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**I. STATEMENT OF WHY THIS CASE IS NOT OF PUBLIC OR GREAT GENERAL INTEREST AND DOES NOT INVOLVE A SUBSTANTIAL CONSTITUTIONAL QUESTION**

The predominant issue in this appeal is the secret “Mary Carter agreement” that existed between the other parties to this case prior to and throughout trial. This Court has previously set forth a crystal clear definition of what constitutes a “Mary Carter agreement,”<sup>1</sup> providing the necessary instruction to the courts of this State to properly and accurately identify these agreements. This definition, in no uncertain terms, allows “Mary Carter agreements” to be easily distinguished from other types of arrangements. Therefore, any mention within Appellant’s Memorandum of “high-low agreements” and “other types of verdict contingent agreements,” including an easily distinguishable case from another jurisdiction, are wholly inapplicable to the instant case. As no conflict exists between the Districts,<sup>2</sup> no substantial constitutional question is presented, and this case is not of public or great general interest, this Honorable Court should decline to extend jurisdiction.

The term “Mary Carter agreement” originates from the 1967 Florida case, *Booth v. Mary Carter Paint Co.*<sup>3</sup> It “is a contract between a plaintiff and one defendant allying them against another defendant at trial.”<sup>4</sup> “It arises in tort litigation where a plaintiff sues two or more defendants for the same injury.”<sup>5</sup> This “agreement establishes a ceiling on the settling defendant’s liability,” though the amount that party ultimately

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<sup>1</sup> *Vogel v. Wells* (1991), 57 Ohio St.3d 91, 566 N.E.2d 154.

<sup>2</sup> See Decision and Entry overruling Appellee, Michael Hodesh’s Motion to Certify a Conflict.

<sup>3</sup> *Booth v. Mary Carter Paint Co.*, 202 So.2d 8 (Fla. Dist. Ct. App. 1967).

<sup>4</sup> *Vogel v. Wells* (1991), 57 Ohio St. 3d 91, 93, 566 N.E.2d 154, 157, fn 1, quoting Note, *It’s a Mistake to Tolerate the Mary Carter Agreement* (1987), 87 *Colum.L.Rev.* 368, 369-370.

<sup>5</sup> *Id.*

pays will be determined by the size of the judgment against the non-settling co-defendant.<sup>6</sup>

This Court has explained that “Mary Carter agreements” are “generally characterized by three basic provisions.”<sup>7</sup> At times, there will be a fourth element requiring “that the agreement be kept secret between the settling parties.”<sup>8</sup> Despite Appellant’s continued arguments that the four-plus page, typewritten, signed and notarized agreement was not a “Mary Carter agreement,” all four of these characteristics are, without question, present in this case:

- (1) **“First, the settling defendant guarantees the plaintiff a minimum payment, regardless of the court’s judgment.”**<sup>9</sup> By way of the agreement in this case, Jewish Hospital guaranteed Plaintiff a minimum payment of \$175,000 if there was “a complete defense verdict.”<sup>10</sup>
- (2) **“Second, the plaintiff agrees not to enforce the court’s judgment against the settling defendant.”**<sup>11</sup> Per the agreement in this case, Jewish Hospital would never pay more than \$250,000, even if the verdict against it exceeded that amount.<sup>12</sup>
- (3) **“Third, the settling defendant remains a party in the trial, but his exposure is reduced in proportion to any increase in the liability of his codefendants over an agreed amount.”**<sup>13</sup> In this case the only way Jewish Hospital could avoid paying any money to Plaintiff was for there to not only be a verdict against just Dr. Korelitz, but that verdict had to exceed \$250,000.<sup>14</sup> Simply put, by entering into this agreement it became in Jewish Hospital’s best financial interests to have a verdict returned against its co-defendant and in excess of \$250,000.
- (4) **Finally, “[s]ome Mary Carter agreements include a fourth element: that the agreement be kept secret between the**

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<sup>6</sup> *It’s a Mistake to Tolerate the Mary Carter Agreement* (1987), 87 Colum.L.Rev. 368.

<sup>7</sup> *Vogel* at 93, n1.

<sup>8</sup> *Id.*

<sup>9</sup> *Vogel* at 93, n1. (Emphasis added).

<sup>10</sup> Appellants’ Brief, “Exhibit E” at Paragraph 2.

<sup>11</sup> *Vogel* at 93, n1. (Emphasis added).

<sup>12</sup> Appellants’ Brief, “Exhibit E” at Paragraph 4.

<sup>13</sup> *Vogel* at 93, n1. (Emphasis added).

<sup>14</sup> Appellants’ Brief, “Exhibit E” at Paragraph 3.

**settling parties.”**<sup>15</sup> The co-conspirators to the agreement in the instant case tried desperately to keep this agreement from ever being discovered, both by way of a confidentiality clause,<sup>16</sup> as well as the willful refusal to reveal its existence despite numerous direct inquiries on this subject.

This agreement fully meets the definition of a “Mary Carter agreement” as set forth by this Court, and the labeling of the agreement in this fashion by the First District was appropriate. And Appellant’s newest argument that this lengthy, typewritten agreement was intended to only be a “high low” agreement is equally without merit. Not only does such an argument lack support (in fact, it is very telling that there is no supporting brief offered from Jewish Hospital, the other party to the agreement); but it is incredible as this agreement would have been a “high-low” in which the low could have been zero.

Likewise, Appellant’s contention that this “Mary Carter agreement” could somehow “advance the ultimate finality of litigation” further flies in the face of this Court’s recognition that “major dangers” accompany “Mary Carter agreements.”<sup>17</sup>

Finally, Appellant grasps for straws by desperately attempting to reframe his punitive damages claims as a public being endangered by “a rogue surgeon” who performed “unconscionable acts” and then sought to “evade punishment.” Such noise proves nothing, and this grandstanding is neither supported by the facts of this case nor the sound legal analysis that was applied on this issue by the lower courts. The fact of the matter is that Appellant fully and fairly had his “day in court” in this regard, as he was permitted to present literally all of his evidence and testimony on these issues. As

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<sup>15</sup> *Vogel* at 93, n1.

<sup>16</sup> Appellants’ Brief, “Exhibit E” at Paragraph 15.

<sup>17</sup> *Ziegler v. Wendel Poultry Servs.*, 67 Ohio St. 3d 10, at 17, 18; 615 N.E. 2d 1022, (overruled on other grounds), citing *Jones v. Ruhlin Co.*, 1990 Ohio App. LEXIS 4692 (Oct. 24, 1990), Summit App. No. 14568, unreported, at 8.

will be discussed in greater detail below, Appellant failed to establish that the challenged behaviors even constituted negligence, much less some nefarious plan to avoid liability, thereby falling far short of the requisite clear and convincing evidence standard. For reasonable minds to find in Appellant's favor on this issue, they would have to conclude that the Appellee's efforts at avoiding liability included dictating removal of a foreign body in his operative note, followed by immediately telling the patient's brother (and power of attorney) what had transpired. Appellee's transparent hyperbole with respect to this aspect of the case provides no basis on which this Court should extend jurisdiction.

This case presents no substantial constitutional question or any unanswered question of public and great general interest. Instead, there is only the Appellant, who having had his secret "Mary Carter agreement" uncovered following a tainted verdict, continues to attempt to have his windfall restored at the prejudice of the Appellees. This Honorable Court should decline to extend jurisdiction.

## **II. STATEMENT OF THE CASE AND FACTS:**

### **A. The malpractice/retained foreign body case.**

The allegations in this case arise out of a December, 2000 abdominal surgery in which a surgical towel was inadvertently left inside the Appellant ("Hodesh").<sup>18</sup> This foreign body was subsequently discovered and removed in January, 2001. Named as defendants were Joel Korelitz, M.D., the general surgeon who performed both surgeries, and his practice group, Cincinnati General Surgeons, Inc. (hereafter collectively referred to as "Dr. Korelitz").<sup>19</sup> Also named as defendants were Jewish Hospital of Cincinnati,

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<sup>18</sup> T.d. 2.

<sup>19</sup> T.d. 2.

the provider of the OR nursing staffs and the facility where the surgeries occurred, and Health Alliance of Greater Cincinnati (hereafter collectively referred to as “Jewish Hospital”).<sup>20</sup> Liability was disputed in that Dr. Korelitz, and his expert witness, contended that it was the OR nursing staff’s responsibility to properly count and track items placed inside the patient during the procedure. Jewish Hospital countered that it was Dr. Korelitz’s responsibility to keep track of this towel.

This matter proceeded to trial against both Dr. Korelitz and Jewish Hospital in July, 2006. Shortly before trial, Dr. Korelitz attempted to discover whether Hodesh and the co-defendant, Jewish Hospital, had entered into any type of agreement.<sup>21</sup> Specifically, Dr. Korelitz sought to learn whether those two parties were aligned by way of a “Mary Carter agreement.”<sup>22</sup>

This issue was first discussed with the trial court in chambers prior to the first morning of trial. At that time both Hodesh and Jewish Hospital refused to respond to this inquiry, claiming that all settlement negotiations between them were “confidential.” The trial court’s intervention was limited to holding that if a “high-low” agreement was in place, then it was to be produced to the court sometime prior to the end of trial.<sup>23</sup>

The following morning, Dr. Korelitz renewed his request to the court, again seeking to learn whether a deal was in place and, if so, whether it constituted a “Mary Carter agreement.”<sup>24</sup> He further argued that if a “Mary Carter agreement” existed, it

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<sup>20</sup> T.d. 2.

<sup>21</sup> T.p. 148.

<sup>22</sup> T.p. 148.

<sup>23</sup> T.p. 151.

<sup>24</sup> T.p. 148.

may be an improper agreement, that he should be able to use it on cross-examination, and that the existence of the agreement could be revealed to the jury.<sup>25</sup>

When Hodesh responded by recounting the previous day's ruling that any agreement was to be submitted sometime before the end of trial,<sup>26</sup> the court clarified that previous instruction by explaining that it applied only to a "high-low" agreement.<sup>27</sup> The court further instructed that if there was a "Mary Carter agreement," that "would not remain confidential until after the trial because it would be too late...then."<sup>28</sup> Furthermore, if such an agreement existed, the court "should know that and...would not keep it confidential."<sup>29</sup>

Hodesh pled ignorance and responded with: "I am not a scholar in Mary Carter. As far as I know, I don't have any Mary Carter."<sup>30</sup> Jewish Hospital continued in its refusal to respond in any way to this inquiry.

With it becoming increasingly apparent that a deal of some fashion may be in place between those two parties, Dr. Korelitz, again, asked for "some statement on the record by counsel...as to whether or not there is an agreement (and) whether or not the court will make them give details of their agreement."<sup>31</sup> Inexplicably, the court then reversed its earlier position, stating that it would not assume "that there (was) some sort of a collusion between the plaintiff and one of the defendants" unless Dr. Korelitz could "come up with some evidence."<sup>32</sup> However, the court then eliminated the only avenue

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<sup>25</sup> T.p. 149.

<sup>26</sup> T.p. 151.

<sup>27</sup> T.p. 151.

<sup>28</sup> T.p. 151.

<sup>29</sup> T.p. 152.

<sup>30</sup> T.p. 152.

<sup>31</sup> T.p. 154.

<sup>32</sup> T.p. 155-156.

available to Dr. Korelitz to present evidence on this issue, overruling his requests to discover this information.<sup>33</sup>

Due to the trial court's ruling in this regard, Dr. Korelitz was precluded from learning of the existence of an agreement between the other parties until after jury deliberations had begun.<sup>34</sup> At that time, the court advised that Hodesh had provided a sealed copy of the agreement just the day before,<sup>35</sup> though the court had not even opened the envelope.<sup>36</sup>

A verdict was ultimately returned against just Dr. Korelitz.<sup>37</sup> Only after the judgment entry was signed was Dr. Korelitz finally provided with a copy of the agreement between Hodesh and Jewish Hospital.<sup>38</sup> A review of the same revealed it to be a "Mary Carter agreement," by which the other parties had secretly conspired against him in the weeks leading up to and through trial.<sup>39</sup>

Dr. Korelitz filed a Motion for New Trial, the same ultimately being denied by the trial court.

In September, 2006, and pursuant to the terms of their agreement, Hodesh dismissed Jewish Hospital from the case with prejudice.<sup>40</sup>

On appeal, the First District sustained Dr. Korelitz's first assignment of error relating to the "Mary Carter agreement," thereby rendering his remaining assignments of error moot.

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<sup>33</sup> T.p. 156.

<sup>34</sup> T.p. 1331.

<sup>35</sup> T.p. 1331.

<sup>36</sup> T.p. 1331-1332, 1334, 1346.

<sup>37</sup> T.d. 202; See "Exhibit A."

<sup>38</sup> T.p. 1348-1349.; See Appellants' Brief, "Exhibit E."

<sup>39</sup> See Appellants' Brief, "Exhibit E."

<sup>40</sup> T.d. 228.

## **B. The punitive damages claims.**

Shortly before the February, 2005 trial date, Hodesh moved for a continuance, thereafter amending his complaint to add allegations of intentional misconduct against Dr. Korelitz.<sup>41</sup> Hodesh claimed that these alleged bad acts were somehow “designed to disrupt” his legal case.<sup>42</sup>

At trial, Hodesh was permitted to present all of his alleged evidence on these new claims. After hearing and considering literally all of this evidence, the trial court granted a directed verdict in favor of Dr. Korelitz on these issues.<sup>43</sup>

The First District reviewed and affirmed the trial court’s judgment in this regard.

### **III. ARGUMENT IN SUPPORT OF PROPOSITION OF LAW:**

**Proposition of Law Number I:** “Mary Carter agreements” distort the traditional, adversarial relationship between plaintiff and defendant and allowing such an agreement to remain hidden throughout trial is prejudicial to the remaining defendant.

**1) Any policy favoring settlement is not advanced by the use of “Mary Carter agreements” which, by their nature, ensure that cases will proceed to trial.**

As opposed to assisting in the resolution of litigation, “Mary Carter agreements” work to ensure that a full trial will occur against the non-aligned defendant.<sup>44</sup> When this is coupled with the great lengths Hodesh and Jewish Hospital went to in an effort to keep their alliance secret, it is clear that any policy argument set forth in Hodesh’s Memorandum is without merit.

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<sup>41</sup> T.d. 50.

<sup>42</sup> Id. at ¶ 44.

<sup>43</sup> T.p. 1076.

<sup>44</sup> See generally, *Elbaor v. Smith*, (Tex. 1992) 845 S.W.2d 240, supra at 248.

Furthermore, while Hodesh points to *Ziegler v. Wendel Poultry Services, Inc.*,<sup>45</sup> applying this Court's *Ziegler* analysis to the instant case further substantiates the existence of a "Mary Carter agreement." First, and as already demonstrated above, this agreement fully meets the *Vogel* definition.

Next, and in complete contrast to the agreement in *Ziegler*, Jewish Hospital had absolutely no incentive to keep the awarded damages down. To the contrary, Jewish Hospital had a direct, financial interest in helping Hodesh increase the damages awarded against Dr. Korelitz, as a verdict under the \$250,000 mark would literally cost it tens of thousands of dollars. For example, a verdict in favor of all defendants would cost Jewish Hospital \$175,000.<sup>46</sup> A verdict against just Dr. Korelitz, but in an amount less than \$250,000, would cost Jewish Hospital anywhere from \$175,000 to \$250,000.<sup>47</sup> However, if Jewish Hospital could succeed in increasing the verdict against Dr. Korelitz to over the \$250,000 mark, then it could pay zero.<sup>48</sup>

Finally, *Ziegler* considered the danger of distorting the traditional relationship between plaintiffs and defendants, scrutinizing that case to determine if the proceedings remained adversarial. In the instant case, that exact danger manifested itself by Jewish Hospital appearing to the jury to simply be a traditional co-defendant when, in actuality, it was secretly partnered with Hodesh, aiding his case against Dr. Korelitz at every turn.

**2) The court of appeals correctly and properly analyzed the "Mary Carter" issue.**

**a) – b) The evidence of collusive activity and lack of adversarial relationship between the parties to the "Mary Carter agreement."**

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<sup>45</sup> *Ziegler v. Wendel Poultry Services, Inc.* (1993) 67 Ohio St. 3d 10, 615 N.E.2d 1022 (overruled on other grounds).

<sup>46</sup> Appellants' Brief, "Exhibit E" at Paragraph 2.

<sup>47</sup> Appellants' Brief, "Exhibit E" at Paragraph 3.

<sup>48</sup> *Id.*

This Court has recognized that “major dangers” accompany Mary Carter agreements, including:

“the distortion of the relationship between the settling defendant and the plaintiff, which allows the settling defendant to remain nominally a defendant to the action while secretly conspiring to aid the plaintiff’s case.”<sup>49</sup>

Once a “Mary Carter agreement” is entered into, “counsel for the settling parties are likely to change their courtroom behavior to damage the non-settling defendant’s case...”<sup>50</sup> “The plaintiff and the settling defendant concentrate their combined energies against the nonsettling defendant to improve their financial positions” at his expense.<sup>51</sup> Furthermore, instead of “cooperating with his codefendant to minimize the culpability of all defendants, he (instead) works to exaggerate their negligence.”<sup>52</sup>

The agreement aligned Hodesh and Jewish Hospital in numerous ways. For example, it provided for the purported co-defendant to secretly “cooperate in providing... employees and medical records at trial in Plaintiff’s case as requested,”<sup>53</sup> to not contest damages,<sup>54</sup> and to aim at securing a judgment against Dr. Korelitz in excess of \$250,000.<sup>55</sup> The collusiveness of the agreement was demonstrated by the great efforts taken by Hodesh and Jewish Hospital to keep their alliance hidden from Dr. Korelitz, the trial court, and the jury.

In the pre-trial period, the aligned parties worked in tandem to oppose Dr. Korelitz’s pretrial motions. While Jewish Hospital had no opposition to Hodesh’s

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<sup>49</sup> *Ziegler v. Wendel Poultry Servs.*, 67 Ohio St. 3d 10, at 17, 18; 615 N.E. 2d 1022,(overruled on other grounds), citing *Jones v. Ruhlin Co.*, 1990 Ohio App. LEXIS 4692 (Oct. 24, 1990), Summit App. No. 14568, unreported, at 8.

<sup>50</sup> *It’s a Mistake to Tolerate the Mary Carter Agreement* (1987), 87 Colum.L.Rev. 368.

<sup>51</sup> *Id.* at 372.

<sup>52</sup> *Id.*

<sup>53</sup> Appellants’ Brief, “Exhibit E” at Paragraph 12.

<sup>54</sup> Appellants’ Brief, “Exhibit E” at Paragraph 10.

<sup>55</sup> Appellants’ Brief, “Exhibit E” at Paragraph 3.

pretrial motions in limine to preclude cross-examination on his past imprisonment<sup>56</sup> and alleged conversion of antique cigar labels,<sup>57</sup> it did file a formal response in opposition to Dr. Korelitz's Alternative Motion to Bifurcate.

Yet another advantage garnered through Hodesh and Jewish Hospital's "Mary Carter agreement" was the ability to hoard a combined 9 peremptory challenges, three times the amount provided to Dr. Korelitz.

Once in trial, Jewish Hospital continued to provide secret aid to Hodesh, including but in no way limited to "cooperat[ing] in providing (its) employees and medical records at trial in Plaintiff's case as requested,"<sup>58</sup> agreeing not to contest damages,<sup>59</sup> and agreeing to provide medical expert testimony against Dr. Korelitz.<sup>60</sup> During closing arguments, Jewish Hospital pointed a finger at Dr. Korelitz but in no way challenged Hodesh's alleged injuries. And in the post-trial period, Jewish Hospital formally opposed Dr. Korelitz's motion for new trial.

### **c) The alleged "savings clause."**

By secretly aligning itself with Hodesh, Jewish Hospital was able to avoid being found liable at trial. However, in exchange for the benefits derived from this partnership, Jewish Hospital obligated itself to make a \$175,000 payment to Hodesh in the event that the verdict against Dr. Korelitz, which it helped inflate, was not paid within 30 days.<sup>61</sup> This contingency payment, given the terms of the agreement and the actions of the parties at trial, in no way transforms a "Mary Carter agreement" into a "high-low" agreement.

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<sup>56</sup> T.d. 114.

<sup>57</sup> T.d. 115.

<sup>58</sup> Appellants' Brief, "Exhibit E" at Paragraph 12.

<sup>59</sup> Appellants' Brief, "Exhibit E" at Paragraph 10.

<sup>60</sup> Appellants' Brief, "Exhibit E" at Paragraph 11.

<sup>61</sup> Appellants' Brief, "Exhibit E" at Paragraph 3.

#### **d) Evid.R. 408**

Hodesh now claims that he relied upon *Ziegler* and Evid.R. 408 when representing to the trial court: "I am not a scholar in Mary Carter. As far as I know, I don't have any Mary Carter." <sup>62</sup> As set forth above, this Court's analysis in *Ziegler* further and clearly substantiates the existence of a "Mary Carter agreement."

Furthermore, Evid.R. 408 provided yet another basis for Dr. Korelitz to use this agreement, as it should have been available during cross-examination of Jewish Hospital's witnesses to show possible bias or prejudice.

#### **3) The trial court mishandled the "Mary Carter agreement" in multiple ways.**

In *Vogel*, the trial court held a pretrial hearing on the challenged agreement to determine if it created any potential bias. In *Zeigler*, the agreement was read into the record prior to jury selection, thereby providing the non-settling party with an opportunity to object. It also allowed the trial court to review the agreement to determine if it would be approved and, if so, whether it would be disclosed to the jury.

In the instant case, none of these safeguards took place. As a result, the trial court not only precluded the proper handling of the agreement, but magnified its effectiveness by allowing it to remain hidden.

#### **4) The evidence of collusive activity and lack of adversarial relationship between the parties to the "Mary Carter agreement."**

Dr. Korelitz reiterates the arguments set forth above under the heading 2) a through b.

#### **5) Dr. Korelitz suffered great prejudice, and Hodesh was unjustly enriched, as a result of the "Mary Carter agreement."**

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<sup>62</sup> T.p. 152.

As set forth above, the secret alignment between the other parties was prejudicial to Dr. Korelitz throughout. Any argument of waiver is without merit, as the record is replete with Dr. Korelitz's efforts prior to and during trial to discover whether a "Mary Carter agreement" existed. And Hodesh's argument that Dr. Korelitz could have cross-examined witnesses on an agreement that he had never seen and had yet to even confirm existed is baseless.

**6) Multiple grounds preclude the trial court's verdict from being reinstated.**

In a disputed liability case, it is not harmless error to have a co-defendant secretly aligned with the plaintiff. This alignment can, and in this case did, impact both the liability decision and the amount of any damages award.

Furthermore, Hodesh's request for this Court to reinstate the verdict of the trial court wholly ignores the fact that Dr. Korelitz brought seven different assignments of error to the appellate court. The final six assignments were rendered moot only because the first assignment was sustained.

**Proposition of Law Number II:** Having afforded Hodesh the opportunity to present literally all of his evidence on the punitive damages claims, the trial properly granted and appellate court properly affirmed a directed verdict in favor of Dr. Korelitz.

A party seeking punitive damages has the burden of proving by clear and convincing evidence that he is entitled to them.<sup>63</sup> At trial, Hodesh fell far short of approaching this clear and convincing evidence standard, failing to even establish that the challenged acts constituted negligence. The trial court, having heard all testimony and observed the trial exhibits, was well within its discretion to issue the directed

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<sup>63</sup> *Cabe v. Lunich* (1994), 70 Ohio St.3d 598, 601, 1994 Ohio 4, 640 N.E.2d 159.

verdict. The independent review of The First District upholding the same was, likewise, proper.

**A. There was no destruction of evidence.**

The sole basis of Hodesh's claim that Dr. Korelitz destroyed evidence is that the retained towel was not sent to pathology after its removal. The evidence in this case demonstrated that this decision was not even a violation of hospital policy.<sup>64</sup> And there was literally no additional information that could be gained by sending the towel to pathology.<sup>65</sup>

Furthermore, the expert testimony demonstrated that this decision was not even negligence. The defense expert testified that there was no medical reason, and no standard of care requirement, to send this towel to pathology.<sup>66</sup> And Hodesh's own surgery expert, who he elected not to call at trial, testified at deposition that the decision on whether to send this item to pathology was "a judgment call."<sup>67</sup> And he agreed that not sending this item to pathology was not even a violation of the standard of care.<sup>68</sup>

Importantly, not sending this towel to pathology had zero impact on Hodesh's case. At no time during this litigation did any party ever dispute that an entire towel had inadvertently been left inside and subsequently removed from this patient.

**B. There was no falsification of the operative report.**

Dr. Korelitz documented the removal of the foreign body in his operative note, describing the towel as a "fragment" because it was much smaller dimensionally upon

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<sup>64</sup> T.p. 936.

<sup>65</sup> T.p. 538.

<sup>66</sup> T.p. 980.

<sup>67</sup> T.d. 92 at page 78, line 17.

<sup>68</sup> Id. at page 79, lines 19-25, page 80, lines 1-2.

its removal due to being folded upon itself.<sup>69</sup> While Hodesh may claim that the word “fragment” as a descriptive term was not precise enough, it does not in any way equate to falsification of a medical record. At no time has Dr. Korelitz claimed that anything less than a full towel was removed from Hodesh. More importantly, Hodesh has yet to offer any plausible explanation for how using the word “fragment,” as opposed to describing an entire, unfolded towel, would in any way aid in avoiding potential liability. Under either scenario, Dr. Korelitz clearly documented that a foreign body had been retained and subsequently removed.

### **C. The alleged evasiveness.**

Hodesh’s brother was also his power of attorney.<sup>70</sup> The evidence established that after the surgery Dr. Korelitz made it clear to this brother that he had removed an item that had been left behind from the previous surgery.<sup>71</sup> At trial, Dr. Korelitz explained that the patient’s brother asked him not to tell Hodesh what had happened.<sup>72</sup> The patient’s primary care physician, Dr. Greenberg, testified that he had this same understanding.<sup>73</sup> The defense expert, Dr. Myers, testified that it is acceptable in this situation to advise a patient’s power of attorney of what had transpired.<sup>74</sup>

Since it is undisputed that Dr. Korelitz immediately disclosed the retained towel to the patient’s brother following its removal, any allegation of intentional misconduct was unfounded.

## **IV. CONCLUSION**

For the reasons set forth above, this Court should decline to extend jurisdiction.

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<sup>69</sup> T.p. 527, 532.

<sup>70</sup> T.p. 753 – 755.

<sup>71</sup> T.p. 759.

<sup>72</sup> T.p. 509.

<sup>73</sup> T.p. 665.

<sup>74</sup> T.p. 1018.

Respectfully submitted,

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**PROOF OF SERVICE**

The undersigned hereby certifies that a true and accurate copy of the foregoing was served upon the following by regular mail this 14<sup>th</sup> day of July, 2008.

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