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No. 65628-7-I

**COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON**

JOSEPH J. AUSTIN

Appellant

SILVANA DI GIACOMO
Respondent.

APPELLANT'S REPLY BRIEF

ORIGINAL

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ARGUMENT

Errata: Before starting his Reply, Appellant wishes to correct an error in the Opening Brief. On pages iii and 13 of Appellant's Opening Brief the figure "\$61,581.25" should read instead "\$67,581.25." The amount is correctly stated at other pages of the brief (e.g., p. 9, line 3 of Appellant's Opening Brief).

The following arguments are presented in the order that corresponding arguments are presented in Ms. DiGiacomo's responsive brief, with similar topic headings.

I. Respondent's Statement of Facts

A. Misstatements And Omissions in Respondent's Statement Of Facts

Ms. DiGiacomo's statement of alleged facts under the heading "Facts Relevant to This Appeal", beginning at page 5 of her reply brief, is highly inaccurate, both due to misstatement of facts and omission of important relevant facts. Although to a large extent Ms. DiGiacomo's statement includes material that is clearly irrelevant to the issues at hand, the reply brief so misrepresents the background of this case that it is incumbent upon Dr. Austin to respond. The following facts are stated in chronological order, and will correct the picture presented by Ms. DiGiacomo.

- January, 2009 – Dr. Austin informed Ms. DiGiacomo that his contract with Overlake will most likely not be renewed. See Appellant’s Opening Brief at p. 6; CP 277, lines 3-5; and CP 278, lines 10-11.

- June 15, 2009 – Dr. Austin’s counsel informed Ms. DiGiacomo’s attorney that the Overlake Contract would definitely not be renewed, and that Dr. Austin was considering several options, including retirement or work outside the medical field. Dr. Austin’s attorney did not say that he would not be working. CP 62, 3rd full paragraph, Appellant’s Opening Brief at bottom of p. 6.

- June 21, 2009 – Dr. Austin signed a one-year contract with Everett Cardiovascular and Thoracic Surgical Associates (ECTSA). The Contract is in some respects executory. For example, it specifically states “nothing herein shall prevent the parties from re-allocating such salary by mutual agreement...” CP 233, last sentence; CP 234, first sentence. The contract also provides that the employment start date could be extended to September 1, 2009, in the event that Dr. Austin’s then current employer wants him to work pending finding his replacement. CP 233, Par. 2, “Term”.

- September 2, 2009 - ECTSA and Dr. Austin amended their contract to provide that no salary would be paid, based upon the following change of circumstances:

After entering into the Contract, the parties have determined that the referrals and cooperation of Physician's prior professional contacts has not occurred as anticipated by the parties. Physician has also determined that his commitment to develop a thoracic surgical program at Evergreen Hospital will require his presence at such facility on an ongoing basis. Therefore, Physician has requested major modifications to the Contract, and ECTSA has agreed to the same as provided below."

CP 246 at Par. "I". The above quotation is consistent with Dr. Austin's later Declaration (CP 279, lines 17-28, CP 280, lines 3-5); perhaps most important, these changes to the one year contract were made almost two months before Ms. DiGiacomo's attorney requested any information about Dr. Austin's status. Compare dates at CP 60 with CP 246-247; see also Par. 2, "Term", at CP 233.

- January, 2010 – One week after Ms. DiGiacomo issued a records deposition subpoena to Dr. Austin's former employer Overlake Hospital (CP 249, first line of letter text), without notice to Dr. Austin's counsel, she received Compensation Summaries of Dr. Austin's 2005 to 2009 income and his 2005 to 2008 W-2 forms. Contrary to Respondent's assertion at p. 6 of the Reply brief, the 2009 Compensation Summary was NOT consistent with prior years, Most importantly, as discussed further below, Overlake's Compensation Summary for 2009 shows that Dr. Austin was paid items not included in his salary or bonus, as clearly defined in the maintenance provisions of the parties' Separation

Agreement. See CP 250 – 251, and CP 77-78. This was a change from 2005-2008, and is covered by the terms of the Separation Agreement at Par. 6.2. CP 35.

B. Hearing

1. Calculation of Commissioner's Award. It is now clear, from the statements Ms. DiGiacomo supplies on p. 6 of her Responsive Brief at Par. B.1, that the Commissioner arrived at her award by using Ms. DiGiacomo's figures in her Reply Declaration at CP 145-146. It is unclear from the Report of Proceedings how the Commissioner arrived at her figures, so Respondent's corroboration of the Commissioner's use of Respondent's Reply Declaration is helpful. It should be noted that since Respondent did not present these figures below until her Reply Declaration on April 6, 2010, even though she could have calculated them earlier with the records Overlake supplied January 27, 2010 (CP 296, lines 13-25, CP 297, lines 1-3), there was no opportunity for Dr. Austin to respond to her figures before the hearing.

2. Request for "Current Status" Information. At p. 7 of her Responsive Brief (at the paragraph numbered "2"), Ms. DiGiacomo asserts: (1) that she requested information on Dr. Austin's current status by letter dated October 28, 2009,; and (2) that she did not receive information from *Overlake*, Dr. Austin's former employer, until January,

2010. She fails to state that on November 17, 2009, Dr. Austin's counsel correctly reported back to Ms. DiGiacomo's counsel that Dr. Austin was not receiving any salary from the practice of medicine, and that he had not received any salary since the end of his Overlake Contract in June, 2009. CP 62. Ms. DiGiacomo did not request further information. Instead, in January, 2010 she filed a motion for contempt and issued subpoenae with notice of records depositions to Overlake and others, without notice to Dr. Austin's counsel. Overlake promptly responded to its subpoena within one week (CP 157). Ms. DiGiacomo admitted that with the records from Overlake and her own records she could have calculated the amount she felt was due in maintenance (CP 296, lines 13-25; CP 297, lines 1-3). Nonetheless Ms. DiGiacomo did not advise the court or Dr. Austin of her calculations until she filed her reply Declaration almost six months later. It is relevant to note here that, contrary to Respondent's assertion at p. 16 of her Response Brief (CP 70-79), there is no duty to supply current information under the parties' Separation Agreement. Also, there is no obligation under the King County Local Family Law Rules to disclose financial information until a motion has been filed. LFLR 10(a).

II. Respondent's Argument

A. Standard of Review

Ms. DiGiacomo in her Brief fails to state the complete standard of review applicable to this case. She states that substantial evidence must be presented for findings of fact and that a decision cannot be manifestly unreasonable, or based on untenable grounds or reasons. She fails to state, or even address, the following legal standards that must be applied in a contempt proceeding to avoid a decision based on untenable reasons or grounds. First, any alleged contempt must be due to *intentional* disobedience of a decree. This is a change from the previous statute that defined contempt as disobedience without the intent requirement. See RCW 7.21.010(1)(b), discussed in Appellant's Opening Brief at p. 18, as well as *Holiday v. City of Moses Lake*, 157 Wn. App. 347, ¶23 at p. 355, 236 P3d. 981 (2010). Consistent with this intent requirement, contempt must be based on a *plain* violation of an Order that is strictly construed to protect the alleged contemnor:

In contempt proceedings [based upon violation of a court order], an order will not be expanded by implication beyond the meaning of its terms when read in light of the issues and the purposes for which the suit was brought. The facts found must constitute a *plain violation* of the order. *State v. International Typographical Union*, 57 Wn. 2d 151, 158, 356 P. 2d 6 (1960); 17 *C.J.S. Contempt* § 12 (1963). Although such proceedings are appropriate means to enforce the court's orders, since the results are severe, *strict construction* is required [emphasis added].

Johnston v. Beneficial Management Corp of America, 96 Wn. 2d 708 at 712-713, 638 P. 2d 1201 (1982). See also Appellant’s Opening Brief, p. 12, and *In re Marriage of Littlefield*, 133 Wn. 2d 39, at p. 47, 940 P. 2d 1362 (1997).

B. Respondent’s Argument of Issues.

1. Treatment of “Paid Time Off. Cash Out” (PTO.CO).

Three arguments should adequately address Ms. DiGiacomo’s most important errors in this section of her Responsive Brief. The Commissioner stated, on p. 3 of her Order, at Par. 3.12 E (CP 202), without further explanation, that “ The Court considered the PTO cash out (paid time off) as part of Dr. Austin’s income for purposes of maintenance.”

a. The Commissioner’s finding was contrary to law. Accumulated *unused* vacation is a post-decree asset, not income, under Washington law. Ms. DiGiacomo consistently confuses and lumps together two distinctly different aspects of Dr. Austin’s contract with Overlake: (1) payment for vacation time actually used during a calendar year, which is income that Overlake paid as part of regular salary (CP 251-252); and (2) accumulated unused vacation time, which is an asset that may or may not have value when the contract ends. Ms. DiGiacomo never addresses the holdings of

the cases that support Appellant's contention that unused vacation pay is a post-decree asset: *In re Marriage of Williams*, 84 Wn. App. 263, 927 P.2d 679 (1996) and *In re Marriage of Hurd*, 69 Wn. App. 38, 848 P.2d 185 (1993), discussed in Appellant's Brief at pp. 16-17. There Dr. Austin argued that since the asset was accumulated long after the Decree was entered, it is beyond question Dr. Austin's separate property. He also pointed out that the payment for unused vacation time was a matter of policy grace from Overlake, and not part of his regular salary or bonus. Appellant's Opening Brief at p. 17; see also Declaration of Brian Read at CP 154, and discussion of the terms gross income, salary and bonus in the maintenance provisions of the parties' Separation Agreement at Pars. 6.1 and 6.2, CP 34-35.

b. The Commissioner's finding is contrary to the plain terms of the parties' Separation Agreement ("the Agreement").

The Agreement specifically provides, in Pars. 6.1 and 6.2, that only Dr. Austin's regular salary and a specific bonus can be used for maintenance payments. See Par. 6.1 of the Separation Agreement, which defines gross income in terms of regular salary and specific bonus. CP 77. The Agreement further calculates maintenance payments based on *annual salary in a specific amount* (\$475,000 until 2005; \$450,000 from 2005 through June, 2009 – CP 276, lines 15-19; CP 106, lines 17-25; CP 107,

line 1). The Agreement specifically references Dr. Austin's "bi-weekly paycheck" and "bi weekly salary". CP 77, lines 14-18. See also Overlake's Compensation Summary, at CP 250-251, where the entries for 2005 through 2008 clearly shows compensation based on annual totals of 2080 hours (40 hours per week for 52 weeks) or \$450,008, including the following elements: (1) regular pay, (2) time paid for attending mandatory medical education courses (usually in multiples of twenty-four hours), and (3) vacation time *actually* used. See CP 250. Furthermore, the Separation Agreement *preserves* this definition of salary and gross income if there is a change in the amount of total compensation. See Par. 6.2 of the Separation Agreement at CP 78, stating that in the event of a change in the husband's *income* from the practice of medicine, his maintenance obligation will still be "50 [percent] of the husband's then current gross income *as herein above defined.*" Thus any extra amount of medical education hours and "PaidTimeOff,CashOut" for vacation time *not* actually used, by *specific operation of the Contract terms*, is *not* included in gross income for calculation of maintenance. These items were *not* part of bi-weekly salary payments and they exceeded the total annual salary amount that defines the extent of Ms. DiGiacomo's maintenance under the Agreement.

2. Commissioner's Abuse of Discretion in Finding Contempt.

a. Respondent and the Commissioner Ignored the Proper Legal Standard Relating to Contempt. Applying the Proper Standard, Dr. Austin Overpaid His Maintenance Obligation for 2009.

The parties essentially agree that contempt proceedings must protect individuals from violations of ambiguous or unclear orders. Responsive Brief at p. 12; Opening Brief at pp. 18-19. However, Respondent makes at least three errors when she attempts to circumvent the proper application of the correct legal standard in this case.

First, Respondent does not consider the complete legal standard for contempt proceedings, as stated above, i.e. to constitute contempt any violation of a decree must be *intentional* (RCW 7.21.010(1)(b)), and must be based on a *plain* violation of an Order that is *strictly* construed to protect the alleged contemnor. Again, see: *Johnston v. Beneficial Management Corp of America*, *supra.*, 96 Wn.2d at 712-713, quoted above at bottom of p. 6 of this brief; *In re Marriage of Humphreys*, 79 Wn. App. 596, at 599, 903 P.2d 1012 (1995).

The purpose of the contempt hearing in this case was to enforce the maintenance terms in the parties' Separation Agreement, and Ms. DiGiacomo specifically requested judgment for the period June 2009 through January 2010. The plain application of the maintenance terms was discussed in the preceding section, i.e. maintenance is set at 50

percent of Dr. Austin's gross income defined as (1) his *regular salary* of \$450,000, as paid through regular, bi-weekly salary payments; and (2) his performance bonus of \$25,000 or less. Again, *see*: Pars. 6.1 and 6.2 of the Separation Agreement at CP 77-78; Dr. Austin's Contract with Overlake at Article 5 (CP 263) and Exhibit C thereto (CP162); and Dr. Austin's salary in 2009, CP 250-251, CP 276, lines 15-19; CP 106 lines 17-25; CP 107, line 1.

Applying the plain meaning (without even having to strictly construe terms) of Pars. 6.1 and 6.2 of the Separation Agreement to (1) the salary and bonus Dr. Austin received and (2) the payments both parties agree that he made, the evidence is that Dr. Austin made all required payments for all of 2009; indeed, he *overpaid* Ms. DiGiacomo by \$4,427. The proper calculation is made as follows, and summarized in the table three paragraphs below.

First, the proper "gross income" for maintenance in 2009, according to the terms of the Separation Agreement, is \$244,448 – i.e. salary for ½ year (\$225,004) plus a bonus of \$19, 444 (compare Ms. DiGiacomo's incorrect gross income at CP 145, lines 23-24 with CP 77-78 and CP 251). As stated in Overlake's Compensation Summary at CP 251, in 2009 Dr. Austin's regular pay hours (872), plus the common amount of medical education hours of (24), plus his vacation time actually used (144 hours)

total 1040 hours, or precisely one-half year of work. The pay for these hours is precisely one-half the amount of his annual salary, i.e. \$225,004. His bonus of \$19,444 is roughly consistent with other years (i.e. less than \$25,000) and does not receive designated hours, also consistent with prior years. (CP 116 and CP 78).

Second, the Separation Agreement requires deductions from gross income for Social Security, Medicare and pension contributions. CP 77, lines 10-17. Using Ms. DiGiacomo's figures for these authorized deductions (Social Security - \$6045.00; Medicare - \$6900.20; and pension - \$20,500.00, at bottom of CP 145 and top of CP 146) total deductions of \$33,445.20 are subtracted from the proper gross income of \$244,448, for a total "base for paying maintenance" of \$211,003.80 (Ms. DiGiacomo's term at CP 146, line 3). Fifty percent of the "base for paying maintenance" of \$211,003.80, or \$105,501.90, is what Dr. Austin should have paid in maintenance for all of 2009. Dr. Austin actually paid between \$109,928.00 and \$110,198.00. CP 146, line 15; CP 131, line 21; corroboration in the parties' bank records at CP 207-230. Thus he overpaid by at least \$4,426.10, i.e. the \$109,928.00 he paid minus the \$105,501.90 he should have paid.

The above calculation is summarized as follows:

1. Salary for ½ year of work		\$ 225,004.00
This includes:		
a. 872 regular hours	\$ 188,657.20	
b. 24 hours medical education	\$ 5,192.40	
c. 144 hours vacation used	\$ 31,154.40	
d. Subtotal – salary	\$ 225,004.00	
2. Performance bonus		\$ 19,444.00
3. Gross income per Separation Agreement (total of items 1 and 2)		\$ 244,448.00
4. Total authorized deduction from income		\$ (33,455.20)
This includes:		
a. Social Security(CP 145, ln.25)	\$ 6,045.00	
b. Medicare (CP 146, ln.1)	\$ 6,900.20	
c. Pension (CP 146, ln.2)	\$ 20,500.00	
d. Subtotal	\$ 33,455.20	
5. “Base for paying maintenance” (Item 3 less item 4)		\$ 211,003.80
6. Maintenance due (1/2 of item 5)		\$ 105,501.90
7. Maintenance paid (per Ms. DiGiacomo)		\$ 109,928.00
8. Overpayment (Item 7 less item 6)		\$ 4,426.10

b. Given The Above, There Can Be No Intentional Or Plain Violation Of The Decree. Thus Even If The Decree Was Violated In Some Manner (And Dr. Austin Strenuously Maintains That It Was Not), There Can Be No Finding Of Contempt.

Research discloses no specific definition of intent for the relatively new contempt statute. However, one recent probate case present dealing with contempt listed several helpful factors describing intent. Also, attorney discipline cases present what might be a useable definition for intent. In the probate case, *In re Estates of Smaldino*, 151 Wn. App. 356, 212 P.3d 579 (2009), a lawyer (one Mr. Todd) contended that his

contempt was not intentional since he had not read the subject Order, even though he had been served with the Order. The *trial* court stated (without review of the specific standard by the Court of Appeals):

A person is held to have intended the natural and probable consequences of his acts and in that sense Mr. Todd did act intentionally. Further, Mr. Todd acted willfully and intentionally when he elected not to read a TRO that was entered and served on him in a case where he was still attorney of record. . . . The violation of a court order without reasonable excuse is deemed willful.

Smaldino, supra., 151 Wn. App. at 364-365.

The definition of intent found in several attorney discipline cases is:

In determining whether a lawyer has committed misconduct, the lawyer's mental state may be evaluated on the basis of intent, knowledge, or negligence. *Intent involves acting with the conscious objective to accomplish a particular result.* There is knowledge when the lawyer has "the conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result. . . [emphasis added, footnotes omitted].

In re Discipline of Juarez, 143 Wn.2d 840, at 876-877, 24 P.3d 1040 (2001).

There can be no intentional *or* plain violation of the parties' Agreement where the evidence indicates there is no violation at all. Here the evidence is that Dr. Austin paid consistently according to the terms of the Separation Agreement. The financial records before the Commissioner below indicate that this is the case. CP 207-230, CP 146, lines 7-16. Indeed, the records suggest that Dr. Austin may have made an

extra payment on June 19, 2009, as there were 14 payments made in a 26 week period. Certainly Dr. Austin did not act with a conscious intent to avoid maintenance, when all the financial records and correct calculations indicate otherwise, and he acted according to the terms of the parties' Separation Agreement. He did so state under oath, and the facts are consistent with his statement. See Supplemental Response Declaration of Dr. Austin, CP 131-133, especially at paragraph 3:

. . . I made all payments through the years with a good faith belief that I was paying everything required under the terms of the Separation Contract, and at the end of the year my accountant reviewed my salary received from Overlake Hospital and did the calculations to verify the amount that was due after deducting retirement contributions and the Medicare and Social Security taxes. At no time did the Respondent ever request documentation to verify the calculations, and this Contempt Motion was the first indication I had that Respondent was making a claim for alleged failure to pay maintenance.

Furthermore, it was certainly a "reasonable excuse", and a natural and probable consequence of his acts, in consistently paying maintenance according to the plain terms of the Separation Agreement, that Dr. Austin felt he was complying with the Agreement.

In addition, the Commissioner's Order is fatally defective in this regard. The operative provision of the Order states that Dr. Austin intentionally violated the decree:

“. . . in the following manner (include dates and times, and amounts, if any):

He didn't pay maintenance in a timely manner. The husband

intentionally concealed income from the wife and intentionally tried to mislead her with respect to his job and salary. . . .

CP 165, at Par. 2.3. As to timely payment of maintenance, discussion above shows that Dr. Austin paid Ms. DiGiacomo her 50 percent share of his 2009 salary and bonus, and therefore the only funds Dr. Austin received in 2009 that could possibly have formed the basis of the commissioner's order was the money Dr. Austin received for his "Paid Time Off. Cash-Out". The court below erroneously included these funds as part of "income" at par. 3.12(E) of the Order (CP 202), RP 14 at lines 9-14. Those funds received by Dr. Austin were not subject to the maintenance provisions of the Separation Agreement, since they were not part of his regular salary or bonus. The commissioner failed to state any other amounts that might have been a basis of violation of the Order, despite the requirements of paragraph 2.3 of the Order to do so. Instead of engaging in this analysis of the record before her, the Commissioner suggested that Dr. Austin's counsel stop argument, and then proceeded to issue a ruling that ignored the terms of the Separation Agreement and simply adopted the erroneous calculation presented by Ms. DiGiacomo in her reply declaration - a declaration that Dr. Austin had no chance to analyze and for which court rules permitted no responsive pleading. See RP pp.20-22; p.27, lines 14-25; p. 28, lines 1-9; CR 7, KCLR 7. The

evidence clearly established below that Ms. DiGiacomo received her 50 percent share of each of Dr. Austin's regular paychecks in 2009, after the deductions specifically permitted by the terms of the Agreement. Again, see CP 146, lines 7-15; CP 131, line 21; corroboration in the parties' bank records at CP 207-230. There is simply no basis in law or fact for the commissioner to have found an intentional violation or a plain violation of the parties' Separation Agreement.

The additional two items quoted above from Par. 2.3 of the Order (CP 165), i.e. findings that Dr. Austin concealed income and attempted to mislead Ms. DiGiacomo with respect to his job and salary, do not warrant a finding of contempt for two reasons. First, as discussed below in the following section numbered "3", the evidence does not support any findings that Dr. Austin concealed income from or intentionally misled Ms. DiGiacomo. Second, even if there were such evidence (and Dr. Austin strenuously maintains there was not), contempt is not an appropriate remedy. There is nothing in the Separation Agreement or the Decree that requires a disclosure of income, and therefore any concealment or misleading, if such factors existed, are not violations of a court order. These two reasons are discussed further below, at segment number "3" of this Argument.

In summary, under the terms of the Separation Agreement, Ms.

DiGiacomo is *not* entitled to 50 percent of the funds Dr. Austin received when his contract at Overlake ended and Overlake *elected* to pay him for accumulated unused vacation time, in addition to the salary and bonus it had already paid. Dr. Austin requests that the judgment below for additional maintenance be vacated, but at a minimum, if this court disagrees and concludes that Ms. DiGiacomo is entitled to 50 percent of all funds paid on termination, the contempt finding against Dr. Austin should still be vacated since he believed in good faith that he was paying the correct amount, and the Separation Agreement certainly does not require in plain, clear terms that Ms. DiGiacomo receive 50 percent of any amount Dr. Austin might receive in the future for cash-out of unused accumulated vacation time.

c. Respondent Turns the Applicable Legal Standard for Contempt Proceedings On Its Head by Misquoting and Misapplying An Irrelevant Legal Principle Relating To Contract Interpretation in Private Disputes.

Ms. DiGiacomo attempts to circumvent the strict construction standard for contempt proceedings, admittedly to protect against erroneous contempt rulings, by arguing that there is an ambiguity in the parties' Separation Agreement, and that that ambiguity must be construed against the drafter – here, Dr. Austin.

First, the “construction against the drafter” rule is a standard of contract interpretation that is applied in disputes between two parties as to

the meaning of a contract between them. “Strict construction” in a contempt proceeding is for the protection of the party against whom contempt is sought, as both parties recognize. Again, see: p. 12, Brief in Response, first sentence of section 2; Appellant’s Opening Brief, p. 19.

Second, and worse, Ms. DiGiacomo misquotes this irrelevant standard for contract interpretation. When correctly considered, the very rule that Ms. DiGiacomo invokes bars a finding of ambiguity in the Separation Agreement. In *Kwik-Lok Corporation v. Pulse*, 41 Wn. App. 142, 702 P. 2d 1226 (1985) cited in the Responsive Brief at p. 12, in addition to the rule of construing ambiguous terms against the drafter, the court stated:

Generally, the question of whether a written instrument is ambiguous is a question of law for the court. *Ladum v. Utility Cartage, Inc.*, 68 Wn. 2d 109, 411 P. 2d 868 (1966). *An ambiguity will not be read to a contract where it can reasonably be avoided by reading the contract as a whole.*

Kwik-Lok Corporation v. Pulse, supra., 41 Wn. App. at 146-147. See also *Green River Valley Foundation, Inc. v. Foster*, 78 Wn. 2d 245, at p. 249, 473 P. 2d 844 (1970), stating that courts should not find an ambiguity in order to construe a contract.

Here the terms of the Separation Agreement are clear. As discussed above, the Agreement takes great pains to specifically define what is meant by salary, and even refers to the number that the parties are to use - \$450,000 in salary as revised in 2004 - with reference to and as reflected

in bi-weekly salary payments to Dr. Austin. The Agreement further preserves this definition *even in the event of a change in compensation* by the operation of Par. 6.2 of the Separation Agreement. The “Paid Time Off. Cash Out” (“PTO.CO”) payment was not part of Dr. Austin’s regular salary for 2009 and was not part of his bi-weekly salary payments. Consistent with the clear terms of Separation Agreement, that payment for PTO.CO was not part of Dr. Austin’s salary. Respondent is seeking an ambiguity where none exists.

Third, even if, for the sake of argument, an ambiguous term in the contract was found (and Dr. Austin strongly maintains there is none), Respondent would then have to concede that there was no plain violation of the terms under the standards for contempt. The law properly clearly provides that contempt proceedings must protect individuals from orders that are ambiguous. *If* there was an ambiguity in the Separation Agreement, as incorporated in the Decree, then there could logically be no plain violation of the Agreement. This is not a proceeding to resolve an ambiguity between two private parties. It is a contempt proceeding with specific legal protections for the alleged contemnor.

3. Neither Dr. Austin’s income nor information about his job and salary were concealed.

First, Dr. Austin did respond, through his attorney in a letter dated

November 17, 2009, as to his current income status. CP 62. This response was less than three weeks after Respondent's request for information through her attorney, and the response correctly stated that Dr. Austin did not receive any salary from any source for medical work from June, 2009 through the date of the letter. CP 62, fourth paragraph.

Second, Dr. Austin was under no duty under either the Separation Agreement or local court rules to supply Ms. DiGiacomo with any further information until she submitted her Motion for Contempt. Even though Dr. Austin *had* supplied correct information, Respondent, without requesting further information, brought a motion for contempt and issued subpoenas for records depositions without notice to Dr. Austin's counsel. At that point Overlake quickly provided the information Ms. DiGiacomo requested. Again, *see* Ms. DiGiacomo's admission that this information allowed her to compute the amount she felt was due in maintenance (CP 144, lines 19-24, CP 145, lines 21-24, and CP 146, lines 1-16). Furthermore, King County Local Family Law Rule 10 relating to disclosure only applies once a motion has been made, and then requires a party to submit a financial declaration with sealed supporting documents. LFLR 10(a) and 10(c).

Finally, Respondent's argument concerning the contract Dr. Austin signed with ECTSA in June, 2010, is inappropriate. ECTSA never paid

Dr. Austin any salary. There was no evidence that they did, despite response to subpoena; the contract was modified by agreement of both parties two months *prior* to any request for information by Ms. DiGiacomo or her attorney. Again, compare CP 60 and CP 246-247. The contract was not modified to avoid a request for information by Ms. DiGiacomo.

4. Findings Concerning Bad Faith.

First, Respondent admits that two of three bad faith findings by the Commissioner were not correct. The third finding of bad faith is based on Respondent's allegation - not cited to any page of the record - that the Separation Agreement imposed a duty on Dr. Austin to disclose income to Ms. DiGiacomo. Respondent's allegation is false and directly contradicted by the record. The only provision of the Separation Agreement remotely related to disclosure of that type is at Paragraph 1.8, which describes the disclosure that both parties have made at the time of the execution of the Separation Agreement.

III. Respondent's Argument Concerning Attorney's Fees.

Respondent argues in its Responsive Brief that it is entitled to fees below and on appeal. As to attorneys' fees below, as there was no contempt, so the award for attorney's fees to the Respondent should be reversed. See, for example, fee reversals in *Johnston v. Beneficial*

Management Corp of America., supra., 96 Wn. 2d at 715-716; Trummel v. Mitchell, 156 Wn.2d 653, at 676, 131 P.3d 305 (2006).

There is an additional reason that Respondent may not seek fees below or on Appeal - Respondent and Dr. Austin agreed not to seek attorney fees from each other in any proceeding related to their dissolution. The Separation Agreement, which is specifically incorporated as part of the Decree and made a personal Order of the Court below (CP 26, at paragraph “3.13”) specifically provides:

VII. ATTORNEY’S FEES. Each of the parties shall pay their respective attorneys’ fees incurred . . . in connection with *any and all proceedings pertaining to the dissolution of marriage of the parties* [emphasis added].

Respondent again ignores the Separation Agreement by seeking attorneys’ fees for this Appeal in her Response.

CONCLUSION

1. Summary of Relief Requested From This Court

The Commissioner’s findings that Dr. Austin failed to disclose income and concealed income relevant to maintenance, and her conclusion that he is therefore in contempt of the dissolution Decree that incorporated the parties’ Separation Agreement, should be vacated. The facts do not support these findings, and there are no provisions of the Decree or court orders below that require disclosure of income.

The Commissioner's finding that Dr. Austin failed to pay required maintenance, and her conclusion that he was therefore in contempt of court and her ensuing judgment against him, should be vacated, since Dr. Austin paid Ms. DiGiacomo 50 percent of his salary and bonus, and the Separation Agreement does not award Ms. DiGiacomo 50 percent of funds Dr. Austin might receive in the future for cash-out of unused vacation time. Even if the court disagrees regarding Dr. Austin's calculation of maintenance, the contempt ruling should still be reversed because there has been no intentional violation of plain provisions of a court order.

Two findings of bad faith should be vacated, as both parties in this appeal agree that they are not sustainable on the record. These findings concerned supposed arguments about (1) a cap on maintenance and (2) income pertaining to Overlake. See Brief of Respondent at p. 15, first two paragraphs. A third finding of bad faith concerning access to documents should be vacated because there was no requirement in any prior court order in this case that Ms. DiGiacomo be provided access to documents.

The award of attorney fees should be vacated because Dr. Austin is not guilty of contempt of court, and because the Separation Agreement in this case requires the parties to pay their respective attorneys fees.

2. Conclusion

Respondent's Brief is inadequate as a Response to this Appeal. Dr. Austin respectfully asks this Court to reverse the judgment for maintenance and the findings of contempt below, and vacate the award of attorneys' fees by the Commissioner as improper, with each party to this appeal to pay their own fees and costs.

RESPECTFULLY SUBMITTED this 10th day of January, 2011.


Bradley K. Crosta, WSBA #10571
Attorney for Appellant


Kenneth G. Christensen, WSBA #13454
Associated on the Brief

**COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I**

In Re the Marriage of)	NO. 65628-7-I
)	
JOSEPH J. AUSTIN, M.D.,)	DECLARATION OF SERVICE
)	OF APPELLANT'S REPLY
Appellant,)	BRIEF
and)	
)	
SILVANA M. DI GIACOMO,)	
)	
Respondent.)	
_____)	

Kieran M. McKee certifies and declares:

I am the legal assistant of Bradley K. Crosta, Crosta and Bateman, attorney of record for Appellant Joseph J. Austin, M.D., in the above-captioned proceeding, and I make this declaration based upon my personal knowledge and belief. I am over the age of eighteen, have personal knowledge of the facts herein, and am competent to testify regarding the same. On January 10, 2011, I mailed via United States First Class Mail, postage prepaid, the original and one copy of the Appellant's Reply Brief

to the Clerk, Court of Appeals, and a true and correct copy of the Appellant's Reply

Brief to Respondent Silvana M. DiGiacomo's attorney at the addresses below:

Clerk
Court of Appeals
One Union Square
600 University Street
Seattle, WA 98101

and

Mr. Alan Dermody
Anderson Fields & McIlwain
207 E Edgar St
Seattle, WA 98102

There are no other necessary parties to this appeal.

I certify and declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED at Seattle, Washington this 10th day of January, 2011.



Kieran M. McKee,
Legal Assistant to Bradley K. Crosta
Attorney for Appellant