IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. SC06-2072

LOUIS R. MONTELLO,

Petitioner,

vs.

SONIA JUCHT MONTELLO,

Respondent.

ON APPEAL FROM THE THIRD DISTRICT COURT
OF APPEAL OF THE STATE OF FLORIDA
CASE NOS.: 3D05-1615, 3D04-788 and 3D04-1094

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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STATEMENT ON JURISDICTION[1]

The Petitioner, Louis R. Montello, invoked this Court's discretionary jurisdiction pursuant to Rule 9.030(a)(2)(A)(vi) of the Florida Rules of Appellate Procedure. On or about November 3, 2006, this Court notified the parties that it was postponing its decision on jurisdiction pursuant to Rule 9.120(e) of the Florida Rules of Appellate Procedure. The Respondent, Sonia Jucht Montello, agrees that this Court possesses the authority to exercise its discretionary jurisdiction to review the certified conflict relating to the attorney's fees issue pursuant to Rule 9.030(a)(2)(A)(vi) but demonstrates that this Court should not exercise its discretionary jurisdiction to review the merits of this appeal. *See Norris v. Treadwill*, 934 So. 2d 1207 (Fla. 2006).

STATEMENT OF THE CASE AND OF THE FACTS

The action below was for the dissolution of the parties' marriage. This appeal, however, is limited to whether Ms. Jucht may recover the attorneys' fees, that were awarded to her by the trial court and that were affirmed by the Florida

[1] Petitioner, Louis R. Montello, is referred to herein as "Montello," and Respondent, Sonia Jucht Montello, is referred to herein as "Jucht." Mr. Montello's Initial Brief on the Merits is cited to herein as "Initial Brief at [page number]." Citations to the trial record are "R. [page number]," using the page numbers in the index prepared by the Third District Court of Appeal. It should be noted that the copy of the index received by Ms. Jucht's counsel did not set forth the complete record in the trial court or in the Third District Court of Appeal. Accordingly, Ms. Jucht is submitting herewith an Appendix, to which citations herein are to "A. [page number]."

Third District Court of Appeal. *See Montello v. Montello,* 937 So. 2d 1154 (Fla. 3d DCA 2006).

The action was commenced in late 2002 when Ms. Jucht filed a petition for the dissolution of marriage. R 2-6. The final trial on the merits was before a Magistrate Judge, whose Report and Recommendation, dated August 25, 2003 (the "8/25/03 Report and Recommendation"), was adopted by the trial judge on March 2, 2004. R. 1093-1094; *see also Montello,* 937 So. 2d at 1155. The trial court rendered its final judgment of dissolution on March 2, 2004. R. 1093-1094.

In the 8/25/05 Report and Recommendation, the Magistrate Judge recommended that the trial court retain jurisdiction to "determine entitlement to legal fees and costs, and the amount of such fees and costs to be awarded, if any, as well as responsibility for the expenses and costs of the joint accountant." A. 4-5.

On September 5, 2003, 11 days after the Magistrate Judge rendered the Report and Recommendation, Ms. Jucht filed her motion for attorneys' fees and costs with the trial court. R. 661-663; *see Montello,* 937 So. 2d at 1155. Mr. Montello filed his motion on September 19, 2003. R. 792-793; *see Montello,* 937 So. 2d at 1155. The trial judge referred the parties' respective motions for attorneys' fees and costs to the Magistrate Judge for hearing. A. 21-22.

On December 10, 2004, the Magistrate Judge heard the evidence on the two (2) motions for attorneys' fees and costs. On February 15, 2005, the Magistrate

Judge issued a Report and Recommendation that Mr. Montello pay Ms. Jucht's attorneys' fees, as well as the fee of the joint forensics accountant (the "2/15/05 Report and Recommendation").[2] A. 2-15. On June 2, 2005, over Mr. Montello's written objections, the trial judge adopted, in whole, the Magistrate Judge's Report and Recommendation on Attorneys' fees, and rendered a final order thereon. A. 16-20; *see Montello*, 937 So. 2d at 1156.

Mr. Montello appealed this final order on attorney's fees, among other things, to the Third District Court of Appeal. *See Montello*, 937 So. 2d 1154. On September 1, 2006, the Third District released its opinion in which it affirmed the trial court's order on attorney's fees. *See Id at* 1154. The Third District "address[ed] the former husband's claim that the trial court did not have jurisdiction to entertain the motion on account of Florida Rule of Civil Procedure 1.525." *Id*. at 1155. The Third District Court ruled against Mr. Montello on that point. *See id.* at 1156. In affirming the trial court's award of fees, the Third District Court of Appeal also certified a direct conflict with other District Courts of Appeal on the issue of the application of Family Law Rule 12.525. *See Montello,* 937 So. 2d at 1156. Rule 12.525, which provides that Rule 12.525 does not apply to family matters, became effective on March 3, 2005, almost three (3) months before the trial court rendered its order awarding Ms. Jucht her attorney's fees.

[2] Mr. Montello is only appealing the award of attorneys' fees.

On September 15, 2006, the Third District Court of Appeal issued its mandate. On September 25, 2006, Mr. Montello filed his Notice to Invoke Discretionary jurisdiction with this Court despite Rule 9.210(b)'s requiring him to file the Notice with the Third District Court of Appeal. This Court forwarded the Notice to the Third District Court of Appeal on October 5, 2006. On November 3, 2006, this Court ordered Mr. Montello to serve his brief on the merits, while postponing its decision on jurisdiction pursuant to Rule 9.210(e) of the Florida Rules of Appellate Procedure.

SUMMARY OF THE ARGUMENT

Although the Third District Court of Appeal certified its decision regarding Family Law Rule 12.525 to be in direct conflict with decisions in its sister Districts, this case does not present such a conflict, because assuming that Rule 1.525 was applicable, Ms. Jucht filed her motion for attorneys' fees before judgment was rendered on the dissolution of marriage. The majority of Florida cases – including from the Third District Court of Appeal – hold that Rule 1.525 provides an outer time limit by when a motion for attorneys' fees costs must be filed, and the Rule does not create a 30 day window of opportunity within which such a motion must be filed. Therefore, because Ms. Jucht filed her attorneys' fees motion *before* the trial court rendered its judgment and *before* expiration of the 30 day deadline, Ms. Jucht's motion was timely under Rule 1.525. The Third District

Court of Appeal did not need to reach the issue whether new Family Rule 12.525 is applicable to this case.

Nor does this Court need to reach that issue. A conflict exists among the Florida District Courts of Appeal over whether the Rule 1.525 that was in effect prior to January 1, 2006, creates a window of opportunity to file a motion for attorneys' fees and costs or sets forth merely an outer limit, allowing one to file the motion prior to entry of the judgment, which was the case here. The majority of the District Courts of Appeal – the First, Third, Fourth, and Fifth – hold that Rule 1.525 does not create a narrow window of opportunity– that a motion filed before judgment is rendered timely under Rule 1.525. Only the Second District Court of Appeal holds otherwise. This conflict was not certified by the Third District Court of Appeal, nor was it raised by Mr. Montello in seeking to invoke the Court's jurisdiction.

Nevertheless, effective January 1, 2006, Rule 1.525 was amended to leave no doubt that it provides for an outer time limit. In light of that amendment, this Court recently declined to resolve the conflict between the District Courts of Appeal on this precise issue, which the Court should likewise do in this case.

Even so, new Rule 12.525 is applicable to this action. As the Third District Court of Appeal noted, when new Rule 12.525 was enacted, the new Rule immediately became applicable to new and pending actions. There is no other way

to read the Rule which became "effective immediately" on March 3, 2005. The judgment awarding Ms. Jucht fees, which was separate and independent from the judgment of dissolution, was rendered *after* new Rule 12.525 was enacted, and the Rule was already in effect when the Order was rendered. It would have been error for the trial court to disregard new Rule 12.525, a rule already in effect.

In addition, Ms. Jucht had filed a motion for enlargement of time, which further removes this case from the ones certified by the Third District Court of Appeal to be in conflict. One can read the trial court's order to have granted the motion for enlargement impliedly, to which Mr. Montello ascribes no error. Even if one could not so read the trial court's Order, it would be error to deny Ms. Jucht's motion for fees with such a motion pending. Even the authority that Mr. Montello relies upon holds that the deadline in (old) Rule 1.525 is modifiable and can be extended pursuant to Rule 1.090 of the Florida Rules of Civil Procedure.

Finally, Mr. Montello seeks to have this Court expand its jurisdiction to review the certified conflict on the applicability of new Rule 12.525 to take up a completely unrelated issue, namely, the time sharing schedule adopted by the trial court. The Court should decline to exercise its jurisdiction on that issue, assuming that the Court has jurisdiction. On the merits, Mr. Montello fails to demonstrate that the trial court abused its discretion and thus does not disturb the presumption that the trial court's decision is correct.

ARGUMENT

I. MS. JUCHT'S MOTION FOR ATTORNEYS' FEES WAS TIMELY FILED UNDER RULE 1.525, BECAUSE SHE FILED HER MOTION BEFORE JUDGMENT WAS RENDERED BY THE TRIAL COURT.

Prior to January 1, 2006, Rule 1.525 provided as follows:

> Any party seeking a judgment taxing costs, attorneys' fees, or both shall serve a motion within 30 days after filing of the judgment, including a judgment of dismissal, or the service of a notice of voluntary dismissal.

Fla. R. Civ. P. 1.525. Effective January 1, 2006, while the appeal in this action was pending, Rule 1.525 was modified to provide as follows:

> Any party seeking a judgment taxing costs, attorneys' fees, or both shall serve a motion no later than 30 days after filing of the judgment, including a judgment of dismissal, or the service of a notice of voluntary dismissal.

Rule 1.525 was enacted in the first place to create a deadline by which motions for attorneys' fees and costs must be filed. *See*, *e.g.*, *Amendments to Florida Rules of Civil Procedure (1.525)*, 773 So. 2d 1098, 1119-1120 (Fla. 2000). Although creating a "bright line," *Saia Motor Freight Line v. Reid*, 930 So. 2d 598, 599-600 (Fla. 2006), the deadline is not jurisdictional and is modifiable in accordance with Rule 1.090 of the Florida Rules of Civil Procedure. *See* p. 18 *infra*.

The plain language of the Rule provides that the 30 days is an outside deadline, not a window of opportunity, which the recent amendment underscores.

The intent behind Rule 1.525 was plainly to deal with dilatory conduct in filing motions for attorneys' fees and costs and the resultant uncertainty of one's obligation for fees and costs, in light of a then-ambiguous standard under which such motions were due within a reasonable time period. *See, e.g.*, *Amendments to Florida Rules of Civil Procedure (1.525),* 773 So. 2d at 1119-1120; *see also Saia Motor Freight Line*, 930 So. 2d at 599-600. Thus, the purpose of the Rule is to set a deadline by which a party seeking attorneys' fees and costs must provide notice of the party's intention to seek attorneys' fees and costs. *See Swift v. Wilcox,* 924 So. 2d 885, 887 (Fla. 4th DCA 2006). The Rule clearly was not intended to punish *diligent* conduct, such as when a party files its motion before rendition of a judgment. *See Swift,* 924 So. 2d at 887. Nor was the Rule intended to create a procedural or an artificial trap.

In the usual (civil) case, a motion for attorneys' fees and costs will not be filed prior to rendition of the judgment because one does not know which party prevailed and which party therefore might be entitled to fees and/or costs. Family-law matters are different, because the entitlement to fees is not dependent on prevailing, but on need and ability to pay, and reflects a policy to even the playing field, and may be awarded at any time during the proceedings, including in appeals. *See* §61.16(1), Fla. Stat. (1996); *Rosen v. Rosen*, 696 So. 2d 697, 699 (Fla. 1997); *pp.15-16 infra.*

In this case -- and others like it – the Magistrate Judge issued a Report and Recommendation dissolving the marriage, deciding some but not all the issues in the case and recommending that the Court retain jurisdiction on the issue of attorneys' fees and costs, which forms part of the equitable distribution. Both Ms. Jucht and Mr. Montello treated the issuance of the Report and Recommendation as an operative event for filing and serving their motions for attorneys' fees and costs – no doubt, the parties were giving notice to one another of their intentions to seek attorneys' fees. *See Montello v. Montello*, 937 So. at 1155 & n. 1.

To be sure, this is not a case where the party failed to make a motion for fees. Ms. Jucht made her motion and requested a hearing before rendition of the judgment, and the uncertainty and delay which Rule 1.525 is intended to address were not an issue and thus the policy behind Rule 1.525 was honored.

The majority of Florida District Courts to interpret this Rule have held that the Rule does not create a window of opportunity within which a motion for attorneys' fees and costs must be filed. *See, e.g., Martin Daytona Corp. v. Strickland Const. Services*, 941 So. 2d 1220, 1225-1226 (Fla. 5th DCA 2006); *Norris v. Treadwell*, 907 So. 2d 1217, 1218-1219 (Fla. 1st DCA 2005); *Swift v. Wilcox*, 924 So. 2d at 887; *Byrne-Henry v. Hertz Corp.*, 927 So. 2d 66, 68 (Fla. 3d DCA 2006). Under those cases, Ms. Jucht's motion for attorneys' fees was timely made. The only District to hold otherwise is the Second District. *See, e.g., Swann*

v. Dinan, 884 So. 2d 398, 399 (Fla. 2d DCA 2004); *Gulf Landings Ass'n, Inc. v. Hershberger*, 845 So. 2d 344 (Fla. 2d DCA 2003).

To dispel any doubt on the matter, effective January 1, 2006, Rule 1.525 was amended to provide as follows: "Any party seeking a judgment taxing costs, attorneys' fees, or both shall serve a motion *no later than* 30 days after filing of the judgment, including a judgment of dismissal, or the service of a notice of voluntary dismissal." Fla. R. Civ. P. 1525 (emphasis added); *Amendments to Florida Rules of Civil Procedure (Two Year Cycle) (Rule 1.525)*, 917 So. 2d 176, 177 (Fla. 2005). New Rule 1.525 clarifies old Rule 1.525; new Rule 1.525 makes clear again that the motion must be filed "no later than 30 days" from the judgment and thus may be filed prior to entry of the judgment; and as a procedural rule, new Rule 1.525 is applicable to pending cases, including on appeal. *See Norris v. Treadwill*, 934 So. 2d 1207 (Fla. 2006); *Pearlstein v. King*, 610 So. 2d 445, 446 (Fla. 1992) (amendment requiring service of process within 120 days of filing complaint applied to cases pending prior to effective date of new rule); *W.R. Grace & Co. v. Parlier*, 614 So. 2d 500 (Fla. 1993)(same). *See also pp. 16-17 infra*.

In *Norris*, this Court initially accepted jurisdiction to review *Norris v. Treadwell*, 907 So. 2d 1217 (Fla. 1st DCA 2005), which certified a direct conflict with *Swan v. Dinan*, 884 So. 2d 398 (Fla. 2d DCA 2004). The direct conflict certified by the Second District concerned the timelines of a motion for attorneys'

fees made before the filing of the judgment – in other words, the same issue presented by this case. *See Norris v. Treadwell*, 907 So. 2d at 1219. In light of the recent amendment to Rule 1.525, this Court discharged its jurisdiction and dismissed the review proceeding. *See Norris*, 934 So. 2d at 1207.

Likewise, the Court should discharge its jurisdiction and dismiss review in this case. Under either old or new Rule 1.525, Ms. Jucht's motion was timely made, and thus this appeal may be decided without reaching the direct conflict certified by the Third District Court of Appeal or the applicability of new Rule 12.525 to this case.

II. NEW FAMILY RULE 12.525 IS GOVERNING IN THIS ACTION.

A. This Case Does Not Involve a Retro-Active Application of New Rule 12.525, Because The Judgment On Attorneys' Fees Was Rendered After New Rule 12.525 Had Become Effective.

At the time that new Rule 12.525 became effective, the trial court in this action had not rendered its judgment on attorneys' fees. As noted, the trial court rendered its judgment three (3) months after Rule 12.525 became effective, and thus, the new rule (regardless whether one treats the rule as procedural or substantive) applied to the subsequently rendered judgment. This is not a case, as Mr. Montello attempts to portray it, as a retro-active application of Rule 12.525.

Mr. Montello's assertion otherwise is fundamentally flawed. For his argument, Mr. Montello focuses on the judgment dissolving the marriage of the

parties, which was rendered on March 2, 2004; he incorrectly assumes that the Third District Court of Appeal applied Rule 12.525 to that judgment. *See Montello*, 937 So. 2d at 1155. Yet, that judgment did not resolve the issue of attorneys' fees. To the contrary, the judgment merely reserved jurisdiction to determine the parties' respective entitlement to attorneys' fees and costs and, if so, the sum of such fees and costs.[3] Rather, the judgment or order that *is* relevant to this appeal is the separate one dealing specifically with the issue of attorneys' fees, which the trial court rendered *after* new Rule 12.525 was adopted, on June 2, 2005.[4]

New Rule 12.525 provides that, "Florida Rule of Civil Procedure 1.525 shall not apply in proceedings governed by these rules." *In re: Amendments to the Florida Family Law Rules of Procedure (Rule 12.525)*, 897 So. 2d 467 (Fla. 2005). In adopting this new rule on March 3, 2005, this Court stated that new Family Law Rule 12.525 "shall become effective immediately." *Id*. at 468. In interpreting like language in Rule 1.525 concerning that rule's date of effectiveness, this Court held that Rule 1.525 "applies to all cases pending on or filed after January 1, 2001."

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[3] Here, *both* parties sought fees.

[4] There can be no dispute that this second judgment on attorneys' fees was separate and independent from the earlier judgment dissolving the marriage. Mr. Montello filed a notice of appeal from this second judgment.

Saia Motor Freight Line, 930 So. 2d at 600; *see also Montello v. Montello*, 937 So. 2d at 1156.[5]

In this case, it is undisputed that the trial court had not rendered its final judgment on attorneys' fees until June 2, 2005 – that is, *after* Rule 12.525 had become effective. As the Third District Court of Appeal found, this action – and specifically, the parties' competing claims to attorneys' fees – was pending and undetermined before the trial court when Rule 12.525 became effective – a fact that Mr. Montello does not and cannot dispute. Thus, Rule 1.525 was no longer governing in family cases when the trial court rendered its final judgment on attorneys' fees.

The cases that Mr. Montello cites in support of his arguments (primarily from the Second District) are distinguishable from this case. In some of those cases, for example, the judgment on attorneys' fees and costs was rendered *before* new Rule 12.525 was enacted. In *Nicoletti v. Nicoletti*, 902 So. 2d 215, 216 (Fla. 2nd DCA 2005), the "judgment that triggered Mrs. Nicoletti's right to attorneys' fees was entered in August 2002." In *Sharon v. Sharon*, 915 So. 2d 630, 632 (Fla. 2d DCA 2003), the judgment or order on attorneys' fees was rendered in May 2003. In *Caldwell v. Finochi*, 909 So. 2d 976, 977 (Fla. 2d DCA 2005), the

[5] Mr. Montello's discussion of the applicability of Family Rule 12.525 ignores the Third District Court's opinion, which was founded on this Court's opinion in *Saia Motor Freight Line*, 930 So. 2d 598. *See* Petitioner's Br. at 14-16; *Montello v. Montello*, 937 So. 2d at 1156.

judgment on attorneys' fees was rendered on November 13, 2003. In *Reddell v. Reddell*, 900 So. 2d 670, 672 (Fla. 5th DCA 2005), the judgment awarding fees was entered in November 2003.

In *Ponce v. Minda*, 923 So. 2d 1250 (Fla. 2d DCA 2006), it is not clear when the attorneys' fees judgment was entered, but a principal issue in that case was whether Rule 1.525 applied to postdecretal orders, as was also the case in *Nicoletti. See Ponce*, 923 So. 2d at 1251.[6] In *Italiano v. Italiano*, 920 So. 2d 694, 695 (Fla. 2d DCA 2006), the issue involved was whether a pre-judgment motion was timely.

B. New Rule 12.525 Is Procedural And Thus, Applicable To The Pending Appeal.

Even had the trial court rendered its judgment on attorneys' fees before the effective date of new Rule 12.525, new Rule 12.525 applies to pending appeals. Rule 1.525 itself is a procedural rule. As this Court stated in adopting Rule 1.525, "[w]e add a court commentary clarifying that this rule only establishes time requirements for serving such motions [for fees and costs], and in no way affects or overrules the pleading requirements." *Amendments to Florida Rules of Civil*

[6] In *Reddel, Nicoletti*, and *Caldwell*, the relevant judgment determined entitlement to fees and reserved jurisdiction to determine the amount. *See Reddell*, 900 So. 2d at 671; *Nicoletti*, 902 So. 2d at 2165; *Caldwell*, 909 So. 2d at 977. The District Courts in those cases held that even in a case where the question of entitlement is determined, old Rule 1.525 requires a motion to be filed within 30 days. Other Districts hold otherwise, ruling that Rule 1.525 does not apply where the final judgment determines entitlement to fees and defers for a separate hearing the issue of the amount of fees to be awarded. *See, e.g., Chamizo v. Forman*, 933 So. 2d 1240, 1241 (Fla. 3d DCA 2006).

Procedure, 773 So. 2d 1098. Rule 1.525 did not create or alter substantive rights to fees or costs.

In family-law matters, the entitlement to fees is governed by statute. Section 61.16(1), Fla. Stat., provides in detail the substantive standard for determining entitlement to fees in family-law matters. Section 61.16(1), Fla. Stat., gives the trial court continuing jurisdiction to award fees and costs, including temporary fees (before any final judgment is rendered in the action) and appellate fees. "[T]he court may from time to time, after considering the financial resources of both parties, order a party to pay a reasonable amount for attorney's fees, suit monies, and the cost to the other party of maintaining or defending any proceeding under this chapter, including enforcement and modification proceedings and appeals." § 61.16(1), Fla. Stat. (2006).

As stated by this Court, one of the considerations in adopting new Rule 12.525 was that "rule 1.525 is ill-fitting to family law matters, and this ill fit may be causing the circuit courts and the district courts of appeal to apply or interpret the rule inconsistently in the context of family law proceedings." *Amendments to the Florida Family Law Rules of Procedure (Rule 12.525)*, 897 So. 2d 467 (Fla 2005). This Court noted that "there already is a well-established body of statutory and case law authority regarding the award of attorneys' fees and costs in family law matters." *Id*. at 468. "[S]ection 61.16, Florida Statutes (2004), *already*

governs the award of attorneys' fees and costs in family law cases." *Id*. at 467 (emphasis added) (*citing* and *quoting Rosen v. Rosen*, 696 So. 2d 697, 699 (Fla. 1997)).

The tension between Rule 1.525 (old and new) and Section 61.16(1) is clear. Whereas Rule 1.525 sets forth a "bright line" deadline for seeking fees that is relative to a judgment's being rendered, Section 61.16(1) eschews any such deadlines or requirement of a judgment, giving instead the trial court considerable flexibility and discretion in the matter. The tension is especially apparent in the award of temporary fees and costs, which are awarded before any judgment is entered. Under the Second District Court of Appeal's reading of Rule 1.525, which requires a judgment or order prior to a motion for fees and costs and creates a narrow window of opportunity, orders awarding such fees and costs would be procedurally impossible. The object of those motions is solely an award of fees and costs. Rather than championing the legislative policy and intent behind Section 61.16(1), under the Second District Court of Appeal's interpretation, Rule 1.525 would frustrate and impede that policy.

As a procedural rule, new Rule 12.525 applies to cases pending on appeal. *See Gupton v. Village Key & Saw Shop, Inc.*, 656 So. 2d 475, 477 (Fla. 1995); *Young v. Altenhaus*, 472 So. 2d 1152, 1154 (Fla. 1985); *McMillan v. Dept. of Revenue ex rel. Searles*, 746 So. 2d 1234, 1237 (Fla. 1st DCA 1999).

Arguing to the contrary, Mr. Montello relies on *Natkow v. Natkow*, 696 So. 2d 315 (Fla. 1997). That case concerned an amendment to Rule 1.540(b), which removed a one-year statute of limitations for filing a motion based on fraudulent financial affidavits in marital cases. *See Natkow,* 696 So. 2d at 316. The final judgment at issue in that case was entered before the effective date of the amendment, and the rule in effect at the time that the final judgment was entered had a one-year limitation period from the date of the judgment. *See id.; see also Mendez-Perez v. Perez-Perez,* 656 So. 2d 458 (Fla. 1995). Ultimately, this Court held in *Natkow* that the former wife's motion under Rule 1.540(b) was untimely, because she did not file the motion pursuant to the rule in effect at the time that the final judgment was entered. *See Natkow*, 696 So. 2d at 317.

Natkow is distinguishable because Rule 1.540(b) provides a limitations period, which is "substantive" in nature and which at the time of the judgment in *Natkow* was expressly *not* modifiable or extendable. *See* Fla. R. Civ. P. 1.090(b); *Merkle v. Robinson,* 737 So. 2d 540, 543 (Fla. 1999)(statute of limitations treated as substantive law for choice of law analysis). Rule 12.525 is not a substantive provision akin to Rule 1.540(b). Because Rule 12.525's deadline is extendable, one does not lose forever the right to seek attorneys' fees, as would be the case in failing to file timely a motion under 1.540(b) based on fraud. *See also Pearlstein v. King,* 610 So. 2d 445, 446 (Fla. 1992) (amendment requiring service of process

within 120 days of filing complaint applied to cases pending prior to effective date of new rule); *W.R. Grace & Co.-Connecticut v. Parlier*, 614 So. 2d 500 (Fla. 1993)(same).

C. Ms. Jucht Filed A Motion For Enlargement Of Time.

Even the cases that Mr. Montello cites hold that Rule 1.525 provides an extendable deadline. *See Ponce v. Minda*, 923 So. 2d 1250 (Fla. 2d 2006); *Italiano*, 920 So. 2d at 695; *see also Lyn v. Lyn*, 884 So. 2d 181, 185 (Fla. 2d DCA 2004). In this case, Ms. Jucht filed a motion for enlargement of time for her motion for attorneys' fees. One may read the record to reflect that the trial court granted the motion for extension.

The General Magistrate, whose 2/15/05 Report and Recommendations was adopted by the trial court, acknowledges that Ms. Jucht filed a motion for enlargement of time and ruled that in light of, *inter alia*, "the overall circumstances in this case, it is herein determined that the requirements of Rule 1.525 do not bar the Former Wife's claim for attorneys' fees and costs in connection with the parties' dissolution of marriage action." *See* 2/15/05 Report and Recommendation at 2, 6; A. 3, 5, 6-7. The language of the Report and Recommendation may be read to include a grant of Ms. Jucht's motion for enlargement, to which Mr. Montello does not ascribe error. Of course, to the extent that the motion was not determined

and remains pending, then a remand is required for the trial court to determine the motion.

III. THE TRIAL COURT DID NOT ERR ON THE VISITATION SCHEDULE.

A. The Visitation Schedule Is Not Properly Before The Court.

Mr. Montello cites *Feller v. State*, 637 So. 2d 911, 914 (Fla. 1994), among other cases, for the proposition that as long as the Court properly asserts jurisdiction over one issue in a case, the Court has jurisdiction over "all of the issues raised" in the case. *See* Initial Brief at 8. This statement is not accurate. This Court has continuously stated that its jurisdiction to consider issues other than those upon which jurisdiction was granted to address only relates to issues appropriately raised in the appellate process, is discretionary, and should be exercised only when the other issues have been properly briefed and argued and are dispositive of the case. *See, e.g., Kelly v. Community Hosp. of Palm Beaches, Inc.*, 818 So. 2d 469, 470 n.1 (Fla. 2002); *Warner v. City of Boca Raton*, 887 So. 2d 1023, 1035 (Fla. 2004); *Savona v. Prudential Ins. Co. of America*, 648 So. 2d 705, 707 (Fla. 1995); *Savoie v. State*, 422 So. 2d 308, 312 (Fla. 1982).

This Court has authorized the parties to prepare briefs on the merits solely to address the certified direct conflict regarding the application of new Rule 12.525. Mr. Montello has not sought to invoke the Court's jurisdiction on any other basis nor as to any other issue. Moreover, by postponing its decision on jurisdiction in

the instant case, this Court has not even fully asserted jurisdiction over any one issue, let alone the additional issues that the Petitioner has unilaterally chosen to address. Furthermore, issues such as how the trial court apportioned the time and nature of child custody and visitation issues were not preserved for appeal, are not dispositive of the case, and have not been properly noticed for briefing.

Assuming the Court has jurisdiction over the extraneous issue of visitation, this Court consistently declines to address issues that are beyond the scope of the basis for which it granted conflict jurisdiction. *See, e.g., Kelly* 818 So. 2d at 470 n. 1 (declining to address issues that were beyond the scope of the Court's conflict jurisdiction); *accord St. Joe Corp. v. McIver*, 875 So. 2d 375, 382-83 (Fla. 2004); *Barnett v. Barnett*, 768 So. 2d 441, 442 n. 1 (Fla. 2000).

Accordingly, the Court should decline to exercise jurisdiction on issues, such as the visitation issue that Mr. Montello raises, that are beyond the scope of its certified-conflict jurisdiction. That is especially warranted in this case, because the Court should discharge its jurisdiction and decline to review even the direct conflict certified by the Third District Court of Appeal.

B. Mr. Montello Fails to Demonstrate an Abuse of Discretion by the Trial Court on the Visitation Issue.

Mr. Montello concedes that the standard of review is the deferential abuse of discretion. *See* Initial Brief at 17. "In appellate proceedings the decision of a trial court has the presumption of correctness and the burden is on the appellant to

demonstrate error." *See Applegate v. Barnett Bank of Tallahassee,* 377 So. 2d 1150, 1152 (Fla. 1979). Mr. Montello does not carry that heavy burden.

According to Mr. Montello, the visitation schedule adopted by the trial court "unfairly punishes the former husband for not being Jewish." *See* Initial Brief at 17. Mr. Montello complains about not receiving Friday night visitation. Nothing in the 8/25/03 Report and Recommendation or the trial court's Order adopting the Report and Recommendation indicates that Mr. Montello was in any way penalized for not being Jewish. As Mr. Montello himself admits, the parties stipulated that the children should be raised Jewish. *See* Initial Brief at 18.

Given that stipulation, Mr. Montello cannot complain that the final judgment specifically directs that the children should be raised Jewish. *See* Initial Brief at 20-21. If, in fact, this direction constitutes error, it was error that Mr. Montello himself invited and therefore, cannot be raised on appeal. *See Gupton v. Village Key & Saw Shop, Inc.*, 656 So. 2d 475, 478 (Fla. 1995)("a party cannot successfully complain about an error for which he or she is responsible or of rulings that he or she has invited the trial court to make").

There is no indication that the visitation schedule in this case was adopted other than in the best interests of the minor children or that the trial court abused its discretion in this regard. As Mr. Montello concedes, he has regular overnight

visitation, including on Fridays (*see* Initial Brief at 22), which belies his assertion of religious discrimination.

Finally, Mr. Montello relies on matters that according to him are "self evident" (*see* Initial Brief at 23), or an alleged evil motive that he ascribes to Ms. Jucht (*see* Initial Brief at 24), rather than on any evidence in the record or to a failure by the trial court to fully and completely review, credit and weigh the evidence. *See* Initial Brief at 21-24.

Accordingly, Mr. Montello's assignment of error is without merit.

CONCLUSION

For all the foregoing reasons, the Court should discharge its jurisdiction and decline to review this case, or in the alternative, affirm the decision of the Third District Court of Appeal in this case.

Dated: January 5, 2007

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on January 5, 2007, I served:

(a) one (1) correct copy of this brief by First Class U.S. Mail to Louis R. Montello, Esq., 777 Brickell Avenue, Suite 1070, Miami, Florida 33131, and

(b) the original and seven (7) correct copies of the brief by First Class U.S. Mail to the Florida Supreme Court, Attn: Clerk's Office, 500 South Duval Street, Tallahassee, FL 32399-1927.

_____
Bernardo Burstein

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with Florida Rule of Appellate Procedure 9.210(a)(2) since it is submitted in Times New Roman 14-point font.

By: _____
Bernardo Burstein