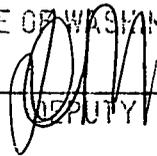


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DIVISION II

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STATE OF WASHINGTON

BY  DEPUTY

No. 43989-1-II

IN THE COURT OF APPEALS
DIVISION II
STATE OF WASHINGTON

SUNHEE LEE, Appellant,

vs.

SUK HUI BONBRAKE, Respondent.

OPENING BRIEF OF APPELLANT

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INTRODUCTION

The justice system of this State has failed in this case. Appellant Sunhee Lee was the victim of abuse, adultery, assault, and battery. Her husband constructively precluded her from her own home, when he moved his girlfriend in. Although Sunhee was the victim, she was wrongfully subject to criminal prosecution. Although acquitted of all charges, Sunhee now suffers loss of income, and loss of her ability to earn income, resulting from the Domestic Violence Protection Order (“DVPO”) at issue. However, the trial court had no authority to enter a DVPO, because the facts established in this case do not meet the requirements of the Domestic Violence Protection Statute. Sunhee has filed this appeal, seeking to redeem a measure of equity from our Courts.

ASSIGMENTS OF ERROR

1. The trial court erred when it entered a DVPO absent a family or household relationship as required by the applicable statute.

2. The trial court erred when it entered an attorney fee award in favor of Respondent, without allowing Appellant notice and a meaningful opportunity to be heard, regarding the amount of fees claimed by Respondent.

ISSUES PRESENTED

1. Does the trial court have authority to enter a DVPO where
(a) the Petitioner and Respondent have no family or other relationship, and
(b) the Petitioner and Respondent have never resided together?

2. If a trial court awards attorney fees and reserves the amount of fees subject to the award for a future hearing, is it proper for the trial court to order an amount of fees without proper notice to the opposing party, concerning the amount of fees claimed?

STATEMENT OF THE CASE

Sunhee Lee is a 58 year old immigrant from South Korea, with no prior history of domestic violence and no prior criminal records of any kind. She has been married to Walter Lee, DDS, for more than twenty years. Walter and Sunhee own a home in Olympia, which they purchased together in 1991.

Sunhee worked to support her family for eight years, while Dr. Lee attended college and graduate school. After Dr. Lee completed his education and his certification, he opened a private dental practice. Sunhee managed Dr. Lee's dental office, without pay, benefits, or social security, for more than a decade.

Sunhee began working as a nurse, part-time, in 2005. At that time, Dr. Lee hired Suk Bonbrake as an office assistant. Sunhee discovered that

her husband was having an affair with Ms. Bonbrake, in 2007. From 2007 – 2008, Sunhee increasingly suffered from mental, emotional, and physical health problems. She eventually relocated to stay with her relatives in Colorado, while seeking medical treatment.

While in Colorado, Sunhee was in constant contact with Dr. Lee. She managed the family finances and paid the mortgage for the marital community residence in Olympia. Sunhee regularly traveled back & forth to visit Dr. Lee, until she was ready to move back to Olympia in the summer of 2011. CP 96 – 102. Meanwhile, Dr. Lee moved Ms. Bonbrake into the family home, in either May, or November of 2011. VRP 5/30/12 at 9:26-28 (CP 59 – 86); *see also* CP 137.¹

Sunhee permanently returned to Washington on January 31, 2012. CP 108. However, she did not move into her Olympia home, because Ms. Bonbrake was living there with Dr. Lee. Sunhee only made use of a shed, located on the property. CP 99. According to Ms. Bonbrake, during direct examination at the hearing of this case, she never saw Sunhee stay in the house, overnight. VRP 5/30/12 at 6:17-18 (CP 59 – 86). There was no evidence presented in this case, that Sunhee ever spent the night.²

¹ According to Ms. Bonbrake's testimony on May 30, 2012, she moved into the residence in May, 2011. According to what Dr. Lee told the Police on February 3, 2012, Ms. Bonbrake moved into the residence in November, 2011.

² Ms. Bonbrake testified on May 30, 2012, that Sunhee had used the bathroom and kitchen, but there was no evidence that Ms. Bonbrake had ever encountered Sunhee prior to the February 3, 2012, altercation at issue. In fact, on February 15, 2012, Ms. Bonbrake stated plainly, under oath, that she never had any contact whatsoever

Just a few days after Sunhee's return to Washington, on February 3, 2012, she was confronted by Ms. Bonbrake while attempting to retrieve some of her belongings and use the bathroom while she was there. Sunhee asked Ms. Bonbrake to leave. Ms. Bonbrake refused, insulted, and then attacked Sunhee. Sunhee ended up getting the better of Ms. Bonbrake, when the fight was stopped by Dr. Lee. Sunhee immediately sought shelter in the shed outside of the house. She locked herself in and called 911. CP 99; CP 113-114; *see also*, CP 137.

Of course, Ms. Bonbrake claimed Sunhee stuck first. The trial court made no finding concerning Ms. Bonbrake's credibility, but some of her testimony was oddly inconsistent. For instance, on February 3, 2012, Ms. Bonbrake filed a declaration, describing Dr. Lee as her "boyfriend." CP 119.³ However, under oath on May 30, 2012, Ms. Bonbrake clearly and adamantly denied any kind of romantic relationship with Dr. Lee. VRP 5/30/12 at 9:12-26 (CP 59 – 86). Dr. Lee, on the other hand, consistently testified that he had a long-term romantic relationship with Ms. Bonbrake and that she was his "live-in girlfriend." CP 105; *see also*, CP 137 (re. Dr. Lee's statements to the Police).

with Sunhee Lee, prior to February 3, 2012. VRP 2/15/12 at 17 (full Transcript of Hearing dated February 15, 2012, pending Appellant's Motion to Modify the Commissioner's January 25, 2012, Order denying consolidation). Ms. Bonbrake went on to testify that she didn't even know Sunhee was present here, prior to February 3, 2012. *Id.*

³ The "boyfriend" who stopped the fight was later identified as Dr. Lee. CP 106.

Moreover, Ms. Bonbrake claimed increasingly traumatic injuries, but she never produced any medical records concerning diagnosis or treatment of any injuries, despite having been admitted to the hospital.⁴ CP 117 – 119; CP 121 – 124. According to the Police Report, after Ms. Bonbrake was taken to the hospital, “[i]t was discovered Suk Bonbrake did not have any serious injuries.” CP 138. It is noteworthy that Sunhee was also injured. CP 131 – 135; *see also*, CP 137.⁵ However, Ms. Bonbrake’s testimony consistently indicated that she was attacked without offering any kind of resistance. CP 115 *v.* VRP 5/30/12 at 6:19 – 7:12 (CP 59 – 86); *see also*, CP 122 – 124.⁶

On February 3, 2012, when the Police arrived, Sunhee was clearly too distraught to make any rational statements. CP 137. The police report notes that “future communications with Sunhee Lee may require a Korean Translator.” CP 138. Yet, Sunhee was arrested and charged with misdemeanor assault, mostly based on statements by Dr. Lee, who did not witness the initial altercation. CP 137 – 138; CP 105; CP 87 – 88.

⁴ Hospital discharge records apparently filed in the trial court were never provided to Sunhee Lee. CP 42.

⁵ The police report indicates the officer’s observations of “scratches on her wrist, fingers, and face.”

⁶ Also, on February 15, 2012, Ms. Bonbrake testified that she couldn’t hear anything Sunhee was saying to her, prior to the altercation that occurred on February 3, 2012. VRP 2/15/12 at 16:1-13. Later that same day, Ms. Bonbrake testified with considerable detail concerning the conversation she had with Sunhee prior to the altercation. CP 125 (VRP 2/15/12 at 39:6-14). Ms. Bonbrake also recounts different details of the conversation on May 30, 2012. VRP 5/30/12 at 6:21-28 (CP 59 – 86).

Ms. Bonbrake initially filed a petition for an anti-harassment order on February 3, 2012. CP 117 – 119. Then, on February 12, 2012, Ms. Bonbrake filed an amended declaration with the Police, and the criminal charges against Sunhee were subsequently enhanced to felony assault. CP 121 – 124; CP 35 – 36; *see also*, CP 87 – 88. Ms. Bonbrake’s anti-harassment order was initially granted, and then later vacated for failure to meet the requirements of the statute. VRP 7/20/12 at 1:28 – 3:2.⁷ Ms. Bonbrake opposed vacating the anti-harassment order. While awaiting a hearing on Sunhee’s motion to vacate the anti-harassment order, Ms. Bonbrake filed a petition for a DVPO on March 21, 2012. CP 5 – 13.

A few weeks after the May 30, 2012, hearing on Ms. Bonbrake’s DVPO petition, Sunhee was acquitted of any criminal charges, felony or otherwise, by a 12 member jury. CP 88. However, Sunhee’s motion for revision of the DVPO was denied. CP 145. Thereafter, Sunhee timely filed a motion for a new trial on the DVPO and an alternative motion to vacate the DVPO. CP 146 – 147; CP 148 – 152. Both post-revision motions were denied. This appeal follows.

⁷ The DVPO Commissioner referenced “credibility assessments” that were made in the anti-harassment case, without providing any detail. The DVPO Commissioner also indicated those assessments were not disturbed on revision of the anti-harassment order. VRP 7/20/12 at 3:3-6. However, credibility assessments in the anti-harassment case were specifically vacated in the trial court’s revision order. Appellant moved to consolidate the two cases under RAP 3.3(b), in order to have a complete record for appeal. Respondent opposed the motion. Unfortunately, the Appellate Court Commissioner denied the motion to consolidate, despite the DVPO Commissioner’s reliance on and reference to the anti-harassment court file. A motion to modify the Commissioner’s Order dated January 25, 2012, has been filed concurrent with this brief.

It is important to note that as a registered nurse with a military background, a DVPO record will likely preclude Sunhee from employment in her field of training and experience. CP 99. The trial court addressed this issue. CP 198 – 199. The impairment to Sunhee’s career and her ability to earn a living will last far beyond the eventual expiration of the DVPO at issue. Given Sunhee’s age, it may very well end her career.

LEGAL ANALYSIS AND ARGUMENT

I. Domestic Violence Protection Orders Can Only Apply to Persons With Family or Household Relationships, and There is No Family or Household Relationship Between Sunhee Lee and Suk Hui Bonbrake.

The standard of review after a bench trial is whether substantial evidence supports the trial court’s findings of fact and, if so, whether those findings support the trial court’s conclusions of law. *Hegwine v. Longview Fibre Co., Inc.*, 132 Wn. App. 546, 555, 132 P.3d 789 (2006). Substantial evidence exists when there is a sufficient quantity of evidence to persuade a fair-minded, rational person that a finding is true. *In re. Estate of Jones*, 152 Wn.2d 1, 8, 100 P.3d 805 (2004).

The trial court’s conclusions of law are reviewed *de novo*. *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 880, 73 P.3d 369 (2003). Conclusions of law erroneously labeled as findings of fact are also subject to *de novo* review. *Hegwine*, 132 Wn. App. at 556.

Statutory interpretation is a question of law, which we review *de novo*. W. Telepage, Inc. v. City of Tacoma Dep't of Fin., 140 Wash.2d 599, 607, 998 P.2d 884 (2000). “In interpreting statutory provisions, the primary objective is to ascertain and give effect to the intent and purpose of the Legislature in creating the statute.” State v. Watson, 146 Wash.2d 947, 954, 51 P.3d 66 (2002). “To determine legislative intent, we look first to the language of the statute.” *Id.* “If a statute is clear on its face, its meaning is to be derived from the plain language of the statute alone.” *Id.* In addition, “[l]egislative definitions included in the statute are controlling.” *Id.*

Neilson ex rel. Crump v. Blanchette, 149 Wn. App. 111, 115-16, 201 P.3d 1089 (2009).

Error concerning the trial court’s authority to act need not be raised in the trial court, prior to appellate review. *Neilson ex rel.*, 149 Wn. App. at 115, citing RAP 2.5(a) (issue concerning whether parties to a domestic violence protection action were “family or household members” as defined in RCW 26.50.010(2) was raised for the first time, on appeal).

Revised Code of Washington 26.50.010(1) and (2) are not ambiguous. Therefore, the meaning of these provisions can be derived from the plain language of the statute alone. *Neilson ex rel.*, 149 Wn. App. at 116 (citing, *State v. Watson*, 146 Wn.2d 947, 954, 51 P.3d 66 (2002)). Under RCW 26.50.010(1), “domestic violence” within the meaning of the statute occurs between “family or household members.” According to RCW 26.50.010(2):

“Family or household members” means spouses, domestic partners, former spouses, former domestic partners, persons who have a child in common regardless of whether they have been married or have lived together any time, adult persons related by blood or marriage, adult persons who are presently residing together or who have resided together in the past, persons sixteen years of age or older who are presently residing together or who have resided together in the past and who have or have had a dating relationship, persons sixteen years of age or older with whom a person sixteen years of age or older has or has had a dating relationship, and persons who have a biological or legal parent-child relationship, including stepparents and stepchildren and grandparents and grandchildren.

In *Neilson ex rel.*, (*supra*), the Court of Appeals vacated a DVPO, because the parties were not “family or household members” within the definition of RCW 26.50.010(2). Since the parties were not family or household members, the acts alleged could not be considered “domestic violence” within the meaning of RCW 26.50.010(1). *Neilson ex rel.*, 149 Wn.2d at 116-17. Therefore, “[t]he trial court lacked authority to issue the domestic violence protection order.” *Id.* at 117.

“It is neither the function nor the prerogative of courts to modify legislative enactments.” *Anderson v. City of Seattle*, 78 Wn.2d 201, 202, 471 P.2d 87 (1970). Thus, RCW 26.50 cannot be modified to encompass incidents and parties that are not within the scope of the statute. *Neilson ex rel.*, 149 Wn.2d at 118.

In the case at bar, the trial court erroneously concluded that Suk Bonbrake had “established that there is a family or household member relationship,” absent any real evidence. CP 143. Ms. Bonbrake and Sunhee are not related. Counsel for Ms. Bonbrake attempted to demonstrate she and Sunhee were “adult persons [] residing together or who have resided together in the past.” RCW 26.50.010(2). However, Sunhee and Ms. Bonbrake never lived together, at any time.

Ms. Bonbrake moved in with Dr. Lee, in either May or November of 2011. VRP 5/30/12 at 9:26-28 (CP 59 – 86); CP 137. At that time, Sunhee was not even residing in this State. CP 98. When Sunhee returned to Washington permanently on January 31, 2012, she did not move into the home where Ms. Bonbrake was residing. CP 108. Ms. Bonbrake testified that she never saw Sunhee spend the night. VRP 5/30/12 at 6:17-18 (CP 59 – 86).

Ms. Bonbrake also testified that sometime between January 31, 2012, and February 3, 2012, (presumably) Sunhee used the kitchen and bathroom. VRP 5/30/12 at 6 (CP 59 – 86). However, Ms. Bonbrake formerly testified, under oath, that she had never seen Sunhee prior to February 3, 2012. VRP 2/15/12 at 17 (pending). Even if Sunhee had intended to use the bathroom while retrieving her belongings on February 3, 2012, this incident cannot establish a household relationship.

Otherwise, any visitor to any home, and any landlord in Washington may be subject to RCW 26.50.

II. The Trial Court Abused Its Discretion When it Entered an Attorney Fee Award Absent Proper Notice.

If a legal basis for an award of attorney fees exists, the trial court's award or denial of attorney fees and the reasonableness of any attorney fee award is reviewed for an abuse of discretion. *Gander v. Yeager*, 167 Wn. App. 638, 647, 282 P.3d 1100 (2012). "A trial court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law." *Scheib v. Crosby*, 160 Wn. App. 345, 350, 249 P.3d 184 (2011), *citing*, *Wash. State Phys. Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 339, 858 P.2d 1054 (1993).

Superior Court Civil Rule 54 requires that "[n]o order or judgment shall be signed or entered until opposing counsel have been given five (5) days' notice of presentation and served with a copy of the proposed order or judgment." Pursuant to Thurston County Local Court Rule 5(d)(1)(C), briefs and supporting affidavits for any scheduled hearing must be served and filed prior to 12:00 pm, five court days prior to the hearing. *See also*, Thurston County LSPR 94.03B.

On May 30, 2012, the Commissioner who signed the DVPO at issue awarded Ms. Bonbrake one hour of attorney fees, because Sunhee

did not testify at the hearing.⁸ VRP 5/30/12 at 25:9-21 (CP 59 – 86); *see also*, CP 144. No additional fees were awarded by the trial court on Sunhee's revision motion. CP 145.

At the conclusion of the hearing on Sunhee's motion for a new trial, and her alternative motions to vacate or terminate the DVPO, the trial court awarded additional fees to Ms. Bonbrake. The additional fee award applied to the motion to terminate the DVPO only. The court scheduled a presentation hearing in regard to the fee award for September 6, 2012. The court also ordered counsel for Ms. Bonbrake to prepare a fee affidavit and send it to counsel for Sunhee. CP 199 – 200.

Counsel for Ms. Bonbrake did not serve any materials, affidavits or otherwise, in support of their fee request, until 11:55 am, the same day of the presentation hearing. CP 164 and 166 – 168; *see also*, CP 157 – 160. Without allowing any meaningful opportunity to respond, on September 6, 2012, the trial court entered an order and judgment for \$2,000 in attorney fees. CP 161 – 162.

Sunhee timely filed a motion for reconsideration of the order and judgment, under CR 59(a)(1), due to irregularity in the proceedings. Sunhee's motion for reconsideration was denied by Order dated October 16, 2012. CP 221. The reconsideration motion was supported by

⁸ Sunhee was awaiting her criminal trial at the time, and so exercised her right against self-incrimination under the Fifth Amendment to the United States Constitution.

argument and proof that counsel did not timely serve a fee affidavit. CP 164 and 166. Yet, the trial court denied the reconsideration motion, reasoning that the court provided adequate notice of the presentation hearing. The trial court did not mention failure to timely serve papers, but mentioned that “counsel for Ms. Bonbrake should have provided counsel for Ms. Lee with a fee affidavit as required by the Court.” CP 219 – 220.

The trial court’s reasoning for denying Sunhee’s reconsideration motion and the commensurate \$2,000 fee award appears to be punitive in nature. It is apparent that the trial court intended to punish Sunhee for exercising all available procedural means of vacating or terminating a DVPO that should have never been entered. CP 217 – 220.

Sunhee has a right to be provided with a copy of any order or judgment to be entered against her, under the clear and unequivocal rules of the Washington Superior Court, and the local rules of the Thurston County Superior Court. Denial of Sunhee’s fundamental right to notice and a meaningful opportunity for response is certainly an abuse of discretion. Therefore, the Judgment and Order entered in the trial court on September 6, 2012, should be reversed.

Sunhee also contends that the award of fees *per se* is an abuse of discretion. Sunhee could not testify at the hearing on May 30, 2012, without waiving important Constitutional rights. Furthermore, Sunhee has every right to utilize the court procedures available to vacate a civil Order

that will preclude her from employment in her field of training and experience.

CONCLUSION

Our justice system is supposed to do equity. Our laws, including RCW 26.50, are designed to deter and rectify oppression and abuse. But in this case, our laws have heaped burning coals of injustice onto a now indigent immigrant who has already suffered years of intolerable oppression. Sunhee is a model citizen. She has never violated any laws. She worked her entire life to support her family and her husband's education and career goals.

After spending all of her resources and borrowing more money than she can possibly repay, to defend herself against meritless anti-harassment, DVP, and criminal proceedings, Sunhee has nothing left to support her rights in a currently pending dissolution. Sunhee has been relegated to a life of poverty, unable to obtain gainful employment, excluded from her own property, her marriage in dissolution and her husband taking everything she worked so hard to achieve in life, only to give it to someone else.

The DVPO at issue should be vacated, and an award of costs should be entered under RAP 14.2. At the very least, this Court should

vacate the order and judgment for attorney fees entered in the trial court
on September 6, 2012.

RESPECTFULLY SUBMITTED this 21st day of February, 2013.



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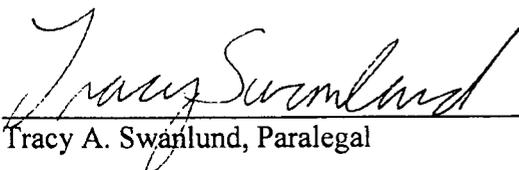
DECLARATION OF SERVICE

On said date below I emailed a true and accurate copy of the following document, pursuant to agreement of counsel for service by email, at the email address indicated below: APPELLANT'S OPENING BRIEF, filed in the Court of Appeals Cause No. 43989-1-II on February 21, 2013.

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I declare subject to penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: February 21, 2013, at Snohomish, Washington



Tracy A. Swanlund, Paralegal