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65628-7

No. 65628-7-I

COURT OF APPEALS, DIVISION ONE
OF THE STATE OF WASHINGTON

JOSEPH J. AUSTIN, Appellant

v.

SILVANA DI GIACOMO, Respondent

BRIEF OF RESPONDENT

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Not applicable

I. Facts Relevant to This Appeal

A. Dr. Austin Concealed his Employment Subsequent to His Departure from Overlake Hospital

As noted in Dr. Austin's brief, he had lost his position from Overlake Hospital at the end of June 2009. Silvana DiGiacomo learned that he might be employed during negotiations in October 2009, to settle a lawsuit in Toronto, Canada. There, Dr., Austin repeatedly commented that he might lose his job if the facts of that lawsuit became public, and he also had to postpone some of the negotiations, because his counsel informed the parties he was in surgery, even on a Sunday. CP 53-55. Until November 17, 2009, Dr. Austin had never indicated he was, in fact employed, or whether he was receiving a salary. In response to Ms. DiGicamo's counsel's request, his counsel responded that he was employed, but was not receiving a salary. CP 60, 62-63, third full paragraph. It was only after discovery that Ms. DiGiacomo learned that Dr. Austin had signed a contract with Everett Cardiovascular and Thoracic Surgical Associates for a salary of \$400,000 per year, CP 233-242, just eight days after notifying her that he would no longer be employed. CP 60, CP 62, second full paragraph, beginning "As you know...". She also learned through discover that he had amended the contract so that he

received no salary. CP 244, Amendment 1. Later, in deposition testimony, Dr. Austin admitted that he had initiated the contact to reduce the salary, without a request by the medical practice. CP 123, lines 2-4, 23-24. At the same time, Ms. DiGiacomo learned from discovery from Overlake Hospital, that Dr. Austin's income from Overlake Hospital for the period 2005 through 2009, inclusive. CP 248-250. The income shown was consistent with the income reported on Dr. Austin's W-2 tax forms for income for years 2005-2008, CP 252-255. It was these records that Ms. DiGiacomo calculated the maintenance paid for 2009, CP 46 lines 6-15 and the amount he should have paid. CP 145 lines 23-25, CP 146 lines 1-3.

B. The Hearing On The Order to Show Cause for Contempt

1. Appellant's counsel is incorrect that an additional \$881.19 was added to the award. Appellant's Brief, p. 9, lines 1-8. The calculation of the deficiency in the maintenance payments had been shown by Ms. DiGiacomo to be \$35,421.82. \$145,349.82 in reported income for Dr. Austin (after deducting social security, Medicare and retirement payments) less the \$109,928 that Dr. Austin had paid in 2009 for maintenance. CP 146 lines 6-15 and the amount he should have paid. CP 145 lines 23-25, CP 146 lines 1-3. there was no explanation in the findings

as to why the court reduced the award to \$34,671.82. Order at Par. I.C., CP 164.

2. The was evidence that Ms. DiGiacomo made a request for evidence of Dr. Austin's income before she filed the Order to Show Cause for Contempt, that was contained in her counsel's letter of October 28, 2009, to Dr. Austin's counsel, specifically requesting income information.

" I am asking for a current status on his position, and a copy of his prior contract as well as any new contract he may have entered into. ...Your letter of June 15th mentioned the possibility of entering into a fee for services practice, or being employed by a local medical group, and the status of any of those activities would be appropriately included as part of your response. " CP 60

As noted in Appellant's Brief, Ms. DiGiacomo did not receive any information from Overlake until January 2010. AB p. 11, lines 2-3-4.

II. ARGUMENT

A. Standard of Review

A trial court may impose a contempt sanction using its inherent constitutional authority or under statutory provisions found in Title 7 RCW. *In re Dependency of A.K.*, 162 Wn.2d 632, 645 (2007). A finding of contempt and punishment, including sanctions, lies within the sound discretion of the trial court. *State v. Dugan*, 96 Wn.App. 346, 351 (1999). Courts will not disturb a trial court's contempt ruling absent an abuse of

that discretion. *Dugan*, 96 Wn.App. at 351. “A trial court abuses its discretion when it exercises its discretion in a manifestly unreasonable manner or bases its decision on untenable grounds or reasons.” *State v. Berty*, 136 Wn.App. 74, 83-84, 147 P.3d 1004 (2006) (citing *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995)).

In reviewing findings of fact entered by a trial court, an appellate court's role is limited to whether substantial evidence exists to support the findings. "Substantial evidence" is evidence in sufficient quantum to persuade a fair-minded person of the truth of the declared premise. (Citations omitted)

Hutchinson Cancer Research v. Holman, 107 Wn.2d 693 (1987) Thus, even if alternative findings could have been created from the evidence, the findings of the trial court are accepted if there is the minimum level of evidence to substantiate the findings.

B. Argument of Issues

1. The Purported Abuse of Discretion of the Commissioner for including “paid time off – cash out” as income for purposes of determining maintenance.

Divorce decrees are interpreted in light of statutes and contract law. See *Callan v. Callan*, 2 Wn.App. 446 (1970) and *In re Marriage of Gimlett*, 95 Wn.2d 699 (1981) The divorce decree here was drafted by Dr. Austin's counsel. CP 67-84. Ms. DiGiacomo was unrepresented at the

time. CP 69, lined 30-34. Courts have long held that if there is any ambiguity in a contract, the doubt created by the ambiguity will be resolved against the one who prepared the contract. See *Felton v. The Menan Starch Co., Inc.*, 66 Wn.2d 792 (1965) and *Kwik-Lok Corp vs. Pulse*, 41 Wn.App. 142 (1985).

Within these legal standards, interpreting the Separation Agreement to say it does not include the payment for accumulated unused vacation time in gross income is to ignore the fact that the contract with Overlake Hospital was signed in June 1999, less than one year prior to the signing of the Settlement Agreement. CP 79, lines 2-10 for the Settlement Agreement, CP 69, line 22 for the date of signature of Decree. No provision was made for vacation pay, because, as noted, no vacation pay had apparently been accrued, or Dr. Austin had used his vacation pay and had none accrued.

Claiming that the vacation pay was not subject to distribution under *In re Marriage of Williams*, 84 Wn.App. 263 (1996) and *In re Marriage of Hurd*, 69 Wn.App. 38 (1993) is misleading. Once a couple is divorced, their earnings are separate property, and the separation contract and decree provide for the allocation of any earnings of the spouse paying maintenance. The issue of vesting of the deferred earnings at the time of

dissolution has already been resolved by the court. The Appellant's argument is basically that the unused vacation pay should retroactively relate to the date of dissolution, but at the same time, Appellant admits that the unused vacation pay was Dr. Austin's separate property, and that it was never included in the specifically quantified salary and bonus provisions of the Separation Agreement. AB page 16, lines 15-19. Further, Appellant admits that the unused vacation pay was a matter of policy grace from Overlake, based on the Declaration of Brian Read. AB page 16, lines 20-21, page 17, lines 1-5.

Dr. Austin received vacation pay in each of the years he worked for Overlake Hospital, reported as type 09 income, CP 249-250, and his reported income on his W-2 forms matched his income reported from Overlake (except for an unexplained \$866 difference in years 2005 through 2008, CP 252-255. His income, by year was reported as follows:

Year	Income reported by Overlake (CP 249-250)	Dr. Austin W.2 tax form (CP 252-255)
2005	\$461,119.00	\$461,811.76
2006	475,008.00	475,874.64
2007	475,008.00	475,874.64

2009	458,064.00	459,110.73
2009	324,144.85	

Consistently, paid time off was reported on the report from Overlake, and that total was included in the total on Dr. Austin's tax returns reported as salary. No W-2 was available for 2009 for Dr. Austin, since the year had just ended when this action was filed, but it is evident from the material provided by Dr. Austin that the payment of the unused vacation time was not considered by Overlake to be deferred compensation, because his other deferred compensation payments were never reported in the income records for 2005-2009, yet the vacation pay was always reported in every year, and Dr. Austin reported it as income upon which he paid his maintenance. This clearly shows an ambiguity in the original Separation Agreement, the unused vacation pay in the future was not described.

If a contract is equally susceptible of two or more constructions it should be construed against the part who drafted it. *Seattle First National Bank v. Hawk*, 17 Wn.App. 251 (1977) Here, the benefit was not described in the Separation Agreement, the Agreement had been drafted by Dr. Austin's counsel, and even Overlake had reported the used and unused vacation time as salary income. Even though that was the

hospital's act of grace, it meant that this was salary income to Dr. Austin, and subject to distribution as maintenance to Ms. DiGiacomo.

2. No Abuse of Discretion for Finding Dr. Austin in Contempt.

The court is required to determine that the alleged contemptuous conduct is willful. As noted in *Graves v. Duerden*, 51 Wn.App. 642, 647-648 (1988), contempt proceedings must protect individuals from violations of orders that are ambiguous or unclear. Here, there is an ambiguity, but it is resolved, as noted in *Kwik-Lok Corp vs. Pulse*, 41 Wn.App. 142 (1985) and *Seattle First National Bank v. Hawk*, 17 Wn.App. 251 (1977) by first determining any drafting ambiguities against the drafter of the documents, and then determining if the action was an intentional violation. *Trammel v. Mitchell*, 156 Wn.2d 653, 131 P.3d 305 (2006) is not applicable here, it discussed contempt for conduct that was not in the original order, yet here, payment of maintenance based upon salary was part of the order. Likewise, *State ex. Rel. Daly v. Snyder*, 117 Wn.App. 602 72 P.3d 780 (2003) and *In re Hansen*, 142 Wn.2d 1027 (2007) dealt with criminal contempt, where jail time was requested or contemplated, here no such request had been made, CP 65.

Dr. Austin knew that Overlake was including his vacation pay as income, as evidenced by his W-2 forms, CP 252-255. The record was also

clear that he had been asked for his income for 20009, yet he had not provided it until it was subpoenaed by Ms. DiGiacomo's counsel. The calculation by Ms. DiGiacomo's counsel was consistent with the including of the unused vacation pay in Dr. Austin's income by Overlake. While Mr. Bean identified the unused vacation pay as a deferred compensation, it was not actually treated by Overlake in that manner, instead it was reported as salary income. Had it been reported as deferred compensation, as his pension and other deferred compensation benefits were, CP 252-255 line 12b of each W-2 form, then there is no question that this would have been outside of the salary and bonus that Dr. Austin had to use to determine the amount of maintenance he paid. Instead, Overlake treated it as a bonus, and reported it as salary, which totally undercuts the argument that it is deferred compensation. Overlake's actual reporting of the unused vacation pay trumps what they called it, deferred compensation or not, it was paid like normal salary or bonus, and therefore was susceptible to division for maintenance. The Commissioner made no error in finding contempt, the determination had to be made that the income from the unused vacation pay was divisible, based on the drafty of the document by Dr. Austin's counsel, and then once that determination was made, it was clear that Dr. Austin had not properly paid maintenance.

3. Evidence was Not Intentionally Concealed

A. Dr. Austin's income was concealed.

The income from Overlake was never disclosed to Ms. DiGiacomo until the subpoenas were sent and the discovery material received. Ms. DiGiacomo had requested information in October 2009, which was not received, nor has there ever been a claim that her request was answered. Her ability to calculate the income due to her, noted by Appellant at AB page 24, lines 13-17, was only after she received the discovery material. The timing of that calculation is critical to Appellant's argument that no concealment of income existed.

B. Information about Dr. Austin's job and salary were concealed.

The Commissioner's oral statement was based on the facts established by Ms. DiGiacomo that Dr. Austin had signed a contract for \$400,000 per year eight days after he notified her he might not have a job, and that he never notified her of that job. CP (deposition) There is sufficient evidence to show that he had signed a contract, and never notified her of its existence. Only later did he modify the contract to eliminate his salary, but the Commissioner had sufficient evidence to make this ruling.

4. Bad Faith Findings of The Commissioner

The Commissioner found bad faith for three arguments. First, that Dr. Austin had argued for a cap on maintenance. While his arguments implied that the maintenance had reached a level where it had met the full economic benefit that Ms. DiGiacomo was entitled to, it was not bad faith to so argue, and this particular finding of bad faith is not sustainable from the record.

The Commissioner next found bad faith for Dr. Austin for arguing that the income provision only related to Overlake. It is accurate that Dr. Austin's counsel stated his opinion about the relevance of income that was not related to Overlake, but since this was not at issue in the contempt order to show cause, it was not germane to the final ruling, and was not necessary for the Commissioner to even rule, even if Dr. Austin's arguments had asked her to rule on it. Accordingly, this finding is also not sustainable.

The Commissioner's third finding of bad faith related to whether or not Ms. DiGiacomo had access to documents to determine his obligation. The initial declaration of Ms. DiGiacomo described Dr. Austin's comments that he would lose his job if the Toronto lawsuit became public knowledge. CP 54 line 21-24, CP 55 lines 1-3. This led to the understandable inference that Dr. Austin was employed, and that there

was maintenance that she was entitled to receive, thus her contempt action. Before the action was instituted, Ms. DiGiacomo requested information about his income, CP 60, but none was forthcoming until she subpoenaed his income and employment records. Dr. Austin even admitted in deposition that he had thought about informing her about his employment, but hadn't done so, CP 117, lines 20-23. Ms. DiGiacomo's statements that she was able to determine Dr. Austin's income from earnings statements from Overlake that were supplied to her in January 2010, CP 296, lines 13-25, CP 297, lines 1-3, clearly show that she was only able to do so after she received the information from Overlake, not from Dr. Austin. Under the Separation Agreement, Dr. Austin had a duty to disclose income to Ms. DiGiacomo, and he did not do so. The Commissioner had sufficient information to make a finding that Ms. DiGiacomo did not have access to the correct income information. Ms. DiGiacomo had the access only after instituting a contempt action and obtaining discovery. The record supported the finding.

5. Award of Attorney's Fees was Appropriate

The record below, and the use of the proper standard of preponderance of evidence show that the Commissioner's ruling regarding contempt for the lack of payment of maintenance was proper. Dr. Austin was held

accountable for the drafting of the decree, and for intentionally failing to pay maintenance, and for failing to properly disclose information that enabled Ms. DiGiacomo to determine whether maintenance was due or not. RCW 26.18.040 allows the institution of proceedings to enforce a duty of spousal maintenance. RCW 26.18.050 authorizes a contempt action under chapter RCW 7.21 (RCW 7.21.010(1)(b), 7.21.030(3) are the applicable portions), with or without notice under RCW 26.18.040. Court may use contempt to enforce support or maintenance order until all of obligor's duties have been satisfied, RCW 26.18.050(5). Prevailing party are entitled to reasonable attorney fees, *Rhinevault v. Rhinevault*, 91 Wn.App. 688, 693, 696, 959 P.2d 687 (1998).

There is no requirement to show need and ability to pay in contempt actions. *Hunter v. Hunter*, 52 Wn.App. 265 (1988) The key term is "reasonable attorney's fees". Here, Ms. DiGiacomo's counsel submitted a fee declaration for \$15,717.74, CP 174. The Commissioner had to assess the fees to determine if they were reasonable, and made a specific finding that the \$11,000 amount was a reasonable attorney's fee amount. This is a matter of discretion for the Commissioner, and she noted that she considered all papers submitted by the parties, CP 66, section 3.11B, line 15-17. Clearly, she was aware of the depositions, the subpoenas, the

considerable amount of work necessitated just to simply obtain the information that Dr. Austin claims was available, but which was only obtained through subpoena. The Commissioner did not rule on several issues that were not properly before her, and based on the evidence before her, determined that the level of work required in this case was substantial enough to warrant the fees awarded.

III. Attorney Fees And Costs.

RAP 18.1(b) requires “a party devote a section of its opening brief to the request for fees or expenses” in the argument section of the brief. Ms. DiGiacomo requests attorney’s fees for defending this appellate action. Since there is no claim that the trial court failed to award fees, there is no requirement to provide citation and analysis as to in what way the trial court abused its discretion. That is not an issue in this appeal. Ms. DiGiacomo is merely exerting her right to seek fees and costs as required by RAP 18.

In contempt cases the relative financial circumstances of the parties is not at issue, and no financial declarations are provided to the court. In other marital dissolution cases the relative financial circumstances of the parties (see RCW 26.09.140) can not be argued in this opening brief since the current financial declarations of the parties

required under RAP 18.1(c) are not due until 10 days prior to oral argument.

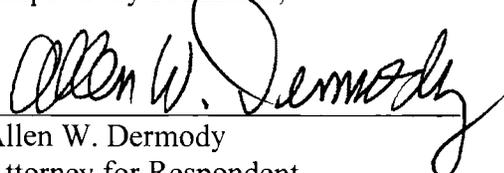
The only other authority in a marital dissolution proceeding is intransigence, which is not being argued in this responsive brief.

IV. Publishing This Decision

This case involves no of issues of first impression: 1) abuse of discretion of a commissioner in contempt cases is well discussed in the current case law; 2) the burden of proof as to contempt is also well discussed in current cases; and 3) attorney's fees in contempt cases is discussed in long established case law. For those reasons we hope Dr. Austin will agree that this court's decision should be published.

DATED this 9th day of December 2010.

Respectfully submitted,


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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 December 9, 2010, I had Seattle Legal Messenger Service file Reply Brief of Respondent with:

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DATED this 9th of December 2010 at Seattle, Washington.

Kristin Mosby
Kristin Mosby
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