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IN THE SUPREME COURT OF FLORIDA

CLERK, SUPREME COURT

By _____
Chief Deputy Clerk

PETRA FISHMAN n/k/a
PETRA SMITH,

Appellant/Petitioner

FLA. S. CT. NO. 83,243

v.

4th DCA Case No. 92-00865

J. ROBERT FISHMAN,

Appellee/Respondent.

_____ /

ANSWER BRIEF OF APPELLEE

On Appeal from the Fourth District Court of Appeal
on a Certified Question of Great Public Importance

✓

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PRELIMINARY STATEMENT

Appellant/Petitioner will be referred to as "Former Wife" and/or Appellant. Appellee/Respondent will be referred to as "Former Husband" and/or Appellee.

References to the Record on Appeal will be designated "R". The Transcript of the contempt proceedings which were held on March 6, 1992 will be designated "T".

STATEMENT OF THE CASE AND FACTS

Appellant, PETRA SMITH, has appealed an Order of Contempt dated March 19, 1992 (R. 629-631) which the lower court entered against her for her willful violation of the Court's Orders dated December 16, 1991 (R. 597-598) ordering the Former Wife to pay the Former Husband's attorney \$2,875.00 for attorney's fees and an Order dated December 27, 1991 (R. 601) ordering the Former Wife to pay costs of \$180.70 to the Former Husband. The Former Wife was ordered to pay these attorney's fees and costs because she had been held in contempt three times for violating the Former Husband's visitation rights. Said Orders were as follows:

1. Order of August 30, 1991 (R. 413-414) enforcing the Former Husband's visitation rights and reserving jurisdiction to award attorney's fees and costs;

2. Order of September 20, 1991 (R. 428-429) in which the Court found the Former Wife to have willfully disobeyed the Court's visitation Orders on at least two occasions; Order to makeup visitation; and reserved ruling on the assessment of attorney's

fees and costs; and

3. Order of October 15, 1991 (R. 442-443) in which the Court held the Former Wife in willful contempt of the Court for violating the terms of the Court's Order requiring free and open communication between the parties' minor child and the Former Husband and reserving jurisdiction to award attorney's fees and cost.

The Former Wife did not appeal the three contempt Orders or the Orders ordering her to pay attorney's fees and costs. The Former Wife is now attempting to attack the validity of the attorney's fee Order dated December 16, 1991 (R. 597) despite the fact that she failed to timely appeal same.

After the Court entered its Orders requiring the payment of attorney's fees and costs in December of 1991, the Former Wife only paid \$10.00 per month to the Former Husband's attorney claiming that she could not afford to pay more than this sum (T. 4). The Former Wife was questioned at the hearing on March 6, 1992 regarding her Financial Affidavit of October 8, 1991 which had been introduced into evidence at a prior hearing (R. 491-496) and her more recent Financial Affidavit dated March 6, 1992 which was introduced into evidence at the hearing on the contempt (R. 622-626). The Former Wife's testimony showed that between October 8, 1991 and March 6, 1992, the Former Wife had:

1. Added basic TV Cable to her household expenses at the rate of \$35.00 per month (T. 5);
2. Had begun receiving \$300.00 per month from the Former

Wife's boyfriend, Mr. Riley, who was now living with the Former Wife (T. 5);

3. Had begun receiving child support and arrearage payments in the total amount of \$72.00 per week from the Former Husband, said payments being only two weeks behind (T. 6). These payments were not included in the Former Wife's Financial Affidavit;

4. Had settled a personal injury lawsuit for \$6,500.00 which was being held in escrow (T. 6);

5. Had been making monthly payments of approximately \$125.00 per month on the Former Wife's closed credit card accounts (T. 8-9);

6. Had an open Discover Card account on which she was still able to charge and was keeping the monthly payments current (T. 10);

7. Had received money from Mr. Riley which she paid to her own attorney (T. 8); and

8. Had taken a trip to Germany which required the Former Wife to take a week off from her job without pay (T. 14).

The Former Wife testified that she had assigned her personal injury settlement to her former family law attorney, Jerry Randolph (T. 11). When the Court asked for a written assignment, the Former Wife stated that she had not brought it to Court (T. 15). The Court specifically rejected the Former Wife's testimony that she did not have access to the settlement based on the Court's finding that her testimony was "not credible". The Court also found that she had the ability to pay all of her other bills and that she was

able to purge herself of contempt by the payment of \$1,000.00 within five days (T. 18).

Apparently in an effort to bolster the Former Wife's position after the hearing, the Former Wife filed her own deposition and the deposition of Jerry Randolph over one month after the March 6, 1992 hearing (R. 21-84). Appellee objects to the use of said depositions as they were not admitted into evidence by the Court at the March 6, 1992 hearing or pursuant to any post trial motion of the Former Wife.

SUMMARY OF THE ARGUMENT

Attorney's fees which are awarded to one former spouse against another as a result of actions to enforce visitation rights are enforceable by contempt. Incarceration which may result from such contempt citations do not violate the constitutional prohibition against imprisonment for the payment of a debt because the payment of such attorney's fees is a duty owed by one former spouse to another and has long been recognized as an exception to the constitutional prohibition. The Appellant has cited no case authority for her contention that attorney's fees are not enforceable by contempt. In fact, Florida Courts have long upheld the use of contempt to enforce attorney's fees. There is no dispute that visitation rights are enforceable by contempt as are support orders and attorney's fees awarded in conjunction therewith. There is no rational basis or policy consideration which would lead this Court to exclude attorney's fees awarded in conjunction with the enforcement of visitation rights while permitting enforcement of these other rights by contempt. Even if attorney's fees may only be enforced by contempt if they are in the nature of a support order or awarded in conjunction with support, Appellee should still prevail because Appellee was in an inferior financial position to the Appellant and Appellee was entitled to an award of attorney's fees under the traditional analysis of need and ability to pay under Section 61.16, Florida Statutes.

The Trial Court did not err in finding the Former Wife in willful contempt of the Court or in ordering her incarceration if

she did not pay a purge amount of \$1,000.00 within five days of the date of the Order. The lower court followed the guidelines of the this Court as enunciated in Bowen v. Bowen, 471 So.2d 1274 (Fla. 1985) in making its rulings. The Former Wife had received over \$4,000.00 in income and child support between the date the Former Wife was ordered to pay the attorney's fees and the date of the contempt hearing, but the Former Wife only paid \$30.00 on the attorney's fees during this time despite her ability to pay substantially more. The Former Wife had the ability to purge herself of contempt from the proceeds of a personal injury settlement of \$6,500.00, the Trial Court finding that her testimony in regard to the unavailability of these funds being not credible. In any event, even if this fund was not available, the purge amount of \$1,000.00 was available through her various sources of income and child support payments.

The Fourth District Court of Appeal properly denied the Former Wife's request for appellate attorney's fees under Section 57.105, Florida Statutes, because there was and are justiciable issues of law or fact in this case. The Former Wife is not entitled to appellate attorney's fees under Section 61.16, Florida Statutes, because of her superior financial position and the fact that she is the party held in contempt by the Trial Court which ruling was affirmed by the Fourth District Court of Appeal.

ARGUMENT

POINT I

THE CERTIFIED QUESTION SHOULD BE ANSWERED
IN THE AFFIRMATIVE. THE ORDER OF CONTEMPT
FOR THE FORMER WIFE'S FAILURE TO PAY THE
FORMER HUSBAND'S ATTORNEY DOES NOT CONSTITUTE
AN UNCONSTITUTIONAL IMPRISONMENT FOR DEBT

The Fourth District Court of Appeal, which affirmed the Trial Court's ruling holding the Former Wife in contempt of Court, correctly held that enforcement of an order for the payment of attorney's fees incurred in enforcing visitation rights are enforceable by contempt and do not constitute imprisonment for debt. Heitzman v. Heitzman, 281 So.2d 578 (4th DCA 1973). The issue posed by Judge Walden in his Opinion in Heitzman was:

"Are contempt proceedings available to enforce payment of attorney's fees awarded to a wife in a divorce judgment?" Heitzman, supra at Page 579.

The Court answered this question in the affirmative and held:

"If, as adjudicated, whether as the fruit of a contest or of a stipulation, an award of fees is made, same should be equally enforceable. If the person ordered to pay, having been adjudicated as having the ability to pay, refuses to do so and abide with the Court's order, and fails to show sufficient cause for his default, he is a proper subject for contempt." Heitzman, supra at Page 580.

Subsequent case law has been consistent with the holding in Heitzman, supra. In Maas v. Maas, 440 So.2d 494 (2nd DCA 1983), the Court held that "contempt was and remains a viable and available judicial remedy" to enforce the payment of attorney's

fees. Maas, supra at Page 497; accord, Hornbuckle v. Hornbuckle, 533 So.2d 323 (1st DCA 1988); and Carlyle v. Carlyle, 438 So.2d 176 (1st DCA 1983).

Appellant is unable to cite any case law or statutory law in support of her position. In the Fourth District Court of Appeal, Appellant cited Laing v. Laing, 431 So.2d 324 (3rd DCA 1983) as authority that attorney's fees are not enforceable by contempt; however, that case supports the Appellee's position. In Laing, the Court drew a distinction between a husband's failure to pay his wife's attorney and his failure to pay his own attorney holding that only the former is enforceable by contempt. The Court reasoned that Mr. Laing's own attorney would be considered a "third party," thus contempt would not be available to enforce such payments, but payments to the Former Wife's attorney would be enforceable by contempt.

The basic flaw underlying Appellant's argument is her assumption that attorney's fees are only enforceable by contempt if they are linked to payments of alimony or child support. Support payments have long been recognized as a personal duty due to one spouse from the other as well as a duty owed to society and not a debt for which imprisonment can be prohibited. Bronk v. State, 43 Fla. 461, 31 So. 248 (1901); Gibson v. Bennett, 561 So.2d 565 (Fla. 1990). Appellant overlooks the fact that payment of attorney's fees is as much a personal duty owed by one spouse to another as the payment of alimony or child support and, as such, is no more a debt for which imprisonment is prohibited than are

other payments such as child support and alimony which one spouse has a duty to pay to the other. The enforcement of attorney's fees as a duty owed by one spouse to another was recognized long ago by this Court. Orr v. Orr, 192 So. 466 (Fla. 1939). In Orr, supra, the Court stated:

"...this is a case of non-payment of counsel's fees rather than failure to contribute to the support of the wife; but it should be borne in mind that it is the disobedience of the Court's order, as well as the necessity of the spouse, which furnishes grounds for this process of Court."
Orr, supra at Page 467.

This language supports the Appellee's position that attorney's fees need not be linked to support to be enforceable by contempt. Instead, the payment of attorney's fees is an independent duty which is just as enforceable by contempt as the duty to pay support or alimony, or to comply with visitation requirements or injunctions for protection, all of which are enforceable by contempt. In Orr the Court concluded that an order to pay attorney's fees is enforceable by contempt and "is a matter of right to those who have a pecuniary interest in the enforcement of the decree." Orr at Page 467. Nothing in the opinion requires attorney's fees to be connected to support in order to be enforceable by contempt.

Although the case of Price v. Price, 382 So.2d 433 (1st DCA 1980) is actually a probate case, the underlying rationale for the Court's ruling in Price supports the enforceability of attorney's fees by contempt as a marital obligation, just like alimony or child support, which must be treated differently than a debt for

which imprisonment may not be imposed. The Price case is similar to the instant case because there was no timely appeal from the judgment awarding attorney's fees, and therefore, the Appeals Court was foreclosed from considering whether the award of fees itself was proper. The only issue before the Court in both instances was the enforceability of the attorney's fees by the power of contempt. Although the fact situation of Price is distinguishable, the underlying reasoning and rationale for the Court's ruling is directly applicable to the facts in this case. The Price Court determined that parties to whom attorney's fees are awarded under Section 61.16, Florida Statutes, may enforce them by contempt because there is an "assumed necessity for special protection and enforcement of rights growing out of the marriage relationship." Price at Page 437. The Court, noting that there is no distinction between alimony and suit money both of which are duties owed to society, stated:

"That the wife, as well as the husband, was made subject to liability for alimony and attorney's fees did not alter the basic principle that only obligations of the parties to the marriage relationship, owed to each other, are to be treated differently from 'debts' for which imprisonment may not be imposed under the Constitution." Price at Page 437.

Logically, there is no reason to conclude that support payments owed by one spouse or former spouse to the other are a duty while the attorney's fees are not a duty but a debt. The duty to pay attorney's fees by one spouse to another is certainly distinguishable from those situations in which one spouse or the

other takes responsibility for paying a debt such as a mortgage payment or from situations in which enforcement of property rights is attempted by contempt. See Filan v. Filan, 549 So.2d 1105 (Fla. 4th DCA 1989). Appellant cites the Filan case in support of Appellant's argument (see Page 22 of Appellant's Brief), but Filan involved an obligation by the husband to pay a second mortgage on the marital home. The Court held that the husband's obligation to pay the second mortgage was not enforceable by contempt because it was in the nature of a settlement of property rights. Filan is clearly distinguishable because it involved a case of an obligation to pay a third party debt versus a duty by one spouse to pay the other which is enforceable by contempt. Price, supra.

The Appellant concedes and it has long been the law in the State of Florida that the denial of visitation rights to the father by the arbitrary and capricious conduct of the mother "may be adjudicated in a contempt proceeding." Lee v. Lee, 43 So.2d 904 (Fla. 1950). Appellant has also admitted that the enforcement of alimony and child support orders along with an accompanying award of attorney's fees may all be enforceable by contempt. Nevertheless, Appellant somehow concludes that the enforcement of attorney's fees awarded when one is held in contempt for violating the visitation provisions of an order or final judgment are not enforceable by contempt; yet Appellant fails to suggest any rational basis or public policy consideration for distinguishing the latter attorney's fee award from the former. The same rationale which justifies an exception to the constitutional

prohibition against imprisonment for debt applies equally to the enforcement of attorney's fees for failure to pay support and for failure to abide by visitation provisions of an order or final judgment. The payments of support and the granting of visitation privileges are but the flip side of the same coin. Both are marital duties owed by one spouse to another. There is no rational basis and, in fact, it would be totally unjust and inequitable to permit enforcement of attorney's fees awards by contempt in the case of child support yet deny such enforcement in the case of visitation.

Every family practitioner in the State of Florida and every family court recognizes that the availability of the contempt remedy is much more likely to ensure the payment of alimony, support, attorney's fees or compliance with visitation privileges than any other remedy. The fact that the attorney's fees, which are usually awarded whenever a father or mother violates a child support or visitation provision of a final judgment, are enforceable by contempt makes it less likely that there will be continuing violations of either child support or visitation provisions of an order. Both child support and visitation are equally important to the stability of the family and to minimizing the damage of a divorce to the minor children. If this Court were to adopt as a rule of law the position of the Appellant, such a rule of law would be tantamount to saying that the receipt of money to support a child is more important than a child's receiving the love, affection and companionship of the non-custodial parent.

Enforcement of visitation rights with an accompanying award of attorney's fees enforceable by contempt is just as essential to meeting the best interests of a child as the receiving of support. There is no rational basis for making any distinction and this Court should refuse to do so.

If contempt becomes unavailable as a remedy for the enforcement of attorney's fees in cases of denial of visitation, such a policy will have a chilling effect on the ability of the non-custodial parent, when he is in a financially inferior position, to obtain representation. The Former Husband/Appellee, ROBERT FISHMAN, had difficulty keeping an attorney and paying his attorney's fees (Appellee's attorney does not have actual copies of the pleadings but believes this is documented in the record as follows: R. 164-165, 179 through 191, 228-229, 399-400). At the same time that the Appellee had to seek three separate contempt citations in a period of approximately four months for violation of his visitation rights, he also was forced into bankruptcy (R. 482) and was granted a reduction in his child support from \$148.00 per week to \$57.00 per week based on a reduction in his income from \$653.00 to \$220.00 per week. His loss of income resulted from an automobile accident suffered by the Former Husband on September 29, 1990 which resulted in a herniated disc. (See Findings of Fact in the Order Modifying Final Judgment; R. 565-569). If this Court holds that attorney's fees recovered as a result of enforcing visitation rights are not enforceable by contempt, then most non-custodial parents in the financial position of the Appellee in this

case will be without representation and cut off from their minor children whenever visitation is denied by the arbitrary and capricious acts of the custodial parent. It will become difficult for non-custodial parents to obtain representation because the likelihood of payment of attorney's fees will be drastically reduced.

Assuming that Appellant is correct and that only support orders are enforceable by contempt as an exception to the constitutional prohibition against imprisonment for debt, the Appellee should still prevail. All awards of attorney's fees including awards of attorney's fees in enforcement actions require a consideration of the financial resources of both parties. Section 61.16, Florida Statutes. Even though a party is held in contempt for failure to comply with a provision of a Final Judgment Dissolution of Marriage, an award of attorney's fees is not automatic because the financial resources of the parties, including need and ability to pay, remain one of the factors that the Court must consider in making such an award. Warnhoff v. Warnhoff, 493 So.2d 52 (4th DCA 1986). The Appellant stated her total net income to be \$1,465.00 in her Financial Affidavit (R. 622-626). In addition, she was receiving \$57.00 per week for child support and \$15.00 per week in arrearage payments from the Appellee which were only two weeks behind (T. 6). The Former Husband's gross income, after subtracting child support, was \$636.40 per month, based on the Court's findings in the Order Modifying Child Support (R. 565-569), while the Former Wife's income was \$1,774.60 per month

including child support and arrearage payments. The Appellee was clearly in an inferior financial position which justified an award of attorney's fees based on the Appellee's need and the Appellant's ability to pay under Section 61.16, Florida Statutes. Even if this Court accepts the Appellant's argument, that only attorney's fees awards in the nature of support are excepted from the constitutional prohibition against imprisonment for debt, there is ample basis in the record to find that the attorney's fee award was in the nature of a support order.

Lastly, Appellant argues under Point I(B) of her Brief that the District Court has fashioned a new exception to the constitutional prohibition against imprisonment for debt, exceeded its jurisdiction and violated longstanding Supreme Court precedent. Appellant's argument fails because the Fourth District Court of Appeal's ruling in this case does not conflict with any Supreme Court decision. There is no Supreme Court decision prohibiting the enforcement of attorney's fees awarded as a result of enforcement of visitation rights by contempt. Furthermore, Appellant's argument that the Fourth District Court of Appeal dropped its reliance on Heitzman, supra, is without support in the record. In fact, Appellee can find no case in which Florida Courts have refused to enforce attorney's fees owed by one spouse or former spouse to another by contempt. The special nature of financial obligations owed between spouses or former spouses, including the payment of attorney's fees owed by one to the other, have always been recognized as a duty not a debt. Such marital obligations have

always been recognized as an exception to the constitutional prohibition against imprisonment for debt.

POINT II

THE LOWER COURT PROPERLY HELD THE FORMER WIFE IN CIVIL CONTEMPT AND PROPERLY ORDERED HER INCARCERATION WITH AN APPROPRIATE MONETARY PURGE REQUIREMENT

The Trial Court complied with the requirements of this Court as enunciated in the case of Bowen v. Bowen, 471 So.2d 1274 (Fla. 1985) in finding the Former Wife in willful contempt of Court for violating the Court's Order to pay attorney's fees of December 16, 1991 (R. 597-598) and the Court's Order requiring the payment of costs dated December 27, 1991 (R. 601) and in ordering the incarceration of the Former Wife if she did not purge herself of contempt by paying \$1,000.00 within five days of the date of the Order.

Bowen did not expressly address the issue of contempt for non-payment of attorney's fees, but the Court promulgated certain guidelines for civil contempt proceedings which are applicable to the instant case:

1. The movant must establish that a prior court order required a monetary payment which has not been paid.
2. The burden of proof then shifts to the defaulting party who must come forward with evidence to dispel the presumption that she had the ability to pay and has willfully disobeyed the Court Order; and
3. If contempt is found, the Trial Judge must separately find that the contemnor has the present ability to pay the purge amount before incarceration can be imposed to obtain compliance with the

Court Order. Bowen, supra.

The Trial Court complied with this Court's guidelines for civil contempt proceedings and its ruling should be affirmed by this Court.

The evidence of the Former Wife's willful violation of the Court's Order was overwhelming. Although the Court ordered the Former Wife/Appellant to pay the Former Husband's attorney's fees of \$2,875.00, the Former Wife instead chose to add cable TV as an additional household expense of \$35.00 per month (T. 5); made payments on a closed Beall's Credit Card of \$50.00 per month (T. 9); made payments on a closed Discover Card of \$45.00 per month (T. 9); made payments on a closed JC Penney Card of \$30.00 per month (T. 9-10); made payments on an open Discover Card of \$75.00 per month (T. 10); made payments to her own attorney from monies given to her by her boyfriend, Mr. Riley (T. 8); and took time off from her job without pay to go to Germany (T. 14). Despite all of this testimony, the Former Wife had the audacity to testify that she could only afford to pay \$10.00 per month on the attorney's fees and that this is all she could pay (T. 4).

At the time of the contempt hearing on March 6, 1992, the Former Husband was obligated to pay \$57.00 per week for child support plus an arrearage payment of \$15.00 per week for a total of \$72.00 per week (or \$309.60 per month) (R. 565-569). At the time of the hearing, the Former Wife testified that the Former Husband was only two weeks behind (T. 6). If the child support and arrearage payments are taken into account and added to the Former Wife's net income, the Former Wife actually had a surplus of over

\$100.00 per month contrary to her claim of a deficit which is shown in her Financial Affidavit (R. 622). From the Former Wife's testimony and Financial Affidavit alone, only one conclusion was possible. The Former Wife blatantly ignored the Court's Order to pay attorney's fees and costs and willfully disobeyed the Court's Order.

Appellant states in her Brief (Page 26) that "these were not token payments." Such a statement is absurd. The attorney's fee Order was entered on December 16, 1991 and the contempt hearing was held almost three months later on March 6, 1992. During this eleven week period, the Former Wife paid only \$30.00 on Court ordered attorney's fees and costs of over \$3,000.00 while receiving over \$4,000.00 in income, rental payments from her boyfriend, and child support and arrearage payments (even assuming that the Former Husband was two weeks behind in his support). The record contains substantial competent evidence to support the finding of contempt in this case and such finding should not be disturbed on appeal. Raheb v. Battisto, 483 So.2d 475 (3rd DCA 1986).

Under Bowen, the lower court must also make a separate finding that the contemnor has the present ability to pay the purge amount before incarceration can be imposed. The Appellant has challenged the Trial Court's authority to find the Former Wife's testimony that she did not have access to a personal injury settlement of \$6,500.00 as "not credible". The Trial Court's function is to weigh the testimony and evidence adduced at the hearing below based on the lower court's observation of the bearing, demeanor and credibility of the witnesses appearing. This Court has no

authority on appeal to substitute its judgment for that of the Trial Court regarding the credibility of the Former Wife. Raheb, supra.

In her Brief, Appellant argues that the Former Wife's testimony in regard to the personal injury settlement was "unimpeached and uncontradicted", thus the Trial Court could not disregard or reject her testimony and, therefore, Appellee failed to prove that the Appellant/Former Wife was able to purge herself by paying \$1,000.00 within five days of the date of the Order (T. 18: there is a typographical error on Page 18, Line 12 of the Transcript which states that the purge amount is \$5,000.00; the purge amount is actually \$1,000.00). Appellant's argument fails for two reasons: (i) The testimony of the Former Wife was impeached, and (ii) there was evidence of the source of other funds from which to pay the purge amount.

In Roach v. CSX Transportation, Inc., 598 So.2d 246 (1st DCA 1992), the Court considered the rule that undisputed evidence must be accepted as true and that finders of fact are not free to disbelieve such evidence and make findings contrary to it. In Appellant's Brief, Appellant cites this case for the general proposition as follows:

"Where the testimony on the pivotal issues of fact is not contradicted or impeached in any respect, and no conflicting evidence is introduced, these statements of fact cannot be wholly disregarded or arbitrarily rejected. Rather, the testimony should be accepted as proof of the issue for which it is tendered, even though given by an interested party, so long as it consists of fact, as distinguished from opinion, and is not essentially illegal, inherently improbable or unreasonable, contrary to natural laws, opposed to common

knowledge, or contradictory within itself."
Roach, supra at Page 249.

Despite the fact that the Plaintiff in Roach was the only person testifying as to how the accident happened, the Court found that the trier of fact was entitled to question the truthfulness of the Plaintiff's testimony in regard to the accident because there were inconsistencies in Plaintiff's testimony on other material issues thereby placing the Plaintiff's veracity and credibility in question; therefore, the jury was entitled to judge the witness' credibility as a witness in its entirety and accept or reject his testimony on all issues.

In the instant case, the Appellant cannot reasonably claim that her testimony was not "impeached in any respect" as required under Roach. Appellant/Former Wife testified that she could only afford to pay \$10.00 per month on the attorney's fees owed to the Former Husband' attorney. (T. 4, 13). As already argued above, the evidence is overwhelming that this was a lie. The Former Wife also testified that she was running a deficit every month (T. 12). Again, especially when the child support and arrearage payments are taken into account, this testimony was also a lie. As in Roach, there were sufficient inconsistencies on material issues to place the veracity and credibility of the Former Wife in question. Under Roach, the Trial Court was permitted to accept or reject her testimony on all issues once her credibility was put in question on other material issues.

The Court inquired of the Former Wife if she had the alleged assignment of the personal injury settlement with her. (T. 15).

Despite the fact that this written assignment had been requested by the Appellee's attorney prior to trial, the Appellant/Former Wife did not produce the document in Court. The Former Wife testified, "Your Honor, I don't have it with me." (T. 15). The Trial Court was certainly entitled to weigh this factor as additional evidence that such an assignment was a fabrication. In addition, the Trial Court was entitled to disbelieve the Former Wife's testimony in regard to the escrowed personal injury settlement because her testimony was in the form of opinion evidence and not factual testimony. Roach, supra. Whether or not the escrowed funds were payable to the Former Wife's former attorney or to the Former Wife would constitute a legal opinion and not fact testimony. In any event, the Appellant's characterization of the statements of Appellee's attorney (Page 27 of Appellant's Brief) are a distortion of what Appellee's attorney knew at the time of the hearing on March 6, 1992. Appellee's attorney was in contact with the liability carrier's attorney, Randy Brennan, as stated at the hearing (T. 16). Mr. Brennan indicated that he was prepared to disburse the funds to Appellant's personal injury attorney except for the fact that Appellee was asserting a lien against the funds by virtue of the orders entered in this action for the payment of attorney's fees and costs to Appellee's attorney. No mention was ever made by Mr. Brennan of any assignment by the Appellant to her former attorney or any other party. Appellant's statement that the escrowed funds were "contractually tied up in the hands of a third party" is a mischaracterization of what Appellee's attorney said.

Even if the Court finds that the Trial Court erred in finding Appellant's testimony regarding the escrowed funds as not credible, there was other competent substantial evidence in the record to sustain a purge amount of \$1,000.00. According to the Former Wife's Financial Affidavit, she was being paid twice a month on March 1st and March 16th; therefore, she would have received over \$500.00 on March 1st and over \$500.00 on March 16th in wages; \$300.00 for rent from her boyfriend (T. 5) and the Former Wife had just received child support and arrearages of \$300.00 (T. 6). The Former Wife also had an open Discover Card from which she could receive cash advances (T. 10). This evidence, even disregarding the personal injury settlement, constitutes substantial competent evidence to support the purge amount of \$1,000.00 and such finding should not be disturbed on appeal. Raheb, supra.

Lastly, Appellant attempts to attack the underlying Orders assessing attorney's fees and costs and asks this Court to hold them unenforceable (Appellant's Brief at Pages 40-42). This is a blatant attempt by the Appellant to circumvent the jurisdictional requirements of Rule 9.110(b), Florida Rules of Appellate Procedure, which requires the Former Wife to appeal the Orders assessing attorney's fees and costs within thirty days. The Former Wife cannot now complain to this Court in regard to the December 16, 1991 and December 27, 1991 Orders taxing attorney's fees and costs because the jurisdiction of this Court was not and has not been properly invoked. Moreover, as argued under Point I of this Brief, there is more than ample evidence to suggest that the Former Wife was in a superior financial position to the Former

Husband, thus an award of attorney's fees was proper based on the financial circumstances of the parties.

POINT III

THE DISTRICT COURT DID NOT
ERR IN DENYING THE FORMER
WIFE APPELLATE ATTORNEY'S FEES

The Appellant/Former Wife is not entitled to attorney's fees under Section 57.105, Florida Statutes. The presence of justiciable issues of law or fact in this case is undeniable.

The Former Wife/Appellant is not entitled to attorney's fees under Section 61.16, Florida Statutes. The Former Husband does not have the ability to pay such fees (See Point I of Appellee's Brief). Furthermore, the original attorney's fees were awarded to the Former Husband on the basis of the Former Wife's contempt for failure to give the Former Husband his visitation rights. The contempt of the non-complying spouse may be taken into account in awarding attorney's fees. Warnhoff, supra. Based on these factors, the Appellate Court correctly denied attorney's fees.

CONCLUSION

For the foregoing reasons, the lower court's Order of Contempt dated March 19, 1992 should be affirmed. In the alternative, if this Court finds that an improper purge amount was set by the lower court, the lower court's Order should be affirmed in part and the cause remanded to the Trial Court for a determination of the proper purge amount.

Respectfully submitted,



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