

**IN THE SUPREME COURT
MISSOURI**

CAUSE NO. SC92672

**KENNETH GOINS,
APPELLANT/PETITIONER**

v.

**LORI GOINS
RESPONDENT/RESPONDENT**

AMENDED - APPELLANT'S APPELLATE BRIEF

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JURISDICTIONAL STATEMENT

This appeal arises from a Judgment entered by the Honorable Bryan L. Hettenbach, Judge of the Circuit Court for the City of St. Louis, on May 2, 2012 regarding Respondent's Motion for Attorney's Fees on Appeal. **LF** 12, 14, 36. The Trial Court entered a judgment, pursuant to 452.355 RSMO, in favor of Respondent for \$7,500 for attorney's fees. These fees were incurred by Respondent while the matter was pending before Court of Appeals. **LF** 12, 14, 36. As such, the Appellant appeals this judgment challenging the constitutionality of said statute, as interpreted, and the merits of the award.

This appeal concerns issues within the exclusive appellate jurisdiction of the Supreme Court because Appellant challenges the constitutionality of the statute upon which said motion was filed and judgment was granted. Therefore, jurisdiction lies within Supreme Court pursuant to Article V, Section 3 of the Missouri Constitution.

Statement of Facts

On October 23, 2003, the Judgment of Dissolution was entered where maintenance and child support was modifiable per paragraph (32) on page 8. On March 16, 2011, The Honorable Judge Hettenbach (the Trial Court) issued the Second Judgment of Modification in case numbered 022-06047-06. **LF** 8. Thereafter Appellant filed several after-trial motions challenging the Trial Court's imputation of \$70,000 of annual income: to 18 months of unemployment, to 13 months of actual income of approximately \$34,000 and to 18 months of actual income of \$68,000. Also, Appellant appealed the Trial Court's voiding of over 60 in-kind payments totaling over \$22,000 agreed to by

respondent and all of Appellant's unreimbursed business expenses. Appellant appealed the Trial Court's failure to find that Appellant had full custody of his eldest daughter and 50% custody of his son. **LF** 9-10. On April 22, 2011 Appellant filed his Notice of Appeal of the Second Judgment of Modification. **LF** 9. The appeal was sent to the Eastern District Court of Appeals and assigned case numbered ED96656. On July 8, 2011 all of Appellant's post-trial motions were denied in the matter 022-06047-06. **LF** 11.

On September 23, 2011 in appellate case numbered ED96656, the Record on Appeal was filed. The Appellant's Brief was filed on December 9, 2011. Mr. Freed entered on behalf of Respondent in case ED96656 on February 1, 2012. On February 21, 2012, Respondent filed her Motion For Attorney's Fees On Appeal in the 22nd Circuit Court Trial Court, before the Honorable Judge Bryan Hettenbach. **LF** 11-12, 14. On February 24, 2012, Respondent filed her second Motion For Attorney's Fees On Appeal. **LF** 12, 14. Simultaneously, Alan E. Freed filed his entry of Appearance on behalf of Respondent in the 22nd Judicial Circuit Court in case numbered 022-06047-06. **LF** 12.

The matter was heard on May 2, 2012. **LF** 12, 36. Appellant filed two motions to Dismiss. **LF** 12, 17, 25, 32. Appellant alleged, among other things, that the Trial Court lacked jurisdiction and that §452.355 RSMO was unconstitutionally vague and unconstitutional to the extent it purports to or is interpreted to grant the Trial Court jurisdiction over any part of an appeal of its judgment. **LF** 12, 17, 25, 32. Respondent abandoned averments numbered 4, 5, 6, 7 and 8 and proceeded only on averments 1, 2, 3

9, 10 and 11. **Tr.** 4:12-24. Appellant testified and submitted exhibits supporting the allegation that his net monthly income is approximately \$2,894.93 and Respondent's net monthly income of about \$4,584.01. **Ex** 1 and 6, **Tr.** 30:6. Appellant alleged a monthly deficit and overdraft fees. **Ex** 1 **Tr.** 32:19, **Tr.** 32-34. Respondent submitted bills for attorney's fees she said she could not pay. **Tr.** 52:17-22. Immediately after the evidentiary hearing, the Trial Court denied all of Appellant's Motions and entered judgment in favor Respondent for \$7,500 on May 2, 2012. **LF** 12, 31, 35, 36. Appellant filed after-trial motions which were deemed denied. **LF** 12, 37, 42. The notice of Appeal was filed on June 11, 2012. **LF** 55.

Points Relied On

I. THE TRIAL COURT ERRED IN FAILING TO FIND THAT SECTION 452.355 RSMO AS INTERPRETED TO GRANT THE TRIAL COURT SUBJECT-MATTER JURISDICTION TO ENTER A JUDGMENT SUBSEQUENT TO THE TRANSFER OF THE CASE TO THE APPELLATE COURT AND WHILE THE CASE IS PENDING BEFORE THE EASTERN DISTRICT COURT OF APPEALS VIOLATES ARTICLE V SECTIONS 1, 3, 11, 13, 14 OF THE MISSOURI CONSTITUTION, WHICH VESTS ALL APPELLATE JURISDICTION IN THE APPELLATE COURTS OF THIS STATE UNLESS THE APPEAL LIES WITHIN THE EXCLUSIVE JURISDICTION OF THE SUPREME COURT.

State ex rel. Berbiglia, Inc. v. Randall, 423 S.W.2d 765, 768 (Mo. 1968)

J.C.W. ex rel. Webb v. Wyciskalla, 275 S.W.3d 249, 253 (Mo. S. Ct 2009)

Spicer v. Donald N. Spicer Revocable Living Tr, 336 S.W.3d 466, 469 (Mo. banc 2011)

Higginbotham v. Higginbotham, SD31957, 2012 WL 4032382 (Mo. Ct. App. 9/13/12)

Missouri Constitution Article V Section 3

II. THE TRIAL COURT ERRED IN FAILING TO FIND THAT SECTION 452.355 RSMO IS UNCONSTITUTIONALLY VAGUE VIOLATING THE DUE PROCESS CLAUSES OF THE FOURTEENTH AMENDMENT OF THE U.S. CONSTITUTION AND ARTICLE I SECTION 10 OF THE MISSOURI CONSTITUTION BECAUSE: (A) IT FAILS TO GIVE ANY NOTICE/INDICATION TO APPELLANT OF THE PROHIBITED CONDUCT JUSTIFYING THE ENTRY OF JUDGMENT AGAINST HIM AND (B) IT LACKS ANY GUIDANCE AS TO WHAT ELEMENTS HAVE TO BE PLEAD AND PROVEN BY THE PROPONENT IN ORDER TO JUSTIFY AN EXCEPTION TO THE AMERICAN RULE (AND IN WHAT AMOUNT AND PAYMENT FREQUENCY) WHICH THREATENS APPELLANTS CONSTITUTIONAL AND STATUTORY RIGHT TO AN APPEAL AND ABILITY TO PROVIDE FOR HIS CHILDREN.

State ex rel. Nixon v. Telco Directory Pub., 863 S.W.2d 596, 600 (Mo. 1993)

In re Marriage of Thompson 24 S.W.3d 751, 756 (Mo. Ct. App. 2000)

Russum v. Russum, 214 S.W.3d 376, 386 (Mo. Ct. App. 2007)

In re Marriage of Maninger, 106 S.W.3d 4, 13 (Mo. Ct. App. 2003)

Article V §§1,3,11,13,14 of the Missouri Constitution

§452.355 RSMO

§512.020 RSMO

III. THE TRIAL COURT ERRED OR ABUSED ITS DISCRETION BY ENTERING JUDGMENT, AGAINST THE WEIGHT OF THE EVIDENCE, AGAINST APPELLANT FOR RESPONDENT'S ATTORNEY'S FEES IN AN AMOUNT THAT EQUALS APPROXIMATELY 3 MONTHS OF APPELLANT'S NET INCOME WHEN APPELLANT HAS NO FINANCIAL ABILITY TO PAY RESPONDENT'S ATTORNEY'S FEES AND/OR HIS OWN ATTORNEY'S FEES, APPELLANT'S NET MONTHLY INCOME IS HALF OF RESPONDENT'S, APPELLANT HAS MORE EXPENSES OR BILLS THAN RESPONDENT, APPELLANT HAS MORE CHILDREN TO SUPPORT THAN RESPONDENT AND THERE IS NO ALLEGATION THAT APPELLANT HAS ENGAGED IN ANY CONDUCT WHICH CAUSED RESPONDENT TO INCUR ADDITIONAL AND UNNECESSARY ATTORNEY'S FEES.

Andrews v. Andrews, 290 S.W.3d 783, 788 (Mo. Ct. App. 2009)

In re Marriage of Thompson, 24 S.W.3d 751, 756 (Mo. Ct. App. 2000)

Kieffer v. Kieffer, 590 S.W.2d 915, 918[6] (Mo. 1979)

Wightman v. Wightman, 295 S.W.3d 183, 193 (Mo. Ct. App. 2009)

IV.THE TRIAL COURT ERRED AND/OR ABUSED ITS DISCRETION BY ENTERING JUDGMENT FOR ATTORNEY’S FEES PURSUANT TO 452.355 BECAUSE THE 452.355.1 REQUIRED COLLATERAL OR UNDERLYING SECOND MODIFICATION JUDGMENT WAS VOID BECAUSE (A)IT WAS NOT BASED ON APPELLANT’S ACTUAL INCOME, (B)APPELLANT WAS NOT GIVEN A HEARING ON HIS MOTION TO MODIFY MAINTENANCE AND (C)THE RESPONDENT’S AFFIDAVITS REPRESENTING APPELLANTS IN-KIND PAYMENTS UNDER 454.432.1, 3 AND 5 RSMO WERE UNCONSTITUTIONALLY VOIDED BASED ON THE COURT’S REFUSAL TO APPLY THEM TO PAST, CURRENT OR FUTURE SUPPORT OBLIGATIONS THEREBY MAKING THEM IMPOSSIBLE TO PAY, AND THE FINDING REQUIRED UNDER 452.355.2 THAT APPELLANT FAILED TO PAY SUPPORT AND/OR MAINTENANCE WITHOUT GOOD CAUSE WAS NOT MADE AND THERE WAS NO EVIDENCE TO SUPPORT SUCH A FINDING.

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State, Dept. of Rev, Child Support Enf. Div. v. Beans, 965 P.2d 725, 729 (Alaska 1998)

Turner v. Rogers, 131 S. Ct. 2507, 2511, 180 L. Ed. 2d 452 (U.S.S.C. 2011)

Supreme Court Rule 74.06(b)

§§454.432.1, 3 AND 5 RSMO

ARGUMENT

A. Standard of Review

The Trial Court will be sustained by the appellate court unless there is no substantial evidence to support it, unless it is against the weight of the evidence, unless it erroneously declares the law, unless it erroneously applies the law, unless it is an abuse of discretion or against the logic of the circumstance and a shock to one's sense of justice. Barrow v. Booneville #1, Inc., 31S.W.3d 90 (Mo.App.W.D. 2000) citing Murphy v. Carron, 536 S.W.2d 30, 32 (Mo. 1976) Wilson v. Whitney, 81 S.W. 3d 172, 182 [19] (SD 2002). Issues of law are reviewed de novo. See, Gordon v. Gordon, 924 S.W.2d 529, 535 [8] (Mo. App. 1996) Section 452.355 RSM, as interpreted, is subject to strict scrutiny because the proscribed conduct alleged involves the exercise of a constitutional and statutory right to an appeal. State ex rel. Nixon v. Telco Directory Pub., 863 S.W.2d 596, 600 (Mo. 1993). The constitutional and statutory right to an appeal is found in Missouri Constitution Article V Sections 1, 3, 11, 13 and 14 and Section 512.020 RSMO and Supreme Court Rule 81.01.

Appellant is requesting higher standard of review because this case involves Appellant's exercise of his constitutional and statutory right to an appeal. And his exercise of this right is Respondent's only conduct she alleged Appellant engaged in that

justified the exception to the American Rule and entry of judgment against him. The judgment equals 3 months of Appellant's net salary and is due and payable immediately. Appellant has 100% custody of his daughter and 50% custody of his son and needs his income to provide for his children and a "reserve" for himself. **Tr.** 8:12-15, 40:15 – 41:1, 83:5-11. However, if said judgment is unpaid Appellant is subject to the following: (1) Civil/Criminal Contempt, (2) Garnishment, (3) Tax-Intercept, (4) Non-Dischargeability, (5) possible jail/incarceration, (6) Levy on house and car and other property, (7) permanent damage to credit, (8) permanent damage to reputation and characterization as "deadbeat dad", (9) 9% interest on delinquent payments, (10) serious impediment to admission to statutorily required professional organizations, (11) negative impact on ability to provide for family and self, (12) real negative impact on employment possibilities because of negative effect on reputation, credit and admission to professional organizations and (13) the entry of a judgment that prevents Appellant from providing for his children and himself and inhibits his right to an appeal. In essence, the judgment destroys Appellant's current ability to provide for the children and himself and therefore should be subject to a higher standard of review.

B. Challenged Findings and Rulings of the Trial Court (Points Relied On)

I. THE TRIAL COURT ERRED IN FAILING TO FIND THAT SECTION 452.355 RSMO AS INTERPRETED TO GRANT THE TRIAL COURT SUBJECT-MATTER JURISDICTION TO ENTER A JUDGMENT SUBSEQUENT TO THE TRANSFER OF THE CASE TO THE APPELLATE COURT

AND WHILE THE CASE IS PENDING BEFORE THE EASTERN DISTRICT COURT OF APPEALS VIOLATES ARTICLE V SECTIONS 1, 3, 11, 13, 14 OF THE MISSOURI CONSTITUTION, WHICH VESTS ALL APPELLATE JURISDICTION IN THE APPELLATE COURTS OF THIS STATE UNLESS THE APPEAL LIES WITHIN THE EXCLUSIVE JURISDICTION OF THE SUPREME COURT.

Analysis

Section 452.355, as interpreted, unconstitutionally grants the trial court subject-matter jurisdiction to grant judgment to Respondent while the appellate case is pending before the Eastern District Court of Appeals. Judge Hettenbach (Respondent) lacked subject-matter jurisdiction to grant Respondent's Motion For Attorney's Fees On Appeal on May 2, 2012. The "subject matter jurisdiction of Missouri's courts is governed directly by the state's constitution." J.C.W. ex rel. Webb v. Wyciskalla, 275 S.W.3d 249, 253 (Mo. 2009). A statute does not confer subject matter jurisdiction in the absence of constitutional authority. *Id.* Missouri's constitution reserves unto the Court of Appeals "general appellate jurisdiction in all cases except those within the exclusive jurisdiction of the supreme court." Mo. Const. art. V, §§ 1, 3, 11, 13 and 14. Missouri's constitution does not purport to apportion any appellate jurisdiction to the trial court. *Id.* The trial court was previously divested of jurisdiction. *See Spicer v. Donald N. Spicer Revocable Living Trust*, 336 S.W.3d 466, 469 (Mo. banc 2011). Accordingly, Respondent's attempt

to conjure up subject-matter jurisdiction based upon § 452.355 must fail as a matter of law. *See State ex rel. Berbiglia, Inc. v. Randall*, 423 S.W.2d 765, 768 (Mo. 1968) (“the court from which the appeal was taken has exhausted its authority and is without jurisdiction...to enter another judgment”)

Following divestiture, “any attempt by the trial court to continue to exhibit authority over the case,...by...entering subsequent judgments, is void.” *Spicer*, 336 S.W.3d at 469 (alterations added). Recently, the Southern District reiterated that the trial court has no jurisdiction and any judgment entered is void (even in the context of a domestic case) where the trial court entered an amended judgment prior to the issuance of appellate court’s mandate. The court stated:

“Defendant contends the amended judgment is void because it was entered prior to the issuance of our mandate. We agree. *See In re E.F.B.D.*, 166 S.W.3d 143, 145–46 (Mo.App.2005). The trial court could not act judicially until our mandate issued in No. SD31087. *Id.* Thus, the amended judgment entered on March 30, 2012 is void. *Id.*

In a case in which the trial court exceeded its authority in entering an amended judgment, an appellate court cannot consider the merits of the appeal. *In re Estate of Shaw*, 256 S.W.3d 72, 77 (Mo. banc 2008). Our role is limited to correcting those actions taken by the trial court that exceeded its authority. *Bureaus Inv. Group v. Williams*, 310 S.W.3d 297, 299–300 (Mo.App.2010). (emphasis added)

In re Marriage of Herrman, 321 S.W.3d 450, 451 (Mo.App.2010). Because the March 30, 2012 judgment is void, it must be vacated. *See id.*”

Higginbotham v. Higginbotham, SD31957, 2012 WL 4032382 (Mo. Ct. App. Sept. 13, 2012).

Similarly, here, for purposes of Rule 81.05(a)(2),¹ the Trial Court became “divested” of subject-matter jurisdiction on July 8, 2011, when the Trial Court denied all post-trial motions filed in the *Matter of Kenneth D. Goins v Lori D. Goins*, cause no. 22023-06047-06. **LF** 11. From July 8, 2011 until the issuance of the appellate court’s mandate in cause no. ED96656 on July 25, 2012, this case was pending before the appellate court. The trial court nevertheless purported to enter an award of attorney’s fees on appeal on May 2, 2012. **LF** 12, 14, 36. Accordingly, the Trial Court’s purported Order and Judgment dated May 2, 2012, therefore, is “void” for lack of jurisdiction Spicer, 366 S.W.3d at 469 Higginbotham, 2012 WL 4032382 at [4] and Wyciskalla, 275 S.W.3d at 253.

Respondent has suggested in opposition: (1) That Appellant’s underlying position is incorrect as a matter of law because of the line of cases that purportedly hold that the circuit court has the “*sole authority*” or exclusive subject-matter “*jurisdiction*” to award attorney’s fees on appeal is pursuant to §452.355 RSMo, and (2) That matters heard pursuant to 452.355 are within the exclusive jurisdiction of the circuit court as if they are new independent causes of action. Appellant responds to these suggestions below

(a) Subject-Matter Jurisdiction

The Missouri Supreme Court has spoken on this issue of jurisdiction and cleared up any misunderstanding.

“[1] . . . Missouri courts recognize two kinds of jurisdiction: subject matter jurisdiction and personal jurisdiction. These two kinds of jurisdiction—and there are only two for the circuit courts—are based upon constitutional principles . . . Subject matter jurisdiction is governed by article V of the Missouri Constitution. . . [6] the subject matter jurisdiction of Missouri's courts is governed directly by the state's constitution” J.C.W. ex rel. Webb v. Wyciskalla, 275 S.W.3d 249, 254 (Mo. Banc 2009)

The Missouri Supreme Court in 2009, in its Wyciskalla judgment, instructed us to confine our discussions of circuit court jurisdiction to “constitutionally recognized doctrines of personal and subject matter jurisdiction;” J.C.W. ex rel. Webb v. Wyciskalla, 275 S.W.3d 249, 254 (Mo.2009). This remains the current legal guide for all Missouri courts. It remains undisturbed. Respondent is wrong when she refers to “authority” and asserts jurisdiction is based on the legislative enactment of §452.355 RSMo. This Court has directly denounced this assertion. Respondent’s reliance on the line of cases it cited is misplaced because they obviously predate this Court’s guidance regarding subject-matter jurisdiction. Besides, none of the cases Respondent has previously cited challenge the constitutionality of 452.355 on the grounds that it violated the separation of powers and/or Missouri constitution. Each of them must therefore be deemed irrelevant, overruled, and/or inapplicable as a matter of law.

On the contrary, Respondent has never acknowledged or addressed the pronouncement by this Missouri Supreme Court concerning subject-matter jurisdiction. Respondent clearly relied on §452.355 RSMo to establish her subject-matter jurisdiction in her Motion For Attorney's Fees On Appeal. Yet she does so while ignoring this Court's admonishment that the neither legislature by statute or this court by rule can confer jurisdiction.

Moreover, Respondent in previous opposition has never mentioned or even remotely referenced "*subject-matter* jurisdiction." Respondent also has not asserted, addressed or even mentioned any constitutional provision granting the Trial Court subject-matter jurisdiction while the case is on appeal or any portion of the case while it is on appeal. Respondent has ***boldly*** asserted that only the circuit court has jurisdiction to award attorney's fees on appeal in dissolution matters. This assertion is clearly in error. For example, Special Rule 400 specifically authorizes the appellate court to award attorney's fees if it has jurisdiction. *See MO R A CT ED Rule 400*. Plus, under the constitution, it is the appellate court that possesses subject-matter jurisdiction over all matters while a case is on appeal. *See Article V*. Power to award attorney's fees for frivolous appeals in dissolution matters clearly lies with the appellate court. *See Mo. Sup. Ct. R. 84.19*. Evidence of the appellate court's power to award such fees on appeal has been well established. See, In re Marriage of Weinshenker, 177 S.W.3d 859, 865 (Mo. Ct. App. 2005)

Finally, by its express terms, §452.355 does not apply to matters on appeal and limits itself to matters filed pursuant to chapter 452, which are not appeals pursuant to

Article V of the Missouri Constitution or Chapter 512 or Rule 81.01. For this reason, Section 452.355 does not apply to appellate cases because it does not even note, mention or reference cases on appeal.

(b) 452.355 not an independent action

Respondent has suggested that 452.355 is an independent action. The facts and law suggest otherwise. Motions under 452.355, as in this case, do not require a separate filing fee or the issuance of a summons because they are not independent actions. Liberman v. Liberman, 844 S.W.2d 79, 81 (Mo. Ct. App. ED 1992). Because these motions are not independent actions, they must necessarily be tied to an action pending. Liberman v. Liberman, 844 S.W.2d 79, 81 (Mo. Ct. App. ED 1992), Weaver v. Prewitt, 937 S.W.2d 412, 413 (Mo. Ct. App. 1997). The pending action here was on appeal. The Trial Court lacked jurisdiction once the judgment became final, just as it would if the case were dismissed prior to judgment with no timely motions to set-aside. Weaver v. Prewitt, 937 S.W.2d 412, 413 (Mo. Ct. App. ED 1997). The appellate court therefore presides over all subjects thereunto. This is consistent with the constitutional mandate that the Appellate Courts/Supreme Courts possess sole subject-matter jurisdiction over cases on appeal. Art V §§1, 3, 11, 13, 14. Appellant's Jurisdictional Statement in his appellate brief in ED96656 is consistent with this mandate and, interestingly, adopted by the Respondent, in her response brief in appellate case ED96656.

Allowing the Trial Court to exercise appellate jurisdiction transforms the appellate process into a motion for reconsideration. The Judgment totals approximately 3 months of Appellant's net income and therefore prevents Appellant from providing for his

children and himself. **Ex 1, LF 36.** The judgment punishes Appellant whose appeal was his attempt to be the “best father” and “best parent” he could be by challenging the taking of his income he uses to provide for his children. The Second Modification left no reserve for Appellant’s children and Appellant. Allowing the same judge to hear his appeal and defend his judgment by paying the attorney defending it, violates Appellant’s Due Process rights to an impartial decision-maker.

This judgment for attorney’s fees cannot be paid and nonpayment labels Appellant as contemptuous and subjects the Appellant as “delinquent” to: (1) Civil/Criminal Contempt, (2) Garnishment, (3) Tax-Intercept, (4) Non-Dischargeability, (5) possible jail/incarceration, (6) Levy on house and car and other property, (7) permanent damage to credit, (8) permanent damage to reputation and characterization as “deadbeat dad”, (9) 18% interest on delinquent payments, (10) serious impediment to admission to required professional organizations, (11) negative impact on ability to provide for family and self, (12) real negative impact on employment possibilities because of negative effect on reputation, credit and access to a passport. In essence, the Trial Court’s unconstitutional exercise of appellate jurisdiction forces payment of the attorney’s fees to defend the Trial Court’s Judgment. The payment destroys Appellant’s current ability to provide for the children and himself because it is beyond Appellant’s ability to pay.

II. THE TRIAL COURT ERRED IN FAILING TO FIND THAT SECTION 452.355 RSMO IS UNCONSTITUTIONALLY VAGUE VIOLATING THE DUE PROCESS CLAUSES OF THE FOURTEENTH AMENDMENT OF THE U.S. CONSTITUTION AND ARTICLE I SECTION 10 OF THE

MISSOURI CONSTITUTION BECAUSE: (1) IT FAILS TO GIVE ANY NOTICE/INDICATION TO APPELLANT OF THE PROHIBITED CONDUCT JUSTIFYING THE ENTRY OF JUDGMENT AGAINST HIM AND (2) IT LACKS ANY GUIDANCE AS TO WHAT ELEMENTS HAVE TO BE PLEAD AND PROVEN BY THE PROPONENT IN ORDER TO JUSTIFY AN EXCEPTION TO THE AMERICAN RULE (AND IN WHAT AMOUNT AND PAYMENT FREQUENCY) WHICH THREATENS APPELLANTS CONSTITUTIONAL AND STATUTORY RIGHT TO AN APPEAL AND ABILITY TO PROVIDE FOR HIS CHILDREN.

Analysis

Section 452.355 is unconstitutionally vague because it does not state or indicate or give any notice of the prohibited act or conduct justifying entry of the judgment against Appellant. Also, Section 452.355 is unconstitutionally vague because it does not provide any guidance as to the elements required to be plead and proven by Respondent in order to justify the entry of the judgment as an exception to the American Rule on Attorney's Fees. Entering judgment against Appellant because of his exercise of his right to an Appeal in excess of his ability to pay interferes or inhibits his right to an appeal. The Missouri Supreme Court establishes a sliding scale for measuring statutes against the due process clause. On the sliding scale this interference is significant because it involves a constitutional and statutory right to an appeal. State ex rel. Nixon v. Telco Directory Pub., 863 S.W.2d 596, 600 (Mo. 1993) citing *Village of Hoffman Estates v. Flipside*,

Hoffman Estates, Inc., 455 U.S. 489, 498–499, 102 S. Ct. 1186, 1193–94, 71 L.Ed.2d 362 (1982)

In analyzing whether a statute is void for vagueness the Missouri Supreme Court has reiterated stating: “The statute must provide some guidance for enforcement officials and courts to lessen the possibility of arbitrary and discriminatory enforcement.” Also, the Court recognized the scrutiny required when the exercise constitutional rights are involved stating: “Finally, perhaps the most important factor affecting the clarity that the Constitution demands of a law is whether it threatens to inhibit the exercise of constitutionally protected rights.” State ex rel. Nixon v. Telco Directory Pub., 863 S.W.2d 596, 600 (Mo. 1993)

(a) Unconstitutionally vague No Notice and No guidance and other reasons

(1) No Notice of prohibited conduct

Section 452.355 RSMO is vague because it does not indicate what activity or conduct is prohibited that would give rise to the Trial Court issuing a judgment against Appellant. The statute never indicates what conduct or action Appellant was prohibited from engaging in. Here, the matter was tried based only on averments numbered 1, 2, 3, 9, 10 and 11. Tr. 4:12-24. The remaining averments in essence state that Appellant filed an appeal and has more money and property than Respondent. Therefore, Respondent holds that Appellant should pay her attorney’s fees on appeal. Appellant had no notice of having engaged in any prohibited conduct except filing an appeal and having some

gross income. Filing an appeal is not a prohibited conduct under 452.355. Having income is not a prohibited conduct under 452.355. Because the statute never sets out the prohibited conduct, Appellant had no notice of the prohibited conduct and could not avoid engaging in it or preparing to defend the motion. Under the terms of the statute, the Trial Court can impose this judgment at any time for any reason (even after losing jurisdiction) in any amount. This is an unconstitutionally vague statute.

(2)No Required elements to be plead/proven for entry of judgment

Section 452.355 RSMO is unconstitutionally vague because it does not indicate what elements the movant must allege and prove in order to be entitled to a judgment for attorney's fees. Since the statute never indicates what the elements the movant has to allege and prove to prevail on her motion, Appellant has neither guidance in nor ability to prepare a defense because there is no notice of what he is alleged to have done or failed to do. Missouri is a fact-pleading state. However, there is no fact pleading requirement to put the Appellant on notice as to what is being alleged or what will be considered by the Trial Court. The trial court can consider any relevant evidence or facts it wants and the first time the Appellant will know what those facts, evidence or elements are would be in the Trial Court's judgment. This is too late for the Appellant to have a chance to prepare a defense or respond or avoid engaging in said conduct. Under the terms of the statute, there are no facts that Respondent had to allege and prove that entitled her to judgment. With no pleading and proof requirement, this statute is unconstitutionally vague.

The case law regarding the elements required for an exception are contradictory, confusing and unconstitutionally vague and applies to subsection C through G in this section. For example, In re Marriage of Thompson, states that the fact that the person against whom the judgment is sought has a greater income is not sufficient to justify an exception to the American Rule. In re Marriage of Thompson 24 S.W.3d 751, 756 (Mo. Ct. App. 2000) citing *Nelson*, 937 S.W.2d at 757. In contrast, “[o]ne spouse’s greater ability to pay is sufficient to support an award of attorney’s fees to the other spouse.” Russum v. Russum, 214 S.W.3d 376, 386 (Mo. Ct. App. 2007) citing *Maninger*, 106 S.W.3d at 13. On the issue of court’s ability to assess the necessity/value/reasonableness of attorney’s fees, there are a line of cases that say the court is an expert on attorney’s fees and the award is presumed correct. In re Marriage of Maninger, 106 S.W.3d 4, 13 (Mo. Ct. App. 2003) citing *Kaminsky v. Kaminsky*, 29 S.W.3d 388, 390 (Mo.App.2000), Russum at 287[25]. However, recently in the Wightman case, the appellate court admitted there was sufficient evidence of hourly rate and that the number of hours was reasonable, but still overturned an award of attorney’s fees not recognizing the court’s expert status. Wightman v. Wightman, 295 S.W.3d 183, 193 (Mo. Ct. App. 2009) One of the last times this court dealt with elements and conflicting case law regarding 452.355, it acknowledged that disagreement among the reported cases. However, finally found that the ability to pay is not a dispositive factor. The leads to the possibility that courts might impose attorney’s fees which are impossible for the obligor to pay. Kieffer v. Kieffer, 590 S.W.2d 915, 918[6]

(3) Subject to Arbitrary and Discriminatory enforcement because of lack of elements or justification for deviation from American Rule

Section 452.355 RSMO is unconstitutionally vague because it is subject to arbitrary and discriminatory enforcement because there are no stated/definitive standards or reasons for deviating from the American Rule regarding attorney's fees. Because there are no standards or elements that have to be pleaded or proven, judges will consider identical conduct and some will enter judgments and some will not and some enter judgments in different amounts. Because the statute lacks any guidance or limitation on the amount or method of calculating the award of a judgment for attorney's fees different judges will enter different judgment amounts for attorney's fees. This would certainly result in arbitrary and discriminatory judgments for attorney's fees.

It is vague because it does not indicate any method of determining the amount of attorney's fees that should be awarded as a judgment. The statute describes no method and no upper or lower limits of the judgment. There is no statutory requirement that the court make any findings or inquiries into whether either party, especially the Appellant, has the ability to pay the award of judgment. There is no statutory guidance into whether the judgment can be paid in installments or is subject to execution immediately. The statute does not prohibit the imposition of an award judgment of attorney's fees in excess of the Appellant's gross monthly income or monthly net income. Under the terms of the statute, the trial court can impose this judgment at any time for any reason in any amount.

It is vague because it does not indicate the reason or rationale for deviating from the “American Rule” and awarding a judgment of attorney’s fees. There is no act or conduct on the part of the Appellant that justifies deviating from the American Rule, other than the fact that he filed an appeal and has a job. Under the terms of the statute, the trial court can impose this judgment at any time for any reason in any amount.

(4)Unconstitutionally interferes with constitutional and statutory rights, without limitation or justification or notice of prohibited conduct

The entry of judgment against Appellant equaling 3 months of his net income simply because Appellant filed an appeal and his salary is more than Respondent’s is an unconstitutional interference with Appellant’s constitutional right and statutory right to an appeal. **Ex 1, LF 36.** Appellant has a constitutional right to an appeal pursuant to Article V Sections 1, 3, 11, 13 and 14 of the Missouri Constitution and a statutory right under §512.020 RSMO and under Supreme Court Rule 81.01. Section 452.355 RSMO unconstitutionally interferes with Appellant-Father’s right to an appeal because it allows the Trial Court, whose judgment is being appealed, to award a judgment for attorney’s fees in any amount for any reason at any time against the appellant in favor of the attorney defending the Trial Court’s judgment. While the case law has indicated that the financial resources are a factor that should be considered, it is not the dispositive factor and inability to pay does not prohibit the trial court from awarding a judgment. Kieffer v. Kieffer, 590 S.W.2d 915, 918[6] (Mo. 1979) Reasonable persons considering the pleading and the proof on the record would conclude that the entry of the judgment was a

punishment for filing an appeal. Rupnik v. Rupnik, 891 S.W.2d 548, 550 (Mo. Ct. App. 1995) Entry of a judgment against Appellant/Father equaling 3 months of his net income, which is payable immediately, can be considered as punishment for filing an appeal which interferes with Appellant's right to an appeal. **Ex 1, LF 36.**

(5)Not applicable to cases on appeal

The statute is unconstitutionally vague because it never mentions that it applies to any cases filed on appeal pursuant to Article V of the Missouri Constitution §512.020 RSMO or Supreme Court Rule 81.01. The statute never identifies which court is allowed to award a judgment of attorney's fees. It is not clear if the statute refers to or applies to or grants this jurisdiction to the circuit, appeals or supreme court. There is nothing in the statute that supports the interpretation that it grants this jurisdiction only to circuit court judges. The trial court could conceivably enter judgment for attorney's fees in any amount and for any reason when the case is pending before the U.S. Supreme Court.

(6)Not clear if it is a new action and violates due process because no meaningful opportunity to prepare a defense through discovery

The statute is unconstitutionally vague because the statute does not indicate whether it authorizes a new action. There is no requirement that the movant pay a filing fee. There is no requirement for personal service of a summons. There is no provision for responsive pleading or discovery or dispositive motions or a hearing on the record. The trial court can simply impose this judgment at any time for any reason in any amount

with only 5 days notice without a hearing on the record or any evidence. Under these circumstances, §452.355 RSMO is unconstitutionally vague. Section 452.355 RSMO, as interpreted, should be subject to strict scrutiny or a higher standard of scrutiny on the sliding scale because the judgment was entered against Appellant simply because Appellant filed an appeal. This was the only allegation of *conduct* which Respondent alleged in her pleading. Respondent abandoned averments numbered 4, 5, 6, 7 and 8 and proceeded only on averments 1, 2, 3 9, 10 and 11. **Tr.** 4:12-24. The remaining averments stated only that Appellant filed an appeal and has more income and property than Respondent. Filing an appeal is right under Article V §§1,3,11,13,14 of the Missouri Constitution, and the Equal Protection Clause of the 14th Amendment to the U.S. Constitution and §512.020 RSMO and Supreme Court Rule 81.01.

(b) Strict Scrutiny

Section 452.355 RSMO should also be subject to strict scrutiny because of the negative impact the entry of judgment against Appellant has on Appellant's ability to provide for his children/himself. The judgment equals 3 months of Appellant's net income and if not paid subjects Appellant to imprisonment for civil contempt and execution of process including wage assignments and liens. **Ex 1, LF 36.** A judgment entered pursuant to Section 452.355, by its terms, does not depend on Appellant's ability to pay. The statute allows the trial court to award a judgment in any amount for any reason without limitation as to computation even in excess of Appellant's ability to pay it. The statute does not limit the court in any manner and offers no guidance as to how

the attorney's fees are calculated or how much the appellant should pay or the frequency. The judgment is exempt under the Bankruptcy Code. The statute offers no notice to Appellant as to what Respondent has to allege and prove in order to be entitled to a judgment. In fact, case law makes it clear that the court has "broad" discretion in considering anything it wants. In Missouri, the general rule is that all parties are required to pay their own litigation expenses, including attorney fees, unless there is credible evidence of unusual circumstances warranting an award of attorney fees. Maurer v. Maurer, ED97269, 2012 WL 4356848 (Mo. Ct. App. Sept. 25, 2012) citing *Hihn*, 237 S.W.3d at 610.

III. THE TRIAL COURT ERRED OR ABUSED ITS DISCRETION BY ENTERING JUDGMENT, AGAINST THE WEIGHT OF THE EVIDENCE, AGAINST APPELLANT FOR RESPONDENT'S ATTORNEY'S FEES IN AN AMOUNT THAT EQUALS APPROXIMATELY 3 MONTHS OF APPELLANT'S NET INCOME WHEN APPELLANT HAS NO FINANCIAL ABILITY TO PAY RESPONDENT'S ATTORNEY'S FEES AND/OR HIS OWN ATTORNEY'S FEES, APPELLANT'S NET MONTHLY INCOME IS HALF OF RESPONDENT'S, APPELLANT HAS MORE EXPENSES OR BILLS THAN RESPONDENT, APPELLANT HAS MORE CHILDREN TO SUPPORT THAN RESPONDENT AND THERE IS NO ALLEGATION THAT APPELLANT HAS ENGAGED IN ANY CONDUCT WHICH CAUSED RESPONDENT TO INCUR ADDITIONAL AND UNNECESSARY ATTORNEY'S FEES.

Analysis

The Trial Court erred or abused its discretion when it entered judgment against Appellant where Respondent failed to meet her burden of proving an exception to the American Rule because: (a) there was no fact plead that justified an exception to the American Rule, (**LF** 14) (b) there was no allegation that circumstances had changed that would justify the trial court awarding attorney's fees where it had declined to do so when it entered its Second Modification Judgment, (**LF** 14) (c) there was no proof that Respondent's monthly net income of almost \$5,000, monthly expenses/bills of \$4,600 would support any finding that she could not pay her own attorney's fees, (**Ex** 6) (d) there was overwhelming evidence that Appellant could not pay his own attorney's fees or Respondent's based on monthly net income of \$2,800 and monthly expenses/bills of \$3,700 (including support payment of \$1,695 monthly), (**Ex** 1,2,5) (e) there was no evidence that Appellant had more property than Respondent, (f) the overwhelming evidence proved that Respondent had more net monthly income - \$5,000 to Appellant's \$2,800, (**Ex** 1 and 6), (g) the overwhelming evidence proved that Respondent had less monthly expenses/bills of \$4,600 than Appellant's \$5,100. (**Ex** 1 and 6) and (h) Respondent did not meet her burden to plead and prove facts necessary to justify an exception to the American Rule. The party requesting an award of attorney fees has the "burden" of proving his or her entitlement to such an award. Ethridge v. Ethridge, 239 S.W.3d 676, 684 (Mo. Ct. App. 2007) citing *Davis v. Schmidt*, 210 S.W.3d 494, 512 (Mo.App. W.D.2007).

(a) No facts plead justifying exception to American Rule

Respondent never alleged any fact upon which Trial Court could have found unique or special circumstances justifying deviation from the American Rule. Respondent's Motion was tried based only on averments numbered 1, 2, 3, 9, 10 and 11. **Tr.** 4:12-24. These averments in essence state that Appellant filed an appeal and has more money and property than Respondent and therefore should pay her attorney's fees on appeal. The Appellate Courts have stated: "Moreover, the fact that Husband's income exceeds Wife's, standing alone, does not compel an award of attorney fees. In re Marriage of Thompson, 24 S.W.3d 751, 756 (Mo. Ct. App. 2000) citing *Nelson*, 937 S.W.2d at 757.

Aside from the fact that Appellant's higher income level alone is insufficient to justify deviation from the American Rule; the evidence proved that Respondent's net income per month almost doubled that of Appellant. (**Ex** 1 and 6) Appellant has more children than Respondent. **Tr.** 40:14-16. Appellant has more bills than Respondent. (**Ex** 1 and 6) Appellant has more expenses than Respondent. (**Ex** 1 and 6) Appellant has filed bankruptcy (**Tr.** 15-17), had his vehicle repossessed, house in foreclosure, utilities disconnected (**Tr.** 81:25 – 81:3) when Respondent has not experienced any of these financial hardships. **Tr.** 55:17-21, 71:14-23. Therefore, analysis of the parties' "abilities to pay" Respondent's attorney's fees indicates that Respondent has more discretionary income from which to pay her own attorneys fees. (**Ex** 1 and 6) Also, Appellant has insufficient money to pay his own attorney's fees and living expenses for his children and himself. This is because of a monthly deficit of about \$800. (**Ex** 1 and 6) With similar

facts, the appellate courts have denied attorney's fees. In re Marriage of Thompson, 24 S.W.3d 751, 756 (Mo. Ct. App. 2000)

(b) No facts change in circumstances plead and no updated financials

Respondent plead no facts suggesting a change in circumstances supporting the Trial Court's attorney's fees award. The trial court found that neither party could pay their own attorney's fees in its Second Judgment. This finding/judgment was not appealed. Respondent alleged no changes in circumstances since the entry of the Trial Court's Second Modification Judgment. LF 14. Respondent filed no updated statement of income and expenses. Respondent did not file any exhibits relating to her income or her expenses or bills since the entry of the Second Modification. The appellate court has rejected the imposition of attorney's fees on appeal when the movant failed to submit any exhibits relating to her income, expenses and bills. Andrews v. Andrews, 290 S.W.3d 783, 788 (Mo. Ct. App. 2009), Davis v Schmidt, 210 S.W.3d 494, 518 (Mo. Ct. App. 2007) The court stated: "Mother was required to present evidence of her post-dissolution financial condition to be entitled to an award of appellate attorney fees." Davis at 518. To the extent Davis has been overruled/distinguished by Potts, Appellant provided updated financials and exhibits. Potts v. Potts, 303 S.W.3d 177, 197 (Mo. Ct. App. 2010) There is simply no basis upon which the trial court should have granted Respondent's Motion on the merits as plead and argued.

(c)- (g) Appellant had more bills/expenses, less net income and a monthly deficit. Respondent had fewer bills/expenses, more net monthly income and a monthly surplus.

Appellant had more monthly bills/expenses and less net income and a monthly deficit and more children than Respondent who enjoyed a monthly surplus. **Ex** 1,6. Therefore financially there were no facts to support an exception to the American Rule. Appellant had more expenses/bills relating to state/federal business taxes, mortgage, support payments and children at home. **Ex** 1,6. Appellant has a monthly deficit (\$800) and Respondent enjoys her salary and support payments of \$1,975 until 1/31/12 and \$1695 after resulting in a monthly surplus and discretionary income. **Ex** 1 and 6, **Tr.** 40:14-16 The amount of the Judgment represents approximately 3 months of Appellant's net income and is due immediately. **Ex** 1, **LF** 36. There are no provisions for partial payments. Appellant is subject to civil contempt motions and execution and garnishment. Appellant's credit is significantly damaged. Thusly, Appellant's employment opportunities may be severely curtailed. All of the damages mentioned affect Appellant's ability to provide for both his children and himself. Currently, Appellant is 60 days delinquent on his car payment. He (and his children's) natural gas has been turned off and electric had been off one-week prior to the hearing. **Tr.** 81:10-83:19 The Trial Court's Second Modification Judgment imputation and voiding of payments transformed a \$30,000 overpayment into an almost \$50,000 arrearage. Also, the Trial Court's Second Modification Judgment increased the monthly obligation by not crediting Appellant with custody and unreimbursed business expenses. This resulted in an arrearage and an increase in Appellant's support obligation by 50% to pay-off the arrearage. **Tr.** 91:6 – 92:5. Adding an additional \$7,500 payable immediately further destroys Appellant's ability to provide for his children and himself. These records are

evidence of Appellant's inability to pay Respondent's attorney's fees on appeal, because his current expenses exceed his current income. It is an abuse of discretion to order attorney's fees when Appellant's debts exceed his income. Andrews v. Andrews, 290 S.W.3d 783, 788 (Mo. Ct. App. 2009)

The Trial Court violated case law when it did not consider that Appellant was paying support to Respondent totaling \$1975 per month until 1/31/12 and \$1695 thereafter. In re Marriage of Thompson, 24 S.W.3d 751, 756-57 (Mo. Ct. App. 2000), Kieffer at 919[7], **Tr.** 91:6 – 92:5, **Ex 1** These payments reflect an additional 50% monthly to pay for arrearages of \$658 and \$565 per month respectively. The Trial Court indicated that this amount was money owed to Respondent and therefore presumably irrelevant to the Trial Court's consideration. **Tr.** 91:6 – 92:5 To treat the Appellant as if he is not making the payment by not reducing his income accordingly is to count the money twice. Because once paid to Respondent, the income is no longer available to Appellant to make additional payments for Respondent fees. This requires Appellant to pay from income which he does not have and creates an impossible and unfeasible burden. Again, case law requires that the Appellant have a "greater ability to pay [Respondent]'s legal fees than [Respondent]". Clearly, this is not the case; therefore the Trial Court must be reversed. See Wightman v. Wightman, 295 S.W.3d 183, 193 (Mo. Ct. App. 2009)

IV. THE TRIAL COURT ERRED AND/OR ABUSED ITS DISCRETION BY ENTERING JUDGMENT FOR ATTORNEY'S FEES

PURSUANT TO 452.355 BECAUSE (a)THE 452.355.1-REQUIRED COLLATERAL OR UNDERLYING SECOND MODIFICATION JUDGMENT WAS VOID BECAUSE (1)IT WAS NOT BASED ON APPELLANT'S ACTUAL INCOME, (2)APPELLANT WAS NOT GIVEN A HEARING ON HIS MOTION TO MODIFY MAINTENANCE AND (3)THE RESPONDENT'S AFFIDAVITS REPRESENTING APPELLANTS IN-KIND PAYMENTS UNDER 454.432.1, 3 AND 5 RSMO WERE UNCONSTITUTIONALLY VOIDED BASED ON THE COURT'S REFUSAL TO APPLY THEM TO PAST, CURRENT OR FUTURE SUPPORT OBLIGATIONS THEREBY MAKING THEM IMPOSSIBLE TO MAKE FOR CREDIT; AND (b)THE FINDING REQUIRED UNDER 452.355.2 THAT APPELLANT FAILED TO PAY SUPPORT AND/OR MAINTENANCE WITHOUT GOOD CAUSE WAS NOT MADE AND THERE WAS NO EVIDENCE TO SUPPORT SUCH A FINDING.

The Trial Court erred awarding attorney's fees pursuant to §452.355 because (a)§452.355.1 requires a collateral or underlying Second Modification Judgment under 452.370 RSMO, and the Second Modification Judgment was Void because (1) it did not consider Appellant's ability to pay for approximately 32 months a relevant factor and imposed an impossible monthly obligation for 19 months in excess of Appellant's gross income violating due process. (2) The Trial Court failed to grant a hearing on Appellant's motion to modify maintenance violating due process. (3) The Trial Court failed to credit Appellant in accordance with Respondent's duly executed affidavits in accordance with 454.432.1, 3 and 5 RSMO, reflecting in-kind payments made by

Appellant. These errors violated Article I §§2 and 10 of the Missouri Constitution and the 4th, 11th 13th and 14th Amendments to the U.S. Constitution or otherwise the due process and equal protection provisions of both the Missouri and U.S. Constitutions. (b) Consistent with the other points in Section IV, there was no finding and no evidence to support a finding that any non-payment of child support and/or maintenance by Appellant lacked good cause because the payments were impossible to make with Appellant's monthly income.

(a)(1) Second Modification Judgment Void because it did not consider Appellant's ability to pay a relevant factor, and did not use Appellant's actual income resulting in imposing a monthly support obligation in excess of Appellant's monthly gross income for 19 months violating due process and equal protection under both constitutions

The Trial Court did not consider Appellant's actual income from 9/1/06 through 5/1/2010 when it retroactively calculated and imposed a monthly child support obligation applicable to this period as part of its Second Modification Judgment. The Trial Court stated that it did not consider Appellant's ability to pay based on his income during this period a relevant factor. *See* Ex. 7. The U.S. Supreme Court stated that the Appellant's ability to pay is the "critical factor" in support cases in order to satisfy due process requirements. Turner v. Rogers, 131 S. Ct. 2507, 2511, (2011). This is echoed by the Commissioner of the Office of Child Support Enforcement, (OCSE) who in referencing the Turner v. Rogers decision clearly stated:

“However, jail is not appropriate for noncustodial parents who do not have the means to pay their child support debts. The first step to reducing the need for contempt hearings is to set accurate child support orders. The research is clear that setting realistic orders based on actual income can actually improve compliance, increasing both the amount of child support collected and the consistency of payment. The research says that compliance falls off when orders are set above 15 to 20 percent of a noncustodial parent’s income.” See Ex. 19 (OCSE Comm. Blog) (emphasis added)

As further evidence of the benefit of this approach, the Federal OSCE has instituted the PAID (Project to Avoid Increasing Delinquencies) initiative. The PAID program’s objective is to reduce the amount of arrearages and provide more support for obligor-parents. The first stated step in reaching this goal is to assist and encourage states in setting reasonable and accurate support orders that consider the obligor-parents’ ability to pay based on actual income. See Ex. 20 (OCSE – Blog). Since the Second Modification did not consider Appellant’s actual income, and therefore Appellant’s ability to pay when the payment was due from 9/1/06 through 5/1/2010; then the Second Modification Judgment violated the due process provisions of both Missouri and US Constitutions and is a Void Judgment. Turner v. Rogers, 131 S. Ct. 2507, 2511, (2011)

The Trial Court in the Second Modification Judgment simply applied Appellant’s income on October 7, 2010 when it retroactively calculated and imposed a “monthly” child support obligation for 42 months and refused to consider Appellant’s actual

lower/reduced income from 2006-07-08-09 and part of 2010. Ex 8 This means the Trial Court ignored Appellant's 19 months of unemployment and 13 months of under-employment and treated Appellant as if his income went from \$48,000 to \$70,000 on December 1, 2006 or \$5842 per month. *See* Ex. 8-17. This is contrary to Appellant's state and federal income tax returns and Appellant's 6 large volumes of job applications and the related bankruptcy, car repossession, utility shut-offs, correspondence and the need for the in-kind payments. *See* Ex. 8-17 (2nd Mod Judgment, Tax returns, Car repossession, Correspondence and language in the in-kind payments' affidavits).

Here, clearly the trial court's imposition of a monthly child support obligation in the Second Modification judgment is a violation of the constitution because it is impossible to pay a monthly support obligation in excess of the obligor's monthly gross income. *See* Ex 8 and 15 (*compare* the Trial Court's monthly gross income with Appellant's in the respective Form 14's). Also, it violates due process and equal protection provisions of the Missouri and US Constitutions because the judgment failed to leave any money for the obligor to support himself and/or his children in his custody and those over whom he exercised and still exercises joint custody. Requiring Appellant to pay an additional \$7,500 because he appealed hurts Appellant and Appellant's children for whom he is responsible.

Appellant cites four cases from the Supreme Courts of the United States, Alaska, Michigan and Indiana. All of these courts state that the imposition of an impossible support obligation and punishment without regard to the obligor's ability to pay is a violation of the due process and equal protection provisions of their respective

constitutions. Turner v. Rogers, 131 S. Ct. 2507, 2511, (2011), State, Dept. of Revenue, Child Support Enforcement Div. v. Beans, 965 P.2d 725, 729 (Alaska 1998), People v. Likine, 492 Mich. 367, 417, 823 N.W.2d 50, 79 (2012). See also Lambert v. Lambert, 861 N.E.2d 1176, 1182 (Ind. 2007) in which Indiana's Supreme Court did not necessarily decide on constitutional grounds, but still clearly states the proposition that ability to pay when the payment is due is the critical factor in setting the monthly support obligation. Because the underlying /Second Modification Judgment, on which the current Judgment for attorney's fees is based is void; then the judgment for attorney's fees is void as well.

(a)(2) Second Modification Judgment Void because Appellant did not receive a hearing on his Motion to Modify Maintenance violating due process and equal protection under both constitutions

Also, the Second Modification Judgment is Void because the trial court did not consider or give the Appellant's motion to modify Maintenance a hearing at all. *See* Ex 8 (2nd Mod Judgment). The Trial Court failed to consider the Wilhoit, Casper and Foraker cases and the language found in the Judgment portion of the Dissolution Judgment, when it decided that Maintenance was non-modifiable under the Dissolution Judgment. When there is a conflict between the findings and the Judgment, the Judgment portion prevails or controls because the Judgment is the determination of rights of the parties. Wilhoit v Wilhoit, 599 SW2d 74,78; Casper v. Lee, 245 SW2d 132,141; Foraker v Foraker, 133 SW3d 84, 94-95. The Trial Court's refusal to give Appellant a hearing violates Article I §§2 and 10 of the Missouri Constitution and the 4th and 14th Amendments to the U.S.

Constitution or otherwise the due process and equal protection provisions of both the Missouri and U.S. Constitutions.

(a)(3) Second Modification Judgment Void because the ruling (i)makes it impossible to make in-kind payments for credit as authorized and mandated under 454.432.5, (ii)interferes with obligee's right to contract and waive a debt owed to her, and (iii) interferes with Appellant's right to contract and rights to the fruits of his labor thereby violating due process and equal protection under both constitutions

Last, the Second Modification Judgment is Void because the trial court violated the US and Missouri Constitutions when it voided all of Appellant's in-kind payments in excess of \$20,000. The trial court unconstitutionally repealed 454.432.1, 3 and 5 RSMO which authorized in-kind payments, by ruling that in-kind payments cannot be applied to past due payments, current payments or future payments making it impossible for in-kind payments to apply as a credit against the child support obligation. *See* Ex 8 (2nd Mod Judgment). Further, the Trial Court required consideration directly related to the benefit of the children when there is no such limitation in the statute. The Trial Court violated well-established precedent that the oblige-parent can spend the support payment on whatever she wants. Also, the court's limited view and second-guessing both parents as to how to spend support or rear the children violates the due process and equal protection provisions of both MO and US Constitutions. By this ruling, the trial court also refused to allow the oblige-parent (Respondent) to waive a debt owed to her violating the 4th, 11th, 13th and 14th amendments of the U.S. Constitution as well as Article I §§2 and 10 of the Missouri Constitution. These provisions grant the Respondent the unilateral power to

execute affidavits for in-kind support received or waive some or all of the debt owed to her. These provisions also prohibit the state from impairing the obligations under contract and guarantee the Appellant the fruits of his labor.

(b) The Attorney's fees judgment failed to find that any non-payment was without good cause and there was no evidence to support such a finding

The Attorney's fees Judgment did not contain the required finding that any non-payment of child support and/or maintenance was lacking good cause. There was no evidence to support a finding, which is required under subsection two of 452.355 RSMO. This because the Trial Court retroactively imposed a child support amount in excess of Appellant's ability to pay by not using Appellant's actual income and imposing an obligation in excess of Appellant's monthly gross income for 19 months. The Trial Court did not grant a hearing on Appellant's Motion to Modify maintenance and voided all of Appellant's in-kind payments. These things caused any perceived non-payment of the monthly support obligations on the part of Appellant. Since the Attorney's fees judgment did not and could not have the required finding that non-payment lacked good cause, then the Trial Court erred in awarding attorney's fees under subsection two of 452.355 which requires a specific finding that any non-payment lacked good cause.

In the trial on attorney's fees, Respondent's counsel attempted to address and satisfy the required element in subsection two of Section 452.355. Respondent's counsel attempted to elicit testimony or evidence from Appellant that the Second Modification Judgment resulted in an arrearage for child support and maintenance. §452.355.2 RMSO. Respondent's counsel couched her question in terms of Appellant failing to pay and a

resulting arrearage to satisfy §452.355.2. Tr. pgs 47-49. However, this question fails to discuss whether Appellant had the ability to make the payment or give him credit for his payments. The arrearage was created by the Trial Court retroactively calculating support and not using Appellant's actual income when the payment was due. The arrearage was also created by the court by the court voiding Appellant's in-kind payments made consistent with the Respondent's duly executed Affidavits. This resulted in the trial court imposing an impossible-to-pay monthly support obligation in excess of Appellant's monthly gross income for 19 months. This also resulted in a court-imposed a monthly obligation in excess of Appellant's ability to pay for an additional 26 months. Finally, this resulted in the Trial Court simply not crediting Appellant with over \$20,000 he did in fact make under 454.432.1, 3 and 5 as proved by Respondent's Affidavits.

There is no reasonable basis upon which the Trial Court could have made the finding that any of Appellant's non-payment was without good cause. The obligations were simply impossible for Appellant to pay. This is readily apparent when you compare Second Modification Judgment – Form 14, to Appellant's Form 14's based on actual income. *See 2nd Mod Judgment (Form 14) compared to Appellant's proposed Form 14s and Tax Returns for 2006, 07, 08 and 09.* Because it was impossible for Appellant to comply, the Second Modification Judgment is Void because the Second Judgment violated Article 1 §2 and 10 of the Missouri Constitution and the 4th, 11th, 13th and 14th Amendments to the U.S. Constitution.

The effect of the imputation destroys Appellant's current ability to provide for his children and himself. The court-created arrearage results in an automatic increase in

monthly support payments of about \$700 to pay the arrearage. Appellant's highest arrearage was approximately \$49,500, plus the judgment for \$7,500 in attorney's fees. Also Appellant cannot get a passport for employment, his licenses (Bar and Driving) are subject to revocation and tax returns garnished. Equally telling, the residence for Appellant's four children and Appellant is worth about \$45,000 and the Family Support Division (child support agency) has a lien on said residence for \$30,341.41 which said residence cannot be sold or used as collateral until said amount is paid. *See* Ex 18. (Family Support Lien Notice). The federal law pursuant to which Missouri child support enforcement laws are based is called the "Personal Responsibility and Work Opportunity Reconciliation Act of 1996." Pub.L. 104-193 42 USCA § 1305 NOTE. And said law requires an "appropriate" monthly obligation. Title 42 Ch. 7 SubChapter IV Part D§ 667(a). Once Appellant found a job, before his first check, he wrote the Family Support Division and told them where he was working and where to send the wage withholding. *See* Ex. 17. Appellant is not in arrearage for an amount which is higher than the value of his home because he lacked personal responsibility and refused to pay. Appellant did not have \$5,842 a month when he was unemployed for 19 months and underemployed working temporary for 13 months from September 1, 2006 to February 2009. *See* Exs. 8, 10, 11, 12, 13, 15 (2nd Mod Judgment (Form 14) *compared to* Appellant's proposed Form 14s and Tax Returns for 2006, 07, 08 and 09). Instead the arrearage is a court-created arrearage because the court did not use actual income and did not credit Appellant for in-kind payments made, among other judicial errors.

The Second Modification Judgment is a Void judgment and may be attacked at any time in any proceeding. This court has stated: “All proceedings founded on a void judgment are themselves regarded as invalid.” Ripley v. Bank of Skidmore, 198 S.W.2d 861, 865 (1947), Rule 74.06(b). Appellant moves for an order/judgment finding that the Second Modification Judgment was void and therefore the Judgment awarding attorney’s fees collateral to the Second Modification Judgment is void also.

Conclusion

WHEREFORE, for all of the foregoing reasons in the Points, the Trial Court’s decisions are unfair, unconstitutional (because 452.355 is unconstitutional as interpreted) against the weight of the evidence, misapply and misstate the law, and Appellant respectfully prays this court finally dispose of this matter for Judgment in his favor (Rule 84.14) because the material facts are uncontroverted and prove that Appellant and his children cannot pay Respondent’s attorney’s fees and the Second Modification Judgment is Void and Appellant request this court Void said Judgment and other relief as this Court deems necessary and appropriate.

CERTIFICATE OF COMPLIANCE WITH RULE 84.06(C)

I certify that Appellant’s Brief complies with Rules 55.03 and 84.06. It contains 11,123 words and 1030 lines as derived from Microsoft Word 2007. The CD-ROM disks were scanned by AVG Anti-Virus and are virus free. It shall be served upon Respondent (lorigoins@gmail.com) as indicated below.

Certificate of Service

I hereby certify that I served by US Mail/hand-delivery 2 exact duplicates of the foregoing Appellant's Brief and a CD-ROM on this 28th day of February, 2013 to (lorigoins@gmail.com):

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