IN THE DISTRICT COURT OF APPEAL
FOR THE FIFTH DISTRICT
STATE OF FLORIDA

CASE NO.: 13-2431

FRANK R. BISSON,

Appellant,

v.

JULIET BISSON,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT
IN AND FOR ORANGE COUNTY, FLORIDA

APPELLANT'S INITIAL BRIEF

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TABLE OF CONTENTS

TABLE OF CITATIONS

CASES

STATUTES AND RULES

PRELIMINARY STATEMENT

In this brief, the Appellant, Frank R. Bisson, will be referred to as the "Former Husband." The Appellee, Juliet Bisson, will be referred to as the "Former Wife."

The Honorable Heather L. Higbee presided over the Verified Motion for Relief from Judgment ("Motion") giving rise to this appeal. Her tribunal will be referred to as the "Trial Court." All orders, motions, and exhibits that give rise to this appeal are in the Appendix. Citations to the Appendix are made as follows: Appx. followed by corresponding letter(s) and page number(s) if applicable.

JURISDICTIONAL STATEMENT

Venue is proper in this Court pursuant to Section 35.043, Florida Statutes. The Notice of Appeal in this case was timely filed on July 1, 2013. (Appx. at AA). Accordingly, jurisdiction lies in this Honorable Court. FLA. R. APP. P. 9.030(b)(1)(A).

INTRODUCTION

This is an appeal from a summary denial of a motion for relief from judgment filed pursuant to Florida Rule of Civil Procedure 1.540 ("Rule 1.540").[1] Former Husband raises two issues on appeal. First, he contends that the Trial Court abused its discretion when it denied the Motion without first conducting an evidentiary hearing because he asserted several colorable claims pursuant to Rule 1.540. Second, Former Husband contends that the Trial Court deprived him of the ability to have meaningful appellate review of the denial because it was deplete of any reasoning.

STATEMENT OF THE CASE AND FACTS

1. The Parties Dissolution of Marriage

Former Husband and Wife ("Parties") dissolved their marriage on or about March 27, 2007. (Appx. at B). As part of the Marital Settlement Agreement, the Parties agreed to exercise and have shared parental responsibility of their two minor children. (Appx. at B). It was further agreed that Former Wife would be designated the primary residential parent of the children and Former Husband would be granted reasonable contact with the children and afforded a minimum of two days per week and two overnights per month. (Appx. at B).

[1] Specifically made applicable to the instant proceeding by Florida Family Law Rule of Procedure 12.540.

To calculate child support, the Parties each submitted a financial affidavit. (Appx. at Q and R). Former Wife's Financial Affidavit revealed that she was not working at the time of the divorce and did not have a monthly gross income. (Appx. at Q). However, prior to the Parties' marriage, Former Wife earned a college bachelor's degree and was making between $26,000 to $27,000 a year. (Appx. at N p. 67-71). Former Husband's Financial Affidavit showed that he worked at IKON Business Solutions, Inc. and made a monthly gross income of $30,000 per month. (Appx. at R). Pursuant the child support guidelines and in reliance on the Parties' financial information, the Trial Court ordered Former Husband to pay $3,178 a month in child support. (Appx. at B p. 9).

2. <u>Former Husband's Supplemental Petition for Modification of Parenting Plan and Child Support</u>

Former Husband petitioned that the Trial Court modify the parenting plan to take into account his relocation and modify his child support obligation to take into consideration his decreased and current income. (Appx. at D).

3. <u>Former Husband's Financial Change of Circumstances</u>

Due to the recession, Former Husband's income drastically dropped in 2009. (Appx. at D p. 2). In fact, from 2009 to 2010, Former Husband's income dropped nearly $210,000.[2] (Appx. at D p. 2). In December of 2010, Former Husband

[2] Income FY 2006 - $331,000
Income FY 2008 - $324,000

resigned from his position at IKON and relocated to Syracuse, New York, where he had previously resided as a child. (Appx. at N p. 24, 34). In Syracuse, Former Husband obtained a job at Comdoc, a company that sold similar products to that of his previous employer. (Appx. at N p. 22). Despite obtaining employment in the same industry, his income for the year was reduced to $92,000. (Appx. at N at 29).

4. Former Wife's Increased Income

At the time of trial, Former Wife's income had increased from $0 to $682.50. (Appx. at N p. 83). In her closing argument, Former Wife requested that the Trial Court consider her current or imputed income when determining whether to modify the Parties' child support obligations: "I ran the guidelines with Former Husband's income at end of 2010 earning [$219,000], and the Former Wife's current income…I also tell the court I ran guidelines that former wife worked full time at minimum wage, using [Former Wife's] current income." (Appx. at N p. 108).

5. Mediated Settlement of Time Sharing

The Parties resolved the timesharing issue at mediation. (Appx. at E). According to the agreement, the Parties agreed to substantially increase Former Husband's overnight timesharing with the children. (Appx. at E). Specifically, Former Husband's overnight timesharing of the children increased from 24

Income FY 2009 - $428,000
Income FY 2010 - $219,000

overnights per year to approximately 20 percent of the overnights per year. (Appx. Vol. at E)

6. <u>Pre-Trial Scheduling Order</u>

The Parties proceeded to trial regarding Former Husband's request that the Trial Court decrease his child support obligation. A Pre-Trial Scheduling Order was entered by the Trial Court on January 17, 2012. (Appx. at G). In part, it required the Parties to disclose the names and addresses of experts to be called at trial within 20 days. (Appx. at G). Despite the Trial Court's order, Former Husband's trial counsel did not timely disclose either Ted Domowitz or David Ramos as expert witnesses expected to be called at trial. (Appx. at H). Rather, his trial counsel waited until April 9, 2012 to disclose these expert witnesses—several months after the Trial Court imposed deadline had passed and only nine days before trial. (Appx. at M at 36-37). Consequently, when Trial Counsel requested a continuance so that an expert witness could testify at trial, the Trial Court denied it and issued an order stating that no experts for either party would be permitted at trial because neither party timely disclosed such a witness in compliance with the Pre-Trial Scheduling Order. (Appx. at I and J).

Had the experts been allowed to testify, they could have explained the past, current, and prospective market conditions of Former Husband's previous employer. (Appx. at O and P). Specifically, in Mr. Ramo's Sworn Affidavit, Mr.

Ramos described the swift decline of the industry and its impact on sales professionals like Former Husband. (Appx. at O). In his opinion, Mr. Ramos believed that:

> Former Husband made a prudent move in leaving IKON Office Solutions when he did because Xerox Corporation and its subsidiaries are poised to capitalize on the coming convergence of IT Professional Service and the traditional imaging industry hardware manufacturers. Had Former Husband not left when he did, his income potential would have plummeted further due to the simple fact that US hardware placement numbers, revenues, and margins have decreased Year-Over-Year since the US economic situation starting in 2009. Transitioning to a Xerox Company allowed for him to offset somewhat the inevitable income decline by having a more robust portfolio to market.

(Appx. at O).

In his Sworn Affidavit, Mr. Domowitz also explained the dire climate of his and Former Husband's sales industry:

> …the Recession created a customer confidence that allowed any company to demand what price they would be willing to pay for equipment and services, and truly driving profitability to an extreme minimum, or even not at all…. Overall…our industry had reached a very challenging point. Profits were diminished; the opportunity to provide value was almost nonexistent as low ball pricing was the tone of business…. For many firms in our industry the sales professionals similar to Frank Bisson who were coined "Heavy Hitters" were now suffering a terrible change and had to either leave the industry for greener pastures, or take significant reductions to their income to survive.

(Appx. at P).

7. The Supplemental Judgment

After trial regarding the modification of child support, the Trial Court entered an order denying Former Husband's request for modification of child support ("Supplemental Judgment"). (Appx. at T). In doing so, the Trial Court held that Former Husband was unable to meet the requirements of the *Burkley* test and failed to demonstrate that the dip in his income in 2010 was permanent—stating an anticipatory reduction in income is insufficient as a matter of law to justify a downward reduction. (Appx. at T). Consequently, the Trial Court held the Parties' child support obligations would remain the same as was originally calculated on March 27, 2007. (Appx. at T).

8. Verified Motion for Relief from Judgment

On March 21, 2013, Former Husband filed a verified motion pursuant to Rule 1.540 and asserted that he was entitled to relief from the Supplemental Judgment for several reasons. (Appx. at X). First, he asserted that the Trial Court due to mistake, inadvertence, surprise, or excusable neglect failed to take into account his increased overnight timesharing. (Appx. at X p. 13-15). Next, Former Husband asserted that the Trial Court due to mistake, inadvertence, surprise, or excusable neglect failed to consider Former Wife's increased or imputed income. (Appx. at X p. 15-17). Third, he asserted that his trial counsel due to mistake, inadvertence, surprise, or excusable neglect denied him of the ability to present

expert testimony at trial by failing to abide by the Trial Court's Pre-Trial Scheduling Order. (Appx. at X p. 17-19). Lastly, Former Husband asserted that the Trial Court's prospective enforcement of a final judgment regarding a prior marital asset would be inequitable because it would impose double liability. (Appx. at X p. 19-21).[3]

9. Trial Court's Summary Denial

Without holding an evidentiary hearing or providing any basis, the Trial Court denied the Motion ("Order").

SUMMARY OF THE ARGUMENT

The Trial Court erred in failing to conduct an evidentiary hearing in regards to Former Husband's colorable claims filed pursuant to Rule 1.540. Where a moving party states a colorable entitlement to relief, the trial court is required to hold a hearing, at which the moving party may present evidence and testimony. Because Former Husband presented several colorable claims, the Trial Court abused its discretion and committed reversible error when it denied the Motion without a full evidentiary hearing.

The Trial Court also committed reversible error by depriving Former Husband of the ability to meaningful appellate review of the Order by failing to provide any basis for its denial.

[3] Due to recent events that have transpired outside of the record, this claim is now moot. Therefore, Former Husband will not address the claim in the instant brief.

ARGUMENT

I. BECAUSE FORMER HUSBAND ALLEGED SEVERAL COLORABLE CLAIMS FOR RELIEF PURSUANT TO RULE 1.540, THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT DENIED HIS MOTION WITHOUT AN EVIDENTIARY HEARING.

A. Standard of Review

This Court reviews the denial of a motion for relief from judgment under the abuse of discretion standard. *See Schleger v. Stebelsky*, 957 So. 2d 71, 73 (Fla. 4th DCA 2007). A trial court abuses its discretion when it fails to conduct an evidentiary hearing on a motion for relief from judgment, where such a hearing is warranted. *See Schuman v. Int'l Consumer Corp*., 50 So. 3d 75, 76-77 (Fla. 4th DCA 2010).

B. Argument on the Merits

Rule 1.540 permits the trial court to relieve a party from final judgment on several grounds. Although Rule 1.540 was not "intended to serve as a substitute for the new trial mechanism prescribed by Rule 1.540 nor as a substitute for appellate review of judicial error,… [M]istakes which result from oversight, neglect or accident are subject to correction under rule 1.540(b)(1)." *Curbelo v. Ullman*, 571 So.2d 443 (Fla.1990). The rule envisions an inadvertent and honest mistake made in the ordinary course of litigation. *Viking Generla Corp. V. Diversified Mortgage Investors*, 387 So. 2d 983 (Fla. 2d DCA 1980). Examples of

mistakes contemplated by Rule 1.540 include a court's inadvertent signing of an incorrect order. *Marx v. Reed*, 368 So. 2d 101 (Fla. 4th DCA 1979). A court's entry of final judgment under the mistaken belief that the defendant is in default. *Odum v. Morningstar*, 158 So. 2d 776 (Fla. 2d DCA 1963). A court's failure to deduct from the verdict the amount of damages due to plaintiff's own negligence. *Hutton v. Sussman*, 504 So. 2d 1372 (Fla. 3d DCA 1987).

A Rule 1.540 motion "should not be summarily dismissed without an evidentiary hearing unless its allegations and accompanying affidavits fail to allege colorable entitlement to relief." *Id.* (emphasis added). Where a party is improperly denied an evidentiary hearing to which he is entitled, the trial court has violated the party's due process rights. "A judgment is void if, in the proceedings leading up to the judgment, there is '[a] violation of the due process guarantee of notice and an opportunity to be heard...due process requires fair notice and a real opportunity to be heard and defend in an orderly procedure *before* judgment is rendered.'" *Schuman*, 50 So. 3d at 76-77 (italicized text in original). Thus, a party is entitled to an evidentiary hearing regardless of whether he has asked for one. *Novastar Mortg., Inc., v. Bucknor*, 69 So. 3d 959, 960 (Fla. 2d DCA 2011).

In this case, Former Husband stated several colorable claims under Rule 1.540 that required the Trial Court to conduct an evidentiary hearing before entering an order.

1. **Former Husband asserted a colorable claim under Rule 1.540, when he alleged that the Trial Court due to mistake, inadvertence, surprise, or excusable neglect failed to take into account his increased overnight timesharing.**

In his Supplemental Petition for Modification of Child Support and Parenting Plan, Former Husband requested that the Trial Court modify the parenting plan to take into account his relocation and modify his child support obligations to take into account his decreased income. (Appx. Vol. at D). Prior to trial regarding the modification of child support, the Parties agreed to modify the parenting plan and increased Former Husband's overnight timesharing with the children from 24 overnights per year to approximately 20 percent of the overnights per year. (Appx. at E). As a result of this increase, Section 61.30(11)(b), Florida Statutes, required the Trial Court to modify any award of child support obligation. FLA. STAT. 61.30(11)(b) ("Whenever a particular parenting plan provides that each child spend a substantial amount of time with each parent, the court shall adjust any award of child support…."); FLA. STAT 61.30(11)(b)(8) (defining a substantial amount of time to be at least 20 percent of the overnights of the year); *see e.g. Seiberlich v. Wolf*, 859 So. 2d 570 (Fla. 5th DCA 2003) (holding that the reduction in support due to substantial time sharing is mandatory). However, the Trial Court failed to modify the Parties' child support obligations. (Appx. at T). Former Husband asserted that the Trial Court's failure to follow this statutorily mandated

adjustment of child support arose due to its mistake, inadvertence, surprise, or excusable neglect. (Appx. at X p. 13-15).

Indeed, Former Husband's assertion was cognizable under Rule 1.540. As support Former Husband relies on *Hutton*, 504 So.2d at 1372. In *Hutton*, the trial court instructed the jury that any award for compensatory damages would be offset by Sussman's comparative negligence. *Id*. at 1373. Sussman did not object to this decision, nor did he appeal it. *Id*. The Jury found Sussman to be comparatively negligent. *Id*. However, in entering the verdict, the trial court failed to deduct the amount of damages attributed to Sussman. *Id*. To correct the trial court's failure, Hutton filed a motion for relief of judgment pursuant to Rule 1.540. *Id*.

The Third District Court of Appeal held that Hutton's claim was properly brought pursuant to Rule 1.540 and granted him relief from judgment. In so holding, the Third District Court of Appeal noted "[t]he key factor [in determining whether a judicial order may be remedies by this rule] is whether or not the court reached a decision in the intentional or purposeful exercise of its judicial function. If the pronouncement reflects a deliberate choice on the part of the court, the act is judicial…." *Id*. 1373-74 (citing *In re Beeman's Estate*, 391 So. 2d 276, 281 (Fla. 4th DCA 1980) (quoting *Spoomer v. Spoomer*, 580 P. 2d 1146, 1149 (Wyo. 1978); *see also, e.g., Dixie Ins. Co. v. Federick*, 449 So. 2d 972 (Fla. 5th DCA 1984) (where terms of insurance policy limited insurer's liability to less than the amount

entered in a judgment against insurer, insurer was entitled to relief from judgment under Rule 1.540).

As in *Hutton*, the Trial Court was bound to take into consideration certain factors. The Trial Court's failure to do so here did not constitute an affirmative judicial decision, but rather arose from the simple mistake of not accounting for its granting Former Husband a substantial amount of the overnights with the children per year. Since this claim was colorable under Rule 1.540, the Trial Court abused its discretion by entering the Order without first conducting an evidentiary hearing.

2. Former Husband asserted a colorable claim under Rule 1.540, when he alleged that the Trial Court due to mistake, inadvertence, surprise, or excusable neglect failed to consider Former Wife's increased or imputed income.

Prior to the Parties marriage, Former Wife earned a college bachelor's degree and was making approximately $26,000 to $27,000. (Appx. at N p. 67-71). However, when the Parties calculated their child support obligations shortly after their marriage was dissolved, the Trial Court attributed no income to the Former Wife because she was not working. (Appx. at B). At the time of the trial regarding the modification of child support, Former Wife was only working part-time and earning $682.50 per month despite her education and previous employment. (Appx. at N p. 83).

Because it is well established that a substantial increase or decrease in the ability of the payor to make the child support payment is justification for

modification, Former Wife, in closing argument, agreed that the Trial Court should consider Former Wife's increased or imputed income when deciding whether to modify the Parties' child support obligations: "I ran the guidelines with Former Husband's income at end of 2010 earning [$219,000], and the Former Wife's current income…I also tell the court I ran guidelines that former wife worked full time at minimum wage, using [Former Wife's] current income." (Appx. at N p.108); FLA. STAT. 61.13(l)(a) 2, 61.14(l)(a); *Garone v. Goller*, 878 So.2d 430 (Fla. 3d DCA 2004) (a substantial change in a payor's income is sufficient to constitute a change in circumstances warranting a modification of child support); *See Schram v. Schram*, 932 So. 2d 245, 249-50 (Fla. 4th DCA 2005) (holding the underemployment analysis requires the trial court to "determine whether any subsequent underemployment resulted from the spouse's pursuit of his own interests or through less than diligent and bona fide efforts to find employment paying income at a level equal to or better than that formerly received") (emphasis added). Despite Former Wife conceding that the Trial Court should account for her current or imputed income when determining whether to modify the Parties' child support obligations, the Trial Court failed to consider it in its Order. (Appx. at T).

Like the appellee in *Hutton*, Former Wife offered no objection to the Trial Court considering her current or imputed income when determining whether to

modify the Parties' child support obligations. Rather, Former Wife emphasized during her closing argument that it should be considered by submitting child support guidelines to the Trial Court using her current income at $682.50 or her imputed income as if she worked full-time. (Appx. at N p. 108). Since Former Wife conceded as much, Former Husband contended that the Trial Court's failure to consider Former Wife's increased or imputed income arose from its mistake, inadvertence, surprise, or excusable neglect. (Appx. at X p. 15-17). This claim was colorable under 1.540 and an evidentiary hearing should have been held. Therefore, the Trial Court's failure to conduct an evidentiary hearing before issuing the Order constituted an abuse of discretion.

3. Former Husband asserted a colorable claim under Rule 1.540 when he alleged that his trial counsel due to mistake, inadvertence, surprise, or excusable neglect denied him of the ability to present expert testimony at trial by failing to abide by the Trial Court's Pre-Trial Scheduling Order.

A party states a cognizable claim and is entitled to relief from judgment when their attorney fails to take an action due to excusable neglect. Errors and omissions of counsel in the conduct of pending litigation may be 'excusable' when considered in the light of generally accepted practices and amenities with which he is familiar, and upon which he may have had a right to rely. *Kash N'Karry Wholesale Supermarkets, Inc. v. Garcia*, 221 So. 2d 786, 789-90 (Fla. 2d DCA 1969). Commonly, this type of neglect arises in the context of summary

judgments, and requires the moving party to show three things: (1) the failure to file a responsive pleading was the result of excusable neglect; (2) the moving party has a meritorious defense; and (3) the moving party acted with due diligence in seeking relief from the default. *Lazcar Int'l, Inc. v. Caraballo,* 957 So.2d 1191, 1192 (Fla. 3d DCA 2007). As illustration, in *Wilson v. Woodward*, 602 So. 2d 547, 549 (Fla. 2d DCA 1992), the Second District Court of Appeal found excusable neglect where an attorney failed to appear at a hearing because of a secretarial error and reversed the trial court's denial of the attorney's motion for rehearing.

Here, Former Husband's trial counsel was plenty neglectful and his actions were akin to an attorney missing a summary denial hearing due to a secretarial error and not having the ability to present a viable defense. Particularly, as counsel of record he had a continuing duty to ensure that all orders issued by the Trial Court were followed so that Former Husband's rights were preserved. However, Former Husband's trial counsel's failed to adhere to this duty when he neglected to disclose two expert witnesses in accordance with the Trial Court's Pre-Trial Scheduling Order. (Appx. at G-I). As a direct result of trial counsel's negligence, Former Husband was unable to present expert testimony regarding the past, present, and future market conditions of the company for which Former Husband was previously employed. (Appx. at O and P). Additionally, he was unable to

present expert testimony regarding the recession's negative impact on the industry, the likelihood that his salary would have continued to trend downwards, and the fact that he was prudent in leaving the industry when he did. (Appx. at O and P).

This expert testimony was tantamount to Former Husband meeting the requirements of the *Burkley* test. *Burkley v. Burkley*, 911 So. 2d 262 (Fla. 5th DCA 2005) (the party moving for modification of child support must plead and demonstrate (1) a substantial change in circumstances, (2) not contemplated at the time of final judgment of dissolution, and (3) that is sufficient, material, involuntary, and permanent in nature). The ramifications of trial counsel's negligence cannot be undermined, as even the Trial Court noted that Former Husband "failed to demonstrate even whether the dip in his income to $219,000 in 2010 was permanent….An anticipatory reduction in income is insufficient as a matter of law to justify a downward reduction." (Appx. at T).

In conclusion, Former Husband asserted that he was entitled to relief from the Supplemental Judgment because his trial counsel's excusable neglect caused him to be unable to present pivotal testimony necessary to show entitlement for a modification of child support. Former Husband pled a cognizable claim under Rule 1.540 and an evidentiary hearing should have been held. By failing to conduct an evidentiary hearing before entering an order, the Trial Court abused its discretion.

II. THE TRIAL COURT DEPRIVED FORMER HUSBAND OF THE ABILITY TO HAVE MEANINGFUL APPELLATE REVIEW OF ITS ORDER BY FAILING TO PROVIDE A BASIS FOR ITS SUMMARY DENIAL OF HIS MOTION.

A. Standard of Review

This Court reviews the denial of a motion for relief from judgment under the abuse of discretion standard. *See Schleger*, 957 So. 2d at 73.

B. Argument on the Merits

Even where factual findings are not required by a procedural rule, statute, or other authority, remand is appropriate where "effective appellate review is made impossible by the absence of specific findings." *See Shaw v. Shaw*, 445 So. 2d 411, 412 (Fla. 4th DCA 1984). The trier-of-fact is charged with resolving the disputed issue, and the appellate court is limited to "reviewing the propriety of that decision." *Featured Properties, LLC v. BLKY, LLC*, 65 So. 3d 135, 137 (Fla. 1st DCA 2011). As such, a lower court's failure to articulate the legal basis for its ruling precludes meaningful appellate review. *Id.*

In the present case, the Trial Court neither held an evidentiary hearing nor articulated the reasons for its decision when it denied the Motion. (Appx. at Z). Notwithstanding the aforementioned argument, Former Husband simply cannot, as is required, assert on appeal how the Trial Court abused its discretion because the Order is deplete of any reasoning. As such, this cause should be remanded to the Trial Court for specific findings as to Former Husband's claims.

CONCLUSION

Based on the foregoing, this Court should reverse the Trial Court's Order and remand this matter for further proceedings.

DATED this 16th day of July, 2013.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Appendix has been furnished by e-mail on July 16, 2013, to Amy E. Goodblatt, Esquire, at service@agoodblatt.com and liz@agoodblatt.com.

/s/ *Matthew R. McLain*
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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Initial Brief complies with the font requirements of Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

/s/ *Matthew R. McLain*
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