

1995

Mal Kim and Frank Kim v. Young (Esther) Ja Jun, and Paul Jun : Brief of Appellant

Utah Court of Appeals

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Mal Kim and Frank Kim; Appellees Pro Se.

Robert Macri; Attorney for Appellants.

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BRIEF

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950029-CA COURT OF APPEALS

BEFORE THE UTAH COURT OF APPEALS

MAL KIM and FRANK KIM,	:	
	:	
Plaintiffs/Appellees,	:	
	
vs.	:	
	:	Case No. 950029-CA
YOUNG (ESTHER) JA JUN, and	:	
PAUL JUN,	:	Priority Classification No. 15
	:	
Defendants/Appellants.	:	
_____	:	

BRIEF OF APPELLANT

THIS IS AN APPEAL FROM A DECISION OF HOMER WILKINSON, JUDGE OF THE THIRD DISTRICT COURT, DATED SEPTEMBER 19, 1994, AND THE DENIAL OF DEFENDANT'S MOTION FOR RELIEF FROM JUDGMENT SIGNED BY THE COURT ON FEBRUARY 15, 1996.

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I.

JURISDICTION OF THE APPELLATE COURT

The Utah Supreme Court has jurisdiction over this matter pursuant to 78-2-2(3)(j) U.C.A. and was assigned by them to the Utah Court of Appeals on January 11, 1995.

II.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

Appellant Paul Jun came from Korea to be minister in a Korean Christian church in Salt Lake City. Appellees Mal Kim and Frank Kim were part of his congregation. Esther Jun, wife of Paul Jun, had experience in the fashion industry in South America.

A business relationship was established between Mal Kim and Esther Jun. The parties acknowledged that neither Frank Kim nor Paul Jun were to have had anything to do with the operation of the fashion business which developed. However, the terms of the parties agreement and the responsibility for certain financial obligations among the parties quickly came into question. Frank Kim attempted to induce Esther Jun to sign certain loan papers at

a bank. At this point it should be noted that none of the parties speaks English as their primary language and it would appear that the transactions were accomplished in Korean and were reflective of a Korean business activity. This is especially true since some question about whether money was invested in a "GAI", a ponzie-or-gambling type enterprise. In any case, the parties were in dispute over what terms they had contracted among themselves and between certain of the parties. A scandal erupted. Mr. Jun lost his position as Pastor of the Korean Christian Church and much respect when this and a related action were filed by his parishioners. Having been disenfranchised, he was left penniless but because of the magnitude of the judgment against Pastor Jun, it was felt that an appeal was necessary, as a matter of honor.

However, pending the appeal, and because of the clear misunderstandings reflected in the transcript acquired for appeal, Appellant sought relief from Judge Wilkinson's Order based on an appeal to his discretion in making the Findings of Fact which he did. It was urged to Judge Wilkinson that because of the clear misunderstandings evinced and ubiquitous in the trial, that he may reconsider his findings to reflect Appellants' point of view, urging that it was because of these misunderstandings that he reached the conclusion that he did, and thus denied due process to Appellants.

Judge Wilkinson denied this motion on February 15, 1996.

III.

STANDARD OF REVIEW

Abuse of Discretion. Appellants claim it was an abuse of discretion not to acknowledge that the trial was tainted by the clear misunderstanding apparent throughout the proceedings and described in further detail in the Statement of the Case below.

IV.

DETERMINATIVE STATUTES OR CONSTITUTIONAL PROVISIONS

Due process provisions of the Utah and United States Constitutions. See Appendix for texts.

V.

STATEMENT OF THE CASE

This is an appeal from an order of judgment of September 19, 1994 from the Third Judicial District Court, Honorable Judge Homer Wilkinson presiding and his subsequent denial of a Motion for Relief from Judgment or Order which denial is dated February 15, 1996.

The issue is whether Judge Wilkinson abused his discretion with respect to his determination and thus denied due process of law to Appellants by not initially acknowledging, and subsequently refusing to consider, the effect of the linguistic problems inherent in the courtroom situation and also, failed to make an independent review of his Findings of Fact and Conclusions of Law in view of the communications morass evident in the transcript.

It is respectfully requested that Judge Wilkinson be required

specifically to reformulate his Findings of Fact and Conclusions of Law in light of the obvious confusion, or open the case for the taking of additional evidence, or declare that the confusion cited did not cloud his factual determinations.

SUMMARY OF ARGUMENT

During the course of the trial, attorneys and court personnel were required to rely on the input of translators. The issues were compounded by the fact that the parties were diametrically opposed in their perception of their agreements.

Due to translation problems in these factual disturbances, Judge Wilkinson was faced with the problem of reconciling diametrically opposed viewpoints. Upon review of the transcript of the proceedings it is clear that the medium of the court process was misunderstanding and confusion. Although Judge Wilkinson tried to control the matter it got out of hand. For him to reach his Findings and Conclusions in face of an equally factual posture from Appellants he refuses to admit the confusion affected his judgment, ~~is~~ urged as reason for a remand rather than an order for a new trial, to examine the effect of the linguistic hurdles.

ARGUMENT

The relative position of Appellants and Appellees is succinctly stated by Judge Wilkinson in his Judgment dated January 26, 1994 and in the trial transcript of which he says:

"The alleged agreement entered into by the parties, alleged by the Defendant, was that the Plaintiff would pay \$25,000 and the Defendant would keep all the books and records

and handle the merchandise, buying, and management of the business, things of that sort, because she claims she didn't have the expertise". (Record at 539:18-23).

The judge then exercises his equitable power to divide the proceeds on the partnership. However, on Page 541 at Line 21 the Court finds:

"The Plaintiff Frank Kim gave \$40,000 or loaned \$40,000 to the Defendant Paul Jun, that the money has not been paid back, that in all probability part of the money was used or loaned to the wife of the partnership, and of course that's not something that is between the Plaintiff Frank and the Defendant Paul, what he did with the money".

And the Court then awarded judgment to Frank Kim against Paul Jun for the sum of \$40,000 plus interest.

In a subsidiary matter, a small claims filing which was consolidated, the Court also found that there was money to pay air fares and that partnership should have paid for those air fares, even though the testimony was that the air fares were used to ferry the money from Frank Kim to the buyer, Mrs. Jun, in Los Angeles.

The Court thus acknowledged two points of view in his determination to find for Plaintiff/Appellees against Defendant/Appellants.

In his Motion for Relief from Judgment or Order, Defendants outline the problems with the Judge's conclusions indicated that one of three possibilities existed which he did not address and should warrant consideration by the Court or relieving Defendants from the Judgments; that is, for the reason the translation process during the course of the trial led to absolute confusion on

numerous issues, which confusion could have been caused by translation or a lack of candor on the part of one or the other of the parties. The Motion focused on the due process issue and referred to Bish's Sheet Metal Co. v. Luras, 11 Ut. 2d, 357, 359 P.2d 21 (1961) wherein it is stated: "A party claiming and establishing a lack of due process would be entitled to relief from judgment under subdivision 60(b)(7) . . . "

A third alternative was proposed for the Judge to consider, that is not that one party or the other was telling a lie but her misunderstanding was disingenuous.

Thus, Defendants contend they were denied due process of law as a result of the translation problems, or a misunderstanding relating to the facts was not considered by the Judge.

The following are facts from the record which Appellants contend warrant this Court to consider having the trial court re-evaluate in lieu of the mis-communication.

This Court will be aware from the record that no written partnership agreement was executed and Mr. Paul Jun was to be a part of the business. (Record at page 145:9-11).

The problems of translation became apparent early on in the proceedings (see for example Record at page 141:11-22):

Interpreter: I would be happy to explain.

Court: You can't explain it. If you don't understand it, state that.

Interpreter: I do understand that, your honor, but . . .

Court: Ma'am listen to me. You can't explain it. All you can do is say what she says. If you don't understand the question then ask. . . tell the attorney and he will re ask the question.

Interpreter: Yes your Honor.

Court: But don't you try to explain her answer.

On page 142 of the record Mr. Maddox, former attorney for Appellees, says: "Your Honor, just to clarify something, and for the translator's benefit, there are some words which in the Korean counterpart have no counterpart in the western culture.

The Court: "Then she can say that". (142:1-4):

Appellants' attorney questions how mistranslations should be handled.

An early translation problem occurred when Mrs. Kim who had been using a translator, indicated that she did speak English (Record at 187:16-22). The matter is further explicated in the Record at page 188: * when it becomes apparent that Mrs. Kim who understood that her ability to speak is one of her contributions to the partnership. Then it is established at page 188 through questioning of the Court, that Mrs. Kim did speak English. After the confusion the judge suggests that he doesn't know how much he understands and let's not waste time on that (Record at 189:8-10).

The confusion continues and culminates in an important issue on page 98 when Appellee Mrs. Kim denies that Pastor Jun was excluded from the partnership, in contradiction to her earlier

testimony cited above.

Whether or not this was a misunderstanding due to mis-translation or a conscious effort to conceal and bootstrap by the Kims is not fathomable. But it is clearly understandable on page 226 of the record that Mrs. Kim was asked repeatedly whether she borrowed money from in-laws in December of 1991. She declares that she did not whereas, on page 42 of the record at lines 15-18 where she admits that she borrowed \$20,000 from her inlaws.

Another example of whether or not translation is a problem is a statement by Mrs. Kim on the Record at page 238:4-7 where in speaking about the "GAI" (Korean ponzie or gambling type arrangement) Mrs. Park "lent" (sic) "it to Fashion Venus*and I gave it to Mrs. Jun when she went to California to get merchandise twice, each time." (emphasis added).

The trial court did not agree that the issues of the money given by Mrs. Park to Mrs. Kim from the "GAI" raise issues about the entire transaction involving the Kims' conception of the partnership which was operating without a partnership agreement. The evidence is clear that the money that Mr. Kim allegedly loaned to Mr. Jun was in two money orders made out to Mr. Jun, but wrote "Mal Kim" on both those money orders. Mr. Kim said he understood those to be a loan to Mr. Jun when Frank Hunt, the receiver (who was often referred to as "my CPA" by the Kims and who allowed the Kims to operate the store as Personal Schedule C Proprietorship for two years during the proceedings states on Page 275 of the record

that "the Kims have no documents signed by either Mr. and Mrs. Jun or Paul Jun implicating them in any debt to this corporation or the partnership". Record at 275:2-

However, it is clear that Mr. Kim tried to implicate Mrs. Jun and Pastor Jun in this loan to his wife several months after having made the loan to his wife. The way he did this is by trying to get Mrs. Jun to sign a loan statement. In furtherance of this enterprise he forged a Key Bank statement. This is clearly outlined in pages 321 through 325 of the record attached hereto.

On page 329 of the record, Mr. Kim finally reveals the purpose for the purported bank statement:

Q. You have Reverend Jun on this paper. You said you typed it on this paper.

A. Yes I did.

Q. This paper is about your loan isn't it?

A. Yes.

Q. Why would you go to the trouble of typing his name on your loan statement that you are going to represent to a receiver as being a bank statement? Why would you do that? Why would he type Reverend Jun's name on a document and that he prepared that he was pretending to be a bank statement? What would be the purpose of that?

A. Because I got that loan to lend to Mr. Jun.

Q. And you wanted to make it seem like there was some connection between the money and Reverend Jun; is that right?

That's why you typed it on.

A. Yes.

Additional confusion is reflected throughout the transcript. Record at page 294 beginning with line 11.

Q. Let me ask . . let me see if I understand this right. I am having a little trouble following you. I don't know if the Court's doing better than me or not. He (Reverend Jun) was a Pastor of your church?

A. Yes.

Q. You indicted that because of the smallness of the church that he didn't have much income and he needed some money to live off or until his wife could get a green card?

A. Yes.

Q. Therefore, he needed \$40,000?

A. Yes.

Q. Then she would be able to get the green card within a couple of months to go back to Argentina to get that money that they had there and bring it back to pay off the debt?

A. Yes.

Q. That's why you loaned the money?

A. Yes.

Q. It was not loaned for business purposes?

A. No.

Q. It was loaned for their personal use?

A. Yes.

Q. And the agreement was that it was to be paid back when?

A. August 17, 1991. *

Q. He never paid it back? The \$40,000? Did he make any payments?

A. They did it some.

Q. What payments did they make?

A. They paid us three months back interest, at \$927. Paid it back and we had to continue to his loan.

Mr. Kim also denies going to the bank with Mrs. Jun. (Record at 325:2-9).

Q You didn't go to Key Bank with this paper and Mrs. Jun refused to sign it when she had it read, . . . you are saying that you didn't do that?

A. No. (Record at 325:3).

This contradicted at Record 335:18-22 where he indicates that he did want to sign the check and implies that it was at the bank.

Mr. Kim is also in denial of the fact that his wife had borrowed \$20,000 from the "GAI" and that he was not aware that his wife controlled the "GAI".

With respect to the issue of the airplane ticket which was decided by the Court against Appellants, the Court should be aware that the same "MAL" indication was on the Morris Air Certificate statement (Record at 329:22-24).

Frank Kim reports his belief that the credit card was stolen when in fact his wife testified that she had picked up tickets for

the Juns and the notation "MAL" appears on the ticket.

Other problems appear in the transcript for example on the translator's answering about when they were talking with the Juns yet the witness already testified that Pastor Jun was not part of the partnership:

Q. I'm wondering if that's a problem with the translator, if it needs to be clarified.

THE COURT: I don't know.

Record at 156:10-15:

Q. How much did she bring?

THE COURT: The question is: When was it bought? That's been asked three times and it's been answered three times, and it was \$25,000.

MR. MADDOX: No your Honor. We're on a different loan now here, your Honor.

On page 173 of the Record your undersigned comments:

Q. The translators are having a difficult time with the concept of a receiver, your Honor. They are also having trouble with the concept of wiring money. (Record 173:3-4).

Record at 180 starting with line 4 and questioning how Mrs. Kim operated the business account for her own personal business:

Q. And you have not passed it through Frank? You have not passed the money through Frank Hunt?

A. Yes.

Q. Yes you have not?

INTERPRETER: No, it's Korean. No, that's what she means.

Q. No she has not passed the money through Frank Hunt? This is very . . .

INTERPRETER: Yes but . .

COURT: Ma'am just say what he says regardless of whether you understand it.

At this late in the trial (Record at 181) the interpreter asks

Q. Can I explain?

THE COURT: No you can't. Just state what she said.

Q. That's what she said.

THE COURT: Alright, I'm sorry.

Q. She says can I explain. It's kind of lengthy.

On page 207 of the Record the confusion is once more evident when the judge tells the interpreter:

THE COURT: Just state what he says.

INTERPRETER: I'm sorry. Say it again.

Q. How did you. . .

THE COURT: Ma'am just a minute. Don't you get involved in the discussion. Don't you be concerned with it, whether you understand it or not, just repeat back what each of them say. That's all you're supposed to do.

INTERPRETER: I am just trying to . .

THE COURT: Try to.

INTERPRETER: I'm not trying to but I thought . . .

Again on page 207 of the Record it is asked whether or not

Mrs. Kim raised the issue of her income and it is her desire to be in the fashion business with the Jun's.

MR. MACRI:

Q. Is that clear?

INTERPRETER: Maybe I made a mistake. I knew the last question was that you said the Jun family knew about she had money so they approached her, that type of thing. That's what I thought.

Q. That was a question or two ago. What I'm trying to find out is whether or not, how they became aware that she had money to invest. So my question is: How did the Jun's become aware that you had money to invest and that you wanted to run a fashion business?

THE COURT: Just ask her the question. Ask her the question. State what she said.

Q. How did the Jun's become aware that she had money and wanted to enter the fashion business?

A. I told them I was going in the fashion business.

Q. And why did she say that to them?

INTERPRETER: She never told them.

THE COURT: Ask her that. Just state what it says.

INTERPRETER: I'm sorry. Say it again.

Q. I'll start again. How did you . . .

THE COURT: Ma'am. Just a minute. Don't you get involved in this discussion. Don't you be concerned with it. Whether you understand it or not. You just repeat back what each of them says.

That's all you're supposed to do.

INTERPRETER: I'm just trying to.

THE COURT: Don't try to.

INTERPRETER: I'm not trying to but I thought I had made a mistake in telling him?

THE COURT: That's fine, but you just state what they say. It's up to you to correct it.

Appendix 2 herein is the answers given by Frank Kim relating to his understanding of the relationship between Pastor Jun and the church. The testimony on its face is clear that either fraud was occurring, that is perjury, or that the misunderstandings were so deep that the Court could not possibly make a fair decision on this testimony. For example, on page 312 of the Record the understands asks Mr. Kim:

Q. You were a church member, you knew that the church had hired him (Reverend Jun) didn't you?

A. No.

Q. Was he hired by the church?

A. No.

Q. He wasn't an employee of the church?

A. No he wasn't a pastor of the church, no.

Q. Do you understand what an employee is?

A. A church a member. No I don't know.

Q. No, an employee is someone who is paid by the church.

A. No.

Q. Was he not hired by the church and paid by the church?

A. No.

Q. He was a pastor and he wasn't earning \$1,500 a month as a pastor?

MR. MADDOX: Your Honor there is confusion as to whether Mr. Kim understands that we are talking about Paul Jun acting as the pastor of the church and being paid by the church. He is thinking of someone else I think.

THE COURT: I don't know.

MR. MACRI:

Q. Do you know Paul Jun. Do you know Paul?

A. Yes.

Q. What job did he have?

A. Pastor.

Q. At what church?

A. The Korean Baptist.

Q. So he was employed by the church?

A. Yes.

THE COURT: Are you understanding the questions?

THE WITNESS: I don't. He's confusing me. I don't have to ask something, whatever I believe or whatever I did.

This is just a sprinkling of the misunderstandings which were such as to deprive Appellants of due process.

It could be argued that the Court, given it's precedent in Willey v. Willey, 930205-CA filed April 4, 1996 gives this Court

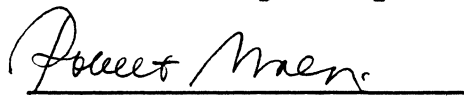
somewhat broader discretion in examining whether or not the interpretation of facts based on a perpetual misunderstanding in the trial is sufficient to grant the relief sought.

CONCLUSION

It is clear from the evidence that two opposing viewpoints existed based on a lack of business experience.

However, compounding this misunderstanding is the language problem which created a problem of understanding for the trial judge and which arguably, led to his Findings of Fact and Conclusions of Law. He has been requested to review these Conclusions in light of the obvious misunderstandings on the record, and he has denied a change. He has not produced Findings of Fact and Conclusions of Law as to how these confusions were resolved by him and it should be ordered that he so do, either in a supplementary hearing or a new trial, or in some way to preserve the honor of Appellant.

RESPECTFULLY SUBMITTED this 18 day of April, 1996.


ROBERT MACRI
Attorney for Appellants

CERTIFICATE OF MAILING

I certify I mailed/faxed/hand delivered a true and correct copy of the foregoing to:

Mal Kim and Frank Kim
2955 South 200 East
Salt Lake City, Utah 84115

this 18 day of April, 1996.

Robert M. Kim

Appendix 1.

STATUTES

United States Constitution

AMENDMENT XIV

Section

1. [Citizenship — Due process of law — Equal protection.]
2. [Representatives — Power to reduce appointment.]
3. [Disqualification to hold office.]
4. [Public debt not to be questioned — Debts of the Confederacy and claims not to be paid.]
5. [Power to enforce amendment.]

Section 1. [Citizenship — Due process of law — Equal protection.]

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Utah State Constitution

Sec. 11. [Courts open — Redress of injuries.]

All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, which shall be administered without denial or unnecessary delay; and no person shall be barred from prosecuting or defending before any tribunal in this State, by himself or counsel, any civil cause to which he is a party.

Appendix 2.

Appendix 2

F. HUNT. CRS-EXAM BY MACRI

1 Q YOU WERE A CHURCH MEMBER; YOU KNEW THE CHURCH
2 HAD HIRED HIM, DIDN'T YOU?

3 A NO.

4 Q WAS HE HIRED BY THE CHURCH?

5 A NO.

6 Q HE WASN'T AN EMPLOYEE OF THE CHURCH?

7 A NO.

8 Q HE WASN'T PASTOR OF THE CHURCH?

9 A NO.

10 Q DO YOU UNDERSTAND WHAT AN "EMPLOYEE" IS?

11 A CHURCH MEMBER? I DON'T KNOW.

12 Q NO, AN EMPLOYEE IS SOMEONE WHO IS PAID BY THE
13 CHURCH.

14 A NO.

15 Q HE WAS NOT HIRED BY THE CHURCH AND PAID BY THE
16 CHURCH?

17 A NO.

18 Q HE WAS THE PASTOR AND HE WASN'T EARNING \$1,500 A
19 MONTH AS PASTOR?

20 MR. MADDOX: YOUR HONOR, THERE IS CONFUSION AS
21 TO WHETHER MR. KIM UNDERSTANDS THAT WE'RE TALKING ABOUT
22 PAUL JUN ACTING AS A PASTOR OF THE CHURCH AND BEING PAID BY
23 THE CHURCH. HE'S THINKING OF SOMEONE ELSE, I THINK.

24 THE COURT: I DON'T KNOW.

25

1 MR. MACRI: PAUL JUN, DO YOU KNOW PAUL?
2 A YEAH.
3 Q WHAT JOB DID HE HAVE?
4 A PASTOR.
5 Q OF WHAT CHURCH?
6 A THE KOREAN BAPTIST.
7 Q SO HE WAS EMPLOYED BY THE CHURCH?
8 A YES.
9 Q HE HAD A GREEN CARD; THE CHURCH HAD ISSUED HIM
10 THAT?
11 A NO.
12 Q WELL, HOW WAS HE WORKING WITHOUT A GREEN CARD?
13 A ON THE IMMIGRATION LAW?
14 Q YES.
15 A HE COMES FROM IMMIGRATION TEMPORARILY IN THE
16 UNITED STATES, AND HE IS THREE YEARS, AND KNOW THIS HAPPENED.
17 AFTER THIS HAPPENED, HE HAVE TO GO BACK TO KOREA. AT THAT
18 TIME THEY DON'T HAVE ANY INCOME.
19 Q LET'S GET TO IT: DO YOU KNOW IF PASTOR JUN HAD A
20 GREEN CARD?
21 A NO.
22 Q YOU KNOW HE DID?
23 A NO.
24 Q YOUR CHURCH AUTHORIZED IT FOR HIM. HOW LARGE WAS
25

1 THE CHURCH?

2 A WHO, ME?

3 Q HOW LARGE WAS THE CHURCH MEMBERSHIP?

4 A MEMBERS, ABOUT TWELVE.

5 Q TWELVE PEOPLE?

6 A YES.

7 Q AMONG THOSE TWELVE PEOPLE, WEREN'T YOU AWARE THAT
8 YOU HAD HIRED PASTOR JUN?

9 A I DON'T KNOW.

10 Q THEY HAD TO HAVE A GREEN CARD TO WORK. ALL THIS
11 BUSINESS ABOUT YOUR WIFE AND YOU TALKING ABOUT A GREEN CARD
12 IS UTTER FALSEHOOD, ISN'T IT, IT'S AN ABSOLUTE LIE? AND YOU'RE
13 TELLING IT BECAUSE YOU WANT TO GET THIS MONEY, DON'T YOU? AND
14 YOU'RE WILLING TO TELL A LIE BECAUSE YOU WANT TO GET THE
15 MONEY?

16 MR. MADDOX: HE'S ASKING WHETHER HE WAS TOLD--
17 NO, IT WAS NOT A LIE. HE TESTIFIED HE KNEW PASTOR JUN NEEDED A
18 GREEN CARD, AND NOW COUNSEL IS SAYING THAT HE DIDN'T KNOW
19 ANYTHING ABOUT A GREEN CARD, YOUR HONOR. COUNSEL NEEDS TO
20 BE REQUESTED TO STICK TO THE FACTS AND ALLOW THE WITNESS TO--
21 QUIT TRYING TO PUT WORDS IN THE WITNESS'S MOUTH AND
22 BADGERING THE WITNESS.

23 A DON'T ASK IT--.

24 THE COURT: SIR. COUNSEL, YOUR EXAMINATION IS
25