IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Steven Mark Orwig,

Plaintiff, Third Party
Defendant and Appellee,

vs.

Mary Caroline Orwig,

Defendant, Third Party
Plaintiff and Appellant.

Case No. 20170454

Civil No. 11-2016-DM-00026
(Dickey County)

Orwig's Livestock Supplements, Inc.;
Orwigs Tubs International Inc.; and
MVP Transport, Inc.,

Plaintiffs and Appellees,

vs.

Mary C. "Marcy" Orwig,

Defendant, Third Party
Plaintiff and Appellant,

vs.

Steven Orwig,

Third Party Defendant
and Appellee.

Case No. 20170455

Civil No. 11-2016-CV-00068
(Dickey County)

BRIEF OF DEFENDANT, THIRD PARTY PLAINTIFF-APPELLANT MARY CAROLINE ORWIG, ALSO KNOWN AS MARY C. "MARCY" ORWIG

APPEAL FROM THE FOLLOWING ORDERS:

A. July 31, 2017, "Order Granting Plaintiff's Motion for Contempt and Plaintiff's Motion for Ex Parte Interim Order." [District Court Docket Entry #91in Civil No. 11-2016-DM-00026];

B. September 1, 2017, "Order Granting Plaintiff's Motion for Contempt and Plaintiff's Motion for Ex Parte Interim Order." [District Court Docket Entry #89 in Civil No. 11-2016-DM-00026];

C. October 9, 2017, Order finding "Defendant, Mary Orwig, is in contempt and be ordered to follow the terms of the July 31, 2017, Order Granting Plaintiff's Motion for Contempt and Plaintiff's Motion for Ex Parte Interim Order, specifically Paragraph 4 regarding the Arizona Property." [District Court Docket Entry #96, and also, Docket Entry #101 in Civil No. 11-2016-DM-00026];

D. November 13, 2017, Order finding "Defendant, Mary Orwig, in contempt of the Order dated October 9, 2017, and thus, Ms. Orwig shall be imprisoned for a period of six (6) months, or until compliance with the aforementioned Order is achieved, whichever is shorter. [District Court Docket Entry #111 in Civil No. 11-2016-DM-00026];

E. Order Denying Motion to Vacate of December 8, 2017. [District Court Docket Entry #139 in Civil No. 11-2016-DM-00026].

DICKEY COUNTY DISTRICT COURT, SOUTHEAST JUDICIAL DISTRICT
HONORABLE CHERIE LaVONNE CLARK

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Paragraph

North Dakota Cases

Statutes

Other Authorities

[¶1] **ISSUES ON APPEAL**

[¶2] 1. Were the orders finding Mary Caroline Orwig in contempt void because they were issued without due process of law afforded to her?

[¶3] 2. Are the contempt orders issued against Mary Caroline Orwig void when the contempt orders were issued without: (1) motions setting forth the grounds for the contempt, in particularity; (2) without a showing the party had actual notice or knowledge of the order that forms a basis for contempt; (3) without notices of the motions [and times for the hearing] afforded to the party alleged to be in contempt and/or fair notice to the party alleged to be in contempt that a punitive remedy would be imposed; and either (4) without evidentiary hearings afforded to the party alleged to be in contempt; or (5) without a factual showing of a willful and inexcusable intent to violate a court order?

[¶4] 3. Does a District Court Judge exceed her jurisdiction, or deny a litigant due process of law, when she issues contempt orders contemplating the party's imprisonment without first warning the party, not then represented by an attorney, and then determining the party fully understood that the party faced (1) the potential of incarceration, (2) her right to attorney to represent her in the contempt proceedings, and (3) her right to an appointed attorney if she is indigent?

[¶5] 5. Was Mary Caroline Orwig denied a meaningful hearing when declared in contempt of court without: (1) a factual showing of a willful and inexcusable

intent to violate a court order; and (2) a factual showing that she had actual notice and knowledge of the court order alleged to be violated by her?

[¶6] 6. Did the District Court err when it refused to vacate its orders declaring Mary Caroline Orwig in contempt of court?

[¶7] **STATEMENT OF THE CASE**

[¶8] At the time this appellate brief is written, Appellant Mary Caroline Orwig [hereinafter "Marcy"] faces imprisonment in North Dakota for a duration of six (6) months without her own set of keys to her jailhouse cell. The keys to Marcy's jailhouse cell appear to be in the hands of others, including her estranged husband, Steven Mark Orwig [hereafter "Steven"] and Steven's Arizona realtor. Appendix, pages 134-137; 163-170; 299-300; 308-215; and 359-360.

[¶9] In this appeal, Marcy asserts the following three (3) contempt orders should have been vacated by the District Court Judge in that they are punitive in nature, and entered against Marcy in violation of Due Process of Law guaranteed to her by the Fourteenth Amendment to the Constitution of the United States of America, and its counterpart in the Constitution of North Dakota [App., ps. 328-345]:

A. *July 31, 2017*, "Order Granting Plaintiff's Motion for Contempt and Plaintiff's Motion for Ex Parte Interim Order" [App., ps. 134-137 and 285-288;[1] 163-170].

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[1] This Order has been docketed two (2) times below in Dickey County District Court Civil No. 11-2016-DM-00026: Docket Entry #89 filed on July 28, 2017, and signed on September 1, 2017; Docket Entry #91 filed and signed on July 31, 2017. To avoid confusion, these two (2) orders are treated as one (1) in this appeal.

B. *October 9, 2017*, Order finding "Defendant, Mary Orwig, is in contempt and be ordered to follow the terms of the July 31, 2017, Order Granting Plaintiff's Motion for Contempt and Plaintiff's Motion for Ex Parte Interim Order, specifically Paragraph 4 regarding the Arizona Property." App., ps. 149-150; 299-300.

C. *November 13, 2017*, Order finding "Defendant, Mary Orwig, in contempt of the Order dated October 9, 2017, and thus, Ms. Orwig shall be imprisoned for a period of six (6) months, or until compliance with, the aforementioned Order is achieved, whichever is shorter." App., ps. 169; 314.

[¶10] **A. Procedures leading to the July 31, 2017, "Order Granting Plaintiff's Motion for Contempt and Plaintiff's Motion for Ex Parte Interim Order."**

[¶11] The procedure that leads to the punitive remedy contained in the July 31, 2017, Order differs from the procedure leading to the punitive sanctions [including the sanction of incarceration] contained in the Orders dated October 9, 2017, and November 13, 2017. On September 15, 2016, Appellees Orwig's Livestock Supplements, Inc., Orwigs Tubs International. Inc., and MVP Transport, Inc., [hereinafter, "Companies"] obtained a temporary restraining order against Marcy, effectively restraining her from transacting any business, or serving as director or officer, on behalf of the Companies. App., ps. 22-23. On October 7, 2016, with the restraining order in place, the Companies moved the lower court for its order directing Marcy to return certain property to the Companies identified within its contemporaneous Affidavit of Kathryn Petersen. App., ps. 41-44. In responding to the

Companies' motion, Marcy had agreed to return the items identified by the Companies that were in her possession, other than a 2014 Dodge Ram pickup owned by North D Lights Ranch. App., ps. 54-55. In her return to the motion, Marcy informed the Companies that certain specific items, identified by them, were not in her possession and that she was unaware of the location of said property. App., p. 54.

[¶12] On October 31, 2016, the lower court issued its Order Granting Motion for Preliminary Injunction continuing its restraint of Marcy from transacting business, or serving as director or officer of the Companies. App., ps. 66-69. Marcy, as part of the preliminary injunction, was ordered to return any corporate property in her possession to the Companies. App., p. 68. Each party was directed to confer and advise the lower court if any dispute remains "as to the specific property at issue" within ten (10) days of the October 31, 2016, Order. *Id.* On December 8, 2016, *long after the ten (10) deadline*, the Companies filed a supplemental brief with the lower court identifying personal property "yet to be returned". District Court Docket No. 119 in Civil No. 11-2016-CV-0006.

[¶13] On December 13, 2016, the lower court, in its Order Granting Motion for Return of Corporate Property, required Marcy, in pertinent part:

> Defendant shall deliver the items in her possession to plaintiff corporations within ten (10) days of the date of this Order. As for items not in defendant's possession or items which plaintiff companies are required to recover themselves – such as the 2011 Chevy Silverado 3500 currently located on Arizona property owned by Mr. and Mrs. Orwig or an entity under their control – plaintiffs must be allowed unfettered access onto any property owned by Mr. and Mrs. Orwig or an entity under their control for the purposes of retrieving items on this list.

App., p. 73. The items of personal property specifically listed within the December 13, 2016,

Order to be returned, were the same items of personal property first listed in the Companies' supplemental brief of December 8, 2016 [other than the 2014 Dodge 2500]. App., p. 73. This is mentioned to explain the Order of December 13, 2016, encompasses *new items of personal property* that differed from the Companies' missing personal property identified in Kathryn Petersen's supporting affidavit of October 7, 2016. App., ps. 43-44; 73.

[¶14] On February 2, 2017, the Companies moved that Marcy be found in contempt of court for violating the lower court's October 31, 2016, Order Granting Preliminary Injunction and the December 13, 2016, Order Granting Motion for Return of Corporate Property. App., p. 78-79. The Companies' Motion for Contempt was submitted under the procedures of Rule 3.2 of the North Dakota Rules of Court, and advised Marcy the Companies had requested "oral argument" of their motion. App., p. 78. The Companies' Rule 3.2 Motion for Contempt was supported by an Affidavit of Kathryn Petersen, dated February 2, 2017, claiming certain "items of property belonging to the plaintiff corporations or their employees remain in the defendant's possession or otherwise unreturned, or were returned in damaged and/or unusable condition." App., ps. 80-81. The personal property items listed by Kathryn Petersen, as being either in Marcy's "possession" or "otherwise unreturned" or returned "damaged" or "unusable" varied from the lower court's order of December 13, 2016. For example, the "third or newer" list of property provided by Kathryn Petersen on February 2, 2017, by affidavit, mentions "Steve Orwig's personal banking binders", "Steve Orwig's Personal Credit Card Binder,"; and also, the website login/password for www.newconceptnutrition.com. These items were not ordered returned in the December 13, 2016, Order [App., ps. 75, 80-81], and Marcy had originally denied on October 19, 2016,

having "Steve's personal banking binders" in her possession. App., ps. 44; 54.

[¶15] On February 15, 2017, Marcy submitted an affidavit to the lower court establishing her compliance with the lower court's order(s) relating to the return of corporate property. App., ps. 85-90. In her affidavit, Marcy testified that on November 15, 2016, she, with the assistance of Raul Gonzales, had returned to the Companies certain "corporate property" listed in Kathryn Petersen's original October 7, 2016, affidavit. App., ps. 85-86. In her affidavit, Marcy testified that she did "not possess the items requested" set forth in Kathryn Petersen's Affidavit of February 2, 2017 [except for Steven's personal banking records or personal credit card statements which were not ordered returned, nor would they be corporate records, and previously dealt with - App., ps. 44; 54], nor did she return items in a damaged state. App., p. 87. Marcy claimed that she had no longer had any of the Companies' property in her possession. App., p. 88.

[¶16] No party requested the "taking of evidence" within seven (7) days of Marcy's response, as required by N.D.R.Ct. 3.2(a)(3). The Companies provided notice that its Rule 3.2 Motion for Contempt would be heard by the Court on April 3, 2017. App., p. 107. During the hearing of April 3, 2017, the Companies' attorney acknowledged, "It wasn't noticed for an evidentiary hearing." Transcript of Proceeding of April 3, 2017, page 24. During the April 3, 2017, hearing the Companies' attorney suggested he was pursuing the Companies' contempt motion to recover the hard drive for the security system and certain files containing information for an IRS audit. Tr. of April 3, 2017, ps. 7-9; 15-16. During the April 3, 2017, hearing, the Companies' attorney further suggested an evidentiary hearing if the lower court felt more evidence was necessary to make a contempt determination. Tr.

of April 3, 2017, ps. 6; 23. Taking into consideration the positions of the Companies, as expressed by their attorney in oral arguments, the lower court recognized the scope of the Companies' Rule 3.2 Motion for Contempt had changed:

> THE COURT: Well, I think Mr. Andrews has narrowed the items to matters that are ncecessary to carry out the corporate business, and we can always talk about the smaller items at the actual trial, but to go forward, these corporations need that information and so it needs to be found. And that's my intent here today is that we can always address trash cans or desktop items at a later time.

Tr. of April 3, 2017, p. 30. The lower court orally announced its decision to continue the hearing, and its belief that an evidentiary hearing may be necessary if the parties could not, themselves, resolve the issues. Tr. of April 3, 2017, ps. 31; 33. A written Order Continuing Hearing on Motion for Contempt was entered on April 7, 2017, providing for the possibility of further hearing "for the taking of evidence". App., p. 113.

[¶17] On April 6, 2017, the Companies moved to consolidate the action it brought against Marcy with the divorce action Steven brought against Marcy. App., ps. 108-109. The Companies' motion to consolidate the two (2) actions was granted on June 8, 2017. App., ps. 114-115. Prior to consolidation, on May 2, 2017, Steven sought an Ex Parte Interim Order to sell real property located in Arizona. App., ps. 250-251. Although Steven's Motion for Ex Parte Interim Order claimed it was based upon N.D.R.Ct. 8.2, Steven's motion actually requested the "authority to sell the property located in Arizona" meaning Steven requested relief far beyond the contemplated permissible relief only involving the "use of real property". N.D.R.Ct. 8.2(b)(4). Because of the Companies' pending motion to consolidate the two (2) actions, the lower court did not hear Steven's Motion for Ex Parte Order on May

25, 2017. Tr. of May 25, 2017, p. 5.

[¶18] After the two (2) actions were consolidated, Steven provided Marcy with written notice that his Motion for Ex Parte Order to sell Arizona real property would be heard on June 28, 2017. App., ps. 116-117. *Marcy did not receive "notice" of any other matter to be heard on June 28, 2017, including the Companies' Motion for Contempt, that complies with the 21 day notice of an evidentiary hearing – required under N.D.R.Civ.P. 6(d)(1).* The Companies claim their attorney's letter of June 23, 2017, suffices as notice to Marcy because the letter stated, in part, "It is understood by the undersigned that these issues will be addressed during the upcoming interim hearing." App., ps. 124-126; 363.

[¶19] On the morning of June 28, 2017, Marcy e-mailed the clerk of court of her desire to speak privately with Judge Greenwood concerning the termination of her then-attorney, Erica Chishom. App., p. 133. An evidentiary hearing on Steven's noticed motion, and the Companies' Motion for Contempt was held on June 28, 2017, with Kathryn Petersen, Amanda Thorpe, Marcy and Steven testifying. Tr. of June 28, 2017.

[¶20] After testimony had concluded on June 28, 2017, the Companies informed the lower court judge that they were not asking "for a sanction for contempt or a remedial sanction in order to purge the contempt." Tr. of June 28, 2017, p. 204. The Companies sought a finding of contempt for failing to "return corporate property", and as the result of that finding, the continuance of the preliminary injunction against Marcy. *Id,* p. 205.

[¶21] The lower court adopted the Companies' suggestions, and found Marcy in contempt for the non-return of items to the Companies, including items never previously ordered by the lower court to be returned. Tr. of June 28, 2017, ps. 223-224. On July 31, 2017, the

lower court, *without making specific findings of fact as to any contemptuous behavior, or intent, on the part of Marcy*, entered its July 31, 2017, "Order Granting Plaintiff's Motion for Contempt and Plaintiff's Motion for Ex Parte Interim Order" [App., ps. 134-137; 285-288; 163-170]. Because of the lower court's declaration that Marcy was in contempt of court, the lower court restrained and enjoined her from acting in any way as a officer or director on behalf of the Companies– companies in owned by both Marcy and Steven – *without any methodology to purge the declared contempt.*

[¶22] Part of the lower court's order of July 31, 2017, addressed Steven's motion to sell the Arizona real estate. The July 31, 2017, Order provides, in part, "it is appropriate to order the Arizona property be sold." App., p. 136.

[¶23] **B. Procedures leading to the October 9, 2017, Order finding "Defendant, Mary Orwig, is in contempt and be ordered to follow the terms of the July 31, 2017, Order Granting Plaintiff's Motion for Contempt and Plaintiff's Motion for Ex Parte Interim Order, specifically Paragraph 4 regarding the Arizona Property."**

[¶24] On September 5, 2017, the Honorable Cherie L. Clark noticed a "scheduling conference" for September 28, 2017, at 9:30 a.m. which resulted in the "Order" dated October 9, 2017. App., ps. 147-148; 297-298. No judicial notice was provided to any party with respect to anything occurring other than a "scheduling conference", and most certainly, nothing was noticed concerning any allegation that Marcy was acting contemptuously with reference to the July 31, 2017, Order determining "it is appropriate to order the Arizona property be sold." App., p. 136. There is no a record of any written motion seeking an order

that Marcy be found in contempt for violating any portion of the lower court's Order of July 31, 2017. A review of the Transcript of Proceedings for September 28, 2017, pages 3-11, establishes no party had orally moved to have Marcy held in contempt of the July 31, 2017, Order relating to the Arizona property. The transcript for September 28, 2017, reveals no evidence, or testimony, being introduced into Court concerning any matter involved in the Order of July 31, 2017 – only existing were statements made by attorneys. Despite a lack of any form of motion, notice of motion, and an utter lack of evidence, the lower court orally declared that Marcy was "in contempt of the prior court order." Tr. of September 28, 2017, p. 12. Immediately *after* the lower court's declaration of contempt, Marcy telephonically joined the "scheduling conference". *Id.* The lower court informed Marcy that it would be the order of the court that Marcy is in contempt "of the contempt order that Judge Greenwood entered ordering you to sell that house in Arizona". Tr. of September 28, 2017, p. 12-13. No such order directed toward Marcy has ever existed.

[¶25] Marcy's question to the judge, as to why Marcy was not notified of the meeting [scheduling conference], was never answered by the judge. Tr. of September 28, 2017, ps. 13-14. Feeling inadequately represented by attorney Chishom, Marcy terminated her services as Marcy's attorney during the scheduling conference. *Id.*

[¶26] The lower court's oral declaration of contempt resulted in the written Order of October 9, 2017, determining in part, "Ms. Orwig has impeded the sale process and shall be held in contempt for the same." App., ps. 155; 300. As part of the Order, Marcy was ordered "to allow the parties' realtor, Kim Williamson, on the property within two weeks of the signing of this Order." *Id.* The written Order of October 9, 2017, contemplated a Status

Conference within three (3) weeks to consider further sanctions against Marcy "including default and/or jail time, if she has not complied with the July 31, 2017, Order." *Id.*

[¶27] It does not appear, from the record below, that Marcy was ever served a copy of the Order of October 9, 2017, holding her in contempt.

[¶28] **C. Procedures leading to the November 13, 2017, Order finding "Defendant, Mary Orwig, in contempt of the Order dated October 9, 2017, and thus, Ms. Orwig shall be imprisoned for a period of six (6) months, or until compliance with, the aforementioned Order is achieved, whichever is shorter.**

[¶29] On October 10, 2017, only one (1) day after the court's order, there was a mailed Notice of Hearing for a "telephonic status conference" to be held on October 19, 2017, a mere ten (10) days after the October 9, 2017, Order which had specified, in writing, a fourteen (14) day window for Marcy's compliance. Marcy did not participate in this telephonic status conference conversation, only noticed by a mailing of October 10, 2017, to her through her forwarding service's address. App., ps. 158-159. The Notice of Hearing did not provide notice to Marcy that any form of order, finding her in contempt of any order of any court, would be sought against her. The Transcript for October 19, 2017, reveals no witnesses were sworn to testify, nor were any affidavits, exhibits, or other forms of evidence introduced into the record on October 19, 2017. In this subsequent telephonic status conference – occurring even before the termination of the time allotted for compliance – Steven's attorney informed the lower court he had mailed Marcy a letter requesting dates that his realtor could be on the property, but had not heard from Marcy. Tr. of October 19, 2017,

p. 6. Steven's attorney, without identifying the specific date or any context to the statement [and perhaps at least double-hearsay], informed the lower court that Marcy told the realtor, "the property was not going to be sold." *Id.*

[¶30] On November 13, 2017, solely based upon Steven's attorney's unsworn hearsay statements, the lower court determined Marcy was in contempt of the Order dated October 9, 2017, subjecting her to to imprisonment for six (6) months or until compliance with the October 9, 2017, Order had been achieved. App., ps. 169; 324. Marcy's fourteen (14) day window to act based on the October 9, 2017, Order expired *after the Status Conference of October 19, 2017*, and before the contempt issued against her on November 13, 2017. Thus, the lower court has imposed imprisonment upon Marcy for six (6) months without any path to open the jailhouse cell. This is a "punitive" sanction. Marcy is also wrongfully subjected to the payment of the attorney fees incurred by Steven and the Companies, and the appointment of a Receiver to sell the parties' Arizona real property. *Id.*

[¶31] A Notice of Entry of [contempt] Order was mailed to Marcy on November 14, 2017. App., ps. 326-327.

[¶32] **D. Marcy's Motion to Vacate Contempt Orders.**

[¶33] On November 17, 2017, Marcy moved to vacate all of the contempt orders issued for various reasons, including, but not necessarily limited to, failure to provide Due Process of Law by inadequate warning to Marcy, inadequate notice of both the hearing and the grounds for the contempt, lack of evidentiary hearings, and the lower court granting relief greater than requested in any party's written motion. App., ps. 328-345. At the time she brought her Rule 3.2 motion to vacate all contempt orders, Marcy also filed her Notice of No Objection

to Mortgage/Protective Actions(s), informing the lower court and the parties, through her attorney, that Marcy does not oppose any step necessary to accomplish the purchase of the Arizona real property so it would not be lost when the balloon payment was due on December 1, 2017. App., ps. 348-350. Through her attorney, Marcy asserted the lower court was without *in rem* jurisdiction over Arizona property, and further, she has done no act that has prevented the sale of Arizona property. *Id.*

[¶34] On November 28, 2017,while Marcy's motion to vacate the contempt orders was pending, the lower court issued its Bench Warrant for Marcy's arrest to imprison her for six(6) months or until compliance with the Court's Order dated October 9, 2017, is achieved. App., ps. 359-360. At the time the Bench Warrant was issued, all time lines in the October 9, 2017, Order had expired – it was, and is, impossible to timely comply.

[¶35] Both the Companies and Steven responded to Marcy's motion by arguing the lower court did not violate Marcy's due process rights. App., ps. 362-376.

[¶36] During the December 13, 2017, Status Conference, Marcy, through her attorney, reminded the lower court of her pending motion to vacate the contempt orders based upon the total lack of any motion, notice, evidence of contempt, or warning to her of a need for an attorney before incarceration is imposed. Tr. of December 13, 2017, ps. 5-8.

[¶37] Responding to Marcy assertions made in the Status Conference, Steven's attorney stated, "We were not able to get the property up for sale because when the realtor went to the property she would not or could not take pictures of the property because of the state of disarray it was in. And so currently we are working on attempting to get financing. We sent an appraiser out there, and we are working on trying to get a loan to try to save this property."

Tr. of December 13, 2017, p. 9. This statement is substantially different than the earlier representations. Although Steven's attorney does not provide the time line for when Steven's realtor was on the Arizona property, such statement negates the attorney's earlier statements to the lower court judge on October 19, 2017, that implied Marcy was preventing Steven's realtor from accessing the Arizona property. Tr. of October 19, 2017, p. 6; see, ¶ 29, above.

[¶38] On December 8, 2017, the lower court issued its Order Denying Motion to Vacate. App., ps. 370-380.

[¶39] **E. Marcy's Notice of Appeal.**

[¶40] On December 20, 2017, Marcy appealed to this Court from the contempt orders issued against her, identified above, and the Order Denying Motion to Vacate of December 8, 2017. App., ps. 383-386.

[¶41] **STATEMENT OF FACTS**

[¶42] The lower court did not make any written factual findings before it ordered, on July 31, 2017, that Marcy "be held in contempt" and ordered to follow the terms of the December 13, 2016, Order granting Motion for Return of Corporate Property. As stated above, the lower court's written list of items, ordered on July 31, 2017, to be returned by Marcy to the Companies, include items that were not earlier listed in the December 13, 2016, Order. Steven's personal banking binders, personal credit card binders, and the New Concept website and passwords were not listed items of the December13, 2016, Order, and appear not be the Companies' property. App., ps. 73; 80-81.

[¶43] Marcy's testimony, through her affidavit and at the time of the June 28, 2017, hearing,

was that she had timely returned all the Companies' items once possessed by her on two (2) occasions, and that she did not possess, or no longer possessed, the Companies' property that they sought. App., ps. 85- 89; Tr. of June 28, 2017, ps. 98-102; 151.

[¶44] On June 28, 2017, the Companies' complaining witness, Kathryn Petersen, acknowledged she had no evidence that Marcy maintained the Companies' IRS binders, tax returns, 1099s and W2s in her possession. Tr. of June 28, 2017, p. 37. The Companies' complaining witness also acknowledged they were able to obtain copies of the claimed missing IRS documents. *Id.* The Companies' complaining witness further testified the Companies had replaced the missing hard drive for the security system. *Id.*

[¶45] There are no facts in the record, by affidavit or by testimony, that established that Marcy intentionally disobeyed the December 13, 2016, Order. The lower court did not make a factual finding that Marcy intentionally disobeyed the December 13, 2016, Order.

[¶46] There was never a fact-finding process afforded to Marcy, before the lower court issued its contempt orders of October 9, 2017, and November 13, 2017.

[¶47] **LAW AND ARGUMENT**

[¶48] **Punitive Nature of the Orders to be Voided**

[¶49] The underlying orders appealed from appear to be legal anomalies, and void of thought or due process.

[¶50] **1. Order dated July 31, 2017.**

[¶51] The July 31, 2017, Order Granting Plaintiff's Motion for Contempt [App., p. 134; 285; see also, footnote #1] appears to be the same document executed by Judge John Greenwood long after his retirement on September 1, 2017 [Docket Entry #91; App., p. 229;

and an August 8, 2017 assignment of the case to the "Hon. Cherie L. Clark on 08/08/2017; 08/23/2016; 08/23/2016. All future proceedings will be before this judge"; Docket Entry #94]. This order is "punitive" – Marcy can do no act to accomplish the return of property that she does not possess. Due to the finding of contempt, Marcy is deprived of (a) the right to participate as an officer or director in corporations she owns, (b) ownership and control of her Arizona property, and (c) the right to jury trials on legal issues. These are punitive acts by the court, and impossible for Marcy to remediate.

[¶52] The second infirmity relates to the issuance of the Order in the first place, because it claims to have "(come) on before the Honorable John Greenwood presiding on the 28th day of June, 2017, on the Plaintiff's Motion for Contempt (Doc. ID #118 in 11-2016-CV-00068) and the Plaintiff's Motion for Ex Parte Interim Order (Doc. ID. #27 in 11-2016-DM-00026)." App., 134; 285. In truth, there was a Plaintiff's Motion for Ex Parte Interim Order [App., ps. 250-251] which was ultimately earlier noticed for hearing on May 25, 2017, [App., ps. 261-262], but such motion did not contain any allegation of Marcy's contempt – rather, it sought judicial permission to sell Arizona property over which no *in rem* jurisdiction existed (and equally offensive – *ex parte*, without a hearing). As to the referenced "Plaintiff's Motion for Contempt (Doc. ID#118 in 11-2016-CV-00068)" [App., ps. 78-79], an earlier hearing was apparently held on April 3, 2017, which ended without any evidence being taken, and resulted in an "Order Continuing Hearing On Motion for Contempt" dated April 7, 2017, which provided, "(i)f no resolution is obtained (by attorney consultations), Counsel for the parties shall secure a hearing date and time, allowing such time as necessary for the taking of evidence with respect to Plaintiff's Motion." App., ps. 112-113. *No subsequent*

notice was ever given for the required evidentiary hearing. Hence, after consolidation, the June 28, 2017, proceedings were *only noticed* for "Defendant's Motion for Ex Parte Interim Order". App., ps. 116-117; emphasis added. Marcy is the Defendant; her counter-motion for Ex Parte Relief is noted at Docket Entry #123; App., p. 84. It is highly irregular to conduct evidentiary hearings without prior written notice [N.D.R.Civ.P. 6(d) requires 21 days advance notice], and while testimony was taken, no documentary evidence was received. The Order(s) issued were in direct conflict with established due process requiring significant advance notice – at least 21 days.

[¶53] **2. October 9, 2017, Order finding "Defendant, Mary Orwig, is in contempt and be ordered to follow the terms of the July 31, 2017, Order Granting Plaintiff's Motion for Contempt and Plaintiff's Motion for Ex Parte Interim Order, specifically Paragraph 4 regarding the Arizona Property."**

[¶54] This October 9, 2017, order for confinement is only "punitive" – it cannot ever be considered remedial because Marcy can do no act to accomplish the sale of the Arizona property, now, or in the past. First, Marcy was enjoined from acting on behalf of the Companies, and has no access to any of their assets or capacity to borrow monies to pay existing indebtedness. Secondly, Marcy only owns one-half (½) of the Arizona property, and cannot compel the other owner, Steven, to do anything. She holds no keys to her cell, the keys being a mere illusion hanging on the sheriff's belt, and only after 180 days confinement will the cell possibly be opened. But more incredible is how such order came to exist – on September 5, 2017, the Honorable Cherie L. Clark noticed a "scheduling conference" for

September 28, 2017, at 9:30 a.m. [App., ps. 146-147] which inexplicably resulted in an unrelated contempt "Order" dated October 9, 2017. App., ps. 149-150. Notice of a "scheduling conference" will never put anyone on notice of a contempt hearing, or even the possibility of its conversion into contempt proceedings. "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mulane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). "But when notice is a person's due, process which is a mere gesture is not due process." *Id.*, p. 316. See also, Dieterle v. Dieterle, 2016 ND 36, ¶ 15, 875 N.W.2d 479, which fully adopts the *Mulane* standard requiring such advance notice to contemnors. In violation of due process of law – no evidence was even admitted, nor testimony taken on September 28, 2017 – without evidence, the Order of October 9, 2017, makes impossible factual findings that "Ms. Orwig has impeded the sale process and shall be held in contempt for the same", and goes on to find "Defendant, Mary Orwig, () in contempt and be ordered to follow the terms of the July 31, 2017, Order Granting Plaintiff's Motion for Contempt and Plaintiff's Motion for Ex Parte Interim Order, specifically Paragraph 4 regarding the Arizona Property." See, App., p. 134, ¶ 4 relating to Arizona property. First, the referenced order(s) were improvidently granted as noted above, but secondly, no reasonable review of Paragraph 4 regarding the Arizona Property reveals any specified role to be played by Marcy that is different than any role to be played by Steven Orwig (or any of the corporate Plaintiffs). Simply put, Paragraph 4 [*id.*] did not compel any action by anyone – it merely recognized that the Arizona property could

be sold. The lower court compounded the error by adding, "Defendant shall allow the parties' realtor, Kim Williamson, on the property within two weeks of the signing of this Order. Ms. Williamson shall be accompanied by a Maricopa County Sheriff, if she so chooses, while taking photos, measurements, gathering information, etc. to get the property ready for sale and to effectuate the sale of the property. Defendant shall not in any way prevent Ms. Williamson from preparing the listing." App., p. 150. First, the lower court does not have *in rem* jurisdiction over Arizona property; secondly, the Arizona property is located in Pinal County. Exhibit A & Exhibit E filed May 3, 2017 [Docket Entry #30; Docket Entry #34]. Marcy was not then represented by Erica L. Chisholm (order allowing withdrawal signed on October 9, 2017; Docket Entry #170), and there is no known personal service of such October 9, 2017, Order on Marcy.

[¶55] Any "Order" dated October 9, 2017, would be highly irregular, and also, issued in violation of due process of law as a purely "punitive" order.

[¶56] **3. November 13, 2017, Order finding "Defendant, Mary Orwig, in contempt of the Order dated October 9, 2017, and thus, Ms. Orwig shall be imprisoned for a period of six (6) months, or until compliance with the aforementioned Order is achieved, whichever is shorter.**

[¶57] There can be no doubt that imprisonment for six (6) months is a "punitive" sanction. On October 10, 2017, attorney Greg Liebl acting on behalf of Steven gave untimely notice of a "telephonic status conference" for October 19, 2017. App., ps. 156-157; the court's own time period for compliance had not yet run; and violation of N.D.R.Civ.P. 6(d). No judicial notice was given with respect to any proceedings other than a "telephonic status conference",

and most certainly, nothing concerning contempt. The transcript for the telephonic hearing of October 19, 2017, indicates no testimony was taken, nor evidence submitted. Indeed, there is nothing to indicate that Marcy even knew about the October 19, 2017, "telephonic status conference", yet, in Marcy's absence, counsel for Steven and the Companies sought greater penalties, including "partial default judgment", "jail .. for six months or when the property sells, whichever comes soonest", banishment from the Arizona property while "up for sale", "strike any claims Ms. Orwig has made against the company or companies", "requesting an order prohibiting her from supporting or opposing designated claims or defenses", and "an order of default", "dismiss Marcy's third party complaint and allegations against Steve .. with prejudice ..(and an) award of attorney's fees to Steve", and a "warrant for Marcy Orwig's arrest (and) jailed for six months or until the property is sold (with) the warrant to be effective in the state of North Dakota (and) the surrounding states". Tr. of October 19, 2017, ps. 6-13. Inexplicably, the "telephonic status conference" – without the presence of any witnesses, or parties, and without any evidence that Marcy even knew about the *untimely* "telephonic status conference", resulted in an "Order" dated November 13, 2017 [App., ps. 163; 308] claiming the "telephonic status conference" was actually a contempt hearing – "hearing on October 19, 2017, finding Defendant, Mary Caroline Orwig a/k/a Mary C. "Marcy" Orwig ("Marcy"), in contempt of court for violating a Court Order dated October 9, 2017." Even worse, the opposing attorneys used the opportunity to cause the imprisonment of Marcy, by judicial sanction – all in violation of due process of law as more fully developed hereafter.

[¶58] **Violations of Due Process of Law**

[¶59] Marcy will first address the end result – an "Order" for imprisonment of a *pro se* defendant cannot exist for reasons enunciated by the North Dakota Supreme Court in Peters-Riemers v. Riemers, 2003 ND 96, ¶ 24, 663 N.W.2d 657[2] – due process requires one who may be deprived of liberty through a contempt proceeding to be afforded a reasonable opportunity to obtain counsel to represent him, with the obligation imposed upon the trial court "to inform a defendant of the right to counsel in a contempt proceeding in which the defendant faces potential incarceration (among other things)":

> [¶ 24] When a trial court has failed to inform a pro se defendant of his constitutional right to appointed counsel in a contempt proceeding in which the defendant faces potential incarceration, we will not attempt to discern whether the error was harmless. *See Walker,* 768 F.2d at 1185; *Emerick,* 613 A.2d at 1354; *cf. State v. Dvorak,* 2000 ND 6, ¶ 9, 604 N.W.2d 445 (stating denial of a defendant's right to counsel at trial is not subject to harmless error analysis and requires reversal of conviction); *State v. Orr,* 375 N.W.2d 171, 178-79 (N.D.1985) (holding absent evidence of a valid waiver of a defendant's right to counsel in a prior proceeding, an earlier conviction cannot be used to enhance a sentence for a subsequent offense of driving under the influence, and a silent record is insufficient to overcome the presumption that the prior uncounseled conviction was void for enhancement purposes). An indigent who appears without a lawyer cannot be charged with knowledge of the contempt laws, and a lack of record evidence of indigency beyond the mere assertion of it is itself evidence of a need for counsel. *See Ridgway,* 720 F.2d at 1412, 1415. We do not determine in this case whether Roland is indigent, but we conclude a trial court's failure to inform a pro se defendant of the right to counsel is fatal to a finding of contempt as well as to orders related to that finding. *See Emerick,* 613 A.2d at 1354; *McBride,* 431 S.E.2d at 20.

[¶60] The underlying record will not reveal any trial court notification of Marcy's right to counsel prior to the imposition of the six (6) month incarceration – *it was impossible to do*

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[2] Paragraphs 20-23 of the Reimers decision greatly expand upon the conclusions herein cited.

when there had never been any notice that a contempt hearing was even being attempted with respect to the three (3) referenced orders finding contempt.

[¶61] When liberty is at stake, if a defendant, who is not represented by an attorney, "has not competently and intelligently waived his constitutional right, the Sixth Amendment stands as a jurisdictional bar to a valid conviction..." *Johnson v. Zerbst*, 304 U.S. 458, 468 (1938). When liberty is at stake, the trial court's "protecting duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused." *Id.*, p. 465. If a Court fails to comply with the Sixth Amendment, it no longer has jurisdiction to proceed and a judgment without jurisdiction is void. *Id.*, p. 468.

[¶62] **Due Process - the Orders finding contempt were issued without due process of law, and/or without adequate warning to Marcy. The diverse contempt motion(s) – to the extent they exist – did not state, with particularity, the grounds therefor, nor was there notice or evidentiary hearings, and the lower court granted even greater relief than possibly requested by any plaintiff in their written motion.**

[¶63] **A. Lack of notice of hearing/underlying order.**

[¶64] Marcy submits that a prerequisite for finding a person in contempt of a prior court order is that the person had actual notice or knowledge of that order. BeauLac v. BeauLac, 2002 ND 126, ¶ 10, 649 N.W.2d 126, citing Bjorgen v. Kinsey, 491 N.W.2d 389, 395 (N.D. 1992). See also, PHI Financial Services v. Johnston Law Office, P.C., 2016 ND 114, ¶22, 881 N.W.2d 216, which adds to the requirement of "actual notice or knowledge of a court order" by including, "and a willful and inexcusable intent to violate the order." Without

actual service of the underlying orders, whether one or more, Marcy does not possess the required *mens rea.*

[¶65] In North Dakota, a civil contempt is initiated by notice and motion. N.D.C.C. § 27-10-01.3. The grounds for a motion must be stated with particularity, and the relief sought must be specified. N.D.R.Civ.P. 7(b)(1). The purpose of this procedural safeguard "is to inform a party of the nature of the claims asserted against him and the relief demanded by the adversary." Van Hoven v. Van Hoven, 399 N.W.2d 855, 857 (N.D. 1987). So far as can be discerned, none of the underlying orders were personally served upon Marcy – she cannot be found in contempt of court without having personal service of the order identifying required conduct.

[¶66] As recently provided in Balvitsch v. Dakota Burger N Fries Corp., 2014 ND 37, 842 N.W.2d 908:

> [¶ 7] Section 27–10–01.3, N.D.C.C., requires notice and hearing before a court may impose a remedial sanction for contempt. *See also Holkesvig v. Welte,* 2012 ND 14, ¶ 11, 809 N.W.2d 323. An order to show cause is equivalent to a notice of motion and provides notice of the contempt proceedings. N.D.C.C. § 27–10–08. The notice must be sufficiently precise to advise the contemnor of the issues involved. *Cf. Jorgenson v. Ratajczak,* 1999 ND 65, ¶ 23, 592 N.W.2d 527 (a notice of motion and motion are adequate if they are sufficiently precise to advise the adversary and the court of the issue involved). "A failure to follow the procedural dictates of N.D.C.C. § 27–10–01.3 is fatal to a court's order of contempt and the resulting sanction." *Holkesvig,* at ¶ 11.
>
> [¶ 8] Furthermore, due process requires that the contemnor receive notice and a fair hearing when the alleged contempt involves conduct occurring outside the court's presence. *See Baier v. Hampton,* 417 N.W.2d 801, 806 (N.D.1987); *see also Groppi v. Leslie,* 404 U.S. 496, 502–03, 92 S.Ct. 582, 30 L.Ed.2d 632 (1972). To adequately provide notice for purposes of due process, the contemnor is entitled to "notice reasonably calculated, under all the circumstances, to apprise [him] of the pendency of the action and afford [him] an opportunity to present [his] objections." *Mullane v. Central*

> *Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 94 L.Ed. 865 (1950). The purpose of the notice requirement is to inform the contemnor of the nature of the proceedings so there is no unfair surprise and to enable the contemnor to prepare a defense. *See Autotech Tech. LP v. Integral Research & Dev. Corp.*, 499 F.3d 737, 748 (7th Cir.2007); *see also Morrell v. North Dakota Dep't of Transp.*, 1999 ND 140, ¶ 9, 598 N.W.2d 111.

[¶67] Marcy respectfully submits that she was denied due process of law and the protection of other constitutional rights in the so-called contempt proceedings, and the resulting Orders should be vacated as a matter of law. At every stage of the proceedings, shortened and inadequate notice of the nature of the claimed contempt – if any notice exists whatsoever – so that there has been the denial of a meaningful hearing.

[¶68] Marcy was denied due process of law required under the Fourteenth Amendment to the Constitution of the United States of America. First, Marcy did not receive proper notice of hearings relating to the claimed contempt. Under existing rules of procedure, whenever there is an evidentiary hearing the "written motion and notice of the motion must be served at least 21 days before the time specified for the hearing .." N.D.R.Civ.P. 6(d) [without taking into account any additional time related to method of service under N.D.R.Civ.P. 6(e)]. Second, to the extent motion(s) even exist requesting Marcy to be found in contempt, there is a failure to specify, with particularity, the grounds therefor, or the specific relief requested. Third, to the extent motion(s) even exist requesting Marcy to be found in contempt, there was no specific request(s) for the relief to be awarded, and such cannot be ethically discussed in some untimely noticed proceeding under some guise [such as a "scheduling conference" or "status conference" without the prior knowledge of Marcy].

[¶69] With respect to contempt, no factual hearing was ever conducted, and the only one

possibly noticed resulted in no evidence having been submitted, the hearing was continued for possible resolution, but never again was it noticed for further hearing – Marcy cannot have been legally found to be in contempt due to two (2) significant deficiencies: lack of both notice and evidence. When coupled with lack of personal service of the underlying orders, it is an overwhelming violation of due process. An additional missing component exists – the underlying order relating to a preliminary injunction had to have expired pursuant to N.D.R.Civ.P. 65(e) for procedural failure – trial must be held within 180 days from the date a temporary restraining order or preliminary injunction was first issued.

[¶70] **B. Lack of intent to violate any court order.**

[¶71] Civil contempt requires a willful and inexcusable intent to violate a court order. Flattum-Riemers v. Flattum Riemers, 1999 ND 146, ¶ 5, 598 N.W.2d 499. See also, PHI Financial Services v. Johnston Law Office, P.C., 2016 ND 114, ¶22, 881 N.W.2d 216, which adds to the requirement of "actual notice or knowledge of a court order" by including, "and a willful and inexcusable intent to violate the order." Without actual service of the underlying orders, whether one or more, Marcy does not possess the required *mens rea.*

[¶72] To the extent any written motion(s) exist, there is no notice to Marcy of what order or judgment requires her to do what is now found to be contemptible – she has no duty different than anyone else with respect to the Arizona property, and she has submitted evidence that she does not have/did not do what she is accused of doing initially. Companies' original motion for contempt is vague as to time and willfulness of the claimed contempt, and the remedy was not specified. The vagueness of the grounds for Companies' motion and relief sought cannot be excused, just as it is impossible to excuse any subsequent

verbal requests – never noticed, nor served on Marcy.

[¶73] **C. Lack of adequate findings.**

[¶74] It was incumbent upon the lower court judge to make sufficient factual findings so as to provide an appellate court with clear understanding of the factual basis for the decision to hold someone in contempt. State ex rel. City of Marion v. Alber, 2013 ND 189, ¶15, 838 N.W.2d 458. It was wrong to imprison Marcy based upon supposition, guestimate, intuition, hunch or surmise – yet that is what was done by the succeeding lower court judge based upon "comments (or) remarks by counsel" that can never be elevated to the status of evidence. Benedict v. St. Luke's Hospitals, 365 N.W.2d 499, 502 (N.D. 1985); Hoffer v. Burd, 49 N.W.2d 282, 292 (N.D. 1951); King v. Railway Exp. Agency, Inc., 107 N.W.2d 509, 516 (N.D. 1961).

[¶75] **CONCLUSION**

[¶76] To guard against unconstitutional restraints on Marcy's liberty, this Court should immediately vacate, nullify, or reverse the lower court's Orders to allow her to fully participate in the required public trials, and not from a cellblock without keys.

Respectfully submitted this 2nd day of April, 2018.

Garaas Law Firm

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IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Steven Mark Orwig,

Plaintiff, Third Party
Defendant and Appellee,

Case No. 20170454

vs.

Civil No. 11-2016-DM-00026
(Dickey County)

Mary Caroline Orwig,

Defendant, Third Party
Plaintiff and Appellant.

Orwig's Livestock Supplements, Inc.;
Orwigs Tubs International Inc.; and
MVP Transport, Inc.,

Plaintiffs and Appellees,

Case No. 20170455

vs.

Civil No. 11-2016-CV-00068
(Dickey County)

Mary C. "Marcy" Orwig,

Defendant, Third Party
Plaintiff and Appellant,

vs.

AFFIDAVIT OF MAILING

Steven Orwig,

Third Party Defendant
and Appellee.

State of North Dakota
County of Cass

[¶1] Pat Doty, being first duly sworn on oath, deposes and says: Affiant is a resident of the City of Fargo, North Dakota, and over the age of eighteen years, and not a party to the above entitled matter.

[¶2] On the 2nd day of April, 2018, Affiant deposited in the United States Post Office at Fargo, North Dakota, a true and correct copy of the following documents in the above entitled action: **(1) Brief of Defendant, Third Party Plaintiff-Appellant Mary Caroline Orwig, also known as Mary C. "Marcy" Orwig and (2) Appendix to Brief of Defendant, Third Party Plaintiff-Appellant Mary Caroline Orwig, also known as Mary C. "Marcy" Orwig.**

[¶3] The copies of the foregoing were securely enclosed in an envelope with postage duly prepaid and addressed as follows:

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Michael T. Andrews
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[¶4] To the best of Affiant's knowledge, the address above given was the actual post office address of the party intended to be so served. The above documents were duly mailed in accordance with the provisions of the North Dakota Rules of Civil Procedure.

Pat Doty

Subscribed and sworn to before me this 2nd day of April, 2018.

JONATHAN T. GARAAS
Notary Public
State of North Dakota
My Commission Expires Dec. 28, 2021

Notary Public