

70549-1

70549-1

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.

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

REPLY 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

FILED
COURT OF APPEALS DIV. I
STATE OF WASHINGTON
2014 JAN -6 PM 3:59

TABLE OF CONTENTS

I. INTRODUCTION 1

II. REPLY ARGUMENT 1

 A. The Trial Court Violated Sung's Due Process Rights By Making His Freedom Dependent On Hung And Delta Inn Agreeing To Grant Him "Access" To Funds To Pay Soon's Maintenance. 1

 B. Soon Is Not Entitled To Her Fees Below Or On Appeal..... 5

III. CONCLUSION..... 6

TABLE OF AUTHORITIES

STATE CASES

In re M.B., 101 Wn. App. 425, 3 P.3d 780
(2000), *rev. denied*, 142 Wn.2d 1027 (2001) 1

Omni Holding & Dev. Corp. v. 3D.S.A., Inc.,
356 Ark. 440, 156 S.W.3d 228 (2004)..... 2

*Roe v. TeleTech Customer Care Mgmt.
(Colorado) LLC*, 171 Wn.2d 736, 257 P.3d
586 (2011)..... 3

FEDERAL CASES

Newman v. Graddick, 740 F.2d 1513 (11th
Cir. 1984) 2

*United States v. Int'l Bhd. of Teamsters,
Chauffeurs, Warehousemen & Helpers of
Am., AFL-CIO*, 899 F.2d 143 (2d Cir. 1990)..... 2

OTHER AUTHORITIES

RAP 10.1 3

RAP 10.3 5

I. INTRODUCTION

Respondent Soon Kim concedes that the trial court held appellant Sung Kim in contempt for not paying her maintenance because it believed that Sung could “access” from his employer appellant Delta Inn, Inc., and its owner appellant Hung Kim, funds to pay Soon’s maintenance. But Sung could not require Delta Inn or Hung to pay Soon’s maintenance. The trial court erred by making Sung’s freedom dependent on the actions of third parties he could not control. This court should reverse the trial court’s contempt order and award of attorney’s fees.

II. REPLY ARGUMENT

A. **The Trial Court Violated Sung’s Due Process Rights By Making His Freedom Dependent On Hung And Delta Inn Agreeing To Grant Him “Access” To Funds To Pay Soon’s Maintenance.**

The trial court’s contempt order violated Sung’s due process rights by making Sung’s freedom dependent on the actions of Delta Inn and Hung. This court should reverse the trial court’s contempt order.

A contemnor “must carry the keys of the prison door in her own pocket,” and thus a purge condition that requires action by a third party violates the contemnor’s due process rights. *In re M.B.*,

101 Wn. App. 425, 460, 3 P.3d 780 (2000), *rev. denied*, 142 Wn.2d 1027 (2001) (Sung Br. 14); ***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.") (Sung Br. 14); ***Omni Holding & Dev. Corp. v. 3D.S.A., Inc.***, 356 Ark. 440, 156 S.W.3d 228, 238 (2004) ("[t]he keys to the jail in civil contempt must rest in the hands of the contemnor and not a third party") (Sung Br. 14-15); ***Newman v. Graddick***, 740 F.2d 1513, 1528 (11th Cir. 1984) (Sung Br. 14).

Here, as in each of the above cases, the trial court violated Sung's due process rights by making his freedom dependent not on his own actions, but on the action of third parties he could not control. Sung had no ability to compel Delta Inn and Hung to provide him "access" to additional income. (CP 285, 296, 375, 408) Indeed, a separate court rejected Soon's claim that she and Sung owned Delta Inn, and thus had the right to control its resources, in an unappealed judgment binding upon the parties in this action.

(Ex. 587) Delta Inn and Hung employed Sung “at will,” and were free to decide the terms of his employment, including his compensation. ***Roe v. TeleTech Customer Care Mgmt. (Colorado) LLC***, 171 Wn.2d 736, 754, 257 P.3d 586 (2011).

Soon attempts to distinguish the cases cited by Sung by arguing that their contempt orders “specifically predicated the contemnor’s purge conditions on the actions of third parties.” (Resp. Br. 19 n.5) And that is precisely what the trial court did. The trial court expressly based its order on Hung and Delta Inn agreeing to grant Sung “access” to their funds. (Sung Br. 15-16)¹

Soon concedes that the trial court held Sung in contempt because it believed that Sung could “access” the funds to pay her maintenance from Hung and Delta Inn. (Resp. Br. 7 (“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.”) (quoting 6/25 RP 18-20) (emphasis removed); see *also* Resp. Br. 3 (“[O]ne of my concerns obviously in the underlying trial

¹ As argued in Hung and Delta Inn’s Reply Brief it is immaterial whether the trial court directly “ordered” Hung and Delta Inn to pay Soon’s maintenance. RAP 10.1(g). The trial court’s contempt order sent Hung and Delta Inn a clear coercive message – pay Soon’s maintenance or Sung will be incarcerated.

was that a huge percentage if not a majority of the Kims' personal expenses were being paid by Delta Inn.") (quoting 6/24 RP 21-22); Resp. Br. at 4 ("his personal expenses are still being paid by Delta Inn") (quoting 6/24 RP 21-22); Resp. Br. 6 ("It came from Delta Inn") (quoting 6/25 RP 18-20)) Although Soon asserts that Sung has "access to more than reflected in his financial declaration" (Resp. Br. 20), she does not dispute that Sung could only get "more" *from* Hung and Delta Inn. (See Sung. Br. 16-18)

Soon's other factual assertions confirm that Sung could not pay Soon's maintenance unless Hung and Delta Inn in their discretion granted him "access" to their funds. For example, Soon repeatedly emphasizes that Sung paid "\$19,000 per month during the dissolution proceedings" (Resp. Br. 2, 10, 12), but glosses over the source of those funds – Hung and Delta Inn. (CP 295-96, 307, 408) Soon likewise fails to explain that Sung and Soon could "spen[d] upwards of \$80,000 per month without incurring debt or invading capital" only because Delta Inn agreed to pay those expenses during their marriage. (Resp. Br. 1; *see also* CP 23; 6/25 RP 18-20) Finally, Soon neglects to mention that Sung "advised" the court he could make the payment necessary to avoid

incarceration only after Hung agreed to pay it. (Resp. Br. 14 (citing 6/25 RP 19))

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. This court should reverse the trial court's contempt order.

B. Soon Is Not Entitled To Her Fees Below Or On Appeal.

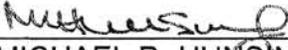
Because the contempt order must be reversed, Sung is not in contempt and the award of attorney's fees and costs must also be reversed. (Sung Br. 18; CP 771-73) Moreover, Soon fails to provide any support for her assertion she is entitled to her attorney's fees on appeal because Sung "persisted in driving forward litigation without evidence or legal arguments." (Resp. Br. 21) To the contrary, Sung supported his argument that the trial court violated his due process rights with ample evidence and legal authority. (See Sung App. Br. 11-18 (supporting argument with both record cites and legal authority)) See *a/so* RAP 10.3(a)(6). Indeed, Soon cites in her own brief the legal authority cited by Sung. (See, *e.g.*, Resp. Br. 19 n.5) This court should reject Soon's conclusory request for fees on appeal.

III. 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 4 day of January, 2014.

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 January 6, 2014, I arranged for service of the foregoing Reply Brief of Appellant Sung Kim, to the court and to the parties to this action as follows:

Office of Clerk Court of Appeals - Division I One Union Square 600 University Street Seattle, WA 98101	<input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail <input type="checkbox"/> E-Mail
Michael Hunsinger Hunsinger & Associates 100 S. King Street, Suite 400 Seattle WA 98104-2817	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail
Jennifer J. Payseno McKinley Irvin, PLLC 1501 4 th Avenue, Suite 1750 Seattle WA 98101	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail

DATED at Seattle, Washington this 6th day of January, 2014.



Victoria K. Vigoren