THE FLORIDA SUPREME COURT

CASE NO. SC06-2072

LOUIS R. MONTELLO,
Petitioner,

v.

SONIA JUCHT MONTELLO,
Respondent

PETITIONER'S REPLY BRIEF ON THE MERITS

On Appeal From the Third District Court of Appeal
State of Florida

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PREFACE

1. Appellee/Cross-Appellant Louis R. Montello will be referred to as the **"Former Husband."**

2. Appellant/Cross-Appellee Sonia Jucht Montello will be referred to as the **"Former Wife."**

3. Citations to the General Magistrate's Report and Recommendation, which is located in the record of the related appeal in Case No. 3D04-1094, will be referred to as **"R&R, p. __."**

4. Citations to the Final Judgment of Dissolution of Marriage, which is located in the record of the related appeal in Case No. 3D04-1094, will be referred to as **"Final Judgment of Dissolution, p. __."**

5. The Report of the General Magistrate (Attorney's Fees and Costs) and Notice of Filing, which is located in Volume II, pages 201-214 of the record for the related appeal in Case No. 3D05-1615, will be referred to as "**Attorney's Fees Report and Recommendation"** and citations to the Attorney's Fees Report and Recommendation will be referred to as **"Attorney's Fees R&R, p. __."**

TABLE OF AUTHORITIES

RULES:

SUMMARY OF THE ARGUMENT

A. AWARD OF ATTORNEY'S FEES TO THE FORMER WIFE.

This Court should resolve the certified conflict by determining that Florida Family Rule of Procedure 12.525, adopted effective March 3, 2005, does not apply retroactively to a judgment of dissolution of marriage entered prior to such date. The date of the judgment that triggers the potential entitlement to attorneys' fees and costs is the operative date for determining which rules of civil procedure or versions thereof apply to a case. This Court has consistently held that rules of procedure are prospective unless specifically provided otherwise. See Natkow v. Natkow, 696 So. 2d 315 (Fla. 1997); Mendez-Perez v. Perez-Perez, 656 So. 2d 458 (Fla. 1995); and Pearlstein v. King, 610 So. 2d 445 (Fla. 1992). Based on the precedent of Natkow, Mendez-Perez and Pearlstein, Florida Family Law Rule of Procedure 12.525 does not apply retroactively to family law cases in which the final judgment of dissolution was rendered before March 3, 2005.

The Former Wife was required to and did not comply with Florida Rule of Civil Procedure 1.525. The Final Judgment of Dissolution was entered on March 1, 2004, and contained a reservation of jurisdiction with respect to attorney's fees and costs. After the Final Judgment of Dissolution was entered, the Former Wife did not file a motion for attorney's fees. In the Attorney's Fees Report and Recommendation, the General Magistrate stated that "[i]n light of the specific

reservation of jurisdiction set forth in . . . the Final Report of General Master (Dissolution of Marriage) . . . it is herein determined that the requirements of Rule 1.525 do not bar the Former Wife's claim for attorney's fees an costs" and cited to Saia Motor Freight Line, Inc. v. Reid, 888 So. 2d 102 (Fla. 3d DCA 2004) in support of his determination. **(**Attorney's Fees R&R, pp. 5-6.**)** On May 11, 2006, this Court rendered its decision in Saia Motor Freight Line, Inc. v. Reid, 930 So. 2d 598 (Fla. 2006), which reversed the Third District Court of Appeal, thereby resolving the conflict that had existed between the various district courts of appeal by holding a trial court's reservation of jurisdiction to determine entitlement to attorneys' fees did not extend the time requirement contained in Florida Rule Civil Procedure 1.525. Because the Third District Court of Appeal had not issued its opinion as of such date, it was required to apply the law as set forth in Saia Motor Freight. The Third District Court of Appeal failed to do so in the case below and, therefore, should be reversed.

The Former Wife argues that she had filed a motion for enlargement of time and that record may be read to reflect that the trial court granted the motion for enlargement. (Answer Brief, p. 18.) This argument fails for several reasons. First, nowhere in the Attorney's Fees Report and Recommendation is there any support for this argument. In fact, the opposite is true. The Attorney's Fees Report and Recommendation indicates "on or about June 21, 2004, the Former Wife filed a

Motion for Enlargement of Time." (Attorney's Fees R&R, p. 2.) The General Magistrate could have only granted an enlargement of time pursuant to Florida Rule of Civil Procedure 1.090(b). The trial court entered the Final Judgment of Dissolution on March 1, 2004. In order to have relied on Florida Rule Civil Procedure 1.090(b)(1) to extend the time to file a motion for attorney's fees under to Florida Rule Civil Procedure 1.525, the Former Wife would have had to file the request for enlargement prior to March 31, 2004. The Former Wife did not file such request until "on or about June 21, 2004." (Attorney's Fees R&R, p. 2.) Accordingly, the General Magistrate could not have relied on Florida Rule Civil Procedure 1.090(b)(1) to grant an enlargement of time. Second, in order to have relied on Florida Rule Civil Procedure 1.090(b)(2) to extend the time to file a motion for attorney's fees under to Florida Rule Civil Procedure 1.525, the Former Wife would have had to demonstrate that the failure to file a motion for attorney's fees by March 31, 2004, was the result of excusable neglect. As reflected by the absence of any such proof in the record, the Former Wife did not offer any affidavit or other evidence on which the General Magistrate could have relied to enlarge the time for the Former Wife to file a motion for attorney's fees on the basis of excusable neglect pursuant to Florida Rule Civil Procedure 1.090(b)(2). As a result, the General Magistrate could not have granted an enlargement of time pursuant to Florida Rule of Civil Procedure 1.090(b).

Based on the foregoing, this Court should hold that Florida Family Rule of Procedure 12.525 does not apply retroactively to cases in which the final judgment of dissolution had been entered prior to the effectiveness of the Rule and rule that the Former Wife did not comply with Florida Rule of Civil Procedure 1.525.

B. VISITATION ISSUES.

The Court has the authority to review the weekend visitation schedule ordered by the trial court. Once this Court has exercised its jurisdiction to review a certified question, the Court may also exercise its discretion to review any issues raised and briefed during the appellate process. See Boca Burger, Inc. v. Forum, 912 So. 2d 561, 563 (Fla. 2005) (once jurisdiction is granted to review an issue, the Court has authority to address other issues properly raised). The trial court abused its discretion in limiting the Former Husband's visitation with his children on alternating weekends, which does not include Friday nights, purportedly based on the Former Wife's desire to have Shabbat dinner with the children. This ruling as to visitation unfairly punishes the Former Husband for not being Jewish. Furthermore, the ruling is not supported by substantial competent evidence and is not in the best interests of the children. Therefore, this Court should reverse the Third District's affirmance of the trial court's award of alternating weekend visitation to the Former Husband with the children to begin on Saturday mornings

and remand with instructions for the trial court to award the Former Husband regular visitation on alternating weekends beginning after school on Friday.

ARGUMENT

I. THE TRIAL COURT ERRED IN AWARDING THE FORMER WIFE ATTORNEYS' FEES AND COSTS.

A. This Court Should Resolve the Certified Conflict by Determining That Florida Family Rule of Procedure 12.525 Does not Apply Retroactively to a Final Judgment of Dissolution of Marriage Entered on March 1, 2004.

The date of the judgment that triggers the potential entitlement to attorneys' fees and costs is the operative date for determining which rules of civil procedure or versions thereof are in effect and, therefore, apply to a case. This Court has consistently held that rules of procedure are prospective unless specifically provided otherwise. See Natkow v. Natkow, 696 So. 2d 315 (Fla. 1997); Mendez-Perez v. Perez-Perez, 656 So. 2d 458 (Fla. 1995); and Pearlstein v. King, 610 So. 2d 445 (Fla. 1992). Based on the precedent of Natkow, Mendez-Perez and Pearlstein, Florida Family Law Rule of Procedure 12.525 does not apply retroactively to family law cases in which the final judgment of dissolution was rendered before March 3, 2005, the date this Court adopted Florida Family Law Rule of Procedure 12.525, which provides that "Florida Rule of Civil Procedure 1.525 shall not apply to proceedings governed by these rules." See Amendments to the Florida Family Law Rules of Procedure (Rule 12.525), 897 So. 2d 467 (Fla.

2005). In order to overcome this tremendous obstacle, the Former Wife argues that the date to consider when analyzing which rules of civil procedure or version thereof applied is the date on which the trial court entered its judgment on attorney's fees. (Answer Brief, pp. 11-12.) This is simply not the law. Once the trial court entered the Final Judgment of Dissolution on March 1, 2004, the Florida Rules of Civil Procedure in effect on such date applied. Given that Florida Family Law Rule of Procedure 12.525 did not become effective until March 3, 2005, over 1 year later, it could not have applied to the case at hand, and therefore, Florida Rule of Civil Procedure 1.525 did apply. See Natkow, Mendez-Perez and Pearlstein. As a result, pursuant to Florida Rule of Civil Procedure 1.525 it was incumbent on both parties to file a motion for attorney's fees and costs if they elected to do so no later than 30 days after the date of the Final Judgment of Dissolution. See Spinelli v. Spinelli, 31 Fla. L. Weekly D3109 (Fla. 2d DCA 2006) (Rule 1.525 applied because the right to attorney's fees was triggered on the date the judgment was entered and on such date Fla. Fam. L. R. P. 12.525 had not become effective). Under the Former Wife's analysis of the law, if Florida Rule of Civil Procedure 1.525 still applied to family law cases, the 30-day period to file a motion for attorney's fees as mandated by Rule 1.525 would not commence to run until after the trial court had rendered its judgment on attorney's fees. Although science and technology are advancing at any amazing pace, the day has not come

where an attorney can travel back in time to file a motion that is the prerequisite for a judgment that has already been rendered in response to the motion that must be filed before the judgment can be rendered!

The cases cited by the Former Wife offer no support for her argument that Florida Family Law Rule Procedure 12.525 applies to cases pending on appeal. This Court in Grupton v. Village Key & Saw Shop, Inc., 656 So. 2d 475 (Fla. 1995) held that an amendment to a statute did not apply retroactively and held in Young v. Altenhaus, 472 So. 2d 1152 (Fla. 1985) that a statute could not be applied retroactively to a cause of action that accrued prior to the effective date of the statute. The First District Court of Appeal in McMillan v. Dept. of Revenue ex rel. Searles, 746 So. 2d 1234 (Fla. 1st DCA 1999) held that a statute adopted prior to the entry of an income deduction order but while the matter was pending did not apply retroactively. In each instance, retroactive application was denied.

By holding that Florida Family Law Rule of Procedure 12.525 applies retroactively, the Third District in the case below, and the First District in Smith v. Smith, 902 So. 2d 859 (Fla. 1st DCA 2005) as discussed in the Former Husband's Initial Brief, erroneously failed to follow this Court's precedent as established by Natkow and Mendez-Perez and should be reversed.

B. The Former Wife did not Comply with Florida Rule of Civil Procedure 1.525.

The Former Wife's request for attorney's fees failed to comply with the requirements of Rule 1.525 of the Florida Rules of Civil Procedure because it was not filed within 30 days of the Final Judgment of Dissolution. Rule 1.525 as in effect on the date of the Final Judgment of Dissolution provided that:

> 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) (emphasis added). The Final Judgment of Dissolution was entered on March 1, 2004, contained a reservation of jurisdiction with respect to attorney's fees and costs. (Final Judgment of Dissolution, p. 1; R&R, p. 39.) After the Final Judgment of Dissolution was entered, the Former Wife did not file a motion for attorney's fees. (Attorney's Fees R&R, p. 2.)

In the Attorney's Fees Report and Recommendation, the General Magistrate stated that "[i]n light of the specific reservation of jurisdiction set forth in . . . the Final Report of General Master (Dissolution of Marriage) . . . it is herein determined that the requirements of Rule 1.525 do not bar the Former Wife's claim for attorney's fees an costs" and cited to Saia Motor Freight Line, Inc. v. Reid, 888 So. 2d 102 (Fla. 3d DCA 2004) in support of his determination. **(**Attorney's Fees R&R, pp. 5-6.**)** On May 11, 2006, this Court rendered its decision in Saia Motor Freight reversing the Third District Court of Appeal, thereby resolving the conflict that had existed between the various district courts of appeal by holding a trial

court's reservation of jurisdiction to determine entitlement to attorneys' fees did not extend the time requirement contained in Florida Rule Civil Procedure 1.525. On May 17, 2006, and prior to the time the Third District Court of Appeal rendered its decision on the pending appeal in this case, the Former Husband filed a Notice of Supplemental Authority with the Third District Court of Appeal to bring to the appellate court's attention this Court's decision in Saia Motor Freight. (Reply Brief Appendix, Item 1.) Because the Third District Court of Appeal had not issued its opinion as of such date (in fact, it did not issue its opinion until September 1, 2006, almost 4 months later), it had notice of and was required to apply the law as set forth in Saia Motor Freight. This situation in the case at hand is similar to the sequence of events that occurred in State Farm Mut. Auto. Ins. Co. v. Stylianoudakis v. Stylianoudakis, 2007 WL 162765 (Fla. 4th DCA 2007), except that in State Farm, the Fourth District Court of Appeal correctly followed a decision that this Court rendered before the Fourth District had ruled on a pending appeal. In State Farm, the trial court entered a final judgment for the plaintiffs on January 28, 2005, and such judgment contained a reservation of jurisdiction to consider and award costs. On March 21, 2005, almost 2 months later, the plaintiffs filed a motion to tax costs in accordance with Florida Rule Civil Procedure 1.525. At such time, the prevailing law in the Fourth District, as set forth in Fisher v. John Carter & Assoc., Inc., 864 So. 2d 493 (Fla. 4th DCA 2004), provided that the

reservation of jurisdiction in a final judgment enlarged the time for filing a motion for fees and costs after entry of judgment. In its opinion, the Fourth District Court of Appeal observed that "the trial court noted that there was a conflict among the district courts of appeal regarding the reservation of jurisdiction in a final judgment that such conflict had been certified to the Florida Supreme Court in Saia Motor Freight. Based on the prevailing law in the Fourth District at such time, the trial court determined that the plaintiffs' motion for costs was timely. State Farm appealed the cost award and while the case was on appeal, this Court rendered its decision in Saia Motor Freight. The Fourth District Court of Appeal reversed the trial court's award of costs on the basis that it was required to apply the law as articulated in Saia Motor Freight, i.e., a "reservation of jurisdiction in a final judgment does not enlarge the time requirement set forth in Fla. R. Civ. P. 1.525." See State Farm, 2007 WL at 162765, citing to Fla. Patient's Comp. Fund v. Von Stetina, 474 So. 2d 783 (Fla. 1985) ("An appellate court generally is required to apply the law in effect at the time of its decision."). The Third District Court of Appeal failed to do so in the case below and, therefore, should be reversed.

C. The General Magistrate did not Grant an Enlargement of Time pursuant to Florida Rule of Civil Procedure 1.090(b).

The Former Wife argues that she had filed a motion for enlargement of time and that record may be read to reflect that the trial court granted the motion for enlargement. (Answer Brief, p. 18.) This argument fails for several reasons. First,

nowhere in the Attorney's Fees Report and Recommendation is there any support for this argument. In fact, the opposite is true. The Attorney's Fees Report and Recommendation indicates "on or about June 21, 2004, the Former Wife filed a Motion for Enlargement of Time." (Attorney's Fees R&R, p. 2.) The General Magistrate could have only granted an enlargement of time pursuant to Florida Rule of Civil Procedure 1.090(b), which provides in relevant part as follows:

> [T]he court at any time in its discretion (1) with or without notice, may order the period enlarged if request therefore is made before the expiration of the period originally prescribed or as extended by a previous order, or (2) upon motion made and notice after the expiration of the specified period, may permit the act to be done when the failure to act was the result of excusable neglect.
>
> Fla. R. Civ. P. 1.090(b).

The trial court entered the Final Judgment of Dissolution on March 1, 2004. In order to have relied on Florida Rule Civil Procedure 1.090(b)(1) to extend the time to file a motion for attorney's fees under to Florida Rule Civil Procedure 1.525, the Former Wife would have had to file the request for enlargement prior to March 31, 2004. The Former Wife did not file such request until "on or about June 21, 2004." (Attorney's Fees R&R, p. 2.) Accordingly, the General Magistrate could not have relied on Florida Rule Civil Procedure 1.090(b)(1) to grant an enlargement of time. Second, in order to have relied on Florida Rule Civil Procedure 1.090(b)(2) to extend the time to file a motion for attorney's fees under to Florida Rule Civil Procedure 1.525, the Former Wife would have had to

demonstrate that the failure to file a motion for attorney's fees by March 31, 2004, was the result of excusable neglect. As reflected by the absence of any such proof in the record, the Former Wife did not offer any affidavit or other evidence on which the General Magistrate could have relied to enlarge the time for the Former Wife to file a motion for attorney's fees on the basis of excusable neglect pursuant to Florida Rule Civil Procedure 1.090(b)(2). As a result, the General Magistrate could not have granted an enlargement of time pursuant to Florida Rule of Civil Procedure 1.090(b). See Lyn v. Lyn, 884 So. 2d 181, 185 (Fla. 2d DCA 2004) (the trial court did not abuse its discretion in denying the wife's motion to extend time to file motion for attorney's fees after the 30-day time limit in Rule 1.525 had expired and the basis for excusable neglect was her attorney's misunderstanding or lack of knowledge of the law).

Based on the foregoing, this Court should reverse the decision of Third District affirming the trial court's Order Granting Former Wife Attorney's Fees, hold that Florida Family Rule of Procedure 12.525 does not apply retroactively to cases in which the final judgment of dissolution had been entered prior to the effectiveness of the Rule and rule that the Former Wife did not comply with Florida Rule of Civil Procedure 1.525.

II. THE TRIAL COURT ABUSED ITS DISCRETION IN NOT AWARDING THE FORMER HUSBAND REGULAR FRIDAY NIGHT VISITATION WITH HIS CHILDREN ON ALTERNATING WEEKENDS.

A. The Court has the Authority to Review the Weekend Visitation Schedule Ordered by the Trial Court.

The Former Wife incorrectly argues that this Court does not have jurisdiction to consider issues other than those upon which jurisdiction was granted. (Answer Brief, p. 19.) This is simply not the law. Once this Court has exercised its jurisdiction to review a certified question, the Court may also exercise its discretion to review any issues raised and briefed during the appellate process. See Boca Burger, 912 So. 2d at 563 (once jurisdiction is granted to review an issue, the Court has authority to address other issues properly raised).

B. The Trial Court Abused its Discretion in not Awarding the Former Husband Regular Friday Night Visitation With His Children on Alternating Weekends.

There is no doubt that based on the children's Jewish religion, the General Magistrate limited the Former Husband's alternating weekend visitation with the children from 9:30 a.m. on Saturday until Monday morning rather than awarding the Former Husband weekend visitation beginning on Friday after school. (R&R, p. 13.) This was an abuse of discretion. At trial, the Former Wife testified at length regarding religious ceremonies associated with the Jewish faith and, in particular, the religious ceremony of Shabbat dinner held on Friday night. In the Initial Brief, the Former Husband provided numerous references in the record to such testimony (Initial Brief, pp. 19-21.) Additionally, the Former Wife's

proposed final judgment specifically requested that the Former Husband's visitation with the children on alternating weekends not begin until Saturday morning. (Supplemental Record, filed February 13, 2006, pp. 1209-1235.) Therefore, the Former Wife's argument that because the Report and Recommendation does not indicate that the Former Husband "was in any way penalized for not being Jewish" (Answer Brief, 21), belies the fact that the only reason the General Magistrate structured regular weekend visitation the way he did was in response to the Former Wife's request based on religious grounds that he do so. This was clearly inappropriate and constituted an abuse of discretion. See Abbo v. Briskin, 660 So. 2d 1157 (Fla. 4th DCA 1995) citing Sotnick v. Sotnick, 650 So.2d 157 (Fla. 3d DCA 1995) (a child's religion is no proper business of judges"). In addition, it is preposterous for the Former Wife to argue that by consenting to raise his children Jewish, the Former Husband somehow agreed to a significant modification of the standard regular weekend visitation schedule typically enjoyed by a divorced parent.

Therefore, this Court should reverse the District Court's affirmance of the trial court's award of alternating regular weekend visitation to the Former Husband with the children to begin on Saturday mornings and remand this case with instructions for the trial court to award the Former Husband regular visitation on alternating weekends beginning after school on Friday.

CONCLUSION

For the reasons set forth above, this Court should resolve the certified conflict by determining that Florida Family Rule of Procedure 12.525, adopted effective March 3, 2005, does not apply to a final judgment of dissolution of marriage entered prior to such date, should rule that Florida Rule of Civil Procedure 1.525 did apply to the proceeding below and the Former Wife failed to comply with such rule, and, in turn, reverse the Order Granting Former Wife Attorney's Fees. In addition, the Former Husband requests this Court to **reverse** the District Court's affirmance of the trial court's visitation award as to his regular visitation on alternating weekends beginning on Saturday mornings and to remand with instructions for the trial court to award the Former Husband regular visitation on alternating weekends beginning at the end of the school day on Friday.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I CERTIFY that a true and correct copy of brief was furnished via U.S. mail on January 29, 2007, to counsel for the Respondent, Bernardo Burstein, Esquire, 12000 Biscayne Boulevard, Suite 508, Miami, Florida 33181.

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Louis R. Montello

CERTIFICATE OF COMPLIANCE

I CERTIFY that this brief complies with the font requirements of Rule 9.210 of the Florida Rules of Appellate Procedure.

_____

Louis R. Montello