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

IN RE: THE MARRIAGE OF:

CASE NO.: 2007-DR-000166-
DIVISION: 29

JULIET L. BISSON,
Former Wife,

and

FRANK R. BISSON,
Former Husband.
_____/

FORMER HUSBAND'S VERIFIED MOTION FOR RELIEF FROM JUDGMENT

COMES NOW the Former Husband, FRANK R. BISSON, by and through the undersigned counsel and pursuant to Florida Rule of Civil Procedure 1.540(b)[1], and moves this Court to vacate its Supplemental Final Judgment on Former Husband's Petition for Modification and Other Relief ("Supplemental Judgment"), Order Regarding Former Wife's Motion for Contempt and Enforcement of Final Judgment of Dissolution of Marriage et. al. ("Order"), and Final Judgment entered on September 4, 2012 ("Final Judgment"). In support therefor, Former Husband alleges the following:

I. INTRODUCTION

In this Motion, Former Husband seeks relief from this Court's Supplemental Judgment, Order, and Final Judgment. Former Husband asserts that he is entitled to relief because: (1) the Court failed to consider his increase of overnight timesharing for the year when it denied his request for modification of child support; (2) the Court failed to consider Former Wife's

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

increased or imputed income when it denied his request for modification of child support; (3) Trial Counsel failed to comply with the Court's Pre-Trial Scheduling Order, which denied Former Husband the ability to present expert testimony to the Court that would have established that his dip of income in 2010 was permanent; and (4) it would be inequitable to prospectively enforce the Final Judgment because the Final Judgment wrongfully imposes double liability on Former Husband regarding the formal marital property located at 16425 Bristol Lake Circle, Orlando, FL 32828 ("Bristol Property").

Thus, in light of the above, the Supplemental Judgment, the Order, and the Final Judgment should be vacated.

II. PRELIMINARY STATEMENT

In this Motion, the former husband, Frank R. Bisson, will be referred to as "Former Husband." The former wife, Juliet L. Bisson, will be referred to as "Former Wife." The attorney that represented Former Husband at trial will be referred to as "Trial Counsel."

III. STATEMENT OF JURISDICTION

The parties' marriage was dissolved in Orange County, Florida, by a Final Judgment of Dissolution of Marriage entered on or about March 27, 2007, which was modified on August 16, 2007 and approved and ratified by this court on August 16, 2007. (*See* Exhibit "B" and "C"). Former Husband filed a Supplemental Petition for Modification of Parenting Plan and Child Support ("Petition") on or about April 12, 2011. (*See* Exhibit "D"). Former Wife filed a Motion for Contempt and Enforcement of Final Judgment of Dissolution of Marriage, Order Approving Partial Mediated Settlement Agreement and Timesharing Plan Dated August 11, 2011 and Order Regarding Former Wife's Motion for Contempt on or about January 6, 2012. (*See* Exhibit "E")

The parties resolved the timesharing issue at mediation and the Court entered an order approving their Partial Mediated Settlement Agreement and Timesharing Plan dated August 11, 2011. (*See* Exhibit "E"). Proceedings were held on April 13 and 18, 2012. (*See* Exhibit "M" and "N"). On July 13, 2012, the Court entered the Supplemental Judgment denying Former Husband's Petition and the Order, which in part, required itself to later enter a judgment against the Former Husband and in favor of the Former Wife for the outstanding balance due on the Bristol Property plus interest, attorney's fees and costs owed to Bank of America. (*See* Exhibit "U"). On September 4, 2012 the Court entered a Final Judgment, which placed a judgment for damages against Former Husband in the amount of $187,242.67 plus 4.75% interest. (*See* Exhibit "V"). Former Husband filed a Notice of Appeal of the Supplemental Judgment on August 15, 2012. Ultimately, the appeal was dismissed as not being timely filed. By filing this Motion, Former Husband seeks relief from the Supplemental Judgment, Order and Final Judgment based on the Court's or Trial Counsel's mistake, inadvertence, surprise, or excusable neglect and the inequity of prospective enforcement of the Order and Final Judgment. This Motion was timely filed, as it has been filed within one (1) year of the Supplemental Judgment, Order and Final Judgment being entered.

IV. EXHIBITS IN SUPPORT OF MOTION

1. The Oath of Former Husband is attached as Exhibit "A."
2. The Marital Settlement Agreement and Final Judgment of Dissolution of Marriage are collectively attached as Exhibit "B."
3. The Joint Stipulation Modifying Final Judgment and Mediation Agreement is attached as Exhibit "C."

4. The Supplemental Petition for Modification of Parenting Plan and Child Support is attached as Exhibit "D."
5. The Partial Mediated Settlement Agreement and Time Sharing Plan and Order Approving Partial Mediated Settlement Agreement and Time Sharing Plan Dated August 11, 2011 are collectively attached as Exhibit "E."
6. Former Wife's Motion for Contempt and Enforcement of Final Judgment of Dissolution of Marriage, Order Approving Partial Mediated Settlement Agreement and Timesharing Plan Date August 11, 2011 and Order Regarding Former Wife's Motion for Contempt is attached as Exhibit "F."
7. The Pre-Trial Scheduling Order is attached as Exhibit "G."
8. Former Husband's Motion to Permit Copier Industry Consultant to Testify by Telephone is attached as Exhibit "H."
9. Former Husband's Motion to Continue Hearing and Trial Date Due to Unavailability of Expert Witness is attached as Exhibit "I."
10. The Order Regarding Former Husband's Motion to Continue Hearing and Trial is attached as Exhibit "J."
11. The Pre-Trial Memorandum of the Modification Proceedings is attached as Exhibit "K."
12. Former Wife's Motion for Summary Judgment is attached as Exhibit "L."
13. The Transcripts from April 13, 2012 are attached as Exhibit "M."
14. The Transcripts from the Trial on April 18, 2012 are attached as Exhibit "N."
15. The Sworn Affidavit of David Ramos is attached as Exhibit "O."
16. The Sworn Affidavit of Ted Domowitz is attached as Exhibit "P."

17. Former Wife's Family Law Financial Affidavit from January 4, 2007 is attached as Exhibit "Q."

18. Former Husband's Family Law Financial Affidavit from January 22, 2007 is attached as Exhibit "R."

19. The Former Wife's Family Law Financial Affidavit from April 17, 2012 is attached as Exhibit "S."

20. The Supplemental Final Judgment on Former Husband's Petition for Modification and Other Relief is attached as Exhibit "T."

21. The Order Regarding Former Wife's Motion for Contempt and Enforcement of Final Judgment of Dissolution of Marriage et. al. is attached as Exhibit "U."

22. The Final Judgment is attached as Exhibit "V."

23. The Note and Financial Documents from Bank of America regarding the Bristol Property are collectively attached as exhibit "W."

V. STATEMENT OF THE CASE AND FACTS

1. The Parties Dissolution of Marriage

The parties dissolved their marriage on or about March 27, 2007. (*See* Exhibit "B"). As part of the marital settlement agreement, the parties agreed to exercise and have shared parental responsibility of their two (2) minor children. (*See* Exhibit "B"). It was agreed that the Former Wife would be designated as the primary residential parent of the children. (*See* Exhibit "B"). Former Husband was granted reasonable contact with the children and afforded a minimum of two (2) days per week and two (2) overnights per month. (*See* Exhibit "B").

To calculate child support, both parties submitted financial affidavits. (*See* Exhibit "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. (*See* Exhibit "Q"). However, prior to the parties' marriage, Former Wife had obtained a college bachelor's degree and earned between $26,000 to $27,000 a year. (*See* Exhibit "N" at 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. (*See* Exhibit "R"). Pursuant the child support guidelines and in reliance of financial information provided in financial affidavits, the Court ordered Former Husband to pay $3,178 a month in child support. (*See* Exhibit "B" at 9).

The marital settlement agreement provided for equitable distribution of the marital assets. However, the parties agreed to modify the marital settlement agreement on August 23, 2007. (*See* Exhibit "C"). Pursuant to the modification, the parties agreed that Former Wife would have exclusive use and ownership of the Bristol Property and Former Husband would pay off the balance of said mortgage in full on or before July 2010, in exchange for Former Husband obtaining exclusive use and ownership of three other properties. (*See* Exhibit "C"). While Former Husband does not have ownership interest in the Bristol Property, he remained liable to Bank of America for the Bristol Property as the sole obligor on the note. (*See* Exhibit "W").

2. <u>Former Husband's Substantial Change of Circumstances</u>

Due to the recession, Former Husband's income drastically dropped in 2009. (*See* Exhibit "D" at 2). In fact, from 2009 to 2010, Mr. Bison's income dropped nearly $210,000.[2] (*See* Exhibit "D" at 2). In December 2010 Former Husband resigned from his position at IKON and relocated to Syracuse, New York, where he had previously resided as a child. (*See* Exhibit "N" at 24, 34). In Syracuse, Former Husband obtained a job at Comdoc, a company that sold

[2] Income FY 2006 - $331,000
Income FY 2008 - $324,000
Income FY 2009 - $428,000
Income FY 2010 - $219,000

similar products as his previous employer. (*See* Exhibit "N" at 22). However, his income for the year was reduced to $92,000. (*See* Exhibit "N" at 29).

3. Former Husband's Supplemental Petition for Modification of Parenting Plan and Child Support

The Former Husband filed his Petition due to the decrease of his income and his relocation to the state of New York. (*See* Exhibit "D"). Within the Petition, Former Husband requested that the Court modify the parenting plan to take into account his relocation and modify his child support obligation to take into consideration his current income. (*See* Exhibit "D").

4. Mediated Settlement of Time Sharing

The parties resolved the timesharing issue at mediation and the Court entered an Order approving their Partial Mediated Settlement Agreement and Time Sharing Plan. (*See* Exhibit "E"). According the agreement, the parties agreed to a substantial increase of timesharing between the Former Husband and the children. Previously, the Former Husband was limited to two (2) overnights per month for the year. The increase in timesharing is as follows:

a. Christmas/Winter Break: From noon Christmas Day until two (2) calendar days before school re-starts following New Year's Day. If, for example, school re-starts on Tuesday, the children shall be returned no later than the prior Saturday evening.

b. Every Spring Break, if Former Husband's schedule permits, from after school dismissal until the Saturday before school re-starts. The Former Husband shall give the Former Wife at least thirty (30) days prior written notice of his ability to execute this parenting time.

c. Easter weekend in odd-numbered years, if the Former Husband's schedule permits. He shall give Former Wife at least twenty-one (21) days prior written notice of his ability to execute this parenting time.

d. Each Father's Day weekend, if the Former Husband's schedule permits and subject to sub-paragraph G Below. The Former Husband shall give the Former Wife at least twenty-one (21) days prior written notice of his ability to execute this parenting plan.

e. Thanksgiving Break: In even years, the children shall share the Thanksgiving break with the Former Husband. In odd years, the children will be with the Former Wife; if, however, the Former Husband is in Florida in odd years, he will have time with the children Friday, Saturday and Sunday following Thanksgiving. The Former Husband shall give the Former Wife at least thirty (30) days prior written notice of his ability to execute this parenting time.

f. For the children's birthdays which fall on Mondays, Tuesday, Wednesday, Thursdays, or Fridays, the Former Husband shall have the children on the weekend either prior to or immediately following the birthday; timesharing shall take place in Florida. If the birthday falls on a Saturday or Sunday, the Former Husband shall share time with the children on the child's birthday from 3 p.m. to 8 p.m. on the child's birthday.

g. During the summer school vacation break, in odd-numbered years, the Former Husband shall share time with the children from seven (7) days after school is out until July 29. In even-numbered years, the Former Husband shall share time with the children from July 5 until seven (7) days before the children's school is scheduled to start.

h. During the summer break, the Former Wife shall have the right to visit with the children, at her own expense, in New York for two (2) days. At all times throughout the year, the Former Husband shall have the same right to see the children if and when he is in the Orlando, Florida area. Each parent shall give the other twenty-one (21) days prior written notice of their intended visit.

i. Should either party fail to give notice on a timely basis, that time sharing period for which he is required to give prior written notice shall be forfeited. "Timely basis" means that the written notice, if sent by U.S. mail, shall be postmarked by the appropriate deadline identified above; if by email, before midnight of the appropriate deadline identified above.

j. The Former Husband shall be responsible for all travel costs for all periods above (except the Former Wife's time in New York as set forth above). The children shall be escorted by a family member until otherwise mutually agreed by the parents.

k. Each parent shall at all times see that the children attend the children's extracurricular activities, friends' birthday parties and the like, and that neither parent will have their individual contact time with the children interfere with such activities.

(*See* Exhibit "E"). Accordingly, Former Husband's overnight timesharing with the parties' two (2) minor children substantially increased.[3] In fact, the increase resulted in Former Husband now having approximately twenty (20) percent of the overnights for the year.

5. The Trial Proceedings Regarding Former Husband's Petition for Modification and other Relief

The parties proceeded to trial regarding Former Husband's request that the Court decrease his child support obligation. A Pre-Trial Scheduling Order was entered by this Court on January 17, 2012. (*See* Exhibit "G"). In part, it required the parties to disclose the names and addresses of experts to be called at trial within twenty (20) days of the Court's Pre-Trial Scheduling Order. (*See* Exhibit "G") (emphasis added). Despite the Court's order, Trial Counsel did not timely disclose either Ted Domowitz or David Ramos as expert witnesses expected to be called at trial. Rather, Trial Counsel waited until April 9, 2012 to disclose these expert witnesses, several months after the Court imposed deadline had passed. (*See* Exhibit "M" at 36-37). Consequently, when Trial Counsel requested a continuance so that an expert witness could testify at trial, the Court denied the continuance and issued an order stating that no experts for either party would be permitted to testify at trial because no expert witnesses were timely disclosed. (*See* Exhibits "I" and "J").

The experts were imperative to Former Husband's Petition and if allowed to testify, the witnesses would have been able to explain the past, current and prospective market conditions of the company for which Former Husband had been previously employed at. (*See* Exhibits "O" and "P"). Specifically, in Mr. Ramo's Sworn Affidavit, Mr. Ramos describes the swift decline

[3] Pursuant to the Marital Settlement Agreement, Former Husband was awarded twenty-four (24) overnights per year, accounting for approximately six-and-a-half (6.5) percent of the overnights for the year. *See* Exhibit "B" at 9.

of the industry and its impact of sales professionals like Former Husband. (*See* Exhibit "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.

(*See* Exhibit "O") (emphasis added).

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.

(*See* Exhibit "P") (emphasis added).

6. The Supplemental Judgment

After trial, the Court entered its Supplemental Judgment and denied Former Husband's Petition. (*See* Exhibit "T"). In doing so, the Court held that Former Husband was unable to meet the two (2) prongs 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. (*See* Exhibit "T"). Consequently, the Court held that Former

Husband's child support obligation would continue at the rate of $3,187, as was originally calculated on March 27, 2007. (*See* Exhibit "T").

7. The Order and Final Judgment

Former Husband did not pay off the mortgage for the Bristol Property by July 2010. (*See* Exhibit "U"). The Bristol property is currently in foreclosure due to unpaid taxes and mortgage payments. (*See* Exhibit "U"). As a result, the Court entered an order against Former Husband and in favor of the Former Wife for the outstanding balance due on the Bristol Property plus interest, attorney's fees and costs owed to Bank of America. (*See* Exhibit "U"). To wit, the Court entered a Final Judgment awarding damages to Former Wife in the amount of $187,242.67 plus 4.75% interest, which included $167,242.67 for the balance of the mortgage, plus $20,000 in interest, attorney's fees and costs owed to Bank of America. (*See* Exhibit "V").

VI. ARGUMENT

There can be no question that Former Husband is entitled to relief from the Judgment. Rule 1.540(b) of the Florida Rules of Civil Procedure provides the following may be reasons for relief from a final judgment:

> 1. mistake, inadvertence, surprise, or excusable neglect;
>
> 2. newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial or rehearing;
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> 3. fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;
>
> 4. that the judgment or decree is void; or
>
> 5. that the judgment or decree has been satisfied, released, or discharged, or a prior judgment or decree upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment or decree should have prospective application.

See FLA. R. CIV. P. 1.540(b) (emphasis added).

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).

1. **Former Husband is Entitled to Relief from the Judgment because of the Court's Mistake or Inadvertence.**

Former Husband contends that the actions of the Court satisfy the requirements articulated under rule 1.540(b). Rule 1.540(b) permits the trial court to relieve a party from final judgment on several grounds. 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). Mistakes contemplated by the rule include the court's inadvertent signing of an incorrect order. *Marx v. Reed*, 368 So. 2d 101 (Fla. 4th DCA 1979). The 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). The trial judge's failure to deduct from the verdict the amount of damages due to plaintiff's own negligence is also a mistake cognizable under the rule. *Hutton v. Sussman*, 504 So.2d 1372 (Fla. 3d DCA 1987).

Former Husband contends that the actions taken by the Court in the instant case are cognizable under the rule 1.540(b). Specifically, Former Husband asserts that he is entitled to relief from the Judgment because the Court (1) failed to take into account the substantial increase in overnights granted to Former Husband and (2) failed to consider Former Wife's increased or imputed income when it denied Former Husband's petition for child support modification. Thus, in order to achieve fairness, equity requires that this Court vacate its Judgment so that it may correct its mistakes.

A. The Court Failed to Take into Account the Increase in Former Husband's Overnights with the Two Minor Children.

The parties resolved the timesharing issue at mediation and the Court entered an Order approving their Partial Mediated Settlement Agreement and Time Sharing Plan. According to the plan, Former Husband's overnight timesharing with the children substantially increased from twenty-four (24) overnights per year to approximately twenty (20) percent of the overnights per year. Despite this change in overnights, the Court ruled not to modify Former Husband's child support obligation.

Pursuant to Section 61.30(11)(b), Florida Statutes, 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) (emphasis added). A "substantial amount of time" is defined as a parent exercising time-sharing at least twenty (20) percent of the overnights of the year. FLA. STAT 61.30(11)(b)(8).

As illustration, in *Seiberlich v. Wolf*, 859 So. 2d 570 (Fla. 5th DCA 2003), the former husband sought a reduction of his support obligation based upon a reduction in his income and his having the child "a substantial amount of time" pursuant to a shared parental agreement. *Id.* The trial court granted a reduction based on the former husband's reduction of income, but denied a further reduction due to the time sharing arrangement. *Id.* The appellate court reversed the trial court's decision holding that the reduction in support due to substantial time sharing is mandatory. *Id.* at 571 (citing *Milgiore v. Harris*, 848 So. 2d 1250 (Fla. 4th DCA 2003): *Santiago v. Santiago*, 830 So. 2d 922 (Fla. 4th DCA 2002). It noted that the trial court was "obligated" to consider all statutory criteria in arriving at the appropriate support amount including the time sharing arrangements. *Id.* (citing *Niemann v. Anderson*, 834 So. 2d 319 (Fla. 5th DCA 2003) (emphasis added).

Since Former Husband was granted twenty (20) percent of the overnights for the year per the mediated settlement agreement, Former Husband now met the statutory definition of a parent exercising a substantial amount of timesharing. Accordingly, Florida Statute dictated that the Court adjust the previously determined award of child support and take into account the substantial amount of timesharing. The Court failed to abide by this statutory requirement due to its mistake, inadvertence, surprise, or excusable neglect

While Florida courts generally hold that judicial error such as a mistaken view of the law is not one of the circumstances contemplated by rule 1.540(b). *Allstate Insurance Company v. Ramjit*, 788 So. 2d 402 (Fla. 3d DCA 2001). Former Husband contends that the Court's instant mistake is not a mistaken view of law, but one contemplated by rule 1.540(b), because the Court was required to by statute to adjust the child support obligation based off the amount of overnights per year granted to Former Husband.

For instance, in *Hutton v. Sussman*, the trial judge forgot to deduct from the verdict, as was statutorily required, the amount of damages due to plaintiff's own negligence. On appellate review, the Third District Court of Appeals held that this was a simple mistake and did not represent affirmative judicial decision. Accordingly, the appellate court held that the trial court should have granted the defendant's motion for relief from judgment due to mistake. *Hutton v. Sussman*, 504 So.2d 1372 (Fla. 3d DCA 1987).

In this case, as in *Hutton*, the Court made the simple mistake of not considering Former Husband's substantial increase of overnights for the year that it granted in accordance with the Partial Mediated Settlement Agreement. The failure to account for the substantial amount of time in overnights granted to Former Husband did not represent an affirmative judicial decision, but rather an oversight of the fact that Former Husband now exercised a substantial amount of

the timesharing. Due to this increase in overnight timesharing, the Court was required by statute to adjust the child support award. Consequently, the Court due to mistake, inadvertence, surprise or excusable neglect failed to take into account the increased amount of overnights granted to Former Husband. As such, equity requires that Former Husband is entitled to relief from the Judgment.

B. The Court Failed to Consider Former Wife's Substantially Increased or Imputed Income.

Former Husband contends that the Court also failed to consider Former Wife's increased or imputed income when it determined that Former Husband's child support obligation should not be modified. A substantial increase or decrease in the ability of the payor to make the child support payment is justification for modification. FLA. STAT. 61.13(1)(a) 2, 61.14(1)(a); *Garone v. Goller*, 878 So.2d 430 (Fla. 3d DCA 2004). In fact, it is error to modify child support without considering the payor's ability to pay. *Shellmyer v. Shellmyer*, 418 So. 2d 477 (Fla. 4th DCA 1982). The court must determine whether a specific change is of sufficient magnitude to be deemed "substantial." In *Thompson v. Thompson*, 402 So. 2d 1220 (Fla. 5th DCA 1981), the court suggested that a 10% change in the income of the payor constituted a substantial change in circumstances justifying modification. However, ability to pay may encompass more than just an increase or decrease in income. *Kersh v Kersh*, 613 So. 2d 585 (Fla. 4th DCA 1993) (father's income had increased but expenses had also increased on remarriage and birth of two subsequent children)[4].

[4] Although the Court was not statutorily required, it appears that the Court did not consider Former Husband's newborn child when it denied Former Husband's Petition. It should be noted that this additional expense of this child was not plead or presented in argument because Trial Counsel failed to apprise Former Husband of his newborn child's applicability to the Petition. Had Former Husband known, he would have insisted that the associated expenses been plead and argued to the Court.

Here, a substantial change occurred in Former Wife's income, her gross income went from $0 to $682.50 at the time of trial. In fact, Former Wife was asked in the trial "you are asking the court to base your child support on what you earn today?" (*See* Exhibit "N" at 90). To which she responded in the affirmative. (*See* Exhibit "N" at 90). Even Former Wife's own attorney in closing argument agreed that the court should consider Former Wife's increased income in its decision, "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." (*See* Exhibit "N" at 108). So even Former Wife's own attorney conceded that the Wife's current or imputed income was to be considered when modifying the child support.

Furthermore, while the Trial Court notably held that Former Husband was underemployed, it should have also considered Former Wife's underemployment. Specifically, Former Wife had earned a college bachelor's degree. (*See* Exhibit "N" at 67). Prior to the parties' marriage, she was earning approximately $26,000 to $27,000. (*See* Exhibit "N" at 71). Despite her education and previous employment, at the time of the trial Former Wife was employed only part-time and making less than ten (10) dollars an hour. *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").

Despite Former Wife's substantial increase of income, apparent underemployment and Former Wife's counsel's concession that Former Wife's income should be considered, the Court failed to consider it in its Judgment. Again, as discussed above, this failure does not constitute

an affirmative judicial decision, but rather an oversight that arises under the mistake, inadvertence, surprise, or excusable neglect contemplated by rule 1.540(b).

2. **Former Husband was Denied the Ability to Present Expert Testimony Because of Trial Counsel's Failure to Abide by the Court's Pre-Trial Scheduling Order.**

Former Husband asserts that he is entitled to relief from the Judgment because he was unable to present expert testimony at trial due to Trial Counsel's failure to comply with the Court's Pre-Trial Scheduling Order. Florida courts have continuously held that the mistake, inadvertence, surprise, or excusable neglect contemplated by rule 1.540(b) can also arise from the actions of a petitioner's attorney. Commonly, the relief sought under rule 1.540(b) 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). For example, in *Wilson v. Woodward*, 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. *Wilson v. Woodward*, 602 So. 2d 547, 549 (Fla. 2d DCA 1992).

Although the instant case does not arise out of a summary denial, Trial Counsel's lack of action is similar to the aforementioned line of cases. To wit, Trial Counsel failed to act in accordance with the Court's Pre-Trial Scheduling Order by not timely disclosing the names of expert witnesses by the deadline imposed by the Court. Trial Counsel's failure to timely act resulted in Former Husband being unable to present sufficient evidence in regards to a pivotal point of contention, the permanency of his dip in income in 2010 while employed at IKON.

Particularly, in order to show that a substantial change in circumstances had occurred, Former Husband was required to demonstrate to the Court that his drop of income in 2010 was permanent and not premature speculation. To meet this burden, Former Husband was prepared to call Mr. Domowitz and Mr. Ramos as expert witnesses to establish that his substantial reduction of income was not merely a temporary dip of income.

In short, Mr. Bisson's expert witnesses would have testified to the past, present and future market conditions of the company for which Former Husband was previously employed at. The experts could have testified to the recession's negative impact on the industry, the likelihood that Former Husband's salary would have continued to trend downwards and the fact that Former Husband was prudent in leaving the industry when he did.

However, Trial Counsel did not timely disclose these expert witnesses in accordance with the Court's Pre-Trial Scheduling Order. In fact, Trial Counsel only disclosed the expert witnesses days before the trial. Consequently, the Court entered an order stating that experts would not be permitted to testify at trial by either party because none were timely disclosed. Thus, Former Husband was denied the opportunity to present Mr. Domowitz's and Mr. Ramos' expert testimony at trial. The inability of Former Husband to present this testimony cannot be undermined, as the Court even noted in its Judgment 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."

The failure to timely disclose the expert witnesses resulted from Trial Counsel's mistake, inadvertence, surprise or excusable neglect. It did not happen because of the failures of Former Husband. Former Husband relied on Trial Counsel to timely disclose the experts to the Court and opposing counsel in accordance with the Court's Pre-Trial Scheduling Order. Had the

expert witnesses been permitted to testify, the outcome of the trial would have certainly been different. Accordingly, equity and fairness dictate that Former Husband be entitled to relief from the judgment entered by this Court.

3. Prospective Enforcement of the Final Judgment would be Inequitable because It would Impose Double Liability on Former Husband as to the Bristol Property.

Former Husband contends that the prospective enforcement of the Final Judgment would be inequitable because it improperly imposes double liability as to the Bristol Property. Rule 1.540(b)(5) of the Florida Rules of Civil Procedure provides that "the court may relieve a party or a party's legal representative from a final judgment, decree, order, or proceeding" if "it is no longer equitable that the judgment or decree should have prospective application." While relief under this rule is typically available only under extraordinary circumstances, "the general purpose of the rule is to enable the court to grant relief against an unjust decree, and should be liberally construed to advance such remedy." *Cutler Ridge Corp. v. Green Springs, Inc.*, 249 So. 2d 91 (Fla. 3d DCA 1971) (citing Florida Bar, Florida Civil Practice Before Trial (2nd ed., 1969) ss 18.13-18.14, pp. 18.10-18.12.).

Here, in an amendment to the Marital Settlement Agreement the parties agreed that Former Wife would have exclusive use and ownership of the Bristol Property. The parties further agreed that Former Husband would pay off the Bristol Property mortgage by July 2010. Former Husband recognizes that he failed to pay off said mortgage by July 2010 because of financial circumstances and the crash of the real estate market. Former Husband also recognizes that the home is now in foreclosure because of unpaid property taxes and mortgage payments. However, Former Husband asserts that when this Court entered the Final Judgment, which awarded Former Wife a judgment against Former Husband for damages in the amount of $187,242.67 plus 4.75% interest, it failed to obligate Former Wife to use the damages awarded to

her to pay off the Bristol Property mortgage and improperly awarded her damages that were exclusively owed to Bank of America; $20,000 in interest, attorney's fees and costs owed to Bank of America. Consequently, since Former Husband is the sole obligor under the note, the Final Judgment, as it stands, has wrongfully made Former Husband liable to both Former Wife and Bank of America for the Bristol Property. Thus the Final Judgment unjustly imposes double liability.

As illustration of the inequity caused by the Final Judgment: if Former Husband were able to remit payment to Bank of America and take the Bristol Property out of foreclosure, Former Husband would still be liable to Former Wife for the full amount of damages awarded in the Final Judgment. In contrast, if Former Husband were able to remit payment to Former Wife in accordance with the Final Judgment, Former Wife would not be obligated to use those proceeds to pay Bank of America and the home would remain in foreclosure and Former Husband would still be liable to Bank of America for the full amount as the sole obligor. Lastly, if the home were to be foreclosed, Former Husband would be solely responsible for any deficiency judgment obtained by Bank of American plus the damages awarded to Former Wife in the Final Judgment. *See Webber v. Blanc*, 39 Fla. 224, 22 So. 655, 656 (1897) ("The fact that a mortgage was taken to secure the note did not deprive the holder thereof of the legal remedy to collect it, nor is there any legal obstacle in the way of his suing at law for the balance due on the note after the sale under the foreclosure decree in equity, if no judgment for the deficiency was entered in such proceedings."); *see also Clements v. Leonard*, 70 So.2d 840, 844 (Fla.1954).

Therefore, as a result of the Final Judgment, Former Wife can reside at the Bristol Property mortgage payment free, while Former Husband is still obligated under the note to pay the mortgage owed to Bank of America and liable to Former Wife for $187,242.67 in damages

pursuant to the Final Judgment. Because of the Final Judgment's imposition of double liability, equity requires that the Order and Final Judgment not be prospectively applied.

VII. CONCLUSION

The Supplemental Judgment entered by this Court is inundated by mistake, inadvertence, surprise or excusable neglect by the Court and Trial Counsel. *First*, the Court failed to account for its granting Former Husband's twenty (20) percent of the overnights for the year. *Second*, the Court failed to consider Former Wife's substantial increase or imputed income when it entered its Judgment denying Former Husband's petition for modification of child support. *Third*, Trial Counsel deprived Former Husband of the ability to present expert testimony to the Court on a pivotal point after the witnesses were not disclosed prior to the Court's deadline. Further, it would be inequitable to prospectively apply the Order and Final Judgment because it wrongfully imposes double liability upon Former Husband for the Bristol Property. As a result of the foregoing, Former Husband should be granted relief from the Supplemental Judgment, Order and Final Judgment.

WHEREFORE, Former Husband request that this Court issue an order granting his Verified Motion for Relief from Judgment, vacating the Supplemental Judgment, Order and Final Judgment entered in this cause, granting him a new trial, and providing any other relief this Court finds just and proper.

DATED this 21st day of March, 2013.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing has been furnished by e-mail on March 21, 2013, to Amy E. Goodblatt, Esquire, at service@agoodblatt.com and liz@agoodblatt.com.

Matthew R. McLain, Esquire