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SUPREME COURT OF FLORIDA
CASE NO.: SC16-1474

DONNA KOPPEL,

Petitioner,

vs.

LAURA OCHOA,

Respondent.

PETITIONER, DONNA KOPPEL'S BRIEF ON MERITS

On Notice to Invoke Discretionary Review from the
Second District Court of Appeal of Florida
Case No.: 2D14-1866

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CITATION TO RECORD

The record is cited "R__.___", and the Supplemental Record is cited "SR__.__." referring to the volume and page number assigned by the clerk of the circuit court.

Koppel refers to the Initial Brief filed in the Second District Court of Appeal, as "Init. Br. __.", the Answer Brief as "Answ. Br. __.", and the Reply Brief as "Reply Br. __."

STATEMENT OF THE CASE AND FACTS

Proceedings in the Circuit Court: On April 15, 2013, Laura Ochoa filed a lawsuit against Donna Koppel for injuries allegedly arising out of a motor vehicle accident. (R1. 1-2.) On September 3, 2013, Plaintiff Ochoa served a proposal for settlement on Defendant, Koppel. (R1. 53; SR1. 8-11.) On September 10, 2013, with approximately 23 days left in the 30-day acceptance period, the Plaintiff served Koppel with a "second supplemental response" to Koppel's request for production, revealing for the first time an MRI report dated August 15, 2013, and a neurosurgical evaluation. (*See* R1. 59.)

On October 2, 2013, a day before the expiration of the 30-day period to accept the proposal, Koppel moved for an enlargement of time to respond to the proposal. (R1. 59-60.) Koppel's motion stated as follows:

1. Plaintiff served a proposal for settlement upon DONNA KOPPEL on September 3, 2013.
2. On September 10, 2013, Plaintiff filed a Second Supplemental Response to Defendant's Request for Production. The response contained MRI report dated 8/15/2013 not previously known to Defendant and a neurosurgical evaluation completed by Dr. Jobe, M.D.
3. The last date to respond to Plaintiff's proposal is October 3, 2013.
4. The deadline does not afford Defendant adequate time to evaluate the proposal in light of new medical information just disclosed.
5. Further, the case is in its infancy. Plaintiff's deposition has not yet occurred.
6. In good faith, counsel for Defendant contacted counsel for Plaintiff and requested an extension of time to respond to

> Plaintiff's offer of judgment. Plaintiff counsel would not grant the extension.
>
> **WHEREFORE**, Defendant respectfully requests the entry of an Order enlarging time for Defendant to respond to Plaintiff's proposal for settlement.

(R1. 59-60.)

Koppel's motion to extend time was heard on December 2, 2013. (R1. 64, 75.) At that hearing, the court did not immediately rule on the motion. Instead, the court asked Koppel to submit case authority within three days that supported her position. (R1. 64, 75.) The next day, while the motion to enlarge time remained pending and un-adjudicated, Koppel filed a written notice accepting Ochoa's proposal for settlement. (R1. 62, 75.) Then, on December 5, 2013, Koppel submitted to the court the requested case law. (R1. 65.)

Thereafter, the court sent an email to the parties asking Ochoa to prepare an order denying Koppel's motion to extend time. (R1. 108.) Ten days after Koppel had accepted the proposal in writing, on December 13, 2013, the trial court executed a written order denying Koppel's motion for extension of time to respond to the proposal. (R1. 63.)

Koppel's insurance carrier sent Ochoa a check for the amount stated in the proposal. (SR1. 12, 15.) On January 7, 2014, Ochoa's counsel returned the check, stating she "is rejecting this offer." (SR1. 12, 15.)

After returning the check, on January 9, 2014, Ochoa moved to strike Koppel's written notice of acceptance of the proposal for settlement. (R1. 64.) Ochoa argued that Koppel "is improperly attempting to avoid the Court's denial of her Motion for Enlargement of Time by having filed the Notice of Acceptance of Proposal for Settlement before the Court issued the Order denying the motion." (R1. 65.)

Koppel responded that the operation of Florida Rule of Civil Procedure 1.090(b) had tolled the time for her to respond to the proposal for settlement so long as her motion for enlargement of time had remained pending. (R1. 76-78.) Koppel also moved to enforce the settlement, and requested an evidentiary hearing. (R1. 78.)

The trial court heard the cross motions, and considered the parties' competing authorities. Koppel primarily relied on *Goldy v. Corbett Crane Services*, 692 So. 2d 225 (Fla. 5th DCA 1997); Ochoa relied on *Donohoe v. StarMed Staffing, Inc.*, 743 So. 2d 623 (Fla. 2d DCA 1999). (R1. 95-96.) The trial court considered it a "black-and-white issue." (R1. 99.)

Ochoa never argued that she was prejudiced by the delay, and the record contains no evidence that Ochoa was prejudiced by the 60-day delay.

At the hearing, the court told both lawyers: "If either of you think that there's a legitimate purpose to be served by an evidentiary hearing in this posture,

I will provide for one. Okay?" (R1. 99.) The court then ruled: "I'm granting the motion to enforce. I'm denying the motion to conduct an evidentiary hearing, but without prejudice. So if either party even has a good faith belief that there would be a constructive purpose served by an evidentiary hearing, I'll provide for one." (R1. 100.) Neither party asked for an evidentiary hearing.

The trial court's rulings and judgment. The trial court rejected Ochoa's argument that the motion for extension did not toll time based on the Second District's *Donohoe* decision. It denied Ochoa's motion to strike Koppel's notice of acceptance of the proposal, and it granted Koppel's motion to enforce the settlement. (R1. 86, 99-100.) The court thereafter dismissed Ochoa's lawsuit. (R1. 89.) Ochoa's appeal to the Second District Court of Appeal followed.

Proceedings in the Second District Court of Appeal: Respondent Ochoa, the appellant below, argued that the trial court had erred by not applying *Donohoe*, and by applying the *Goldy* "tolling rule" to extend the time that Koppel had to accept her proposal (Init. Br. at p. 17). Ochoa argued that strict compliance was required for abiding a deadline for filing an acceptance of a proposal for settlement (Init. Brief p. 14). Ochoa argued that under *Donohoe*, "a motion for enlargement of time, standing alone, does not toll the time for responding to a proposal for settlement" (Init. Br. 16).

Petitioner Koppel, the appellee below, countered that *Goldy* - which provides for tolling – controlled the issue, and that *Goldy* and *Donohoe* did not conflict (Answ. Br. 8). In the course of oral argument, Koppel's counsel twice asked the panel to apply any change in the controlling law, *Goldy*, on a prospective basis only. (Oral Argument time stamps 34:05; 42:25.)

The Second District rejected Ochoa's argument that *Donohoe* was controlling on the issue. The Court declared conflict with *Goldy*, and, even though it made no finding that the trial court had erred, it reversed the judgment of dismissal and remanded for further proceedings, thus nullifying the settlement.

Koppel moved for rehearing, asking the Second District to declare that its opinion – which announced a new rule on the tolling issue – would have prospective application only, and Koppel requested the Court to not reverse the judgment of dismissal, which, again, was not stated to be in error. The motion was denied, and Koppel petitioned to this Court for review.

SUMMARY OF ARGUMENT

Koppel's position is, foremost, that the trial court did not err – it followed the controlling law, which was clearly *Goldy*, and her acceptance of Ochoa's proposal was timely and effective to settle the case. Koppel's ultimate interest in this appellate proceeding is to uphold the judgment of dismissal of the lawsuit against her, and that any change in the law should be applied prospectively only.

The Second District found a problem with *Goldy* after that case stood apparently unquestioned for 19 years. Koppel recognizes that it is the prerogative of the Second District to disagree with the merits of *Goldy*. But the merits of *Goldy* were not a matter for discussion in the trial court when Koppel filed her Rule 1.090(b) motion, nor was it the trial court's prerogative to disregard *Goldy*. Koppel should not be the first person subjected to the new "no tolling" rule of the Second District, which has been imposed upon her without notice. Rule changes made by this Court are established with future effective dates, so that litigants are given notice of upcoming changes. Ms. Koppel asks this Court to afford her that same measure of due process.

The important exception to the general rule – that appellate changes in the law are applied to current litigants – applies here. Koppel acquired important legal rights on the basis of the former law, *i.e.*, the settlement of the lawsuit against her. She now faces the prospect of greater financial liability, and Koppel asks this Court to correct that injustice by applying any change in the law prospectively only, and to quash that part of the Second District's decision that reversed the judgment of dismissal.

Counsel for the parties both understand the issues for this Court are much broader than those of the litigants here. Koppel's position is this: *Goldy* is a better rule than the one announced by *Ochoa*, and *Goldy* should be approved and

incorporated into Florida Rule of Civil Procedure 1.442. Neither this Court, The Florida Bar, any district court, nor the Legislature has criticized or disturbed the tolling effect of *Goldy* in the 19 years since it was issued. *Goldy* has been left undisturbed in multiple cycles of Rule amendments, and in years of opportunities for the Legislature to respond to *Goldy*. A review of citations in Westlaw to *Goldy* show no judicial or commentator criticism of *Goldy*. There is no documentation found of any harm whatsoever arising from the *Goldy* rule.

Respondent recognizes that important principles exist on both sides of this argument. But, on balance, that conflict in considerations should give way to recognized purpose of the Florida Rules of Civil Procedure, to secure the just, speedy, and inexpensive determination of every action, and to further justice. The effects of the *Goldy* "tolling rule" are benign and consistent with these purposes; the effects of the *Ochoa* "no-tolling" rule are pernicious, as it creates both an opportunity and an incentive for an offeror to reveal new evidence in tandem with a proposal for settlement with a "hard" 30-day time period. A "hard" 30-day window curtails the offeree's opportunity to take discovery or assess the bona fides of the new evidence. By contrast, the *Goldy* rule precludes this unfair litigation practice, which was attempted in this very case. And so, this Court should approve *Goldy*, disapprove *Ochoa*, and quash the Second District's decision. Should the Court approve of neither, it should consider the thoughtful

approach suggested by commentators Berman & Webster discussed below, which provides a third path to resolution. In any event, the judgment of dismissal should be reinstated, and the settlement of the Ochoa-Koppel lawsuit upheld. Koppel could have acted differently in September, 2013, if the controlling law at that time not provided a tolling effect to a pending motion to enlarge time to accept a proposal for settlement. But the after-the-fact rewriting of the rule, or the controlling interpretation of the rule, has unfairly denied Ms. Koppel that opportunity.

STANDARD OF REVIEW

The "proper interpretation" of the Florida Rules of Civil Procedure requires a review *de novo*. *Strax Rejuvenation & Aesthetics Inst., Inc. v. Shield*, 49 So. 3d 741, 742 (Fla. 2010) (citing *Saia Motor Freight Line, Inc. v. Reid*, 930 So. 2d 598, 599 (Fla. 2006)). This Court stated, in *Strax*, that "[t]he general guide to construction of the procedural rules is set forth in Florida Rule of Civil Procedure 1.010, which states that the rules 'shall be construed to secure the just, speedy, and inexpensive determination of every action.' " 49 So. 3d at 742 (quoting *Barco v. Sch. Bd. of Pinellas Cnty.*, 975 So.2d 1116, 1123 (Fla.2008), and *Singletary v. State*, 322 So. 2d 551, 555 (Fla. 1975) ("Procedural rules should be given a construction calculated to further justice, not to frustrate it.")).

While courts apply contract principles to proposals for settlement, *see, e.g*, *Kendel v. Pontious*, 261 So. 2d 167, 170 (Fla. 1972), proposals for settlement are not purely private contracts. They are contracts created by the Legislature (section 768.79) and regulated by the Courts (Rule 1.442).[5] While an offeror may be the "master of the offer" in the realm of purely private contracts, the 30-day acceptance period for proposals for settlement is not absolute.

The proposal for settlement statute is contrary to the common-law American Rule of fees, and thus is strictly construed to limit fee awards under the statute – not to further limit the common law rule. The strict construction of Section 768.79 and Rule 1.442 will "apply only when there has been a rejection of a proposal for settlement and the case goes to trial resulting in a judgment." *Baratta v. Bradford Elec., Inc.*, 9 So. 3d 694, 696 (Fla. 4th DCA 2009). For this reason, "neither section 768.79 nor rule 1.442 prevents an offeree from actually accepting an untimely offer and avoiding trial. Rather, it merely prevents the offer from later serving as a basis for an award of costs and attorney's fees under the statute." *Id.*

The Second District went beyond this intended purpose behind the 30-day deadline to undo the settlement between Koppel and Ochoa. Because this case is

[5] Rule 1.442 supersedes section 768.79 on all procedural aspects. *See The Florida Bar Re Amendment to Rules of Civil Procedure, Rule 1.442 (Offer of Judgment)*, 550 So. 2d 442, 443 (Fla. 1989).

about enforcing a settlement, and not about entitlement to fees in derogation of the common-law American Rule, the *Ochoa* court should not have strictly construed the 30-day deadline for accepting a proposal for settlement.

ARGUMENT

I

The trial court did not err in this case: *Goldy* was the controlling law as to the effect of Koppel's timely-filed Rule 1.090(b) motion to extend time to accept Ochoa's proposal.

The Fifth District construed Rule 1.090(b) as follows: "[A] motion to enlarge the period within which to respond to an Offer of Judgment . . . effectively toll[s] the responsive period provided that the motion is filed before the period had otherwise expired." *Goldy v. Corbett Crane Serv., Inc.*, 692 So. 2d 225, 228 (Fla. 5th DCA 1997).

A. The tolling rule of *Goldy* is based on sound judicial principles.

In *Goldy*, the offeree timely filed (*i.e.*, before the time to accept had expired) a Rule 1.090(b) motion to enlarge the 30-day period in which to accept the offeror's proposal for settlement. The Fifth District recognized that Rule 1.090(b) applies to the time to accept a proposal for settlement, citing *Schmidt v. Fortner*, 629 So. 2d 1036, 1038 n. 3 (Fla. 4th DCA 1993) ("Because the time for responding to an offer of judgment under section 768.79 is now governed by

Rule 1.442, there is no reason why Rule 1.090(b) would not authorize the enlargement of the prescribed period of time to respond to an offer or demand for judgment.").

The Fifth District found no direct authority regarding whether that motion "toll[ed] the responsive period pending a ruling on the motion." *Id.* at 228. Indeed, "Rule 1.090 provides no insight into the procedural effect of the mere service, prior to expiration, of a motion to enlarge a time period." Bruce J. Berman & Peter D. Webster, *Berman's Florida Civil Procedure* § 1.090:12 (Apr. 2016) update. The Fifth District thereafter analyzed case precedent involving other types of "time periods which are to be strictly construed," and found "courts have frequently indicated that a motion to enlarge time filed prior to the expiration of the time to be enlarged effectively extends the subject period beyond its prescribed deadline pending a ruling on the motion." *Goldy*, 692 So. 2d at 228.

The Fifth District, in *Goldy*, found that "[i]t seems logical then to conclude that a motion to enlarge the period within which to respond to an Offer of Judgment would effectively toll the responsive period provided that the motion is filed before the period had otherwise expired." *Id.*

B. The tolling rule of *Goldy* has stood unquestioned since 1997.

Goldy was issued in 1997. Since then, neither this Court, nor the Legislature, has disturbed *Goldy* and the tolling effect of a timely-filed Rule 1.090(b) motion on the 30-day period to accept a proposal for settlement. Since 1997, this Court has amended Rule 1.090 (twice, in 1992 and 2012), and Rule 1.442 (three times, in 2000, 2012, and 2013), without addressing the *Goldy* "tolling effect." The Legislature – presumed to know *Goldy* and its tolling effect on the 30-day period established by section 768.79 – never amended the statute to negate *Goldy*.

Indeed, this tolling effect has found widespread acceptance, and was apparently generally understood to be the law by legal commentators, given the absence of any negative case law. *Cf.* Henry P. Trawick, Jr., *Trawick's Florida Practice and Procedure*, § 16:13 (2016-2017 ed.) (discussing tolling effect of service of the motion for protective order); *and see* Berman & Webster, *supra*, § 1.090:12 ("There is authority that concludes that the mere filing of a motion to enlarge time suspends the expiration of the period until the entry of an order on the motion." (*citing Pinnacle Corp. of Cent. Fla., Inc. v. R.L. Jernigan Sandblasting & Painting, Inc*., 718 So. 2d 1265 (Fla. 2d DCA 1998); *Coggan v. Coggan*, 161 So. 2d 550, 552 (Fla. 2d DCA 1964); and *Goldy*)). No District

Court of Appeal, until the Second District in this case – *Ochoa v. Koppel*, 197 So. 3d 83 (2016) – has held there is no tolling effect of a timely-filed Rule 1.090(b) motion.

C. Rule 1.090(b) authorizes a trial court to extend the offeree's time to accept a proposal for settlement.

Rule 1.090(b) authorizes a party to request, and a court to grant, an extension of time for any act "required or allowed to be done at or within a specified time by . . . these rules, or by notice given thereunder." The time to accept a proposal is governed by Rule 1.442(f). Rule 1.090(b)(2) enumerates six exceptions to its application, none of which involves a proposal for settlement or Rule 1.442. It is reasonable to infer that this Court did not intend to exclude proposals for settlement from the scope of Rule 1.090(b). *See D.M.T. v. T.M.H.*, 129 So. 3d 320, 333 (Fla. 2013) ("Under the canon of statutory construction *expressio unius est exclusio alterius*, the mention of one thing implies the exclusion of another."). Consequently, the plain language of Rule 1.090(b) authorizes an offeree to move for, and the trial court to grant, an extension of time to accept a proposal for settlement. The rules are silent as to whether such a motion tolls time.

The point that Koppel seeks to make here is that the 30-day period set out in section 768.79, and regulated by Rule 1.442, is not an absolute deadline. That 30-day period is subject to judicial control, and is not totally under the control of

the offeror – it is not a private contract. It is a creature of statute and subject to the court's power to alter the time to accept.

Rule 1.442(f) (requiring acceptance within 30 days) lists Florida Rule of Judicial Procedure 2.514(b) as an exception. Rule 2.514(b) allows an additional 5 days after service. This specific exception requires the inference that all other rules of civil procedure, such as Rule 1.090(b), (relating to "computation of time") do apply. "[R]elated statutory provisions must be read together to achieve a consistent whole, and . . . '[w]here possible, courts must give full effect to all statutory provisions and construe related statutory provisions in harmony with one another.'" *Larimore v. State*, 2 So. 3d 101, 106 (Fla. 2009). This means, for example, that the 30-day period to accept is subject to the "holiday" tolling rule set forth in Florida Rule of Judicial Administration 2.514(a)(1)(C); the tolling "prisoner mailbox" rule from cases like *Scullock v. Gee*, 133 So. 3d 1208, 1208 (Fla. 2d DCA 2014) (mem.); and any emergency rule issued by this Court pursuant to Florida Rule of Judicial Administration 2.205(a)(2)(B)(iv). Thus, there is nothing sacrosanct about the 30-day time period in section 768.79 or Rule 1.442.

II

The Second District's *Ochoa* opinion plainly makes new law, and this new law explicitly conflicts with *Goldy* – thus this Court has the jurisdiction to act.

The Second District in *Ochoa*, expressly certified conflict with the Fifth District's *Goldy* decision stating: "We hold that the filing of a motion to enlarge time to respond to a proposal for settlement does not automatically toll the time pending a decision on the motion. Accordingly, we reverse the final judgment, remand for further proceedings consistent with this opinion, and certify conflict with *Goldy*." *Ochoa*, 197 So. 3d at 83-84.

Trial courts within the jurisdiction of the Second District are bound by *Ochoa*, and they will not apply a tolling effect to a timely-filed Rule 1.090(b) motion to extend the 30-day period to accept a proposal for settlement.
By contrast, the trial courts within the jurisdiction of the Fifth District will apply a tolling effect to such a motion, because under *Goldy*, such a motion "effectively extends the subject period beyond its prescribed deadline pending a ruling on the motion." *Goldy*, 692 So. 2d at 228. The conflict between *Goldy* and *Ochoa* is both expressed and clear.

A. *Goldy* is not limited to Rule 1.090(b) extension motions that are granted.

Respondent's jurisdictional argument – which Koppel anticipates may be repeated in its answer brief to this Court – was that *Goldy* and *Ochoa* do not

conflict. (Respondent's Jurisdictional Br. 3-5.) Respondent attempted to distinguish these two cases (seeking to resolve the expressed conflict) arguing that the *Goldy* tolling effect is limited to motions for enlargement of time that are granted. First, this argument is incorrect because the Fifth District never restricted its tolling effect to motions that are granted. Under *Goldy*, even motions for enlargement that are denied will toll the time to accept the proposal up until the moment of entry of an order denying the motion to enlarge time. This was clear from Judge Griffin's dissent in *Goldy* – that even motions to extend that were denied would still provide the offeree an extension. Moreover, Respondent's argument was implicitly rejected by the Second District in *Ochoa*, where even timely-filed motions to extend the 30-day period that are granted are not given a tolling effect.

B. The Third District's *Three Lions Constr., Inc. v. Namm Group, Inc.* decision is unhelpful in resolving the issues before this Court.

Three Lions Constr., Inc. v. Namm Group, Inc., 183 So. 3d 1119 (Fla. 3d DCA July 22, 2015) (issued after briefing in the Second District was completed on May 6, 2015) fits with *Donohoe* more than with *Goldy*, but it does not contain an analysis of the issues before this Court. In *Three Lions*, the plaintiff/offeree, Namm Group, sought an extension of time to respond to a proposal for settlement served by defendant/offeror, Three Lions. After filing its Rule 1.090(b) motion,

the plaintiff/offeree Namm Group dismissed its complaint, thereby abandoning its motion to enlarge time. The circuit court denied the offeror's subsequent motion for fees based on the unaccepted proposal. The Third District reversed, ruling that the Rule 1.090(b) motion did not toll the 30-day time to accept beyond the dismissal date because the offeror had not agreed to the motion, and the offeree did not obtain a hearing on the motion prior to the expiration of the 30-day deadline to accept. The *Three Lions* decision appears to be somewhat consistent with the *Ochoa* decision, but it does not declare a conflict with *Goldy* - nor does *Three Lions* even mention the *Goldy* decision.

III

The trial court did not err because it was bound by *Goldy*, which was the only law controlling the effect of Koppel's timely-filed Rule 1.090(b) motion to extend time to accept Ochoa's proposal.

The Second District in reversing the judgment for Koppel, did not find or rule that the trial court had erred by following *Goldy*, or by enforcing the settlement and dismissing the case. The trial court here had no option but to abide *Goldy*. *Goldy* was the sole law governing whether Koppel's timely-filed Rule 1.090(b) motion tolled the time to accept the proposal. Koppel urges this Court to preserve the ruling and the judgment, no matter how it resolves the tolling issue for future cases.

This point is most important to Koppel because she relied on controlling law when she moved for an extension of time to respond to Ochoa's proposal for settlement. Koppel asks this Court to rule that, if approved, the Second District's new rule should not be applied retroactively against Koppel, who relied on good law, and in doing so, acquired an important legal right (settlement of the case against her) that will be lost if she is becomes the first litigant to whom the new *Ochoa* rule is applied.

A. *Goldy* was the law controlling the tolling effect of Koppel's motion to enlarge time.

The Fifth District Court of Appeal, like all of Florida's district courts, is a "court of last resort." When this Court revised Rule 9.030 in 1980, modifying its appellate, discretionary, and original jurisdiction, the district courts of appeal became the "courts of last resort for the vast majority of litigants under amended article V." Fla. R. App. P. 9.030, Comm. N., 1980 Amend. These Committee Notes explain:

> **1980 Amendment.** Subdivision (a) of this rule has been extensively revised to reflect the constitutional modifications in the supreme court's jurisdiction as approved by the electorate on March 11, 1980. See art. V, § 3(b), Fla. Const. (1980). The impetus for these modifications was a burgeoning caseload and the attendant need to make more efficient use of limited appellate resources. Consistent with this purpose, revised subdivision (a) limits the supreme court's appellate, discretionary, and original jurisdiction to cases that substantially affect the law of the state. <u>The district courts of appeal will constitute the courts of last resort for the vast majority of litigants under amended article V.</u>

(Underlining added.)

Koppel relied on the tolling effect of the *Goldy* decision of the Fifth District, a court of last resort, when she timely filed her motion to enlarge time to accept Ochoa's proposal for settlement. The trial court in Pinellas County was bound by the Fifth District's *Goldy* opinion because, again, the Fifth District is one of Florida's five "courts of last resort." *Gore v. Harris*, 772 So. 2d 1243, 1258 (Fla.) (stating that "[t]his Court has determined the decisions of the district courts of appeal represent the law of this State unless and until they are overruled by this Court, and therefore, in the absence of interdistrict conflict, district court decisions bind all Florida trial courts"), *rev'd on other grounds,* 531 U.S. 98 (2000). *See Johns v. Wainwright*, 253 So. 2d 873 (Fla. 1971). The "decisions of the district courts of appeal represent the law of Florida unless and until they are overruled by this Court." *See also Ansin v. Thurston*, 101 So. 2d 808, 810 (Fla. 1958) ("It was never intended that the district courts of appeal should be intermediate courts."); *see generally* John M. Scheb, *Florida's Courts of Appeal: Intermediate Courts Become Final*, 13 Stetson L. Rev. 479 (1984) (cited in Justice Well's concurrence in *Bunkley v. State*, 882 So. 2d 890 (Fla. 2004).

B. Because there was no other applicable law, the trial court did not err in abiding *Goldy's* tolling rule.

Until the *Ochoa* decision was issued, *Goldy* was controlling law of the trial courts within the Second District on the point in question in this case. "The decisions of the district courts of appeal represent the law of Florida unless and until they are overruled by this Court." *Pardo v. State*, 596 So. 2d 665, 666 (Fla. 1992) (citing *Stanfill v. State*, 384 So. 2d 141, 143 (Fla. 1980)). "Thus, in the absence of interdistrict conflict, district court decisions bind all Florida trial courts." *Pardo*, 596 So. 2d at 666. Because the Fifth District's *Goldy* decision did not conflict with any case of the Second District when the trial court enforced Koppel's acceptance of Ochoa's proposal for settlement, *Goldy* was the "law of Florida" for the trial court in this case.

The Second District's *Pinnacle* and *Donohoe* decisions did not conflict with *Goldy*, or require a different result. The Second District said in *Ochoa* that its reference to the *Goldy* case in its *Pinnacle* decision was only "dictum." The Second District said in *Ochoa* that its *Donohoe* decision had rejected "the defendant's argument" that the motion had a tolling effect, finding that *Goldy* was "distinguishable." *Ochoa*, 197 So. 3d at 82.

Both the Fifth and Second Districts described their respective opinions as cases of first impression. *See Goldy*, 692 So. 2d at 228 ("Neither party has offered nor has the Court been able to locate any direct authority regarding whether a

motion to enlarge the time within which to respond to an Offer of Judgment, filed prior to the expiration of the *period*, tolls the responsive period pending a ruling on the motion."); and *see Ochoa*, 197 So. 3d at 82 ("Neither *Pinnacle* nor *Donohoe* held that *Goldy* represented the law of this district. Nor did either case analyze the validity of its reasoning. We now do so for the first time, and we respectfully disagree with our sister court."). The Second District's conflict with *Goldy* was declared in *Ochoa*, and never before.

IV

The Second District's *Ochoa* decision, if approved, should be applied prospectively only. Application of the new *Ochoa* rule retroactively to Koppel would unfairly destroy a valuable contract right she acquired in relying on *Goldy*.

Koppel relied on the then-controlling authority in the Second District, *i.e.*, *Goldy*, to toll the time she had to accept the Ochoa's proposal. Because of that extra time, she was able to acquire a valuable contract right, the settlement of Ochoa's lawsuit against her. Although appellate decisions generally have retroactive application, an exception exists where contract rights acquired on the basis of the former rule, would be destroyed. Because Koppel relied on then-existing law and acquired a valuable contract right, the new rule announced by the Second District in *Ochoa* should not be applied retroactively.

A. Koppel acquired a very valuable contract right – the settlement of the claim against her – by relying on the tolling rule of *Goldy.*

When Koppel accepted Ochoa's proposal, *Goldy* was the law, and her acceptance of the proposal, approximately 90 days later, created a binding contract under that law. *Jamieson v. Kurland,* 819 So. 2d 267, 268 (Fla. 2d DCA 2002) ("A proposal for settlement is in the nature of a contract."). If this Court were to approve and retroactively apply the new "no tolling" rule of *Ochoa*, this Court would nullify Koppel's acceptance of Ochoa's proposal for settlement, and reverse the dismissal of Ochoa's case against Koppel.

"[S]ettlement agreements are contractual in nature, they are interpreted and governed by contract law." *Barone v. Rogers,* 930 So. 2d 761, 763–64 (Fla. 4th DCA 2006). Both parties agree that a proposal for settlement is a form of contract. (*See* Respondent's Initial Brief 15 (citing *Campbell v. Goldman,* 959 So. 2d 223, 225-226 (Fla. 2007)).

The rules governing the application of appellate decisions that change existing law are stated in *Florida Forest & Park Serv. v. Strickland,* 18 So. 2d 251 (Fla. 1944). Koppel understands that unless an appellate court states otherwise, its decision is given both retrospective and prospective application.

> Ordinarily, a decision of a court of last resort overruling a former decision is retrospective as well as prospective in its operation, unless specifically declared by the opinion to have a prospective effect only. Generally speaking, therefore, a judicial construction of a statute will

> ordinarily be deemed to relate back to the enactment of the statute, much as though the overruling decision had been originally embodied therein.

Strickland, 18 So. 2d at 253. Because the Second District did not restrict the application of its decision to future cases only, it applies retroactively to Koppel's case.

B. An appellate court's change in the law will not be applied retroactively if it would destroy an important legal right acquired under the former law.

But there is an important exception to general rule of retroactive application. When a party acquires contract rights in reliance on then-controlling law, the new decision will be given application prospectively only.

> To this rule, however, there is a certain well-recognized exception that where a statute has received a given construction by a court of supreme jurisdiction and property or contract rights have been acquired under and in accordance with such construction, such rights should not be destroyed by giving to a subsequent overruling decision a retrospective operation.

Strickland, 18 So. 2d at 253 (emphasis added).

The exception to the rule of retroactive application applies when a party has taken a course of action in reliance on the prior rule:

> Based upon a recognition of this commonsense exception to the rule, some of the courts have gone so far as to adopt the view that the rights, positions, and courses of action of parties who have acted in conformity with, and in reliance upon, the construction given by a court of final decision to a statute should not be impaired or abridged by reason of a change in judicial construction of the same statute

> made by a subsequent decision of the same court overruling its former decision.

Strickland, 18 So. 2d at 253 (emphasis added).

Here, Koppel took a course of action consistent with the rule of *Goldy*, and in reliance on this binding precedent, she acquired a substantial legal right – the settlement of Ochoa's lawsuit against her. This right was recognized by the trial court, which enforced the settlement and dismissed the case against Koppel. The acceptance was effective, and the case was dismissed, because Koppel took a course of action based on the then-controlling precedent, *Goldy*.

C. The *Strickland* exception to retroactive application applies in this case.

Rule 1.090 had "received a given construction by a court of supreme jurisdiction," (*i.e.*, the Fifth District in *Goldy*), "and property or contract rights," (*i.e.*, the benefit to Koppel of a settlement agreement) "have been acquired under and in accordance with such construction . . . ." As this Court held in *Strickland*, in these circumstances "such rights should not be destroyed by giving to a subsequent overruling decision a retrospective operation." 18 So. 2d at 253. *Ochoa* is an "overruling decision," and it should be given "a prospective operation only, in the same manner as though the new construction had been added to the statute by legislative amendment." *Id.*

D. If this Court were to approve *Ochoa*, then it should act prospectively only.

Three district court decisions that overruled a prior decision illustrate why the new *Ochoa* rule, if approved, should be applied prospectively only.

The first case is *Aronson v. Congregation Temple De Hirsch, of Seattle, Washington*, 123 So. 2d 408 (Fla. 3d DCA 1960), which dealt with the application of a change in appellate rules governing the time to file an appeal in a probate matter, reducing the time from 60 to 30 days. The court held that its

> construction of the applicable rules and statute to provide for a 30-day appeal period for such appeals, as announced in the [overruling decision] will not operate retroactively in other cases, but shall operate prospectively from . . . . the date of the publication of the report of [in the overruling decision].

123 So. 2d at 410. The *Aronson* court noted that:

> [p]rior to [the date of the overruling order] the Bench and Bar of Florida, and proper[l]y so, were entitled to rely and act on the basis of the previously accepted construction of the appellate rules and statutes, as applicable to orders and decrees from county judge's courts in probate matters, for appeals to be taken within 60 days after their rendition. Only after our different construction thereof in the [overruling] case did it become otherwise.

Id.

Similarly here, "the Bench and Bar of Florida, and properly so, were entitled to rely and act on the basis of the previously accepted construction" articulated in *Goldy*. The *Ochoa* decision should be given prospective effect only.

The second case is *Intl. Studio Apt. Ass'n, Inc. v. Lockwood*, 421 So. 2d 1119, 1121 (Fla. 4th DCA 1982). There, the Fourth District looked to federal precedent, *Chevron Oil Company v. Huson*, 404 U.S. 97, 106 (1971), to guide application of a three-phase test to determine whether a decision should have retroactive effect. The three-phase test is as follows:

- Does the decision to be applied nonretroactively establish a new principle of law by overruling clear past precedent on which litigants may have relied?
- Does retrospective operation further or retard operation of the new rule?
- Does the new decision produce substantial inequitable results if applied retroactively?

Lockwood, 421 So. 2d at 1121. Analysis of the *Ochoa v. Koppel* opinion meets all three tests to apply the new rule only prospectively.

- The opinion establishes a new rule of law, as it overrules, in the Second District, past clear precedent, i.e., *Goldy*, which was binding on the lower tribunal.
- Prospective application of the new rule announced by the Second District will not retard its future operation.

- By applying the new rule prospectively only, this Court will avoid the injustice of destroying Koppel's legal or contract rights, and it will respect the prior precedential value of *Goldy*.

The third case is *Green Tree Servicing, LLC v. McLeod*, 15 So. 3d 682 (Fla. 2d DCA 2009) (en banc), where the court analyzed whether to apply a change in the law retroactively, or prospectively only. The court's task was to reconcile its position with that of other district courts of appeal as to whether propounding discovery in the course of litigation constituted a waiver of a contractual right to arbitrate a claim. The Second District announced a new rule in *Green Tree*, receding from its prior holding that held such discovery did not constitute a waiver. *Id.* at 694.

At the conclusion of its opinion, this Court analyzed and decided whether the application of the new rule it was announcing in would be unfair to the appellant, Green Tree. *Id.* at 694-95.

> The dispositive factor on this issue is the statement made by Green Tree's counsel at the hearing on its renewed motion to stay discovery. At the hearing on this motion – held before Green Tree had propounded its merits – related discovery requests – Green Tree's counsel acknowledged that its participation in any discovery related to the merits of the case would result in a waiver of its right to arbitration. Thus Green Tree did not rely to its detriment on our *Merrill Lynch* decision in serving its merits – related discovery requests on Mrs. McLeod. On the contrary, Green Tree's understanding of the law on this subject was in accord with the rule that we adopt today. Accordingly, the application of this rule to Green Tree's conduct in this case is not unfair to Green Tree.

Id. at 694-95 (emphasis added).

This case is unlike *Green Tree* because Koppel did rely on the prior rule, a rule that was overturned within the Second District. This Court – should it approve the *Ochoa* decision, should rule that its operation is prospective only, as Koppel falls within the *Strickland* exception to the general rule. Koppel could have acted differently in September, 2013, if the controlling law at that time not provided a tolling effect to a pending motion to enlarge time to accept a proposal for settlement. But the after-the-fact rewriting of the rule, or the controlling interpretation of the rule, has unfairly denied Ms. Koppel that opportunity.

V

Tolling is the better rule as to proposals for settlement, and it should be specifically incorporated into Florida Rule of Civil Procedure 1.442.

This Court should approve *Goldy* and codify the automatic tolling rule into Rule 1.442 because *Goldy*'s approach is consistent with the goals behind the Florida Rules of Civil Procedure and the public policy in favor of settlements. The Court should disapprove *Ochoa* because it creates opportunities for unfair litigation tactics by offerors, and imposes burdens on offerees and trial courts that are inconsistent with both the goals of the rules of procedure and the public policy favoring settlement. In the alternative, should the Court reject both *Goldy* and

Ochoa, the Court should adopt a third approach that "provide[s] an automatic tolling effect upon pre-deadline service of motions, but only if the motions affirmatively establish the movant's inability, after good faith effort, to obtain a pre-expiration court hearing or consensual extension." Berman & Webster, *supra*, § 1.090:12 n.3.

A. The current rules and case law regarding the tolling effect of motions are inconsistent.

Under the current rules governing civil cases, the tolling effect of motions is different before this Court, the district courts, and the trial courts throughout the state. The rules provide that motions filed in this Court do not automatically toll any times "unless accompanied by a separate request to toll time." Fla. R. App. P. 9.300(d)(13). By contrast, most motions filed in the district courts (with the exception of 12 enumerated motions) automatically "toll the time schedule of any proceeding in the court until disposition of the motion." Fla. R. App. P. 9.300(b). The rules are silent as to the tolling effect of any motions filed in the trial courts. *See* Fla. R. Civ. P. 1.090; Fla. R. Jud. Admin. 2.514.

But a conflicting body of case law has developed to fill this gap in the procedural rules applicable in the trial courts. One line of cases supports the proposition that timely motions for extensions of procedural deadlines effectively tolls the response time if the motion is filed before the expiration of the deadline. *E.g.*, *Pinnacle*, 718 So. 2d at 1266 (deadline to file answer to a complaint); *Goldy*,

692 So. 2d at 228 (deadline to accept a proposal for settlement). Because of court congestion, no other procedure can effectively protect the rights of the parties when new information is disclosed during the pendency of the proposal for settlement. *Cf.* Trawick, *supra*, § 16:13 ("Service of the motion [for protective order] suspends discovery until the motion is determined. Due to court congestion and short notice for discovery, no other procedure can effectively protect the rights of all parties.").

Another line of cases supports the opposite proposition that a motion for extension of time does not automatically toll the deadline at issue. *E.g.*, *Ochoa*, 197 So. 3d at 81; *Three Lions*, 183 So. 3d at 1120. Florida courts have also held that a motion for protective order does not automatically stay a scheduled deposition. *Momenah v. Ammache*, 616 So. 2d 121, 123-24 (Fla. 2d DCA 1993); *Stables v. Rivers*, 559 So. 2d 440, 440 (Fla. 1st DCA 1990). The reason for this alternative approach appears to be that "[t]he existence of such a tolling effect could certainly provide a tool for abuse, by the regular service of a motion without setting it for hearing (or worse, setting it for hearing weeks into the future), and thus unilaterally obtaining what could be a material delay in the proceedings and inconvenience to other parties in the action." Berman & Webster, *supra*, § 1.090:12.

B. This Court should adopt *Goldy's* tolling rule, which has been in effect as to proposals for settlement for almost 20 years with no ill effect.

This Court should adopt *Goldy*'s tolling rule because it furthers the goals of the Florida Rules of Civil Procedure and the public policy in favor of settlement. Florida law is clear that the rules of procedure "shall be construed to secure the just, speedy, and inexpensive determination of every action." Fla. R. Civ. P. 1.010 (emphasis added).

The automatic tolling under *Goldy* furthers the "just . . . determination of every action" because it places offerees throughout the state on an equal footing: an offeree in Miami-Dade County will not be disadvantaged by having to secure scarce hearing time (because of court congestion) that would be easily available to an offeree in Monroe County. Moreover, automatic tolling is fair to both parties, while the *Ochoa* "no-tolling" rule creates opportunities for unfair gamesmanship by offerors (and not offerees), a topic that is addressed in subsection C below.

The *Goldy* rule furthers the "speedy . . . determination of every action" because it does not force the offeree to obtain scarce hearing time on an emergency or time-sensitive basis within the 30-day acceptance period for an "*Ochoa* hearing," *i.e.*, where the offeree seeks an order (which must be entered within the 30-day period) extending the time to accept. These "*Ochoa* hearings" will displace time available for other cases on the court's docket. Thus, these

time-sensitive "*Ochoa* hearings" will contribute to delay in *other cases*, contrary to the goal of a "speedy . . . determination of *every* action."

The *Goldy* tolling rule is consistent with "[t]he public policy of the State of Florida, as articulated in numerous court decisions, [which] highly favors settlement agreements among parties and will seek to enforce them whenever possible." *Sun Microsystems of Cal., Inc. v. Eng'g & Mfg. Sys., C.A.*, 682 So. 2d 219, 220 (Fla. 3d DCA 1996). *Goldy*'s rule promotes settlement in those circumstances when the offeree – for some valid reason – lacks sufficient information to assess a proposal for settlement. What is a "valid reason" should be a subject for the trial court's discretion. The offeree should not be penalized for an inability to secure a ruling within the 30-day period, and stuck with a choice between (a) accepting an offer with insufficient time to assess its value; or (b) rejecting it in order to conduct discovery as to that new evidence, and risking what could be a crippling financial liability if the trial goes badly.

For these reasons, the *Goldy* rule is consistent with the goals of Rule 1.010 and the public policy in favor of settlement.

C. The tolling rule of *Goldy* is benign: The concerns expressed by the dissent in *Goldy* never materialized in the nearly two decades between *Goldy* and *Ochoa*.

The tolling rule of *Goldy* provides an offeree an automatic extension of time until the court rules on the motion to enlarge time to accept the proposal,

just as appellate motions do in district court practice. That automatic tolling may amount to perhaps an extra 30 or 60 days (as was the case here), until one of the parties gets the matter set for hearing and the Court can issue a ruling. The measure of harm – if any - from the *Goldy* tolling rule to the offeror is this:

- If the offer is accepted, the offeror's fees incurred in the extra 30 or 60 days will be expended but not be recovered; but the case will be settled at the dollar point set by the offeror.
- If the offer is rejected, the offeror loses nothing, as all the offeree's fees will be recoverable if the offeror "beats" the proposal after a trial.

So the *Goldy* tolling rule has an overall benign effect; there is no substantial harm to the offeror. And the offeror here, Koppel, has never alleged or documented any harm whatsoever from the enforcement of the settlement at a dollar point that she herself proposed.

The *Goldy* dissent feared that "[i]f the filing of the motion to extend prevents expiration, the offeree will likely always file one since there is no downside to doing so." *Goldy*, 692 So. 2d at 229 (Griffin, J., concurring in part, dissenting in part). But neither the parties to this case nor the Second District have documented abuses of the *Goldy* tolling rule. Neither the parties nor the Second District cite to any legal commentary that was critical of the *Goldy* tolling

rule. In fact, it appears the *Goldy* tolling rule has been generally accepted by such sources.

D. The "no-tolling" rule of *Ochoa* creates pernicious effects.

The *Ochoa* "no-tolling" rule can be unfair to offerees because it creates the opportunity and incentive for the offeror to reveal new evidence, and serve a proposal simultaneously, a strategy that curtails the offeree's opportunity to conduct discovery and assess that new evidence. Also, the "no-tolling" rule is even more unfair to offerees in congested circuits where hearing time within less than 30 days is difficult to obtain, and where setting a hearing within the 30-day period is subject to intentional delay tactics by the offeror.

Here, Ochoa served a proposal for settlement, and seven days later, served amended discovery response revealing new medical information that likely changed the valuation of Ochoa's case. (*See* R1. 59.) Koppel had only 23 days left, before the 30-day acceptance window closed, to conduct discovery and assess the new information. The *Ochoa* "no-tolling" rule creates an incentive for offerors to simultaneously reveal new evidence, and serve a proposal for settlement with a "hard" 30-day deadline, to keep the offeree from looking too closely at that new evidence. The offeree has the option to accept the offer without full opportunity to assess the new evidence, or to reject the offer in order to conduct discovery, but then, they take their chances with the result at trial.

This Court recognizes that certain circuit court cases are taking longer to dispose of cases due to a variety of reasons. *In re Certification of Need for Additional Judges*, No. SC16-2127, 2016 WL 7242657 (Fla. Dec. 15, 2016). The *Ochoa* "no-tolling" rule puts offerees in highly-congested courts at an unfair disadvantage. For example, offerees in Hillsborough County may not be able to set a hearing or obtain a ruling before the deadline for acceptance. But offerees in Pasco County or Hardee County may be able to do so.

E. This Court's decision as to tolling should be guided by the equities, not technical rules of interpretation.

This Court should not follow the Second District's strictly technical approach because that approach disregards the potential for inequitable results. In particular, the Second District rejected the *Goldy* rule because it seemed "more like a revision of the rules to meet the perceived equities of a case—here, the protection of a party with a sincere desire to settle—than it does an exercise in determining what the rules actually authorize and what they do not." *Ochoa*, 197 So. 3d at 82. But Florida law is clear that "[p]rocedural rules should be given a construction calculated to further justice, not to frustrate it." *Singletary v. State*, 322 So. 2d 551, 555 (Fla. 1975). The Florida Rules of Civil Procedure " 'should never be permitted to become so technical, fossilized and antiquated that they obscure the justice of the cause and lead to results that bring its administration into disrepute.' " *Miller v. Fortune Ins. Co.*, 484 So. 2d 1221, 1224 (Fla. 1986)

(quoting *Sundell v. State*, 354 So. 2d 409, 410 (Fla. 3d DCA 1978)). So the goals of "just, speedy, and inexpensive determination of every action" constitute the general guide when interpreting the rules of procedure. *Strax*, 49 So. 3d at 742. In other words, the rules of procedure should be interpreted to avoid "an inequitable result." *Miller*, 484 So. 2d at 1224. This means that, contrary to the Second District's position, "the perceived equities of a case" do matter, and in fact, are paramount.

For all of these reasons, this Court should disapprove the Second District's decision in *Ochoa*.

F. In the alternative, this Court should adopt the "Berman & Webster Rule" that charts a middle path between *Goldy* and *Ochoa*.

Two commentators have suggested a third approach. Berman & Webster, *supra*, § 1.090:12 n.3. Under this approach, the rules would "provide an automatic tolling effect upon pre-deadline service of motions, but only if the motions affirmatively establish the movant's inability, after good faith effort, to obtain a pre-expiration court hearing or consensual extension." *Id.* This means that the offeree would have to make a good faith effort to obtain an agreed extension or to set a hearing within 30 days of the proposal for settlement. If the offeree cannot obtain an agreement or set a timely hearing, then the motion for extension of time would have to contain a certificate stating that: (1) the movant

has consulted opposing counsel, (2) opposing counsel does not agree to the extension, and (3) despite the offeree's good faith efforts no hearing can be set before the deadline expires. The inclusion of this certificate in a motion for extension of time for accepting a proposal for settlement would then automatically toll the deadline until the court rules on the motion.

This "Berman & Webster Rule" establishes a reasonable framework to address the concerns behind *Goldy* and *Ochoa*. Like the *Goldy* rule, this approach protects parties "with a sincere desire to settle" by providing for automatic tolling in limited circumstances. And, like the *Ochoa* approach, it requires more than "the simple act of putting a piece of paper in the court file" to automatically toll the deadline because the offeree would have to make a good faith effort to obtain an agreed extension or set a hearing within 30 days of the proposal.

The "Berman & Webster Rule" also furthers the goals of Rule 1.010. This approach is fair because, unlike the *Ochoa* approach, it does not put offerees in highly-congested courts at a disadvantage because the deadline would be tolled if no hearing can be set after a good faith effort. Also, unlike the *Ochoa* approach, it does not require that litigants and courts give precedence to time-sensitive "Ochoa hearings," pushing aside other cases on the courts' dockets. This third approach also promotes settlement when a party has a "sincere desire to settle" and a legitimate need for an enlargement of time. The time for acceptance would be

automatically tolled, provided the offeree has made a good faith effort to obtain an agreed extension or set a hearing before the deadline for accepting the proposal.

For all of these reasons, should this Court disapprove of both *Goldy* and *Ochoa*, this Court should adopt the "Berman & Webster Rule" that would "provide an automatic tolling effect upon pre-deadline service of motions, but only if the motions affirmatively establish the movant's inability, after good faith effort, to obtain a pre-expiration court hearing or consensual extension." Berman & Webster, *supra*, § 1.090:12 n.3. In any event, the new rule should be applied prospectively only, the judgment affirmed and Ms. Koppel's settlement preserved.

CONCLUSION

The *Goldy* tolling rule should be approved and incorporated into Rule 1.442. If the *Ochoa* "no-tolling" rule is approved, then it should be applied prospectively only, and the judgment of the trial court in this case affirmed. If this Court should reject both *Goldy* and *Ochoa*, it should consider implementing the "Berman & Webster Rule" as a fair compromise. In any event, the judgment of dismissal, should be reinstated and the Koppel-Ochoa settlement upheld.

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