No. 2D18-1566

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

BARBARA G. JUDY,

Appellant/Cross-Appellee,

v.

MICHAEL W. JUDY,

Appellee/Cross-Appellant.

On Appeal from the Circuit Court of the Twelfth Judicial Circuit
in and for Manatee County, Florida
L.T. No. 11-DR-5011, Hon. Susan B. Maulucci

INITIAL BRIEF OF BARBARA G. JUDY

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STATEMENT OF THE CASE AND FACTS

Nature of the case

This appeal arises from a post-judgment reduction of alimony. After over 26 years of marriage, Appellant/Cross-Appellee, Barbara Judy, and Appellee/Cross-Appellant, Michael Judy, divorced pursuant to a mediated marital settlement agreement ("MSA"). *See* R. 828-42, 905.

The MSA required Michael to pay Barbara $4,500 per month in durational alimony for eight years. R. 836. It neither required Barbara to seek employment outside the home nor contemplated her return to the workforce. It did, however, provide: "Husband's involuntary loss of employment shall be considered a substantial change in circumstance or an exceptional circumstance for purposes of modification." R. 837. In contrast, the MSA prohibited the parties from seeking a court-ordered modification of the alimony's duration. R. 836. It also obligated both Barbara and Michael to each pay half of their two adult children's reasonable and necessary college expenses. R. 836.

Five years after the divorce, the parties litigated (*see* R. 290, 903-07, 908-09, 913-1086, 1087-88) Michael's second supplemental petition to modify, terminate, or suspend alimony ("the Petition" (R. 275-76)). After a hearing (R. 913-1086), the trial court reduced Michael's monthly alimony obligation from $4,500 to

$2,655.92 and required Barbara to reimburse him for alimony he had overpaid since filing the Petition. R. 906.

This appeal concerns (1) whether the trial court erred when it determined Michael was entitled to a post-judgment alimony modification and (2) whether the trial court erred in calculating Barbara's alimony need and thus abused its discretion in reducing Michael's monthly alimony obligation and awarding him retroactive alimony.

Course of the proceedings

Barbara and Michael divorced in August 2012. R. 828-30. Thereafter, Michael filed a supplemental petition seeking a post-judgment modification or suspension of alimony. R. 171-72. He did not pursue that petition. R. 904. He then filed the Petition (R. 275-76), and Barbara responded (R. 290). He also filed a memorandum of law in support of the Petition. R. 501-09.

The Petition proceeded to a hearing before a magistrate judge on October 30, 2017. R. 913-1086. The magistrate judge entered a report and recommendation that would reduce Michael's monthly alimony obligation. R. 903-07. Barbara filed exceptions to the report and recommendation. R. 908-09. Michael did not. The circuit judge denied Barbara's exceptions, adopted the report and recommendation, and entered judgment on March 22, 2018. R. 1087-88.

This timely appeal followed. R. 1091-99.

Disposition in the lower tribunal

A. The marriage and divorce

During the marriage, Michael was a college-educated engineer who earned a six-figure salary with companies such as Honeywell. R. 131-32, 527-28, 979-80. At the same time, Barbara was a housewife who raised their two children. R. 905. Those children are now in college. R. 958. Eventually, Barbara and Michael decided to end their marriage. *See* R. 828-29. To that end, they mediated their dispute and entered into the MSA. R. 830-42.

B. The mediated marital settlement agreement ("MSA")

Barbara's and Michael's financial affidavits showed that when they entered into the MSA on April 24, 2012, Michael's gross monthly income was $13,063.88 (R. 528) and Barbara's was $0 (R. 578).

Because the parties' son was a minor at the time of the divorce (*see* R. 830), the MSA provided for child support (*see* R. 836).[1] It required Michael to pay Barbara $1,200 per month in child support. R. 836. Additionally, the child support provision stated:

> In the event the children's prepaid college accounts and/or scholarships are not adequate to cover the children's reasonable and necessary college expenses, provided the children are attending college full-time and participating in good faith, the Husband and Wife agree to equally divide the cost of the minor children's college expenses.

[1] The children reached the age of majority before Michael filed the Petition. *See* R. 905.

R. 836. The word "minor" was crossed out, and Michael's initials appear next to that alteration. R. 836.

The MSA's alimony provision required Michael to pay Barbara $4,500 per month in durational alimony for a term of eight years (May 1, 2012 through May 1, 2020). R. 836. It expressly stated the alimony was "non-modifiable in duration." R. 836. It did, however, provide: "Husband's involuntary loss of employment shall be considered a substantial change in circumstance or an exceptional circumstance for purposes of modification." R. 837.

C. The dissolution judgment

The final judgment of dissolution incorporated the MSA. R. 828. In that regard, it observed that after the parties entered into the MSA, Michael's "employment was involuntarily terminated," and he was still "unemployed." R. 829.[2] As such, the trial court found his "future employment, earnings, and ability to pay the alimony and child support" were "uncertain and unknown." R. 829. Accordingly, it "specifically retain[ed] and reserve[d] jurisdiction … to modify" Michael's "alimony or spousal support obligation based upon [his] current unemployment and his subsequent re-employment, if any." R. 829.

[2] The dissolution judgment's reference to Michael as "unemployed" (R. 829) seems to be directed specifically to the position he lost at Honeywell, because Michael was continuously employed by the Naval Reserves throughout the proceedings in the trial court (*see* R. 904, 1014).

D. The parties' employment throughout the divorce and alimony modification proceedings

When the parties entered into the MSA, Michael was employed by Honeywell and the Naval Reserves. R. 502, 527-28. His gross monthly income from Honeywell was $11,958, and his gross monthly income from the Naval Reserves was $1,105.88 (for a total of $13,063.88). R. 528. Sometime in 2012, Michael lost his job at Honeywell because it eliminated his position. *See* R. 502, 829, 904, 983.

Hence, he filed his first supplemental petition to modify or suspend alimony. *See* R. 904. He did not pursue it, however, because, in December 2012, he obtained employment as a director of engineering with BE Aerospace. *See* R. 182-84, 199, 538, 904, 986. His annual BE Aerospace salary was $140,000 (R. 182-83, 539, 985), and his monthly gross income from BE Aerospace and the Naval Reserves combined was $12,638.16 (R. 539). In March 2015, however, BE Aerospace terminated Michael's employment due to a corporate restructuring. R. 904.

Apart from his continuous employment with the Naval Reserves, Michael remained unemployed until Northrup Grumman hired him as a technical manager in March 2017. *See* R. 562, 904, 989, 993. His combined monthly gross income from Northrup Grumman and the Naval Reserves was $9,641.82 (R. 563), which was 26% less than the income he was earning when the parties entered into the MSA (R. 527-28) and 24% less than the income he was earning while employed by BE Aerospace (*see* R. 538-39).

Since the parties divorce, Barbara's only source of income has been the alimony she receives from Michael. *See* R. 583-84, 588-89, 593-94, 959, 1053.

E. The alimony modification papers

1. The Petition

Michael filed the Petition in February 2017, one month before Northup Grumman hired him. *See* R. 275, 917. It alleged there "ha[d] been substantial and permanent changes in the financial circumstances of the parties that warrant[ed] a change in the former Husband's obligation[] to pay alimony." R. 275. Specifically, Michael asserted the changed circumstances were:

> 1. Former Wife is still not gainfully employed and/or is underemployed;
>
> 2. Former Wife is engaged in a supportive relationship as set forth and defined in F.S. § 61.14; and
>
> 3. Former Husband has suffered involuntary decreases in salaries and/or compensation which have forced him to seek other employment and/or alternative careers and has been unemployed for a substantial period of time.

R. 275.

Accordingly, Michael sought an alimony calculation based on Barbara's current need and his current ability to pay. R. 276. He also requested that the trial court either reduce or terminate his alimony. R. 276. Alternatively, Michael asked the trial court to suspend his alimony obligation during his unemployment. R. 276.

2. Barbara's response

Barbara's response to the Petition denied there had been a substantial change in the parties' financial circumstances. R. 290. It also denied Michael's allegations that her unemployment was a change in circumstances, that she was in a financially supportive relationship, and that he had suffered decreases in salaries and been unemployed for a substantial period of time. *See* R. 290. In fact, Barbara's denial of her involvement in a financially supportive relationship alleged Michael was the one who was engaged in such a relationship. R. 290. Lastly, Barbara opposed Michael's request for the trial court to recalculate, terminate, or suspend his alimony obligation. *See* R. 290.

3. Michael's memorandum in support of the Petition

In his memorandum, Michael alleged that, despite Barbara's "employment qualifications and earning ability," she was "voluntarily unemployed and ha[d] no intention of obtaining employment." R. 503. He further alleged that, although the parties' children had reached the age of majority, Barbara's alimony need seemed to be similar to what it was at the time the parties divorced. R. 503.

Michael defined the issues for the trial court to determine as:

1. [Whether] Former Husband's loss of income is an involuntary, material, substantial, and permanent change in circumstances that entitles him to modify his alimony obligation.

2. [Whether] Former Wife[] [has a] need[] for all or any portion of the durational alimony.

3. [Whether] Former Husband[] [has the] ability to pay all or any portion of the durational alimony.

4. [Whether] income should be imputed to Former Wife to determine her needs for durational alimony.

5. [Whether] there is any cause or necessity for Former Husband to obtain life insurance to secure an award of durational alimony.

6. [The] amount of retroactive credits in the payment of alimony that may be due to Former Husband.

R. 503.[3]

Additionally, Michael's memorandum recounted a version of his employment history that conflicted with the dissolution judgment. *Compare* R. 502, *with* R. 829. In a section of the memorandum entitled "Outline of the Case," Michael stated: "At the time of the Judgment, Former Husband's employment was in jeopardy, and the parties anticipated that Former Husband's employment may be terminated. The parties therefore agreed that Former Husband's loss of employment would constitute a substantial change in circumstances for purposes of modification of his alimony obligation." R. 502. He further stated: "As of the date of the Judgment, Former Husband was employed by Honeywell and the U.S. Naval Reserves earning a monthly gross income of approximately $13,063.88. *Shortly after*

[3] At the October 30, 2017 hearing on the Petition, Michael did not present any evidence or argument that Barbara was in a financially supportive relationship.

the entry of the Final Judgment Former Husband's employment with Honeywell was terminated." R. 502 (emphasis added).

To the contrary, however, the dissolution judgment indicated Michael lost his job at Honeywell *after* the parties agreed to the MSA but *before* entry of the dissolution judgment. R. 829. It expressly found he was "currently unemployed," and his "future employment, earnings, and ability to pay the alimony" were, at that time, "uncertain and unknown." R. 829. It also referred to Michael's "unemployment" as a "prejudgment occurrence." R. 829.

F. The October 30, 2017 hearing

On October 30, 2017, the court convened a hearing on the Petition. R. 913-1086.

1. Substantial change in circumstances

Although Michael no longer pays child support (R. 977, 1020), he testified he could not afford to pay $4,500 per month in alimony. R. 1000, 1011.[4]

a. Michael's financial condition when he agreed to the MSA

Michael's January 5, 2012 financial affidavit (R. 527-37), which was the last one he filed before entering into the MSA (*see* R. 1018), showed he was earning a combined monthly gross income of $13,063.88 from Honeywell and the Naval Re-

[4] All of Michael's financial affidavits were admitted into evidence. *See* R. 982, 987, 990, 996, 1009.

serves (R. 528). After reducing that number by the allowable deductions, the affidavit showed a net monthly income of $10,854. R. 529. That affidavit showed $8,321 in monthly expenses, which left him with a $2,533 monthly surplus (*i.e.* $10,854 net monthly income - $8,321 monthly expenses = $2,533 monthly surplus). R. 532. That affidavit did not include alimony or child support expenses because the court had not yet entered the final judgment of dissolution. *See* R. 1020.

b. Michael's financial condition at the time of the dissolution judgment

At the October 30, 2017 hearing, Michael testified he was "earning" "13,03.88" per month when the parties divorced in August 2012. R. 985. To the extent Michael intended to testify his monthly gross income when the parties divorced was $13,063.88, that testimony directly conflicted with the dissolution judgment's finding that he had lost his job at Honeywell before entry of the dissolution judgment. *See* R. 829.

c. Michael's financial condition when he abandoned his first petition to modify or suspend alimony

Michael's April 10, 2013 financial affidavit (R. 538-48), which he filed after securing employment with BE Aerospace, showed a combined monthly gross income from BE Aerospace and the Naval Reserves of $12,638.16. R. 539. After reducing that sum by the allowable deductions, Michael's affidavit asserted his net

monthly income was $5,934.92. R. 540. It asserted his expenses at the time totaled $7,670.10, which left him with a monthly deficit of $1,735.18. R. 543.

d. Michael's financial condition at the time of the October 30, 2017 hearing

Michael's April 11, 2017 financial affidavit (R. 562-72), which he filed after filing the Petition but before the October 30, 2017 hearing, showed his combined monthly gross income from Northrup Grumman and the Naval Reserves was $9,641.82. R. 563. After reducing that sum by the allowable deductions, Michael claimed a net monthly income of $2,124.06. R. 564. He asserted his expenses at the time totaled $4,726.41, which would have left him with a monthly deficit of $2,602.35. R. 567.

e. Michael's educational background and employment history

Michael presented evidence of his educational background and extensive work history as an aerospace engineer and a Naval officer. *See* R 983-93.

Michael had obtained a Bachelor of Science degree in electrical engineering and received a commercial pilot's license. R. 979.[5] His Naval service included four years of active duty, one year of mobilization after September 11, and 30 years in the Reserves. *See* R. 980. He also had 13 years' experience as an engineer manager

[5] He sought but could not find employment as a commercial pilot. R. 980.

(Honeywell and BE Aerospace (*see* R. 131-32, 983, 988, 993)) and at least 10 years' engineering experience before that (*see* R. 131-32).

After losing his job at Honeywell, Michael found commensurate employment at BE Aerospace within a few months. R. 904, 983, 986, 989. After BE Aerospace let him go, however, he could not find a job for two years. R. 993. Thereafter, Michael accepted a technical manager position at Northrup Grumman, which was the first job he was offered, even though the wages were, according to him, "significantly less" than those he earned at Honeywell and BE Aerospace. R. 989.

Despite being only 52 years old when the trial court heard his petition (*see* R. 527, 1049), Michael testified his job at Northrup Grumman was a "permanent position" and that he expected to stay for the foreseeable future. R. 1000-01. He also testified he did not know whether his technical manager position at Northrup Grumman presented opportunities for upward mobility. R. 1041. Nevertheless, he admitted that Northrup Grumman's technical managers are supervised by program managers but claimed he was not qualified to perform program management functions. R. 1041. Michael also stated he did not know if he would receive a cost of living increase in salary. R. 1041-42.

2. Barbara's need

a. Earning capacity

In support of his request to impute income to Barbara, Michael called Dr. Anita Rothard, a vocational expert, to testify about Barbara's earning capabilities and the availability of suitable jobs in the community. *See* R. 922-48. In accordance with a report she had compiled (R. 727-33), Dr. Rothard testified that given Barbara's qualifications and employment history (*see* R. 734-35), she could reasonably be expected to find a job paying $42,000 per year within six months of commencing a job search (R. 935-37).

Without objection, Barbara's depositions of February 28, 2012 (843-900) and May 31, 2017 (R. 736-783) were admitted into evidence (R. 948-49) and portions were read into the record (R. 949-966). Her 2012 deposition testimony revealed that although in 1979 she had attained a Bachelor of Arts degree in languages and was fluent in Spanish, French, and Italian, she had not used her French or Italian skills in the recent past. R. 950-51; *see also* R. 735. Along with her résumé (R. 734-35),[6] Barbara's 2012 deposition testimony also revealed her work history was limited to: (1) retail management (1976-1984 and 1986-1996); (2) teaching high-school Spanish and French (from 1988-1990); (3) providing day-care to elementary school and sixth grade students (2003-2004); and teaching pre-

[6] Over Barbara's objection, her résumé was also admitted into evidence at the hearing. R. 971-72.

school (2004-2005). R. 734-35; 951-55. She did not undertake any efforts to obtain employment after leaving the workforce in 2005. R. 955-56. Her 2017 deposition testimony showed she still did not intend to seek employment. *See* R. 965-66.

Barbara also testified that, during her marriage to Michael, after she quit working outside the home in 2005, her primary duties consisted of taking care of the house and raising the parties' children. R. 1052.

b. Expenses

All of Barbara's financial affidavits (R. 573-97) and her tax returns for 2014, 2015, and 2016 (R. 640-45) were admitted into evidence (R. 956-57, 960, 966-67). The last financial affidavit she filed before entry of the final dissolution judgment (R. 578-82) showed her monthly net expenses totaled $6,090.70 (R. 579). Similarly, the last financial affidavit she filed before the October 30, 2017 hearing (R. 593-97) and testified about in her May 27, 2017 deposition (*see* R. 956-66) showed her total monthly expenses were $6,506.92 (R. 594). That financial affidavit also showed she was operating at a $2,316.92 monthly deficit. R. 595.

With regard to her monthly expenses, Barbara testified the parties' two adult children, who are both full-time college students, live with her but do not work or contribute to the payment of any household expenses. R. 958, 965, 1052-53, 1056-57. Rather, Barbara covers all of their expenses, save for insurance (R. 958, 960-65), and claimed both children as dependents in her 2016 tax return (R. 960).

Michael objected to Barbara's testimony about her expenditures on the children's non-covered college expenses. R. 1053. The magistrate judge overruled his objection, finding those expenses were not "voluntary expenses" and that they were instead "mandated by the final judgment." R. 1053.

While cross-examining Michael, Barbara's attorney asked whether Michael had, through the MSA, "committed to paying 50% of all noncovered college related expenses for the kids." R. 1023. Michael's attorney objected, arguing Barbara presumably would be seeking enforcement of the MSA's college-expenses provision, she had not pled that issue, and he would not try that issue by consent. *See* R. 1023. Barbara's attorney responded, explaining Michael's lawyer had brought up Barbara's alimony need in his direct-examination of Michael, and her need encompassed the sums she incurred in providing for all of her children's expenses. R. 1023. He further argued, "the reason that she's having to pay all those things, is because he's not," and if Michael was going to claim Barbara's need was relevant to the existence of a substantial change in circumstances, and she was able to "bring up the fact that he's no longer paying child support," she should also "be able to bring up the fact that he's not paying his 1/2 share of the … college related expenses." R. 1023-24.

The magistrate judge overruled Michael's objection but entertained further argument. R. 1024. Michael argued there is no legal duty to support children past

majority, and a trial court cannot consider the money an alimony recipient spends on the parties' adult children when determining the recipient's need. R. 1025-28. In response, Barbara distinguished the authorities and principles Michael cited based on the existence of the MSA's contractual requirement that each party pay half of the children's non-covered college expenses. R. 1028-30.

Michael then further objected and argued that the MSA's non-covered college expenses provision pertained only to the children's reasonable and necessary college expenses, which, according to Michael, included only tuition and books. R. 1030. He contended that provision was "not intended to cover food, gas, [or] things of that nature." R. 1030. He then argued parole evidence could only be introduced to interpret the meaning of the MSA's non-covered college expenses provision if that provision was ambiguous. R. 1030. The magistrate judge explained Barbara was "not putting any parole evidence in" and was instead just presenting argument. R. 1030-31. Barbara further argued the court could determine what the children's reasonable and necessary college expenses were, and those expenses were relevant to Barbara's need because she was covering those expenses. R. 1031. The magistrate judge overruled Michael's objection (R. 1031), and Michael testified he had not contributed anything toward the children's college expenses. R. 1031.

While Barbara was testifying about her understanding of the MSA's alimony provision, her attorney asked her, "Did you give up your right to permanent period-

ic alimony?" R. 1057. She answered, "Yes," and Michael objected to that response. R. 1057. The magistrate judge sustained Michael's objection because the question pertained to pre-MSA negotiations. R. 1057.

c. Assets

Barbara's most recent financial affidavit showed $431,802 in assets and $160,400 in liabilities, leaving her with a net worth of $271,402. *See* R. 595-96.

3. Michael's ability to pay

a. Income

Michael testified that but for his alimony obligation, his monthly net income would have been $6,624.06. R. 1039-40.

b. Expenses

Michael testified he was operating at a monthly deficit of $2,602.35. R. 1000, 1011; *see also* R. 567. Apparently, he had kept current on his alimony obligation by withdrawing funds from his brokerage and retirement accounts,[7] using his credit cards, and taking loans from family members. *See* R. 1000, 1006. In doing so, he incurred $30,000 in debt. *See* R. 1000, 1010-11.

Among other expenses, Michael testified he made $1,050.39 monthly mortgage payments (including property tax and insurance). R.1001. His most recent financial affidavit showed his monthly household expenses were $2,171.69. R. 564.

[7] Michael testified that to keep up with his alimony obligation he has had to withdraw $48,000 from his brokerage account and $25,000 from his IRA. R. 1011.

Michael also testified he was "co-habitating" with a woman named Erin Capecchi. R. 1042. He explained she currently resided in his home with him, had been living with Michael for the past three years, and was employed full-time as a healthcare administrator. R. 1042-43. Michael and Erin do not share bank accounts. R. 1043. She was, however, an authorized user on one of his credit cards (R. 1043) but made no charges on that card (R. 1045). Michael testified that although he borrowed money from his mother and incurred credit card charges to keep up with his expenses, he and Erin had agreed she would not contribute to any of the household expenses, and she therefore "does not provide any expenses or support to the household." R. 1043. According to Michael, those expenses were his "to bear, and [his] to bear" alone. R. 1045.

c. Assets

Michael's most recent financial affidavit showed $394,755 in assets and $174,280 in liabilities, leaving him with a net worth of $220,475. *See* R. 569-70.

4. The parties' competing requests for relief

Michael sought to impute $3,500 monthly income to Barbara. R. 1070-71. He also argued the monthly expenses that were attributable to the children should be reduced by two-thirds. R. 1070-71. Accordingly, Michael argued that if the court were to impute $3,500 monthly income to Barbara and reduce the monthly child-related expenses she claimed in her April 19, 2017 financial affidavit by two-

thirds, her actual monthly need would be $490. R. 1070-71. He asked the court to reduce his monthly alimony obligation to that amount. R. 1070-71.

Barbara argued that, when determining Michael's ability to pay, the court should consider the amount his live-in companion should be contributing to the household expenses. R. 1078-79. She also contended Michael contractually obligated himself to "contribute towards the children's reasonable and necessary college expenses," and the court could consider which of the expenses listed in her financial affidavit were reasonable and necessary college expenses. R. 1079. She further argued Michael chose to contribute nothing to the children's non-covered college expenses and instead "elected to forgive his live[-]in girlfriend" the obligation to contribute to the household expenses. R. 1079. As such, she asserted Michael had the ability to continue paying $4,500 per month, and reducing his alimony to $490 per month would be unreasonable. R. 1079.

Ultimately, Barbara argued she "ha[d] no obligation to work," "[t]here [was] no substantial change in circumstances, and [Michael] should be obligated to continue paying the amount that he agreed to pay when the original marital settlement agreement was entered into." R. 1079-80.

5. The closing argument regarding the burden of proof

In her closing argument, citing *Tinsley* v. *Tinsley*, 502 So. 2d 997 (Fla. 2d DCA 1987), Barbara argued a party seeking modification of alimony that has been

fixed by agreement faces a higher burden of proof than he would if the alimony had been established by a court pursuant to findings on the payee spouse's need and the payor spouse's ability to pay. R. 1072. She contended this distinction was justified because when parties enter into a negotiated MSA, they are reaching a global settlement, and there is "no way to extricate from that agreement what … concessions may have been made as it relates to alimony." R. 1072.

Michael responded that the heightened burden *Tinsley* discussed did not survive the 2010 enactment of § 61.14, *Fla. Stat.*, and the burden is the same regardless whether the alimony was established by agreement or court order. R. 1080.[8] He cited *Wilson* v. *Wilson*, 37 So. 3d 877 (Fla. 2d DCA 2010), for that proposition.

G. The magistrate judge's report and recommendation

The magistrate judge did not rule on the Petition at the hearing. *See* R. 1086. Instead, he subsequently entered a report and recommendation. R. 903-07.

With regard to Michael's income, the magistrate judge found: "The Former Husband at the time of the Final Judgment earned $13,086.88 gross a month working for Honeywell and the Naval Reserve. A short time later, he was terminated when his position was eliminated, and in response he filed his First Supplemental Petition for Modification." R. 904. The magistrate judge further found Michael

[8] Section § 61.14(7), which relates to the proof required in alimony and child support modification proceedings, was actually enacted in 1993, and the modification statute itself was enacted decades before that. *See* Laws 1993, c. 93-208, § 3, eff. July 1, 1993 (codified at § 61.14(7), *Fla. Stat.*); *infra* Argument I.C.

"did not pursue the Supplemental Petition because he obtained a job with BE Aerospace," lost that job in March 2015, did not find work for two years, and now works for Northrup Grumman and the Naval Reserve "for a total monthly gross income of $9,641.82." R. 904.

Based on those facts, the magistrate judge found: (1) Michael's "loss of employment from Honeywell and BE Aerospace was not voluntary"; (2) "based on the MSA," those losses of employment constituted a "substantial change of circumstances"; and (3) "the change [was] material and permanent in nature" and "was not anticipated at the time of the Final Judgment." R. 904. The magistrate judge did not, however, determine whether Michael's loss of employment from Honeywell and BE Aerospace resulted in a loss of income that was *sufficient* to justify a post-judgment alimony reduction. *See* R. 904.

The magistrate judge then concluded, based on Michael's request for an alimony reduction and Barbara's request that it not be reduced, both parties had taken "a position that there is a need and some ability to pay." R. 904. The magistrate judge then considered the alimony factors in § 61.08(2), *Fla. Stat.* (2017). R. 904.

With regard to Michael's ability to pay, the magistrate judge found, among other things, Michael was 52 years old, lived in Missouri, no longer had a $1,200 per month child support obligation, could deduct his alimony from his federal, but not state, income taxes, incurred approximately $30,000 in debt to keep up with his

alimony obligation, and had conducted his two-year job search in good faith. R. 904-05. The magistrate judge acknowledged the $2,602.35 deficit, the $9,641.82 gross income, and the $219,202.64 total investment and retirement assets listed on his April 11, 2017 financial affidavit. *See* R. 904-05. The magistrate judge also concluded there was insufficient evidence under § 61.14(1)(b)1, *Fla. Stat.* (2017), to establish he was in a financially supportive relationship with Erin. *See* R. 905.

With regard to Barbara's need, the magistrate judge found she was "60 years old and last worked in 2005 in a part time job," "[s]he was primarily a stay at home mother during the 27 year (long term) marriage," "the only income she has is from her monthly alimony," and "her current Financial Affidavit reveals that she has a monthly deficit of $2,316.92." R. 905.

Barbara's financial affidavit claimed her current monthly expenses totaled $6,506.92. R. 594, 905. In determining Barbara's alimony need, the magistrate judge made two key reductions from her total monthly expenses. *See* R. 905-06. First, he reduced sums Barbara spent each month on the parties' adult children. R. 905. Second, he imputed minimum wage income to Barbara. R. 906.

With regard to the child-related expenses, the magistrate judge found Barbara spent $2,447 per month on her adult children. R. 905.[9] He ruled that $2,447 sum could not be included in her alimony need calculation, because Michael "has no

[9] The magistrate judge calculated the amount Barbara spent on her children by reducing certain expenses her financial affidavit had claimed by 2/3. R. 905.

duty to support the children past majority." R. 905. Accordingly, the magistrate judge subtracted $2,447 from her $6,506.92 claimed monthly expenses and determined Barbara's "actual need for her alone" was $4,059.92. R. 905.

Then, after rejecting Dr. Rothard's testimony that Barbara could reasonably be expected to earn $42,000 per year, the magistrate judge concluded it would be "appropriate to impute" minimum wage income to her because her "unemployment was voluntary and she ha[d] made no effort to obtain employment after the dissolution." R. 906. Hence, the magistrate judge imputed $1,404 monthly minimum wage income to Barbara. R. 906. He then subtracted $1,404 (monthly minimum wage income) from $4,059.92 (Barbara's need after the trial court subtracted the child-related expenses from her claimed total monthly expenses). R. 906. Based on that calculation, the magistrate judge ruled Barbara's monthly alimony need was $2,655.92 (*i.e.*, $4,059.92 reduced need – $1,404 imputed monthly minimum wage income). R. 906.

The magistrate judge then ruled Michael had the ability to pay $2,655.92 per month and reduced Michael's monthly alimony obligation from $4,500 to $2,655.92. R. 906. Based on these calculations, the magistrate judge further required Barbara to reimburse Michael $14,752.64 for alimony he had overpaid since filing the Petition. R. 906. But the magistrate judge never found Michael lacked the ability to pay $4,500 per month in alimony.

Additionally, the report and recommendation stated: "Should you wish to seek review of the Magistrate's Decision, you *must* file exceptions in accordance with Fla. Fam. L. R. P. 12.490(f)." R. 906 (emphasis added).[10]

H. Barbara's exceptions to the magistrate judge's report and recommendation

Barbara filed exceptions to the magistrate's report and recommended order (R. 908-09), and Michael did not. Barbara's exceptions included the following:

> 6. The Court err[ed] in imputing income to the Former Wife as the evidence and testimony did not support imputation.
>
> 7. At the time of the dissolution, the Former Wife was unemployed and had been for approximately six years.
>
> 8. The Marital Settlement Agreement (MSA) was a negotiated agreement which included durational alimony in lieu of permanent periodic alimony as part and parcel of the overall terms.
>
> 9. The Supplemental Petition to Modify included as a substantial change in circumstances, "The Former Wife is *still* not gainfully employed and/or is underemployed."
>
> 10. The original MSA had no language suggesting the agreed upon alimony amount would be subject to modification upon the Former Wife securing employment, so the Former Wife continuing to be unemployed was anticipated at the time of signing the MSA.
>
> 11. The Former Husband alleged his monthly expenses exceeded his income and, as such, requires a reduction in his alimony obligation; however, he testified he has been living with his paramour for 3 years; she is employed full time, but does not con-

[10] The magistrate's report and recommendation did not determine whether Michael needed to obtain life insurance to secure the durational alimony award, which was one of the issues for determination asserted in the Petition. *See* R. 503.

tribute to the household expenses. The Former Husband's testimony is not credible.

12. The Court should not have found there was a substantial change in circumstances as it pertains to the Former Wife's continued unemployment and the requested relief [that] the alimony be modified should have been denied.

R. 909 (emphasis added).

I. The order overruling Barbara's exceptions, adopting the magistrate judge's report and recommendation, and entering judgment

The trial court concluded "the Magistrate's findings [were] supported by competent substantial evidence and consistent with applicable case law." R. 1088. As such, it overruled Barbara's exceptions, adopted the report and recommendation's findings, and incorporated those findings into its judgment. R. 1088.

SUMMARY OF ARGUMENT

1. The trial court erred in concluding Michael was entitled to a post-judgment alimony reduction for three reasons.

First, it incorrectly interpreted the MSA's alimony provision to mean any involuntary loss of employment automatically qualified as a *sufficient* substantial change in circumstances. As a result, it did not decide the sufficiency component of the modification test's third prong.

Second, the trial court factually erred when it found Michael lost his job at Honeywell after (as opposed to before) entry of the dissolution judgment. That factual error altered the legal inquiry whether any substantial change in circumstances

was sufficient in a way that allows this Court to conclude, from the existing record on appeal, that Michael did not establish he was entitled to a post-judgment alimony modification.

Third, the ruling that Michael was entitled to an alimony reduction was inequitable. Michael's gross income had decreased only 26% since the MSA's effective date, and Barbara had agreed to $4,500 monthly durational alimony for eight years in lieu of the permanent periodic alimony to which she would have been presumptively entitled. *See* § 61.08(8), *Fla. Stat.* ("Permanent alimony may be awarded following a marriage of long duration.").

2. Although Barbara's financial affidavit claimed monthly expenses in the amount of $6,506.92, the trial court concluded her monthly alimony need was only $2,655.92. It reached that $2,655.92 figure by first subtracting from her $6,506.92 monthly expenses the $2,447 sum it determined Barbara spends on her adult children each month. That arithmetic resulted in a reduced alimony need of $4,059.92. From $4,059.92, the trial court subtracted the $1,404 monthly minimum wage income it had imputed to Barbara and determined her monthly alimony need was only $2,655.92. This need calculation involved two critical errors.

First, the trial court erred when, in determining Barbara's monthly need, it imputed $1,404 monthly minimum wage income to her. The MSA neither required nor contemplated, whether expressly or implicitly, her return to the workforce.

Hence, the trial court erred when it subtracted $1,404 (monthly minimum wage income) from Barbara's monthly alimony need.

Second, the trial court erred when it failed to recognize the MSA required Barbara and Michael to each pay half of the adult children's reasonable and necessary college expenses and, as a result, concluded no portion of the amount Barbara spent on her children each month could be considered in calculating her monthly alimony need. But the MSA had obligated both Michael and Barbara to each pay half of the children's reasonable and necessary college expenses, and Michael had not paid any of those expenses, whereas Barbara had paid all of them. Thus, at least some of Barbara's $2,447 child-related expenses, such as the $166 monthly expenditure on school supplies (*see* R. 905), included reasonable and necessary college expenses the MSA obligated both Barbara and Michael to pay. Because Michael had not paid any of those expenses, and Barbara had been paying both his and her share of those expenses, the trial court should have considered the amount Barbara spent each month on the children's reasonable and necessary college expenses in determining her alimony need.

ARGUMENT

I. Issue 1: Did the trial court err when it concluded Michael had established he was entitled to a post-judgment alimony modification?

The trial court erred when it determined Michael had carried his burden of proving he was entitled to a post-judgment alimony modification.

To establish entitlement to a post-judgment reduction of alimony pursuant to § 61.14(1)(a), *Fla. Stat.* (2017), the party seeking the modification must adequately allege and the trial court must "decide that (1) there has been a substantial change in circumstances, (2) the change was not contemplated at the time of the final judgment of dissolution, and (3) the change is sufficient, material, permanent and involuntary." *Jarrard* v. *Jarrard*, 157 So. 3d 332, 336-37 (Fla. 2d DCA 2015) (citing *Pimm* v. *Pimm*, 601 So. 2d 534, 536 (Fla. 1992)). Only after the moving party has carried his burden of establishing entitlement to a modification may a trial court determine the amount, if any, by which the alimony should be reduced. *Koski* v. *Koski*, 98 So. 3d 93, 95-96 (Fla. 4th DCA 2012).

In concluding Michael was entitled to an alimony modification, the trial court applied the incorrect legal standard, made a harmful factual error, and reached a result that was inequitable under the circumstances. Therefore, the trial court's entitlement determination should be reversed and remanded with instructions to deny the Petition in its entirety.

Standard of review

The trial court's determination of a party's entitlement to an alimony modification is reviewed under a mixed standard. *Jarrard*, 157 So. 3d at 337. The express and implicit factual findings that are essential to the trial court's entitlement determination are reviewed for competent, substantial evidence. *Id.* These factual

findings include "the nature and extent of any change" and whether that "change was anticipated at the time of the final judgment." *Id.*

In contrast, "whether the proven change is substantial and whether the change was sufficient, material, permanent, and involuntary" "are legal conclusions." *Id.* These legal conclusions are reviewed under a "form of de novo review" that recognizes "the factual component was determined by the trial judge and that all factual determinations may not have been expressly stated in that order." *Id.* at 337-38. Ultimately, "[t]he interrelationships between the findings of fact and the conclusions of law is what makes the standard of review 'mixed.'" *Id.* at 338.

"[A] trial court's interpretation of a settlement agreement, as incorporated into a dissolution judgment," is reviewed de novo. *Kallett* v. *Kastriner*, 225 So. 3d 967, 968 (Fla. 2d DCA 2017).

Merits

A. The trial court misinterpreted the MSA's alimony provision and, as a result, applied the wrong legal standard in determining whether Michael had proven he was entitled to a post-judgment alimony modification

The trial court misinterpreted the MSA's alimony provision as meaning Michael did not have to prove his loss of employment at Honeywell and BE Aerospace was a substantial change in circumstances *that was sufficient to justify an alimony modification*. As such, it applied the wrong legal standard in determining Michael had established he was entitled to an alimony reduction.

In addition to proving a substantial change in circumstances, a party seeking an alimony reduction must also satisfy the second and third prongs of the modification standard. *See, e.g.*, *Morrison* v. *Morrison*, 60 So. 3d 410, 415 (Fla. 2d DCA 2011) ("[t]he three-part test is a conjunctive test," and all three prongs must be met); *Damiano* v. *Damiano*, 855 So. 2d 708, 710 (Fla. 4th DCA 2003) ("[t]hree prerequisites are required for a modification of alimony"). Relevant here, the third prong of the modification test requires the substantial change in circumstances to be "*sufficient*, material, permanent and involuntary." *E.g.*, *Jarrard* v. *Jarrard*, 157 So. 3d 332, 337 (Fla. 2d DCA 2015) (emphasis added).

The trial court concluded Michael's "loss of employment from Honeywell and BE Aerospace" qualified as "a substantial change of circumstances" under the MSA (R. 904). It also concluded that "change was not anticipated at the time of Final Judgment" and was involuntary, "material, and permanent in nature." R. 904. It did not, however, determine whether that change was *sufficient* to justify an alimony reduction (*see* R. 904), even though the modification test's third prong requires that determination, *see, e.g.*, *Jarrard*, 157 So. 3d at 336 (a modification "claim essentially requires … the trial court to decide that … the change is sufficient"); *Pimm*, 601 So. 2d at 537 (considering "the total circumstances in determining if *sufficient* changed circumstances exist to warrant a modification of alimony" (emphasis added)).

The trial court appears to have foregone making this crucial determination because the parties had agreed in the MSA that Michael's "involuntary loss of employment shall be considered a substantial change in circumstance or an exceptional circumstance for purposes of modification." R. 837. That MSA language, however, speaks only to the first prong (*i.e.* substantial change) of the three-pronged modification test. Accordingly, the trial court erred when it interpreted the MSA's alimony provision to mean any loss of employment would be *both a substantial and a sufficient* change in circumstances. Based on that misinterpretation, it declined to decide whether any change in circumstances was sufficient, thereby failing to apply the correct modification standard.

And that error mattered. *See Special* v. *W. Boca Med. Ctr.*, 160 So. 3d 1251, 1256 (Fla. 2014) (error is harmful unless its "beneficiary" satisfies his "burden to prove that the error complained of did not contribute to the" judgment). The trial court based its entitlement determination exclusively on Michael's changed employment circumstances. *See* R. 904. Hence, whether those changed employment circumstances were *sufficient* to warrant an alimony reduction was outcome determinative. *See Wolfe* v. *Wolfe*, 953 So. 2d 632, 634 (Fla. 4th DCA 2007) (a modest decrease in income cannot support an alimony modification); *Abdella* v. *Abdella*, 693 So. 2d 637, 639 (Fla. 3d DCA 1997) ("a substantial decrease in … earnings does not in all circumstances require a reduction in support payments").

In that regard, after Michael lost his jobs at Honeywell and BE Aerospace, he obtained employment at Northrup Grumman. R. 904, 983, 986, 989. So in addition to his income from the Naval Reserves, he was once again earning a six-figure salary by the time the trial court held the October 30, 2017 hearing. *See* R. 989. Without a determination whether that change was "sufficient," the trial court's entitlement determination was inadequate.

The record facially establishes Michael's changed employment circumstances were insufficient to warrant an alimony modification. *See infra* Argument I.B. If this Court, however, decides it cannot, from the record, determine that change was insufficient to warrant an alimony reduction, it should (1) reverse the portion of the modification order that concluded Michael had proven entitlement to an alimony modification and (2) remand this case for the trial court to determine whether any change in circumstances was sufficient.

B. Michael's changed employment circumstances were insufficient to warrant a post-judgment alimony reduction

Michael's loss of employment from Honeywell and BE Aerospace was insufficient to justify an alimony reduction.

Here, the dissolution judgment, which was entered in August 2012, indicated Michael lost his job at Honeywell before the trial court entered that judgment but after the MSA's effective date. R. 829. The magistrate's report and recommendation, however, stated that at the time of final dissolution judgment, Michael was

working for Honeywell and the Naval Reserve and was terminated from Honeywell "[a] short time later." R. 904. That finding appears to have been induced by misstatements or misrepresentations Michael made in his memorandum of law (*see, e.g.*, R. 502 (Michael's Honeywell employment was terminated "[s]hortly after the entry of the Final Judgment")) and his testimony at the October 30, 2017 hearing (*see* R. 985 (testifying that when the parties divorced, he was earning the same amount he had been earning when the parties agreed to the MSA)). Accordingly, the trial court factually erred by finding Michael had lost his job at Honeywell *after* entry of the dissolution judgment. That factual error (R. 904), which was incorporated into the judgment granting the alimony reduction (R. 1088), is both indisputable and apparent from the face of the record.

Due to this factual error and the lack of analysis and a determination on whether the change in circumstances was sufficient (*see supra* Argument I.A), it is impossible to conclude the trial court would have reached the same result concerning Michael's entitlement to a modification had it correctly found he had lost his job at Honeywell before entry of the dissolution judgment. The timing of Michael's loss of employment from Honeywell with respect to the final judgment is crucial, because "[i]n considering modification the court … should … contrast the total circumstances *at the time of the original order* with all the current circumstances." *Wilson*, 37 So. 3d at 880 (emphasis added). Because the trial court did

not correctly identify when Michael lost his job at Honeywell, it could not have properly compared his financial circumstances "at the time of the original order with all the current circumstances." *Id.*[11]

The inquiry whether any change of circumstances was sufficient is further complicated by the dissolution judgment expressly contemplating a post-judgment modification. *See* R. 829. The dissolution judgment allowed Michael to bootstrap his *prior* job loss from Honeywell as a substantial change in circumstances for modification purposes "[n]otwithstanding the prejudgment occurrence of" that job loss. *See* R. 829.

That language, however, appears to be related to the second prong of the modification test, which deals with whether a change in circumstances was anticipated at the time of final judgment. Otherwise, the dissolution judgment was silent as to what income would be the relevant comparator for determining whether that change was sufficient. *See* R. 829. In that regard, even to the extent the dissolution judgment allowed Michael to seek a modification based on loss of employment

[11] With regard to the second prong of the modification test, this Court has held: "In cases involving an MSA, the effective date of the agreement establishes the date to which a trial court should look in determining whether a substantial change in circumstances was contemplated by the parties." *Dogoda* v. *Dogoda*, 233 So. 3d 484, 488 (Fla. 2d DCA 2017). That rule applies specifically to whether a change was contemplated by the parties, not whether the change was sufficient. For purposes of determining whether a change in financial circumstances was sufficient to justify an alimony reduction, the rule in this Court requires a comparison between a party's financial circumstances at the time of final judgment with his current financial circumstances. *Wilson*, 37 So. 3d at 880.

from Honeywell, the inquiry whether the change in his employment circumstances was sufficient should be based on a comparison between his income at the time of final judgment and his income at the time of the October 30, 2017 hearing (*i.e.*, the comparison is income at final judgment versus income at October 30 hearing, not income at the MSA's effective date versus income at October 30 hearing).

Under such a comparison, Michael would not have been able to establish entitlement to an alimony modification. Based on the dissolution judgment's finding that Michael had already lost his job at Honeywell when the trial court entered that judgment, his monthly gross income at the time the parties actually divorced was $1,105.88 ($13,063.88 monthly gross income – $11,958 monthly income from Honeywell = $1,105.88 income from Naval Reserves). *See* R. 527-28 (Michael's January 5, 2012 affidavit). At the time of the October 30, 2017 hearing, Michael's gross monthly income was $9,641.82. R. 563, 904. Therefore, the various changes in Michael's employment circumstances actually significantly *increased* his income between entry of the dissolution judgment and the October 30, 2017 hearing.

Thus, if this Court agrees that, for modification purposes, Michael's income at the time of the October 30, 2017 hearing should be compared with his income when the trial court entered the dissolution judgment, he actually experienced an income increase, not a decrease. Hence, the change in circumstances was insufficient to justify an alimony reduction, and this Court can and should reverse the

judgment on appeal without remanding for a determination whether any change in Michael's employment circumstances was sufficient. *See supra* Argument I.A.

Alternatively, if this Court rules the relevant comparison for the entitlement inquiry was Michael's income when the MSA became effective ($13,063.88 gross (*see* R. 527-528)) versus his income at the time of the October 30, 2017 hearing ($9,641.82 gross (*see* R. 563, 904)), it should still vacate the judgment and remand with instructions for the trial court to determine whether that 26% change in income was sufficient.[12]

C. It was inequitable for the trial court to grant a downward alimony modification

"'Section 61.14 … extends jurisdiction to the trial courts to 'make orders as equity requires' to modify an award of alimony.'" *Dogoda*, 233 So. 3d at 487 (citations omitted). And the alimony statute, § 61.08, *Fla. Stat.* (2017), specifically requires them to consider "[a]ny other factor necessary to do equity and justice between the parties" when "determining the proper … amount of alimony." § 61.08(2)(j), *Fla. Stat.* (2017). Under the circumstances of this case, equity did not require or permit an alimony reduction.

[12] This Court has found sufficient substantial changes circumstances when a former spouse's income had decreased by 40%, *see Driggers* v. *Driggers*, 127 So. 3d 762, 763-64 (Fla. 2d DCA 2013), by 38%, *see Antepenko* v. *Antepenko*, 824 So. 2d 214, 215 (Fla. 2d DCA 2002), and by 35%, *Wilson*, 37 So. 3d at 881. Undersigned counsel, however, has not found any cases from this Court holding an income drop of 26% (or less) was a sufficient substantial change in circumstances.

When Michael and Barbara divorced, they had been married over 26 years. R. 905. Hence, their marriage qualified as a long-term marriage. *See* § 61.08(4), *Fla. Stat.* (2017) (defining a long-term marriage as having a duration of 17 years or longer). Accordingly, Barbara would have been presumptively entitled to receive permanent periodic alimony had she gone to trial instead of entering into the MSA. *See Fortune* v. *Fortune*, 61 So. 3d 441, 446 (Fla. 2d DCA 2011) (holding a long-term marriage creates a presumption in favor of permanent periodic alimony).

Although the mediated negotiations that yielded the MSA were confidential and therefore inadmissible at the October 30, 2017 hearing, Barbara's exceptions to the magistrate's report and recommendation indicated she had agreed to eight years of $4,500 monthly durational alimony "in lieu of permanent periodic alimony." R. 909. Under these circumstances, it was inequitable for the trial court to grant Michael an alimony reduction for the remainder of the durational alimony term (approximately two years) based on a 26% gross income decrease since the MSA's effective date.

The MSA provided the alimony's duration was non-modifiable. R. 836. As such, Barbara contracted for a fixed sum of $432,000 in alimony to be paid in monthly installments over 8 years ($4,500 per month x 12 months x 8 years). In exchange, she gave up the presumptive right to a type of alimony that is meant to permanently "'provide for the needs and necessities of life for a former spouse as

they were established during the marriage,'" *Rosecan* v. *Springer*, 845 So. 2d 927, 929-30 (Fla. 4th DCA 2003) (citation omitted), and "ensure that, viewing the totality of the circumstances, one spouse is not 'shortchanged,'" *Griffin* v. *Griffin*, 906 So. 2d 386, 388-89 (Fla. 2d DCA 2005) (quoting *Canakaris* v. *Canakaris*, 382 So. 2d 1197 (Fla. 1980)). By granting an alimony reduction, the trial court not only deprived Barbara of "the standard of living established by the parties during the marriage," *id.* at 388, but also deprived her of the benefit of the bargain she had struck and guaranteed she would be shortchanged.

For example, assuming Barbara had sought a permanent alimony award pursuant to the trial court's determination of need and ability to pay, and it had granted permanent alimony in the reduced amount of $2,655.92 per month (*see* R. 905-06), she would have received $637,420.80 over the course of 20 years. That sum is substantially more (*i.e.*, almost 50% more) than the $432,000 she contracted to receive over 8 years.

At the time of the October 30, 2017 hearing, Michael's monthly gross income had decreased only by 26% since the MSA's effective date. R. 502. He still had investment and retirement assets totaling $219,202.64 (*see* R. 905), was only 52 years old (R. 904), had impressive educational credentials and work experience in the aerospace engineering field (*see* R. 131-32, 980, 983, 988, 993), and had ob-

tained a commercial pilot's license (R. 979).[13] By ruling Michael was entitled to an alimony reduction, the trial court ensured he not only got the benefit of not having to pay permanent periodic alimony, which he bargained for in the MSA, but also got the additional benefit of having to only pay $2,655.92 per month instead of $4,500 per month for the last two years of the durational alimony term.

On the other hand, Barbara gave up her presumptive right to permanent periodic alimony but did not get the benefit of receiving $4,500 for eight years. The MSA also foreclosed her from arguing that if Michael's decreased monthly income justified a monthly alimony reduction, the trial court should, at least, extend the alimony term. *See* R. 836 (the alimony was "non-modifiable in duration"). Under these circumstances, the alimony modification was inequitable, and the trial court erred in concluding Michael was entitled to a modification pursuant to § 61.14(1)(a), *Fla. Stat.*

Furthermore, despite an intra-district conflict in this Court's case law, the rationale for applying a heavier burden of proof in alimony modification cases involving MSAs further shows the trial court's entitlement decision was inequitable. Before the 1993 enactment of § 61.14(7),[14] it was unequivocally the law of Florida

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[13] *See Vriesenga* v. *Vriesenga*, 931 So. 2d 213, 217-18 (Fla. 1st DCA 2006) (when recalculating alimony, "all relevant economic factors" must be considered).

[14] *See Knight* v. *Knight*, 702 So. 2d 242, 243 (Fla. 4th DCA 1997) (subsection (7) "was added [to § 61.14] in 1993"); Laws 1993, c. 93-208, § 3, eff. July 1, 1993.

that when a party sought reduction of alimony that was fixed by agreement, he faced a heavier burden than he would have if the alimony had been awarded pursuant to a trial court's determination of need and ability to pay. *See, e.g.*, *Tinsley* v. *Tinsley*, 502 So. 2d 997, 998 (Fla. 2d DCA 1987) ("Where the alimony sought to be modified was, as here, set by the court upon an agreement of the parties, the party who seeks a change carries a heavier than usual burden of proof."); *Pimm* 601, So. 2d at 537 (same).

In *Dogoda*, however, this Court held that because § 61.14(7), *Fla. Stat.*, states "'the proof required to modify a settlement agreement and the proof required to modify an award established by court order shall be the same,'" a party seeking a post-judgment modification of alimony that was "instituted through an MSA" "bears no heavier burden." 233 So. 3d at 486 (quoting § 61.14(7), *Fla. Stat.*)). But *Dogoda* was wrongly decided in light of this Court's then-existing precedent, because even after subsection (7)'s enactment, this Court continued to apply the heavier burden. *See, e.g.*, *Chambliss* v. *Chambliss*, 921 So. 2d 822, 824 (Fla. 2d DCA 2006) ("Where the alimony obligation is based on an agreement, a heavier burden is on the applicant to establish the change as sufficient."); *Morrison* v. *Morrison*, 60 So. 3d 410, 413 (Fla. 2d DCA 2011) ("If the alimony award is fixed by agreement, the party seeking to modify that award carries an exceptionally heavy burden.").

Furthermore, *Chambliss*'s and *Morrison*'s decision to, in the alimony context, continue applying the heavier burden is consistent with how courts have interpreted § 61.14(7), *Fla. Stat.*, in the context of child-support modifications. For example, in *Knight,* the Fourth District explained, "the supreme court has decided that section 61.14(7) does not apply to a petition to *reduce* child support." 702 So. 2d at 243. It recognized that after § 61.14(7)'s enactment, "[t]he supreme court … reiterated the well established rule that when 'the child support was based on an agreement by the parties that was subsequently incorporated into an order, a heavier burden rests on the party seeking a *reduction* than would otherwise be required.'" *Id.* (quoting *Overbey* v. *Overbey*, 698 So. 2d 811, 814 (Fla. 1997) (emphasis added)). Accordingly, "presum[ing] … the supreme court's ruling was made with awareness of section 61.14(7)," *Knight* concluded that under *Overbey*, when a party seeks a *reduction* of child support that was set by MSA, the burden of proof stated in § 61.14(7), *Fla. Stat.*, does not apply. *Id.* at 243-44.

Importantly, *Knight*'s rationale for holding the heavier burden still applied to child-support reduction requests was that "'a parent may [have] agree[d] to a child-support obligation that exceeds the duty imposed by law.'" *Id.* at 243 (quoting *Matthews* v. *Matthews*, 677 So. 2d 323, 325 n.1 (Fla. 1st DCA 1996)). Likewise, parties may agree to alimony that exceeds the duty imposed by law. *See Brackin* v. *Brackin*, 182 So. 2d 1, 6 (Fla. 1966) ("The basis of a decree awarding alimony …

in the absence of an agreement between the parties, is an obligation imposed by law requiring the [payor spouse] to do what in equity and good conscience he ought to do under the circumstances."). Therefore, *Knight*'s rationale informs the equity issue raised here regardless whether this Court agrees with the cases that continued to apply the heavier burden. With that in mind, this Court should hold it was inequitable for the trial court to rule Michael was entitled to a post-judgment alimony reduction because Michael's gross income had decreased only 26% since the MSA's effective date and Barbara had agreed to $4,500 in monthly durational alimony for eight years in lieu of the permanent periodic alimony to which she was presumptively entitled.

II. Issue 2: Did the trial court abuse its discretion when it reduced Michael's monthly alimony obligation based on an erroneous interpretation of the MSA, which led to an erroneous calculation of Barbara's monthly need?

Because the trial court erred in concluding Michael had established entitlement to a modification, it should not have reduced his alimony obligation at all. But even if its entitlement determination were proper, it still erred when it misinterpreted the MSA by (1) reading into the MSA a requirement that Barbara seek employment outside the home and (2) failing to recognize Michael was contractually obligated to pay half the children's reasonable and necessary college expenses. These interpretive errors led the trial court to erroneously conclude Barbara's alimony need was only $2,655.92. Instead, the trial court should not have reduced

Barbara's alimony that much and perhaps should have ordered Michael to reimburse Barbara for her past overpayment of the children's college expenses.

Standard of review

"The extent of any modification of alimony, based on the evidence of record," "is reviewed for an abuse of discretion." *Jarrard* v. *Jarrard*, 157 So. 3d 332, 336 (Fla. 2d DCA 2015). "[A] trial court's interpretation of a settlement agreement, as incorporated into a dissolution judgment," is reviewed de novo. *Kallett* v. *Kastriner*, 225 So. 3d 967, 968 (Fla. 2d DCA 2017).

Merits

A. Based on two separate misinterpretations of the MSA, the trial court erred in calculating Barbara's monthly alimony need

The trial court's misinterpretations of the MSA led to an erroneous calculation of Barbara's monthly need. Once a party has established entitlement to an alimony modification, in determining the amount by which to modify the alimony, the trial court must first consider the payee spouse's current need. *Walters* v. *Walters*, 96 So. 3d 972, 978 (Fla. 4th DCA 2012). If the payee spouse has an alimony need, the trial court must then determine the amount of that need and whether the payor spouse has the current ability to pay that amount. *Id.* Here, the trial court erred when it determined Barbara's monthly need was only $2,655.92.

1. The trial court erred in imputing income to Barbara

The trial court erred when it read into the MSA a requirement that Barbara seek employment after the divorce, because the MSA did not contemplate or require her return to the workforce.

The trial court ruled, "[t]he Former Wife's unemployment was voluntary and she has made no effort to obtain employment after the dissolution." R. 906. It therefore concluded imputing income to Barbara would be "appropriate." R. 906. Generally, when "computing an alimony award," a trial court must impute income to a spouse who has become voluntarily unemployed. *See, e.g.*, *Lafferty* v. *Lafferty*, 134 So. 3d 1142, 1144 (Fla. 2d DCA 2014). The same is not true, however, when a party seeks modification of alimony that was agreed to in an MSA, and the MSA did not contemplate the payee spouse's eventual return to the work force.[15]

[15] Notably, all the cases Michael cited in the income imputation section of the memorandum of law in support of the Petition pertained to initial divorce proceedings. *See* R. 504-08. None of them involved alimony fixed by MSA a mediated settlement agreement or alimony modification proceedings. *See Solomon* v. *Solomon*, 861 So. 2d 1218, 1220-21 (Fla. 2d DCA 2003); *Lafferty* v. *Lafferty*, 134 So. 3d 1142 (Fla. 2d DCA 2014); *Koscher* v. *Koscher*, 201 So. 3d 736 (Fla. 4th DCA 2016); *Broemer* v. *Broemer*, 109 So. 3d 284, 288 (Fla. 1st DCA 2013); *Wendel* v. *Wendel*, 805 So. 2d 913, 914 (Fla. 2d DCA 2001) (dealing with imputation of income for purposes of modifying a *child support* award); *Adelberg* v. *Adelberg*, 142 So. 3d 895, 897-98 (Fla. 4th DCA 2014); *Welch* v. *Welch*, 951 So. 2d 1017, 1019-20 (Fla. 5th DCA 2007) (involving a pre-separation marital agreement that ceased to exist "after the parties separated"); *McDuffie* v. *McDuffie*, 155 So. 3d 1234 (Fla. 1st DCA 2015).

In *Regan* v. *Regan*, a former husband appealed an order granting his supplemental petition for an alimony reduction because "he believe[d]" the reduction was "insufficient." 217 So. 3d 91, 91-92 (Fla. 4th DCA 2017). He contended the trial court should have imputed minimum wage income to his former wife. *Id.* at 92. There, like here, the parties had agreed to a particular type and amount of alimony via a mediated settlement agreement. *Id. Regan* held the trial court did not "abuse its discretion in failing to impute income to the former wife for employment." *Id.* at 93. Importantly, "[s]he had not been employed outside the home for the entire marriage and the MSA did not either specifically or impliedly require [her] to work to support herself." *Id.* As such, the trial "court was merely giving effect to the MSA in not imputing income to the former wife to reduce the former husband's obligation." *Id. Regan* further held if "the parties [had] intended to impute income to the former spouse for purposes of support, they should have put a provision [to that effect] in the MSA." *Id.*

Here, Barbara was 60 years old, and her most recent employment was a part time job she "worked in 2005" (*i.e.*, seven years before the divorce). R. 905. "Her last full time employment was in 1994," and like the former wife in *Regan*, "[s]he was primarily a stay at home mother during the" long-term marriage. R. 905. And like the mediated settlement agreement in *Regan*, the MSA here did not "specifically or impliedly" require Barbara "to work to support herself." 217 So. 3d at 93.

Therefore, the trial court erred by not "giving effect to the MSA," *id.*, and instead reading into it a requirement that Barbara seek employment after the divorce, and imputing to her $1,404 in monthly minimum wage income. Accordingly, the order reducing Michael's alimony obligation should be vacated and the case remanded for the trial court to, at the very least, recalculate her monthly need without imputing income to her (*i.e.*, add $1,404 to $2,655.92). *See Quinn* v. *Quinn*, 307 So. 2d 848, 849 (Fla. 2d DCA 1975) (holding former wife's failure to seek employment after divorce was not a substantial change in circumstances because the MSA establishing the alimony "contain[ed] no provision requiring" the former wife "to seek employment"); *Schmachtenberg* v. *Schmachtenberg*, 34 So. 3d 28, 39 (Fla. 3d DCA 2010) (reversing imputation of income for lack of competent, substantial evidence, even though MSA had a provision imputing $18,000 annual income to former wife).

2. The trial court erred in reducing Barbara's monthly need by the amounts she spent on the children's reasonable college-related expenses

The trial court also erred when it reduced Barbara's monthly need by the amounts she had been spending on the reasonable college-related expenses incurred by the parties' adult children. Importantly, Michael had not paid any of those expenses despite the MSA's requirement that he pay half of them.

In deciding to subtract the child-related expenditures from Barbara's monthly need, the trial court ruled, "Former Husband has no duty to support the children past majority, despite the Former Wife's choice to do so." R. 905. That ruling ignored the MSA's requirement that each party pay half of their "children's reasonable and necessary college expenses" that were not covered by "prepaid college accounts and/or scholarships." R. 836. Crucially, by striking through the word "minor," the MSA facially required the parties to pay these expenses even after the children became adults. *See* R. 836.

"Ordinarily, the purposes to which [a former] spouse puts the alimony award generally do not support a modification of the award." *Tinsley*, 502 So. 2d at 998. Moreover, a parent ordinarily "has no legal obligation to provide post-majority support for a child and cannot be compelled to support an adult child indirectly through the payment of alimony." *Wolfe* v. *Wolfe*, 953 So. 2d 632, 636-37 (Fla. 4th DCA 2007); *accord Donoff* v. *Donoff*, 940 So. 2d 1221, 1224-25 (Fla. 4th DCA 2006) (rejecting *Tinsley*'s analysis in determining sums former spouse spent on adult daughter for college expenses should not have been factored into her alimony need). The alimony analysis is different, however, when the parties have contractually obligated themselves to provide post-majority support to their children.

Though not on all fours, *Mitchell* v. *Combank/Winter Park*, 429 So. 2d 1319 (Fla. 5th DCA 1983), is instructive. In *Mitchell*, a decedent's children and former

spouse sued the personal representative of his estate to recover reasonable college expenses to which they claimed the children were entitled under the terms of an MSA. *Id.* at 1321. The complaint alleged the decedent had agreed in the MSA "to pay for 'all reasonable college expenses' for the parties' children." *Id.* It further alleged, "the parties' four children attended college prior to the decedent's death," who "had not paid their reasonable college expenses." *Id.* For that reason, the children and the decedent's former spouse asserted breach of contract causes of action against the estate, and the trial court dismissed the complaint. *Id.* at 1321.

Mitchell held the trial court erred when it "dismiss[ed] the complaint as to the children's cause of action." *Id.* at 1322. Instead, it reasoned the children were "third party donee beneficiaries of the father's executory agreement to pay their reasonable college expenses" and were thus "entitled to performance." *Id. Mitchell* further explained the father's obligation was purely contractual and "not based on any legal duty of child support imposed by law." *Id.*[16] Relying on *Mitchell*, this

[16] *Mitchell* affirmed the dismissal as to the former wife's cause of action, which sought reimbursement for college expenses she had paid. *Id.* at 1322. But that was because her cause was premised on the allegation that the decedent's failure to pay "obligated [her] to … pay [the] expenses on behalf of her children." *Id. Mitchell* held she had failed to state a cause of action because "[i]n the absence of an agreement to do so neither the mother nor the deceased father had a legal obligation to provide a college education for their children." *Id.* Accordingly, it reasoned, "[i]f the mother became in any way legally obligated to pay such expenses, that obligation resulted from her" own choice and not the MSA. *Id.* Here, however, Barbara's obligation to pay the children's reasonable college expenses was, like Michael's, contractually imposed by the MSA. *See* R. 836.

Court has also held that an adult child of divorced parents could maintain a contract cause of action against his father for breaching a marital settlement agreement that obligated his father to pay his college expenses. *Potts* v. *Potts*, 615 So. 2d 695, 697 (Fla. 2d DCA 1992).

The same is true here. Both Barbara and Michael contractually obligated themselves to pay the children's reasonable and necessary college expenses past the age of majority. Barbara fulfilled her obligation by paying those expenses. *See* R. 905. Michael did not. R. 1031. Thus, the trial court erred when it reduced Barbara's need by amounts she had spent on the children's reasonable and necessary college expenses. On remand the trial court should determine which of the child-related expenditures Barbara claimed in her April 19, 2017 financial affidavit (R. 593-97) are reasonable and necessary non-covered college expenses.

B. The $14,752.64 retroactive alimony award should be vacated

Finally, in light of the miscalculations described above (*see supra* Argument II.A), the Court should vacate the $14,752.64 retroactive alimony award (R. 906) and instruct the trial court to adjust that retroactive alimony award consistent with the alimony obligation the trial court imposes on remand.

CONCLUSION

The Court should reverse the judgment in its entirety (*see supra* Argument I) or vacate it and remand for further proceedings (*see supra* Argument II).

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief was prepared in Times New Roman, 14-point font, in compliance with Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

August 13, 2018

/s/ Thomas Burns
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