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

REPLY/CROSS-ANSWER BRIEF OF BARBARA JUDY

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REPLY BRIEF

ARGUMENT

I. Michael was not entitled to a post-judgment alimony reduction

Michael argues the trial court correctly determined he was entitled to an alimony reduction. *See* Michael Br. 15-19, 22-36. He is wrong.[1]

A. Michael distorts this Court's precedent to invent a nonexistent legal principle

Citing *Jarrard* v. *Jarrard*, 157 So. 3d 332, 337 (Fla. 2d DCA 2015), Michael contends, "Since the 'sufficiency' of a change is a legal conclusion based upon the evidence that is reviewed *de novo*, the Trial Court is not required to expressly state that conclusion." Michael Br. 16. That is not what *Jarrard* said.

To the contrary, *Jarrard* actually held a trial court need not expressly state the *factual findings* on which its legal conclusions are based. *See* 157 So. 3d at 337 (referring to "findings of fact, both express and *implied*" (emphasis added)), 338 ("the legal conclusion is reviewed with a recognition that … all factual determinations may not have been expressly stated in the order"). It said nothing about when a trial court must expressly state its *legal conclusions* whether any change in circumstances

[1] The answer brief's six-page summary of argument section violates Florida Rule of Appellate Procedure 9.210(b)(4) ("a summary of argument … should seldom exceed 2 and never 5 pages"), and its statement of the case is unduly argumentative and lacks sufficient record citations (*see* Michael Br. 9 (arguing "[n]othing … supports Former Wife's assertions"), 10 (arguing issue and testimony were "outside the scope of the pleadings"), 15 (arguing testimony was "largely undisputed")). That is improper. *See Sabawi* v. *Carpentier*, 767 So. 2d 585, 586 (Fla. 5th DCA 2000) (explaining purpose of statement of the case).

was substantial and sufficient (*i.e.*, the legal conclusions that are at issue in this appeal). *See id.* at 337 ("whether the proven change is substantial and whether the change was sufficient …. are legal conclusions").

The Court should thus disregard Michael's mischaracterization of *Jarrard*, especially to the extent it could be construed to support his argument that the trial court did not need to expressly conclude his income reduction was sufficient. *See* Michael Br. 16, 26.

Relatedly, Michael asserts Barbara misstated the standard under which this Court reviews a party's entitlement to a post-judgment alimony modification. *See* Michael Br. 15-16, 22. Yet both parties rely on *Jarrard*'s standard of review stated and appear to agree that whether a movant has established a substantial change in circumstances and whether that change was sufficient are legal inquiries reviewed de novo, albeit under a more deferential species of the de novo standard than would apply to a "pure issue of law." 157 So. 3d at 338; *compare* Barbara Br. 29 ("'whether the proven change is substantial and whether the change was sufficient'" "'are legal conclusions'" that "are reviewed under a 'form of de novo review' that recognizes 'the factual component was determined by the trial judge'" (citation omitted)), *with* Michael Br. 16 ("the 'sufficiency' of a change is a legal conclusion …that is reviewed *de novo*"), 23 ("Once a movant proves a change in circumstances, a trial court then needs to determine whether that change is substantial and sufficient, material, permanent, and involuntary. These are legal conclusions.").

B. Michael conflates the modification standard's substantial-change inquiry with its sufficiency inquiry

Michael argues that, under the alimony-modification standard,[2] the words "substantial" and "sufficient" mean the same thing. *See* Michael Br. 26 (the trial court did not need to "expressly determine that Former Husband's involuntary loss of employment was sufficient"), 31 (the word "'[s]ufficient'" "has no greater or other meaning in the" alimony context). He is wrong for three reasons.

First, Florida case law belies the assertion that substantial means the same thing as sufficient in the alimony modification context. *See 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"); *Wolfe* v. *Wolfe*, 953 So. 2d 632, 634 (Fla. 4th DCA 2007) (a modest decrease in income cannot support an alimony modification); *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 (Fla. 1992) (considering "the total circumstances in determining if *sufficient* changed circumstances exist to warrant a modification of alimony"(emphasis added)).

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[2] 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*, 157 So. 3d at 336-37 (citing *Pimm* v. *Pimm*, 601 So. 2d 534, 536 (Fla. 1992)).

Second, because the alimony modification standard parses out substantiality and sufficiency as separate requirements, *see supra* note 2, holding that substantial and sufficient mean the same thing for alimony purposes would violate the principle that courts "must avoid construing legal text 'as mere surplusage,'" *Boatright* v. *Philip Morris USA Inc.*, 218 So. 3d 962 (Fla. 2d DCA 2017) (quoting *Hechtman* v. *Nations Title Ins. of N.Y.*, 840 So. 2d 993, 996 (Fla. 2003)).

Third, the notion that a substantial change in circumstances can never be insufficient to justify an alimony reduction defies common sense. For example, suppose that, at the time of a dissolution judgment, a former husband had a yearly income of $5 million. Further suppose the former wife had never worked outside of the home, and the dissolution judgment required the former husband to pay her $5,000 monthly durational alimony for five years. Lastly, suppose that, one year after the dissolution, the former husband lost his job but immediately found a new one paying $2.5 million per year (*i.e.* 50% of his prior salary). Under those circumstances, a trial court would not err if it were to conclude the former husband's $2.5 million, 50% yearly income loss was substantial. But, if the former wife still had a monthly alimony need of $5,000, the trial court also would not err if it were to conclude the former husband's income loss was *insufficient* to justify an alimony reduction because, although the $2.5 million yearly income loss was substantial, the former husband's alimony obligation comprised less than 3% of his new monthly income.

Hence, an income reduction can certainly be substantial while still being insufficient to justify an alimony modification.

C. Michael concedes the trial court failed to determine whether his changed employment circumstances were sufficient to warrant an alimony reduction

Michael concedes the trial court "fail[ed] to expressly determine that Former Husband's involuntary loss of his employment was sufficient." Michael Br. 26. Yet he argues that failure "does not require reversal," because, under *Jarrard*'s mixed standard of review, this Court can "review the evidence" to determine in the first instance "whether the Trial Court was required to reach the legal conclusion that [his income reduction] was sufficient to justify a downward" alimony modification. Michael Br. 26. That argument misapprehends the scope and nature of this Court's review.

Indeed, an appellate court is "'a court of review, not of first view.'" *Byrd* v. *United States*, 138 S. Ct. 1518, 1527 (2018) (quoting *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005)). So, contrary to Michael's arguments (*see* Michael Br. 26-27), even under a mixed standard of review, *Jarrard*, 157 So. 3d at 337-38, when a trial court fails to make required legal conclusions, the appropriate remedy is for the appellate court to remand for the trial court to state and explain its legal conclusions, thereby enabling meaningful appellate review.[3]

[3] *See Dillbeck* v. *State*, 882 So. 2d 969, 973 (Fla. 2004) (even under mixed standard, remanding for postconviction court "to elaborate on its order by making"

D. Michael misreads the cases on which he relies to argue his change in financial circumstances was sufficient

In arguing his changed financial circumstances were sufficient to warrant an alimony reduction (*see* Michael Br. 27-31), Michael misinterprets *Wilson* v. *Wilson*, 37 So. 3d 877 (Fla. 2d DCA 2010), and *Dogoda* v. *Dogoda*, 233 So. 3d 484 (Fla. 2d DCA 2017).

He argues that, for alimony modification purposes, courts should look only to net income, not gross income, when determining whether a change in financial circumstances was sufficient. *See* Michael Br. 30 ("ability of a payor to pay alimony is always determined by net, not gross, income").[4] On that basis, he further argues

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the required "conclusions of law … as to each" claim); *Bunger* v. *State*, 779 So. 2d 542, 543 (Fla. 2d DCA 2000) (same); *Trump Endeavor 12, LLC* v. *Fla. Pritnik Ctr., LLC*, 208 So. 3d 311, 312 (Fla. 3d DCA 2016) (reversal and remand "warranted because the trial court failed to provide sufficient … conclusions of law, thus precluding meaningful [appellate] review"); *see also Healy* v. *Healy*, 834 So. 2d 287, 291 (Fla. 2d DCA 2002) (remanding alimony reduction case for the trial court to determine whether the former husband "ha[d] experienced a substantial change in circumstances" and, if so, "clarify whether it finds that change to be permanent").

[4] For the proposition that only net income, not gross income is relevant in alimony modification proceedings, Michael relied on *Hanson* v. *Hanson*, 217 So. 3d 1165 (Fla. 2d DCA 2017). *See* Michael Br. 30-31. But *Hanson* is inapposite because it involved a situation where the trial court had established an alimony award in the first instance pursuant, not a modification proceeding, *id.* at 1166-67, where the trial court "'can and should take into consideration all factors and contrast the total circumstances at the time of the original order with all current circumstances.'" *Wilson*, 37 So. 3d at 880 (citation omitted). Accordingly, it appears the principle that "[a] party's ability to pay alimony should be based on the party's net income[,] not gross income," *Gilliard* v. *Gilliard*, 162 So. 3d 1147, 1154 (Fla. 5th DCA 2015), does not apply with equal rigidity when a trial court is deciding whether to grant an alimony modification (*i.e.*, as opposed to when the trial court is establishing an alimony award in the first instance).

Wilson "stated that a thirty-eight percent (38%) change in circumstances met the substantial change in circumstances test," so "[t]he decrease in [Michael's] net monthly income is both sufficient and substantial." Michael Br. 31.

But *Wilson*'s analysis actually turned on a change in *gross* income, not *net* income. *See* 37 So. 3d at 880 ("'[t]he percentage that alimony bears to the *gross* income at the time of entry of Final Judgment is about 39%'" (quoting trial court's modification order) (emphasis added)), 881 (concluding "[t]he [39%] change [was] material and sufficient"), 882 ("[w]e also cannot say that the trial court abused its discretion in reviewing the parties' current financial situations"). As such, *Wilson* undermines Michael's argument that "gross income [is] irrelevant to whether Former Husband is entitled to a modification." Michael Br. 35-36.

To the contrary, a change in gross income is a relevant part of the "'total circumstances'" that should be compared, *Wilson*, 37 So. 3d at 880 (citation omitted), when determining whether a party is entitled to an alimony modification, *see, e.g.*, *Carls* v. *Carls*, 890 So. 2d 1135, 1138, 1139 & n.1 (Fla. 2d DCA 2004) (approving general master's comparison of change in gross income as basis for alimony reduction); *Wood* v. *Blunck*, 152 So. 3d 693, 695 (Fla. 1st DCA 2014) (basing alimony modification holding on former wife's 63% increase in gross income); *Mastromonico* v. *Mastromonico*, 685 So. 2d 74, 76 (Fla. 1st DCA 1996) (concluding trial court

had abused its discretion in reducing former husband's alimony obligation because his gross income).[5]

Furthermore, Michael relies on *Dogoda* to support his argument that the Court should compare his current income with his income at the MSA's effective date in determining whether the change in his circumstances was sufficient. *See* Michael Br. 28-29. But, in her initial brief, Barbara had distinguished *Dogoda* on the basis that it requires a trial court to look to the MSA's effective date only when "'determining whether a substantial change in circumstances was *contemplated by the parties*'" and has no bearing on "whether the change was *sufficient*." Barbara Br. 34 n.11. In other words, she argued *Dogoda*'s discussion of an MSA's effective date pertained to prong two, not prong three, of the modification standard. *See supra* note 2. Michael does not attempt to rebut that assertion.

E. Michael's attempts to distinguish Barbara's heightened-burden-of-proof authorities are misguided

In responding to Barbara's argument that *Dogoda* was wrongly decided (*see* Barbara Br. 39-42), Michael attempts to distinguish *Chambliss* v. *Chambliss*, 921 So. 2d 822 (Fla. 2d DCA 2006), and *Morrison* v. *Morrison*, 60 So. 3d 410 (Fla. 2d DCA 2011). His attempts are misguided.

[5] Notably, the trial court itself used *gross*, not *net*, income as the relevant comparator in deciding to reduce Michael's alimony obligation. *See* R. 904-05.

Michael argues *Chambliss* and *Morrison* are inapposite because they never "actually applied the princip[le]" that a higher burden of proof applies when a party seeks to modify an alimony award established through an MSA. Michael Br. 35. But *Chambliss* expressly stated the higher burden (*i.e.*, "'[w]here an alimony obligation is based on an agreement, a heavier burden is on the applicant to establish the change is sufficient'" (citation omitted)), went on to examine the facts regarding what had changed since the divorce, and concluded "the modification was improper ... because there was an insufficient showing to justify the trial court's finding of a substantial change in circumstances." 921 So. 2d at 824.

Similarly, *Morrison* set forth the heightened burden in its "Standard of Review" section, *see* 60 So. 3d at 413, and concluded the trial court abused its discretion in modifying an alimony award that had been established pursuant to an MSA, *see id.* at 415-16 ("the trial court abused its discretion in using the [*Bedell* v. *Bedell*, 583 So. 2d 1005 (Fla. 1991)] exception as the basis for its finding that the Former Wife met the substantial change in circumstance prong of the alimony modification test"). Accordingly, both *Chambliss* and *Morrison* support Barbara's argument that this Court has continued to apply the heightened burden of proof even after the 1993 enactment of § 61.14(7), *Fla. Stat.*

Michael further attempts to argue *Chambliss*'s application of the heightened burden is irrelevant because that case involved an MSA that predated § 61.14(7)'s 1993 enactment. *See* Michael Br. 35. But *Morrison* contravenes that reasoning

because it applied the heightened burden despite dealing with a post-enactment MSA. *See* 60 So. 3d at 412 (the trial court entered a final judgment of dissolution incorporating the MSA in 2006).[6]

Additionally, after the parties filed the appellant's and answer/cross-appellant's briefs, a panel of this Court decided *Inman* v. *Inman*, which purported to recede from its post-enactment decisions applying a heightened burden of proof. 260 So. 3d 555, 557 & n.2 (Fla. 2d DCA 2018) (although "some courts, including ours, have issued decisions employing a heavier burden of proof subsequent to the 1993 enactment of section 61.14(7)," "we are bound by the language of section 61.14(7)"). But that holding violated this Court's prior-panel precedent rule.[7] Of the post-enactment burden-of-proof cases cited in this appeal, *Chambliss*, which applied the heightened burden, 921 So. 2d at 824, is the earliest prior-panel precedent and a panel of this Court cannot recede from it absent en banc consideration.

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[6] Moreover, Michael fails to distinguish or respond to Barbara's argument that "*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." Barbara Br. 41-42.

[7] *See Wood* v. *Fraser*, 677 So. 2d 15, 18 (Fla. 2d DCA 1996) ("absent an en banc opinion expressly receding from a point of law announced in previous opinions of this court, a trial court should not rely on the expressions of a three-judge panel as a basis to conclude that a previous opinion of another three-judge panel no longer carries the force of law"); *In re Fla. R. App. P. 9.331,* 416 So. 2d 1127, 1128 (Fla. 1982) ("We would expect that, in most instances, a three-judge panel confronted with precedent with which it disagrees will suggest an en banc hearing.")

F. Michael misapprehends the parties' financial circumstances

In responding to Barbara's equity argument (*see* Barbara Br. 36-42), Michael contends "the parties are largely on equal footing in terms of net worth from their distributed assets," so "[r]equiring Former Husband to invade the principal of these assets to pay the durational alimony award as established by the MSA is nether equitable nor required" (Michael Br. 36). But that statement takes an overly narrow view of the scope of equity jurisdiction: equity is not focused exclusively on the respective net worth of each litigant; rather, it considers both their net worth *and* their ability to earn income in the future.

That is where Michael's argument falls short. It overlooks the facts that: Michael was only 52 years old, whereas Barbara was 60 (R. 904-05); he had impressive educational credentials and work experience that were far superior to hers (*compare* R. 131-33, 979, 980, 983, 988, 993, *with* R. 734-35); he was employed full-time and had been for a great majority of the years since the parties married (R. 131-32, 904, 983, 986, 989, 988, 993), whereas she had not been employed full time since 1994 and her primary duties during the presumptively long-term marriage consisted of taking care of the parties' children (R. 905, 1052); and he continued to earn a six-figure income after the alimony reduction (*see* R. 989), whereas Barbara had no income besides Michael's alimony payments and also, therefore, had a negative net income stream (*see* R. 583-84, 588-89, 593-94, 959, 1053). Accordingly, the parties were by no means on equal footing regarding their ability to provide for themselves.

II. The trial court miscalculated Barbara's alimony need

Michael argues the trial court did not err when it reduced Barbara's monthly need. Michael Br. 36-40. Again, he is wrong.

A. Michael's attempts to distinguish *Regan* v. *Regan* are mistaken

In responding to Barbara's argument that the trial court erred in imputing income to her because the MSA did not expressly or implicitly require her to return to the workforce (*see* Barbara Br. 44-46), Michael attempts to distinguish *Regan* v. *Regan*, 217 So. 3d 91 (Fla. 4th DCA 2017), by pointing out that case dealt with a permanent alimony award, whereas this case involves durational alimony (Michael Br. 36-37). On that basis, he argues, "Because a durational alimony award is finite, it implies that a spouse is able to and will provide for their own support." Michael Br. 37. But that argument is inapposite here because the trial court imputed income to Barbara for the remainder of the durational alimony term. Accordingly, even if durational alimony implies a recipient spouse might be expected to support herself *after* the durational alimony term expires, it does not imply she should have to return to the workforce during that term. In fact, it implies the opposite (*i.e.*, that a former spouse has a need for support during the *entire* durational alimony term).

Michael also attempts to distinguish *Regan* by arguing its reasons for not imputing income to the former wife were that (1) the former husband had already satisfied his burden of proving entitlement to a modification based on the former wife's voluntary reduction of her living expenses, and (2) he had failed to plead imputation

and meet his burden of proof on the issue. Michael Br. 40. That argument misreads *Regan.* Nowhere in *Regan*'s imputation analysis (*i.e.*, outside its recitation of the case's factual background) did the Fourth District mention the former husband's failure to plead imputation or meet his burden of proof on that issue. *See Regan*, 217 So. 3d at 93. Instead, *Regan* reasoned the former wife "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.* On that basis, it plainly held "the court was merely giving effect to the MSA in not imputing income to the former wife to reduce the former husband's obligation." *Id.* The trial court should have done the same here.

Additionally, Michael attempts to circumvent *Regan*'s holding by arguing it "is not controlling authority in this district" because "a sister district's opinion is not binding on this Court." Michal Br. 40 (citing *Nader* v. *Fla. Dep't Highway Safety & Motor Vehicles*, 87 So. 3d 712, 724 (Fla. 2012)). But that argument ignores the maxim that a sister district's opinion can and should be considered as persuasive authority, especially when, as in this case, the district court deciding the matter has not spoken directly on the disputed issue. *See Weiman* v. *McHaffie*, 470 So. 2d 682, 684 (Fla. 1985) (absent conflicting "decisions on [a] point of law," "[d]istrict court decisions 'represent the law of Florida unless and until they are overruled by'" the Florida Supreme Court and have "a persuasive effect on sister district courts" (citation omitted)).

B. Michael misperceives the record evidence and incorrectly argues the Court cannot consider trial counsel's legal argument

Michael argues, "Importantly, Former Wife did not cite to the MSA or state that she was not required to work or even that she could not because of her age, time out of employment, or any other reason. Citing to the MSA and the forgoing reasons was merely argument of counsel that may not be considered by the Court." Michael Br. 37-38. That argument is factually and legally incorrect.

It is factually incorrect because Barbara testified (1) the reason she did not intend to seek employment or take classes to improve her employability was, in part, because she was "going to be 60", and (2) she could not or did not want to return to the workforce because she did not believe she had the necessary skills or capabilities. *See* R. 965.

It is legally incorrect because the whole point of argument is for counsel to persuade a court why it should draw certain inferences and legal conclusions from the evidence. *See, e.g.*, *Bertolotti* v. *State*, 476 So. 2d 130, 134 (Fla. 1985) ("The proper exercise of closing argument is to review the evidence and to explicate those inferences which may reasonably be drawn from the evidence."). Moreover, because contract interpretation, including the interpretation of MSAs is a matter of law, *Wells* v. *Wells*, 239 So. 3d 179, 181 (Fla. 2d DCA 2018), it is, of course, appropriate for the Court to consider counsel's legal argument about how the MSA should be

interpreted. The case on which Michael relies, *Heller* v. *Bank of Am., N.A.*, 209 So. 3d 641 (Fla. 2d DCA 2017), does not contradict that proposition.

C. Michael ignores the fact that he has not paid any of his contractually mandated share of the children's reasonable and necessary college expenses

In arguing the trial court properly deducted all child-related expenses from Barbara's need, Michael contends, "If the parties' contractual obligations to pay for the children's college expenses are to be considered, adding these expenses to Former Wife's need also allows Former Husband to subtract them from his available net income thereby diminishing his ability to pay alimony." Michael Br. 43. In other words, he asserts, "assuming [the college expenses] can be legitimately considered affects both parties equally and creates, in essence, a wash." Michael Br. 43.

But that argument ignores the fact that Barbara had *already* paid *all* of the children's college-related expenses (*i.e.*, not just the one-half she was contractually obligated to pay) (R. 958, 960-65) because Michael had paid *none* (R. 1031). As such, she should be entitled to reimbursement for the college expenses Michael contractually owed but did not pay. That is, Barbara's reimbursement argument is backward-looking, whereas Michael's ability-to-pay argument is forward-looking. But reimbursement is necessarily a backward-looking process.

CROSS-ANSWER BRIEF

STATEMENT OF THE CASE AND FACTS

Following the October 30, 2017 hearing (*see* R. 913-1086), the Magistrate Judge entered a report and recommendation (R 903-07). It 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). But Michael never filed exceptions to the report and recommendation. Apart from these key procedural facts, Barbara relies on the statement of the case and facts set forth in her initial brief. *See* Barbara Br. 1-25.

SUMMARY OF ARGUMENT

As a threshold matter, this Court should adopt the Third District's rule (which is also consistent with federal practice) and hold that, when a party to a post-judgment alimony modification proceeding fails to file exceptions to a magistrate judge's report and recommendation per Florida Family Law Rule of Procedure 12.490(f), he waives his right to appellate review of the final order adopting that report and recommendation. On that basis, the Court should decline to review the arguments Michael raises on cross-appeal because he never filed exceptions to the magistrate's report and recommendation. *See infra* Cross-Answer Br. Argument I.A, II.A.

If the Court rules Michael preserved the issues in his cross-appeal, it should still reject his argument (*i.e.*, that the trial court imputed an insufficient amount of

income to Barbara) on the merits, because the trial court never should have imputed any income to her in the first place. *See infra* Cross-Answer Br. Argument I.B.

Likewise, even if preserved, the Court should also reject Michael's other argument (*i.e.*, that he did not have the ability to pay more than $2,027.65 per month in alimony) on the merits, because competent, substantial record evidence showed he had a substantial net worth and earning capabilities and could pay both the original alimony amount ($4,500/month) and the reduced alimony amount ($2,655.92/month). *See infra* Cross-Answer Br. Argument II.B.

ARGUMENT

I. Issue 1: Did the trial court abuse its discretion by not imputing more than minimum wage income to Barbara?

Michael argues the trial court abused its discretion by not imputing more than minimum wage income to Barbara. *See* Michael Br. 44-47.[8] But he waived that argument when he failed to file exceptions to the Magistrate Judge's report and recommendation (R. 903-07), so this Court should decline to review it. Alternatively, the Court should reject his argument on the merits because the MSA did not

[8] Michael asks the Court to "remand this case to the Trial Court with instructions to impute income to Former Wife at a level that is consistent with the evidence." *See* Michael Br. 47. But he does not state what that amount is. *See* Michael Br. 47. To the extent Michael means to argue the trial court should impute $42,000 yearly income to Barbara in accordance with Dr. Rothard's testimony (*see* Michael Br. 47), the Court should reject that argument because the trial court expressly found that testimony incredible (R. 906), and appellate courts do "not reweigh the evidence or second-guess the" trial court's "findings as to credibility of witnesses." *E.g.*, *Brown* v. *State*, 959 So. 2d 146, 149 (Fla. 2007).

expressly or impliedly contemplate Barbara's return to the workforce, so the trial court should not have imputed any income to her.

Standard of review

Error preservation is "a question of law arising from undisputed facts," so it is reviewed de novo. *Aills* v. *Boemi*, 29 So. 3d 1105, 1108 (Fla. 2010).

"The framework the court uses to determine whether imputation is necessary, and, if so, how to calculate an amount is an issue of law" reviewed de novo. *Lafferty* v. *Lafferty*, 134 So. 3d 1142, 1144 (Fla. 2d DCA 2014). "It is within the [trial] court's discretion to determine the amount" of income to be imputed to a former spouse, if any, *id.* at 1145, but its "determination [must be] supported by competent, substantial evidence," *Gruber* v. *Gruber*, 857 So. 2d 329, 331 (Fla. 2d DCA 2003).

"[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. Michael waived the imputation argument he now raises

This Court should hold that, by not filing exceptions to the Magistrate Judge's report and recommendation, Michael waived his right to seek review of the final order that adopted that report and recommendation.

Florida Family Law Rule of Procedure 12.490(f) requires "general magistrate[s] [to] file the report and recommendations and serve copies on all parties."

Then it allows "[t]he parties [to] file exceptions to the report within 10 days from the time it is served on them" and further allows "[a]ny party [to] file cross-exceptions within 5 days from the service of the exceptions." *Id.* Relatedly, Rule 12.490(d)(4) requires orders setting matters for hearing before a magistrate judge to "contain the following language in bold type: SHOULD YOU WISH TO SEEK REVIEW OF THE REPORT AND RECOMMENDATION, YOU MUST FILE EXCEPTIONS IN ACCORDANCE WITH RULE 12.490(f), FLA. FAM. L. R. P." Here, the Magistrate Judge's report and recommendation contained that mandatory admonition (R. 906), yet Michael did not file exceptions to the report and recommendation.

This Court has never squarely addressed the issue whether, under Florida Family Law Rule of Procedure 12.490, a party waives appellate review of a final order adopting a magistrates report and recommendation if he fails to file exceptions to that report and recommendation. It has, however, recognized the "potential tension" between cases holding "that a failure to file any exceptions to a magistrate's report and recommendation does not prohibit raising appellate issues embedded in it,"[9] and those holding that such a failure does waive those appellate issues. *Winchel*

[9] *See, e.g.*, *P.P.* v. *Dep't of Children & Family Servs.*, 86 So. 3d 556, 560 (Fla. 2d DCA 2012) (failure to file exceptions to a report and recommendation in the juvenile context did not bar raising an issue on appeal); *U.S. Bank N.A.* v. *Grant*, 180 So. 3d 1092, 1093 (Fla. 4th DCA 2015) ("Bank's failure to file exceptions to the special master's report [does not] precludes appellate review"); *Aspsoft, Inc.* v.

v. *PennyMac Corp.*, 222 So. 3d 639, 644 n.4 (Fla. 2d DCA 2017); *see also Rosen* v. *Wilson*, 922 So. 2d 401, 402 (Fla. 4th DCA 2006) ("[a]lthough the ex-husband objected to the magistrate's denial of attorney's fees, in his exceptions to the magistrate's report he does not make the precise argument that the modification issue was a separate and distinct claim," so "his argument is not preserved for appeal").

There, however, appear to be only two appellate decisions discussing waiver in the context of Rule 12.490(f): *Edge* v. *Edge*, 69 So. 3d 348, 349 (Fla. 3d DCA 2011) and *Lascaibar* v. *Lascaibar*, 156 So. 3d 547 (Fla. 3d DCA 2015). Both require a party to file exceptions to magistrate's report and recommendation in order to preserve any potential error for appellate review. *Edge* held "Rule 12.490(f) requires a party to file all exceptions to a report and recommendation of a magistrate within ten days from the time it is served," and "[f]indings for which a timely exception has not been lodged are deemed waived." 69 So. 3d at 349. Applying that rule, it reversed on waiver grounds despite otherwise being inclined to agree with the former wife's substantive arguments. *See Id.* at 349-50. Similarly, *Lascaibar* declined to consider appellate arguments that she had waived by not filing exceptions pursuant to Rule 12. 490(f). *Lascaibar*, 156 So. 3d at 549.

Edge and *Lascaibar* are consistent with the general principles of error preservation applied by the courts of this State. Indeed, the preservation requirement's

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WebClay, 983 So. 2d 761, 764 n.1 (Fla. 5th DCA 2008) (failure to file exceptions at all does not bar raising appellate issues).

purpose "is to put the trial judge on notice of a possible error, to afford an opportunity to correct the error early in the proceedings, and to prevent a litigant from not challenging an error so that he or she may later use it for tactical advantage." *Clear Channel Commc'ns, Inc.* v. *City of North Bay Village*, 911 So. 2d 188, 190 (Fla. 3d DCA 2005); *accord City of Orlando* v. *Birmingham*, 539 So. 2d 1133, 1134-35 (Fla. 1989). And timely objections also afford opposing parties the opportunity to correct the error and avoid its prejudicial effect. *See Parlier* v. *Eagle-Picher Indus., Inc.*, 622 So. 2d 479, 481 (Fla. 5th DCA 1993). Allowing Michael to proceed on his cross-appeal arguments even though he never objected to the Magistrate Judge's report and recommendation would undermine these principles.

Edge and *Lascaibar* are also consistent with how many federal appellate courts treat a party's appellate claims when he fails to timely object to a magistrate judge's report and recommendation.[10] Moreover, they are in line with how the

[10] In federal civil cases, the "[f]ailure to make timely objection to the magistrate's report prior to its adoption by the district judge may constitute a waiver of appellate review of the district judge's order." Fed. R. Civ. P. 72 cmt. (1983 amendment) (citing *United States* v. *Walters*, 638 F.2d 947 (6th Cir. 1981)). In that regard, "[t]he First, Second, Fourth, Sixth, Seventh, and Tenth Circuits have adopted 'firm waiver' rules and hold that if a party fails to object to a magistrate judge's report and recommendation, that party cannot challenge on appeal the factual findings and legal conclusions in the report and recommendation." *Dupree* v. *Warden*, 715 F.3d 1295, 1302 (11th Cir. 2013) (collecting cases). "The Third and Fifth Circuits have adopted a middle-ground approach," holding that "[i]f a party fails to object to a report and recommendation's factual findings or legal conclusions, … those unobjected-to findings and conclusions" are reviewed "under a plain error standard of review." *Id.* at 1302. The Eighth and Eleventh Circuits "review[] unobjected-to factual findings for plain error" and hold "failure to object does not waive a party's right to challenge

Florida Supreme Court has treated failures to object to a magistrate judge's recommendation before the adoption of Rule 12.490. *See Whyel* v. *Smith*, 101 Fla. 971, 976 (Fla. 1931) ("This Court has repeatedly held that, before the appellate court will consider such matters or objections, made before a master, the transcript must show that they were brought to the attention of the court and should also show the ruling of the court thereon.")

Accordingly, this Court should now hold that, under Rule 12.490, the failure to file exceptions to a magistrate judge's report and recommendation waives any appellate issues embedded within that report and recommendation. It should then apply that holding and decline to review Michael's cross-appeal argument that the trial court should have imputed more than minimum wage income to Barbara. *See* Michael Br. 44-47. Alternatively, at most the Court should review the merits of Michael's arguments for fundamental error, which he cannot establish. *See, e.g.*,

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legal conclusions on appeal." *Id.* The Ninth Circuit "holds that the failure to object waives a party's right to challenge the magistrate judge's factual findings" but "does not bar a party from challenging those conclusions on appeal. *Id.*

In federal criminal cases, the failure to object to a magistrate judge's report and recommendation absolutely and unambiguously "waives a party's right to review." Fed. R. Crim. P. 59(b)(2); *id.* cmt (2005 adoption) ("This waiver provision is intended to establish the requirements for objecting in a district court in order to preserve appellate review of magistrate judges' decisions."); *accord United States* v. *Garcia-Sandobal*, 703 F.3d 1278, 1283 (11th Cir. 2013) (criminal defendant "waived his right to appellate review on this issue" per Rule 59(b)(2) because "he failed to file any objections").

Importantly, "federal decisions interpreting federal rules" of procedure "which are similar to Florida's rules are persuasive." *Dominique* v. *Yellow Freight Sys. Inc.*, 642 So. 2d 594, 596 (Fla. 4th DCA 1994).

Hooters of Am., Inc. v. *Carolina Wings, Inc.*, 655 So. 2d 1231, 1235 (Fla. 1st DCA 1995) (fundamental error is "an extremely rare exception to the usual rule of waiver of issues not argued below and is probably reserved only for the exceedingly unusual case where a substantial injustice would be otherwise perpetrated" (quoting *Moorman* v. *Am. Safety Equip.*, 594 So. 2d 795, 800 (Fla. 4th DCA 1992))).

B. If the Court reviews the merits of Michael's cross-appeal, it should hold the trial court did not err in not imputing more than minimum wage income to Barbara

If the Court decides to review Michael's argument that the trial court should have imputed more than minimum wage income to Barbara (*see* Michael Br. 44-47), then for the reasons stated in Barbara's initial brief (*see* Barbara Br. 42-46), and reply brief (*see supra* Reply Br. Argument II.A-B), it should reject Michael's argument on the basis that the trial court actually should not have imputed *any* income to Barbara because the MSA neither expressly nor impliedly required her to return to the workforce. The Court should also reject Michael's argument because the record is devoid of any competent, substantial evidence supporting imputation of more than minimum wage income. Indeed, Barbara "left the job market during the marriage to stay home and raise the children" (R. 906), was 60 years old (R. 906), had not been employed full-time since 1994 (R. 905), and had not been employed outside the home since 2005 (R. 905).

II. Issue 2: Did competent, substantial evidence show Michael had the ability to pay at least $2,655.92 per month in durational alimony?

Michael argues there was no competent substantial evidence showing he had the ability to pay more than $2,027.65 in monthly durational alimony, so the trial court abused its discretion when it ordered him to pay $2,655.92. *See* Michael Br. 47-50. The Court should deem that argument waived and decline to review it. *See supra* Cross-Answer Br. Argument I.A. Alternatively, it should reject that argument because there was competent, substantial evidence that Michael, *inter alia*, was earning a six-figure salary, had a substantial net worth, and could pay at least $2,655.92 in monthly durational alimony.

Standard of review

Error preservation is "a question of law arising from undisputed facts," so it is reviewed de novo. *Aills*, 29 So. 3d at 1108.

"The extent of any" alimony modification "is reviewed for an abuse of discretion," *Jarrard* v. *Jarrard*, 157 So. 3d 332, 335 (Fla. 2d DCA 2015), but the trial court's decision must be supported by "competent substantial evidence showing that the payee has a need and the payer has the ability to pay," *De La Piedra* v. *De La Piedra*, 243 So. 3d 1052, 1053 (Fla. 1st DCA 2018).

Merits

A. Michael waived the ability-to-pay argument he now raises

As argued above, *see supra* Barbara Cross-Answer Br. Argument I.A, the Court should hold that, under Florida Family Law Rule of Procedure 12.490, failure to file exceptions to a magistrate judge's report and recommendation waives any appellate issues embedded within that report and recommendation. It should then apply that holding to decline to review Michael's cross-appeal argument that Michael only had the ability to pay $2,027.65 in monthly durational alimony and not more. *See* Michael Br. 47-50. Importantly, even if the Court were to review the merits of that argument and agree Michael did not have the ability to pay $2,655.92 in monthly durational alimony (*i.e.*, the amount to which the trial court reduced Michael's alimony obligation), it should not reduce his monthly alimony obligation beyond $2,027.65, because he concedes he has the ability to pay that amount. *See* Michael Br. 48 (Michael "has a surplus $2,027.65 to pay a durational alimony award"); 50 ("subtracting his monthly living expenses … leaves Former Husband with a surplus of $2,027.65 to pay his durational alimony obligation and is the extent of his ability to pay the same"). Alternatively, at most the Court should review the merits of Michael's arguments for fundamental error, which he cannot establish. *See, e.g.*, *Hooters of Am., Inc.*, 655 So. 2d at 1235 (fundamental error is "extremely rare").

B. If the Court reviews the merits of Michael's cross-appeal, it should hold that there was competent, substantial evidence showing Michael had the ability to pay at least $2,655.92 in monthly durational alimony

Michael argues the trial court abused its discretion in determining he had the ability to pay $2,655.92 in monthly durational alimony, because there was no competent substantial evidence showing he had the ability to pay more than $2,027.65, the monthly surplus he claimed. *See* Michael Br. 47-50. If the Court reviews the merits of Michael's cross-appeal, it should reject that argument.

Michael cites no authority holding that a trial court automatically abuses its discretion if it orders a party to pay durational alimony that exceeds the monthly surplus his financial affidavit indicates. To the contrary, "assets equitably distributed to a party may be considered in determining" a party's ability to pay alimony. *Acker* v. *Acker*, 904 So. 2d 384, 388 (Fla. 2005). Similarly, § 61.08(2)(g), *Fla. Stat.*, requires the trial court to consider "'all sources of income available to either party,'" *Acker*, 904 So. 2d at 389, when fashioning an alimony reduction, if any*, see Vriesenga* v. *Vriesenga*, 931 So. 2d 213, 217-18 (Fla. 1st DCA 2006) ("When determining afresh the amount of alimony a former spouse should pay, the trial court must consider all relevant economic factors, including '[t]he financial resources of each party, the nonmarital and marital assets and liabilities distributed to each' and '[a]ll sources of income available to either party'" (quoting § 61.08(2)(d), (g), *Fla. Stat.*).

With regard to the parties' financial resources and relative earning capabilities, Michael:

- was only 52 years old (R. 904);
- had a $220,475 net worth (*see* R. 569-71);
- would be relieved of his alimony obligation in a little over two years following the modification judgment (*see* R. 903, 907);
- was earning a six-figure salary when his modification petition was heard on October 30, 2017 (*see* R. 903-04); and
- had impressive educational credentials and work experience that would ostensibly allow him to increase his income in the years following durational alimony term's expiration (R. 131-33, 979, 980, 983, 988, 993).

On the other hand, Barbara:

- was 60 years old (R. 905);
- had not been employed full-time since 1994 (R. 905, 1052); and
- "was primarily a stay at home mother during the 27-year (long term) marriage" (R. 905).

Accordingly, it was well within the trial court's broad discretion to award Barbara an alimony amount that exceeded Michael's monthly surplus. *See Acker*, 904 So. 2d at 388 ("the trial judge possesses the broad, discretionary authority to do equity between the parties" (citing *Canakaris* v. *Canakaris*, 382 So. 2d 1197, 1202 (Fla. 1980))).

CONCLUSION

In Barbara's appeal, the Court should reverse the judgment in its entirety or vacate it and remand for further proceedings. In Michael's cross-appeal, the Court should affirm the judgment in all respects.

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.

February 22, 2019

/s/ Thomas Burns
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