IN THE SUPREME COURT OF FLORIDA

PETRA SMITH FISHMAN,

Appellant / Petitioner,

v.

J. ROBERT FISHMAN,

Appellee / Respondent.

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FLA. S. CT. NO. 83,243

4th DCA CASE NO. 92-00865

APPELLANT'S REPLY BRIEF

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

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PRELIMINARY STATEMENT

Petitioner will be referred to as "former wife" or "Ms. Smith." Respondent will be referred to as "former husband" or "Mr. Fishman."

References to the record on appeal will be designated "(R:)." The transcript of the underlying contempt proceedings appear at pages 1-20, volume 1, of the record; the relevant and most recent financial affidavit of the former wife appears at pages 622-626, volume 4.[1]

STATEMENT OF THE CASE AND FACTS

Appellant, Ms. Smith must correct certain "facts" as represented in Appellee's Answer Brief.

The $300.00 per month Ms. Smith began to receive, prior to the contempt hearing that is the subject of this appeal, from her boyfriend was fully reflected in the Financial Affidavit under the item "rent" submitted into evidence at the hearing. This money does not represent any additional sums available to the Former Wife as may be suggested by Appellee's version of the facts. That Affidavit, a copy of which is in the Appendix attached to this brief, nevertheless reflected a monthly deficit of $190.00. (R: 90-93). Former Husband's counsel did not object to the Affidavit or the deficit therein, did not impeach or submit evidence refuting the figures, and in fact, offered to submit the Affidavit demonstrating the $190.00 deficit into evidence himself. (R: 4, this is a reference to the transcript of the hearing below and is available in the Appendix to Appellant's Initial Brief).

The child support and arrearages were not reported in the Affidavit since, as Appellee

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[1] On May 11, 1994, this Honorable Court Granted a Motion to Supplement the Record and directed the district court clerk to transmit the Briefs below, the Motions for Rehearing (including Rehearing En Banc and Rehearing Re: Attorney's Fees and Responses thereto, as well as the Appendix submitted in support). These items will be, respectively, identified by document name.

Additionally, the Former Wife's Financial Affidavit of March 5th, 1992, which appears in the record on appeal at pages 90-93, and is repeatedly cited to by the Appellee, is reproduced for the Court's convenience, and pursuant to Fla.R.App.P. 9.220, in an attached Appendix to this Brief.

concedes (Answer Brief at 2-3), Ms. Smith had only just "begun receiving" them (conveniently just prior to the hearing (R:6)) and as she explained at the hearing she was never able to count on the child support payments because they were so irregular and had, in fact, just been cut down. (R: 6). Appellee also fails to mention the approximately $4000.00 in child support arrearages that had accrued. (R: 604).

In fact, around the time of the underlying visitation problems, the Former Husband, in addition to running up the over 4000.00 in arrearages in child support payments, moved to New Jersey having, apparently, decided that phone "visitation" with a five year old was adequate, and successfully sought a substantial reduction in his support payments. Former Husband's bad back allegedly caused his income to drop from $30,000 -35,000 per year to somewhat over $11,000. (R: 565-569, 420-565 (see generally Clerk's Index to Record Sept. 3, 1991 - Nov. 4, 1991)). Ms. Smith's attempt to prove that the Former husband's employer who was paying such reduced salary was conveniently a relative, by submitting into evidence the incorporation papers of Former Husband's employer showing Henry Fishman as registered agent and sole director, was rejected by the trial court which held that the evidence only established that the Former Husband was paid by a friend of the Former Husband's father rather than the father himself. (R: 554-558, 566.). Ms. Smith not only found her child support payments severely reduced but incurred legal expenses for such privilege as the trial court did not award her any attorney fees for the modification of the final judgment (the support reduction proceeding). (R:565-569, Clerks Index Nov. 4, 1991 et seq.).

With respect to a Discover Card account, Ms. Smith's testimony was "I still owe a lot of money on [it]." (R: 10).

Appellee's account states that Ms. Smith "received money from Mr. Riley which she paid to her own attorney," implying that Ms. Smith exercised discretion over the funds. (Answer Brief at 3). The transcript suggests only that Mr. Riley paid the attorney himself. (R: 8).

Ms. Smith's trip to Germany, for which she committed the appalling act of taking a second

- unpaid- week of vacation from work, **occurred in the year prior to the contempt proceedings**. (R: 14). Her father paid for her tickets and expenses so that she could visit him on his 50th birthday. (R: 14).

With respect to the apparently untimely filing of depositions below - **which depositions are not cited to in the briefs to this Court nor were they to the district court below -** Appellant respectfully refers the Court to Rule 9.200 of the Florida Rules of Appellate Procedure which indicates that it is the court reporter that files transcripts. The clerk of the trial court was, however, directed to include filed depositions in the record. (R: 640-641). The Designation to Court Reporter filed by the Appellant following the filing of the Notice of Appeal requests only one new transcript, that of the contempt hearing itself. (638-639).

Appellant, Ms. Smith, not having made any reference to the actual text of the depositions themselves, does not object to keeping them, so to speak, in a "sealed" condition. However, it should be noted that the Appellee failed to follow appellate rules governing errors in the record. Rule 9.200 (c)(1) provides that the lower tribunal may correct the record before it is submitted. Fla.R.App.P. 9.200(c)(1). The Former Husband, or counsel, instead of following this rule, stated an "objection" to the requested record - and only to the deposition of attorney Jerry Randolph - in his Cross Directions to Clerk. (R: 642). This was manifestly before the record was transmitted. (Id.). Apparently, if some small measure of educated surmise be allowed, Appellee did not move the trial court for relief because of what is already on the record with respect to the deposition of Mr. Randolph. The transcript of the contempt hearing below indicates that, as was stated in the Initial Brief, the trial court was informed that counsel for the Appellee as well as Ms. Smith's attorney deposed Mr. Randolph and that counsel for the Appellee had (a copy) of the written assignment of the personal injury settlement. (R: 15). Counsel for Appellee denied receiving the document but did not deny either the deposition or knowledge of the assigment. Nevertheless, following the contempt hearing, counsel for Appellee prepared the contempt order for the trial court stating that the "Former Wife also has available to her a personal injury settlement in the

amount of $6,500.00." (R: 18) The contempt order is in a separate folder with the lower court's transmitted record and can also be found at Exhibit 5 of the Appendix to Appellant's Initial Brief.

The colloquy about the deposition came at the very end of the contempt hearing and the trial court, rather than focusing on the assignment, raised the issue of its order directing that the fees be paid, a little later the court again stated, "[t]his court is going to be obeyed," again reflecting the trial court's erroneous shift to a punitive (i.e. criminal contempt) type analysis rather than the compensatory focus that is paramount in a civil contempt proceeding. (R: 15 and 18). A hearing on whether the Randolph deposition should be included in the record would bring the trial court's attention back to the assignment and to the apparent fact (based on the colloquy before the court and not on the actual contents of the deposition) that an officer of the court may very well have perpetrated a fraud on the trial court by his preparation of an order for the trial court with the personal knowledge of its falseness. Nothing else can explain Appellee's failure, or in fact refusal, to seek the relief from the trial court that was readily available to him before the record was transmitted.

Nor can it be said absolutely that the Randolph deposition cannot be held, at least in part, to be properly part of the record. In Watson v. Williams, 227 So. 2d 226 (1st DCA 1969), the district court held that a portion of a deposition that was not filed nor submitted into evidence was nevertheless part of the record because the trial court was read those portions of the deposition. Analogously here, the trial court was informed and made aware of a portion of the Randolph deposition and it can be argued, not unreasonably, that such portion is properly part of the record herein.

Of course, the purpose of proceedings before the present Court are not to conduct evidentiary hearings on the content of the record and counsel for the Appellee has not formally submitted a motion to this Court asking for any specific relief with respect to the record nor has he even suggested that there was some improper reference in Appellant's Briefs, on this appeal or before the district court, that should be stricken.[2]

It should be observed that nowhere in Appellee's Answer Brief is it actually stated that the personal injury settlement was in fact available to the Former Wife or that the evidence before the trial court so proved. The closest that Appellee comes to this is some inscrutable gibberish that the trial court could disregard Ms. Smith's testimony as to the assignment of the personal injury settlement because "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 an opinion and not factual testimony." (Appellee's Answer Brief at 22). Even if Ms. Smith merely "opined" that she did not have access to the settlement proceeds, counsel for Appellee, nevertheless, never "proved" or offered any evidence whatever that the funds were in fact readily available to her.

Appellee did, however, concede, that the funds were in the hands of a third party and had competing claims against them:

> 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.*

Appellee's Answer Brief at 22.

Initially, **the italicized portion of the above quotation refers to matters outside the record and as such should be stricken**. The transcript of the hearing is only nineteen pages long and this information does not appear any where in it, nor is it in any of the underlying motions.

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[2] Moreover, apparent fraud on the trial court cannot be corrected on appeal in cases such as the one at bar which constitute "intrinsic fraud." See e.g. Thompson v. Crawford, 479 So. 2d 183 (Fla. 1985) (intrinsic fraud may not be used to set aside a judgment on appeal). But due to the rather unique circumstances of the present case, where the substance of the Randolph deposition was made known to the trial court, the deposition was not properly objected to and at least in part is properly part of the record, and where the apparent fraud was in the preparation of an order to be signed by the trial court by an officer of the court with **record** knowledge of that order's falseness, it remains an open question whether, had counsel for the Appellee made an affirmative misrepresentation to this Court regarding the availability of the personal injury settlement, this Court would have held that it lacked authority to deal with such misrepresentation.

However, this statement concedes that the money is (1.) in the hands of a third party who (2.) was to release the funds not to Ms. Smith but to one of her attorneys and (3.) evidences at least two competing claims to the funds - that of Appellee's counsel and Ms. Smith's personal injury attorney, which (4.) would require the third party attorney to deposit the funds in the registry of the court rather than releasing them to either party.

Finally, on May 11, 1994, this Honorable Court granted Appellant's Motion to Supplement the Record which provides this Court with the Briefs and Motions for Rehearing and Rehearing En Banc below as well as the Appendices thereto. Some reference to these is made in the Initial Brief. Furthermore the Court may confirm on its own that no mention to matters outside the undisputed record were ever made by the Appellant. The Briefs below establish that Heitzman v. Heitzman, infra, became an issue only on appeal - as was argued in the Initial Brief, at page 4. The Appendix to the Motions for Rehearing to the district court has the Heitzman lower court orders proving that case did in fact involve a husband being held in contempt for being in default on attorney's fees related to support obligations.

SUMMARY OF ARGUMENT

Appellee states, in his Summary of Argument, that "[t]here 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;" the only other rights cited are those to support. There is, however, the small matter of the constitution, both state and federal, which prohibit imprisonment for debt. See Initial Brief at 13. Additionally, Appellee cites not a single case, besides the one at bar, where contempt was allowed to be used to enforce attorney's fees unrelated to child support or alimony.

Even if long-standing constitutional principles were to be modified by this Honorable Court, the fact remains that even by Appellee's own accounting Ms. Smith would have had, and this is in theory, only $300.00 to pay towards the $1000.00 contempt order purge amount. This

makes manifest that the underlying order of contempt is an unnoticed and thus unconstitutional order of criminal, that is punitive, contempt. For this same reason, the underlying orders assessing the attorney's fees in the first place, in not taking into account Ms. Smith's ability to pay are unconstitutional and void ab initio and this Court is only asked to recognize the well established fact that such orders are unenforceable.

Finally, in seeking the incarceration of Ms. Smith in violation of the constitutional provisions against incarceration for debt and in absence of any case authority demonstrating that contempt has ever been used to enforce attorney's fees unrelated to child support or alimony the Appellee and his counsel, as he is the true party in interest here, should be sanctioned under F.S. 57.105.

Appellant seeks reversal of the district court decision affirming the contempt order of incarceration against Ms. Smith as well as of that court's denial of appellate attorneys fees.

ARGUMENT

MAY THE POWER OF CONTEMPT BE USED TO ENFORCE THE PAYMENT OF ATTORNEY'S FEES TO BE PAID BY ONE FORMER SPOUSE TO THE OTHER FOR FEES INCURRED BY THE LATTER IN ENFORCING VISITATION RIGHTS WITH THE PARTIES CHILD?

POINT ONE

THE CERTIFIED QUESTION SHOULD BE ANSWERED IN THE NEGATIVE.

APPELLEE FAILS TO CITE A SINGLE CASE WHERE A FLORIDA COURT HAS HELD A PARTY SUBJECT TO INCARCERATION FOR FAILURE TO PAY ATTORNEY'S FEES THAT ARE UNRELATED TO CHILD SUPPORT OR ALIMONY. NOR HAS APPELLEE PROVIDED THE COURT WITH A SUITABLE BASIS FOR MODIFYING LONG-STANDING CONSTITUTIONAL LAW PROHIBITING INCARCERATION FOR DEBT.

The Appellee first cites Heitzman v. Heitzman, 281 So. 2d 578 (4th DCA 1973), presumably to support his argument that attorney fees unrelated to underlying support obligations may be enforced by contempt. The Initial Brief made clear that Heitzman involved a contempt action against a former husband for failure to pay attorney's fees to his former wife to whom the husband was obligated to provide child support. (Initial Brief at 4, 20-21) Therefore, the case only holds the usual, that fees related to support obligations may be enforced by contempt. This Honorable Court now has the Rehearing and Rehearing En Banc Motions to the district court as well as the (single) Appendix thereto. Exhibits 4 and 5 of that Appendix establish the former husband's support obligations in Heitzman.

As Appellee states, subsequent case law is indeed consistent with Heitzman, unfortunately for the Appellee, however, it is consistent only with the undisputed proposition that attorney's fees related to support are enforceable by contempt. Not one of the cases cited by Appellee allow contempt enforcement of attorney's fees generally or, specifically, for fees arising out of visitation disputes.

Briefly, Maas v. Maas, 440 So. 2d 1983 (2nd DCA 1983), involved child support and lump sum alimony; Hornbuckle v. Hornbuckle, 533 So.2d 323 (1st DCA 1988), involved a former husband in arrears for spousal maintenance; in Carlyle v. Carlyle, 438 So. 2d 176 (1st DCA 1983), the former husband was held in contempt for failure to pay sums for alimony, costs and attorneys fees. The court in Laing v. Laing, 431 So.2d 324 (3rd DCA 1983), indicated that the attorney fees owed the wife would be enforceable by contempt because they arose out of the former husband's "marital duty" to his former wife. The brief decision omits the words "of support" after "marital duty," probably because 1. it goes without saying, and 2. the marital duty as defined by the courts in these cases is invariably that of support. Appellee's grasping at this, faint straw does not, provide a shred of authority that attorney's fees unrelated to support may be enforced by contempt, the decision, all twenty one lines of it, simply does not so hold.

Appellee states:

> The basic flaw underlying Appellant's argument is her assumption that attorney's fees are only enforceable by contempt if they are linked to alimony or child support payments.

(Answer Brief at 8). One would think if this were flawed that Appellee could come up with some case law demonstrating the error. Nor is the above an assumption; an obligation to pay money is a debt, the constitution forbids incarceration for debt, the debt herein in under review does not fall into either the express constitutional exemption for fraud nor the limited case law exemption arising out of marital duty for a financial obligation related to support. See e.g. Filan v. Filan, 549 So. 2d 1105 (4th DCA 1989) (only financial obligations in the nature of support may be enforced by civil contempt).

For flawed reasoning one need go no further than a few lines down in the same paragraph quoted above.

> Appellant overlooks the fact that payment of attorney's fees is as much a 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.

(Answer Brief at 8-9). Although Appellee makes a valiant effort here to reason by analogy, the argument (it is an argument and not a fact) is essentially an expression of what Appellee wishes the law to be and is completely unsupported by any authority, conflicts with the holding and analysis of Filan, supra, and runs afoul of the constitution.

Specifically, the argument is flawed because it stands on its head the reasoning of the case law establishing that only marital support obligations, are not a debt but a duty to the former spouse, for which contempt is available as an enforcement measure without violating the constitution, and which obligation cannot be distinguished from the attendant attorney's fees because if the courts allowed the support obligation to be enforced by contempt and not the attorney's fees, those support obligations would then be used to pay the dependent's spouses attorney's fees and thus deprive that spouse of the needed support. Any victory in court would thus be pyrrhic.

It is not unheard of in domestic relations litigation for the financially superior spouse to prefer to have his money go to his attorney rather than to the ex-wife. That appears to be the situation at bar, since in Point 2 of the Answer Brief the Appellee essentially claims the right to all the monies paid to Ms. Smith's for child support. (Answer Brief at 18-19). "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," which could then be used to pay the former husband's attorney. (Id.). Of course, the record shows the support payments were unreliable and intermittent with the Former Husband, rather cynically sending a $300.00 check just prior to the contempt hearing. (R: 5). At $100.00 per month even starting eleven weeks prior to the contempt hearing as Appellee suggests (see Answer Brief at 19) Ms. Smith would have been incarcerated for at least seven months before the $1000.00 purge amount would have accrued.

Child visitation is of course vital, even if it is only by telephone. However it has already been established that contempt, even criminal contempt, is available against the custodial parent to enforce visitation. To pile contempt upon contempt is neither reasonable nor necessary to enforce visitation. If proper procedures are followed, contempt (even incarceration where necessary - where, for example, the custodial spouse is hiding the children) with the threat of serious financial burdens, again assuming the proper procedures were followed - which were not in the case at bar, in the form of having to pay the non-custodial parent's attorney's fees are more than ample to ensure compliance with court ordered visitation. Granted, there have been cases where a woman has been kept incarcerated for several years without revealing the location of her children, but this is not one of those cases.

Orr v. Orr, 192 So. 466 (Fla. 1939), also cited by Appellant is yet another case involving attorney's fees, or suit money as it is called in the decision, that were enforceable by contempt because they were related to and indistinguishable from alimony. Id. at 467. Orr does however state that "[i]nability to pay is a valid defense at the time the decree was entered," which suggests

that a party may be held in contempt even though at the time of the enforcement proceeding he or she lacks the ability to purge the contempt. However, this possibility has been absolutely precluded by this Court's more recent decision in Bowen v. Bowen, 471 So.2d 1274, 1277 (Fla. 1985), which requires that the contemnor have a present ability to urge himself or herself of civil contempt.

The rational basis for treating attorney's fees unrelated to support as a debt for which contempt is unavailable is, first, the constitution. Courts should not lightly seek to amend that document; since visitation herein was reestablished without having to incarcerate the custodial parent, there is no overwhelming public policy reason for the Court to seek to stretch its jurisdiction so as to carve out another constitutional exception to the prohibition against imprisonment for debt. It is not, arguably, within the Court's jurisdiction to do so, particularly since there is a well established way to amend the constitution requiring popular referendum. Contrary to Appellant's dire suggestion, reversing the decision here will not have a chilling effect on visitation enforcement because contempt has never been a method of such enforcement.

The argument that the order directing Ms. Smith to pay the Former Husband's attorney is a support payment to the Former Husband (Answer Brief at 14-15) is preposterous and irrelevant to the review here of a specific lower court order that is silent with respect to any alleged support owed the husband, but is clearly in violation of the constitution.

Finally, Appellee argues that:

> Appellant argues under Point I(B) 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 its 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 visitation rights by contempt.

(Answer Brief at 15). Reference to Point I(B) indicates that the precedent violated is, inter alia, Hofman v. Jones, 280 So. 2d 431 (Fla. 1973), which prohibits district courts from disregarding

Supreme Court precedent and fashioning new rules of law. The district court also violated this Court's holding in Continental Assur. Co. v. Carroll, 485 So. 2d 406, 409 (Fla. 1986), that:

> **No district court can legitimately circumvent a decision of this Court.**

When this Court recognizes only one limited exception to the constitutional prohibition against imprisonment for debt, the district court lacks jurisdiction to fashion additional exceptions or otherwise amend the constitution. For all these bases, the decision must be reversed.

POINT TWO

ACCORDING TO THE FINANCIAL FIGURES CITED BY APPELLEE, THE FORMER WIFE THEORETICALLY HAD AT MOST A $300.00 "SURPLUS" FROM WHICH TO PAY A $1000.00 CONTEMPT PURGE AMOUNT. WHILE ONLY ACTUAL, NOT THEORETICAL, MONIES POSSESSED BY A PARTY MAY BE CONSIDERED BEFORE THAT PARTY CAN BE INCARCERATED FOR FAILING TO PAY THE PURGE REQUIREMENT OF A CIVIL CONTEMPT ORDER, EVEN PURSUANT TO APPELLEE'S OWN ACCOUNTING THE UNDERLYING CIVIL CONTEMPT ORDER MUST BE REVERSED.

According to the Appellee, in the 11 weeks prior to the contempt hearing Ms. Smith had income of something over $4000.00 and this justifies the contempt order against her and demonstrates her ability to pay the $1000.00 purge amount set on March 6, 1992. Assuming for the sake of argument that this number is correct, given Ms. Smith's monthly expenses of $1655.00 per month, over the same 11 week period she had **expenses** of $4187.15 - something over the $4000.00 in alleged income.[3] Ms .Smith's financial position provides no basis for the contention that she could have paid a $1000.00 purge amount at the end of the 11 week period in question.

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[3] This assumes 30.5 days per month, 4.35 weeks per month resulting in 2.53 months in an 11 week period (2.53 x 1655.00 = 4187.15). The $1655.00 expense figure is from the most current, at the time of the contempt hearing, Financial Affidavit of Ms. Smith, which affidavit was accepted without objection by the Former Husband's counsel at the contempt hearing and is attached to this brief. (It also appears at the record at pp. 622-6260).

Elsewhere, Appellee states that for the three month period preceding the contempt hearing she had a surplus of "$100.00 per month." (Answer Brief at 18-19). This would have **theoretically** allowed her to pay only $300.00 of the $1000.00 purge amount. Moreover this really assumes that she should have turned over the entire amount she received in child support from the Former Husband to his attorney.

Of course, as was established in the initial brief, **the actual basis for a civil contempt purge amount must be the money the party has available to her at the time of the contempt hearing**. If the money has been spent, for such luxuries as food and shelter or for any reason other than perhaps fraudulent transfer, than it is not available to pay the purge amount.

The standard for setting aside unrebutted evidence is whether that evidence

> Is not essentially illegal, inherently improbable or unreasonable, or contrary to natural laws, opposed to common knowledge or contradictory within itself.

Evans v. State, 603 So.. 2d 15 (5th DCA 1992) (cited with extensive citations in the Initial Brief at 33). The "testimony ...not impeached in any respect," citation used by the Appellee from Roach v. CSX transportation, Inc., 598 So. 2d 246 (1st DCA 1992), is not the standard but rather a recital of the particular facts of that case. Ms. Smith's testimony that the personal injury settlement had been assigned to her attorney Mr. Randolph is not improbable or unlikely. Nor, in fact has it been impeached in any respect since what Appellee considers "impeachment" is based on the argument refuted above that since Ms. Smith allegedly had $4000.00 in income in the 11 weeks prior to the contempt hearing she, therefore, had the ability to meet the $1000.00 purge amount at the time of the contempt hearing.

As was indicated in the Facts, supra at 6, much of the information regarding the liability carrier's attorney refers to matters outside the record. However, Appellee attorney's concession that the settlement was in the hands of a third party and had competing claims against it amounts to a concession on the issue that the fund was not available to Ms. Smith to pay the purge amount. (See Answer Brief at 22, supra at 6). Given the competing claims, the liability carrier's

attorney could not disburse the funds; in all likelihood he would pay them into the registry of the court and commence an impleader action.

Appellee has also failed to rebut or present a single case rebutting Ms. Smith's argument that the underlying orders directing her to pay the attorney's fees to the husband, having been entered without a hearing as to her ability to pay, constitute unconstitutional and void orders of criminal contempt which are unenforceable. The relevant case law supporting this issue is fully set forth in the Initial Brief at pages 40-42.

It is now, of course over two years after the contempt hearing, even if the Court were to rule entirely for the Appellee the matter would have to be remanded to determine if those funds were still available. Pursuant to the unimpeached testimony of Ms. Smith the only reasonable outcome is that the monies have long since been disbursed to her attorneys in payment of their fees.

Appellee's concessions and the facts of Ms. Smith's financial position require reversal of the district court decision on this basis alone.

POINT THREE

IN LIGHT OF THE UNEQUIVOCAL CONSTITUTIONAL PROVISION AGAINST INCARCERATION FOR DEBT, APPELLEE AND COUNSEL FOR APPELLEE MUST BE SANCTIONED UNDER SECTION 57.105 FOR IMPROPERLY SEEKING THE FORMER WIFE'S INCARCERATION FOR HER FAILURE AND CONCEDED INABILITY TO PAY THE FEES OF AFOREMENTIONED COUNSEL. THE DISTRICT COURT'S DENIAL OF THE FORMER WIFE'S APPELLATE ATTORNEY'S FEES MUST BE REVERSED.

In seeking the incarceration of Ms. Smith in violation of the constitutional provisions against incarceration for debt and in absence of any case authority demonstrating that contempt has ever been used to enforce attorney's fees unrelated to child support or alimony the Appellee and his counsel, as he is the true party in interest here, should be sanctioned under F.S. 57.105.

The record fully supports the finding that the attempt to incarcerate Ms. Smith was unsupported by any statutory or case law and was in violation of the constitutional prohibition against incarceration for debt. The conduct of Appellee and counsel in this matter is was not only frivolous but unconscionable. The fact that the Fourth District Court of Appeal ruled for the Appellee below does not turn the attempt to incarcerate Ms. Smith into a justiciable issue, it was fully established in the Initial Brief that the district court overstepped its jurisdiction in seeking to amend constitutional law.[4]

In the alternative, of course, the Court is requested to simply grant Appellant the appellate attorney's fees denied her by the district court and order the matter to be remanded to set the amount of such reasonable fees. The Court, however, is strongly urged to grant sanctions since only that will grant her some, though only partial, relief from the costs of pursuing this matter to the highest court in the state. The proper bases for sanctions are here. Sanctions were sought from the district court but were denied.

CONCLUSION

The order of contempt and incarceration issued by the trial court, being based on fees and costs unrelated to child support or alimony, amounted to an unconstitutional order of imprisonment for debt. The order and the district court's affirmance should be reversed.

The lower courts also erred in finding that Ms. Smith had the financial ability to pay the purge amount. This Honorable Court is further requested to rule on jurisdictional grounds that the underlying orders assessing the contempt are void and unenforceable.

Finally, the Court should reverse the district court's denial of appellate attorney's fees to Ms. Smith and direct that those fees be entered as sanctions with the Former Husband and his attorney equally responsible for their payment pursuant to F.S. 57.105 (that each pays 50%).

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[4] Moreover, to prevent any confusion since that statute only allows 50% of the fees to be assessed against the attorney, this honorable Court is requested to direct that the trial court first set the reasonable amount of appellate attorney's fees and only then consider whether the Former Husband's financial situation warrants a decrease in the fees he is to pay.

Respectfully submitted,

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APPENDIX

FINANCIAL AFFIDAVIT OF MS. SMITH dated March 5, 1994.

(Appearing in the record at pp. 622-626).