

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

OTTAWA TOWER II, LLC, et al.,

Plaintiffs,

v.

Case No. 12-130331-CH
Hon. Michael Warren

CITY OF PONTIAC, et al.,

Defendants.

**OPINION AND ORDER REGARDING PLAINTIFFS' EMERGENCY
MOTION FOR CONTEMPT OF PRELIMINARY INJUNCTION AND FOR
AN ORDER TO SHOW CAUSE AGAINST CITY DEFENDANTS AND
DEFENDANTS CITY OF PONTIAC'S AND LOUIS SCHIMMEL'S
EMERGENCY MOTION FOR TEMPORARY MODIFICATION OF THE
PRELIMINARY INJUNCTION**

At a session of said Court, held in the
County of Oakland, State of Michigan
Friday, June 28, 2013.

PRESENT: HON. MICHAEL WARREN

OPINION

Before the Court is the Plaintiffs' Emergency Motion for Contempt of Preliminary Injunction and for an Order to Show Cause Against City Defendants and the Defendants City of Pontiac's and Louis Schimmel's Emergency Motion for Temporary Modification of the Preliminary Injunction. The Court previously issued an Order to Show Cause Against City Defendants and conducted oral argument on the Order to Show Cause and the Defendants' Motion on June 26, 2013. At issue is whether the Defendants are free to blatantly violate an order of

this Court without first seeking leave to do so? Because the answer is “no,” the Defendants committed contempt. Also at issue is whether the Defendants can escape any liability for damages and reasonable attorney fees and costs incurred by the Plaintiffs arising from the contempt since the Plaintiffs have subsequently brought themselves into compliance with the Court’s order? Because the answer is “no,” damages and reasonable attorney fees and costs will be assessed.

**I
BACKGROUND**

A

The Court has twice Ordered that the Defendants not Close the Phoenix Center Plaza & Parking Garage or Diminish its Availability or Condition for Use by the Plaintiffs

Pursuant to an Opinion and Order Granting Plaintiffs’ Motion for Preliminary Injunction and Expediting the Proceedings dated November 30, 2012, the Court issued the following Order:

In light of the foregoing Opinion, the COURT HEREBY ORDERS that the Defendants, and their agents, representatives, contractors, members, successors and assigns, are, at this juncture, enjoined and restrained from taking any actions to close or demolish the Phoenix Center Plaza & Parking Garage or diminish its availability or condition for use by the Plaintiffs and their tenants, agents, representatives, contractors, members, successors, and assigns. In addition, the Court shall schedule an expedited status conference to develop an expedited scheduling order in this matter.

The Defendants’ filed a Motion to Clarify Injunction Regarding Parking, which was denied without prejudice on December 19, 2012. The Defendants thereafter sought reconsideration of the Court’s Opinion & Order Granting Plaintiffs’ Motion for Preliminary Injunction, and after much briefing, the Court issued an Opinion & Order Regarding Defendants’ Second Replacement Motion

[for] Reconsideration in which the Court denied the Defendants' Motion and issued the following Order:

Based on the foregoing Opinion, the Defendants' Motion is DENIED, and to the extent any clarification of the original opinion & order is warranted, this ORDER clarifies that the Defendants, and their agents, representatives, contractors, members, successors and assigns, are, at this juncture, enjoined and restrained from taking any actions to close or demolish the Phoenix Center Plaza & Parking Garage or diminish its availability or condition for use, including but not limited to parking, by the Plaintiffs and their tenants, agents, representatives, contractors, members, successors, and assigns.

B

The Defendants Closed the Phoenix Center Plaza & Parking Garage and Diminished its Availability or Condition for Use by the Plaintiffs

That the Defendants closed the Phoenix Center Plaza & Parking Garage (the "Phoenix Center") and diminished its availability and condition for use by the Plaintiffs is uncontested. The Motion papers and oral argument confirmed that on June 11, 2013, the Defendants closed down the Phoenix Center, forced evacuation of its occupants, required workers to dispatch their cars from the center, and barricaded its entrance. The Defendants claim that the Plaintiffs were engaging in work without a permit in violation of law, and that Plaintiffs' actions were justified by welfare and safety concerns. The Plaintiffs counter that the work did not require permits and no welfare or safety concerns existed. On June 13, 2013, the Plaintiffs filed the Emergency Motion for Contempt of Preliminary Injunction and for an Order to Show Cause Against City Defendants, and the Defendants City of Pontiac and Louis Schimmel filed their Emergency Motion for Temporary Modification of the Preliminary Injunction hours later. This Court issued an Order to Show Cause on June 17, 2013 and set it for hearing on June 26, 2013. Before the Show Cause Hearing Date (on or about June 18, 2013),

the Defendants removed the barricades and allowed the Plaintiffs and the affected employees access to the Phoenix Center.

II Contempt

The judiciary's "primary functions . . . are to declare what the law is and to determine the rights of parties conformably thereto.'" *Johnson v Kramer Bros Freight Lines, Inc*, 357 Mich 254, 258; 98 NW2d 586 (1959), quoting 16 CJS, Constitutional Law § 144, p 687. Accordingly, from "time immemorial" the judicial power has included the authority to ensure the orderly administration of justice and to enforce orders and judgments of the court in the face of contempt. *Nichols v Judge of Superior Court of Grand Rapids*, 130 Mich 187, 195 (1902). Indeed, the power of the courts to find parties and litigants in contempt of court "is as ancient as the courts, and antedates *Magna Charta*." *Id.* at 196. This is so because Michigan law has long held that the contempt power is inherent in the power judicial. See, e.g., *Langdon v Judges of Wayne Circuit Courts*, 76 Mich 358, 367; 43 NW 310 (1889) ("Courts of record in this state have inherent power to hear and determine all contempts of court which the superior courts of England had at the common law"); *In Re Chadwick*, 109 Mich 588, 601; 671 NW 1071 (1896) quoting *Ex Parte Robinson*, 86 US 505, 510; 22 L Ed 205; 19 Wall 505 (1873) ("The power to punish for contempts is inherent in all courts"); *In re Dingley*, 182 Mich 44, 50; 148 NW 218 (1914) ("The right of the court to punish as for a criminal contempt an offender is no longer an open question in this state. . . . The courts possess the power independent of the statute"); *People v Doe*, 226 Mich 5, 19; 196 NW 757 (1924) (Dissenting Fellows, J.) ("The power to punish for contempt is inherent in the court. It is a part of the judicial power. It is as firmly vested in the constitutional courts by the Constitution as is the exercise of any other judicial power. That the exercise of the judicial power and all of it cannot be taken away from constitutional courts by the Legislature is settled" [opinion of four justices,

affirming by evenly split decision the trial court's exercise of the contempt power)]; *In re White*, 340 Mich 140, 146; 65 NW2d 296 (1954), *rev'd on other grounds*, 349 US 133; 75 S Ct 623; 99 L Ed 942 (1955), quoting *Doe, supra* at 19; *In Re Scott*, 342 Mich 618; 71 NW2d 71 (1955); *In Re Huff*, 352 Mich 402, 415; 91 NW2d 613 (1958) ("There is inherent power in the courts, to the full extent that it existed in the courts of England at the common law, independent of, as well as by reason of statute" [citations omitted]); *Cross Co v United Auto, Aircraft and Agr Implement Workers of America, Local 155*, 377 Mich 208 n 2; 139 NW2d 694 (1966) ("Michigan courts have inherent power to punish for contempt"); *In re Grand Jury Proceedings, No. 93, 164*, 384 Mich 24, 35; 179 NW2d 283 (1970), quoting *In re Huff, supra* at 415, 416; *In re Contempt of Dougherty*, 429 Mich 81, 92 n 14; 43 NW2d 392 (1987) ("Michigan courts have, as an inherent power, the power at common law to punish all contempts of court"); *In Re Contempt of Auto Club Ins Ass'n*, 243 Mich App 697, 708-709; 624 NW2d 443 (2000), quoting *Huff, supra* at 415; *In re Contempt of United Stationers Supply Co*, 239 Mich App 496, 499; 608 NW2d 105 (2000) ("Michigan courts of record have the inherent common-law right to punish all contempts of court" [citations omitted]); *In re Contempt of Steingold*, 244 Mich App 153, 157; 624 NW2d 504 (2000) ("Michigan courts of record have the inherent common-law right to punish all contempts of court"). In so finding, Michigan law is in accord with federal and other state jurisprudence. See, e.g., *Ex parte Robinson, supra* at 510 ("The power to punish for contempts is inherent in all courts"). Thus, "[t]his contempt power inheres in the judicial power vested in this Court, the Court of Appeals, and the circuit and probate courts by Const 1963, art 6, §1." *Dougherty, supra* at 92 n 14. "Such power, being inherent and a part of the judicial power of constitutional courts, cannot be limited or taken away by act of the legislature nor is it dependent on legislative provision for its validity or procedures to effectuate it." *Huff, supra* at 415-416. [DELETE b/c REV'D criminal contempt convictions? See also *Appeal of Murchison*, 340 Mich 151, 155-156; 65 NW2d 301 (1954), *rev'd In re Murchison*, 349 US 133 (1955)

(finding in response to the petitioner's claim that a statute prohibited the trial court from trying the contempt case that "[t]he trial judge answered * * * [the claim] by holding that the state statute barring him from trying the contempt cases violated the Michigan Constitution on the ground that it would deprive a judge of inherent power to punish contempt. This interpretation of the Michigan Constitution is binding here"); *Grand Jury Proceedings, No 93, 164, supra* at 36, quoting *Murchison*, 349 US at 135.

A party who through act, omission, or statement, "impede[s] or disturb[s] the administration of justice," is considered in contempt of court. *Ex Parte Gilliland*, 284 Mich 604, 611; 280 NW 63 (1938), *cert den* 306 US 643; 59 S Ct 583; 83 L Ed 1042 (1939), *rehearing den* 306 US 669; 59 S Ct 641; 83 L Ed 1063 (1939). See also *Pontiac v Grimaldi*, 153 Mich App 212, 215; 395 NW2d 47 (1986) ("Contempt of court is a willful act, omission, or statement tending to impair the authority or impede the functioning of a court"); *In re Contempt of Auto Club Ins Ass'n, supra* at 708. Michigan jurisprudence has long held the contempt power "extends not only to contempt committed in the presence of the court, but also to constructive contempt arising from refusal of defendant to comply with an order of the court." *In re Huff, supra*, at 415; 91 NW2d 613-(1958). See also *Carroll v City Commission*, 266 Mich 123, 124-125; 253 NW 240 (1934) ("There is no question but the court has inherent power to punish for contempt, whether such contempt is committed in the presence of the court, in which case the presiding judge may act summarily, or whether the contempt is constructive, arising from the refusal of the party to comply with an order of the court").

Indeed, "[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 Michigan High School Athletic Ass'n*, 459 Mich 23, 40; 585

NW2d 290 (1999). See also *Schoensee v Bennett*, 228 Mich App 305, 317; 577 NW2d 915 (1998). Stated another way, “an order entered by a court with proper jurisdiction must be obeyed even if the order is clearly incorrect.” *Matter of Hague*, 412 Mich 532, 545; 315 NW2d 524 (1982). See also *Rose v Aaron*, 345 Mich 613, 615; 76 NW2d 829 (1956) (“Although the temporary restraining order was improperly granted, it should have been obeyed until dissolved and the court had the power to punish disobedience thereof as for contempt. Accordingly, defendant is not entitled to reversal of the order from which he appeals not to costs” [citations omitted]); *State Bar of Michigan v Cramer*, 399 Mich 116, 125-126; 249 NW2d 1 (1976); *City of Troy v Holcomb*, 362 Mich 163, 169-170; 106 NW2d 762 (1978); *Lester v Spreen*, 84 Mich App 689, 697; 270 NW2d 493 (1978) (“While acknowledging that the order was improperly entered, it must still be obeyed until vacated by appropriate judicial action”). In fact, even if a higher court has previously “held the ordinance upon which [an] injunction was based to be void, nevertheless, an order entered by the court of proper jurisdiction must be obeyed even if it is clearly incorrect.” *Ann Arbor v Danish News Co*, 139 Mich App 218, 229; 361 NW2d 772 (1984). Simply put, “Unless a court lacks jurisdiction, its orders must be obeyed, and a party’s reasons for defying an order are ‘irrelevant’ to the issue of whether sanctions for disobedience are properly imposed.” *Liberty Property Ltd v City of Southfield*, unpublished opinion of the Michigan Court of Appeals, issued June 18, 2002 (Docket No. 231323); 2002 Mich App LEXIS 895 (2002), quoting *Matter of Hague, supra* at 544. “The reasons for this principle were set forth by the United States Supreme Court in *Walker v City of Birmingham*, 388 US 307, 320-321; 87 S Ct 1824; 18 L Ed 1210 (1967), upholding convictions for criminal contempt of civil rights marchers who were in violation of an injunction: ‘(I)n the fair administration of justice no man can be judge in his own case, however exalted his station, however righteous his motives * * *. [R]espect for judicial process is a small price to pay for the civilizing hand of law, which alone can give abiding meaning to constitutional freedom.’” *Cramer, supra* at 125-126.

In short, the rule of law requires that the determination of the validity of a court's order "is one to be made by the courts, not by the parties." *Lester, supra* at 696. The Michigan Court of Appeals, explained these principles of law when affirming the trial court's finding of criminal contempt against a defendant who wore a shirt in defiance of the trial court's order, even though the Court of Appeals found that the trial court's order barring the shirt was in error:

Therefore, despite our conclusion that the statement on appellant's shirt did not constitute an imminent threat to the administration of justice and was constitutionally protected speech, appellant's willful violation of the trial court's order, regardless of its legal correctness, warranted the trial court's finding of criminal contempt. Civil disobedience is not the appropriate course of action when a person disagrees with a court order. We are a society of laws and the legal remedy available to appellant was to seek leave to appeal the trial court's order precluding him from wearing his shirt. Appellant elected not to pursue his legal remedy, and instead elected to willfully disobey a valid albeit erroneous court order. A person may not disregard a court order simply on the basis of his subjective view that the order is wrong or will be declared invalid on appeal. Allowing such behavior would encourage noncompliance with valid court orders on the basis of misguided subjective views that the orders are wrong. There exists no place in our justice system for self-help. [*In re Contempt of Dudzinski*, 257 Mich App 96, 111-112; 667 NW2d 68 (2003) (footnotes omitted)].

Accordingly, the proper recourse for a party in light of an order the party believes is erroneous is to file an appeal or to move to change the order, not to disregard the order of the court. *Cramer, supra* at 125, quoting Kuhns, *Limiting The Criminal Contempt Power: New Roles For The Prosecutor And The Grand Jury*, 73 Mich L Rev 484, 504 (1975), citing *Howat v Kansas*, 258 US 181, 189-190; 42 S Ct 277; 66 L Ed 550 (1922); *Worden v Searls*, 121 US 14; 7 S Ct 814; 30 L Ed 853 (1887).

Moreover, attempts to circumvent orders through indirect subterfuge also constitute contempt. See, e.g., *Glover v Malloska*, 242 Mich 34, 36; 217 NW 896 (1928) (“In substance and legal effect [the business practice in question] is the same scheme the continuance of which was forbidden. At best it is a mere subterfuge. It is contempt to employ a subterfuge to evade the decree of the court”); *Craig v Kelley*, 311 Mich 167, 178; 18 NW 2d 413 (1945) (“The temporary restraining order enjoined Louise Lathrup Kelley, her agents, employees and servants, from taking any action or permitting any action or proceeding to be taken whatsoever toward the erection of any residential building costing less than \$7,500. Louise Lathrup Kelley and her husband, Charles D. Kelley, deliberately proceeded to cause the erection of residential buildings to cost not to exceed \$6,000. This was done by subterfuge, which is as much a contempt of court as though done by more direct action”); *ARA Chuckwagon of Detroit v Lobert*, 69 Mich App 151, 159; 244 NW2d 393 (1976) (“Case law has also stressed that nonsignatories to a restrictive agreement who act and conspire with a signatory to cause its violation are equally liable to restraint orders and to contempt proceedings”).

The United States Supreme Court has aptly illustrated the purpose and proper use of civil contempt:

If a defendant should refuse to pay alimony, or to surrender property ordered to be turned over to a receiver, or to make a conveyance required by a decree for specific performance, he could be committed until he complied with the order. Unless there were special elements of contumacy, the refusal to pay or to comply with the order is treated as being rather in resistance to the opposite party than in contempt of the court. The order for imprisonment in this class of cases, therefore, is not to vindicate the authority of the law, but is remedial, and is intended to coerce the defendant to do the thing required by the order for the benefit of the complainant. If imprisoned, as aptly said *In Re Nevitt*, 117 F 448, 451 [CA 8, 1902], “he carries the keys of his prison in his own pocket.” He can end

the sentence and discharge himself at any moment by doing what he had previously refused to do. [*Gompers v Bucks Stove & Range Co*, 221 US 418, 442; 31 S Ct 492; 55 L Ed 797 (1911).]

Accordingly, “[a] proper civil contempt proceeding seeks to coerce compliance with an act commanded by prior court order, or to compensate the complainant for actual loss. Only where the contemnor, at the time of the contempt hearing, is in violation of an order, is a coercive sanction permissible.” *In Re Contempt of Dougherty, supra* at 111. In other words, “[p]roceedings for civil contempt are instituted to preserve and enforce the rights of private parties to suits and to compel obedience of orders and decrees made to enforce those rights and administer the remedies to which the court has found the parties are entitled. A court may issue an order to pay compensation for actual loss or injury caused by a contemnor’s misconduct.” *In Re Contempt of United Stationers Supply Co, supra* at 500 (citations omitted). See also *In re Contempt of Rochlin, supra* at 647. MCL 600.1721 has codified the compensatory civil contempt sanction:

If the alleged misconduct has caused an actual loss or injury to any person the court shall order the defendant to pay such person a sufficient sum to indemnify him, in addition to the other penalties which are imposed upon the defendant.

III

By Violating the Court’s Order, the Defendants Committed Civil Contempt and the Plaintiffs are Entitled to Compensatory Damages

In the instant case, the Defendants’ actions clearly violated the order of this Court. By causing the evacuation and closing access to the Phoenix Center, the Defendants unquestionably “close[d]” and “diminish[ed] its availability or condition for use by the Plaintiffs” That the Defendants believe the Court’s order is misguided and erroneous matters not. As explained by the authorities *supra*, even if the Defendants are correct in that position, it does not sanction

their violation of the Court's orders. The Defendants' after-the-fact request to modify the preliminary injunction is too little, too late. To appropriately achieve a request to modify the injunction, the Defendants should have filed the motion prior to violating the Court's order. Contrary to the Defendants' position, no emergency existed warranting the violation of the order pending the Court's approval.

However, because the Defendants have ceased and desisted their violation of the Court's order, this Court cannot use its coercive powers to remedy the contempt. On the other hand, the Plaintiffs have more than sufficiently shown that the Defendants' actions caused the Plaintiffs, and their tenants, agents, representatives, contractors, members, successors, and assigns, compensable injuries, including reasonable attorney fees and costs. To enable the Court to fix the appropriate amount of damages, the Court requires the Plaintiffs to file a motion to fix such damages.

ORDER

In light of the foregoing Opinion, the Court FINDS the Defendants IN CIVIL CONTEMPT OF COURT and that the Plaintiffs are ENTITLED TO DAMAGES, INCLUDING REASONABLE ATTORNEY FEES AND COSTS, and ORDERS that the PLAINTIFFS FILE A MOTION TO FIX SUCH DAMAGES NO LATER THAN JULY 31, 2013 OR SUCH DAMAGES SHALL BE DEEMED WAIVED.

/s/Michael Warren

HON. MICHAEL WARREN
CIRCUIT COURT JUDGE