STATE OF MICHIGAN
IN THE COURT OF APPEALS

ZANTE INC., d/b/a MARLENA'S BISTRO AND PIZZERIA and
In re MARLENA PAVLOS-HACKNEY

Defendant-Appellants,

v.

MICHIGAN DEPARTMENT OF AGRICULTURE AND RURAL DEVELOPMENT,

Plaintiff-Appellee.

Court of Appeals Dkt. No. 357407
Ingham Co. Cir. Ct. Case No. 21-113-CZ
HON. Wanda M. Stokes

Danielle Allison-Yokom (P70950)
Laura R. LaMore (P79943)
Eileen C. Whipple (P74700)
MICHIGAN ATTORNEY GENERAL
Attorneys for Plaintiff-Appellee
Environment, Natural Resources, and Agriculture Division
P.O. Box 30755
Lansing, MI 48909
(517) 335-7664

Robert J. Baker (P57964)
Stephen J. Vargo (P76963)
Caleb E. Gonzalez (P78505)
R.J. BAKER & ASSOCIATES, PLLC
Attorney for Defendant-Appellants
225 Hubbard Street
Allegan, MI 49010
(269) 686-9448

DEFENDANT-APPELLANTS' BRIEF ON APPEAL

(ORAL ARGUMENT REQUESTED)

TABLE OF CONTENTS

INDEX OF AUTHORITIES

CASES

UNITED STATES CONSTITUTION

Michigan Constitution

STATUTES

COURT RULES

STATEMENT OF JURISDICTION

A Judgment of Contempt (and as amended) was issued against Defendants-Appellants, Zante Inc., d/b/a/ Marlena's Bistro and Pizzeria, and restaurant owner Marlena Pavlos-Hackney following an Arraignment that took place on or about March 19, 2021. The Michigan Court of Appeals has jurisdiction over this matter pursuant to *Mich DOT v Detroit Int'l Bridge Co (In re Moroun)*, 295 Mich App 312; 814 NW2d 319 (2012).

STATEMENT OF QUESTIONS PRESENTED

I. Is this an issue of 1st impression where during a pandemic this Court is asked to determine that the alleged violations as applied are actual criminal contempt violations, and Defendant-Appellant is to be afforded all corresponding due process rights?

Defendant-Appellant says: YES

Plaintiffs-Appellee say: NO

The Circuit Court says: NO

II. If this is a matter of civil contempt, was that the flawed "Arraignment" that occurred on the afternoon of March 19, 2021, so insufficient that Defendant-Appellant was not afforded even rudimentary due process as to both contempt violations?

Defendant-Appellant says: YES

Plaintiffs-Appellee say: NO

The Circuit Court says: NO

III. Is Defendant-Appellant entitled to an accurate transcript and the actual video or recording of the hearing on March 19, 2021, to ensure the accuracy thereof?

Defendant-Appellant says: YES

Plaintiffs-Appellee say: NO

The Circuit Court says: NO

VI. Did the Trial Court violate Ms. Hackney's constitutional rights by improperly exercising Subject Matter and In Personam jurisdiction over her?

Defendant-Appellant says: YES

Plaintiffs-Appellant says: NO

The Circuit Court says: NO

.

INTRODUCTION

Defendant-Appellant, Marlena Pavlos-Hackney (Marlena), perhaps the first political prisoner of the COVID-19 Pandemic, appeals to this court seeking fundamental fairness thus far lacking in her proceedings. Marlena was jailed for operating her restaurant in defiance of a contempt order based upon the Governor Whitmer's pivoted use of the health code and executive branch agencies (constitutionally suspect but so far untested) following the Michigan Supreme Court's striking her emergency orders as unlawful and unconstitutional.

In an abuse of governmental power and overreach, the Michigan State Police (MSP) in the wee hours of March 19, 2021, chased down and arrested Marlena in front of her residence at the direction of the Michigan Attorney General (AG). Four state police vehicles and eight state police troopers were dispatched to arrest her for basically serving food without a license. The MSP set up a task force, surveilled Marlena's house, prepared a dossier on her husband and herself and executed a self-titled "traffic stop" based upon an alleged civil show cause warrant executed on direct order of arrest from the AG. The AG, in recently released documents evidently was urging Marlena's arrest to MSP prior to her appearance on FOX News' Tucker Carlson Show. The arrest procedure has all the attributes of a felony fugitive apprehension and maybe beyond. This, the trial court has classified as a "civil contempt" violation.

Ironically, the Governor over the pandemic has repeatedly violated her own COVID restrictions, rules, and orders without enforcement ramifications to her or patronized businesses.

At the "Arraignment" on the afternoon of March 19, 2021, this case was never called. Richard Martin, self-professed "Constitutional Lawyer" and Marlena's perceived "assistance of counsel" was quickly sent to jail for allegedly practicing law without a license in criminal contempt of court. He stated on the record he was not a licensed attorney but was appearing

.

solely as “assistance of counsel”. Mr. Martin’s constitutional rights were also trampled upon - this issue, however, is left to him to pursue.

Marlena, being the only inmate brought that day before pinch-hitting Judge Aquilina, in shackles, in front of at least three recording media outlets was then berated, demeaned, shouted at, lectured, denied effective assistance of counsel, and sent back to jail until the AG’s office determined Marlena followed the court’s edicts – improperly giving the keys to her jail cell to the AG. Marlena was returned to jail, endured a cavity search, and incarceration until March 24, 2021.

Marlena filed multiple motions to set-aside the contempt, get a proper hearing on all issues, have the $15,000 fine returned, correct the erroneous transcript, and to correct the flawed Judgment of Contempt. The court *sua sponte*, had an “Amended Arraignment” transcript prepared that remains erroneous; attempted to amend and correct the errors in the original Judgement of Contempt fining Marlena $15,000 for two alleged contempt’s (exceeding the statutory maximum) and remanding her to jail for 93 days.

The Arraignment was flawed primarily because it was termed and titled an “Arraignment” that did not proceed as such. There was no ability to prepare and present any defense, test any underlying accusations or affidavits, cross examine or present witnesses or to have the effective assistance of counsel.

The lack of a proper, accurate or complete record, violations of substantive and procedural due process, repeated denials for production of an accurate transcript and recordings of the March 19, 2021 hearing and denial of corrections have required this Appeal. The tenor and vitriol of the Judge’s statements to Ms. Hackney at that hearing are not reflected in the cold black type of the printed pages of the flawed transcript where the judge lost her judicial

.

demeanor in apparent exasperation and frustration.

In an issue of 1st impression during a pandemic, this Court is asked to determine that this is an actual criminal contempt violation, afforded all corresponding due process rights. Or, if civil contempt was that the flawed "arraignment" that occurred on the afternoon of March 19, 2021, insufficient that Marlena was not afforded even rudimentary due process. And either way, she is entitled to an accurate transcript and the actual video or recording of the hearing on March 19, 2021, to ensure the accuracy thereof. Clarity in present case law regarding contempt is convoluted and conflicting, *sui generis*-indeed. What follows is an honest stuttering attempt to fully layout the facts, caselaw, applicability and legal argument.

Apologetically, Marlena presents this tangled, confusing, gordian knot to this court to untangle.

STATEMENT OF FACTS

I. Background & Procedural Summary

The factual details and constitutional/legal issues in this case are too numerous to "briefly" describe but are set forth in summation below. This case involves ongoing fall-out from the political circus surrounding Covid-19, the Governor's (Democrat) unconstitutional enforcement and restrictions placed into effect, and the procedural and constitutional questions surround the Governor's lack of legislative involvement. After several of the Governor's executive orders were overturned as unlawful and unconstitutional,[1] the State turned to the Michigan Department of Agriculture and Rural Development (hereinafter "MDARD") to implement and carry out its unconstitutional Covid-19 agenda.

Defendant Zante Inc. d/b/a Marlena's Bistro and Pizzeria (hereinafter "Marlena's

[1] See generally *Midwest Inst of Health, PLLC v Governor of Mich (In re Certified Questions from the United States Dist Court)*, 506 Mich 332; 958 NW2d 1 (2020)

.

Bistro") and its owner Marlena Pavlos-Hackney, out-spoken Political Activist and Polish Immigrant, became the target of Covid-19 enforcement when she went on prime-time television and spoke out against government oppression and Covid-19 mandates. Marlena's Bistro operates business in Holland, MI on the border of Allegan and Ottawa counties (both of which are traditionally Republican-controlled counties).

A. First Covid-19 Shutdown

Marlena's Bistro operates business in Holland, MI on the boarder of Allegan and Ottawa counties (both of which are traditionally Republican-controlled counties). Ms. Pavlos-Hackney closed Marlena's Bistro during the first shutdown of the Covid-19 Pandemic. After the State announced that restaurants could re-open for business Marlena's Bistro re-opened and continued serving its patrons. After Marlena's Bistro re-opened, Ms. Pavlos-Hackney was outspoken about the fact that she would not be "policing" or refusing service to patrons who had chosen not to follow mask mandates and "social-distancing" requirements.

i. Governor's Orders Unlaw and Unconstitutional

As the pandemic continued, numerous controversial executive orders issued by the Governor were held unlawful and unconstitutional. Rather than turning to the legislative and executive branches of government to work out resolution through under America's system of checks and balances, the State turned to the Michigan Department of Agriculture and Rural Development (hereinafter "MDARD") to implement and carry out its unconstitutional Covid-19 agenda and the Attorney General – all executive branch functions.

B. Second Covid-19 Shutdown

After the State announced a second round of business shut-downs, Ms. Pavlos-Hackney, along other business and restaurant owners, remained out-spoken against the oppressive manner

.

in which the State was handling Covid-19 issues. Ms. Pavlos-Hackney publicly announced that the restaurant would not be closing, would not be questioning or enforcing Covid-19 "masking" or "social distancing" requirement. Marlena's Bistro proudly displayed patriotic signage, put messages supporting freedom, and criticized the Governor's handling of the pandemic on her building and Facebook page. Ms. Pavlos-Hackney also began getting a lot of support from her regular patrons, community, and national and local news outlets.

Thereafter, Marlena's Bistro and Ms. Hackney, as well as other outspoken restaurant and business owners, became that target of the government's task-force to round-up outspoken and defiant business owners. MDARD cited Marlena's Bistro for Covid-19 related "health code" violations, alleged Marlena's Bistro was a "danger to the public,"[2] and suspended Marlena's Bistro's license to sell food in the State of Michigan following an MDARD administrative hearing and order – The State tried to silence Ms. Pavlos-Hackney by shutting her business down.

Ms. Pavlos-Hackney refused to shutdown Marlena's Bistro, served her supporters and patrons, and continued to be an out-spoken activist against government oppression and Covid-19 related issues.

i. Richard Martin – "Constitutional Lawyer"

Ms. Pavlos-Hackney's story captured the attention of self-proclaimed "constitutional lawyer" Richard Martin. Mr. Martin contacted Ms. Pavlos-Hackney and explained that he was a constitutional lawyer and supported her efforts against the State's oppressive Covid-19 practices. Thereafter, Ms. Pavlos-Hackney asked Mr. Martin to represent her. Mr. Martin was not a licensed attorney in Michigan and filed appearances on Ms. Pavlos-Hackney on constitutional

[2] !"#$#%&#$#%' (%)*+#+%(,%-(./0123%+4$#*0%+5#66/'7%,$(6%8*$9#'*:+%;/+5$(%*'0%('9<%('#%*99#7#0%4*5$('%&"(%"*+%#.#$%5#+5#0%4(+/5/.#%=%' (%)(64#5#'5%#./0#')#%&*+%4$#+#'5#0%($%5#+5#0>%5"#$#(,?

.

theories that he could represent her in capacity as "of counsel". Further discussion *infra*.

C. MDARD Enforcement and Administrative Process

As stated above, after the Governor's executive orders regarding Covid-19 restrictions were struck down as unconstitutional, the State shifted gears and continued to pursue enforcement of Covid-19 regulations through administrative agency theories. The State, unable to shut Marlena's Bistro down through its unconstitutional executive orders, tried to shut-down Marlena's Bistro and targeted, out-spoken, Ms. Pavlos-Hackney by utilizing the health department and MDARD. The State's new vehicle for forced Covid-19 compliance came in the form of striping business licenses; and in the instant case, Marlena's Bistro's license to sell food. In MDARD's attack on defendant's food license, MDARD turned its attention to Marlena's Bistro's signs and Facebook page which stated "we do not follow any of the governor's, mayor's, health department's or government agency orders or suggestions pertaining to social distancing or mask wearing. Your health is your responsibility." Of further importance, MDARD did not complain or cite any traditional violations or concerns about food poisoning or food preparation concerns – Marlena's Bistro was targeted because of Covid 19 and patron support from her community. Despite being targeted for forced compliance, Ms. Pavlos-Hackney remained outspoken throughout the administrative proceedings. In addition, during this time, Ms. Pavlos-Hackney was receiving "of counsel" legal advice from Mr. Martin. Because Mr. Martin was not a licensed attorney, the Administrative Law Judge would not allow him to represent Marlena's Bistro during administrative proceedings. On February 11, 2021, the Administrative Law Judge upheld an Emergency Summary Suspension Order stripping Marlena's Bistro's food license for failing and refusing to comply with Covid-19 restrictions. See **Exhibit 1** – Michigan Administrative Hearing Decision and Order Continuing Summary

.

Suspension (also attached as Exhibit 15 to MDARD's February 24, 2021 Ex Parte Motion for TRO).

In sum, the State stripped Marlena's Bistro of its food license under the guise that it was danger to the public. The states claim that Marlena's Bistro was an imminent danger to the public was not supported by science or actual factual support (and this is highly suspect). surrounding Marlena's Bistro's restaurant activities as there was only one alleged person who ever ate at her restaurant to test positive for Covid-19; and there is no evidence of known cases were ever spread by any of its patrons eating there. MDARD's February 24, 2021 Ex Parte Motion for TRO Bistro's food license was based on "pollical science" and the fact she was out-spoken against Covid-19 and State' unconstitutional actions.

ii. The Governor has been caught violating her own Covid-19 orders and the Governor's patronized establishments are not similarly being attacked

It has been reported that Governor was caught traveling out of state while her Covid-19 travel ban restriction were in place. It has also been reported the Governor was caught pushing tables together at a restaurant and was seated in close proximity with several friends in violation of Covid-19 restrictions. Despite these acts of no-compliance the Governor nor her patronized establishments were ever governmentally attacked for their violative acts during Covid-19 like Ms. Pavlos-Hackney was.

D. Ingham County Circuit Court TRO and Show Causes

After Ms. Pavlos-Hackney refused to shut down, continued to garner community and media support, and remained outspoken against the State's Covid-19 practices, the State sought enforcement of the MDARD summary license suspension and administrative order through the Ingham County Circuit Court via an Ex Parte Temporary Restraining Order and Show Cause

.

Motions.

i. February 25, 2021 Ex Parte TRO

On February 24, 2021, the Attorney General filed for a TRO against Marlena's Bistro in the Ingham County Circuit Court. See **Exhibit 2 –** MDARD's February 24, 2021 Ex Parte Motion for TRO. The TRO requested by MDARD was issued on February 25, 2021 by Judge Wanda M. Stokes of the Ingham County Circuit Court. The Ex Parte TRO directed Marlena's Bistro to cease operations. Like the Governor's Covid-19 orders and order from the administrative law judge, the Circuit Court order the restaurant to shut down. Although Covid-19 issues were the underlying basis, this Circuit Court's TRO was issued under the guise that Marlena's Bistro no longer had a valid food license (after MDARD summarily suspended it and the administrative law judge upheld the suspension). **Exhibit 3** – February 25, 2021 Ex Parte TRO. Similar to the State's false claims in the administrative proceedings, the State claimed that Marlena's Bistro was a threat to the public and immediate irreparable harm would result if the TRO was not issued on an Ex Parte basis because of Marlena's Bistro's refusal to comply with Covid-19 practices. The Ex Parte TRO was set for hearing on or March 4, 2021 whereby Marlena's Bistro was supposed to be afforded the opportunity to contest the Court's issuance of th3 Ex Parte TRO.

ii. March 1, 2021 MDARD Motion for Civil Contempt

After Marlena's Bistro continued to serve patrons and remained out-spoken, the Attorney General filed a motion to show-cause against Marlena's Bistro on March 1, 2021 for violating the Ex Parte TRO. The Attorney General filed a Motion to Show Cause supported by an affidavit from an MDARD representative against Malena's Bistro and specifically requested civil contempt sanctions against Marlena's Bistro; and also specifically requested that Marlena's

.

Bistro not receive criminal contempt sanctions from the court. See **Exhibit 4** – March 1, 2021 MDARD Motion to Hold Marlena's Bistro and Pizzeria in Contempt. Therefore, the factual allegations cite instances of non-compliance with Covid-19 orders; and not practical/actual food license or health code violations.

iii. March 4, 2021 Arraignment Regarding Attorney General Motion to Show Cause (Stokes)

As noted above, the temporary restraining order was issued against Marlena's Bistro on or about February 26, 2021; and thereafter, on or about March 1, 2021, MDARD filed a motion for contempt. (It is important to note that the Attorney General only filed one motion for contempt. A subsequent notice of continued violation was filed, however the Court punished Ms. Pavlos-Hackney with $15,000 in sanctions. After motions were filed, the court attempted to clean up the problem by claiming this was for two distinct contempt violations, to wit two $7,500 sanctions, which were not at issue nor properly before the court.

On or about March 4, 2021, Ms. Pavlos-Hackney appeared for a hearing via Zoom on behalf of her company regarding the Motion to Show Cause MDARD filed against Defendant (business) Marlena's Bistro. See **Exhibit 5** – March 4, 2021 Hearing Transcript, at 3:5-7, 4:6-21 (March 4, 2021).

Ms. Pavlos-Hackney appeared with self-identified constitutional lawyer Richard Martin whom she asked to assist as "assistance of counsel." H.T. at 4-5 (March 4, 2021). Like the administrative hearing, because Mr. Martin was not an attorney licensed to practice law in the State of Michigan the Trial Court determined that the company, which was required to have an attorney represent it, was unrepresented by an attorney. The court proceeded with the hearing, found Marlena's Bistro in default for not having a licensed attorney present, found Marlena's Bistro in contempt for not complying with the Trial Court's Ex Parte TRO, issued a fine of

.

$7,500 and a nationwide bench warrant for Ms. Pavlos-Hackney's arrest, and granted the state's motion and issued a Preliminary Injunction. Hearing Transcript, at 13-16 (March 4, 2021). Hearing Transcript, at 13-16 (March 4, 2021).

After issuing its ruling, the Judge inquired whether the state's Assistant Attorney General if she had any questions, but refused to address or entertain questions from Ms. Pavlos-Hackney The dialoged was as follows:

> Do you have any questions, Ms. Whipple?
>
> MS. WHIPPLE: No, Your Honor.
>
> THE COURT: Okay. There being no questions, and we have no...
>
> MS. HACKNEY: I have a question.
>
> THE COURT: ...no counsel representing the Defendant, then this hearing is adjourned, and the Court's Orders will be issued.
>
> MS. HACKNEY: I have a question.
>
> THE COURT: This hearing is adjourned.
> (At 1:34 p.m., proceedings concluded.)

The Trial Court plowed over Ms. Pavlos-Hackney's repeated attempts to ask a question, seek clarification, and gain understanding.

a. March 4, 2021 Order & Bench Warrant

The trial Court issued an order following the March 4, Hearing. **Exhibit 6** – March 4, 2021 Order. The order indicates that Ms. Pavlos-Hackney was found in civil contempt and ordered to pay a $7,500 fine and ordered the restaurant to cease operations. In conjunction with her order, the Court issued a bench warrant which indicated that "Ms. Marlena Pavlos-Hackney shall be incarcerated until such time as she abides by this Court's order." The bench warrant also afforded Ms. Pavlos-Hackney no bond. See **Exhibit 7** – March 4, 2021 Bench Warrant.

.

It is important to note that the procedural process up to this point did not include an arraignment or appointment of counsel; and was handled completely different than the "other" show cause issue discussed below. It is also important to note that there was never an additional motion and affidavit to show cause regarding any "new" form of contempt filed with the court; and never any direct contempt that occurred in the Judge's presence at later judicial proceedings. The Attorney General filed a notice on March 5, 2021 that Marlena's Bistro was not complying (as discussed below). Also, according to the hearing transcript, the hearing was "adjourned" as to the company (Marlena's Bistro); and not "concluded." Also of important note, the court issued an "order" after this hearing rather than a "Judgment of Contempt." The eventually entered Judgement of Contempt, which was later amended, was issued long after these proceedings as further discussed *infra*.

Rather than focusing the attention of the hearing on the Court's February 25, 2021 Ex Parte TRO, whether allegations in MDARD's complaint were accurate, whether there was "the necessity for immediate action to prevent continued violation of the Michigan Food Law, MCL 289.1101 et seq., and that continued operations of Marlena's creates an imminent threat to the public health" as set forth in the Ex Parte TRO, the hearing was focused almost entirely on MDARD's request for contempt sanctions regarding violation of the ex parte TRO; and not the validity or basis thereof.

b. March 5, 2021 Notice Regarding Marlen's Bistro Continued Violation of March 4, 2021 Court Order and Bench Warrant

On March 5, 2021, the Attorney General filed a notice with the court, supported by another affidavit from an MDARD representative stating that Marlena's Bistro was still not complying with Covid-19 regulations, had not shutdown, and that an employee had posted on social media account stating that the restaurant would not be closing its doors. See **Exhibit 8** –

.

March 5, 2021 MDARD Notice Regarding Marlena's Bistro and Pizzeria.

Of significant importance, the Attorney General never filed a "new" or additional motion for contempt. Notice was provided in conjunction with prior order that alleged prior contemptuous behavior was still taking place. Moreover, Defendants were never on notice that criminal contempt or additional sanctions could be or would be the subject of future hearings.

c. The Arrest

After local authorities in Ms. Pavlos-Hackney's Allegan/Ottawa community would not arrest Ms. Pavlos-Hackney, the Attorney General directed the MSP to get involved. On Friday, March 19, 2021 an eight-man team was sent by the Michigan State Police, acting at the direction of the Attorney General, to arrest Ms Pavlos-Hackney on a civil contempt bench warrant for operating a restaurant. The perplexities surrounding the arrest are numerous. Traditional felony arrest warrants do not receive a police task force of this magnitude to arrest criminals for major crimes. Thereafter, Ms. Pavlos-Hackney received a cavity search and was transported halfway across the State to Ingham County to receive her "day in court."

iv. March 19, 2021 "Arraignment" (Aquilina)

The "Arraignment" hearing originally scheduled to take place before the Judge of record (Stokes), was rescheduled before Judge Aquilena. When the court began the hearing, Judge Aquilena did not "call the case" of MDARD v. Marlena's Bistro (Zante, Inc.); nor was it ever "called" any time thereafter. The Trial Court did not explain whether the parties were present for a continuation of the previously adjourned hearing against Marlena's Bistro (the company). The Trial Court did not explain whether the parties were there on a continuation or allegations of violations of the March 4, 2021 order and bench warrant or new allegations of contempt – civil or criminal.

.

Instead, the Trial Court Judge called and "swore in" Mr. Martin. The Trial Court rejected Mr. Martin's arguments that he was allowed to appear as "assistance of counsel" on behalf of Marlena's Bistro and Ms. Pavlos-Hackney (a term which he distinguished from being a traditional licensed "attorney"). In addition to rejecting his arguments, the Trial Court found him in criminal contempt of court for the unauthorized practice of law. See **Exhibit 9** – Arraignment Hearing Transcript at 3-6 (March 19, 2021).

Thereafter, Ms. Pavlos-Hackney attempted to address the Trial Court and explain that her husband had just retained the services of licensed attorney Robert J. Baker of R.J. Baker and Associates, PLLC to represent her and her company earlier that day. H. T. at 6-8 (March 19, 2021). (Although the Trial Court would not release hearing videos to Defense Counsel, video snippets obtained from news outlets via the internet show that Ms. Pavlos-Hackney also pointed to the court's video/Zoom monitor where Attorney Baker appeared. The transcript, and as amended, is devoid of this important fact. Instead, transcripts erroneously indicate that Ms. Pavlos-Hackney identified Mr. Martin as her attorney).

The Trial Court refused to allow Ms. Pavlos-Hackney to speak and instead eventually requested appearances. The Trial Court took the state's Assistant Attorney General's appearance and immediately began berating and trying to "swear in" Ms. Pavlos-Hackney without addressing defense counsel or providing her the opportunity to speak to same. The Court did not address retained counsel Attorney Baker who had appeared via Zoom, had an internet lag or delay, and was not experiencing the hearing in "real time." Additionally, the Court had several court-appointed lawyers as backup counsel (presumably because the Trial Court Judge anticipated throwing Mr. Martin in jail) and did not address or appoint counsel before berating and addressing Ms. Pavlos-Hackney directly. H.T. at 6-10 (March 19, 2021).

.

After the Trial Court turned its attention to Ms. Pavlos-Hackney, the Trial Court turned its attention to licensed Attorney Baker. Attorney Baker informed the court that he had not had an opportunity to speak with his client and had not been provided any paperwork. The Trial Court allowed Defense Counsel time to speak with Ms. Pavlos-Hackney. Defense Counsel was under the upstanding, and the Trial Court affirmed, that the hearing was only supposed to be an **arraignment**. H.T. at 10-11 (March 19, 2021)

While being "arraigned," Ms. Pavlos-Hackney was informed that the bench warrant was issued on March 4, 2021 for violating the Trial Court's TRO. H.T. at 12:19-20 (March 19, 2021). Thereafter, the Court read the allegations and Ms. Pavlos-Hackney was informed that the Trial Court **pre-determined and had already found her in contempt** the February 25, 2021 Ex Parte TRO and was issue a fine $7,500. H.T. at 13:3-5 (March 19, 2021). Thus far in the proceedings, Ms. Pavlos-Hackney, nor her company, Marlena's Bistro, had ever had a formal evidentiary hearing regarding the allegations. Moreover, it was never explained that Ms. Pavlos-Hackney was facing new or subsequent contempt sanctions. (The Court's bench warrant simply stated that she could be incarcerated until she agreed to comply).

After "arraigning" Ms. Pavlos-Hackey, the Trial Court asked Defense Counsel if his client was going to plea or proceed with a hearing. Defense Counsel explained that he needed time to properly meet with his client and requested a contested hearing. Defense Counsel also informed that Trial Court that Ms. Pavlos-Hackney agreed to comply with the court order until such time as the contested hearing could be held. H.T. at 14:4-9 (March 19, 2021).

The Trial Court acknowledged and agreed that Marlena's Bistro and Ms. Pavlos-Hackney **were entitled to a hearing**. H.T. at 14:24 (March 19, 2021). However, immediately thereafter in contradictory fashion, **and without a hearing**, issued contempt sanctions and put

.

Ms. Pavlos-Hackney "in lock-up for 93 days and pay a $7,500 fine. H.T. at 14:25, 15: (March 19, 2021). The Trial Court went on to state, that Ms. Pavlos-Hackney can "prepare whatever it is you want for a hearing, for appeal, for what have you…" after she serve out her sentence. This was contrary to the fundamentals of American Jurisprudence as Marlena's Bistro and Ms. Pavlos-Hackney were entitled to, and should have been provided, a hearing before the Court issued contempt findings and sanctions – not after Judgment.

"So, sir, your client is entitled to a hearing. However, I am holding her at this time in contempt pending a hearing. She is going to be in lockup for 93 days and/or $7,500 and closing of the establishment. So once she closes her establishment, which will be checked on frequently by the Attorney General, and she pays $7,500, she can be released from jail. You can then prepare whatever it is you want for a hearing, for appeal, for what have you, but right now she is, based on the documentation that I have, she has violated the Orders of Judge Stokes, clearly violated them, and she has put the community at risk. We are in the middle of a pandemic. She's not followed the Orders of the Court which is a valid Court Order. There is nothing here and no challenge to it having not been valid. It's not been filed as a Motion for Reconsideration or any other tool that we have in the system where you can say it was an invalid Order. So until it's removed, it's valid." H.T. at 14:25, 15:

Counsel was never given an opportunity to prepare a defense, review the unauthenticated "documentation" that the judge had (notably not a decision based on "testimony" or other admissible evidence), never allowed to call or cross examine witnesses, or otherwise properly prepare. It is also important to note that the words the Judge used were all past-tense and the decision was focused on punishing Ms. Pavlos-Hackney for past behavior; and was not issued to coerce Ms. Pavlos-Hackney into doing something in the future. It is also important to note that the Judge never articulated what burden of proof the "documents" that were reviewed supposedly supported – preponderance of the evidence or beyond all reasonable doubt?

Moreover, despite informing the court that she was going to comply with court's bench warrant and order directing her to close her restaurant and was going to pay the $7,500 fine forthwith, the Trial Court imposed a 93 day jail sentence conditioned on factors outside of her

.

control. Of importance, Ms. Pavlos-Hackney was never informed or on any notice that she was facing new or additional contempt charges and newly retained and uniformed counsel, was aware of the March 4, 2021 bench warrant.

Following the hearing, the Court issued judgment of contempt which contained several defects as set forth *infra*. See **Exhibit 10** –March 19, 2021 Judgment of Contempt. Issuing this judgement was not consistent with the Court's March 4, 2021 order or bench warrant previously issued by Judge Stokes.

a. Judgment of Contempt

After the "Arraignment", the Trial Court's issued a flawed Judgment of Contempt which was signed by Judge Aquilina on March 19, 2021. See **Exhibit 11** – March 19, 2021 Judgment of Contempt Regarding Marlena Pavlos-Hackney. The Judgment of Contempt indicates that it was civil judgment of contempt for failing to comply with the court order signed on March 4, 2021. The judgment of contempt sentenced Marlena Pavlos-Hackney to serve 93 days in jail and indicated that a $7,500 fine was being imposed. However, the Judgment of Contempt (identified as "Civil") stated that Marlena Pavlos-Hackney's could be released upon "full payment of $15,000.00 and upon verification of restaurant closure and further order of the court."

However, at this point in the proceedings, the alleged contemptuous behavior, and specifically motion and affidavit to show cause was supposedly derived from the February Ex Parte TRO requiring the restaurant to close. Additionally, Ms. Pavlos-Hackney could not be subject to "double jeopardy" for or found in "double contempt" for the same or one continued, contemptuous act; or alternatively stated, one continuous act of keeping the restaurant open.

b. Satisfaction and Judgment of Contempt and Release from Incarceration

Ms. Pavlos-Hackney was arrested on the March 4, 2021 bench warrant and the

.

"Arraignment" hearing where the Judge threw her in jail took place on Friday, March 19, 2021 in Ingham County. As argued *infra,* Ms. Pavlos-Hackney did not "hold the keys to her cell" and "civil contempt" sanctions were not levied against her. Actually, the Trial Court deferred the "keys" to the Attorney General's office. At the March 19, 2021 hearing, and after consulting with licensed counsel, Ms. Pavlos-Hackney told the Court that she was going to follow the Court's order and close the restaurant. By Saturday, March 20, 2021, Marlena's Bistro not only closed, but was completely boarded up and caution tape was wrapped around the premises signify that business operations had ceased. Ms. Pavlos-Hackney also learned that written the Judgment of Contempt ordered her to pay a $15,000 fine; rather than the ordered $7,500.

Ms. Pavlos-Hackney's husband attempted to pay the fine on Friday, March 19, 2020 but the payment was rebuffed by both the jail and also at the court clerk's office. Thereafter, on Saturday, Ms. Pavlos-Hackney's husband obtained two cashier's checks and was finally able to get the court clerk's office to accept payment on Monday.

Ms. Pavlos-Hackney paid the "double" $15,000 fine on March 22, 2021 and subsequently filed a Notice of Satisfaction of Judgment of Contempt. **See Exhibit 11 –** March 22, 2021 Notice of Satisfaction of Judgement of Contempt filed by Ms. Pavlos-Hackney.

On March 22, 2021, late in the afternoon, the Attorney General filed notice with the court in response to Defendant's. MDARD's notice admitted that the Allegan County Health Department had observed the boarded up and closed restaurant on March 20 and 21; and that an MDARD "Food Service Inspector" observed same on March 22, 2021. However, the notice filed by the Attorney General further stated that the restaurant was normally closed on Mondays. See **Exhibit 12 -** March 22, 2021 MDARD Notice Regarding Marlena's Bistro and Pizzeria.

Despite the fact that Ms. Pavlos-Hackney had previously done everything in her power to

.

purge the contempt and paid an improperly issued fine, the Court did not authorize her release until Tuesday, March 23, 2021. See **Exhibit 13** - March 23, 2021 Order (It is important to note that the Order states "IT IS FURTHER ORDERED that Ms. Pavlos-Hackney has not waiver her right to a hearing regarding this contempt order and may exercise her right after consultation with her attorney." This statement is conjunction with and correlates to the inappropriate nature in which she was incarcerated, and the "Arraignment" was conducted on March 19, 2021. It is also important because later, in the court asserts a new and completely different finding that Ms. Pavlos-Hackney somehow waived her right to a hearing or did not properly preserve same with an objection).

Later that day on, on Mach 23, 2021, the Court also entered an regarding Ms. Pavlos-Hackney's satisfaction of judgment release from jail. See **Exhibit 14**- March 23, 2021 Order Regarding Satisfaction of Judgment of Contempt and Release from Imprisonment.

c. Issues with Hearing and Judgment of Contempt

After the defective "Arraignment" was conducted, Defendant filed a Motion for relief from March 19, 2021 Judgment of Contempt & March 23, 2021 Order of Contempt, among others. See generally Register of Actions. See **Exhibit 15 –** March 23, 2021 Order. Defendant pointed out numerous defects in the way the hearing and procedural process of her case had been handled up to this point, pointed to numerous defects in the orders issued, and further identified that the hearing transcript contained numerous defects throughout various pleadings, supplements, and at hearings.

In particular, a major defect exists as the record does not reflect that Ms. Pavlos-Hackney asked for her licensed attorney, Robert Baker, and was pointing to his appearance via Zoom on the court-room TV monitor. Instead, the record erroneously states that she was identifying

.

recently incarcerated Richard Martin as her attorney.

Ms. Pavlos-Hackney has repeatedly argued that she was deprived of fundamental fairness and due process in this case. The court's failure to generate an accurate transcript has been one of many contentious issues in the case. Defendants request for accuracy were met with opposition from the Court and Plaintiff's. Ms. Pavlos-Hackney requested, asserted, and preserved her right to counsel and a hearing on this matter. A fact which has been ignored by the court and mistakenly exploited by Plaintiff relying on the inaccurate transcript is Ms. Pavlos-Hackney's statements and ignored request to the Court to have licensed attorney Baker represent her - this statement came after Richard Martin was thrown in jail, while the Judge was directing inappropriate commentary at Ms. Pavlos-Hackney, and before acknowledging Attorney Baker's existence and appearance in the court proceedings. Although Attorney baker was eventually acknowledged, it came long after Ms. Pavlos-Hackney's request.

Rather than indicating that the Ms. Pavlos-Hackney requested the assistance of Licensed Attorney Baker, the erroneous transcript indicates that Ms. Pavlos-Hackney requested the assistance of unlicensed attorney Richard Martin who had just been sent to jail.

Not only is the fact important to support Ms. Pavlos-Hackney's constitutional claims, it is also critical because the Plaintiff used and exploited this error in the Amended Transcript in their Response to Defendants' Motion for Relief from Judgement. On Page 10 of Plaintiff's document it is alleged that Defendant stated, "[he]'s in the jail backroom" (PAGE 7, LINE 25) in reference to Mr. Martin. Actually, she states, "He's Mr. J. Baker" and she as best she could, being shackled, points to the screen where Attorney Baker was on the Zoom Hearing. **Video Disk - YouTube Video** *! "#$"%&'()*+%,(-,../(0,/-&*0&'-(12',0(34$"/("/'5-(6*0%,0(7"'%3(+*0"'%(&00&"%'8,'-(&-(10(&91*-(-$,(:;<=(8&0>(?@1*0(A"+,1(#."B/(#1'-&"''%(B10-"1'/(1C(*

.

! &0#$(DEF(G:GD($,&0" '%HI

In addition to not accurately identifying Ms. Pavlos-Hackney's request for licensed counsel, the amended transcript erroneously identifies the hearing date and nature of the proceedings as an "amended arraignment." Ms. Pavlos-Hackney was never afforded an "amended arraignment" or subsequent hearing to adequately address the procedural pitfalls that took place on March 19, 2021. An "amended transcript" was generated at a later date which still contained several defects and errors.

d. Amended Hearing Transcript and Judgment of Contempt

After Defendant filed its motions and pointed out the numerous defects, the Court *sua sponte* made attempts correct errors and defects but did not successfully address them all. In response the court made several corrections to the transcript but perpetuated errors and created additional inaccuracies. See **Exhibit 15** – Amended Hearing Transcript Regarding March 19, 2021 Arraignment.

Specifically, and materially relevant and prejudicial to Defendants, the Amended Transcript was not corrected to reflect:

1) That Ms. Pavlos-Hackney requested licensed attorney Baker at the hearing, not Mr. Martin;
2) It was not identified as an amended transcript, but instead an amended arraignment;
3) The certification of the amended transcript remains identical to original.

The Court also issued an Amended Judgment of Contempt in an attempt to patch the numerous defects but created perpetuated problems. See **Exhibit 16** – May 11, 2021 Amended Judgment of Contempt. The Amended Judgment of Contempt corrected and altered the original Judgment of Contempt, however, the Amended Judgment of Contempt also remained materially

.

defective.

v. April 27,2021 Hearing Regarding Defendants Motion for Videos for Hearing on March 19, 2021, Notice of Erroneous Transcript and Request to Cure Erroneous Transcript AND Defendant's Motion for Relief from March 19, 2021 Judgment of Contempt, March 23, 2021 Order of Contempt and Request for Hearing (Stokes)

At the April 27, 2021 hearing, Defendant requested to have an accurate transcript prepared. See **Exhibit 17** – April 27, 2021 Motion Hearing Transcript. The original transcript and the amended transcript contained material defects. Ms. Pavlos-Hackney reiterated and pointed out, in pertinent part, that at the March 19, 2021 "arraignment," the Trial Court judge inquired about Defendant's attorney shortly after throwing Mr. Martin in jail. The transcript states that when the court inquired about her attorney, Ms. Pavlos-Hackney states that "he's in jail in the back room." However, what actually took place, and can be seen in videos of the hearing circulating on You Tube, is Ms. Pavlos-Hackney pointing to the big TV screen in the court room where Defendant's licensed attorney, Robert Baker, was appearing via Zoom and tells the Trial Court that Mr. Baker is her attorney; and not recently jailed Mr. Martin. H.T. at 7:5-24 (April 27, 2021).

At the hearing, the court agreed Defendant was entitled to have an accurate transcript and that substantive errors need to be corrected. Thereafter, Defendant's attorney explained that the problem he was having was that he only had video snippets found on You Tube, and not the video of the entire hearing, so he could not yet identify all errors - only those found in the snippets. Defendant's attorney further explained that when he tried to get the videos from the court, he was never told that a video of the hearing did not exist, but that the video is unavailable to him. H.T. at 8-9 (April 27, 2021).

Judge Stokes replied by stating that there was a local court rule on the issue. Judge

.

Stokes explained that it was custom and practice that all hearings are recorded and placed on the website for the 30th Circuit Court and posted for the public to view. Judge Stokes explained that the videos are not technically part of the official transcript but were available to everyone. Judge Stokes made it clear that her reporter is a "steno reporter" and transcribes her hearing notes and not from the videos of recorded hearings. The court reiterated that there may be inconsistencies between the steno notes and videos, but nonetheless, Defendant should have an accurate transcript. H.T. at 9-10 (April 27, 2021).

> THE COURT: Okay. So, Mr. Baker, I'll leave it up to you. If you want to proceed today with your - with your motions, and you indicated to the Court early on that you, you don't, you need the - an accurate transcript in order to move forward. And then so if that's the case, I'll adjourn this hearing until you have a - I'll give you 10 days to review the, the Court procedures, and I'll allow you to supplement your motion with specific substantive errors that you find, and you can present those to the Court, and then the Court will rule on, on whether or not this is a - there is something in error with the transcript. At this point the Court doesn't - the Court is aware of three errors that have been corrected and the, the, the transcript has been certified. So if you have more than that, if you have information that's different from the Court, then you need to present that to me so that I have a complete record and the Court is well informed. So is that - is that your - is that what you'd like to do? You'd like take a - you'd like to adjourn for now and, and we will reschedule this? We'll probably reschedule, I'm not - I don't have the calendar in front of me, but we can probably reschedule this in 15 days. That will give you 10 days to, to explore these, these alleged errors and then provide a response to the Court and to the, the other - to the party. And then we can schedule it for a hearing, and then have a meaningful hearing on your motions.
>
> MR. BAKER: Yes. That's the way - the way I'd like to proceed, Your Honor, and thank you very much for giving me the opportunity. H.T. at 11-12 (April 27, 2021).

It is important to note that Defendant was never actually given the opportunity to correct the transcripts from the video. Judge Stokes has posted videos from her hearings on the court's website. However, the hearing videos from THIS case appear to be the only videos not being posted to the Trial Court's website. Additionally, the policy or practice in Judge Aquilina's courtroom, turned out to be completely different and as stated by Defendant's attorney. Judge

.

Aquilina's courtroom has videos recordings, but she will not post them to the court's website, release them to the public, or even turn them over to counsel for purposes of preparing an accurate transcript and litigation.

vi. May 14, 2021 Continuation Hearing Regarding Defendants Motion for Videos for Hearing on March 19, 2021, Notice of Erroneous Transcript and Request to Cure Erroneous Transcript AND Defendant's Motion for Relief from March 19, 2021 Judgment of Contempt, March 23, 2021 Order of Contempt and Request for Hearing (Stokes)

Continuation of the April 27, 2021 occurred on May 14, 2021. See **Exhibit 18** – May 14, 2021 Continuation Hearing. The Trial Court began the hearing by acknowledging that the hearing was being recorded, but that the official transcript was being prepared by her court reporter:

> Let me remind Counsel that this hearing is being recorded and that a copy of the recording is going to be placed on the web page for the 30th Circuit Court under my name. However, the official transcript of this hearing is being taken by our court reporter Leslie Fox. And if you need to reach her, you would reach her through my Court. If - this is a permissible format for having hearings under our Court Rules and our local rules. It's also permitted given that we were - we've been isolated under the pandemic, so this is - this is an appropriate format. However, if you have any objections, you can make the objections at the time that you file your appearances, make your appearance on the record. H.T. at 4 (May 14, 2021)

Thereafter, the Court addressed the substance of the hearing. Rather than allowing the parties to present typical arguments, the court suspended oral arguments and wanted to discuss any additional topics not included in briefing. Defense Counsel began to explain that at the "Arraignment" the court never called the case, never indicated who the parties were, that counsel's Zoom connection lost signal, was never provided a formal hearing to test underlying proofs... Thereafter, the Court interrupted and asked "Tell me how - how your client has been prejudiced."

.

Counsel further explained that he wasn't sure if it was his turn to speak or place objection because Judge Aquilina had just issued sanctions and jailed Mr. Martin, had been threating sanctions and jail each time someone spoke out of turn, and the Court had other lawyers present on standby for Defendant. Counsel went on to point out that this was procedurally improper. H.T. at 7-9 (May 14, 2021)

Counsel further explained that he was not able to properly represent his client can this caused him to be ineffective. He went on to further explain that there was no indication of whether Ms. Pavlos-Hackney or her company was defending against civil or criminal contempt, whether the contempt she was supposedly facing was direct or indirect, whether fines and jail were coercive or punitive, and did not apply appropriate standards of scrutiny to the case and explained that Counsel understood that the parties were only present for an arraignment and was only prepared for same. Counsel explained that he was not prepared for an evidentiary to test proofs at that time, requested an appropriate hearing, and demanded the ability to prepare a proper defense for his client. Counsel also informed the court that the Attorney General had cited to erroneous portions of the transcript and was using it to make improper arguments against Ms. Pavlos-Hackney. Finally, counsel explained that despite all of the procedural defects and inability to present a prepared and proper defense for his client, she was summarily and unconscionably found guilty of contempt. H.T. at 9-11 (May 14, 2021)

Thereafter, Defense Counsel explained that having an erroneous transcript and not producing the hearing video will be problematic on appeal if the underlying facts supporting these issues are not appropriately reflected in the transcript or court record. H.T. at 10-11 (May 14, 2021)

After limited argument and discussion on the record, the trial court held that the transcript

.

was accurate and did not need to be corrected. In issuing her finding, the Trial Court repeatedly stated that its finding was based on a "review of the transcript."[3],[4],[5] Notably, the Trial Court did not review the hearing videos, refused to produce them and make them available, and refused look to any external sources that would substantiate the argued errors as argued by Defense Counsel. Also, of significant and contradictory note, the court, at its prior hearing, stated it was common practice for the court to publish the videos on its website; and now a week later has made them unavailable, refuses to release them or publish them to the public, and has generated a tactic, argument, and position which is impossible for Marlena Pavlos-Hackney to defend. – The Trial Court refused to look at sources that would show the errors.

The Court clarified that Marlena Pavlos-Hackney was being found in contempt for the actions of her company and *Abbott* case was not controlling. H.T. at 22 (May 14, 2021)

The court held that, "The merits of her violation of my Court Order and of the Department, those were developed, and I think all factually supported during the show cause hearings, and the record is very clear on that." H.T. at 23 (May 14, 2021).

It is important to note that the record is wildly unclear, and facts were not supported during what is now being identified as multiple show cause hearings. By this point in the unorthodox proceedings against Ms. Pavlos-Hackney, the court appeared to not understand or improperly create facts or justification for the process that took place and added to the confusion by misstating what had taken place thus far. Rather than making a reasonable effort to fix the

[3] "And this court has reviewed that transcript very carefully. H.T. at 17:5-6 (May 14, 2021)
[4] "With respect to the request that the transcript be cured and that it is erroneous, again the court reviewed that transcript ad nauseum." H.T. at 19:5-7 (May 14, 2021) The Court further found that the "the record just doesn't support" the argument that the transcripts are erroneous and reiterated – the "transcripts are correct." H.T. at 19:7-9 (May 14, 2021)
[5] "...the Court finds that the amended transcript is an appropriate transcript. Mr. Baker, you've failed just to show how that amended transcript of March 19 isn't accurate or that the changes, more importantly, materially, affected all or some of the rights of your client as required in MCR 2.611(A)(1)(A). So the motion regarding the videotape both access and further changes, that motion is denied in its entirety. H.T. at 21-22 (May 14, 2021)

.

procedural mess that the court created, the Judge blamed Ms. Pavlos-Hackney, criticized defense counsel, and added to the confusion surrounding the Ex Parte TRO, issue of contempt and procedural confusion.

The Judge erroneously stated that the Bench warrant was issued on March 5th and publicly indicated that she didn't care if she went to jail. H.T. at 25 (May 14, 2021). As set forth above, the bench warrant was issued actually issued on March 4, 2021 and not pursuant to any new motion to show cause filed by the Attorney General.

The Judge also improperly accused Defendant and Defendant's Attorney of never making an objection to the proceedings taking place after Attorney Baker was asked if he had enough time to talk to Ms. Pavlos-Hackney. HT. at 25 (May 14, 2021). After being put in Zoom "break-out room" briefly with Ms. Pavlos Hackney, and going back on the record a few minutes later, Attorney Baker explained he had enough time to explain the concept of the arraignment that was supposed to take place but stated he was not prepared for a hearing or defending allegations. (In its Order Denying Reconsideration, the Trial Court improperly argues the statement that Defensed Counsel "had enough time" completely out of context).

Thereafter, the Court issued an order denying Ms. Pavlos-Hackney's motion for videos for the hearing on March 19, 2021, request to cure the erroneous transcript, and denied relief from March 19, 2021 Judgment of Contempt & March 23, 2021 Oder of Contempt. However, the Trial Court also held that "IT IS FURTHER ORDERED that Marlena Pavlos-Hackney's attorney may request a hearing regarding the hearing reserved by the Court during the March 19, 2021 arraignment." See **Exhibit 19** – May 14, 2021 Order. There after Plaintiff filed a motion to reconsider which was subsequently denied. See **Exhibit 20** – June 22, 2021 Order Denying Motion for Reconsideration. In yet another wild turn of events, the Trial Court stated that Ms.

.

Pavlos-Hackney was not entitled to a hearing on the contempt issues because no objection or request was made at the Mach 19, 2021 arraignment hearing and the issue had somehow been waived. – The request for a hearing was not only repeatedly requested at the March 19, 2021 hearing and orally granted by the Trial Judge, but has also been preserved in numerous court orders.

By the time the political dog and pony show was concluded the alleged issue claimed for needing the Ex Parte TRO was never tested, set for hearing, or and "adjournment" so the company could be represented by counsel has never been addressed. The State unconstitutionally stripped Ms. Pavlos-Hackney's food license the proceeded to punish her and beat her into submission with massive fines and incarceration on contempt theories without hearings on the merits. There was no "notice and opportunity to be heard." The proceedings were a continuation of the unconstitutional Covid-19 attack on Ms. Pavlos-Hackney and designed to punish her for speaking out against unconstitutional state activity.

ARGUMENT

I. Standard of Review

Whether a person has been afforded due process is a question of law that is reviewed de novo. *In re Henry*, 282 Mich App 656, 668; 765 NW2d 44 (2009). *Mich DOT v Detroit Int'l Bridge Co (In re Moroun)*, 295 Mich App 312, 331; 814 NW2d 319 (2012). On appeal from conviction for contempt, court does not weigh evidence or credibility of witnesses and findings must be affirmed if there is competent evidence to support them. *Berry Pontiac, Inc. v. Burke*, 19 Mich. App. 648, 173 N.W.2d 243, 73 L.R.R.M. (BNA) 2262 (1969); *Cross Co. v. United Auto.*, *Aircraft and Agr. Implement Workers of America, Local 155*, 377 Mich. 202, 139 N.W.2d 694, 46 L.R.R.M. (BNA) 2707, 53 Lab. Cas. (CCH) P 51444 (1966). The appellate court reviews for

.

abuse of discretion a trial court's decision to hold a party or individual in contempt. *In re Contempt of Auto Club Ins. Ass'n,* 243 Mich. App. 697, 624 N.W.2d 443 (2000).

II. Contempt

"Contempt of court" is willful act, omission, or statement tending to impair authority or impede functioning of court. *City of Pontiac v. Grimaldi*, 153 Mich. App. 212, 395 N.W.2d 47 (1986). A contempt order may be entered only when violation alleged has been clearly and unequivocally shown. *ARA Chuckwagon of Detroit, Inc. v. Lobert*, 69 Mich. App. 151, 244 N.W.2d 393 (1976). In order for there to be a contempt of court, it must appear that there has been a willful disregard or disobedience of the authority or orders of the court. *People v. Mat*ish, 384 Mich. 568, 184 N.W.2d 915 (1971).

MCR 3.606(A) allows a Court to initiate a proceeding for contempt committed outside of the court's presence by 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.

The court may consider and pass upon only those charges of which the alleged contemnor was properly notified and given an opportunity to defend. *Ex parte Gilliland,* 284 Mich. 604, 280 N.W. 63 (1938). However, charges need not be set out in the form and detail of a criminal information. *Cross Co. v. United Auto., Aircraft and Agr. Implement Workers of America, Local 155*, 377 Mich. 202, 139 N.W.2d 694, 46 L.R.R.M. (BNA) 2707, 53 Lab. Cas. (CCH) P 51444 (1966). The motion for order to show cause generally must include an affidavit regarding the purported contumacious behavior. *In re Contempt of of Calcutt*, 184 Mich App 749, 757, 458 NW2d 919 (1990); MCR 3.606(A).

.

In the instant case, contempt proceedings were initiated against Defendants via a motion to show cause supported by an affidavit and on a February Ex Pate TRO whose underly issues and basis had never been properly tested. What started as a finding of civil contempt on March 4, 2021 with a simultaneously issued "coercive" bench warrant improperly and unconstitutionally morphed into a "punitive" multi-contempt theory case with criminal contempt ramifications on March 19, 2021. There was never an additional contempt proceeding initiated via motion and affidavit to show cause; nor by properly issued bench warrant.

A. Due Process

An individual is afforded due process and right to effective assistance of counsel under the U.S. Constitutional protections under the 4th, 5th, 6th, & 14th Amendments and state counterparts. When contempt is committed outside presence of court, law requires that accused be advised of charges against him, **afforded hearing** regarding those charges, and **given reasonable opportunity to meet charges by defense of explanation**; those minimal due process safeguards require that accused be given reasonable time in which to prepare defense to contempt charge. *In re Contempt of Robertson*, 209 Mich. App. 433, 531 N.W.2d 763 (1995).

Determining whether the contempt at issue is civil or criminal in nature is a vital threshold determination in any contempt matter. In a fashion parallel to general jurisprudence, whether a matter is classified as civil or criminal is dispositive with regard to a number of critical issues, including the burden of proof, the process due, standing, and the permissible sanctions to be rendered against the contemnor. *See, e.g., In re Contempt of Dougherty*, 429 Mich 81, 95, 413 NW2d 392 (1987). A person arrested for contempt does not have immunity from civil process and his offense must be shown by evidence, unless the facts constituting the contempt are within the personal knowledge of the judge. The accused must be allowed a reasonable time for

.

preparation of his defense. See *In re Henry*, 369 Mich. 347, 119 N.W.2d 671 (1963).

However, the distinction between the two forms is not always clear, can be difficult to distinguish, and has resulted in a great deal difficulty on appellate review.

i. Civil Contempt

Civil contempt addresses disobedience of a court order by remedying the violation. Civil contempt proceedings are coercive in nature—they attempt to compel the contemnor to obey a prior order or judgment of the court. *People v Goodman*, 17 Mich App 175, 177–178, 169 NW2d 120 (1969). Accordingly, a party held in civil contempt has the opportunity to purge the contempt by subsequently complying with the court's orders. *Harvey v Lewis*, 10 Mich App 709, 717, 160 NW2d 391 (1968). In other words, if incarcerated because of civil contempt, the contemnor "'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 (1911) (quoting *In re Nevitt*, 117 F 448, 461 (8th Cir 1902)). Civil contempt only requires that an accused be accorded rudimentary due process; the accused need only be given notice and an opportunity to present a defense, and the burden of proof is preponderance of the evidence. Mich. Const. 1963, art. 1, § 17; *Ferranti v. Electrical Resources Company*, 330 Mich. App. 439, 2019 WL 6138141 (2019). Although civil sanctions for contempt may also have a punitive effect, the sanctions are primarily coercive, to compel the contemnor to comply with the court order. Civil contempt proceedings seek compliance through the imposition of sanctions of indefinite duration, terminable upon the contemnor's compliance or inability to comply. In contrast, the purpose of criminal sanctions for contempt is to punish past disobedient conduct by imposing an unconditional and definite sentence. *DeGeorge v. Warheit*, 276 Mich. App. 587, 741 N.W.2d 384 (2007).

.

Moreover, civil contempt proceedings are only proper when at the time of the proceeding there is an ongoing violation of a court order; prior violations of a court order can only be addressed through criminal contempt proceedings. *See, e.g., In re Contempt of Dougherty*, 429 Mich 81, 111, 413 NW2d 392 (1987).

In contempt proceedings, if court contemplates coercion, and order reflects the remedial aspect of contempt proceeding by setting forth conditions with which defendant may reasonably be expected to comply and thereby obtain release, the contempt proceeding is civil. *Sword v. Sword,* 399 Mich. 367, 249 N.W.2d 88 (1976) overruled on other grounds by, *Mead v. Batchlor*, 435 Mich. 480, 460 N.W.2d 493, 32 A.L.R.5th 737 (1990)). The objective of civil contempt is to bring about compliance with a court order entered after trial, not punishment for offense of which defendant was determined guilty at time of trial. *Id.*

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. *Borden v. Borden*, 67 Mich. App. 45, 239 N.W.2d 757 (1976). When hearing was instituted by a show cause order and placed on civil docket, when proceedings lacked any semblance of a criminal trial, and when sentence had elements of both civil and criminal contempt, defendant could reasonably have expected that he was being held in civil contempt, and under the procedure followed defendant could not have been found guilty of criminal contempt. *People v. Nowicki*, 384 Mich. 482, 185 N.W.2d 390 (1971). "Civil contempt" seeks to change respondent's conduct by threatening him with penalty if he does not change it. *Jaikins v. Jaikins*, 12 Mich. App. 115, 162 N.W.2d 325 (1968).

ii. Criminal Contempt

.

Criminal contempt requires greater due process, requires a higher standard of proof and is used to punish an individual for their behavior. An individual charged with criminal contempt is presumed innocent, must be informed of the nature of the charge, has the right against self-incrimination, has the opportunity to prepare a defense, has the opportunity to secure counsel, the contempt must be proven beyond a reasonable doubt, and criminal penalties may not be imposed upon an individual who was not afforded the protections that the Constitution requires in criminal proceedings. Mich. Const. 1963, art. 1, § 17; F*erranti v. Electrical Resources Company*, 330 Mich. App. 439, 2019 WL 6138141 (2019). Examples of criminal contempt include giving false testimony under oath, violating a protective order by disclosing confidential evidence, violating a personal protection order, violating an injunction, failing to timely produce documents, and witness tampering

Criminal contempt is willful disregard or disobedience of court order and must be clearly and unequivocally shown. *People v. MacLean*, 168 Mich. App. 577, 425 N.W.2d 185 (1988). "Willful disregard" for purposes of criminal contempt consists of act, omission, or statement tending to impair authority or impede functioning of court. *People v. MacLean*, 168 Mich. App. 577, 425 N.W.2d 185 (1988). When an individual in good faith relies upon his attorney's advice or interpretation of court order, he cannot be found guilty of criminal contempt since the element of intentional violation has not been established. I*n re Contempt of Rapanos*, 143 Mich. App. 483, 372 N.W.2d 598 (1985).

To support conviction of criminal contempt, elements which must be proven beyond a reasonable doubt are: that individual engaged in a willful disregard of disobedience of authority or orders of court, and that contempt has been clearly and unequivocally shown. Criminal contempt proceedings are those prosecuted to preserve power and vindicate dignity of courts and

.

to punish for disobedience of their orders. *In re Contempt of Rapanos, 143 Mich. App. 483, 372 N.W.2d 598 (1985)*. Contempt adjudication by which defendant was sentenced to serve 20 days in jail or pay over $1700 was criminal in nature. People v. McCartney, 141 Mich. App. 591, 367 N.W.2d 865 (1985).

An essential element of criminal contempt is that defendant act culpably. *People v. Little,* 115 Mich. App. 662, 321 N.W.2d 763 (1982). An essential element of the crime of criminal contempt is that the defendant acted culpably, in willful disregard or disobedience of the authority or orders of the court. *Birkenshaw v. City of Detroit*, 110 Mich. App. 500, 313 N.W.2d 334 (1981). Indicative of criminal contempt is the imposition of a determinate sentence without any opportunity for the contemnor to purge himself of the contempt. *State ex rel. Calahan v. Powers*, 97 Mich. App. 166, 293 N.W.2d 752 (1980). Criminal contempt imposes a definite term of imprisonment as punishment for a past offense. Borden v. Borden, 67 Mich. App. 45, 239 N.W.2d 757 (1976).

In *People v. Giacalone*, 17 Mich. App. 508, 170 N.W.2d 179 (1969), the Michigan Court of appeals analyze a case with facts analogous to those at hand engaged in debate over civil versus criminal contempt and determined a case where a defendant continually refused to testify at grand jury proceedings and criminal contempt sanctions were issued that the matter had to be remanded for criminal contempt proceedings. In the case of *Cross Co. v. United Auto., Aircraft and Agr. Implement Workers of America, Local 155,* 377 Mich. 202, 139 N.W.2d 694, 46 L.R.R.M. (BNA) 2707, 53 Lab. Cas. (CCH) P 51444 (1966), contempt proceedings took place wherein fines and prison sentences were imposed on a labor union and certain officers and members as punishment for offenses committed, and not to enforce the performance of an act, so far partook of a criminal character as to require observance of basic constitutional protections

.

afforded to those charged with crime. *Cross Co. v. United Auto., Aircraft and Agr. Implement Workers of America, Local 155*, 377 Mich. 202, 139 N.W.2d 694, 46 L.R.R.M. (BNA) 2707, 53 Lab. Cas. (CCH) P 51444 (1966).

In the case of *People v. Yarowsky*, 236 Mich. 169, 210 N.W. 246 (1926) the Court held that defendant should have gotten a hearing in proceedings adjudging one guilty of contempt in violating a decree restraining her from conducting a place of prostitution.

iii. Distinguishing between Civil and Criminal Contempt

When an individual's conduct has altered the status quo so that it cannot be restored or relief intended has become impossible, there is criminal contempt; however, when individuals' noncompliance with court order is such that status quo can be restored and it is still possible to grant relief originally sought, there is civil contempt. *In re Contempt of Rapanos*, 143 Mich. App. 483, 372 N.W.2d 598 (1985). It is difficult to generalize about the criminal or civil nature of contempt proceedings. The Michigan statutes do not recognize a dichotomy of civil and criminal contempt, and the proceedings under Revised Judicature Act Chapter 17 and Rule MCR 3.606 are not characterized as either. The Michigan Supreme Court has indicated that contempt proceedings are *sui generis*, having some characteristics of criminal proceedings, some of civil proceedings, and some of neither. Generally speaking, criminal contempt differs from civil contempt in that the former seeks to punish whereas the latter seeks to compel compliance.

If it is intended that offender be punished for his disobedience or contumacious behavior, contempt in question is criminal contempt, but if purpose is to compel obedience to an order of court, contempt in question is civil contempt. *Spalter v. Kaufman*, 35 Mich. App. 156, 192 N.W.2d 347 (1971). Where contemnor's conduct of noncompliance with court order has altered status quo so that it cannot be restored or relief intended becomes impossible, there is criminal

.

contempt, but where contemnor's conduct of noncompliance with court order is such that status quo can be restored and it is still possible to grant relief originally sought, there is civil contempt. *Jaikins v. Jaikins,* 12 Mich. App. 115, 162 N.W.2d 325 (1968). Where the contemnor's conduct of noncompliance with court order has altered status quo so that it cannot be restored or relief intended becomes impossible, there is criminal contempt; however, where the contemnor's conduct of noncompliance with the court order is such that the status quo can be restored and it is still possible to grant relief originally sought, there is civil contempt. *Harvey v. Lewis*, 10 Mich. App. 709, 160 N.W.2d 391 (1968). Where contempt consists of refusal to do something ordered for benefit of opposite party, process is civil; but, where it consists of doing forbidden act injurious to opposite party, process is criminal. *People v. Yarowsky,* 236 Mich. 169, 210 N.W. 246 (1926). Criminal contempt differs from civil contempt in that the sanctions are punitive rather than remedial. *DeGeorge v. Warheit*, 276 Mich. App. 587, 741 N.W.2d 384 (2007).

iv. Preparation of Defense

What constitutes a reasonable time to prepare defense to contempt charge must be viewed in context of the entire situation. *Cross Co. v. United Auto., Aircraft and Agr. Implement Workers of America, Local 155*, 377 Mich. 202, 139 N.W.2d 694, 46 L.R.R.M. (BNA) 2707, 53 Lab. Cas. (CCH) P 51444 (1966). Three or four days given a defendant in an order to show cause why he should not be held in contempt of the Supreme Court for failing to carry out its order, would be deemed an adequate time, especially where nothing was made to appear to indicate defendant's need for additional time. *In re Huff,* 352 Mich. 402, 91 N.W.2d 613 (1958). The action of the circuit judge in issuing an order directing relator to show cause a week later why he should not be punished for a criminal contempt of court for a publication relating to its

.

proceeding, and over the protest of relator's counsel in finding relator guilty and deferring sentence for a week, was too hasty, and not to have allowed relator his proper day in court, so that the judgment would be set aside. *In re Dingley*, 182 Mich. 44, 148 N.W. 218 (1914).

A record of conviction for contempt punished summarily, may, perhaps, be comprehended in the single order and judgment. But when an attorney is tried for any other misconduct it can only be done on specific charges; an opportunity for a full defense must be afforded, so that there may be, if necessary, a resort to an appellate court to determine their legal sufficiency. *Dickinson v. Dustin*, 21 Mich. 561, 1870 WL 4186 (1870).

While the initial application may be heard ex parte, the motion and supporting affidavits must thereafter be served on the accused, whether the court responds by issuing an order to show cause or a bench warrant for the arrest of the accused party.[6] Service on the attorney of the accused has been held insufficient upon a charge of violation of an injunctive order.[7] Moreover, due process requires proper notice of the charges, adequate time to seek counsel and prepare a defense and an opportunity to produce witnesses and to examine opposing witnesses.[11]

See *Smilay v. Oakland Circuit Judge*, 235 Mich. 151, 209 N.W. 191 (1926); In re Oliver, 333 U.S. 257, 68 S. Ct. 499, 92 L. Ed. 682 (1948)

v. Contempt in the Present Case was Criminal in Nature

Because of the unique nature and manner in which contempt proceedings were conducted

[6] MCR 3.606(A). See *In re Moroun*, 295 Mich. App. 312, 331, 814 N.W.2d 319 (2012) ("For indirect contempt, the trial court must also comply with MCR 3.606(A), which, on a proper showing on ex parte motion supported by affidavits, requires 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.") (persons responsible for ensuring company's compliance with court order may be held in contempt, regardless of whether they were parties to the underlying litigation or whether they were named in the order).

[7] S*milay v. Oakland Circuit Judge*, 235 Mich. 151, 209 N.W. 191 (1926); and see MCLA 600.1968, requiring that notice or order made in proceedings for contempt for disobeying a court order must be personally delivered to the party, unless otherwise specially ordered by the court.

.

in this case it difficult to categorically classify Ms. Pavlos-Hackney's contempt. However, as identified above caselaw supports that where contempt contains criminal aspects, standards for criminal contempt apply.

- Marlena's behavior – Ms. Pavlos-Hackney was acting in protest of state oppression and the Governor's unconstitutional Covid-19 orders and practices (which after being deemed oppressive and unconstitutional, the Governor turned to MDARD to push her unconstitutional Covid-19 agenda). Ms. Pavlos-Hackney's behavior was not designed to impair or impede the functioning of the court or in willful disregard thereof. See generally, *City of Pontiac v. Grimaldi*, 153 Mich. App. 212, 395 N.W.2d 47 (1986); People v. Matish, 384 Mich. 568, 184 N.W.2d 915 (1971).

- Punishment Imposed – The Trial Court sentenced Ms. Pavlos-Hackney to the criminal maximum of 93 days in jail and $15,000 fine (orally stated $7,500). The Trial Court held that Ms. Pavlos-Hackey could purge her sentence by closing her restaurant and paying her fine (but did so in a fashion that was not with Ms. Hackeny's control).

- No Ability to Immediately Purge Incarceration – After Ms. Pavlos-Hackney told the Trial Court she was closing her restaurant immediately and going to pay the fine, the Court made it impossible for her to avoid incarceration. The Trial Court indicated Ms. Pavlos-Hackney was going to be incarcerated anyway because the Trial Court wanted to see if the restaurant was going to re-open the next day and into the future. Since the next day and future had not yet occurred and was not within Ms. Pavlos-Hackney's immediate ability to control the Court's sanctions were a proper form of civil contempt.

- Future Contempt, if any, should have been delt with in the form of an additional show cause – To the extent that Ms. Pavlos-Hackney did not close her restaurant, as she committed to the court that she would, the Court should have conducted additional contempt proceedings either to punish her for defiance or fashion a sanction that was actually within her control that would coerce her behavior.

- Ability to Purge was Conditioned on Third-Party Conduct – MS. Pavlos-Hackeny was denied the ability to purge her sentence. As stated above, Ms. Pavlos-Hackney told the court she would close the restaurant and cease operations. After committing to full compliance the Trial Court stated that Ms. Pavlos-Hackney's assurance were insufficient to avoid incarceration. Instead, the Court gave the "keys" to Ms. Pavlos-Hackney's cell to the prosecuting party, to wit, MDARD and the Attorney General. The Trial Court conditioned Ms. Pavlos-Hackney's on MDARD's satisfaction and ability to send a representative to the restaurant and verify that it was closed (in addition to paying the $7,500 fine which was improperly and unexpectedly increased to $15,000 without notice to Ms. Pavlos-

.

Hackney). Placing the "keys" in the hands of the prosecuting party stripped Ms. Pavlos-Hackney of her ability to immediately purge her jail sentenced; and ensured that she would be incarcerated.

Moreover, In the instant case, at the arraignment, the court determined without articulating a burden of proof or conducting a hearing that she determined Ms. Pavlos-Hackney was in non-specified contempt that based on "documentation" that she supposedly had that the restaurant was still in operation, jailed Ms. Pavlos-Hackney, and ordered her to pay a $7,500 fine (which was later converted to a $15,000 fine in the judgment). Thereafter, Ms. Pavlos-Hackney paid the $15,000 fine and submitted pictures and proof that the restaurant was boarded up and closed. However, the Court improper refused to release her. Instead, there Court improperly continued to incarcerate Ms. Pavlos-Hackney and did not provide and order for her release until MDARD/Attorney General submitted its notice that someone from their organization investigating and inspected the restaurant and was satisfied.

- No Determination on Ability to Pay – The Trial Court improperly made no determination regarding Ms. Pavlos-Hackney's ability to pay when setting payment a condition to purge her jail sentence. See generally Sword v. Sword, 399 Mich. 367, 249 N.W.2d 88 (1976) overruled on other grounds by, Mead v. Batchlor, 435 Mich. 480, 460 N.W.2d 493, 32 A.L.R.5th 737 (1990) (where incarceration was conditioned on non-payment). Ms. Pavlos-Hackney told the Court she could pay the $7,500 contempt fine and meet the condition of her release but the Trial Court increased the amount to $15,000 in its judgement without discussion as to whether Ms. Pavlos-Hackney had the ability to pay and explanation at the time of the hearing.

- Behavior and Statements of the Judge – When the judge issued Ms. Pavlos-Hackneys sentence, her statements and conduct were not directed at determining what type of sanction would coerce Ms. Pavlos-Hackney to close her restaurant. – After being arrested by 8 Michigan State police officers, subject to a cavity search, hauled across the state to Lansing, and speaking to her (licensed) lawyer briefly during a Zoom breakout session at what was believed to be an arraignment hearing about the situation and proceedings, Ms. Pavlos-Hackney told the Judge that she was going to immediately close her restaurant. **– No further coercion or persuasion by the court was necessary.**

  The sole focus of the judge was on Ms. Pavlos-Hackeny's past behavior and Covid-19 concerns and not compliance with the court's order. Despite Ms. Pavlos-Hackney's commitment to comply, the Judge threw Ms. Pavlos-Hackeny in jail, imposed the maximum 93 day jail sentence and orally awarded the maximum fine it could impose of $7,500, and later "moved the goal post" by changing the amount to $15,000 in its written order (which exceeded the maximum allowable amount). The purpose of this sentence was not to coerce Ms. Pavlos-Hackney, it was to punish her. The judges in this matter have made

several comments about how the sentence was based on Ms. Pavlos-Hackney's past behaviors, perceived disrespect and defiance of Covid-19 orders, and comments Ms. Pavlos-Hackney was making in protest of same to national news outlets. Although the Judge use the in the "purge" buzzword in conjunction with its imposed jail sentence, the Judge knew that some jail time was going to be completely unavoidable and outside Ms. Pavlos-Hackeny's control. See People v. Yarowsky, 236 Mich. 169, 210 N.W. 246 (1926) (Where contempt consists of refusal to do something ordered for benefit of opposite party, process is civil; but, where it consists of doing forbidden act injurious to opposite party, process is criminal)

The judge's behavior lacked proper and traditional courtroom decorum. The Court did not begin this case in traditional fashion by calling the case of Ms. Pavlos-Hackney, identify parties and counsel, and proceeding with an arraignment by notifying the parties of the charges and allegations. Instead the Judge called unlicensed, self-identifying "constitutional lawyer" Richard Martin. Mr. Martin explained to the court that he was not a "BAR" lawyer, but was appearing on behalf of Ms. Pavlos-Hackney not as an "attorney", but as a "of counsel" and cited case law and presented argument as to why it was constitutionally proper for him to do so. The judge then cited her authority as to she believed Mr. Martin's actions constituted the unauthorized practice of law without a license.

Rather than entertaining the argument, issuing an order which Mr. Martin could appeal, or have an opportunity to comply, the judge threw him in jail for 93 days. After informing Mr. Martin that she disagreed and did not view his conduct as constitutionally protected activity, she did not give Mr. Martin an opportunity to comply by ceasing argued "of counsel" representation. Also of importance, the Judge never afforded Mr. Martin a hearing, counsel, opportunity defend, or issued findings as to why Mr. Martin's behavior was willful, wanton, or rose to the level of criminal contempt. – Contrary to the fundamental principles of American jurisprudence, Mr. Martin was found in contempt for making a constructional legal argument to the court for which the Judge disagreed.

After Mr. Martin presented his argument to the Court and was incarcerated, the judge improperly turned her attention and began addressing Ms. Pavlos-Hackney directly in scolding and punitive fashion. At that time, the judge should have formally called her case and turned her attention to licensed attorney Baker filed a lawful, proper, appearance to which the Judge had in her current possession, and proceeded to arraignment or notify Ms. Pavlos-Hackney and counsel of the allegations.

For arguendo purposes, had licensed counsel Baker's appearance not been on file and in possession of the Judge, the Judge should have arraigned Ms. Pavlos-Hackney on the charges and appointed one the court-appointed attorneys that the judge had standing by in the "bullpen".

Not calling the case, going immediately on an assaultive attack on Ms. Pavlos Hackney was improper and behavior consistent with the "criminal" contempt (rather than "coercive") contempt sanctions levied.

- The court's contempt sanctions were criminal and punitive in nature. For example, in common or traditional contempt cases like *Sword,* where a person does not want to pay child support, the courts have to Engauge in a thoughtful analysis as to whether the party has the present ability to pay and whether reasonable efforts are being made to seek or obtain employment. In FOC show cause cases, there is logical rational to behind one's ability to pay and obtaining employment or a means of income, to wit, if the goal is to coercive people into making payments, the first step is often to get a job as the two concepts go hat in hand.

  In the present case, the Court's "coercive" purge-sentence is illogical and, by design, would usually be impossible. Ms. Pavlos-Hackeny was ordered to pay $15,000 in fines or serve out the remaining jail sentence. $15,000 is a large sum of money many Americans do not have readily available. In order to that type of payment, an individual would have to work or generate income. In Ms. Pavlos-Hackney's case, the Court shut down her restaurant making it impossible for her to generate income, placing a roadblock in her way so she could not to meet the prerequisite conditions for her release from jail.

  Had the court truly wanted to coerce Ms. Hackney close her restaurant it would not solely conditioned her release on her ability to pay a $15,000 fine. Contrary to the courts stated objective, this type of imposed sentence has a counter-coercive effect and incentivizes, if not forces, people in Ms. Pavlos-Hackney's situation to remain open and continue operations so they can purge their jail sentence. Conditioning Ms. Pavlos-Hackney's release on payment of her fines was a sham form of purge relief and court rhetoric that Ms. Pavlos-Hackney "held the keys to her jail cell." Scheme was designed to make compliance impossible and ensure Ms. Pavlos-Hackney's incarceration.

  If the State and Court's goal was truly to coerce Ms. Pavlos-Hackney into closing or restaurant during the Covid-19 pandemic or get her State issued food license back which was taken for operating during the Covid-19 pandemic, would have given Ms. Pavlos-Hackney the ability to pay off her massive-imposed fines after the Covid-19 pandemic had passed, restaurant operation restrictions were lifted, and Ms. Pavlos-Hackney afforded the opportunity to get her food license back from the state. In illogical fashion, the Court's sentence incentivized and coercive to continuing, rather than closing, restaurant operations.

- Punitive Effect of Sentence Imposed - In the instant case, the court was punishing Ms. Pavlos-Hackney because her restaurant remained open during the Covid-19 pandemic; and operating after MDARD took away her food license pursuant to

.

same. The Court did not give Ms. Pavlos-Hackney a proper hearing, but instead sent her immediately to jail without giving her reasonable opportunity to comply with the court's determination; that being immediately come up with $15,000 and provide more than assurances that the restaurant would be immediately closed. However, the Court fabricated an improper "purge" provision in quasi-civil fashion Criminal contempt proceedings mete out punishment for past misdeeds that cannot be rectified. *Id.* at 93–94. Stated another way, criminal contempt is a crime and public wrong. *People v Joseph*, 384 Mich 24, 33, 179 NW2d 383 (1970). Thus, a conviction for criminal contempt cannot be purged by compliance with the court's underlying order. *State Bar v Cramer (In re Auto Club Ins Ass'n)*, 399 Mich 116, 127, 249 NW2d 1 (1976)

vi. Defects in Due Process

As stated above, Ms. Pavlos-Hackney should have, , at minimum, been advised of charges against her, afforded hearing regarding those charges, and given reasonable opportunity to meet charges by defense of explanation and be given reasonable time in which to prepare defense to contempt charge. *In re Contempt of Robertson*, 209 Mich. App. 433, 531 N.W.2d 763 (1995). In additional to the lack of clarity and defects as to whether civil or criminal contempt sanctions were being issued, there were numerous defects in the manner in which the proceedings were conducted.

- The first contempt hearing was adjourned because Marlena's Bistro, the company, was not represented by counsel.

- Apparently, the second finding of contempt took place at an arraignment after Ms. Pavlos-Hackney was arrested early that morning on a bench warrant.

- Ms. Pavlos-Hackneys case was never called – The Court began the arraignment hearing by calling Richard Martin, berated him for practicing law without a license, and threw him in jail. Immediately, thereafter directly addressing Ms. Pavlos-Hackney and never "calling the case" thereafter.

- Right to Counsel – Ms. Pavlos-Hackney was denied the right to counsel. After finally being addressed and acknowledged by the Judge, Mr. Baker informed the Court that he had recently been retained, had not been provided or had an opportunity to review the motion to show cause, court orders, or other legal documents, had not spoken with his client, and more importantly, was unprepared to proceed with the arraignment. After being provided a moment to talk, counsel informed the judge that he explained to Ms. Pavos-Hackney that they were in

court for an arraignment and would get a hearing at a later date. Although Ms. Pavlos-Hackney avers that only an arraignment took place, to the extent that it is somehow construed as the formal "contempt hearing" on the allegations the court should have corrected counsel's obvious and apparent misunderstanding. Likewise, to the extent that the court appearance was the "contempt hearing" (as the judge stated at a later hearing and on reconsideration), counsel was clearly ineffective, uninformed, and his mere presence in court would not satisfy Ms. Pavlos-Hackney's "right to counsel".

Likewise, and in conjunction with points already made, had licensed attorney Baker not been present, licensed court-appointed counsel standing by in the bullpen would have also been equally unprepared, uninformed, and need reasonable time to meet with Ms. Pavlos-Hackney, review court documents, and require more than a moments time in a breakout session to become prepared and effective.

- Right to Hearing or Ability to Present a Defense – Ms. Pavlos-Hackney was denied a right to a hearing and ability to present a defense.
    - Although not an exhaustive list, defenses include Ms. Pavlos-Hackney's protest of unconstitutional government action, oppression, and orders.
    - Continued business operations were in good-faith actions based on the advice of perceived and self-proclaimed constitutional attorney Richard Martin.
    - Uninformed decisions and misunderstanding of unconstitutional Covid-19 orders, Governor's improper and unconstitutional shift to continue unconstitutional enforcement through its executive branch partners (Attorney General / MDARD)
    - Improper and unconstitutional administrative proceeding.
    - Improper and unconstitutional taking of her food license.
    - Improper and unconstitutional activity of the prosecuting party, Attorney General / MDARD.
    - Improper and unconstitutional issuance of the TRO.

- In reference to the Trial Court judge's comments in the court's Order Denying Reconsideration, in cases addressing a cases addressing sufficient time to prepare for hearings, an adjournment consisting of a number of days is generally granted so that all aspects can be revied analyzed. In the case at hand newly retained Defense counsel was on given moments in a Zoom break-out room to explain the meaning and nature of an "arraignment."

- At the show cause hearing, the court may dismiss the matter if it finds that the allegations do not constitute contempt as a matter of law or if the court finds that there is no genuine issue of material fact that no contempt occurred. If the court determines that the alleged behavior or omission could constitute contempt, or that there is an issue of material fact about whether the alleged behavior or omission occurred, the court will set the matter for trial. As set forth above, the

.

> Court never set the matter for trial. Defense counsel repeatedly told the Judge that he was under the belief that the parties were only at court for an arraignment. Defendants counsel also repeated requested that Ms. Pavlos-Hackney be provided a trial or evidentiary hearing on the matter. At the unorthodox hearing, the judge stated and agreed that Ms. Pavlos-Hackney was entitled to a trial or hearing on the matter. However, and in completely contradictory, unconstitutional fashion, issue sanctions, jailed Ms. Pavlos-Hackney, and told her she could have all the hearings and due process she wanted after she was done serving her jail sentence

III. The Trial Court Lacked Jurisdiction Over Defendant

Lack of personal jurisdiction must be raised in the defendant's first motion under MCR 2.116(D)(1) or its first responsive pleading, whichever is filed first. *Leite v Dow Chem Co*, 439 Mich 920, 478 NW2d 892 (1992). If this is not done, the issue is waived. The plaintiff bears the burden of presenting evidence to establish jurisdiction but must only make prima facie showing. If there is a disputed issue of fact, the motion must be denied; however, the court may hold an immediate trial on that issue and render judgment on the facts as determined by the court, or it may defer a decision until trial on the case.

Representations and arguments of counsel in their briefs do not constitute record evidence. *Hazle v Ford Motor Co*, 464 Mich 456, 474, 628 NW2d 515 (2001). Any disclosures or discovery materials that a party wishes to rely on must be filed and served in accordance with MCR 2.302(H) (filing and service of discovery materials). *Ward v Frank's Nursery & Crafts, Inc,* 186 Mich App 120, 134, 463 NW2d 442 (1990).

In this case, The Defendant Zante INC, was deprived of MCR 2.116(C)(1), lack of jurisdiction over person or property; MCR 2.116(C)(2), insufficient process; MCR 2.116(C)(4), lack of subject-matter jurisdiction; and MCR 2.116(C)(7), claim barred due to release, prior payment, res judicata, etc.

In deciding a motion brought under any of these specific subrules, the court must consider any affidavits, pleadings, depositions, admissions, and documentary evidence "then

.

filed in the action or submitted by the parties." MCR 2.116(G)(5); see, e.g., *Tryc v Michigan Veterans' Facility*, 451 Mich 129, 133, 545 NW2d 642 (1996*); Jeffrey v Rapid American Corp, 448 Mich* 178, 184, 529 NW2d 644 (1995); *Wortelboer v Benzie Cty*, 212 Mich App 208, 213, 537 NW2d 603 (1995). If neither party submits such materials, review is limited to the pleadings alone. *Trowell v Providence Hosp & Med Ctrs, Inc*, 502 Mich 509, 918 NW2d 645 (2018) (holding that because neither party submitted materials outside of pleadings, it was error for court of appeals to remand for further discovery to determine whether plaintiff's claims sounded in ordinary negligence or medical malpractice for purposes of statute of limitations–based motion brought under MCR 2.116(C)(7); instead, motion had to be decided based solely on plaintiff's complaint).

Due process "does not contemplate that a state may make binding a judgment in personam against an individual or corporate defendant with which the state has no contacts, ties, or relations." *Witbeck v Bill Cody's Ranch Inn*, 428 Mich 659, 666, 411 NW2d 439 (1987) (quoting International Shoe Co v Washington, 326 US 310, 319 (1945)). Consistent with this constitutional principle, a motion may be brought under MCR 2.116(C)(1) challenging the court's in personam jurisdiction. Such a motion questions whether a nonresident defendant has sufficient "minimum contacts" with the state to enable the court to render a binding personal judgment against that party. See, e.g., *Starbrite Distrib v Excelda Mfg Co*, 454 Mich 302, 562 NW2d 640 (1997*); Mozdy v Lopez*, 197 Mich App 356, 494 NW2d 866 (1992). "A personal jurisdiction analysis involves a two-fold inquiry: (1) do the defendant's acts fall within the applicable long-arm statute, and (2) does the exercise of jurisdiction over the defendant comport with the requirements of due process." *WH Froh, Inc v Domanski,* 252 Mich App 220, 226, 651 NW2d 470 (2002).

.

The Defendant is identified as a Corporation, Zante INC. and is incorporated in the state of Michigan. Nowhere in the pleadings, is the individual Defendant, Marlena Pavlos, Identified in an individual capacity. She is a Resident Agent of Zante Inc, a Corporation in this litigation. The Court has the authority pursuant MCL 600.701(3) to exercise general personal jurisdiction when there is consent. See also *Ewing v Bolden*, 194 Mich App 95, 101, 486 NW2d 96 (1992). Consent may be by an appearance, a waiver, a contract provision to submit a dispute to the jurisdiction of the state's courts, or the appointment of an agent authorized to receive service of process within the jurisdiction. Consent as it relates to general personal jurisdiction must be distinguished from consent regarding the subject matter of the lawsuit. Subject-matter jurisdiction may not be conferred on a court by the parties' consent. *People v Mierzejewski* (In re Return of Forfeited Goods), 452 Mich 659, 670, 550 NW2d 782 (1996); see also *McFerren v B&B Inv Grp*, 233 Mich App 505, 513, 592 NW2d 782 (1999) (when statute prohibits arbitration of issue, parties cannot stipulate to confer jurisdiction on arbitrator).

Furthermore, Where Plaintiff relies on statue apply only to jurisdiction over corporations, a disposition for lack of jurisdiction over individual defendant is proper. *Halzer v F Joseph Lamb* Co, 171 Mich App 6, 429 NW2d 835 (1988).

The plaintiff bears the burden of establishing jurisdictional facts. *Froh,* 252 Mich App at 225. However, in resolving a motion brought under MCR 2.116(C)(1), a court must consider the evidence submitted by both parties. *Mozdy*, 197 Mich App at 359–360. That evidence, along with the pleadings, is reviewed "in the light most favorable to the nonmoving party." Froh, 252 Mich App at 225–226. Additionally, plaintiff need only make a prima facie showing of jurisdiction to defeat a motion for summary disposition. Id. at 225. Moreover, all factual disputes are resolved in favor of the nonmoving party (here, the plaintiff). *Jeffrey v Rapid American Corp*,

.

448 Mich 178, 184, 529 NW2d 644 (1995). If there is a disputed issue of fact, summary disposition is inappropriate. Hazelton v Lustig, 164 Mich App 164, 169, 416 NW2d 373 (1987). In its discretion, the court may resolve the factual dispute "in accordance with the immediate trial procedure set forth in MCR 2.116(I)(3)," which provides that "judgment may be entered forthwith if the proofs show that a party is entitled to judgment on the facts as determined by the court." MCR 2.116(I)(3). Or the court may defer a decision until trial in accordance with MCR 2.116(I)(4). *Hazelton*, 164 Mich App at 169. Should the court decide to order an immediate trial to resolve a disputed factual issue arising from a motion brought under MCR 2.116(C)(1)–(6), it should be a bench trial rather than a jury trial. *Al-Shimmari v Detroit Med Ctr*, 477 Mich 280, 289, 731 NW2d 29 (2007).

Although it appears that the existing caselaw addressing the standards for granting or denying a motion for summary disposition under MCR 2.116(C)(1) addresses only challenges to personal jurisdiction, the rule does not distinguish between personal and in rem jurisdiction, and there is no principled basis why these cases should not equally apply when the court's jurisdiction over the property is in question.

For example, in *Oberlies v Searchmont Resort, Inc*, 246 Mich App 424, 633 NW2d 408 (2001), the court of appeals provided a detailed discussion of personal jurisdiction issues and the applicable standards for deciding a motion for summary disposition under MCR 2.116(C)(1). This detailed discussion of personal jurisdiction can be instructive when analyzing in rem jurisdiction.

IV. Defendant's is Entitled to an Accurate Record and Transcripts

Defendants concede that many defects are minor, but believes they should be corrected to preserve an accurate record. At minimum, major defects should be corrected. Defendants have

.

been deprived an accurate transcript for appeal. As set forth above, the record regarding the arraignment hearing which took place before Judge Aquilena contains numerous defects – some minor, some major.

It is important because an accurate record is necessary for appeal pursuant to MCR 7.20. et seq. The Appellant has certain duties. One such duty is identified as to provide a transcript. A transcript is necessary part of any appeal. A party seeking review by the Court of Appeals has the duty to file a full transcript of testimony and other proceedings unless excused from doing so by court order or by stipulation of the parties. *Nye v. Gable, Nelson & Murphy*, 169 Mich App (1998). A failure to provide the Court of Appeals with a transcript of a hearing acts as a waiver of any issue which is based upon events which transpired at that hearing. *People v. Petrella*, 124 Mich App 745 (1983). The inability to obtain the transcript of criminal proceedings may so impede a defendant's right of appeal that a new trial must be ordered. *People v. Horton*, 105 Mich App 329 (1981).

In this case, though quasi-civil, jail was ordered. The lack of an accurate transcript will deprive the Defendants of a fair appeal and a fair hearing on their Motion for Relief from Judgements. The lack of an accurate transcript in this case is prejudicial sufficient to deprive Defendants of a fair rehearing on their current motions and a fair hearing on appeal. Therefore, a new Arraignment must be ordered. A party fails to properly present and preserve an issue for review where she fails to provide the Court of Appeals with a transcript of any trial testimony or exhibits pertaining to the issue which may have been presented to the trial court. *Holtzlander v. Brownnell,* 182 Mich App 716 (1990).

CONCLUSION AND RELIEF REQUESTED

For the above stated reasons, it appears abundantly clear that Marlena Pavlos-Hackney

.

was denied even rudimentary due process and right to effective assistance of counsel in violation of the corresponding U.S. Constitutional protections under the 4th, 5th, 6th, & 14th Amendments.

The totality of circumstances indicate that the contempt as applied to Marlena was criminal and she should be afforded the corresponding heightened level of procedural and substantive due process.

Fundamental fairness requires that she be provided an accurate transcript of the March 19, 2021, hearing and a video to assure accuracy. The flawed arraignment was improper, as she had no opportunity to prepare, present, or even have the entertain any defense.

Determine subject matter and in Personam jurisdiction execution were improper as to Marlena which should require dismissal or proper hearing.

WHEREFORE, Defendant-Appellant, Marlena Pavlos-Hackney, request this court to;

A. Set Aside the Findings of Contempt and corresponding judgements,

B. Return the $15,000 fine assessed as punishment,

C. Remand the case back to the trial court for actual hearing allowing a proper defense in the proper jurisdiction following arraignment,

D. Grant any other remedies as justice requires.

Respectfully Submitted,
R.J. Baker & Associates, PLLC

Dated: 7/30/21

/s/ Robert J. Baker
Robert J. Baker (P57964)
Stephen J. Vargo (P76963)
Attorney for Appellant-Defendant

.

PROOF OF SERVICE

The undersigned certifies that the foregoing Brief on Appeal was served upon all parties to the above cause to each of the attorneys of record herein and at their respective email addresses by electronic filing.

Date: 7/30/21

/s/ Robert J. Baker
Robert J. Baker (P57964)

.

INDEX OF EXHIBITS

Exhibit 1 – Michigan Administrative Hearing Decision and Order Continuing Summary Suspension (also attached as Exhibit 15 to MDARD's February 24, 2021 Ex Parte Motion for TRO)

Exhibit 2 – MDARD's February 24, 2021 Ex Parte Motion for TRO

Exhibit 3 – February 25, 2021 Ex Parte TRO

Exhibit 4 – March 1, 2021 MDARD Motion to Hold Marlena's Bistro and Pizzeria in Contempt

Exhibit 5 – March 4, 2021 Hearing Transcript, at 3:5-7, 4:6-21 (March 4, 2021)

Exhibit 6 – March 4, 2021 Order

Exhibit 7 – March 4, 2021 Bench Warrant

Exhibit 8 – March 5, 2021 MDARD Notice Regarding Marlena's Bistro and Pizzeria

Exhibit 9 – Arraignment Hearing Transcript at 3-6 (March 19, 2021)

Exhibit 10 –March 19, 2021 Judgment of Contempt

Exhibit 11 – March 22, 2021 Notice of Satisfaction of Judgement of Contempt filed by Ms. Pavlos-Hackney

Exhibit 12 - March 22, 2021 MDARD Notice Regarding Marlena's Bistro and Pizzeria

Exhibit 13 - March 23, 2021 Order

Exhibit 14- March 23, 2021 Order Regarding Satisfaction of Judgment of Contempt and Release from Imprisonment.

Exhibit 15 – Amended Hearing Transcript Regarding March 19, 2021 Arraignment

Exhibit 16 – May 11, 2021 Amended Judgment of Contempt

Exhibit 17 – April 27, 2021 Motion Hearing Transcript

Exhibit 18 – May 14, 2021 Continuation Hearing

Exhibit 19 – May 14, 2021 Order

Exhibit 20 – June 22, 2021 Order Denying Motion for Reconsideration