STATE OF MICHIGAN

COURT OF APPEALS

In re Contempt of KEITH MITAN and KENNETH MITAN.

MITAN PROPERTIES,

Plaintiff-Counter Defendant,

and

KENNETH MITCHELL MITAN and KEITH JOSEPH MITAN,

Plaintiffs-Counter Defendants/Appellants,

v

FRANDORSON PROPERTIES, JEROME CORR and THOMAS P. CORR,

Defendants-Cross Appellees/Appellees.

UNPUBLISHED
September 17, 2002

No. 222230
Ingham Circuit Court
LC No. 94-077994-CZ

FRANDORSON PROPERTIES,

Plaintiff-Appellee,

v

KEITH JOSEPH MITAN and KENNETH MITCHELL MITAN,

Defendants-Appellants,

and

TERESA FRANCES MITAN, MITAN PROPERTIES COMPANY V, MITAN

No. 222231
Ingham Circuit Court
LC No. 94-078210-CH

PROPERTIES VI, and MITAN DOUBLEWOOD ANCILLARY,

Defendants.

Before: Hood, P.J., and Holbrook, Jr., and Owens, JJ.

PER CURIAM.

In this consolidated appeal, appellants Kenneth and Keith Mitan appeal as of right from their convictions for criminal contempt. Both appellants were sentenced to thirty days in jail and ordered to pay $250 court costs. Appellants' sentences were stayed pending a final decision from this Court. We affirm.

The history of this case is complicated and protracted. It has been before this Court several times, and has been the subject of two unpublished per curiam opinions. *Frandorson Properties v Mitan et al*, unpublished opinion per curiam of the Court of Appeals, issued 12/13/1996 (Docket No. 182423) (hereinafter *Frandorson I*); *Frandorson Properties v Mitan et al*, unpublished opinion per curiam of the Court of Appeals, issued 1/24/2002 (Docket No. 220675) (hereinafter *Frandorson II*).[1] As did the circuit court and this Court in *Frandorson II*, we turn to *Frandorson I* for the underlying facts:

> Defendant Mitan Properties Company, VI ("Mitan VI") is a partnership composed of defendants Keith J. Mitan and Kenneth Mitan. On August 7, 1993, Mitan VI entered into a purchase agreement with plaintiff, Frandorson Properties, whereby Mitan VI agreed to purchase from plaintiff three shopping centers for $21,976,832.10. Plaintiff alleges that Mitan VI subsequently defaulted on the purchase agreement by failing to tender various deposits required by the agreement and by failing to obtain a required financing commitment, thereby rendering the agreement null and void under its terms.
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> On April 21, 1994, Mitan VI tendered to plaintiff a second offer to purchase the three shopping centers, this time for a price of $16,500,000. Plaintiff did not accept this offer. Instead, plaintiff entered into an agreement with Chemical Bank of New York, whereby plaintiff agreed to convey its interest in the three shopping centers to Chemical Bank in lieu of foreclosure. A closing date of July 20, 1994, was set.
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> On July 15, 1994, five days before the scheduled closing with Chemical Bank, Mitan VI filed a complaint in the Ingham Circuit Court, alleging an interest in the subject shopping centers pursuant to the August 7, 1993, purchase agreement ("Case I" [case No. 94-077994-CZ]). At the same time, Mitan VI recorded a lis pendens in both Ingham County and Clinton County for the purpose

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[1] Application for leave pending, Supreme Court Docket No. 121175.

of notifying interested parties that an action was pending seeking "the transfer and conveyance to [Mitan VI] of title to the propert[ies]" in question. The case was assigned to Circuit Judge Carolyn Stell. On July 18, 1994, plaintiff filed its answer, together with a counter-complaint against Mitan VI, and Keith and Kenneth Mitan, alleging slander of title and tortious interference with a business or contractual relationship. Plaintiff also filed a motion for bond with surety as security. An expedited hearing was conducted on July 19, 1994, by Circuit Judge James Giddings, acting in place of Judge Stell, who was unavailable. Following oral arguments, Judge Giddings ordered Mitan VI to post a security bond with surety in the amount of $38.4 million by 1:00 p.m. on July 21, 1994. Judge Giddings also ordered that if the security bond was not posted by the date and time required, Mitan VI's complaint would be dismissed and Mitan would be enjoined from refiling any action or related action for a period of forty-five days. Judge Giddings gave the following reasons in support of his decision to issue the order: (1) that submitted documentation "belies any assertion that [Milan VI] can rightfully claim that there is a lawful basis to proceed"; (2) Mitan VI's failure to demonstrate "that they have any lawful claim whatsoever arising out of the [August 7, 1993, purchase agreement]"; (3) "inconsistencies demonstrated by the conduct of [Mitan VI and its agents] in this matter"; and (4) that interference with the pending sale of the properties would have "a significant compelling effect on the financial future of [Plaintiff]."

Mitan VI did not post a security bond as ordered. Consequently, on July 21, 1994, Judge Giddings issued an order dismissing Mitan VI's complaint and canceling all the lis pendens recorded by Mitan VI or its agents with respect to the properties in question. Additionally, the court enjoined Mitan VI from refiling its action or a related action for forty-five days. In the meantime, Mitan VI filed an appeal with this Court from the July 19 order requiring it to post a security bond.[2] At the same time, it recorded a second set of lis pendens, this time using the caption of this Court on the lis pendens.

On the following day, Friday, July 22, 1994, plaintiff filed a motion for bond, injunctive relief and contempt in the trial court and again obtained an expedited hearing. Judge Giddings thereupon issued a second order canceling the second set of lis pendens and enjoining Mitan VI from recording, "anywhere in the world," any further lis pendens pertaining to the subject properties. The order also enjoined Mitan VI and its agents "from initiating any new actions pertaining to the subject matter of the case in any court of general jurisdiction for forty-five days from July 21, 1994." Additionally, the order provided that a contempt

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[2] On September 28, 1994, this Court dismissed the appeal for lack of jurisdiction because the July 19, 1994, order was not a final order appealable as of right. *Frandorson v Mitan et al*, unpublished order of the Court of Appeals (Docket No. 177187). A second claim of appeal from the July 21, 1994, order was also dismissed for lack of jurisdiction. *Frandorson v Mitan et al*, unpublished order of the Court of Appeals (Docket No. 177645).

hearing would be held at a future date and the matter of sanctions for the filing of the second set of lis pendens would be addressed at the contempt hearing.

Two days later, on July 24, 1994, Mitan VI assigned its alleged interest in the shopping centers to Mitan Properties Company, V ("Mitan V"), which is a Michigan limited partnership composed of Keith and Kenneth Mitan as the limited partners and Mitan Doublewood Ancillary Control Section, Inc. ("Mitan, Inc.") as the general partner. On the following day, Monday, July 25, 1994, Mitan V recorded in both Ingham County and Clinton County copies of: (1) the August 7, 1993, purchase agreement between plaintiff and Mitan VI; (2) the above-described assignment from Mitan VI to Mitan V; and (3) an affidavit from Teresa Mitan, an officer of Mitan Inc., attesting to Mitan V's alleged interest in the shopping centers pursuant to the foregoing assignment. These documents, although not containing the label "lis pendens," nonetheless had the same effect of clouding plaintiff's title to the properties in question, thereby impeding plaintiff from consummating its pending transaction with Chemical Bank.

Plaintiff responded to this latest course of events by filing a motion for bond, injunctive relief, contempt and cancellation of the third set of title-clouding documents. Judge Stell, who was now available, scheduled a hearing for August 1, 1994, at 4:00 p.m. on plaintiff's motion.

On August 1, 1994, before the scheduled hearing in Case I, plaintiff commenced the present action in the Ingham Circuit Court against Mitan VI, Mitan V, Mitan Inc., Keith J. Mitan, Kenneth Mitan and Teresa Mitan, alleging slander of title, tortious interference with a business or contractual relationship, and conspiracy to commit slander of title or tortious interference with a business or contractual relationship ("Case II" [Case No. 94-07821-CH]). The second action was commenced because, following the assignment of interest from Mitan VI to Mitan V, there were now several new participants involved in the matter who were not parties to the action in Case I. The complaint in Case II alleged that the action arose out of the same transaction as that involved in Case I and, consequently, Case II was assigned to Judge Stell. Plaintiff's complaint requested an award of compensatory and exemplary damages, an award of costs and attorney fees under MCL 565.108 . . . , an order canceling the latest set of title-clouding documents, and an order adjudging that the Mitan defendants had no right, title or interest in the properties in question.

Just hours before the scheduled hearing in Case I, Mitan VI caused Case I to be removed to federal court. The parties subsequently appeared for the scheduled hearing, but Judge Stell ruled that she no longer had jurisdiction over that case in light of its removal to federal court. However, Judge Stell agreed to entertain a motion for bond or other relief in Case II. Defendant Keith Mitan, an attorney, represented the defendants. Plaintiff's counsel apprised Judge Stell of the previously described history in the matter and informed her that plaintiff was unable to consummate its pending real estate transaction with Chemical Bank because [of] the various title-clouding documents that had been recorded by

defendants. Following oral arguments, Judge Stell announced the following decision from the bench:

"The argument that an affidavit of interest, or these latest filings are not the equivalent of a lis pendens is completely without merit[.]

* * *

The Court grants bond in the amount of $38.4 million which is to be filed with the Clerk of this Court no later than 12:00 noon, Wednesday, August 3, 1994.

Since this amount has been under discussion since a week ago Tuesday, I think that there has been ample notice.

I believe *Action Auto* [*v Anderson*, 165 Mich App 620; 419 NW2d 36 (1988)] does provide for the Court to require a bond to be filed by the filer of a lis pendens or the equivalent to a lis pendens.

The sanction, if the bond is not filed, is that no pleadings may be filed by Defendant Mitan until the bond is filed.

Obviously, that opens the possibility of a motion for summary disposition under MCR 2.116(C)(9).

The Court dismisses any affidavit of interest, any lis pendens or any other document[s] that are currently clouding title to these subject properties.

The Court enjoins any person or legal entity from filing any document that clouds title to the subject properties."

Plaintiff's attorney was directed to prepare an order consistent with Judge Stell's ruling. Judge Stell ordered the parties to appear at 2:00 p.m. the following day, i.e., August 2, 1994, for entry of the order.

As it turned out, Judge Stell was unable to issue an order as contemplated on August 2, 1994, because, shortly before the scheduled hearing, defendants caused Case II to be removed to federal court. On August 4, 1994, however, on plaintiff's motion, the federal court remanded Cases I and II to state court. In doing so, the federal court imposed sanctions against the Mitan litigants on the basis that removal "was instituted for the wholly improper purpose of delaying and impeding both the state court in conducting its business as well as Frandorson in conveying title of the real property to Chemical Bank."

On the following day, August 5, 1994, Judge Stell, having regained jurisdiction over Case II, entered an order providing: (1) that the Mitan defendants were required to post a $38.4 million bond with surety as security for damages and costs, including attorney fees, for which they might be found liable for recording the various title-clouding documents; (2) that defendants were not

permitted to file any pleadings "until said bond is filed or until further Order of th[e] Court"; (3) that if defendants failed to post the required security bond, plaintiff could file a motion for summary disposition pursuant to MCR 2.116(C)(9); (4) that defendants and their agents were enjoined from filing or recording any further documents which cloud or may tend to cloud the title to the properties in question; (5) that all title-clouding documents previously filed were to be canceled and dissolved upon the recording of a certified copy of the court's order; and (6) that a contempt hearing would be scheduled for a future date.

On August 8, 1994, the law firm of Hardig & Parsons entered an appearance in Case II on behalf of each of the Mitan defendants. The following day, August 9, 1994, the Mitan defendants, through their newly retained counsel, once again removed Cases I and II to federal court. The federal court, once again, remanded the cases to the Ingham Circuit Court.

On August 26, 1994, without having posted any security bond as ordered, the Mitan defendants filed an answer to plaintiff's complaint. The answer was signed by defendant Keith Mitan, as attorney for all defendants. The answer was filed against the recommendation of Hardig & Parsons, which subsequently withdrew as legal counsel for the Mitan defendants.

On October 7, 1994, plaintiff moved to strike defendants' answer and sought summary disposition under MCR 2.116(C)(9). The motion alleged that defendants' answer violated the court's August 5, 1994, order, because defendants had not posted a security bond as required by the order. The motion further alleged that, due to defendants' noncompliance with the August 5, 1994, order, defendants could not defend plaintiff's action, thereby entitling plaintiff to summary disposition under MCR 2.116(C)(9). Defendants, through newly retained counsel, responded to the motion by attacking Judge Stell's August 5, 1994, order, arguing that it was unconstitutional and invalid. Defendants also informed Judge Stell that plaintiff had now consummated its real estate transaction with Chemical Bank and, therefore, a bond was no longer necessary.

In a decision from the bench, Judge Stell granted plaintiff's motion, stating:

"Well, I believe that most of the arguments that have been made were made at the time of the original motion, and I reject those arguments at this time.

It's certainly possible that I am wrong, and that one cannot impose a bond as a requirement for a Defendant to file pleadings; but I did address that issue previously. And I still think my ruling was correct.

It does not at all surprise me that Defendant does not agree, and I recognize that Mr. Knowlton is not responsible for the things that occurred in this case before he took over.

> However, I do not believe that a party can, by consistently changing lawyers, evade the responsibility of its decisions.
>
> At the time that I signed that order, Defendants had at least two options. One was a Motion to Reconsider, and the second—which has to be filed within 14 days—the second was to go to the Court of Appeals and say, [‘]we need immediate relief. This is an absurd ruling, and we ask for immediate consideration.[’]
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> To wait and do nothing, and then say, [‘]oh, by the way, we think this isn't fair, just the way we thought it wasn't fair or constitutional initially,[’] seems to me to be very inappropriate way to be proceeding. And I believe your clients have placed you in an awkward position, Mr. Knowlton.
>
> The Court denied the motion--or grants the Motion to Strike Answers and Summary Disposition, pursuant to MCR 2.116(C)(9).”
>
> An order incorporating Judge Stell's decision was entered on November 28, 1994. Thereafter, on January 10, 1995, the parties stipulated to entry of a consent judgment as to damages only in the amount of $25,000. [*Frandorson I*, *supra*, slip op at 1-6 (footnotes omitted).]

In *Frandorson I*, this Court affirmed the circuit court’s decision requiring the filing of a security bond for continuance of the various title-clouding documents. *Id.*, slip op at 6-7. However, on due process grounds, the Court reversed the order striking the Mitans' answer and granting summary disposition in favor of Frandorson. *Id.*, slip op at 8-9.

At the conclusion of its opinion, the *Frandorson I* Court also made the following comments regarding the issue of contempt:

> We wish to emphasize that our decision in this case is not based on any determination on our part that defendants did not engage in any improper conduct. Rather, we merely hold that it was inconsistent with due process to foreclose defendants from filing any pleadings as a sanction for failure to post a security bond. That does not mean, however, that defendants may not be appropriately sanctioned for improper or contemptuous conduct. We note that the trial court, in its order of August 5, 1994, deferred ruling on the issues of contempt, or imposition of other appropriate sanctions, pending further proceedings. Although we are not aware whether any proceedings were ever conducted in this regard, if not, we agree that such proceedings would be appropriate in light of the circumstances and history of this case. We are particularly troubled by the conduct and actions of defendant Keith Mitan, who is a licensed attorney, and, in view of such actions, direct the Clerk of Court to refer this case to the Attorney Grievance Commission for possible investigation. [*Id.*, slip op at 9-10.]

On remand, the circuit court granted summary disposition to Frandorson on all counts under MCR 2.116(C)(10) and the alternative ground of res judicatta. The court also found Kenneth and Keith Mitan guilty of criminal contempt. In *Frandorson II*, the Mitans appealed as

of right from that portion of the circuit court's order granting Frandorson summary disposition. The *Frandorson II* Court affirmed the grant of summary disposition on all claims except for the conspiracy claim against Teresa Mitan.[3] *Frandorson II, supra*.

In its May 28, 1999 opinion and order, the circuit court found the Mitans guilty of criminal contempt for (1) recording the second set of lis pendens on July 21, 1994 with the Ingham County and Clinton County Registers of Deeds, and (2) for recording an additional set of title-clouding documents on July 25, 1999 with the Ingham County and Clinton County Registers of Deeds. The court also found the Mitans not guilty of criminal contempt for (1) filing claims in federal court in violation of the court's July 19, 21, and 22, 1994 orders, and (2) filing an answer in case 94-078210-CH (Case I [hereinafter, this Court will use the "Case I" and "Case II" designations established in *Frandorson I*]) in violation of the court's August 5, 1994 order.[4]

Appellants first argue that the circuit court lacked personal jurisdiction over them because appellee did not file the required affidavits in support of its ex parte contempt petition. We disagree. MCR 3.606(A) states as follows:

> For a contempt committed outside the immediate view and presence of the court, on a proper showing on ex parte motion supported by affidavits, the court shall either
>
> (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. [See also MCL 600.1711(2)[5].]

On July 25, 1994, appellee filed an ex parte petition with the court for the issuance of bench warrants. The petition outlined all the essential facts pertaining to the two charges underlying appellants' criminal contempt convictions. This petition was supported by an affidavit of appellees' counsel, which stated that counsel had "personal information and knowledge [that] . . . [a]ll of the facts set forth in [the petition] . . . are correct, true, and accurate to the best of his information, knowledge and belief." We believe that this satisfies the requirements of the court rule.

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[3] Teresa Mitan is the mother of Kenneth and Keith Mitan.

[4] On this final charge, the court cited to this Court's opinion in *Frandorson I*, in which this Court held that the striking of appellants' answer was punitive in nature, and thus violated due process. *Frandorson I, supra*, slip op at 8-9.

[5] Section 1711(2) states: "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."

Second, appellants argue that they never received proper notice that the proceedings were criminal in nature. Again, we disagree. "A defendant charged with contempt is entitled to be informed . . . whether the contempt proceedings filed against him are civil or criminal . . . ." *In re Contempt of Rochlin*, 186 Mich App 639, 649; 465 NW2d 388 (1990). During the show cause hearing held on September 1, 1994,[6] appellants raised three objections to the contempt action. Appellants argued (1) that Kenneth Mitan had not been served with personal notice as required by MCR 2.107(B)(1)(b)[7], (2) that the show cause order was not clear on its face that the proceedings were criminal in nature, and (3) that the contempt proceedings should be tried before a different judge. The court ruled on these objections as follows:

> MCR 2.107(B)(1)(b) does require personal service absent a court order to the contrary . . . . There was no personal service on Kenneth and, therefore, that show cause isn't valid. There was, however, personal notice to Keith in the courtroom because I reviewed the transcript.
>
> The second issue is that it must state on the face of the document whether it is criminal or civil contempt, and I did read the cases cited by Mr. Hardig. I do not think, however, the court rules themselves are consistent with those cases, and I believe that within the context of the motion for show cause, it is clear as to what kind of contempt is being sought.
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> ***
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> The problem that I have had, and what has taken me more time than I had hoped, is I cannot find an order to show cause in this file that is signed. And if counsel has one, I would be happy to look at it. I'm not at all disputing that Judge Giddings ordered it from the bench. I believe he did. . . . There is no doubt in my mind that Keith Mitan had actual notice.
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> I think, unfortunately, the case law is clear that a court must speak through its orders.
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> [The court then denied appellants' request to recuse itself from the matter.]
>
> I think we can take care of all these problems in a very expeditious manner.
>
> To bring all three of these charges of contempt[8] before the Court, I am setting a show cause hearing for tomorrow morning, September 2nd, at 9:30 a.m.

[6] The issue of appellees' amended motion for sanctions was also addressed at this hearing. This matter is not before us.

[7] The subrule reads, "When a contempt proceeding for disobeying a court order is initiated, the notice or order must be personally delivered to the party, unless the court orders otherwise."

[8] The three charges identified were the filing of the second notices of lis pendens, the subsequent filing of other title-clouding documents, and filing claims in federal court in violation of court orders. Filing an answer in Case I was not mentioned. We need not address whether this oversight tainted the convictions, however, given the court's finding of not guilty on this charge.

> This notice is not untimely. The Mitans have been aware of the subject matter of the show cause, all of the arguments made. Their attorney has reviewed it, they have reviewed it. They have apparently filed documents [in federal court] . . . indicating that they are quite familiar with the allegations that were to have been heard today.
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> So I do not believe there is any prejudice or any surprise to the Mitans to be told that they have to appear and address these charges of contempt.[9]

In support of their argument, appellants point to the circuit court's July 22, 1994 order, in which the court ordered

> Plaintiff Mitan Properties Company, VI and its attorney, Keith J. Mitan . . . to appear and show cause at a time set by the Court why either or both of them should not be held in contempt of this Court for recording or causing the recording of a second set of Notices of Lis Pendens . . . . The matter of costs and attorneys fees for the filing of the second set of Notices of Lis Pendens against Plaintiff and its counsel shall be reserved for a determination at the contempt hearing.

Appellants argue that there was nothing in the order informing Kenneth Mitan that he was subject to contempt proceedings, and that the mention of costs and attorneys fees clearly suggested that only civil sanctions were being sought.

However, appellants fail to acknowledge or address the fact that a second show cause order was issued following the September 1, 1994 hearing. It is a handwritten document and was drafted by the parties' attorneys in the courtroom. It reads in pertinent part:

> IT IS FURTHER ORDERED that *Kenneth Mitan and Keith Mitan,* Mitan Properties Company VI, Mitan Properties Company V, and Mitan Doublewood Ancillary Control Section, Inc. shall appear and show cause why they should not be held in *criminal and civil contempt* at 9:30 am on Friday, September 2, 1994, based on Defendants/Counter Plaintiff[s] Amended Motion . . . . [Emphasis added.]

The court and the parties' attorneys signed the order.

We believe that the September 2, 1994 order remedies all the problems with notice identified by the court and by appellants on appeal. The order clearly indicates that criminal contempt was contemplated. Appellants did not raise a contemporaneous objection to the timeliness of this notice. Under these circumstances, we believe that appellants did receive proper notice of the criminal nature of the contempt proceedings.

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[9] Noting a continuing problem with getting the Mitans to court, the court then issued bench warrants for the Mitans. We note that the Mitans were not in court on September 1, 1994.

Third, appellants argue that the trial court erred in allowing appellees' counsel to prosecute the criminal contempt. Specifically, appellants assert that counsel's involvement was fundamentally unfair and inconsistent with the public's interest in vindicating the power of the court through a disinterested prosecution.

Appellants' argument is based primarily on *Young v US ex rel Vuitton et Fils SA*, 481 US 787; 107 S Ct 2124; 94 L Ed 2d 740 (1987). The petitioners in *Young* were found guilty by a jury of criminal contempt for violation of an injunction of the United States District Court for the Southern District of New York, which prohibited infringement of the respondent's trademark. *Id.* at 790. The injunction stemmed from a trademark infringement action brought in December 1978 by the respondents against Sol Klayminc, his wife Sylvia, his son, and their family-owned businesses. *Id.* Under a July 1982 settlement agreement, the Klaymincs agreed to pay Vuitton $100,000 in damages, and consented to the entry of a permanent injunction prohibiting them from, inter alia, "manufacturing, producing, distributing, circulating, selling, offering for sale, advertising, promoting or displaying any product bearing any simulation, reproduction, counterfeit, copy, or colorable imitation' of Vuitton's registered trademark." *Id.*

Pursuant to an undercover investigation proposed and performed by a private firm, the respondents uncovered information that the injunction was being violated. *Id.* at 791. Thereafter, Vuitton's attorney asked the district court to appoint him and a colleague as special counsel to prosecute a criminal contempt action against the petitioners for violation of the injunction. *Id.* Vuitton's attorney also asked for permission to videotape an upcoming meeting involving Sol Klayminc and his son, and two private investigators. The attorney also sought permission to carry out further undercover activity. *Id.* Finding probable cause to believe that the injunction had been violated, the district court appointed the attorney and his colleague to "represent the United States in the investigation and prosecution of such activity." *Id.* at 791-792. Vuitton's attorney informed the United States Attorney's Office of his appointment and offered to make available any evidence that was uncovered during the investigation. *Id.* However, "the Chief of the Criminal Division of that Office expressed no interest beyond wishing [the attorney] good luck." *Id.* at 792.

"Over the course of the next month, more than 100 audio and video tapes were made of meetings and telephone conversations between petitioners and investigators." *Id.* With that evidence in hand, Vuitton's attorney requested and obtained an order from the district court directing the petitioners "to show cause why they and other parties should not be cited for contempt for either violating or aiding and abetting the violation of the court's July 1982 permanent injunction." *Id.* Eventually, two of the petitioners pled guilty. Sol Klayminc was found guilty of criminal contempt, and the remaining petitioners were found guilty of aiding and abetting that contempt. *Id.*

On appeal, the Court of Appeals for the Second Circuit rejected the petitioners' argument that the appointment of Vuitton's attorney and his colleague violated the petitioners' right to be prosecuted only by an impartial prosecutor. *US ex rel Vuitton et Fils SA v Klayminic*, 780 F2d 179, 183 (CA 2, 1985), rev'd by *Young, supra*.

The *Young* Court rejected the petitioners' argument that the district court lacked the authority to appoint private counsel to prosecute a criminal contempt. *Young, supra* at 793. The Court reasoned, in part, that "it is long settled that courts possess inherent authority to initiate

contempt proceedings for disobedience to their orders, authority which necessarily encompasses the ability to appoint a private attorney to prosecute the contempt." *Id.* The Court reasoned that

> [w]hile contempt proceedings are sufficiently criminal in nature to warrant the imposition of many procedural protections, their fundamental purpose is to preserve respect for the judicial system itself. As a result, courts have long had, and must continue to have, the authority to appoint private attorneys to initiate such proceedings when the need arises. [*Id.* at 800-801.]

We agree with this analysis, and hold that courts in Michigan also possess such inherent authority and the concomitant power to appoint private counsel to prosecute criminal contempt actions.[10]

The *Young* Court, however, agreed with the petitioners that the district court erred in appointing Vuitton's attorney to prosecute the criminal contempt. *Id.* at 809. The Court reasoned:

> Private attorneys appointed to prosecute a criminal contempt action represent the United States, not the party that is the beneficiary of the court order allegedly violated. As we said in *Gompers* [*v Bucks Stove & Range Co*, 221 US 418, 445; 31 S Ct 492; 55 L Ed 797 (1911)] criminal contempt proceedings arising out of civil litigation "are between the public and the defendant, and are not a part of the original cause." . . . The prosecutor is appointed solely to pursue the public interest in vindication of the court's authority. A private attorney appointed to prosecute a criminal contempt therefore certainly should be as disinterested as a public prosecutor who undertakes such a prosecution.
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[10] The *Young* Court also made the following comments regarding the exercise of the power to appoint:

> This principle of restraint in contempt counsels caution in the exercise of the power to appoint a private prosecutor. We repeat that the rationale for the appointment authority is necessity. If the Judiciary were completely dependent on the Executive Branch to redress direct affronts to its authority, it would be powerless to protect itself if that Branch declined prosecution. The logic of this rationale is that a court ordinarily should first request the appropriate prosecuting authority to prosecute contempt actions, and should appoint a private prosecutor only if that request is denied. Such a procedure ensures that the court will exercise its inherent power of self-protection only as a last resort. [*Young, supra* at 801.]

While these comments were dicta, we agree with the premise that this is the better procedure to follow. However, we do not believe that the failure to first make such a referral automatically constitutes error requiring reversal. See discussion *infra* at 14-15.

> In short, as will generally be the case, the appointment of counsel for an interested party to bring the contempt prosecution in this case at a minimum created *opportunities* for conflicts to arise, and created at least the *appearance* of impropriety.
>
> ***
>
> The requirement of a disinterested prosecutor is consistent with our recognition that prosecutors may not necessarily be held to as stringent a standard of disinterest as judges. . . . In a case where a prosecutor represents an interested party, however, the ethics of the legal profession *require* that an interest other than the Government's be taken into account. Given this inherent conflict in roles, there is no need to speculate whether the prosecutor will be subject to extraneous influence.
>
> As we said in *Bloom* [*v Illinois*, 391 US 194, 207; 88 S Ct 1477; 20 L Ed 2d 522 (1968)], "In modern times, procedures in criminal contempt cases have come to mirror those used in ordinary criminal cases." . . . The requirement of a disinterested prosecutor is consistent with that trend . . . . [*Id.* at 804-808 (emphasis in original).]

The *Young* Court's holding was based on the Court's supervisory authority over federal district and appeals courts. *Id.* at 809 ("We rely today on that authority to hold that counsel for a party that is the beneficiary of a court order may not be appointed as prosecutor in a contempt action alleging a violation of that order."). Only Justice Blackmun concluded "that the practice—federal or state—of appointing an interested party's counsel to prosecute for criminal contempt is a violation of due process." *Id.* at 814-815 (Blackmun, J., concurring). Accordingly, *Young* does not control the case at bar, which involves a state criminal contempt proceeding.

Moreover, we do not believe that due process concerns mandate the adoption of an automatic rule barring the appointment of a party's private counsel to prosecute a contempt action. Under both the federal and state constitutions, US Const, Am 14; Const 1963, art 1, § 17, due process "is flexible and satisfied as long as fundamental fairness is observed." *Genesco, Inc v Michigan Dep't of Environmental Quality*, 250 Mich App 45, 56; 645 NW2d 319 (2002). Determining whether particular procedures are fundamentally fair, this Court considers "the private interest at stake, the risk of an erroneous deprivation of such interest through the procedures used, the probable value of additional or substitute procedures, and the state or government interest, including the function involved and the fiscal or administrative burdens imposed by substitute procedures." *Dobrzenski v Dobrzenski*, 208 Mich App 514, 515; 528 NW2d 827 (1995).

Here, the private interest at stake is significant. In Michigan, a conviction for contempt involving a duty which is no longer within the power of a party to perform is punishable by a fine and imprisonment. MCL 600.1715(1).[11] We find this to be a significant interest.[12]

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[11] MCL 600.1715(1) reads:

(continued…)

However, we do not believe that the risk of erroneous deprivation of this interest is high. Pursuant to court rule, it is the trial judge who must decide whether a proper showing has been made to institute contempt proceedings. MCR 3.606(A). While this may not "quell concern that prosecution by an interested party may be influenced by improper motives," *Young*, *supra* at 807, it does provide a procedural safeguard against initiation of a contempt prosecution for reasons other than the seriousness of the accusations, which in turn minimizes the risk that defendant will be erroneously deprived of his property and liberty interest. Further, we believe the value of adopting a blanket rule prohibiting appointment of interested party's counsel is small, especially in the context of the "tremendous fiscal and administrative burdens [that] would result from" such an absolute ban. *Wilson v Wilson*, 984 SW2d 898, 903 (Tenn, 1999). Further, if we were to hold that appointment of an interested party's counsel is per se a due process violation, we believe that given the heavy caseloads that already exist in the offices of Michigan prosecutors, "many citizens would be deprived of the benefits to which they already have been adjudged entitled by state courts and many state court orders would remain unenforced." *Id.* Thus, the goal of reaffirming the authority of our state judiciary through criminal contempt proceedings would actually be undermined by such a procedure.

We agree with the general proposition in *Young* that appellate courts can, in the exercise of their supervisory responsibilities, adopt a rule of practice precluding the appointment of an interested party's counsel to prosecute a criminal contempt. We, however, do not possess such authority. In Michigan, general supervisory authority over all inferior courts is held by our Supreme Court. Const 1963, art 6, § 4. That Court has yet to address this issue.

Even if such a rule of practice were recognized in Michigan, we would find any error in the case at bar to be harmless. A plurality in *Young* concluded that the appointment of an interested prosecutor was so "fundamental and pervasive" an error that harmless error analysis did not apply. *Young*, *supra* at 809-810. We disagree that such an error is structural in nature, thereby requiring automatic reversal. The list of such structural defects is limited. The alleged error complained of here does not fall within any of these previously established structural errors. See, generally, *Neder v United States*, 527 US 1, 8; 119 S Ct 1827; 144 L Ed 2d 35 (1999); *People v Duncan*, 462 Mich 47, 52; 610 NW2d 551 (2000). Comparing this alleged error to those on that list, we do not believe that it should be added to it. It is not a defect that affects the very framework of a contempt proceeding, nor does it undermine the function of such a proceeding to the extent that no punishment resulting there from could be regarded as fundamentally fair. *Arizona v Fulminante*, 499 US 279, 310; 111 S Ct 1246; 113 L Ed 2d 302 (1991). This alleged error does not transcend the criminal process. *Id.* at 311.

(…continued)

> 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.

[12] While the potential fine is small, we will not engage in any speculation on the relative significance or insignificance of potential jail terms. Regardless of the length of the stay, the deprivation of a liberty interest is significant.

Nor do we believe that the alleged error was constitutional in dimension. See *Young*, *supra* at 826-827 (Powell, J., concurring in part, dissenting in part). As we have already concluded, due process was not violated. Accordingly, if error was established, the following standard of review would apply:

> A preserved, nonconstitutional error is not a ground for reversal, "unless 'after an examination of the entire cause, it shall affirmatively appear' that it is more probable than not that the error was outcome determinative." Stated another way, the analysis focuses on whether the error undermined reliability in the verdict. [*People v Cornell*, 466 Mich 335, 363-364; 646 NW2d 127 (2002), quoting *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999).]

There is nothing in the record to suggest that appellees' attorney acted unethically in prosecuting the contempt. There is no evidence that the process was abused in any way and there is no evidence of investigative overreaching. Further, the evidence in the record before us provides ample, indeed overwhelming, support for the contempt convictions. See discussion *infra* at 17-18. We do not believe there is any evidence that the error was outcome determinative.

Next, we disagree with appellants' assertion that they were denied the fundamental constitutional rights that apply to criminal contempt proceedings in several ways. We have already rejected the assertion that notice was fatally flawed. Further, the trial court's opinion and order makes clear that the court both understood and applied the presumption of innocence and the beyond a reasonable doubt standard of proof. We also reject appellants' claim that their Fifth Amendment privilege against self-incrimination was violated.

Appellants' Fifth Amendment argument is focused on their testimony at the contempt proceedings. A defendant waives his right against self-incrimination when he takes the stand and testifies of his own volition. *People v Alexander*, 188 Mich App 96, 102; 469 NW2d 10 (1991). Both appellants took the stand to testify, Kenneth Mitan having been called by his own attorney. Neither was under any compulsion to testify; no objection was ever raised by counsel. In the case of Keith Mitan, who is a licensed attorney in this state, we believe it is reasonable to assume that he understood fully his right not to testify. In his case, we find no error in the court's denial of a later attempt to invoke his Fifth Amendment privilege. See *Brown v United States*, 356 US 148, 155-156; 78 S Ct 622; 2 L Ed 2d 589 (1958).

We also reject Kenneth Mitan's assertion that he was denied his Sixth Amendment right to confront his accusers when the trial court refused to postpone the proceedings on July 29, 1997. On that day, Kenneth Mitan was testifying pursuant to subpoena in a civil proceeding in Houghton County Circuit Court. The subpoena was issued on July 21, 1997. The parties differ regarding their understanding of the efforts made by Kenneth Mitan to postpone the Houghton County action. The trial judge made no specific findings on the matter other than to note that "any problem here is of Mr. Mitan's own making." Before reaching this conclusion, the judge had related a conversation she had with the judge in the civil matter, in which the judge in the case at bar was informed that the trial date of June 9, 1997 had been "adjourned, apparently at the request of counsel, to today's date." If this is accurate, then at the very least it appears Kenneth Mitan had ample time to bring to the attention of the court sitting in the contempt

action, that a scheduling conflict existed on Tuesday, July 29, 1997. Nonetheless, a motion to adjourn was not filed until 4:08 PM on Friday, July 25, 1997.

We need not wade into the responsibility quagmire, however, to resolve this issue. Both the US and Michigan Constitutions guarantee a criminal defendant the right to be present at all stages of his trial and to a face-to-face meeting with the witnesses against him. US Const, Am VI; Const 1963, art 1, § 20. "Nonetheless, these rights are not absolute and must be construed according to the necessities of the trial and the adversarial process." *People v Burton*, 219 Mich App 278, 287; 556 NW2d 201 (1996). "'The standard by which to determine whether reversible error occurred (is) . . . whether there is "any reasonable possibility of prejudice".'" *People v Morgan*, 400 Mich 527, 536; 255 NW2d 603 (1977), adopting the test articulated in *Wade v United States*, 142 US App DC 356, 360; 441 F 2d 1046, 1050 (1971).

Based on the record, we find no such probability of prejudice. Appellants were not precluded from questioning either witness called on July 29, 1997, one of whom was Keith Mitan. The testimony of the first witness, one of appellants' former attorneys, was a continuance of his testimony from three years prior. The subject matter of that testimony was the second removal of Cases I and II to federal court on August 9, 1994. The record shows that appellants' counsel was fully prepared to question the witness on the subject. Further, we again note the overwhelming nature of the evidence against appellants. See discussion *infra* at 17-18. Under these circumstances, reversal is unwarranted.

Appellants next argue that they were denied their right to a speedy trial by the thirty-three month delay that occurred between the last contempt hearing in 1994 and the resumption of hearings in July 1997. We disagree. Without objection, the contempt proceedings were held in abeyance pending the outcome of the appeal in *Frandorson I*. After the resolution of that appeal, the matter was once again placed on the court's schedule. Although the court need not necessarily have stayed the contempt proceedings during our review, we cannot find that it was error to do so, especially in light of the fact that the contempt proceeding involved issues raised in the appeal.

We also reject appellants' assertion that the trial judge erred in denying their request to assign the matter to another judge. In support of this assertion, appellants have cited to one case, *People v Kurz*, 35 Mich App 643; 192 NW2d 594 (1971). That case is distinguishable from the case at bar. In *Kurz*, consideration of the contempt citation in issue was deferred until after the conclusion of a jury trial. *Id.* at 645. "Substantially all the charges [grew] . . . out of the manner in which Kurz voiced objections to questions propounded by the prosecutor." *Id* at 647. The *Kurz* Court concluded that when action on a contempt matter is deferred until after the conclusion of trial, "a person accused of contempt by a trial judge should be tried before a different judge, one not involved in the subject matter of the contempt or in the citation of the contemnor." *Id*. at 660.

In the case at bar, the accusations of contempt were raised in an ex parte petition by appellees' counsel, not by the trial judge. Further, the contempt matter was deferred until the resolution of the appeal in *Frandorson I*, not the conclusion of proceedings involving the sale of the shopping centers. Additionally, while the contempt charged in the case at bar was a challenge to the authority of the Ingham Circuit Court, the individual judge implicated was the judge who issued the two orders, not the judge who presided at the contempt proceedings. The

rule of *Kurz* is premised on a presumption that it was needed to protect the public reputation of the judicial proceedings. Such a presumption is unwarranted in the case at bar.

We also do not believe that appellants have established that grounds existed for disqualification. MCR 2.003. "[T]he party who challenges a judge on the basis of bias or prejudice must overcome a heavy presumption of impartiality." *Cain v Dep't of Corrections*, 451 Mich 470, 497; 548 NW2d 210 (1996). Appellants have not shown that the judge could not impartially hear the matter. See *In re Forfeiture of $1,159,420*, 194 Mich App 134, 151; 486 NW2d 326 (1992). In fact, because their argument is based on the erroneous assumption that disqualification is mandated, appellants have not even argued that the judge was biased. Indeed, we believe that the judge's well-reasoned opinion and order evidence the proper judicial temperament.

We also find no merit in appellants' claim that criminal contempt should not have been considered given that civil contempt was enough to vindicate the court's authority. Given the nature and tenor of appellants' actions, including the fact that they filed not one but two sets of title-clouding documents after ordered by the court not to, and given the fact that the need to coerce compliance was no longer present when the contempt proceedings concluded, we believe that criminal contempt proceedings were appropriate. *In re Contempt of Rochlin, supra*, 186 Mich App at 648.

Next, appellants argue that insufficient evidence was adduced below to support their convictions. We disagree. When reviewing a claim regarding the sufficiency of the evidence in a bench trial, this Court examines the evidence in a light most favorable to the prosecution to determine if a rational trier of fact could find that the essential elements of the offense were proved beyond a reasonable doubt. *People v Nunez*, 242 Mich App 610, 615; 619 NW2d 550 (2000). Regarding the first charge of contempt, the trial court made the following findings:

> The July 19, 1994 Order stated that if the Mitans failed to file a security bond by 1:00 p.m. on July 21, 1994, an order would enter dismissing their complaint and enjoining them from filing the same action or any related action for 45 days. When the Mitans recorded the second set of notices of lis pendens they knew that the bond would not be filed, that the complaint would be dismissed, and that they would be barred from filing any similar action for 45 days.
>
> At the time of recording the second set of notices of lis pendens, the Mitans knew the first set of notices of lis pendens had been or would shortly be cancelled and that there was or would soon be no existing court case justifying them. In a meretricious attempt to keep the notices of lis pendens in effect despite the Court's order, the Mitans filed a Claim of Appeal with the Court of Appeals and used that caption and docket number as authorization for the second set of notices of lis pendens. Both Mitans have law degrees and Keith Mitan is licensed to practice law in Michigan. Both knew that the "Claim of Appeal" they filed would be dismissed by the Court of Appeals because the order granting the motion for a security bond was not a final order of the case. In fact, the purported "Claim of Appeal" was later dismissed for lack of jurisdiction.

> The actions of Keith Mitan and Kenneth Mitan were a blatant disregard of the authority of the Court.

Regarding the second charge, the court made the following findings:

> Once again, the Mitans attempt to evade the consequences of a clear order of the Court by employing subterfuges. As was evident in the hearings of July 19, 1994 and July 21, 1994, the intent of the Court's rulings was to allow the closing between Chemical Bank and Frandorson to proceed.
>
> The affidavit of Assignee, Assignment, and purchase agreement smell just like a lis pendens and have the same title-clouding effect. The recording of these affidavits was a willful violation of the July 22, 1994 Order enjoining Mitans from recording any more notices of lis pendens.
>
> Judge Richard A. Enslen of the U.S. District Court for the Western District of Michigan reached a similar conclusion when he remanded both Case I and Case II to this Court . . . .

Viewed in the required light, these findings, which are amply supported by competent evidence in the record, are clearly sufficient to uphold the contempt convictions. *Id.*

Finally, we reject appellants' argument that the cumulative effect of the alleged errors deprived them of a fair hearing. Having found only one error, which was also found to be harmless, we find no merit to this assertion. See *People v Cooper*, 236 Mich App 643, 660; 601 NW2d 409 (1999).

Affirmed.

/s/ Harold Hood
/s/ Donald E. Holbrook, Jr.
/s/ Donald S. Owens