

No. 70549-1

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

SUNG LEE KIM, HUNG KIM and DELTA INN, INC.,

Appellants,

and

SOON IM KIM,

Respondent.

49-2-01-0-00000
2010-01-13 09:04
100 S. King Street
Seattle, WA 98104
M

APPEAL FROM THE SUPERIOR COURT
FOR KING COUNTY
THE HONORABLE PALMER ROBINSON

BRIEF OF APPELLANT SUNG KIM

THE HUNSINGER LAW FIRM
Attorney for Appellant Sung Kim

By: MICHAEL D. HUNSINGER
WSBA NO. 7662

100 S. King Street, Suite 400
Seattle, WA 98104
(206) 624-1177

TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	ASSIGNMENTS OF ERROR	1
III.	ISSUES	2
IV.	STATEMENT OF FACTS	2
	A. Delta Inn Paid Many Of Sung And Soon Kim’s Expenses During Their Marriage, But Its Owner Hung Refused To Pay Soon’s Expenses After Dissolution.....	2
	B. Before Sung And Soon Were Divorced, A Previous Court Had Rejected Soon’s Claim That She And Sung Owned Delta Inn.....	5
	C. The Trial Court Held Sung In Contempt After He Was Unable To Pay All Soon’s \$20,000 Monthly Maintenance, On The Ground That Sung Had “Access To Substantially More” Income From Delta Inn.	7
V.	ARGUMENT.....	11
	A. The Trial Court Violated Sung’s Due Process Rights By Making His Freedom Dependent On The Action Of Third Parties He Did Not Control.....	11
	B. The Trial Court’s Award Of Attorney’s Fees Based On Its Erroneous Contempt Order Must Be Reversed.....	18
VI.	CONCLUSION	18

TABLE OF AUTHORITIES

STATE CASES

<i>Britannia Holdings Ltd. v. Greer</i> , 127 Wn. App. 926, 113 P.3d 1041 (2005), <i>rev. denied</i> , 156 Wn.2d 1032 (2006)	13
<i>In re M.B.</i> , 101 Wn. App. 425, 3 P.3d 780 (2000), <i>rev. denied</i> , 142 Wn.2d 1027, 21 P.3d 1149 (2001)	11-14, 16
<i>Nielson By & Through Nielson v. Spanaway Gen. Med. Clinic, Inc.</i> , 135 Wn.2d 255, 956 P.2d 312 (1998)	16
<i>Omni Holding & Dev. Corp. v. 3D.S.A., Inc.</i> , 356 Ark. 440, 156 S.W.3d 228 (2004)	14-15
<i>Roe v. TeleTech Customer Care Mgmt. (Colorado) LLC</i> , 171 Wn.2d 736, 257 P.3d 586 (2011)	16

FEDERAL CASES

<i>Newman v. Graddick</i> , 740 F.2d 1513 (11th Cir. 1984)	14
<i>United States v. Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am., AFL-CIO</i> , 899 F.2d 143 (2d Cir. 1990)	14, 17

STATUTES

RCW ch. 7.21	11
RCW 7.21.010	11-12
RCW 7.21.030	2, 11-12, 18
RCW 7.21.040	11

RCW 26.18.040..... 11

RCW 26.18.050..... 11, 13, 17

RULES AND REGULATIONS

RAP 10.1..... 17

I. INTRODUCTION

Because it was “convinced” that appellant Sung Lee Kim could “access” additional “income” from his employer Delta Inn, the trial court ordered Sung¹ jailed for contempt after he failed to pay all of his \$20,000 monthly maintenance obligation to respondent Soon Im Kim. Delta Inn, which is owned by appellant Sung’s brother Hung Kim, paid Soon \$21,000 to prevent Sung’s incarceration. The trial court’s contempt order violated Sung’s due process rights by making his freedom dependent on the actions of his employer and brother. This court should reverse the contempt order and the accompanying attorney’s fee award.

II. ASSIGNMENTS OF ERROR

1. The trial court erred in entering its June 24, 2013, contempt order. (CP 698-705)
2. The trial court erred in entering its findings of fact 2.4-2.5 that Sung Kim had the ability to pay Soon’s \$20,000 monthly maintenance. (CP 699-700)

¹ Since they all share the last name Kim, for clarity the non-corporate parties are referred to by their first names. No disrespect is intended.

3. The trial court erred in entering its order awarding Soon \$14,102.47 in attorney's fees and costs related to the contempt proceedings. (CP 771-73)

III. ISSUES

1. Does a trial court violate a contemnor's due process rights by ordering him jailed until third parties make a maintenance payment to his ex-wife on his behalf?

2. Must an award of fees under RCW 7.21.030(3) be reversed when the underlying contempt order is reversed?

IV. STATEMENT OF FACTS

A. **Delta Inn Paid Many Of Sung And Soon Kim's Expenses During Their Marriage, But Its Owner Hung Refused To Pay Soon's Expenses After Dissolution.**

Sung Kim and Soon Kim married on October 14, 1976. (CP 15)² Throughout their marriage, Sung worked for Delta Inn Inc., which is owned by his older brother Hung Kim and operates a chain of hotels, mostly in Oregon. (CP 307; Ex. 587 at 3-13) Sung managed the day-to-day operations of Delta Inn on behalf of Hung, who lives in South Korea. (Ex. 587 at 3, 5, 11) Sung's role in Delta

² The facts relevant to all appellants' arguments largely overlap, and are set forth in full in both opening briefs for the court's convenience. This brief also recites additional facts relevant only to Sung's appeal.

Inn became even more critical after Hung suffered a series of strokes and the tragic death of Hung's wife and daughter. (Ex. 587 at 9) Over the years, Delta Inn generously compensated Sung by paying him a base salary as well as his and Soon's substantial expenses, which were sometimes in excess of \$80,000 a month. (CP 23; Ex. 587 at 15)

Soon filed for dissolution from Sung on March 10, 2010. (CP 15) From September 2010 through October 2012, Sung paid Soon \$19,000 in temporary monthly maintenance with funds received from Delta Inn and Hung. (CP 295-96, 307, 408) Although Hung, through Delta Inn, had generously provided for Sung and Soon during their marriage, Hung decided that neither he nor Delta Inn would continue to pay Soon's expenses at the conclusion of the dissolution trial. (CP 284, 296, 307 ("It is my understanding that the divorce is about to be finalized, and [Soon] will no longer be my sister-in-law. . . . I have no interest in supporting her any further"), 408) In November 2012, Delta Inn began paying Sung a \$10,000 gross monthly income (\$7,200 after taxes). (CP 284-85, 296, 307, 404-05, 408, 431-36) Additionally, Delta Inn continued to pay for some of Sung's business-related expenses. (CP 296, 404)

Pursuant to this compensation policy, Hung gave Delta Inn employees "clear instructions to pay [Sung] only the authorized monthly salary and minor expenses." (CP 307) Each month, the Delta Inn comptroller reviewed Sung's expenses and told Sung how much he must reimburse to Delta Inn. (CP 404) From January through May 2013, Delta Inn paid Sung his \$10,000 monthly salary and monthly expenses ranging from \$2,257.49 to \$4,588.59, some of which Sung later reimbursed. (CP 404, 431-36, 446-62) In total, Delta Inn paid Sung \$63,183.53³ between January and May 2013, an average monthly compensation of \$12,636.71.

In addition to working for Delta Inn, Sung owns 50% of Landmark Investment Construction, Inc., a corporation that owns and manages two shopping centers. (CP 16-17, 285) Due to financial difficulties and much needed maintenance, Sung has not received any income from Landmark since May 2012, and may not receive any further income until 2014. (CP 286-90, 342-53)

³ This average was calculated from the total of Sung's base salary (\$50,000) plus the credit card balances paid by Delta Inn (CP 446-60, \$15,904.37) minus Sung's reimbursement to Delta Inn (CP 462, \$2,720.84), divided by five.

B. Before Sung And Soon Were Divorced, A Previous Court Had Rejected Soon's Claim That She And Sung Owned Delta Inn.

After filing for dissolution from Sung, Soon also had sued Delta Inn and Hung, seeking a declaratory judgment that she and Sung, not Hung, owned Delta Inn. (CP 306-07; Ex. 587 at 2) After a four-week trial, King County Superior Court Judge Carol Schapira in December 2011 rejected Soon's claims of ownership. (Ex. 587) Judge Schapira found that although Sung and Soon had aided in Delta Inn's incorporation and served as directors and officers at various times, Hung and his late wife Un Hung Kim were at all times the sole owners of Delta Inn, and that Soon "knew that Hung Kim and Un Hung Kim were the record owners of Delta Inn." (Ex. 587 at 3-13, 19-22)

Judge Schapira rejected Soon's contention that stock certificates reflected her and Sung's ownership interest in Delta Inn, finding that one certificate submitted as "proof" of Soon's claims had been "altered and/or backdated," and that another "closely resembles a stock certificate in Sung Kim and Soon Kim's name for 76 shares" in a different corporation. (Ex. 587 at 11, 19-20) Judge Schapira also found that "Hung Kim gave Sung Kim and Soon Kim

significant leeway to pursue personal projects and provided generous compensation for their continued work for Delta Inn.” (Ex. 587 at 15)

Judge Schapira further found that Soon had brought her action with “unclean hands,” waiting 23 years to make any claim of ownership to Delta Inn and during that time representing to the world, under oath, that Hung owned Delta Inn, despite her “above-average understanding of business, financing and corporate formalities.” (Ex. 587 at 15-18, 21-24) In particular, Judge Schapira found that Soon had represented to the IRS that Hung and Un Hung owned Delta Inn, and that she “testified that Hung Kim was the owner of Delta Inn (which she claims was a lie) in order to defend against a lawsuit that would hold her and Sung Kim personally liable.” (Ex. 587 at 22) Judge Schapira further found that Soon never returned \$1 million in Delta Inn funds that Sung had given her (without Hung’s consent) in the hopes of reconciliation. (Ex. 587 at 15; *see also* CP 5)

C. The Trial Court Held Sung In Contempt After He Was Unable To Pay All Soon's \$20,000 Monthly Maintenance, On The Ground That Sung Had "Access To Substantially More" Income From Delta Inn.

On March 20, 2013, after a 10-day trial, King County Superior Court Judge Palmer Robinson ("the trial court") entered a decree of dissolution, findings of fact, and conclusions of law in this action. (CP 1-69) The trial court found that because Delta Inn "paid all of their expenses, apparently without limitation," Sung and Soon had a "very comfortable" standard of living during their marriage, and that Sung "has the ability to get or provide whatever income he needs or thinks he needs." (CP 23) The trial court thus had "no doubt at all that [Sung] is capable of meeting his needs and financial obligations while meeting those of [Soon] from this point forward." (CP 23) Based on this finding, the trial court awarded Soon \$20,000 in monthly maintenance for the rest of her life. (CP 24) Additionally, the trial court required Sung, then age 65, to obtain a \$4 million life insurance policy naming Soon as beneficiary, and awarded Soon \$550,000 in attorney's fees. (CP 7-8, 25-27)

On June 5, 2013, Soon filed a motion seeking to imprison Sung for contempt, after he failed to pay all the maintenance due under the decree. (CP 70-74) Sung responded, noting that he

earned \$10,000 in gross monthly income and that he had paid as much as possible towards maintenance each month, ranging from \$2,600 to \$3,500. (CP 284-90, 296, 307, 372-76, 405, 408)

Sung submitted paystubs and credit cards statements documenting his salary and the expenses paid for by Delta Inn, as well as a financial declaration demonstrating \$3,556 in basic monthly expenses. (CP 285-86, 320, 404, 431-62)⁴ Sung stressed that he could not force Delta Inn to pay him more than his \$10,000 salary or otherwise alter the way it compensated him. (CP 285, 296 (“I have no ability, or power, to get money from Delta Inn, Inc. that it does not want to pay me, and what it wants to pay me is \$10,000 per month, along with payment of some of my expenses.”), 375, 408) Sung also noted that in addition to the maintenance he had been able to pay, Soon had received \$62,607 from Landmark Investment Construction between December 2012 and April 2013 (\$12,521 per month), that she had listed their former residence (valued at \$1.75 million by the trial court in the dissolution decree) for sale at \$2.5 million, and that she owned a condo in Los Angeles

⁴ Sung also documented his efforts to obtain the \$4 million life insurance policy required by the trial court. The life insurance agent had quoted Sung a \$245,776 annual premium for the court-ordered coverage. (CP 406, 463-69)

that generated steady income and was worth nearly \$1 million. (CP 289)

Judge Robinson, who had presided over the dissolution trial, also heard the motion for contempt. On June 24, 2013, the trial court found Sung in contempt, entered a \$110,299.10 judgment for back maintenance against him, and ordered Sung immediately jailed unless he paid remaining June maintenance due of \$16,000 and \$5,000 towards delinquent maintenance (\$21,000 total). (CP 698-705) After incorporating its findings from the dissolution trial (CP 699), the trial court found that Sung had the past and present ability to comply with the order, because it “remain[ed] convinced [Sung] is receiving more income than disclosed by him and that he has access to more than reflected in his financial declaration.” (CP 698-703)

Specifically, the trial court believed that Delta Inn’s payment of Sung’s expenses was “income” that Sung could “access” if he chose to do so. (6/24 RP 59-60 (“I remain convinced that he is getting substantially more in income, as I’m used to the word being used, from Delta Inn than shows up on his financial declaration. . . . I think he has access to substantially more in what I consider to be

income than is reflected in his financial declaration.”), 6/25 RP 18 (“the Kims had \$85,000 a month, plus or minus some percent, in credit card expenses which were paid by Delta Inn. . . . That is income to Mr. Kim. And that was the basis of my award of maintenance.”); 6/25 RP 20 (“I don’t know what else to call it other than income. When a company pays someone’s living expenses and salary and all kinds of other expenses, to me that’s income. I don’t know any other way around it. And that’s the basis of my ruling.”))

In order to keep his brother out of jail, Hung had Delta Inn pay \$21,000 to Soon on June 25, 2013, after both Hung and Delta Inn appeared through counsel in this action. (6/25 RP 4-5) On June 26, 2013, Sung, Hung, and Delta Inn filed a notice of appeal from the June 24 contempt order and judgment. (CP 711-21) On August 5, 2013, the trial court awarded Soon a judgment against Sung for \$14,102.47 in attorney’s fees and costs related to the contempt proceedings. (CP 771-73) Sung filed an appeal from that decision (CP 774-78) that has been consolidated with this appeal.

V. ARGUMENT

A. The Trial Court Violated Sung's Due Process Rights By Making His Freedom Dependent On The Action Of Third Parties He Did Not Control.

The trial court's order violated Sung's due process rights by placing his freedom not under his own control, but under Delta Inn's and Hung's control. This court should reverse the trial court's contempt order.

RCW 26.18.050, the statute governing support and maintenance contempt, incorporates Washington's general contempt statute RCW ch. 7.21. RCW 26.18.050(1) ("If an obligor fails to comply with a support or maintenance order, a petition or motion may be filed without notice under RCW 26.18.040 to initiate a contempt action as provided in chapter 7.21 RCW."). RCW ch. 7.21 provides for "remedial" or "punitive" sanctions. RCW 7.21.010(2)-(3); RCW 7.21.030-040. Remedial sanctions are "imposed for the purpose of coercing performance," whereas punitive sanctions are "imposed to punish a past contempt of court." RCW 7.21.010(2)-(3). This court reviews de novo whether a remedial sanction's purge condition exceeds the trial court's authority or violates a contemnor's due process rights. *In re M.B.*,

101 Wn. App. 425, 454, 3 P.3d 780 (2000), *rev. denied*, 142 Wn.2d 1027, 21 P.3d 1149 (2001).

Remedial sanctions aim to coerce action *by the contemnor*, that is, the “person [that] has failed or refused to perform an act that is yet within the person’s power to perform.” RCW 7.21.030(2); RCW 7.21.010(3) (a remedial sanction is imposed on a contemnor to coerce “an act that is yet in the person’s power to perform”). A court may imprison a contemnor as a remedial sanction “only so long as it serves a coercive purpose,” RCW 7.21.030(2)(a), and “only when no alternatives appear available for coercing obedience to the court’s order,” *M.B.*, 101 Wn. App. at 439.

A remedial sanction that imprisons a contemnor who lacks the ability to purge his contempt violates the contemnor’s due process rights:

A contempt sanction involving imprisonment remains coercive . . . only if the contemnor is able to purge the contempt and obtain his release by committing an affirmative act. In other words, the contemnor “carries the keys of his prison in his own pocket” and will be released upon obeying the order. Accordingly, there must be a showing that the contemnor has the means to comply. Coercive incarceration loses its coercive character and becomes punitive where the contemnor cannot purge the contempt. This violates due process.

Britannia Holdings Ltd. v. Greer, 127 Wn. App. 926, 932, ¶ 15, 113 P.3d 1041 (2005), *rev. denied*, 156 Wn.2d 1032 (2006); see also RCW 26.18.050(4) (a contemnor can demonstrate his inability to comply with maintenance order by establishing that he “exercised due diligence in seeking employment, in conserving assets, or otherwise in rendering himself or herself able to comply with the court’s order”).

Because the sole purpose of remedial sanctions is to coerce a contemnor into taking an action within his or her power, remedial sanctions may not be imposed against a contemnor to compel action by a third party. ***M.B.***, 101 Wn. App. at 460. In *M.B.*, for instance, the trial court held a juvenile in contempt until she was enrolled and accepted into a treatment program. This court reversed because the trial court’s contempt order violated the juvenile’s due process rights. Because the juvenile’s acceptance into the program “was not within her sole control” and was “dependent upon the actions of a third party,” the juvenile did not “carry the keys of the prison door in her own pocket”:

If R.H.'s ability to purge herself of the contempt is dependent upon the actions of a third party, the purpose of civil contempt is defeated.

For these reasons, the treatment purge condition was punitive and therefore unlawful.

M.B., 101 Wn. App. at 460.

Courts elsewhere have also recognized that a court may not imprison a contemnor to coerce action by a third party. See, e.g., **United States v. Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am., AFL-CIO**, 899 F.2d 143, 147 (2d Cir. 1990) ("Ligurotis argues that the court cannot, as a condition to purging himself of contempt, coerce him to order persons whose actions he may not rightfully control to forfeit their substantial legal rights. We agree."); **Newman v. Graddick**, 740 F.2d 1513, 1528 (11th Cir. 1984) ("There is no authority for holding Attorney General Graddick in civil contempt 'to prompt the Governor, the Legislature or the Parole Board of the State of Alabama, separately or severally, to remedy the problem.' This so-called 'hostage' theory of contempt . . . has no legal support."). In **Omni Holding & Dev. Corp. v. 3D.S.A., Inc.**, 356 Ark. 440, 156 S.W.3d 228 (2004), for instance, the Arkansas Supreme Court reversed the portion of a trial court's contempt order that required

an employee imprisoned until his employer paid \$75,000 to a competitor because “[t]he keys to the jail in civil contempt must rest in the hands of the contemnor and not a third party.” 156 S.W.3d at 238.

Here, the trial court’s contempt order violated Sung’s due process rights by making his freedom dependent not on his own actions, but on the action of third-parties Delta Inn and Hung. The trial court expressly based its finding that Sung could meet his \$20,000 monthly maintenance obligation on its belief that he could simply “access” additional “income” from Delta Inn and Hung. (CP 23, 703 (“The court remains convinced Respondent . . . has access to more than reflected in his financial declaration”); 6/24 RP 59-60 (“I think he has access to substantially more in what I consider to be income”); 6/25 RP 8-20 (“When a company pays someone’s living expenses and salary and all kinds of other expenses, to me that’s income. . . . And that’s the basis of my ruling.”) But Sung had no ability to compel Delta Inn and Hung to provide him “access” to additional income (CP 285, 296, 375, 408), as Judge Schapira

necessarily found in rejecting Soon's claim that she and Sung owned Delta Inn. (Ex. 587)⁵

Delta Inn and Hung employed Sung "at will," and were free to decide the terms of that employment, including his compensation. ***Roe v. TeleTech Customer Care Mgmt. (Colorado) LLC***, 171 Wn.2d 736, 754, 257 P.3d 586 (2011). Just as the treatment program in *M.B.* was free to refuse the juvenile's application, so too were Delta Inn and Hung free to refuse Sung "access" to their funds. Although the trial court could require that Sung seek money from Delta Inn and Hung – an act within his power to perform – it could not imprison him because Delta Inn and Hung refused to pay him more than his agreed salary.

Without "access" to additional funds from Delta Inn and Hung, Sung could not comply with the trial court's \$20,000 monthly maintenance award, contrary to its findings. (FF 2.4-2.5, CP 699-700) Sung documented his \$10,000 gross monthly salary (\$7,200

⁵ As noted in Delta Inn's and Hung's opening brief at 17-18, because they were not parties to the contempt action they had no opportunity to argue that Soon was collaterally estopped by Judge Schapira's findings from asserting that Sung had unfettered access to Delta Inn's funds. See ***Nielson By & Through Nielson v. Spanaway Gen. Med. Clinic, Inc.***, 135 Wn.2d 255, 262, 956 P.2d 312 (1998) (collateral estoppel "prevents relitigation of an issue after the party against whom the doctrine is applied has had a full and fair opportunity to litigate his or her case").

after taxes) from Delta Inn with paystubs, as well as his \$3,556 in basic monthly expenses. (CP 285-86, 320, 404, 431-44) He proved that Landmark Construction has not produced income since May 2012, and may not produce income until 2014. (CP 286-90, 342-53) That Delta Inn and Hung ultimately paid Soon to prevent Sung's incarceration demonstrates only their concern for an employee and brother, not that Sung himself had the ability to comply with the court's order. *Teamsters*, 899 F.2d at 147 (recognizing that a third party might "accede to the contemnor's demand even though he was not legally obliged to accede" "in order to spare the contemnor the heavy burden of contempt penalties").

Sung established his diligence in obtaining employment and conserving assets, and his inability after doing so to pay \$20,000 monthly maintenance to Soon. RCW 26.18.050(4). The trial court erred by finding that Sung nevertheless had the ability to comply with its order. By making Sung's freedom dependent on the actions of Delta Inn and Hung, the trial court deprived Sung of the keys to his jail cell, in violation of his due process rights. Pursuant to RAP 10.1(g), Sung also adopts all arguments made in the opening brief

of appellants Delta Inn and Hung Kim. This court should reverse the contempt order.

B. The Trial Court's Award Of Attorney's Fees Based On Its Erroneous Contempt Order Must Be Reversed.

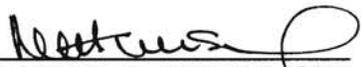
The trial court awarded Sung \$14,102.47 in attorney's fees and costs under RCW 7.21.030(3), which allows an award of fees against "a person found in contempt." (CP 771-73) Because the contempt order must be reversed, Sung is not in contempt and the award of attorney's fees and costs must also be reversed.

VI. CONCLUSION

For the reasons set out in this and co-appellants' briefs, this court should reverse the contempt order and the award of attorney's fees and costs.

Dated this 5 day of November, 2013.

THE HUNSINGER LAW FIRM
Attorneys for Appellant Sung Kim

By: 
MICHAEL D. HUNSINGER
WSBA NO. 7662

DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on November 6, 2013, I arranged for service of the foregoing Brief of Appellant Sung Kim to the Court of Appeals, Division I, and to the parties to this action as follows:

Catherine W. Smith
Smith Goodfriend, P.S.
1619 8th Avenue North
Seattle, WA 98109

_____ Facsimile
_____ Messenger
_____ U.S. Mail
 E-Mail

Jennifer J. Payseno
Jessica Moore
McKinley Irvin, PLLC
1501 4th Avenue, Suite 1750
Seattle, WA 98101

_____ Facsimile
 Messenger
_____ U.S. Mail
_____ E-Mail

DATED at Seattle, Washington this 6th day of November, 2013.



CAMILLE CAMPBELL MILLS