforts. *Williams Int'l Corp*, 144 Mich App at 266. In light of the fact that appellants can purge the contempt prior to the full completion of the project, I cannot conclude that the trial court's decision regarding the imprisonment constituted an abuse of discretion.

I would affirm the lower court order in its entirety.

/s/ Karen M. Fort Hood