

**IN THE SUPREME COURT OF MISSISSIPPI**

**MARTIN HOWARD, JR.**

**APPELLANT**

**VS.**

**NO. 2006-CA-00350**

**TERESA HOWARD**

**APPELLEE**

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**BRIEF OF APPELLANT**

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**Appeal From the Chancery Court of Pike County, Mississippi**

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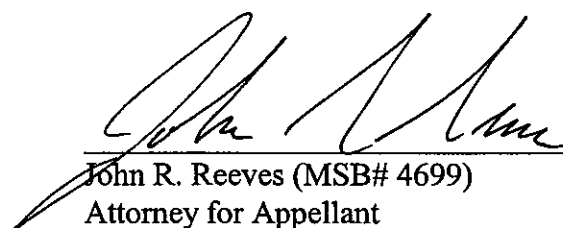
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**CERTIFICATE OF INTERESTED PERSONS**

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Pursuant to Rule 28(a)(1) of the Mississippi Rules of Appellate Procedure, the undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. Their representations are made in order that the Justices of the Supreme Court and/or the Justices of the Court of Appeals may evaluate possible disqualification or recusal.

1. Martin Howard, Jr., M.D. - Appellant
2. John R. Reeves - Attorney for Appellant
3. J. Justin King - Attorney for Appellant
4. Teresa Howard - Appellee
5. Wayne Smith - Attorney for Appellee
6. Debra K. Halford, Chancellor



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Attorney for Appellant

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### **STATEMENT OF THE ISSUES**

The lower court erred by:

1. Denying Martin's request for modification;
2. Finding Martin in contempt of court; and
3. Awarding Teresa attorney's fees.

## **STATEMENT OF THE CASE**

Appellant Martin Howard, Jr. (Martin) was divorced from appellee Teresa Howard (Teresa) in 1995 by judgment of the Chancery Court of Pike County, Mississippi. (Rec., p. 8). By judgment dated November 17, 2000, Martin's child support obligations for his three children were increased from \$2,100 per month to \$2,500 per month; both before and after the modification, Martin was also ordered to pay the mortgage on the marital home in which Teresa and the children continued to reside and the reasonable educational expenses of the three children, including but not limited to private school tuition. These amounts totaled apparently \$5,100 per month. At this time, Martin was a surgeon, with an income exceeding \$200,000 per year. (Rec., p. 8)

On June 13, 2001, Martin petitioned the chancery court for modification of child support, contending that since the date of these orders, there had "been a substantial and material change in circumstances in that the petitioner sustained an injury to his hand and has been required to undergo surgery on his right hand and will no longer be able to practice his chosen profession, i.e., that of a surgeon, and, therefore, his income has or will decrease substantially." (Rec., p. 8). He requested the court to reduce his child support to an amount commensurate with his new or anticipated income and to terminate the requirement that he pay the educational expenses of the children. Teresa denied Martin's allegations regarding material change in circumstance and raised the "clean hands doctrine" as an affirmative defense, claiming that Martin had "wilfully and contemptuously refused to pay" a number of items ordered by the court. (Rec., p. 8)

The matter was heard by the chancery court on October 30, 2001. Martin testified that following carpal tunnel release in November 2000, his dexterity decreased and he had difficulty holding objects. (Rec., p. 8). In April, 2001, he took a medical leave of absence and consulted with

Dr. Aubrey Lucas, an orthopaedic surgeon who specialized in hand surgery. Dr. Lucas testified by way of deposition; his office notes were attached as an exhibit. Following his initial examination of Martin on April 27, 2001, Dr. Lucas referred him to a neurologist for a nerve conduction study, an anesthesiologist for pain management and, to an occupational therapist for strength, range of motion and sensation measurement. (Rec., pgs. 8-9). Upon reviewing the results of these examinations, Dr. Lucas recommended continued evaluation by the pain management specialist and, a return visit to Dr. Lucas in two weeks. (Rec., p. 9). Three months later, he telephoned Dr. Lucas advising that he had made plans to start a pathology residency at the University of South Alabama in the next few weeks due to his inability to hold laparoscopic instruments for more than one to two minutes without significant pain and numbness. He asked Dr. Lucas to give a deposition for use in chancery court proceeding and made an appointment for Dr. Lucas to update his condition before the deposition. On August 28, Dr. Lucas detected no visible abnormalities with Martin's hands and found the range of motion to be good. Dr. Lucas recommended that "if his condition does not improve and if he still feels unable to practice as a general surgeon, I would recommend a 2nd opinion regarding that issue...." In response to a request for information from Martin's disability insurer, Dr. Lucas wrote, on September 12:

Martin has plans to complete a pathology residency and does not have plans to return to his normal practice of general surgery which included laparoscopic procedures. At this current time Martin is under restrictions that would not allow him to hold the laparoscope for extended periods of time. I discussed with Martin that if his condition continues to provide problems related to using the laparoscopic equipment and to returning to normal employment as a general surgeon, I would recommend a 2nd opinion regarding this issue.... At this time Martin has not been released to his regular occupation. He has been released to perform the office or clinic component of his surgical occupation and has been free to do so since I originally saw Martin on 4-27-01. The medical restrictions to avoid

the use of the laparoscope will be in effect until 12-1-01. I hope at that time to either hear from Martin that he can return or to obtain a 2nd opinion regarding this issue.

(Rec., p. 9).

Dr. Lucas testified that while Martin could perform some simple surgical procedures, he could not perform the laparoscopic component of his practice which, according to the history, was the majority of his practice. (Rec., pgs. 9-10). When asked whether there was a need for Martin to change occupations at that time, Dr. Lucas responded “[a]t this point and (sic) time, there were probably many personal reasons that I don't feel that I should be in the middle of... As far as physical reasons for changing occupations, I would say it's premature. But, he might have many reasons he's factoring in.” (Rec., p. 10).

By letter opinion dated November 2, 2001, the trial court found Martin's decision to leave his career as a surgeon to be “premature” and denied his request for modification. (Rec., p. 10). The court found “no vocational evidence” to support Martin's position; instead, the court found “strong evidence from Dr. Lucas that Martin was motivated to make a change by considerations other than his medical condition.” The court concluded that all of these matters “show clearly that Martin was, at the least, premature in the decision to abandon his career as a surgeon.” (Rec., p. 10). The court found that Martin made the decision to change careers when he knew the extent of his obligations and that his decision would prevent him from being able to comply with the court's order. The court determined that “Martin must accept responsibility for that ill-timed and ill-advised decision that was at best premature.” Accordingly, the court denied his request for modification. (Rec., pgs. 10-11).

The chancery court held Martin in contempt twice during 2002. First, by order dated January 30, 2002, the court found Martin in wilful and obstinate contempt of prior orders of the court



respecting, inter alia, his failure to pay monthly mortgage payments on the marital home, child support and educational expenses; the court ordered him incarcerated until he purged himself of contempt by paying all amounts specified in said order (approximately \$24,000) and by complying with other non-monetary provisions. Second, by order dated April 19, 2002, the court found Martin in contempt of the January 30, 2002 order and also of additional items, including continued failure to pay the mortgage and other expenses relating to the marital home, educational and child support obligations, medical expenses and attorney's fees. The court ordered Martin to be incarcerated until he purged himself of contempt (by paying approximately amount of \$67,000, which incorporated all amounts due and owing under the January 30 order). (Rec., p. 11).

The court also divested Martin of his ownership in the marital home in order that Teresa might refinance the debt. Martin retained, however, an equitable interest in the home for which he would be compensated upon any sale of the home, subject to his payment of all outstanding arrearage. (Rec., p. 11).

Martin subsequently filed the instant motion to modify/suspend support obligation and motion for release from incarceration, contending that he had no money, had exhausted all liquid assets to satisfy the standing orders of the court, was "unable to practice medicine as a surgeon as was his previous employment due to a medical/physical disability which is beyond his control," and was entitled to modification of his child support obligation based upon his current income of approximately \$3,000 per month from his pathology internship. (Rec., p. 12). On January 17, 2003, Teresa filed the instant motion for citation for contempt, claiming Martin to be in contempt not only of the April 19, 2002, order but also of his continuing obligations under prior orders of the court. The chancery court ordered that Martin could be temporarily released from incarceration on a cash bond

of \$36,500; Martin paid this amount on January 19, 2003 and was released, having spent five days in jail. (Rec., p. 12).

Hearing was held before the chancery court on April 17, 2003, regarding Teresa's motion for contempt and Martin's motion for modification of child support. (Rec., p. 12). The parties stipulated that Martin's arrearage as of April 17, 2003 was \$100,620.43. Teresa testified that she works approximately thirty hours a week and last year made \$15,900, which was insufficient to cover her house payments. She said has borrowed money from her family and inherited part of a small estate of her father. Teresa testified that while she had considered moving into a different home with a lower monthly note, she did not qualify for other loans because of the negative liens on her credit report that Martin had failed to clear up previously. (Rec., pgs. 12-13). Teresa testified that the minimum amount that she needed in order to make ends meet considering the children's educational expenses, insurance, clothing, food, and housing was \$2,500 per month. (Rec., p. 13).

As to the requested modification, Martin testified that he was continuing his medical education to become a pathologist because it is one of the few fields of medicine left open to him without the use of his right hand for fine motor skills; his salary as a second year resident was \$37,500. He reported that the malpractice coverage for his surgical career had been cancelled due to the number of claims which had been filed; he testified that he was currently litigating six malpractice claims. (Rec., p. 13).

By letter opinion of April 22, 2003, the chancery court rejected Martin's request that his obligations be reduced due to the drop in his income for a number of reasons. (Rec., pgs. 13-14). First, the court found that the issue had previously been presented to the court and determined adversely to Martin by letter opinion of November 2, 2001. Second, that Martin "does not appear

before the court with 'clean hands,' especially in light of his complete failure to pay any amount toward child support or any other obligation since he was released from jail in January 2003." Third, that while the "realities of th[e] drop" in Martin's income were "evident," he had "not taken reasonable steps to try to correct" the matter. The court determined, however, that "despite the lack of entitlement to any modification," Martin's obligations to Teresa should be reduced to \$2,500 per month, with the balance of all other sums, approximately \$2,600 per month continuing to accrue; the failure of Martin to pay the additional amounts until further order of the court would not constitute contempt. (Rec., p. 14). The additional amounts would be "abated but not forgiven." The letter opinion was incorporated into an order of the court on May 19, 2003, which decreed Martin to be in arrears for non-payment of child support and other obligations in the amount of \$100,620.43, to bear interest at the legal rate of 8% per annum, to be in willful contempt of the prior decrees of the court, to be incarcerated for said contempt unless \$10,000 towards the arrearage be paid within twenty-one days, and to pay child support in the amount of \$2,500 per month beginning May 1, 2003, with all other sums to continue to accrue. (Rec., p. 14).

On May 29, 2003, Martin filed a notice of appeal, and Teresa filed a motion for reconsideration. (Rec., p. 14). The chancery court granted Teresa's motion, and by order dated July 2, 2003, reversed its ruling regarding the reduction of child support. The chancellor determined:

"it was error for me to allow Dr. Howard to reduce his child support. By way of explanation, Dr. Howard approached the court on a motion to modify ... regarding his claim that he was no longer able to practice as a general surgeon. The court found that position to not be substantiated, that he had elected to withdraw from the surgical field and his own treating physician didn't support that position at the time he made it. The court ruled on this matter on April 22nd. I was attempting to address the information that I had and apply it to the difficult case where Dr. Howard now claims that he only had an income of approximately \$3,000 a month in his pathology residency

at the University of South Alabama.... But the court, I believe, committed error in making that determination on April 22d. The realities are that apparently Dr. Howard's income is that amount. However, that was the same defense and position he had taken and the court had previously ruled on that. So, in essence the law of the case in this particular instance is controlling, and the court has previously ruled and denied that relief, and, therefore, the court erred in making that determination and I now reverse that ruling and reinstate the provisions that existed immediately prior to the April 22nd, 2003 ruling and the order that followed that ruling”.

(Rec., pgs. 14-15).

On May 10, 2005, the court of appeals handed down its decision. (Rec., p. 7). The decision of the chancellor was affirmed as to the contempt but reversed and remanded as to Martin's modification request. The chancellor had cited three reasons why Martin's modification request should not be granted:

1. Because the court had previously been presented with the matter of modification and the court had ruled adversely to Martin;
2. Because Martin did not appear before the court with clean hands; and
3. Because while the realities of the drop in Martin's income were evident, Martin had not taken reasonable steps to try to correct the matter.

(Rec., p. 20).

The court of appeals reversed the chancellor, holding that the first two reasons could not serve as bases to deny modification. “We find that two of the three reasons given by the chancellor for denying Martin's motion for modification did not preclude modification.” Howard v. Howard, 913 So.2d 1030, 1040 (Miss. Ct. App. 2005). (Rec. P. 20). As to the third reason, the court of appeals could not determine whether the chancellor would have denied the modification based only on this reason. (Rec., p. 25). The court of appeals was swayed by the fact that the chancellor had

actually granted a modification citing the realistic matter of the drop in Martin's income, but then reversed himself. (Rec., p. 25). This caused the court of appeals to believe that there was merit in Martin's contention that he could no longer perform surgery, but that more proof was needed. "The chancellor's concern over the 'realities' of Martin's reduction of income and the court's attempt to alleviate part of Martin's monetary burden, even temporarily, leads us to believe that the chancellor may have ruled differently had the other two reasons for denying modification not been present." (Rec., p. 25). Therefore, with the first two reasons cited by the chancellor being rejected, the lower court was left to determine the third reason: whether or not Martin has presented a "second opinion" as to his inability to perform surgery and whether that second opinion confirms his position.

The case was tried over two days, October 21, 2005, and December 16, 2005. (T.T., p. 2). The trial was a two phased hearing; the first part on the remand and the second on Teresa's motion for citation of contempt. (T.T., p. 2).

The lower court entered its decision on February 14, 2006, denying Martin's request for modification and holding Martin in contempt. (Rec., pgs. 294 -328). Martin timely appealed. (Rec., p. 340).

### **SUMMARY OF THE ARGUMENT**

The lower court erred in several respects. The lower court erroneously denied Martin's request for modification. The lower court's denial of Martin's modification based on *res judicata* is inconsistent with the court of appeals' direction that the chancery court should consider any events subsequent to November, 2001. Denying the modification request based on unclean hands was also in error because Martin proved with medical particularly his inability to earn his pre-injury income. The lower court also erred by finding Martin in contempt. Had the lower court correctly granted Martin's request to modify, contempt of court would not have been an issue. Further, Martin particularly set forth his inability to comply. Because he particularly set forth his inability to comply, the lower court further erred by finding Martin in willful contempt. The lower court also erred by awarding Teresa attorney fees. Martin was not in contempt and therefore should not have to pay attorney's fees. Further, Teresa's counsel provided only a general description of services provided in order to substantiate his fee and this is insufficient under well-settled law for an award of attorney fees. For these reasons, the supreme court should reverse the decision of the lower court.

## ARGUMENT

### A. The Lower Court Erroneously Denied Martin's Request for Modification.

#### 1. The Lower Court Erroneously found that Martin's Request for Modification was Barred by the Doctrine of Res Judicata.

In Howard v. Howard, 913 So.2d 1030 (Miss. Ct. App. 2005), the court of appeals held:

[Martin] is not precluded from showing a material change in circumstances occurring subsequent to the November 2001 opinion. ... We find that the chancery court should have considered **any** evidence ... subsequent to the November 2001 opinion to determine whether a substantial and material change had occurred justifying modification of Martin's support obligations.

(Emphasis added).

About the Howard decision, the chancellor opined:

In dicta following its holding, the Appeals court attempted to speculate what the outcome would have been had the Trial Court been basing its ruling strictly on the third reason given and further contemplates what effect additional medical testimony in the form of a second opinion would have had on the Court. The Trial Court is of the opinion that this discussion was not a dictate of what testimony should be presented on remand or an indication of the desired outcome ... but merely a criticism of Martin's appellate argument ....

(Rec., pgs. 301-302).

Even though the court of appeals instructed the chancellor to consider any evidence subsequent to November 2001, the lower court ignored that and found that Martin's request for modification is barred by *res judicata*. The terms of a child support order are "inherently modifiable upon a showing of a material change in circumstances." Miss. Dept. of Human Services v. Shelby, 802 So.2d 89 (Miss. 2001). Whether or not Martin could engage in the practice of surgery was not settled by the prior decision of the trial court. The court of appeals held that Martin's modification request was revived in May, 2003. Howard at 1043. Again, the appellate decision reads that Martin

“is not precluded from showing a material change in circumstances occurring subsequent to” November, 2001. Id. at 1041. Martin presented the testimony of Dr. Frederick Myer regarding Martin’s carpal tunnel syndrome, carpal tunnel release surgery and the resultant reflex sympathetic dystrophy from which Martin now suffers.

Dr. Meyer is a Board certified orthopaedist who treated Martin for carpal tunnel syndrome. (R.E., p. 46). Carpal tunnel syndrome is a condition stemming from repetitive hand and wrist usage. Dr. Meyer testified that Martin underwent surgery to relieve the symptoms of carpal tunnel syndrome, the procedure being known as carpal tunnel release. As a result of the surgery, Martin developed reflex sympathetic dystrophy, or RSD, which is a common side-effect of carpal tunnel release. (R.E., pgs. 50-52). RSD leaves the hand and wrist numb and renders the patient with a loss of dexterity and motor skill in the hand and wrist. Dr. Meyer testified that there can be a difference between a person’s subjective complaint of hand and wrist problems as contrasted with medically objective findings. Dr. Meyer testified that recognized medical testing objectively confirms that Martin suffered and suffers from RSD and that, to a reasonable medical certainty, Martin is unable to engage in the practice of surgery and has been unable to do so since at least his surgery. (R.E., p. 59-64). No evidence was offered to refute Dr. Meyer’s testimony or opinion.

Dr. Myer testified that he began seeing Martin as a patient in November 2001. (R.E., p. 46). He continued to see and treat Martin over the next couple of years. (R.E., p. 49). While Martin showed some progression he continued to have problems in 2002. (R.E. p. 53). Martin continued to have problems in 2003. (R.E., p. 55). Dr. Meyer opined that Martin’s condition impairs his ability to perform surgery. (R.E., p. 59). Dr. Meyer testified:

[T]here’s several issues .... Number one is the reflex sympathetic dystrophy which is ... decreased motion, decreased strength ....



The second issue is [Martin] had residual symptoms from the carpal tunnel syndrome. The carpal tunnel syndrome ... frequently causes ... people to drop things. It causes people to have difficulty with loss of sensation, inability to manipulate fine objects. ...

The third thing is, the widened two-point discrimination at 9 millimeters. That indicates ... by the time in a carpal tunnel syndrome you start seeing widening of two- point discrimination that indicates a rather significant drop in nerve function ....

...

So for all those reasons. Plus, he has arthritis of the CMC joint which makes it difficult to pinch and grip ....

(R.E., p. 59- 61).

Dr. Meyer opined that allowing Martin to perform surgery on patients would result in an increased risk to the patient's safety. (R.E., p. 61). Regarding Martin's career as a pathologist, Dr. Meyer stated "[t]he amount of manual dexterity it takes to be a pathologist is a lot less than the amount of manual dexterity it takes to be a surgeon." "So you could function quite nicely as a pathologist and not be able to operate." (R.E., p. 78). Dr. Meyer further testified that Martin's "got a myriad of problems that probably impair his ability to do surgery ...." (R.E., p. 79).

Teresa offered absolutely no medical or other expert evidence to refute anything Dr. Meyer said. This evidence stands as uncontradicted medical fact.

Dr. Farrina testified that he examined Martin. Dr. Farrina opined that Martin's hand and wrist condition was objectively verified and that Martin could not engage in the practice of surgery. (R.E., pgs. 126-129).

Dr. Farina testified that Martin experienced problems with "dexterity, pain, and strength in the hand." (R.E., p. 100). Dr. Farina further testified that Martin did not decide to stop being a surgeon until Martin realized that he would no longer be able to do so due to his hand condition. (R.E., p. 116). Dr. Farina testified that he would not recommend that Martin continue to practice

as a surgeon because he wouldn't be insurable and would be unable to trust himself. (R.E., p. 126). Dr. Farina testified that based on Martin's ailments, Martin's decision to discontinue practicing as a general surgeon was wise. (R.E., p. 129).

Teresa offered absolutely no medical or expert evidence to refute anything Dr. Farrina said. This evidence stands as uncontradicted medical fact.

Whether or not Martin could engage in the practice of surgery was unsettled at the time of Martin's November, 2001, modification action which preceded the instant action. Howard at 1033. Then, the trial court found "no vocational evidence" to support Martins's position that he could no longer practice surgery. Id. at 1034. Now, the issue is settled by uncontradicted medical fact. Martin is unable to engage in the practice of surgery due to RSD which occurred secondary to his carpal tunnel release. Two physicians have testified without refutation that Martin is unable to engage in the practice of surgery. This proves that a material change in circumstances exists after November, 2001. The terms of a child support order are "inherently modifiable upon a showing of a material change in circumstances." Miss. Dept. of Human Services v. Shelby, 802 So.2d 89 (Miss. 2001). Martin can show a material change in circumstances, i.e., he can no longer engage in surgery, whether or not the matter had been determined otherwise in 2001. Martin has demonstrated a material change in circumstances effective April 17, 2003, the date of hearing of his petition to modify.

## **2. The Lower Court Erroneously Found that Martin had Unclean Hands**

The lower court, as a basis for denying Martin's modification request, finds that Martin voluntarily reduced his income. (Rec., p. 313). This finding is contradicted by the evidence. The remand hearing was conducted during two days, October 21, 2005, and December 16, 2005. When

the hearing began on October 21, 2005, Martin was residing in Lake Charles, Louisiana. Before December 16, 2005, Hurricane Rita ravaged Lake Charles. (T.T., p. 150, lns. 15-17). The laboratory housing the pathology firm for which Martin was employed was heavily damaged. (T.T., p. 150, lns. 19-20). Martin was forced to evacuate his home and upon returning learned from his employer that Martin's employment was uncertain due to the severe damage caused by the hurricane. (T.T., p. 150, lns. 20-25). Specifically, Martin's employer was completely shut down for at least one month. (T.T., p. 150, lns. 28-29). In order to secure certain employment, Martin sought employment as a pathologist with the University of Mississippi Medical Center (UMC) in Jackson, Mississippi. (T.T., p. 151, lns. 19-29). Martin was hired by UMC to be an assistant professor and to practice pathology in the University clinic. (T.T., p. 152, lns. 4-14). For his duties as an assistant professor and practicing pathologist, Martin's gross yearly compensation was set at \$125,979. (T.T., p. 154, lns. 7-15).

The lower court says that Martin was first employed with UMC at a salary of \$134,000 and that the salary was changed to \$124,000. This was fully explained by Martin. Martin testified that when UMC offered \$134,000 it had not taken into account the cost of Martin's malpractice insurance. So, UMC recalculated the salary to take that into account and the reduction is due to the cost of the malpractice insurance. (T.T., p. 179, ln. 22 - p. 180, ln. 19). Teresa offered absolutely no evidence to contradict Martin's testimony.

Martin's decision to seek employment at UMC was due to circumstances entirely beyond his control - Hurricane Rita. Martin sought work at UMC only after Hurricane Rita destroyed the laboratory for which Martin was working in Lake Charles, Louisiana. Martin testified that, as the last person hired, he would be the first to be laid off. Martin testified that the laboratory could not

guarantee that he would remain employed beyond a 30 day basis. Based on that, Martin made the appropriate decision to seek other employment which would offer certainty. Teresa contradicted none of this with any evidence. The hurricane was an act of God over which Martin had no control. Martin was faced with possible unemployment and therefore the inability to pay any child support and chose to seek secure employment. Martin did not wilfully and voluntarily reduce his income or worsen his financial positions. Martin stabilized his financial position with the best employment option available at the time.

**B. The Lower Court Erroneously Found Martin in Contempt**

The trial court erroneously held Martin in contempt for several matters:

1. Not paying Teresa's house note;
2. Not paying private school tuition;
3. Not paying private school and college expenses;
4. Not paying college tuition;
5. Not paying all child support;

The lower court wrote that Martin "continued his standard of living without providing his children with ... court ordered obligations." (Rec., p. 323). This matter, of course, is tied to Martin's request for modification, previously addressed. For, if the court had modified Martin's support obligations consistent with his income effective April 2003, then Martin would have been able to pay and would not be in contempt for non-payment. Further, Martin particularly set forth his inability to comply with prior orders. Martin testified that he has no pension plan that he can draw down to pay obligations. He is in the state retirement system but that just started last year and would

not even be vested. (T.T., p. 261, lns. 16-18). He has no retirement accounts. (T.T., p. 262, lns. 2-16). Martin's home in Brandon, Mississippi, was purchased with 100% VA financing - no down payment - and there is no equity in the home. (T.T., p. 262, lns. 21-29). Martin testified that he has no mutual funds, stocks, 401(k) plans, certificates of deposit, money market accounts, or passbook savings accounts. (T.T., p. 263, lns. 1-29). Martin testified that he and his current wife share one checking account which, after obligations are paid, has minimal funds. (T.T., p. 263, lns. 14-21). Martin has one vehicle and it has over 100,000 miles on it. (T.T., p. 264, lns. 9-14).

The lower court erroneously found Martin in willful contempt of prior court orders. (Rec. P. 324). To be found in willful contempt it must be determined whether the alleged contemnor's conduct "was sufficiently knowing so that it should be labeled contumacious ...." In a contempt proceeding it is a defense that the alleged contemnor "was not guilty of wilful or deliberate violation of a prior judgment or decree." Dunaway v. Busbin, 498 So.2d 1218, 1222 (Miss. 1986). An alleged contemnor's "willful disobedience must be proven by a preponderance of the evidence." Bounds v. Bounds, 935 So.2d 407, 411 (Miss. Ct. App. 2006). The proof shows that Martin could not pay the huge obligations forced upon him.

As explained herein above Martin lacked the present ability to pay his obligations. Martin could not have been in willful contempt. The lower court was erroneous in finding that Martin willfully violated any order.

### **C. The Lower Court Erroneously Awarded Teresa's Attorney Fees.**

The lower court erred by awarding Teresa's attorney fees for three reasons. First, Martin was not in contempt of court. Second, Martin himself incurred legal expenses in the remand hearing and

subsequent hearings. Third, Teresa's proof of attorney's fees fail to meet the requirements of the law with respect to awarding attorney's fees. The statement of Teresa's attorney contains no detail which would enable the court to discern what service was performed and whether such service was necessary and reasonable. (R.E., p. 134-136). The evidence is insufficient to support an award of attorney fees. The evidence consisted only of a statement of Teresa's counsel which contains only entries of general categories such as "work on case" and "phone call", and the like. (R.E., p. 134-136). No testimony was offered. These general entries do not meet the requirements of McKee v. McKee, 418 So.2d 764 (Miss. 1982):

In determining an appropriate amount of attorneys fees, a sum sufficient to secure one competent attorney is the criterion by which we are directed.

Rees v. Rees, 188 Miss. 256, 194 So. 750 (1940). The fee depends on consideration of, in addition to the relative financial ability of the parties, the skill and standing of the attorney employed, the nature of the case and novelty and difficulty of the questions at issue, as well as the degree of responsibility involved in the management of the cause, the time and labor required, the usual and customary charge in the community, and the preclusion of other employment by the attorney due to the acceptance of the case.

We think it is not the best practice to estimate the time expended as the basis for a fee as the approximation is more susceptible to error, and thus more suspect than properly maintained time records. Estimates, however, can properly be considered by the court but the attorney who does so should have a clear explanation of the method used in approximating the hours consumed on a case. We are also of the opinion the allowance of attorneys fees should be only in such amount as will compensate for the services rendered. It must be fair and just to all concerned after it has been determined that the legal work being compensated was reasonably required and necessary.

Teresa's counsel failed to satisfy the McKee factors. For the reasons explained herein above, the lower court erroneously awarded attorney fees.

## CONCLUSION

The lower court committed several errors. Martin's request for a modification was not barred by *res judicata*. Martin offered additional medical evidence as directed by the court of appeals. Martin established the occurrence of a material change in circumstances justifying a modification. Teresa offered absolutely no medical or expert evidence to rebut the medical expert testimony offered by Martin. Martin would not be in contempt of court if the chancellor had modified his obligations back to April 2003, the date of filing of his modification petition. Further, Martin particularly set forth his inability to comply with prior orders. Therefore, the court erroneously found that Martin had unclean hands and erroneously found Martin in contempt of court. The lower court erred in awarding Teresa's attorney fees. Martin was not in contempt. The failure of Teresa's counsel to meet the McKee factors made an award of attorney's fees further erroneous.

For the above and foregoing reasons, Martin respectfully requests that this court reverse the trial court's judgment and hold that Martin's support obligations are modified and reduced effective April 2003.

Respectfully submitted,  
Martin Howard, Jr., Appellant

By: 

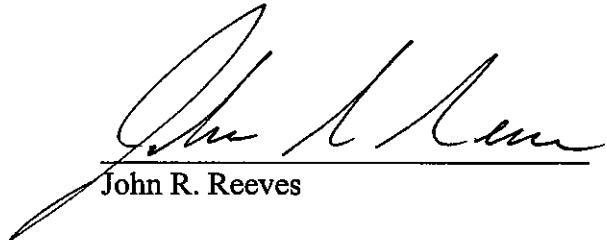
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**CERTIFICATE OF SERVICE**

I certify that I mailed a true copy of this document to the following, via First Class U.S. Mail, postage prepaid on October 30, 2006.

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