

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

Advance Sheets Version

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 and Dan Stamper for the reason that, as they are nonparties to the underlying action by the Michigan Department of Transportation (MDOT) against the Detroit International Bridge Company (DIBC), the order that 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 so that they were able to immediately 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 in contempt. Thus, any act to be performed by Moroun and Stamper was not to purge themselves of contempt for some unstated act in defiance of the trial court's order, but instead was to purge DIBC of contempt. Second, there is considerable ambiguity with regard 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 before this Court 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, the trial court had appointed a monitor to oversee and report on the project's progress and had also ordered DIBC to file biweekly progress reports. But, as also acknowledged by counsel for MDOT, it is unclear to what extent the trial court's review of the reports would affect its determination whether DIBC had sufficiently complied with the February 1, 2010, order, so that Moroun and Stamper could be determined to have done enough to have purged DIBC of contempt.¹ For these reasons, I agree that the commitment directive did not enable appellants "to purge the contempt and obtain [their] release by committing an affirmative act," or in other words, appellants did not carry "the keys of [their] prison in [their] own pocket[s]."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) (quotation marks and citations omitted).

III

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

¹ Having seen no order that seals any part of the court record (there might be valid reasons to seal aspects of the record, such as to protect proprietary information, or for matters of public safety or national 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.

A

There is no question that officers and agents of a corporation are bound to follow orders that are directed toward the corporation, even if those officers and agents are not named in the order itself. See *In re Kennison Sales & Engineering 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 DIBC were bound by the orders of the trial court directing certain action by DIBC, and they were required to avoid conduct that contributed to or caused DIBC to violate the trial court's February 1, 2010, order. From the fact that the trial court ordered them incarcerated, it is clear that the trial court concluded that Moroun and Stamper did or failed to do something that contributed to or caused the contumacious conduct of DIBC.³ However, the June 9, 2011, ex parte motion filed by MDOT, the trial court's June 13, 2011, order to show cause, and the show-cause proceedings commenced on July 7, 2011, did not identify what conduct of Moroun and 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 that require 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 that "[w]hen 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.)

³ I acknowledge Moroun and Stamper's argument that if an appellate court agrees 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, the appellate court might also conclude that DIBC's conduct was not contumacious. However, because the February 1, 2010, order was not a final order, MCR 7.202(6)(a)(i), that issue is not before us.

Accordingly,

[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) (citations 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. In this case, the ex parte motion, without referring to 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 show-cause order and the averments in the ex parte affidavit were insufficient to comply or substantially comply with the requirement that Moroun and Stamper be given notice that they personally could be punished because the documents 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 at 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 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's 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) as 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) as requiring 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 caselaw 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 (NY Sup Ct, 1965).

⁴ See, for example, Michigan Judicial Institute (MJJ), Contempt of Court Benchbook (4th ed), Appendix C, p Appendix – 5, 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 date for trial if necessary. The alleged contemnor must be given a reasonable opportunity to prepare a defense or explanation. [Emphasis added; citations omitted.]

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

In *Dole Fresh Fruit Co v United Banana Co, Inc*, 821 F2d 106 (CA 2, 1987), the district court found three officers of the corporate defendant in civil contempt. The United States Court of Appeals for the Second Circuit 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 court stressed that the three individuals did not know that they were “personally” going to be held in contempt. *Id.* This factual situation is nearly identical with the situation in the present case, in which 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 *Auto Club*, 243 Mich App 697, does support these 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 defendant corporation. *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.* (emphasis added).]

Just as the defendant in *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 hold 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 had 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 that 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 this Court's judgment immediate effect pursuant to MCR 7.215(F)(2). The panel has issued three authored opinions concerning the necessary due process of law to be accorded to corporate officials in a show-cause proceeding against a corporation. This issue has not been directly addressed by any Michigan precedent. Under these circumstances, I believe that exceptional issuance of our judgment is unwarranted.

/s/ Kurtis T. Wilder