IN THE SUPREME COURT OF OHIO

Michael Hodesh	:	
	:	
Appellant	:	Case No. 08-1133
	:	
v.	:	On Appeal from the
	:	Hamilton County Court of Appeals,
Joel Korelitz, M.D., et al	:	First Appellate District
	:	
Appellees	:	

MERIT BRIEF OF APPELLANT MICHAEL HODESH

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STATEMENT OF FACTS

On July 26, 2006, a Hamilton County jury returned a verdict in the amount of Seven Hundred Seventy-five Thousand Dollars in favor of Plaintiff Michael Hodesh ("Hodesh") against defendant surgeon Joel Korelitz ("Korelitz"), and a defense verdict in favor of Jewish Hospital of Cincinnati and the Health Alliance of Greater Cincinnati ("Hospital") after a nine day trial. In a jury interrogatory, the jury stated that Korelitz was negligent:

> *"Dr. Korelitz failed to examine the abdominal cavity and remove a foreign body (a towel), before the incision was closed."*[1]

After judgment was entered on the jury's verdict, Korelitz filed a Motion for a New Trial and a Motion to Revoke Confidential Agreement, contending that the Hospital and Hodesh had entered a confidential agreement ("Agreement" or "the Agreement") before the trial, asserting it to be a "Mary Carter Agreement."[2] Korelitz claimed that the trial court should revoke the Agreement, or should have allowed disclosure to him before the trial and to the jury during the trial.[3] Hodesh and the Hospital opposed the motions.

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[1] Supp. A-1, Vol. 9, Trial trans. 1341; Supp. B-2 (Jury Questions)

[2] Although the precise definition of what constitutes a "Mary Carter Agreement" is elusive, this Court in *Vogel v. Wells* (1991), 57 Ohio St.3d 91, 93, 566 N.E.2d 154 defined it as, "...a contract between a plaintiff and one defendant allying them against another defendant at trial."

[3] Common Pleas Docket 208 (Motion for a New Trial)

After thirty days, the Hospital paid Hodesh One Hundred Seventy five Thousand Dollars, the "low" payment in accordance with the Agreement. The Hospital was then dismissed.

The trial court, in a written Memorandum of Decision citing two Ohio Supreme Court cases,[4] denied the motions, holding the Agreement was not a Mary Carter Agreement:

> *During the trial, there was no evidence that The Jewish Hospital remained as only a nominal Defendant which conspired with Plaintiff to the detriment of Dr. Korelitz. The positions of Plaintiff and the hospital remained adversarial at all times;...Since the court has found no evidence of collusion, in bad faith, between Plaintiff and the hospital to the detriment of Dr. Korelitz, there was no duty to reveal the contents of the agreement to the doctor.*[5]

Korelitz appealed and the court of appeals reversed the judgment in a de novo[6] review, finding that the trial court erred in failing to review the Agreement before the trial and admit it into evidence before the jury, as the court of appeals determined the Agreement was a "Mary Carter Agreement." [7]

How the Trial Court Handled the Mary Carter Issue

The question of a Mary Carter Agreement between Hodesh and the Hospital was first raised by counsel for Korelitz in chambers on the first day of scheduled

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[4] *Vogel*, supra at fn. 2; *Ziegler v. Wendel*, 67 Ohio St.3d 10, 615 N.E.2d 1022 (1993).
[5] Appx. D, Trial Court Memorandum of Decision.
[6] The court of appeals reviewed all issues de novo, including not only construction of the agreement, but also fact, discovery and evidentiary issues.
[7] Appx. C, Appeal Court Opinion, Para. 38.

trial before a visiting judge.[8] The trial court then recessed before starting voir dire and scheduled a hearing the next day, where he questioned the attorneys for Hodesh and the hospital at some length about the nature of the Agreement. Korelitz cited *Ziegler v. Wendel*[9] to the court as the controlling Ohio law on Mary Carter agreements.[10]

Counsel for Hodesh agreed that *Ziegler* was lead precedent, and represented to the trial court that in his opinion under *Ziegler* there was not a Mary Carter Agreement. The court then ordered that counsel submit any confidential high-low agreement in camera before the trial ended. [11] He ordered that if there was a Mary Carter agreement, it had to be disclosed to Korelitz.[12]

Clearly, the trial court relied upon representations of counsel for Hodesh and the Hospital that the agreement was confidential and a high-low, but not a Mary Carter.[13] Although the record does not show why the trial court did not read the agreement, based upon his Memorandum of Decision, he would not have found the Agreement to be a Mary Carter Agreement even if he had read it, because his

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[8] Supp. A-2-12, Vol. 2, Trial trans. 148-158
[9] *Ziegler*, supra, fn. 4
[10] Supp. A-8, Vol. 2, Trial trans. 154
[11] Supp. A-5-12, Vol. 2, Trial trans. 151-158
[12] Id.
[13] Supp.A-7, A-8, Vol. 2, Trial trans. 153, 154.

definition of a Mary Carter Agreement was based not solely on the actual language of the agreement but primarily on the conduct of the settling parties at trial.[14]

Following jury instructions, counsel for Korelitz, at side bar, stated, "...*after the jury leaves*, I would like to put something on the record with regards to if there is a high/low or any other type of agreement...." The court agreed, "...we will do that."15

After judgment and disclosure of the Agreement, the trial court held a lengthy hearing.[16] In the trial court's post trial decision, the court explicitly analyzed the Mary Carter issue, citing the agreed upon Ohio case law, *Vogel*[17] and *Ziegler*.[18] Based upon his review of the Agreement and observation of the trial, the trial court held that as there was no evidence that the Agreement influenced the trial and as he saw no evidence of collusion at trial, the Agreement was not a Mary Carter agreement under Ohio law and denied the motions.[19]

The visiting trial judge assigned to this trial was a retired judge of over twenty years experience as an active trial judge in Hamilton County, Ohio. He was

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[14] Appx. D, Trial Court Memorandum of Decision.
[15] Supp. A-13, A-14, Vol. 8, Trial trans. 1329, 1330
[16] Vol. 8, Trial trans. 1354-1393
[17] *Vogel*, supra, fn 2.
[18] *Ziegler*, supra, fn 4.
[19] Appx. D, Trial Court Memorandum of Decision.

assigned this case on the scheduled first day of trial.[20] The trial transcript and written record reflects the time and careful consideration he gave to all issues.

In short, although the trial court did not review the Agreement pre trial, the record shows the trial judge allowed Korelitz ample opportunity to argue his position both before and after trial, to cite precedent to support his arguments, demonstrably reviewed that precedent carefully both pre and post trial, never denied Korelitz an opportunity to renew the issue during the trial, held several hearings and carefully analyzed, on the record orally in open court and in writing, his interpretation of existing Ohio law as cited by the parties.

Adversarial positions of the parties pre-agreement.

In 2001, Hodesh filed his Complaint claiming joint and several liability of Korelitz and the hospital for medical and nursing negligence. He claimed permanent injury and harm.

The Hospital was adversarial to Korelitz and to the Plaintiff in the exact same way *before and after* the Agreement was made. The Hospital contended throughout that its hospital operating room policy in December, 2000 did not allow surgeons to use towels intra-abdominally rather than counted sterile laparotomy sponges provided on the surgical tray. The Hospital claimed the standard of care did not require nurses to independently count such towels. The Hospital never

[20] Appx. E, Ohio Evid. R. 201, Counsel asks the Court to take judicial notice of its appointments.

changed its position that the standard of care required Korelitz to be solely liable for failing to remove the towels or specifically directing the nurses to count them.

There was a longstanding disputed issue of fact between the Hospital and Korelitz. At his deposition in 2002, Korelitz blamed the nurses for failing to keep count of the towels.[21] However, the circulating and scrub nurse, before any Agreement was reached, testified that Korelitz never told them to count any towels and that neither the standard of nursing care nor hospital operating room policy required them to do so.[22]

Korelitz's expert surgeon, Dr. Myers, admitted at his deposition well before trial that "no standard of care" allowed towels to be left in the abdomen by the "surgical team," but stated that the nurses should have counted the towels.[23] He then testified at trial that the "system" was at fault.[24]

Dr. Gerard Bechamps, the hospital's expert surgeon, testified by video on June 7, 2006 that Korelitz had violated the surgical standard of care in failing to carefully inspect the surgical area before closing and could not rely on the nurse's counting normally uncounted surgical towels.[25] This videotape was played at trial.

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[21] Trial Ct. Docket 91, Korelitz Dep., Nov. 11, 2003, trans., p. 46, 47.
[22] Trial Ct. Docket. 96, 173, 174, scrub nurse Berke Dep., Feb. 26, 2004, p. 29, and May 8, 2006, p. 7, 8; circulating nurse Murphy Dep., May 12, 2005, p. 42.
[23] Trial Ct. Docket 88, Myers Dep., p. 40, 41.
[24] Supp. A, 15, 16, Myers trial testimony, Vol. 6, Trial trans. 985, 986.
[25] Trial Ct. Docket 164, Bechamps Dep., p. 10-12.

Both defendants' experts and Korelitz himself admitted before the Agreement was entered that the retained towel directly and proximately caused harm to Hodesh, including infection and abscess, several additional surgeries and abdominal scars, a hernia, and a more difficult post operative course.[26]

Hodesh's surgical experts testified at depositions before the agreement that Korelitz and the OR nurses were both liable.[27] Hodesh nurse expert Nancy Phillips testified at the trial that the nurses were negligent.[28] The record shows absolutely no new or different alliance between Hodesh and the hospital, no collusion, and no change of position because of a pre trial high-low Agreement.

Adversarial Arguments of Counsel at Trial.

The Agreement was executed on June 28, 2006, several weeks before the scheduled trial, and well after the depositions of witnesses and experts had been completed.[29]

Plaintiff's counsel in opening statement and in final argument emphatically contended that the evidence and law required the jury to find that Korelitz *and the Hospital* were jointly and severally liable for failing to remove the towel, just as he had in pre trial motions.[30]

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[26] Trial Ct. Docket 88: Myers Dep., p. 48; Trial Ct. Docket 164: Bechamps Dep., p. 28, 29.
[27] Trial Ct. Docket 139, 92, 89: Hartman Dep., 27; Cooperman Dep. 47; Phillips Dep., p. 37, 38.
[28] Supp. A-17, Vol. 4, Trial trans. 700
[29] Supp. E, Contingency Agreement
[30] Supp. A-18,Vol. 2 Trial trans. 302; Supp. A- 19-21, Vol. 8, Trial trans. 1208, 1209, 1291

The Hospital counsel in opening statement and closing argued consistent with her position pre Agreement; that the nurses were not "independently responsible," as Korelitz was asserting, for counting the surgical towels, but were dependent on instructions by Korelitz, which he failed to do.[31] These positions of Hodesh counsel and the Hospital counsel were exactly the same as they were before entering of the Agreement, with no changes.

Korelitz counsel in opening statement contended the nurses had "assured him per the policy that he had removed everything from Mr. Hodesh's abdomen."[32] Hospital counsel in opening disputed that based upon the expected testimony of the operating room nurses.[33] Thus, the central liability issue was a fact question not in any way affected by the Agreement or its terms.

Hodesh counsel contended in his opening that Hodesh suffered serious and permanent harm and presented substantial corroborative evidence. Dr. Greenberg, Hodesh's treating internist, testified that his abdominal pain, bowel incontinence and abnormal abdomen were permanent injuries.[34] Korelitz counsel was permitted to cross examine Dr. Greenberg at length and with broad latitude.[35] Korelitz and the hospital both had admitted before the trial started that the second and third

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[31] Supp. A-22, 23, Vol. 2, Trial trans. 335, 339,
[32] Supp. A-24, Vol. 2, Trial trans. 308
[33] Supp. A-25, Vol. 2, Trial trans. 330
[34] Supp. A-26, Vol. 4, Trial trans. 676
[35] Supp. A-27-43, Vol. 4, Trial trans. 677-693.

surgeries, scars and recovery were harm suffered by Hodesh directly and proximately related to the embedded towel, and they admitted those damages consistently at trial.[36]

Korelitz produced no witnesses or experts disputing causation or damages in any significant way. In final argument, although he disputed the amount of damages argued by Hodesh in his final argument, counsel for Korelitz conceded that Hodesh was entitled to substantial compensation of over $116,000.[37] The trial court asked Korelitz's counsel at sidebar after his final argument if he was aware he was admitting liability.[38] Thus the only issue at trial was which of the co-defendants was at fault and for how much in damages.

At final argument, Hodesh's counsel argued that the hospital was liable, as well as Korelitz.[39] Hospital counsel argued that the hospital was not liable.[40] Korelitz counsel argued that the hospital, not Korelitz, was liable.[41]

The Agreement therefore did not alter the positions of the settling parties or the arguments of counsel, a crucial indisputable fact in this appeal.

Conduct of settling counsel concerning the Contingency Agreement

The case was filed on July 3, 2002. From that time forward, the Hospital

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[36] Supp. A-44, Vol. 3, Trial trans. 586
[37] Supp. A-45, 46, 47, Vol. 8, Trial trans. 1242, 1259, 1262
[38] Supp. A-48, Vol. 8, Trial trans. 1281
[39] Supp. A-21, Vol. 8, Ttial trans. 1291
[40] Supp. A-49, 50 Vol. 8, Trial trans. 1279, 1280
[41] Supp., A-51,Vol. 8, Trial trans. 1245

and Korelitz were adversarial to each other as to which was liable. Shortly before trial, and *before* the instant Agreement was entered, counsel for Korelitz met privately with the Hospital counsel but rejected her proposal to focus the defense jointly on containing damages rather than continuing the internecine battle at trial as to which defendant was liable.[42]

The Agreement was thereafter entered and signed by Hodesh and Aurora Lambert, the Vice President of Jewish Hospital. One term of the Agreement was that it remain confidential, unless by consent, or in accordance with law or court order.[43]

When questioned by the trial court at the hearing before trial, counsel for Hodesh informed the court that there was a separate negotiation with the hospital but that it was confidential, and it was not a Mary Carter agreement.[44] Counsel complied with the court order that any high-low agreement must be filed in camera before the trial ended.

Hodesh counsel and Hospital counsel had both been practicing law for over 25 years at the time the agreement was negotiated. Both had exemplary records with no grievances.[45] Both informed the court as to the known Ohio law as stated

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[42] Supp. D, Trial Ct. Docket 219, Attorney Ann Combs Affidavit.
[43] Supp. E-4, Contingency Agreement, para. 15
[44] Supp. A-6, Vol. 2, trans. 152
[45] Appx. E, Ohio Evid. R. 201, Counsel asks this Court to take judicial notice of its own disciplinary records.

in *Ziegler*[46] and abided by the ethical mandates involving the maintaining of confidentiality promised to their respective clients.[47] When the trial court ordered the Agreement disclosed, the parties disclosed the Agreement to Korelitz.

The Agreement is well drafted and explicit on its face as to the legitimate purpose of the Agreement and specific as to its terms. There is no provision expressed or implied creating collusion or an alliance against Dr. Korelitz, and both parties are explicitly free to contest liability and damages with each other as well as with Korelitz.[48]

In short, counsel complied with all Ohio law, code of ethics and orders of the trial court relating to the Agreement.

Korelitz Did Not Renew His Objection or Request for Disclosure

After the jury was seated, Korelitz never again during the eight further days of trial raised the issue of an agreement at all until the last day of trial. Not once did Korelitz object to the exclusion of the Agreement, attempt to renew his motion for disclosure or further move for admission of the Agreement.

The record reveals no suggestion during trial by Korelitz that there was evidence of an alliance or collusion between Hodesh and the hospital in the presentation of evidence, change of position, or other conduct of the trial. No

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[46] *Ziegler*, supra, fn 4.
[47] Appx. F, Canon 4, Ohio Code of Prof. Resp.; DR 4-101; EC 4-1 to 4-6.
[48] Supp. E-3, 4, Contingency Agreement, Para. 10, 13.

renewed request for disclosure was made by Korelitz for the purposes of cross-examination of any witness or for direct examination of any witness.

Although opportunity was provided to approach sidebar while the jury was still in the courtroom, Korelitz made no request then for a cautionary instruction, review by the court, or disclosure of the Agreement or its terms to the jury before the jury was excused to deliberate. Korelitz did not offer a jury instruction on Mary Carter Agreements or collusion or object to the jury instructions.

As to settlement negotiations during the trial, for an unexplained reason Korelitz failed to offer the full extent of his authority, which if offered would have globally settled the case before judgment.[49]

ARGUMENT

Proposition of law

Pretrial verdict contingent agreements between the plaintiff and less than all defendants in a multiple defendant case are lawful and enforceable in Ohio, but must be submitted to the trial court in camera. The settling defendant may remain in the trial to defend its interests so long as an adversarial relationship continues to exist as before between the settling defendant and the settling plaintiff. The discovery and use of such agreements at trial rests within the sound discretion of the trial court.

[49] Supp. C-1, 2, 3, Kevin Brennan, Pro Assurance Ohio supervisor, testified that Korelitz's counsel failed to offer all authority. (Prejudgment Interest hearing trans., Feb. 8, 2008, p. 187, 213, 214)

A. The court of appeals erred as the trial court properly excluded the Agreement from disclosure.

1. The Relevant Terms of the Agreement.

There are different kinds of verdict contingent settlement agreements with different characteristics.[50] The Mary Carter agreement is one type of agreement, but there is no universal definition of what terms and characteristics make up a Mary Carter agreement. Another kind is a high-low agreement, which Hodesh contends he and the Hospital agreed to in this case.

The court of appeals characterization of the Agreement in this case as a Mary Carter Agreement elevates form over substance, and is clearly wrong in finding that this Agreement includes evidence of the biggest danger of any verdict contingent settlement agreement---collusion and distortion of the adversarial process. Hodesh respectfully suggests that this Court should be far less concerned about whether to call this Agreement a high-low agreement or a Mary Carter agreement than whether there was collusion that tainted the adversarial nature of the proceedings.

Simply put, if a verdict contingent settlement taints the adversarial nature of the proceedings it should be prohibited or disclosed to the jury, but if not, it should be permitted, with discretion placed in the trial court as to whether, when and to

what extent such agreement should be disclosed. But the appeals court finding of something fundamentally improper in the trial court's decision, after argument and review of precedent cited by the parties, to decide against disclosure and in favor of sealing a confidential agreement was clearly erroneous.

The instant Agreement consisted of a preamble and sixteen separate paragraphs. The purpose, as expressed in the preamble and paragraph thirteen, was to establish high and low parameters to protect the parties from adverse high or low verdicts and reduce risk to both parties. The parties agreed to maintain confidentiality absent consent of the other party or as required by law or court order. The agreement did not mandate the Hospital participating in the trial or any alliance against Korelitz. The agreement recited financial high-low terms but also non-financial terms.[51]

As to the relevant non-financial terms, the Hospital was allowed to defend its liability. Hodesh was allowed to produce evidence of, and argue Hospital negligence and liability for compensatory damages, but not punitive damages.[52] The hospital agreed to cooperate in scheduling Hospital employees for testimony and bring Dr. Bechamps to the trial.[53]

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[50] 22 A.L.R.5th 483, "Validity and effect of "Mary Carter" or similar agreements setting maximum liability of one co-tortfeasor and providing for reduction of extinguishment thereof relative to recovery against non agreeing co-tortfeasor."
[51] Supp. E, Contingency Agreement.
[52] There was no claim against the hospital for punitive damages.
[53] Such agreements are professional and civil. Korelitz enjoyed similar courtesy.

The effect of all possible verdicts, and a high and low cap for each were also defined by the Agreement. Because of an "appeals contingency clause," which required a substantial payment by the Hospital to avoid appeal, the Hospital in fact did have to pay One Hundred Seventy-five Thousand Dollars, despite the defense verdict in its favor and the verdict of over Two Hundred Fifty Thousand Dollars against Korelitz.[54]

In fact, the Agreement also contained a "settlement provision," which, combined with the "thirty day window provision" actually increased the Hospital's potential payment to Two Hundred Fifty Thousand Dollars if Korelitz settled within thirty days after judgment, even though the jury returned a defense verdict in the Hospital's favor.[55] Korelitz thus controlled his own exposure for thirty days.

This was not an inherently collusive term as determined by the court of appeals in its analysis of Mary Carter agreements. The clear incentive of these terms was not to increase damages against Korelitz at trial, but to give Hodesh leverage *post trial* to induce the recalcitrant Korelitz insurer to end the litigation and settle before appeal in the very possible event of a Plaintiff verdict against Korelitz only, by forcing the Hospital to substantially increase its payment.[56] The terms actually favored Korelitz financially, but his counsel and Pro Assurance

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[54] Such payment is the classic hallmark of a high low agreement
[55] Supp. D, Contingency Agreement, Para. 3, 6.
[56] Id.

chose instead to turn away from found money, and instead continued the litigation and appeal, although the record shows that the evidence of Korelitz's liability and Hodesh's damages was overwhelming.

The court of appeals ignored the terms favorable to Korelitz and therefore erred in its construction of the Agreement as a Mary Carter agreement.

2. Because there was no evidence of collusion in this case, the exclusion of the Agreement in evidence was proper.

In this case, there was overwhelming evidence that the Agreement in no way improperly re-aligned the parties or distorted the adversarial nature of the proceedings. The trial court correctly found this to be so; the court of appeals improperly disturbed that finding, which is entitled to discretionary deference.

The court of appeals stated in its opinion that it was reviewing the record on a de novo standard of review, because the trial court "refused" to read the Agreement until after the jury verdict.[57] Obviously the court of appeals misinterpreted the record. The trial court made a ruling that the law of Ohio did not require him to disclose or read the agreement. The rulings of the trial court were not made arbitrarily or capriciously, but reasonably, after hearing arguments.

While it is undoubtedly correct that a de novo review was appropriate as to whether or not the Agreement was a Mary Carter Agreement, the standard of

[57]Appx. C, Court of Appeals Opinion, para. 34.

review of the trial judge's actions as to disclosure and admission of the Agreement should have been reviewed on an abuse of discretion standard, as the trial judge correctly ruled at the pre trial hearing that the Mary Carter issue under *Ziegler* was collusion, an evidentiary matter, and that therefore, the literal language of the Agreement would not control.[58] So, the court of appeals review of the trial court's specific finding that the Agreement was not admissible should have properly been reviewed on an abuse of discretion standard.[59] Reading or not reading the Agreement pre trial would not have changed the trial court's decision.

But if this Court finds a de novo review was proper by the court of appeals because the trial court did not read the Agreement before its pre trial ruling, a de novo review of the court of appeals rulings is also proper by this Court as well, and Hodesh contends the record shows no evidence of collusive behavior before or at trial, no evidence of an alliance in bad faith to drive up damages, and no change of position of the settling parties in any way created by the entering of the Agreement. Under whichever standard of review this Court rules should have applied below, the trial court did not err.

After all, the trial court acknowledged he was on was notice, based on the representations of counsel for Korelitz, to watch for collusion, change of position

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[58] Supp. A-2-12, Vol. 2, trans. 148-158

[59] *Ziegler*, supra. fn 4; *Krischbaum v. Dillon* (1991), 58 Ohio St.3d 58, 567 N.E.2d 1.

or any alliance in bad faith, as this was raised before the trial started.[60] Therefore the trial court's decision to delay review of the Agreement until after the trial should have been afforded deference as he clearly found no collusion, alliance or bad faith that would have mandated breaching the confidentiality of the parties.[61]

The court of appeals also erroneously sua sponte considered factual matters de novo, finding some slight evidence of collusion in the Hospital's preemptory challenge of one juror and opposition to a bifurcated trial. The trial court found no collusion in either of these strategic maneuvers by the Hospital.

Ohio law allows broad discretion to the trial court in matters involving the admission or exclusion of evidence. One of the primary duties of the trial court is to decide admissibility questions. Exclusion of the Agreement was not the only discretionary decision on admissibility of evidence made by the trial court. For example, although Hodesh cited reasonable Ohio authority, the trial court excluded evidence that Korelitz had multiple prior malpractice lawsuits, one similarly involving a retained object, and did not allow cross-examination of Korelitz's expert to try to show that at the time of the surgery they had the same malpractice insurer.[62]

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[60] Supp. A-10, 11, Vol. 2 trans. 156, 157
[61] Appx. D, Trial Court Memorandum of Decision.
[62] Supp. A-52-56, Vol. 3, trans. 555-559.

These, like a pre trial settlement agreement, are collateral matters to the central role of the jury in deciding the facts and rendering a verdict, and subject to the discretion of the trial court. The record reveals no reason to believe that this jury had to have the Agreement in evidence in order to adequately discharge its duties.

There was no abuse of discretion by the trial court in his rulings concerning the Agreement. To the contrary, his respect for the representations of experienced counsel, his pre trial hearing and knowledgeable discussion there of *Ziegler* and the requirement of collusion, and his demonstrable meticulous consideration of all issues raised by the parties during the trial does not show the "unreasonable, arbitrary or unconscionable" judicial conduct or attitude necessary to reverse a verdict on an abuse of discretion standard.[63]

But even more glaring is the complete failure of the court of appeals to address the crucial fact that the trial court ordered the Agreement disclosed after the trial as Korelitz requested, and allowed this matter to be briefed and argued by Korelitz at great length in his post judgment motions, including most particularly the motion for a new trial.[64] The trial court held a full hearing, giving the parties and himself adequate time to have a careful and thoughtful review of the

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[63] *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 450 N2d 1140
[64] Trial Ct. Docket 208

Agreement, trial evidence, authority and the conduct of the parties at trial.[65] There is absolutely no evidence that the trial court abused its discretion in denying the new trial, or was unreasonable, arbitrary or unconscionable. On this basis alone, the court of appeals must be reversed and the judgment reinstated.[66]

B. Mary Carter law in Ohio in July, 2006.

Boiled down to its essence, this case involved a factual determination by the jury of which of the two co-defendants was responsible for leaving a towel in the plaintiff's abdomen and therefore the harm it caused. The court of appeals seems to imply some collusion in the fact that at trial the Hospital cast liability onto Korelitz, opposed bifurcation, and chose to dismiss a juror who appeared to favor Korelitz.

But in this type of case, where co-defendants blame each other for negligence, the trial strategy of each counsel necessarily and always has the collateral and unintended effect of assisting the plaintiff.[67] This obvious adversarial finger-pointing between defendants at trial also suggested that the trial court had broad discretion in how to handle such a claim. These defendants "pointing the finger" at each other and thereby inevitably helping Hodesh would have necessarily also occurred with no Agreement. This undeniable fact explains

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[65] Supp, A-16-54, Vol. trans.1355-1393
[66] *Blakemore*, supra, fn 63
[67] Supp. D, Affidavit of Ann Combs, Esq.

the attempt of the hospital attorney to work out a joint defense agreement with Korelitz focusing on damages, not liability.

The trial judge and the appeals judge have posited very different definitions of what constitutes a Mary Carter agreement in their opinions. The trial court relied on Ohio law, not on cases from other jurisdictions.

The court of appeals defined a Mary Carter agreement in Ohio as one that has the four terms listed in the *Vogel* footnote.[68] This new holding in Ohio mandates that if the Agreement has these terms, it is per se a Mary Carter agreement, and the Agreement must in all cases be disclosed to the jury. The trial court, under the court of appeals opinion, has no discretion.[69] Surely this was not a reasonable interpretation of Ohio law the trial court relied on as embodied in *Vogel* and *Ziegler*.

In *Vogel*, a wrongful death accident case involved allegations of negligence against both a driver and the city of Akron, Ohio. Akron unsuccessfully argued for a new trial on the basis that the attorneys for the co-defendant driver's insurance carrier and the plaintiff entered a collusive pretrial agreement that plaintiff would not execute any verdict against the driver over the limits of the insurance policy. Akron appealed to the Supreme Court. The Court found no collusion, and held

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[68] Appx. C, Court of Appeals Opinion, Para. 30.

[69] Do all agreements between any parties before the verdict now have to be disclosed to the jury? Has all confidentiality in settlements in litigation been abrogated?

that as the agreement was "gratuitous" and as it could potentially be withdrawn any time before the verdict was announced, the trial court did not abuse its discretion in excluding disclosure of the agreement in evidence to the jury.[70]

Although in *Vogel*, the Court footnoted a list of four characteristic terms of Mary Carter agreements, that list of possible characteristic terms, written by a law student in a law review note, was obviously not intended to be the conclusive definition of a Mary Carter agreement in Ohio at the time.[71]

Next, in 1993, this Court considered how the trial court handled an agreement between a plaintiff and one defendant in *Ziegler*,[72] which also involved an automobile accident with multiple co-defendants. The agreement there was similar to that in this case, although the court of appeals found significance that the agreement there was read into the record outside the presence of the jury, although it was not allowed into evidence. This Court affirmed in *Ziegler* the trial court decision defining the agreement as a high-low agreement but not a Mary Carter, and held, just as the trial judge did here, that a settling defendant in such a case may participate in the trial without disclosure to the jury absent evidence of bad faith alliance created by the agreement or collusion.[73]

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[70] Arguably this Agreement, expressly contingent, could have been similarly withdrawn during the trial before the verdict.
[71] *Vogel*, supra, fn 2, at fn. 1. The footnote simply commented based on a law review note, clearly dicta.
[72] *Ziegler*, supra.
[73] Id., citing Evid.R. 408 and *Krischbaum v. Dillon*, supra.

Since that time and before this trial, all Ohio appellate courts have followed *Ziegler* and approved non-disclosure of such agreements, including agreements very similar to this one in medical malpractice cases.[74]

As this Court stated in *Vogel*, "one of the major dangers of Mary Carter Agreements lies in 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."[75] But here, there was overwhelming evidence that the Agreement in no way improperly realigned the parties or distorted the adversarial nature of the proceedings.

The court of appeals erred in second guessing the reason for the hospital's totally proper trial strategy and tactics, and in substituting its judgment for the trial court's on the decision not to disclose the Agreement to the jury.[76]

C. How do Courts in other states distinguish Mary Carter Agreements from other verdict contingent agreements and whether they should be disclosed?

Mary Carter agreements and other pre trial agreements such as high-low agreements are common in complex litigation of all kinds nationally, and how trial

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[74] *Berdyck v. Schinde* (1998), 128 Ohio App.3d 68 (Ottawa Cty.), App. Den., 83 Ohio St.3d 1446, 700 N.E.2d 330; *Hale v. Spitzer Dodge* (Franklin Co.), 2006-Ohio-3309; *Satterfield v. St. Elizabeth Health Ctr.* (Mahoning Co.), 2005-Ohio-710.
[75] *Vogel*, supra.
[76] Appendix C, Court of Appeals Opinion, Para. 34, 42.

courts should identify and handle such agreements has been considered by many jurisdictions.[77] The evolving trend, followed most recently this year in Connecticut, is that all verdict contingent agreements whatever they are called, are lawful and enforceable, but that they should be disclosed to the court. Where they have not been disclosed, the focus has been on whether the non-settling defendant was prejudiced by the non-disclosure.[78]

The term, "Mary Carter Agreement," was coined in citing an early case in Florida.[79] Since that time, the majority of jurisdictions have held that pretrial contingent agreements, whether called Mary Carter Agreements, high-low agreements, or Gallagher agreements, are enforceable[80]; only a few states have held them unenforceable.[81]

Mary Carter and similar types of agreements have also been the subject of scholarly articles and comment in legal journals, with widely varied conclusions about how to define them, how the courts should handle such agreements, the effect of such agreements on the fairness of trial, and the economic impact.[82]

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[77] Appx. C, Court of Appeals Opinion, Para. 31-33(State survey)
[78] Appx. M, *Monti v. Wenkert* (2008), 287 Conn. 101, 947 A.2d 261; *Gulf Industries v. Nair*, 953 So.2d 590 (Fla. App. 2007)
[79] *Booth v. Mary Carter Paint Co.,* 202 So.2d 8 (Fla. App. 1967)
[80] Appx. C, Supra.
[81] Appx. C, Supra.
[82] e.g., Bernstein and Klerman, "An Economic Analysis of Mary Carter Settlement Agreements," Georgetown L.Rev. 83:2215 (1995); Shockley, "The Use of Mary Carter Agreements in Illinois," S.Ill. U. L.J. 223 (1994); Benedict, Note, "It's a Mistake to Tolerate the Mary Carter Agreement," 87 Colum.L. Rev. 368 (1987)

Full disclosure to the jury is not favored by the more recent court decisions absent bad faith and collusion by the settling parties against the non-settling defendant, and is generally left to the discretion of the trial court.[83]

While the court of appeals here stated it was following the majority rule of other jurisdictions, as ruled below it is hard to imagine how there could any longer exist *any* confidential pre trial settlement agreements in Ohio, creating a whole new category of pre trial hearings and a trial within a trial, with juries asked to decide the intent of parties entering partial settlements along with the traditional issues of negligence. California and Maryland now have passed statutes or undertaken rulemaking under the evidence rules to define such agreements more precisely and control how parties and the trial court must handle them.[84]

Hodesh urges that this Court recognize that the law in Ohio, as well as nationally, was unsettled at the time of trial. Whether or not this Court agrees with the court of appeals as to whether this Agreement was a Mary Carter agreement, any Ohio trial court would have felt justified in excluding this evidence on this record.

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[83] Appx. M, *Monti v. Wenkert*, 287 Conn. 101; *Nair*, 953 So.2d 590; *Ziegler, supra*; *Ryals v. Hall-Lane Moving*, N.C. Ct of App., 94-748, (4/2/1996); *Wingo v. Rockford Memorial*, 292 Ill. App.3d 896, 686 N.E.2d 722 (Winnebago Co. 1997); *Soria v. Sierra Pacific Airlines*, 111 Idaho 594 (1986); *Ratteree v. Bartlett*, 238 Kan. 11, 707 P.2d 1063 (1985); *Stephens v. Bohlman, M.D.*, Ore. App. 381, 909 P.2d 208, pet. Den., 324 Or. 18 (1996); *Slusher v. Ospital*, 777 P.2d 437 (Utah 1989).

[84] Cal. Civ. Proc. Code 877.6 (West Supp. 1995); Md. Ev. Rule 408 (D).

Rather than allowing the court of appeals to reverse a well decided jury verdict supported by overwhelming evidence, in order to create new rules judicially, this matter could better be handled with the deliberation and investigation that is afforded to legislative bodies,[85] or at least an appropriate rulemaking process by the Supreme Court, modifying Ohio Evid.R. 408 as was done in Maryland.

Therefore, the court of appeals decision should be reversed, and the judgment reinstated.

D. Settlements, even partial settlements, are favored under Ohio law.

Although the Agreement only contingently settled the case between Hodesh and the Hospital, even partial settlements are highly favored in Ohio.[86] Moreover, the terms in paragraphs three and six encouraged a global settlement post verdict, by offering Korelitz a large incentive to settle within thirty days, if he, but not the hospital, was found liable.[87] In exchange for the payment of One Hundred Seventy-five Thousand Dollars by the Hospital, Hodesh agreed not to appeal the defense verdict in favor of the Hospital, and thereby settled his dispute with the Hospital with finality.

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[85] *Arbino v. Johnson and Johnson* (2007), 116 Ohio St.3d 468

[86] *Krischbaum v. Dillon* (1991), 58 Ohio St.3d 58, 69,70, 567 N.E.2d 1

[87] Supp. E-3, Contingency Agreement, Para. 6; if Hodesh and Korelitz settled, the Hospital would have to pay an equal amount as Korelitz, up to $250,000, even if the Hospital obtained a defense verdict, much more than the $175,000 it paid when Korelitz appealed.

Pre-trial settlement agreements are highly favored under Ohio law.[88] Ohio law clearly allows verdict contingent settlements where the settling defendant remains in the trial so long as there is no distortion of the parties' positions created by the agreement, or collusion in bad faith detrimental to the non-settling defendants.[89] "Given the explosion of litigation so characteristic of the modern era, it is essential that settlement of litigation be facilitated not impeded."[90]

Complex litigation with multiple parties can be difficult to settle and require creative solutions. One common problem facing counsel trying to settle such litigation arises when liability probably exists, but co-defendants sharply dispute which is at fault. A pre-trial settlement in such cases, partial or global, requires a determined effort and nuanced approach.[91]

Even with the most experienced lawyers using best efforts to settle all claims, sometimes settlement can only be achieved in steps, limited only by the creativity and motivation of the attorneys, parties and the judge or mediator.[92] It is certainly not Ohio public policy to restrict the discretion of the trial courts and

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[88] *Continental West Condominium Unit Owners v. Ferguson, Inc.* (1996), 74 Ohio St.3d 501, 502, 660 N.E.2d 443.
[89] *Ziegler*, 67 Ohio St.3d 10, 17.
[90] *Krischbaum v. Dillon* (1991), 58 Ohio St.3d 58, 69, 70, 567 N.E.2d 1
[91] The Chief Justice of Ohio in a speech to the Bar recently compared the practice of law to the work of an artist. Nothing is more artistic in law than the collaborative creativity of settling complex litigation.
[92] R. Fisher, et.al, *Getting to YES: Negotiating Agreement Without Giving In* (Penguin, 2d Ed. 1991)

place insurmountable barriers to partial settlements in complex cases, which the inflexible disclosure rules suggested by the court of appeals would surely do.

E. This Court should determine de novo that the court of appeals erred in finding a Mary Carter Agreement.

It should be less important what an Agreement is called than the effect of the Agreement on the trial. But even using the four prong test of Mary Carter agreements proposed by the court of appeals, this Agreement did not contain all of the *Vogel* footnoted set of characteristics.

First, although there was a "low payment" provision, the hospital was not simply a nominal defendant—it had a real interest in the outcome of the trial, adversely to both Hodesh and Korelitz, and as to a significant gap between the high and low.

Second, Hodesh agreed not to enforce judgment against the hospital of a judgment below the low and above the high—a judgment in between was enforceable.

Third, and most significant in the court of appeals opinion, paragraph three stated that in the event of a verdict against Korelitz over Two Hundred Fifty Thousand Dollars and a defense verdict favorable to the Hospital, Hodesh agreed

to look only to Korelitz for payment. The court of appeals found that to be the type of clause characteristic of a Mary Carter agreement.

But the court of appeals failed to recognize the distinction in the following sentence of paragraph three modifying that clause, which stated that if Korelitz or his insurer failed to pay Hodesh within thirty days from the date of judgment, the Hospital was required to pay the low of One Hundred Seventy-five Thousand Dollars in order to avoid appeal, and further, under paragraph six, if Korelitz and Hodesh settled within that same thirty days, the hospital had to pay half, up to Two Hundred Fifty Thousand Dollars.

Thus, looking at the Agreement as a whole, there was no true incentive to the Hospital to increase the damages against Korelitz, because if the verdict against Korelitz was over Two Hundred Fifty Thousand, and he appealed it, the Hospital's payment was the low of One Hundred Seventy-five Thousand Dollars, whether the damages were Two Hundred Fifty Thousand and One Dollars, or Millions.

That is just what happened: the Hospital did not avoid paying anything to Hodesh. The fact that the verdict was over Two Hundred Fifty Thousand Dollars did not eliminate the Hospital's obligation to pay. When taken together, the Agreement has the classic hallmarks of a high low agreement. The record shows no evidence that the Hospital did anything at trial to drive up damages. Any possible incentive found in this clause in the abstract by the court of appeals for the

Hospital to increase damages was effectively obviated by these other clauses. The court of appeals analysis was overly superficial and failed to recognize the careful crafting of this Agreement to keep the adversarial positions of the parties the same as before the Agreement.

Finally, while the Agreement was explicitly confidential, at the hearing before trial, Korelitz evinced his knowledge of the Agreement and plaintiff complied with the court's order to submit the Agreement in camera. There was confidentiality. But there was not secrecy, which was listed in the *Vogel* footnote as one of the four characteristics of a Mary Carter agreement. And, there were good reasons to keep the Agreement confidential from Korelitz, who was stubbornly refusing to acknowledge any right of the Hospital to require him to follow its operating room rules. The Hospital had a strong non financial reason to stay in the trial to vindicate its operating room policies and the veracity of its nurses.

The confidential Agreement here allowed the hospital to stay in the trial but with reduced risk. Disclosure of the Agreement to the jury, and the Hospital's potential payments, would have severely prejudiced the Hospital's right to have the

jury decide this non financial issue of primary importance to the administration of the Hospital and patient safety.[93]

The court of appeals erred in its de novo review and reversal of the trial court's decision that the Agreement need not be disclosed and was not a Mary Carter agreement and therefore the judgment must be reinstated.

F. Korelitz waived any error by the trial court by failing to renew his objection to the exclusion of evidence.

It is axiomatic that if a party fails to renew its objections to evidentiary decisions of the trial court to exclude evidence, such objections are waived and may not be raised on appeal.[94] Korelitz did not renew his request for disclosure of the Agreement to the jury at a time when the trial court could reconsider and cure any claimed error. For this reason alone, the court of appeals erred and must be reversed.[95]

This Court recently emphatically rejected a request for judicial modification of Ohio Evid. R. 103 to conform to the federal version of the rule that does away with the Ohio requirement to renew motions during the trial to admit evidence earlier excluded.[96] The Ohio Rule has not been amended since that time.

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[93] The Hospital produced evidence that surgical towels were used for a variety of purposes in the OR and were not necessarily sterile. Hodesh, for example, contracted MRSA strep from the retained towel.
[94] Appx. G, Ohio Evid.R. 103.
[95] Appx. G, Ohio Evid.R, 103; *Gable v. Gates Mills*, 103 Ohio St.3d 449, 2004-Ohio-5719; *Goldfuss v. Davison* (1997), 79 Ohio St.3d 116, 121, 679 N.E.2d 1099.
[96] *Gates*, supra, 455-458.

The trial court's pre-trial ruling to submit the Agreement in camera certainly did not bar such questioning or renewal of the argument for disclosure. It was a preliminary ruling. Korelitz's failure to renew his objection or request for disclosure, "...deprived the trial court of the opportunity to take corrective measures, if needed, and waived the error on appeal."[97]

If Korelitz's counsel had raised evidence of collusion or realignment at trial to the prejudice of his client, the issue would have been promptly heard by this trial court, as it had been before trial.[98]

Counsel for Korelitz conducted multiple cross and direct examinations. A representative of the hospital administration was at his counsel table, available as a witness. Counsel failed to query Hodesh as to any agreements he had made with the Hospital during cross-examination. Counsel failed to renew his request for disclosure of the Agreement for his use at trial in any way. Whether counsel for Korelitz simply saw no evidence of collusion or bias during trial, or did not feel the issue was important enough to raise during the trial is unknown.[99] The record is clear that he only specifically asked the court to discuss the Agreement *after* the jury left the room.[100]

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[97] *Knowlton v. Schultz*, 2008-Ohio-5984 (1st Dist. App.)
[98] The record and transcript as a whole shows the trial court was demonstrably diligent in allowing parties to be heard on a number of issues during trial.
[99] Dave Calderhead, counsel for Korelitz, had similar experience and trial expertise as Hospital counsel and Hodesh counsel at the time of trial.
[100] Supp. A-57, A-13, Vol. 8 Trial trans. 1328, 1329.

Korelitz therefore knowingly waived any claim on appeal of error in the failure of the trial court to read the Agreement and disclose the Agreement to him or the jury.[101] For this reason alone, the court of appeals must be reversed and the judgment reinstated.

G. Even if the trial court erred in failing to review the agreement before the trial, the court of appeals erred in reversing the judgment as such error was harmless as it did not prejudice Korelitz.

Any error the trial court made in failing to review or disclose the Agreement was harmless error, as he made clear to Korelitz in the hearing for prejudgment interest as well as the post trial Memorandum of Decision:[102]

"...it was open and notorious that this doctor was negligent and that he was responsible for the injuries that Mr. Hodesh suffered"[103]

And further:

"...this was a case of liability...your only defense in this case was damages...[but you produced]... no damages evidence to keep the damages down in this case."[104]

And further:

"During the trial there was no evidence that that the Jewish Hospital remained only as a nominal defendant which conspired with Plaintiff to the detriment of Dr. Korelitz."[105]

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[101] Appx. G, Ohio Evid.R. 103; *Peffer v. Cleveland Clinic Found.,* 177 Ohio App.3d 403, 2008-Ohio-3688 (Cuy. Co. 2008).
[102] Appx. D, Trial Court Memorandum of Decision; Appx. L, Ohio Civil Rule 61.
[103] Supp. C-4, PJI Hearing trans. 300 (Feb. 8, 2007)

As to collusion, the court of appeals sua sponte and by de novo review dismissed all claimed evidence except for the two instances which it considered as "evidence of collusion" between Hodesh and the hospital.[106] These findings were erroneous, both in the standard of review and substantively.

First, the court of appeals questioned why the Hospital opposed Korelitz's motion for bifurcation. However, the hospital stated it felt that Korelitz's disposing of the towel, evasive conduct after the second surgery and questionable recording of the towel as a "fragment," instead of a towel, was evidence helpful to the Hospital for liability purposes.[107] The hospital's position here was not indicative of collusion in bad faith, but rather a strategic trial decision consistent with the long-standing adversarial position of the hospital to Korelitz on liability.

Second, the court of appeals sua sponte questioned the unobjected to peremptory challenge of a juror, Ms. Gilpin, by the hospital. But a review of the voir dire of Juror Gilpin[108] shows that she displayed bias favorable to Korelitz, and unfavorable to the Hospital, a legitimate and non-collusive reason for the Hospital to remove her.

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[104] Supp. C-5, PJI Hearing trans., p. 301
[105] Appx. D, Trial Court Memorandum of Decision.
[106] Supp A-66; Supp. F: Korelitz never raised either issue at trial or on appeal, and court of appeals made no finding of actual collusion in either instance.
[107] Supp. F; Common Pleas Docket 136, Memorandum of Jewish Hospital Opposing Bifurcation.
[108] Supp. A-58-67 Vol. 2, Trial trans. 218-227.

The court of appeals erred in substituting its judgment that there was evidence of collusion at trial. This is important, because the question of collusion at trial, under *Ziegler,* is a factual determination which should rest in the sound discretion of the presiding trial judge, regardless of whether he read an Agreement or not.

Thus the verdict should be reinstated, even if this Court finds the agreement should have been disclosed earlier to the trial court, or read by the trial court earlier, as such error on the part of the trial court was harmless without evidence of an alliance or collusion created by the Agreement.

Next, the court of appeals mentioned that Korelitz claimed that the Hospital did nothing to contest the damages claimed by Hodesh.

Plaintiff's trial strategy was to focus almost exclusively on damages, while each defendant's trial strategy was to focus on avoiding liability and blaming the other. It was clearly trial strategy, and not the Agreement, that caused the defendants to focus on liability and not call rebuttal damages witnesses.

Further, it was Korelitz who identified, but did not call, Drs. Head, Balko and Yaffee as damages experts. The Hospital on the other hand clearly never intended to produce evidence in opposition to Hodesh's damages claim, as it never identified any experts or other witnesses on the subject before entering the

Agreement.[109] Thus, the Hospital's decision to forego presenting evidence on damages was obviously not related to any collusion created by the Agreement.

Neither Korelitz nor the Hospital had Hodesh undergo an independent medical examination, another indication that liability and not damages was the central focus of both defendants.

Most importantly, the court of appeals points to no evidence of the Hospital doing *anything* to support an increase in Hodesh's damages. It was Korelitz, not the Hospital, who admitted in closing argument that Hodesh was entitled to a substantial damage award in six figures.

The question is raised, therefore, as to what it is that the court of appeals thought the Hospital should have done, and whether there is anything it could have done at trial that would have had any impact on the damage award had there been no Agreement, or if the Agreement was disclosed.

Certainly, the Hospital had no greater duty that Korelitz to produce evidence in opposition to damages. Therefore, its decision not to present evidence in opposition to Hodesh's damages claim cannot be reasonably viewed as evidence of collusion between it and Hodesh created by the Agreement, and the court of appeals erred in so finding.

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[109] Trial Docket 59, 60. Korelitz listed several damages experts; internist Yaffee, pathologist Balko, and psychiatrist Head, whose depositions were taken, but called none to testify. The Hospital's expert list filed in 2005 included only liability experts.

Finally, a review of the transcript reveals that Korelitz's counsel engaged in very limited cross examination of Hodesh's damages witnesses, a strategic decision no doubt, made in order to avoid offending the jury. The hospital could have asked similar types of questions, but it is equally likely that teaming up and grilling these lay witnesses, including a doctor, Hodesh's adult sister and brother, and a CEO of a major corporation who was a customer of Hodesh's art business, could have agitated the jury and caused more damages. It cannot reasonably be concluded that if the Hospital had engaged in the same limited, or more vigorous, cross examination of Hodesh's witnesses as Korelitz, that the outcome of the trial would have been any different.

H. Any ruling by this Court should be purely prospective as the parties in contracting and the trial court in rulings relied on Stare Decisis and Retroactive Application would cause an inequitable result

Even if this Court agrees with the court of appeals as to the proper handling of pre trial agreements by the trial court, to the extent the decision below applies new definitional and disclosure rules relating to Mary Carter agreements, these rules and disclosures should be applied purely prospectively and the verdict and judgment should be reinstated.

This Court last month decided a landmark case relevant to this case, *Dicenzo v. A-Best Products Company, Inc.*, which establishes a three part test for the pure

prospective application of a common law decision.[110] The Ohio test, derived from a United Supreme Court case, *Chevron Oil Co. v. Huson*,[111] allows this Court to apply a court decision prospectively where retroactive application interferes with a contract right or vested rights under the old law, or, "...after considering whether retroactive application would fail to promote the rule within the decision *and/or* cause inequity."[112]

The Court determined that although the general rule in Ohio is that decisions are to be applied retroactively, "blind adherence to this rule" has never been mandated by the Supreme Court. As stated earlier by the Court in *Wagner v. Midwestern Indemn. Co.*, "consideration must be given to the purpose of the new rule or standard and to whether a remand is necessary to effectuate that purpose."[113]

Further, a retroactive application would impair the contractual right of Hodesh and the Hospital and disturb the vested rights of the parties. There is a constitutional issue here as well, as the court of appeals ruling below clearly impairs the right of private parties to freely contract.[114] The Supreme Court should

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[110] *Dicenzo*, 2008-Ohio-5327
[111] 404 U.S. 97, 106-107, 92 S.Ct. 349, 30 L.Ed.2d 296
[112] *Dicenzo*, 2008-Ohio-5327 Para. 14.
[113] 83 Ohio St.3d 287, 289, 290, 699 N.E.2d 507 (1998)
[114] Appx. J, Constitution of the United States, Art. I, Sec. 10.

not "shy away" from overturning appellate opinions which unreasonably contort the terms of a contract.[115]

At the very least, in that a contract was entered into in reliance on established law, and vested rights were acquired and relied on by Hodesh, the Court should reinstate the verdict and apply any new disclosure rules prospectively only for that reason.[116]

The three part test stated in *Dicenzo* now to be followed in Ohio to determine whether a decision should be applied prospectively only is:

1. Whether the decision establishes a new principle of law that was not foreshadowed in prior decisions;
2. Whether retroactive application of the new decision promotes or retards the purpose behind the rule defined in the decision; and/or
3. Whether retroactive application of the decision causes an inequitable result.[117]

1. The decision below establishes new principles of law concerning the definition of and disclosure of Mary Carter agreements.

The definition of a Mary Carter agreement and particularly the disclosure rules mandated to trial courts below was not foreshadowed in the prior case law.

Vogel and *Ziegler* did not even hint that a pre trial agreement must be disclosed to the jury if four characteristics of a Mary Carter agreement existed in the agreement. Further, in each subsequent reported assertion of a Mary Carter

[115] *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849.
[116] *Peerless Electric Co. v. Bowers* (1955), 164 Ohio St. 209, 129 N.E.2d 467.

agreement in Ohio following *Vogel* and *Ziegler* the lower courts either upheld the trial court's decision not to admit the asserted Mary Carter settlement agreement in evidence, finding either that the agreement under *Ziegler* was not a Mary Carter Agreement,[118] or the issue was not reached because the parties achieved a settlement that made such determination moot.[119]

It was reasonable in July, 2006 in this case for experienced lawyers and the trial judge to determine that the Agreement should not be disclosed. The doctrine of stare decisis is relevant here, because the trial court obviously relied upon the central holding in *Vogel* and *Ziegler*, that the trial court has broad discretion in admission of such a settlement agreement.

The court of appeals cited no precedent, rule or statute prohibiting the trial judge's discretion to hold a pre trial hearing, interrogate and then rely upon counsel as officers of the court as to the nature of a confidential pre-trial agreement rather than mandating that the agreement be disclosed. In fact, this Court recently held that even where there is an explicit statutory requirement of a hearing, the nature of the hearing is within the sound discretion of the trial court.[120]

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[117] *Dicenzo,* 2008-Ohio-5327, para. 24, 25.
[118] *Berdyck v. Shinde* (1998), 128 Ohio App.3d 68, 713 N.E.2d 1098 (6th Dist.); *Ziegler v. Wendel Poultry (*1991), 91-LW-4471 (3d Dist.) (rev. on other grounds)
[119] *Hale v. Spitzer Dodge, Inc.,* 2006-Ohio 3309 (10th Dist.); *Satterfield v. St. Elizabeth Health Ctr.,* 2005-Ohio-710 (7th Dist.); *Nalley v. Ireland,* Case No. A0603970 (C.P. Ham. Co. 11/20/2007)
[120] *Puszynski v. Reeves* (2008), 117 Ohio St.3d 92, 2008-Ohio-510.

Agreements of all kinds are often confidential.[121] Counsel and the trial court properly relied on Ohio public policy and stare decisis favoring confidentiality, specifically in settlement agreements,[122] and as to counsel protecting the confidentiality of his or her clients.[123] Hodesh complied with the trial court's order that he submit the agreement in camera.

The trial court had access to the agreement during the trial, even if he did not read it, and if there had been any indication of collusion or a change of position as indicated in *Vogel* and *Ziegler*, the trial court had the ability and discretion to sua sponte review the agreement and disclose it to the jury prior to deliberations, even if Korelitz never again raised the motion or objected.

Further, there were other Ohio statutes and rules as well which were fairly interpreted by counsel and the trial court to favor non-disclosure of the Agreement to anyone. Ohio Evid.R. 408, cited by this Court in *Ziegler*, favors confidentiality and inadmissibility of settlements and negotiations in most circumstances.[124]

Mediations, by statute, are generally protected from admission at trial.[125] Disclosure of settlement negotiations to the jury had been held at the time of trial in the first District to be prejudicial to the settling parties.[126]

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[121] *Proctor & Gamble Co. v. Stoneham* (2000), 140 Ohio App.3d 260, 747 N.E.2d 268.
[122] Appx. H, Ohio Evid.R. 408
[123] Appx. K, Ohio Rules Prof. Conduct 1.6; Appx. F, Ohio Code Prof. Resp. Canon 4.
[124] Appx. H, Ohio Evid.R. 408.
[125] Appx. I, Ohio Rev. Code Sec. 2710.07.
[126] *Breining v. Trimble*, 107 Ohio App.3d 740, 669 N.E.2d 494 (Ham. Co. 1995)

2. **Whether retroactive application of the new decision promotes or retards the purpose behind the rule defined in the decision.**

As in *Dicenzo*, retroactive application of the new rules to these parties would certainly not advance the purpose of the new rules defined in the decision below. The purpose of the disclosure rules announced below is clearly to provide the jury with awareness that the settling parties had entered an agreement creating an alliance against the non settling defendant or distorting the adversarial position of the settling parties that existed before the Agreement.

First, the court of appeals failed to recognize that the Agreement here did not "alter or distort" the settling parties' positions at trial, with the hospital staying as a "nominal party...."[127] As discussed above, the adversarial positions of the parties were exactly the same before the parties entered the Agreement.

Second, certainly the purpose behind the rule would not be advanced by retroactive application against Hodesh, which would require remand for a new trial. The rule requiring disclosure would not be promoted in such a trial because the Hospital has paid Hodesh, is no longer a party, and thus the Agreement would not be admissible as it would no longer have any relevance to show an alliance to the new jury.

[127] *Ziegler*, supra, at 17.

The retroactive application of the rule below would retard the purpose of the rule to promote fair trials as disclosure here would have the effect of denying the Hospital to limit its financial risk but remain in the trial to defend its nurses and to establish that the community would not support Korelitz and other surgeons with hospital privileges flaunting hospital safety policies with impunity.

3. Retroactive application of the decision would cause an inequitable result.

Most importantly, as in *Dicenzo*, the retroactive application of the definition of a Mary Carter agreement, and new rules created below mandating disclosure causes the great inequity of reversing this jury's well determined verdict and would require Hodesh (and Korelitz) to engage in another trial before another jury. A trial of this magnitude is a tremendous undertaking, and as in *Dicenzo*, "would impose a tremendous financial burden" on Hodesh, "years after the fact,"[128] involving a number of witnesses and evidence concerning matters occurring a long time ago. Such trial would also disrupt the operations of Jewish Hospital as the same witnesses and same contested issues of fact would be necessary. At this point, the record does not show whether the operating room rules have been changed or whether the same nurses still work at the Hospital.

[128] Dicenzo, 2008-Ohio-1628, para. 47

Expert witnesses on both sides would have to be consulted and retained at a huge expense once again, only to reiterate the same standards and opinions. The law has not changed as to the standard of care of a surgeon to remove a towel from the patient before ending the surgery. The jury below found that Korelitz was negligent and there is no reason to believe a retrial would change that firmly stated jury interrogatory.

The court of appeals certainly did not state any reason to believe that the result would be any different on remand for a new trial. Significantly, the court of appeals made absolutely no finding of any collusive trial actions by Hodesh,[129] and Korelitz was clearly liable for the admittedly significant harm that he caused by his negligence. Retrospective application would cause the harsh and inequitable result of needlessly delaying, or potentially denying, justice to Hodesh.[130]

Retroactive application would inequitably nullify the jury's decision below, by its verdict, upholding the Hospital policy that a surgeon is responsible for harm caused by the intra-abdominal use of surgical towels. The Hospital was faced with a non compliant surgeon who refused to accept Hospital policy against this dangerous use of surgical towels inside the body.[131]

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[129] The only evidence of collusive actions at trial noted by the court of appeals were actions by the Hospital, not Hodesh.
[130] The negligent surgery took place on December 20, 2000. Hodesh is now sixty-one years old.
[131] Beyond the specific issue posed here of the danger of retention, the testimony at trial also revealed that all surgical towels in the OR may not be sterile, thus potentially carrying bacteria.

Finally, regardless of the handling and non-disclosure of the Agreement by the trial court, it is unfair and inequitable to reverse the judgment as Hodesh fairly and properly put forth overwhelming evidence of the liability of Korelitz and the harm Hodesh suffered as a direct and proximate result, and the jury simply believed the Hospital's evidence and nurses testimonies over that of Korelitz.[132]

As the trial court stated, and the court of appeals did not dispute, this was as close to a clear liability case as one could imagine.[133] Korelitz was legally liable under longstanding Ohio precedent.[134] It would be grossly inequitable to now allow him to avoid or further delay the consequences of his liability to Hodesh.

The Agreement offered Hodesh a reasonable opportunity to assure himself of at least reimbursement of his [then] litigation expenses and medical bills by the Hospital even if he lost the trial. Hodesh produced evidence by expert testimony and strenuously argued at closing argument for joint and several liability against both defendants.[135] There was no evidence that he colluded with the Hospital--- in fact all evidence points to the contrary.

The doctrine and application of stare decisis and prospective application is complex, but in Ohio under *Dicenzo*, it is now clear that these doctrines should

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[132] The recent 2008 Gallup Poll of Honesty and Ethics showed nurses by far the most trusted profession for the past seven straight years.
[133] Supp. C-4, PJI trans., p. 300.
[134] *Ault v. Hall* (1928), 119 Ohio St. 422.
[135] Supp. A-20, Trial trans. 1209, "We say on behalf of Mr. Hodesh that both are jointly and severally liable."

protect those such as Hodesh who rely on prior decisions of this Court and suffer undue hardship when established law is changed or reversed or new rules are announced after the fact.[136]

While this Court may well agree with the court of appeals and the recent decision in Connecticut that a better rule is that all "verdict contingent" agreements, whether characterized as a Mary Carter or not, must be disclosed, it is instructive that in the most recent similar case decided by another jurisdiction, Connecticut, the failure of the settling parties and the court to do so was remedied prospectively and not as to the parties there.[137]

In respect of stare decisis and the test stated in *Dicenzo*, even if the rules advanced below are upheld, the court of appeals decision should be applied prospectively only and not to this case. Therefore the jury verdict must be reinstated.

I. Conclusion: The verdict and judgment should be reinstated.

Significantly, neither the trial court nor even the court of appeals found any evidence of collusive conduct on the part of Hodesh or his counsel. The evidence of collusive conduct found by the court of appeals on the part of the Hospital was simply erroneous.

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[136] *Dicenzo*, 2008-Ohio-5327, para.47; *Galatis*, supra (Syll. 1)
[137] Appx. M, *Monti*, 287 Conn. 101, 947 A.2d 261 (2008).

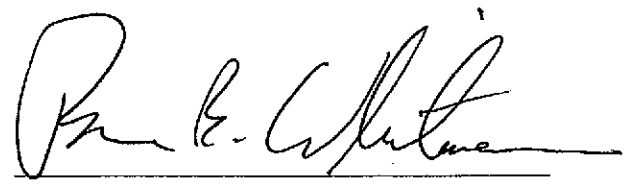
Even if this Court finds that the agreement should have been disclosed earlier, or the trial court should have disclosed the agreement to Korelitz before the trial, the facts compel the conclusion that any such error was harmless and did not affect the conduct or the outcome of the trial. Indeed, Korelitz never renewed his assertion of a Mary Carter agreement, renewed his request for disclosure, or objected to any evidence of a bad faith alliance or collusion during the presentation of evidence or arguments of counsel at trial.

The court of appeals did not make the critical finding that the verdict would have been any different with disclosure or would be different at retrial. There was more than ample evidence supporting the jury's verdict on liability and damages. In fact, the trial court held the evidence against Korelitz was overwhelming.

Regardless of the appellate court's determination of what the law should be, that court erred in applying these new rules retroactively rather than prospectively only, when it reversed the jury's verdict, and therefore the verdict and judgment must be reinstated, with interest calculated as according to law. [138]

[138] Appx. C, Court of Appeals Opinion, Para. 66. The court of appeals analyzed the method it felt was proper in determining prejudgment interest in the event the verdict was reinstated.

Respectfully submitted,



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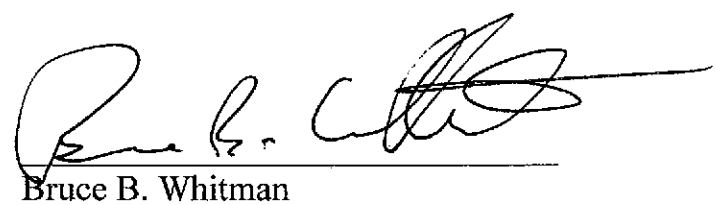
Certificate of Service

I hereby certify that a copy of the Merit Brief was sent by ordinary U.S. mail to counsel of record for Appellees Joel Korelitz and Cincinnati General Surgeons, Inc.: Irene C. Keyse-Walker, Tucker, Ellis & West LLP, 2250 Huntington Building 925 Euclid Avenue, Cleveland, Ohio 44115-1475 and David Calderhead, Triona, Calderhead & Lockemeyer, 2021 Auburn Avenue, Cincinnati, Ohio 45219 on December 5, 2008.



Bruce B. Whitman

COUNSEL FOR APPELLANT,
MICHAEL HODESH

IN THE SUPREME COURT OF OHIO

Michael Hodesh	:	
	:	
Appellant	:	Case No. 08-1133
	:	
v.	:	On Appeal from the
	:	Hamilton County Court of Appeals,
Joel Korelitz, M.D., et al	:	First Appellate District
	:	
Appellees	:	

APPENDIX

IN THE SUPREME COURT OF OHIO

08-1133

MICHAEL HODESH	:	
Appellant,	:	On Appeal from the Hamilton County Court of Appeals, First Appellate District
vs.	:	
JOEL KORELITZ, M.D., et al.	:	Court of Appeals Case Nos. C-061013, C-061040, C-0700168, and C-0700172
Appellees	:	

NOTICE OF APPEAL OF APPELLANT MICHAEL HODESH

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COUNSEL FOR APPELLEE,
PROASSURANCE COMPANY

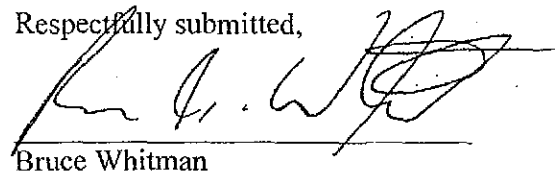
FILED
JUN 12 2008
CLERK OF COURT
SUPREME COURT OF OHIO

Notice of Appeal of Appellant Michael Hodesh

Appellant Michael Hodesh hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Hamilton County Court of Appeals, First Appellate District, entered in Court of Appeals Case Nos. C-061013, C-061040, C-0700168, and C-0700172 on May 2, 2008.

This case raises a substantial constitutional question and is one of public or great general interest.

Respectfully submitted,

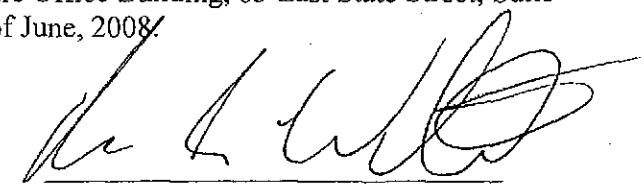


Bruce Whitman

COUNSEL FOR APPELLANT,
MICHAEL HODESH

Certificate of Service

I certify that a copy of this Notice of Appeal was sent by ordinary U.S. mail to counsel for Appellees, David Calderhead/Joel Peschke, Triona, Calderhead & Lockemeyer, 2021 Auburn Avenue, Cincinnati, Ohio 45219 and upon Mark Schumacher/Sandra McIntosh, Freund, Freeze & Arnold, Attorneys for Appellant, Capitol Square Office Building, 65 East State Street, Suite 800, Columbus, Ohio 43215-4247 this 12th day of June, 2008.



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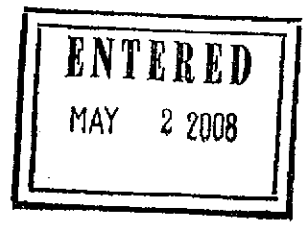
COUNSEL FOR APPELLANT,
MICHAEL HODESH



IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

MICHAEL HODESH	:	APPEAL NOS. C-061013, C-061040 C-0700168, C-0700172
Plaintiff-Appellee	:	TRIAL NO. A-0205071
v.	:	
JOEL KORELITZ, M.D., et al.	:	
Defendant-Appellants.	:	D78217235

This cause was heard upon the appeal, the record, the briefs, and arguments.

The judgment of the trial court is affirmed, in part, reversed, in part, and remanded for the reasons set forth in the Opinion filed this date.

Further, the court holds that there were reasonable grounds for this appeal, allows no penalty, and orders that costs are taxed 50% to Appellee and 50% to Appellants.

The court further orders that 1) a copy of this Judgment with a copy of the attached constitutes the mandate, and 2) the mandate be sent to the trial court for execution under App.R. 27.

WILLIAM H. WOLFF, JR., Judge

JAMES A. BROGAN, Judge

MIKE FAIN, Judge

To The Clerk:
Enter upon the Journal of the Court on _____ Per Order of the Court.

By: _____
Judge

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

MICHAEL HODESH	:	APPEAL NOS. C-061013, C-061040 C-0700168, C-0700172
Plaintiff-Appellee	:	TRIAL NO. A-0205071
v.	:	*OPINION.*
JOEL KORELITZ, M.D., et al.	:	
Defendant-Appellants.	:	

PRESENTED TO THE CLERK
OF COURTS FOR FILING

MAY 02 2008

COURT OF APPEALS

Medical Malpractice Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: 1) Entry Granting Plaintiff's Motion for Prejudgment Interest; 2) Judgment Entry following jury trial; 3) Entry Granting Plaintiff's Motion for Bill of Costs; 4) Entry Denying Motions for New Trial, Remittitur, Set-off and Revoke Confidential Agreement

Date of Judgment Entry on Appeal: 1) February 13, 2007; 2) July 27, 2006; 3) September 5, 2006; 4) October 31, 2006; May 2, 2008

Bruce B. Whitman, Mark Schumacher, and *Sandra R. McIntosh,* for Plaintiff-Appellee,

David C. Calderhead and *Joel L. Peschke,* for Defendant-Appellant

JAMES A. BROGAN, Judge

MIKE FAIN, Judge

To The Clerk:
Enter upon the Journal of the Court on _____ Per Order of the Court.

By: _____
Judge

BROGAN, Judge.

{¶1} This medical malpractice case involves two appeals and a cross-appeal from the judgment of the Hamilton County Court of Common Pleas following a jury trial, at the conclusion of which the jury returned a verdict against Appellant, Joel Korelitz, M.D., in the amount of $775,000.00, plus costs. Korelitz appeals from the trial court's (1) Entry granting the Motion for Prejudgment Interest of Appellee, Michael Hodesh; (2) the Judgment Entry entered on July 26, 2006; (3) the Entry granting Hodesh's Motion for Bill of Costs; and (4) the Entry denying Korelitz's Motions for a New Trial, Remittitur, Set-off and to Revoke the Confidential Agreement. Korelitz's insurance company, Pro Assurance, Inc., intervened in the case after Hodesh moved for prejudgment interest. Pro Assurance has filed its own appeal from the trial court's Entry awarding Hodesh prejudgment interest in the amount of $348,750.00.

{¶2} Hodesh cross-appeals, contesting the trial court's decision to grant a directed verdict against Hodesh as to his claims of spoliation of evidence, intentional destruction of evidence, fraudulent concealment and punitive damages.

I. The Facts

{¶3} On December 26, 2000, Michael Hodesh underwent abdominal surgery for diverticulitis at Jewish Hospital in Cincinnati, Ohio. Performing the surgery was Appellant, Joel Korelitz, M.D. Korelitz was assisted by Jeffrey Mathisen, M.D., a surgical resident at Jewish Hospital; Tari Berke, a scrub nurse; and Sherry Murphy, a circulating nurse.

{¶4} During the surgery, Korelitz used an unspecified number of 18" x 12" surgical towels to pack Hodesh's small bowel in order to visualize the colon. Testimony was presented at trial that

indicated such use of surgical towels was not common practice, as towels, at that time, were rarely included in nurses' procedure for counting instruments and supplies placed on surgical trays and used during operations. However, Korelitz routinely used the towels for this purpose.

{¶5} The parties do not dispute that one of these towels was left inside of Hodesh's abdomen at the conclusion of the surgery. Rather, conflict arose because neither the nurses nor Korelitz would assume full responsibility for keeping track of the surgical towels that were used. Gerald Bechamps, M.D., an expert witness retained by Jewish Hospital, testified via video deposition during the plaintiff's case-in-chief that it is the responsibility of the surgeon as the head of the operating room team to tell the nurses that he or she is placing an item into the abdomen of a patient, so that the item may be accounted for and removed before the surgery is completed. Bechamps also asserted that the nurses have a duty to make a notation of any objects placed inside of a patient's abdomen during surgery that are not part of the routine counting procedure, but that this duty arises only after the surgeon has alerted them that he or she has actually placed the objects in the patient. To the contrary, Korelitz's expert witness, Stephan Myers, M.D., testified that it is always the expectation of the surgeon that the nurses in the operating room will count all items that go into and are taken out of a patient's abdomen. This count must occur at the time the nurse hands the surgeon the item. According to Myers, the expectation results from the surgeon's complete attention being focused on the procedure, not on accounting for different devices. Furthermore, Myers contended that Jewish Hospital's counting policy lacked the necessary precision to advise nurses of what to do with towels used during a surgery.

{¶6} Hodesh was released from the hospital on January 5, 2001. For the next 20 days, symptoms associated with the surgery persisted, including fever, severe abdominal pain and uncontrollable bowel movements. On January 18, 2001, Hodesh went to Korelitz's office, where x-

rays were taken of his upper gastrointestinal tract. The surgical towel was not identified at that time. Instead, Korelitz concluded that fecal matter had amassed near Hodesh's colon where the prior surgery had been performed. Due to ongoing pain and discomfort, Hodesh was re-admitted into Jewish Hospital on January 26, 2001. Stuart Hodesh, the appellee's brother, signed the admission papers as the appellee's power of attorney.

{¶7} Upon admission, the surgical resident, Mathisen, took x-rays of Hodesh's abdomen as part of a preliminary examination. Mathisen opined that the films showed a small bowel obstruction and evidence of a foreign body in the abdomen. Moreover, the radiologist's diagnosis indicated that the "[f]indings are suspicious for intra-abdominal radiopaque foreign bodies possibly representing intra-abdominal towels or sponges." (Tr. at 518.) When Mathisen informed him of the findings, Korelitz reviewed the x-rays with the radiologist, comparing those with the films taken on January 18, 2001. Based on their review, the radiologist included an addendum to his report, providing that the "hazy density [in the x-ray] most likely represents a peculiar configuration of stool present in the right colon." (Tr. at 517.)

{¶8} Thereafter, Korelitz performed a second surgery on Hodesh, which was identified as an exploratory laparotomy. During this surgery, Korelitz located and extracted the retained surgical towel from the center of an abscess cavity filled with pus. Despite the operative report prepared by Korelitz indicating that a "fragment of old towel" was identified and removed from Hodesh's abdomen, Korelitz admitted at trial that the whole surgical towel was removed, although it was compacted. (Tr. at 526.)

{¶9} Following its removal, Korelitz ordered that the towel be discarded. According to Carolyn Davis, a registered nurse at Jewish Hospital and the charge nurse at the time of Hodesh's second surgery, the proper procedure would have been to send the towel to the pathology lab for

examination. Davis further testified, however, that commonly a nurse would not send a specimen to pathology if told not to by the participating surgeon. In such an event, the nurses are required to record appropriate documentation of the item pursuant to Jewish Hospital policy. This did not occur. In addition, Korelitz testified that it was unnecessary to send the towel to the pathology lab because its description was not at issue and the fact that it was the origin of Hodesh's abdominal infection was not in dispute.

{¶10} At the conclusion of the surgery, Korelitz informed Stuart Hodesh that he had removed a surgical towel from his brother's abdomen and that this towel had been the source of Hodesh's infection and coinciding abdominal pain. According to Korelitz, Stuart Hodesh requested that he keep this information from his brother because of Michael Hodesh's unstable mental condition. Korelitz complied. He further testified that he recounted the results of the surgery and the conversation with Stuart Hodesh to Bruce Greenberg, M.D., Hodesh's general practitioner.

{¶11} A drainage tube was inserted into Hodesh's abdomen on January 31, 2001. Its purpose was to remove excess pus as a result of the infection. The tube remained inside of Hodesh for an additional ten days.

{¶12} In July 2001, Hodesh underwent surgery for an incisional hernia. Testimony from the treating physician, Martin B. Popp, M.D., indicated that the hernia was an "infectious complication" related "to the whole towel and the whole inflammatory process." (Popp Dep. at 12-13.)

{¶13} Hodesh filed a medical malpractice action in January 2002 against Korelitz, his general surgeon; Cincinnati General Surgeons, Inc., Korelitz's practice group; and Jewish Hospital and the Health Alliance of Greater Cincinnati (collectively, "Jewish Hospital"). He subsequently amended his complaint to include claims of spoliation of evidence, destruction of evidence, fraud

and punitive damages.

{¶14} This matter proceeded to trial in July 2006. On the day prior to trial, Korelitz's attorney became aware that Jewish Hospital and Hodesh had entered into a partial settlement agreement – his concern was that the parties had entered into a Mary Carter agreement, whereby Jewish Hospital aligned itself with Hodesh in exchange for a release from judgment. See *Booth v. Mary Carter Paint Co.* (Fla.App.1967), 202 So.2d. 8, overruled by *Ward v. Ochoa* (Fla.1973); 284 So.2d 385. Defense counsel's concern was entered into the record on the day of trial. According to the trial court, there was no evidence of collusion between Jewish Hospital and Hodesh for it to determine that the agreement was a Mary Carter agreement and, thus, should be disclosed to the jury. Instead, the court determined it to be a high/low agreement and ordered that it remain confidential and sealed until the end of the trial. It is important to note that the trial court did not examine the instrument at this time. At the conclusion of the trial, the parties agreed to have confidentiality of the agreement lifted.

{¶15} After a week-long trial, the jury found that Korelitz, alone, was negligent for failing to examine Hodesh's abdominal cavity and remove the surgical towel before the incision was closed. As a result, the jury returned a verdict against Korelitz in the amount of $775,000.00. At the end of Hodesh's case-in-chief, the trial court had directed out his claims of spoliation of the evidence, destruction of the evidence, fraud and punitive damages, in addition to any allegations regarding informed consent.

{¶16} Post-trial, Korelitz moved for a new trial, or in the alternative, for remittitur, for a set-off, and for revoking the confidentiality order of the court. Each motion was subsequently denied. At the same time, Hodesh moved for prejudgment interest. After Hodesh filed his motion, Korelitz's medical malpractice insurer, Pro Assurance, obtained permission to intervene to challenge

prejudgment interest. The trial court subsequently granted prejudgment interest, following a hearing in February 2007, in the amount of $348,750.00 on the entire verdict of $775,000.00.

{¶17} In September 2006, Jewish Hospital was dismissed with prejudice in accordance with the terms of its agreement with Hodesh. Additionally, Jewish Hospital paid Hodesh $175,000.00, also per the agreement ("*If Korelitz or his insurance carrier do not pay the verdict within thirty-days from the judgment in the trial court, Jewish will pay $175,000.00 to Plaintiff; and, Hodesh will forego any appeal against Jewish and provide a dismissal of Jewish with prejudice.*").

{¶18} Korelitz filed a timely notice of appeal with this Court, and he has assigned the following errors for our review:

{¶19} I. "THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANTS BY PERMITTING HODESH AND JEWISH HOSPITAL TO MAINTAIN A SECRET 'MARY CARTER AGREEMENT.' "

{¶20} II. "THE TRIAL COURT ERRED TO THE PREJUDICE OF THE APPELLANTS BY FAILING TO APPLY A SET-OFF."

{¶21} III. "THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANTS BY FAILING TO BIFURCATE THE ALLEGATIONS OF INTENTIONAL MISCONDUCT."

{¶22} IV. "THE TRIAL COURT ERRED TO THE PREJUDICE OF THE APPELLANTS BY PRECLUDING CROSS-EXAMINATION OF HODESH ON PRIOR, INCONSISTENT, SWORN STATEMENTS."

{¶23} V. "THE TRIAL COURT ERRED TO THE PREJUDICE OF THE APPELLANTS IN DENYING THE MOTION FOR DIRECTED VERDICT ON ALLOWING HODESH TO CLAIM, AND INSTRUCTING THE JURY ON ALLEGED LOSS OF BUSINESS OPPORTUNITIES CLAIM."

{¶24} VI. "THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN DENYING THE APPELLANTS' MOTION FOR A NEW TRIAL WHEN THEY WERE DEPRIVED OF A FAIR TRIAL."

{¶25} VII. "THE TRIAL COURT ERRED TO THE PREJUDICE OF THE APPELLANTS BY CONSIDERING AND THEN GRANTING HODESH'S MOTION FOR PREJUDGMENT INTEREST."

{¶26} For the following reasons, we affirm the judgment of the trial court in part, reverse it in part and remand this matter for further proceedings consistent with this opinion.

II. The "Mary Carter Agreement"

{¶27} In his first assignment of error, Korelitz argues that Jewish Hospital and Hodesh entered into a prejudicial Mary Carter agreement prior to the trial, and that the trial court erred in not revealing this agreement to the jury.

{¶28} The term "Mary Carter agreement" arose from a Florida appellate case, *Booth v. Mary Carter Paint Co.* (Fla.App.1967), 202 So.2d. 8, overruled by *Ward v. Ochoa* (Fla.1973), 284 So.2d 385. There, attorneys for the plaintiff and two of the three defendants entered into a confidential agreement, whereby the plaintiff agreed not to execute judgment against the settling defendants in exchange for the settling defendants' continued presence in trial and a guarantee that the plaintiff would receive at least $12,500.00 despite the judgment. Id. at 10. On appeal, the non-settling defendant argued that the agreement was essentially a release from judgment, and that its liability for damages should have been offset by $12,500.00, the amount of consideration paid by the settling defendants. Id. at 11. The court of appeals disagreed, finding the agreement to simply be an instrument limiting liability of the settling defendants and guaranteeing some return for the plaintiff.

Id.

{¶29} Over time, a Mary Carter agreement has come to designate a contract between a plaintiff and at least one defendant allying them against another defendant at trial. *Vogel v. Wells* (1991), 57 Ohio St.3d 91, 93, 566 N.E.2d 154. "In effect, the 'Mary Carter agreement' is a *partial* settlement of a dispute between a plaintiff and at least one of the defendants. The role of the contracting defendant is comparable to that of the role of an actor in a real play. He is a favored party to the litigation as he hides behind his mask, thereby precluding the court, the jury, and the noncontracting defendant or defendants from recognizing what has conspiratorily transpired to their detriment. The contracting defendant or defendants are defendants in name only, since they, by 'agreement,' actively promote the plaintiff's case. They may very well abandon or not even assert certain obvious defenses, such as contributory negligence, assumption of the risk, or even misuse of the product. They may readily admit the reasonableness of the damages claimed by the plaintiff. In either event, the 'conduct' of the contracting defendant or defendants must influence the judge and jury, especially in those situations where the judge and jury are unaware of the executed 'Mary Carter agreement.' Therefore, any recovery by the plaintiff is tainted because it also accrues to the benefit of the contracting defendant or defendants at the expense of the noncontracting defendant or defendants." (Emphasis sic.) *Vermont Union School Dist. No. 21 v. H.P. Cummings Const. Co.* (Vt.1983), 469 A.2d 742, 749, quoting Freedman, The Expected Demise of "Mary Carter": She Never Was Well (1975), 633 Ins.L.J. 602, 610.

{¶30} The Ohio Supreme Court has established that Mary Carter agreements are generally characterized by three basic provisions: " 'First, the settling defendant guarantees the plaintiff a minimum payment, regardless of the court's judgment. Second, the plaintiff agrees not to enforce the court's judgment against the settling defendant. 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. Some Mary Carter agreements include a fourth element: that the agreement be kept secret between the settling parties.' " *Vogel*, 57 Ohio St.3d at 93, fn. 1, quoting Benedict, It's a Mistake to Tolerate the Mary Carter Agreement (1987), 87 Colum.L.Rev. 368, 369-70.

{¶31} The importance in determining whether an instrument is a Mary Carter agreement lies in how the agreement is subsequently treated. Some jurisdictions have held that Mary Carter agreements are void as against public policy. See, e.g., *Elbaor v. Smith* (Tex.1992), 845 S.W.2d 240, 250 (Mary Carter agreements favor partial settlements that promote further litigation, skew the trial process, mislead the jury, promote unethical collusion among nominal adversaries, and create the likelihood that a less culpable defendant will be hit with the full judgment); *Lum v. Stinnett* (Nev.1971), 488 P.2d 347, 351 (Mary Carter agreements promote maintenance and champerty, contravene legal ethics, and prejudice nonsettling defendants); and *Trampe v. Wisconsin Tel. Co.* (Wis.1934), 252 N.W. 675 (deliberately withholding information of the existence of the settlement imposes a fictitious suit upon the court that impedes the regular administration of justice and results in the trial of issues which are not real).

{¶32} In contrast, a majority of jurisdictions have held that the agreements are valid but subject to disclosure to the parties, to the court, and to the jury. See, e.g., *Sequoia Mfg. Co., Inc. v. Halec Const. Co.* (Ariz.App.1977), 570 P.2d 782, 792-95 (agreement must be disclosed to the court and remaining parties at the earliest opportunity; trial court has discretion to present the agreement to the jury); *Firestone Tire & Rubber Co. v. Little* (Ark.1982), 639 S.W.2d 726, 728 (agreement must be disclosed to the nonagreeing party and may be admitted into evidence); *Ratterree v. Bartlett* (Kan.1985), 707 P.2d 1063, 1074-76 (agreement must be disclosed to the court, and the general terms of the financial interest of a settling defendant in the outcome of the case should be disclosed

to the jury); *General Motors Corp. v. Lahocki* (Md.App.1980), 410 A.2d 1039, 1046-47 (agreement must be disclosed to the court and opposing parties and admitted into evidence, unless there is danger of self-serving statements, in which case a statement of the terms of the settlement must be presented to the jury); *Hegarty v. Campbell Soup Co.* (Neb.1983), 335 N.W.2d 758, 765 (agreement must be disclosed upon proper motion and admitted into evidence); *Hatfield v. Continental Imports, Inc.*, (Pa.1992), 610 A.2d 446, 451-52 (agreement or at least the existence of the reason for the potential bias must be conveyed to the jury); *Poston by Poston v. Barnes* (S.C.1987), 363 S.E.2d 888, 890 (agreement must be disclosed to the jury); *Slusher v. Ospital by Ospital* (Utah 1989), 777 P.2d 437, 444 (agreement must be disclosed to court and parties; then court should disclose the existence and basic contents of agreement to jury, which may include admission of the agreement into evidence).

{¶33} Having considered the policies and law surrounding Mary Carter agreements, we are compelled to agree with the jurisdictions requiring that such agreements be subject to pretrial discovery and admitted into evidence, with some qualifications. See, e.g., *Cox v. Kelsey-Hayes Co.* (Okla.1978), 594 P.2d 354, 360 (finding that full disclosure of the agreement to the jury may prejudice the nonsettling defendant where the agreement contains self-serving statements of the plaintiff and settling defendant). "The reason for requiring disclosure of such agreements is manifest: the normal adversarial relationship between the plaintiff and defendants is distorted, if not destroyed, in instances where a purported defendant has an incentive to increase plaintiff's damages. Such distortion and incentive have the distinct potential for misleading jurors in reviewing evidence and judging witness credibility." *Soria v. Sierra Pacific Airlines, Inc.* (Idaho 1986), 726 P.2d 706, 716.

{¶34} Here, Korelitz argues that the agreement entered into between Jewish Hospital and

Hodesh is a Mary Carter agreement, evidenced most clearly by its built-in incentive for Jewish Hospital to facilitate an increase in Hodesh's damages by reducing Jewish Hospital's exposure to payment liability in proportion to an increase in liability of Korelitz. See *Ziegler v. Wendel Poultry Services, Inc.* (1993), 67 Ohio St.3d 10, 16, 615 N.E.2d 1022, overruled by *Fidelholtz v. Peller* (1998), 81 Ohio St.3d 197, 690 N.E.2d 502. Because the trial court did not examine the subject agreement before the matter proceeded to trial, we review the record in conjunction with Appellant's assignment of error de novo. Effectively, the trial court failed to exercise any discretion it may have had in determining the type of agreement at issue by refusing to examine the instrument until after the jury returned its verdict.

{¶35} The agreement between Hodesh and Jewish Hospital called for the following: (1) if the jury returns a judgment for Hodesh against Jewish Hospital only, the hospital's payment is capped at $250,000.00 regardless of the judgment amount; (2) if the jury returns a complete defense verdict, Jewish Hospital promises to pay Hodesh $175,000.00; (3) if the jury returns a verdict for Hodesh against Korelitz only, Jewish Hospital promises that Hodesh will receive at least $175,000.00, but that Jewish Hospital's maximum contribution in effectuating the judgment will be $250,000.00 – any judgment over $250,000.00 will relieve Jewish Hospital of any payment liability; (4) if Korelitz or his insurance carrier fails to pay the judgment amount within 30 days from the entry of judgment, Jewish Hospital will pay Hodesh $175,000.00, and Hodesh will dismiss Jewish Hospital from the case with prejudice; (5) if the jury returns a joint and several verdict, Jewish Hospital will pay one-half of the compensatory damages, but, again, Hodesh is guaranteed a payment of at least $175,000.00, and Jewish Hospital's payment liability is capped at $250,000.00; (6) if the jury returns an apportioned verdict against Jewish Hospital and Korelitz, Jewish promises to pay Hodesh no less than $175,000,00, including its apportioned share, but no more than

$250,000.00; (7) Jewish Hospital will match any settlement amount made with Korelitz, but no more than $250,000.00; (8) Jewish Hospital will establish an escrow account to cover payments included within this agreement; (9) Hodesh will not assert a cause of action for punitive damages against Jewish Hospital; (10) Jewish Hospital will not contest that Hodesh suffered damages as a result of the surgical towel being left in his abdomen, but Jewish Hospital may contest whether it caused the damages and the extent of the damages; (11) Jewish Hospital will provide its employees, medical records and expert witness at trial, if requested; (12) the contingency agreement is not to be construed as an admission of liability or an impairment of the rights of the parties to proceed with their causes of action, nor is it to be construed as a settlement until the provisions have been exercised; (13) this agreement will remain confidential between Jewish Hospital and Hodesh – disclosure is prohibited without the express consent of the other party; and (14) Jewish Hospital will pay court costs with Korelitz, not independently.

{¶36} Applying the factors set forth by the supreme court in *Vogel*, we find that the agreement in the present case is a Mary Carter agreement. First, under the agreement, Jewish Hospital guaranteed Hodesh a minimum payment of $175,000.00, regardless of the court's judgment. Next, Hodesh agreed not to enforce the court's judgment against Jewish Hospital – under no circumstances would Jewish Hospital be required to pay more than $250,000.00. Third, Jewish Hospital remained a defendant in the trial, but its exposure was reduced in proportion to an increase in the liability of Korelitz. This incentive is present in the clause providing that Hodesh would not look to Jewish Hospital for any payment in the event of a verdict against Korelitz for more than $250,000.00. Finally, Jewish Hospital and Hodesh agreed to keep the terms of the agreement confidential. Only after Korelitz's counsel voiced his suspicion did counsel for Hodesh and Jewish Hospital acknowledge an agreement existed, but even then its terms were never disclosed until the

jury returned with its verdict.

{¶37} Next, presuming Mary Carter agreements are valid in Ohio, this Court must determine what requirements attach to the agreement in this matter with respect to disclosure.[1] At the very least, the trial court had a duty to examine the agreement before trial at the request of Korelitz's counsel. We fail to see any advantage in simply "sealing" the agreement and delaying any sort of examination, including whether the agreement could potentially influence the conduct of the parties, until the conclusion of the case. Rather, we find the appropriate procedure would have been to disclose the agreement to the court so that it could determine it was, in fact, a Mary Carter agreement. Thereafter, the agreement should have been entered into evidence to allow the jury a candid opportunity to consider Jewish Hospital's interest in the outcome of the matter when judging the conduct of the parties and the credibility of their witnesses.

{¶38} Korelitz further alleges that the record contains evidence of collusive conduct between Jewish Hospital and Hodesh. Specifically, he contends that (1) Hodesh and Jewish Hospital worked together to oppose Korelitz's pre-trial and post-trial motions; (2) the agreement prevented Jewish Hospital from contesting damages; (3) the agreement permitted Jewish Hospital to secretly provide hospital employees and medical records for the appellee's case; and (4) Hodesh and Jewish Hospital had a combined nine peremptory challenges.

{¶39} The Supreme Court of Ohio has stated that "[o]ne of the major dangers of Mary Carter agreements lies in 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*." (Emphasis added.) *Ziegler*, 67 Ohio St.3d at 17. Moreover, Mary Carter agreements "pressure the 'settling' defendant to alter the character of the suit by contributing discovery material, peremptory challenges, trial tactics, supportive witness

examination, and jury influence to the plaintiff's cause." *Elbaor*, 845 S.W.2d at 249, citing Benedict, It's a Mistake to Tolerate the Mary Carter Agreement (1987), 87 Columbia L.Rev. 368, 372-73.

{¶40} Although we do not find merit in all of the allegations Korelitz asserts, we do conclude that there exists some evidence of collusive activity in this case. First, Korelitz alleges that the hospital conspired with Hodesh to expose him to personal liability by opposing his pretrial motion to bifurcate – separating the issue of negligence from the issue of intentional misconduct. On one hand, including evidence of intentional misconduct within the primary argument of medical negligence was one tactic to boost the argument that Korelitz was solely at fault. However, in light of the Mary Carter agreement and the incentive to increase Korelitz's liability over $250,000.00, it is rational to construe Jewish Hospital's opposition to bifurcation as a means for elevating the damages. Indeed, with the presence of punitive damages, the potential for a jury award over $250,000.00 is great.

{¶41} We also are compelled to find some evidence of collusion in the way Jewish Hospital handled its peremptory challenges. Specifically, Korelitz questions whether the hospital was influenced by the agreement to excuse a prospective juror who, herself, had been a defendant in a recent personal injury action. That juror stated during voir dire that she felt targeted by the plaintiff in her case because the alleged pain and suffering sought appeared to be intertwined with the plaintiff's extensive medical history. She further provided that she could render a decision in favor of Jewish Hospital's nurses if the evidence demonstrated that they were not at fault. We find it inexplicable on its face why Jewish Hospital excused this juror, when she appeared inclined to challenge damages and weigh the evidence with a sympathetic ear toward the defendants. As before, it is reasonable to infer that the incentive to increase the damages above $250,000.00

influenced the hospital's choice.

{¶42} In conclusion, we agree that Korelitz was prejudiced by the trial court's decision not to disclose the terms of the Mary Carter agreement between Hodesh and Jewish Hospital to the jury. We find the instrument is valid and enforceable, but it should have been subject to pre-trial discovery and admissible into evidence. Doing so protects the integrity of the jury system, whose role is to fairly resolve actual disputes between parties. When a Mary Carter agreement is present, as it was here, "a cloud of doubt remains over the proceedings because of the information withheld from the jurors." *Hashem v. Les Stanford Oldsmobile, Inc.* (Mich.App.2005), 697 N.W.2d 558, 572. Accordingly, Korelitz's first assignment of error is sustained. The judgment of the trial court is reversed, and the matter is remanded for further proceedings consistent with this opinion.

{¶43} Having sustained Appellant's first assignment of error, the remaining assignments of error are hereby rendered moot.

III. Appeal by Intervenor Pro Assurance

{¶44} Pro Assurance also filed a timely notice of appeal, assigning the following four errors related to the award of prejudgment interest:

{¶45} I. "THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT IN FAILING TO DETERMINE THAT R.C. 1343.03(C) IS UNCONSTITUTIONAL."

{¶46} II. "THE TRIAL COURT ABUSED ITS DISCRETION IN GRANTING PLAINTIFF-APPELLEE'S MOTION FOR PREJUDGMENT INTEREST."

{¶47} III. "THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT IN FAILING TO APPLY BASIC RULES OF PROCEDURE AND EVIDENCE TO THE HEARING ON PREJUDGMENT INTEREST."

{¶48} IV. "THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT IN INCORRECTLY CALCULATING ITS AWARD OF PREJUDGMENT INTEREST."

{¶49} As we noted above, our decision to sustain Appellant Korelitz's first assignment of error rendered moot his other six assignments of error, including his challenge to the trial court's award of prejudgment interest. Likewise, our determination that the judgment against Korelitz must be reversed renders moot Pro Assurance's four assignments of error concerning the prejudgment interest award.

{¶50} In order to provide some guidance on remand, however, and without resolving all of Pro Assurance's arguments, we briefly will address which version of the interest statute, R.C. 1343.03, applies in Hodesh's case. When Hodesh filed his lawsuit in 2002, R.C. 1343.03(C) read:

{¶51} "Interest on a judgment, decree, or order for the payment of money rendered in a civil action based on tortious conduct and not settled by agreement of the parties, shall be computed from the date the cause of action accrued to the date on which the money is paid if, upon motion of any party to the action, the court determines at a hearing held subsequent to the verdict or decision in the action that the party required to pay the money failed to make a good faith effort to settle the case and that the party to whom the money is to be paid did not fail to make a good faith effort to settle the case."

{¶52} An amended version of R.C. 1343.03 became effective on June 2, 2004, while Hodesh's lawsuit was pending. As amended, R.C. 1343.03(C) now provides:

{¶53} "(1) If, upon motion of any party to a civil action that is based on tortious conduct, that has not been settled by agreement of the parties, and in which the court has rendered a judgment, decree, or order for the payment of money, the court determines at a hearing held subsequent to the verdict or decision in the action that the party required to pay the money failed to make a good faith

effort to settle the case and that the party to whom the money is to be paid did not fail to make a good faith effort to settle the case, interest on the judgment, decree, or order shall be computed as follows:

{¶54} "(a) In an action in which the party required to pay the money has admitted liability in a pleading, from the date the cause of action accrued to the date on which the order, judgment, or decree was rendered;

{¶55} "(b) In an action in which the party required to pay the money engaged in the conduct resulting in liability with the deliberate purpose of causing harm to the party to whom the money is to be paid, from the date the cause of action accrued to the date on which the order, judgment, or decree was rendered;

{¶56} "(c) In all other actions, for the longer of the following periods:

{¶57} "(i) From the date on which the party to whom the money is to be paid gave the first notice described in division (C)(1)(c)(i) of this section to the date on which the judgment, order, or decree was rendered. * * *

{¶58} "(ii) From the date on which the party to whom the money is to be paid filed the pleading on which the judgment, decree, or order was based to the date on which the judgment, decree, or order was rendered.

{¶59} "(2) *No court shall award interest under division (C)(1) of this section on future damages, as defined in section 2323.56 of the Revised Code, that are found by the trier of fact.*" (Emphasis added).

{¶60} A review of the foregoing language reveals that the amendments to R.C. 1343.03(C) potentially changed the accrual date for a prejudgment interest award and prohibited prejudgment interest on future damages. The trial court declined to apply the amended version of R.C.

1343.03(C). Pro Assurance argues that it erred in failing to do so. Although the amended statute took effect in 2004, well after Hodesh filed his lawsuit, Pro Assurance contends application of the amendments here is not retroactive because the jury verdict, the judgment, the motion for prejudgment interest, and the prejudgment interest hearing all post-dated the 2004 amendments. Therefore, Pro Assurance argues that applying the amendments in Hodesh's case would result in purely prospective application.

{¶61} In support of its argument, Pro Assurance cites *Barnes v. Univ. Hospitals of Cleveland*, Cuyahoga App. Nos. 87247, 87285, 87710, 87903, 87946, 2006-Ohio-6266, appeal allowed, 114 Ohio St.3d 1409, 2007-Ohio-2632, 867 N.E.2d 843.[2] In that case, the plaintiff argued that the amended version of R.C. 1343.03(C) was inapplicable because her complaint was filed before the effective date of the amendments. The Eighth District disagreed, reasoning: "Although this statute was enacted after the suit was originally filed, it was in place before the prejudgment interest determination hearing was conducted, thus, it is applicable. The trial court's actions did not constitute a retroactive application because the current version of the statute was firmly in place before prejudgment interest was evaluated."

{¶62} We note, however, that Pro Assurance has failed to mention *Scibelli v. Pannunzio*, Mahoning App. No. 05 MA 150, 2006-Ohio-5652. In that case, the Seventh District rejected the same argument advanced by Pro Assurance and adopted by the Eighth District in *Barnes*. Id. at ¶143. The *Scibelli* court found more persuasive the plaintiff's assertion "that since prejudgment interest started on the date the cause of action accrued, use of a statute different than the one existing on that date would constitute a retroactive application in a pending case." Id. at ¶141. Pro Assurance also has overlooked *Conway v. Dravenstott*, Crawford App. No. 3-07-05, 2007-Ohio-4933, which was decided shortly before ~~Pro Assurance~~ filed its reply brief. In *Conway*, the Third

District followed *Scibelli* and held that the pre-amendment version of R.C. 1343.03(C) applied, in an action pending on the effective date of the amendments, to determine the accrual date for prejudgment interest and whether prejudgment interest could be awarded on future damages. Id. at fn. 3 and ¶15.

{¶63} Having reviewed *Barnes*, *Scibelli*, and *Conway*, we agree with the Seventh and Third Districts. Under the pre-amendment version of the statute, prejudgment interest started on the date a cause of action accrued. When Hodesh's cause of action accrued, and when he filed his lawsuit, the pre-amendment version of the statute was in effect. Moreover, immediately after Hodesh filed his lawsuit, the parties' respective obligations to act in good faith were governed by the pre-amendment version of R.C. 1343.03(C). Therefore, we agree with *Scibelli* and *Conway* that applying the post-amendment version of R.C. 1343.03(C) in Hodesh's case would constitute retroactive application.

{¶64} Even if we are correct, however, Pro Assurance insists that retroactive application of the statute is appropriate. As Pro Assurance notes, an amended statute may be applied retroactively if (1) the legislature clearly expresses its intent to make the statute retroactive and (2) the statute is remedial in nature. *State v. Consilio*, 114 Ohio St.3d 295, 298, 2007-Ohio-4163, 871 N.E.2d 1167, at ¶10. Pro Assurance argues that the first part of this test is satisfied because the amended statute expressly states that it "applies to actions pending on the effective date" of the amendment. With regard to the second part of the test, Pro Assurance cites several cases for the proposition that prejudgment interest is remedial in nature.

{¶65} Upon review, Pro Assurance's argument fails to persuade us that the amended version of R.C. 1343.03(C) may be applied retroactively in Hodesh's case. To support its argument that the amendments were intended to be applied retroactively, Pro Assurance cites uncodified law in section three of 2004 H 212, which reads: "*The interest rate provided for in division (A) of section*

1343. 03 of the Revised Code, as amended by this act, applies to actions pending on the effective date of this act. In the calculation of interest due under section 1343.03 of the Revised Code, in actions pending on the effective date of this act, the interest rate provided for in section 1343.03 of the Revised Code prior to the amendment of that section by this act shall apply up to the effective date of this act, and the interest rate provided for in section 1343.03 of the Revised Code as amended by this act shall apply on and after that effective date." (Emphasis added).

{¶66} As the Seventh District recognized in *Scibelli*, the foregoing language pertains exclusively to the interest-rate determination under division (A). It makes a new interest rate partially retroactive to pending actions. *Scibelli*, supra, at ¶146. The fact that 2004 H 212 expressly addresses the retroactivity of R.C. 1343.03(A), while failing to mention any retroactivity in R.C. 1343.03(C), supports Hodesh's position that R.C. 1343.03(C) does not have retroactive application to pending cases. Id. at ¶147; see, also, *Conway*, supra, at ¶15. Absent a clear indication that the legislature intended the amended version of R.C. 1343.03(C) to apply retroactively, it may be applied prospectively only. *Scibelli*, supra, at ¶143-44. Accordingly, we agree with the trial court that the pre-amendment version of the R.C. 1343.03(C) applies in Hodesh's case. As noted above, however, the amended version of R.C. 1343.03(A), which addresses the applicable interest rate, also applies because the legislature expressly made it applicable to pending cases. In any event, because we must reverse the trial court's entry of final judgment in favor of Hodesh, Pro Assurance's four assignments of error concerning prejudgment interest are overruled as moot.

IV. Cross-appeal

{¶67} Hodesh raises the following assignment of error on appeal:

{¶68} "THE TRIAL COURT ERRED TO THE PREJUDICE OF MICHAEL HODESH

WHEN IT GRANTED A DIRECTED VERDICT ON SPOLIATION OF EVIDENCE, FRAUD AND PUNITIVE DAMAGES."

{¶69} Specifically, Hodesh contends that he set forth sufficient evidence of Korelitz's intentional misconduct and attempt to thwart liability, where (1) the surgeon procured an addendum to the radiologist's report of Hodesh's x-rays, providing that the "hazy density [in the x-ray] most likely represents a peculiar configuration of stool present in the right colon" (Tr. at 517.); (2) he discarded the surgical towel immediately after removing it from Hodesh's abdominal cavity; and (3) he misrepresented the towel in the post-operative report as a "fragment." For the following reasons, we find no merit in these arguments.

{¶70} Civ.R. 50(A) governs the disposition of a motion for a directed verdict. Civ.R. 50(A)(4) provides:

{¶71} "When a motion for a directed verdict has been properly made, and the trial court, after construing the evidence most strongly in favor of the party against whom the motion is directed, finds that upon any determinative issue reasonable minds could come to but one conclusion upon the evidence submitted and that conclusion is adverse to such party, the court shall sustain the motion and direct a verdict for the moving party as to that issue."

{¶72} A review of a motion for a directed verdict necessitates an assessment of the legal sufficiency of the evidence presented at trial to take the case to the jury. Therefore, the question to be determined is one of law. *Weisbrodt v. Stark Plumbing Co.* (Jan. 6, 1993), Hamilton App. Nos. C-910572, C-910590, and C-910592, 1993 WL 4169, at *2. Under Civ.R. 50(A), an appellate court's standard for reviewing a motion for a directed verdict is de novo. In other words, the reviewing court must ask "whether, after construing the evidence most strongly in favor of the nonmoving party, reasonable minds could come to but one conclusion and that conclusion is adverse

to the nonmoving party." Id., citing *Strother v. Hutchinson* (1981), 67 Ohio St.2d 282, 21 O.O.3d 177, 423 N.E.2d 467.

{¶73} In the present matter, Hodesh disputes the trial court's decision to grant Korelitz's directed verdict pertaining to the plaintiff's claims of spoliation of the evidence/destruction of the evidence, fraud and punitive damages. First, the legal elements necessary to prove spoliation of evidence are " '* * * (1) pending or probable litigation involving the plaintiff, (2) knowledge on the part of defendant that litigation exists or is probable, (3) willful destruction of evidence by defendant designed to disrupt the plaintiff's case, (4) disruption of the plaintiff's case, and (5) damages proximately caused by the defendant's acts * * *.' " *Thomas v. Cleveland Clinic Found.*, Cuyahoga App. No. 85276, 2005-Ohio-4564, quoting *Smith v. Howard Johnson Co.* (1993), 67 Ohio St.3d 28, 29, 615 N.E.2d 1037.

{¶74} The premise of Hodesh's spoliation claim was that Korelitz intentionally destroyed the surgical towel after removing it from the plaintiff's abdomen in an effort to conceal evidence. While Hodesh did not present evidence demonstrating that Korelitz was aware of pending litigation in conjunction with the retained surgical towel, we may presume that he could predict a potential conflict to arise. Thus, we find the first two elements satisfied. However, Hodesh presented no evidence indicating Korelitz's action was willfully designed to disrupt the plaintiff's case. Here, Korelitz testified that he believed it wasn't necessary to send the towel to the pathology lab because there was no question that it was the origin of Hodesh's infection. According to Korelitz, the main function of the pathology lab is to identify a particular object or, more commonly, to identify tissue. In this case, it was not necessary to identify the towel; instead, Korelitz sent a sample of the pus found on the towel in order to determine the bacteria causing the infection. This decision not to send the surgical towel to the pathology lab did not violate any standard of care, as opined by Korelitz's

surgical expert, Stephan Myers, M.D. Furthermore, the evidence did not suggest that Korelitz violated any hospital policy in discarding the towel. Carolyn Davis testified that it was appropriate to not send the towel to the pathology lab because it was not a tissue specimen.

{¶75} Likewise, there is no evidence demonstrating that Korelitz's decision to dispose of the towel disrupted Hodesh's case or caused any damage. The fact that the surgical towel was left inside of Hodesh's abdomen during the first surgery and caused a severe infection was never disputed. Moreover, we find that Hodesh has made no clear argument how there is more evidentiary value in submitting the actual towel to the jury than in presenting sworn testimony that the towel was recovered and confirmed to be the origin of the infection. Accordingly, we find that the trial court did not err in granting a directed verdict to Korelitz on the issue of spoliation of evidence.

{¶76} Next, we find that the evidence was also insufficient to support Hodesh's fraud claim. In order to prevail on a claim of fraud, Hodesh was required to demonstrate all of the following elements at trial: " '(a) a representation or, where there is a duty to disclose, concealment of a fact, (b) which is material to the transaction at hand, (c) made falsely, with knowledge of its falsity, or with such utter disregard and recklessness as to whether it is true or false that knowledge may be inferred, (d) with the intent of misleading another into relying upon it, (e) justifiable reliance upon the representation or concealment, and (f) a resulting injury proximately caused by reliance.' " *Wiley v. Good Samaritan*, Hamilton App. Nos. C-0301301 and C-030181, 2004-Ohio-763, at ¶9, quoting *Burr v. Stark Cty. Bd. of Commrs.* (1986), 23 Ohio St.3d 69, 23 OBR 200, 491 N.E.2d 1101, paragraph two of the syllabus.

{¶77} Here, Hodesh asserts that Korelitz committed two fraudulent acts: (1) he altered the x-ray of Hodesh's abdomen to conceal that the source of the plaintiff's pain was the retained surgical towel; and (2) he mischaracterized the size of the towel in a post-operative report as a "fragment."

{¶78} As we stated above, x-rays of Hodesh's abdomen prior to the second surgery showed a small bowel obstruction and evidence of a foreign body in the abdomen. The radiologist diagnosed these findings as "suspicious for intra-abdominal radiopaque foreign bodies possibly representing intra-abdominal towels or sponges." (Tr. at 518.) Korelitz thereafter reviewed the x-rays with the radiologist, comparing those with the films taken from the upper GI on January 18, 2001. Based on their review, *the radiologist* included an addendum to his report, which indicated that the "hazy density [in the x-ray] most likely represents a peculiar configuration of stool present in the right colon." (Tr. at 517.) At trial, Korelitz testified that the radiologist made his first diagnosis without the knowledge that an upper GI had already been performed on Hodesh, which would allow a comparison of the two films. Furthermore, the evidence showed that the towel was not a radiopaque foreign body clearly identified by an x-ray. Like before, Hodesh has not presented sufficient evidence which would lead us to conclude that the x-ray report was a reckless attempt to conceal a material fact with the intent of misleading Hodesh. Instead, we find that the evidence demonstrates the addendum to the report was a reasonable alternate interpretation of the radiologist's diagnosis.

{¶79} Nor do we find the misrepresentation of the surgical towel as a "fragment" to be an attempt by Korelitz to minimize his liability. At trial, no witness, including Korelitz, disputed that the entire towel was removed from Hodesh's abdomen. While we agree that the term does not create a precise picture of the size of the towel, there was no evidence that Korelitz intentionally sought to misrepresent it. In fact, he testified himself that it was a poor choice of words, where it was his intent to describe the towel as "compacted." (Tr. at 527.)

{¶80} Furthermore, Hodesh has not proven that he justifiably relied upon the addendum to the x-ray report or the term "fragment" in the post-operative report for any particular purpose, or that

he was injured on account of this reliance. At the most, Hodesh maintains he was angry with Korelitz for not discussing with him the details of the second surgery. However, the trial court found, as do we, that the evidence demonstrated Korelitz informed both Stuart Hodesh, the plaintiff's brother, and Bruce Greenberg, M.D., Hodesh's general practitioner, that a surgical towel had been found in the plaintiff's abdomen and it was the cause of the plaintiff's complications. Without proof of all six elements of fraud, Hodesh's argument must fail. Thus, we find the trial court did not err in directing a verdict for Korelitz on the issue of fraud.

{¶81} Having concluded that neither the spoliation claim nor the fraud claim has merit, we further disagree with Hodesh that the trial court erred in directing out his claim for punitive damages. According to the Supreme Court of Ohio, "[i]n a case involving medical malpractice where liability is determined and compensatory damages are awarded, punitive damages pled in connection with the claim for malpractice may be awarded upon a showing of 'actual malice' * * * ." *Moskovitz v. Mt. Sinai Med. Ctr.* (1994), 69 Ohio St.3d 638, 635 N.E.2d 331, paragraph one of the syllabus. Actual malice, defined within the context of awarding punitive damages, is " '(1) that state of mind under which a person's conduct is characterized by hatred, ill will or a spirit of revenge, or (2) a conscious disregard for the rights and safety of other persons that has a great probability of causing substantial harm.' " Id. at 652, quoting *Preston v. Murty* (1987), 32 Ohio St.3d 334, 512 N.E.2d 1174.

{¶82} In *Moskovitz*, the conduct giving rise to the claim for punitive damages was the deliberate alteration of medical records. There, the defendant-surgeon "whited-out" a typed entry in the medical record indicating that it was his decision to merely monitor a growth in the plaintiff's leg because he believed, at that time, the growth was benign. Id. at 643. A handwritten notation was inserted which provided that the patient-plaintiff refused a recommended biopsy and follow up work.

Id. Thereafter, copies of the new record were distributed to different doctors and hospitals treating the plaintiff. Several months before she died of a malignant soft-tissue cancer that had originated from the growth in her leg, the plaintiff filed a complaint for discovery related to a potential medical malpractice claim. Id. at 640-41. During discovery, the original medical record was reconstructed, exposing the doctor's changes. In reviewing whether punitive damages were appropriately rewarded in this case, the supreme court found that such an intentional alteration of documents was "indicative of actual malice," thereby rendering it necessary to submit the issue of punitive damages to the jury. Id. at 652. It further concluded that the doctor's "alteration of records exhibited a total disregard for the law and the rights of [the plaintiff] and her family," in that it was a blatant attempt by the doctor to exculpate himself for his medical negligence while placing the blame on the plaintiff. Id.

{¶83} We find *Moskovitz* distinguishable from the case at bar. The evidence here does not point to a flagrant disregard for the law and the rights of the plaintiff. The decisions Korelitz made about interpreting the x-rays, discarding the towel, and representing it as a "fragment" in the post-operative report were clear examples of exercising his discretion as a surgeon. Moreover, the fact that an entire surgical towel was left in Hodesh's abdomen was never disputed; Korelitz himself admits this. Rather, the only issue in this case was whether Korelitz or the nurses or both were negligent in failing to remove the towel. This Court does not find that Hodesh produced evidence that demonstrates Korelitz's conduct rises to the level of actual malice warranting a reward of punitive damages. Accordingly, we find that the trial court did not err in granting Korelitz's motion for a directed verdict on the issues of spoliation of evidence, fraud and punitive damages. Hodesh's sole assignment of error is without merit and is hereby overruled.

{¶84} The judgment of the trial court is affirmed in part, reversed in part, and the cause is remanded for further proceedings consistent with this decision.

Judgment affirmed in part, reversed in part, and remanded.

Wolff, J., and **Fain, J.,** concur.

(Judges Wolff, Brogan, and Fain of the Second Appellate District sitting by assignment of the Chief Justice of the Supreme Court of Ohio.)

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FRED J. CARTOLANO, Judge

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

MICHAEL HODESH	:	Case No. A-0205071
Plaintiff	:	Judge Cartolano (Sitting by Assignment)
vs.	:	
JOEL KORELITZ, M.D., et al.	:	**MEMORANDUM OF DECISION**
Defendants	:	

This was a medical malpractice action brought by the Plaintiff claiming the Defendant, Dr. Korelitz was negligent by leaving a surgical towel within the surgical field after performing abdominal surgery on Plaintiff. Too, Plaintiff claimed the Defendant, The Jewish Hospital, was negligent because the operating room nurses failed to "count the towels" entering or leaving Plaintiff's abdomen.

After a ten day jury trial, the jury returned a verdict in favor of the Jewish Hospital and a verdict against Dr. Korelitz in the amount of $775,000.00.

Dr. Korelitz has filed several post-trial motions. Each will be discussed separately and each is overruled.

MOTION TO APPLY SET-OFF

Because of a settlement agreement between Plaintiff and The Jewish Hospital, Dr. Korelitz requests the Court to apply a set-off from the judgment returned against him.

> "... some finding of liability is required before a set-off is permitted." (Fidelholtz, et al. v. Peller, et al. (1998), 690 N.E.2d 502).

The jury returned a verdict in favor of The Jewish Hospital and when asked by interrogatory, specifically stated the hospital was not negligent. By their verdict, the jury determined that the co-Defendant, The Jewish Hospital was not a "person liable in tort."

MOTION TO REVOKE CONFIDENTIALITY AGREEMENT

Before trial, Plaintiff and The Jewish Hospital entered into a "confidential agreement." This agreement was sealed, and not revealed to Dr. Korelitz, until after the jury verdicts. Dr. Korelitz claims this agreement was a "Mary Carter Agreement," which should have been made available for his use during the trial.

What is a "Mary Carter Agreement"? "...(It) is a contract between a Plaintiff and one Defendant allying them against another Defendant at trial. It arises in tort litigation where a Plaintiff sues two or more Defendants for the same injury." (Vogel, Admr. v. Wells (1991), 566 N.E.2d 154)

The agreement in question provided for a "high-low" settlement; The Jewish Hospital agreeing to pay Plaintiff $175,000.00 regardless of a jury verdict exonerating the hospital, and up to $250,000.00 if the jury found the hospital liable. The hospital also agreed not to contest that Plaintiff suffered some damage or injury, but would contest whether the hospital proximately caused the injury and the extent of damage.

During the trial, there was no evidence that The Jewish Hospital remained as only a nominal Defendant which conspired with Plaintiff to the detriment of Dr. Korelitz. The positions of Plaintiff and the hospital, remained adversarial at all times; the jury, in fact, found the hospital not to have been negligent during the care and treatment of Plaintiff.

> "... The law favors prevention of litigation by compromise and settlement. 'So long as there is no evidence of collusion, or bad faith, to the detriment of other non-settling party(s), the settlement of litigation will be encouraged and upheld.'" (Zeigler, Admr. v. Wendel Poultry Services, Inc. (1993), 615 N.E.2d 1022).

MOTION FOR NEW TRIAL

Dr. Korelitz moves for a new trial or in the alternative a remittitur of the jury award against him. Their motion is based on several issues:

CONCLUSION

Dr. Korelitz's motion to apply a set-off is overruled; his motion to revoke the "Confidentiality Agreement" is overruled; and the motion for a new trial or remittitur is overruled.

Please present an entry reflecting the findings within ten (10) days.

Fred J. Cartolano, Judge

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RULE 201

Ohio Court Rules

RULES OF EVIDENCE

Article II. JUDICIAL NOTICE

RULE 201 Judicial Notice of Adjudicative Facts

RULE 201. Judicial Notice of Adjudicative Facts

(A) Scope of rule.

This rule governs only judicial notice of adjudicative facts; i.e., the facts of the case.

(B) Kinds of facts.

A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

(C) When discretionary.

A court may take judicial notice, whether requested or not.

(D) When mandatory.

A court shall take judicial notice if requested by a party and supplied with the necessary information.

(E) Opportunity to be heard.

A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.

(F) Time of taking notice.

Judicial notice may be taken at any stage of the proceeding.

(G) Instructing jury.

In a civil action or proceeding, the court shall instruct the jury to accept as conclusive any fact judicially noticed. In a criminal case, the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed.

[Effective: July 1, 1980.]

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RULE 61

Ohio Court Rules

RULES OF CIVIL PROCEDURE

TITLE VII. JUDGMENT

RULE 61 Harmless Error

RULE 61. Harmless Error

No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

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and philosophy of law to a specific legal problem of a client; and thus, the public interest will be better served if only lawyers are permitted to act in matters involving professional judgment. Where this professional judgment is not involved, non-lawyers, such as court clerks, police officers, abstracters, and many governmental employees, may engage in occupations that require a special knowledge of law in certain areas. But the services of a lawyer are essential in the public interest whenever the exercise of professional legal judgment is required.

EC 3-6 A lawyer often delegates tasks to clerks, secretaries, and other lay persons. Such delegation is proper if the lawyer maintains a direct relationship with his client, supervises the delegated work, and has complete professional responsibility for the work product. This delegation enables a lawyer to render legal service more economically and efficiently.

EC 3-7 The prohibition against a non-lawyer practicing law does not prevent a layman from representing himself, for then he is ordinarily exposing only himself to possible injury. The purpose of the legal profession is to make educated legal representation available to the public; but anyone who does not wish to avail himself of such representation is not required to do so. Even so, the legal profession should help members of the public to recognize legal problems and to understand why it may be unwise for them to act for themselves in matters having legal consequences.

EC 3-8 Because a lawyer should not aid or encourage a nonlawyer to practice law, a lawyer should not practice law in association with a nonlawyer or otherwise share legal fees with a nonlawyer. This does not mean, however, that the pecuniary value of the interest of a deceased lawyer in his or her firm or practice may not be paid to his estate or specified persons such as a surviving spouse or heirs through the sale of a law practice or otherwise. In like manner, profit-sharing retirement plans of a lawyer or law firm which include nonlawyer office employees are not improper. These limited exceptions to the rule against sharing legal fees with nonlawyers are permissible since they do not aid or encourage nonlawyers to practice law.

(Amended, eff 2-1-03)

EC 3-9 Regulation of the practice of law is accomplished principally by the respective states. Authority to engage in the practice of law conferred in any jurisdiction is not per se a grant of the right to practice elsewhere, and it is improper for a lawyer to engage in practice where he is not permitted by law or by court order to do so. However, the demands of business and the mobility of our society pose distinct problems in the regulation of the practice of law by the states. In furtherance of the public interest, the legal profession should discourage regulation that unreasonably imposes territorial limitations upon the right of a lawyer to handle the legal affairs of his client or upon the opportunity of a client to obtain the services of a lawyer of his choice in all matters including the presentation of a contested matter in a tribunal before which the lawyer is not permanently admitted to practice.

DISCIPLINARY RULES

DR 3-101 AIDING UNAUTHORIZED PRACTICE OF LAW.

(A) A lawyer shall not aid a non-lawyer in the unauthorized practice of law.

(B) A lawyer shall not practice law in a jurisdiction where to do so would be in violation of regulations of the profession in that jurisdiction.

DR 3-102 DIVIDING LEGAL FEES WITH A NONLAWYER.

(A) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:

(1) An agreement by a lawyer with his or her firm, partner, or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons.

(2) An agreement to purchase the practice of a deceased, disabled, or disappeared lawyer in accordance with DR 2-111 may provide for the payment of money, over a reasonable period of time, to a nonlawyer.

(3) A lawyer who undertakes to complete unfinished legal business of a deceased lawyer may pay to the estate of the deceased lawyer that proportion of the total compensation which fairly represents the services rendered by the deceased lawyer.

(4) A lawyer or law firm may include nonlawyer employees in a retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement.

(5) A lawyer participating in a lawyer referral service that satisfies the requirements of DR 2-103(C) may pay to the service a fee calculated as a percentage of legal fees earned by the lawyer in his or her capacity as a lawyer to whom the service has referred a matter. This percentage fee is in addition to any reasonable membership or registration fee established by the service.

(Amended, eff 7-1-96; 2-1-03)

DR 3-103 FORMING A PARTNERSHIP WITH A NON-LAWYER.

(A) A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.

CANON 4

A Lawyer Should Preserve the Confidences and Secrets of a Client

ETHICAL CONSIDERATIONS

EC 4-1 Both the fiduciary relationship existing between lawyer and client and the proper functioning of the legal system require the preservation by the lawyer of confidences and secrets of one who has employed or sought to employ him. A client must feel free to discuss whatever he wishes with his lawyer and a lawyer must be equally free to obtain information beyond that volunteered by his client. A lawyer should be fully informed of all the facts of the matter he is handling in order for his client to obtain the full advantage of our legal system. It is for the lawyer in the exercise of

his independent professional judgment to separate the relevant and important from the irrelevant and unimportant. The observance of the ethical obligation of a lawyer to hold inviolate the confidences and secrets of his client not only facilitates the full development of facts essential to proper representation of the client but also encourages laymen to seek early legal assistance.

EC 4-2 The obligation to protect confidences and secrets obviously does not preclude a lawyer from revealing information when his client consents after full disclosure, when necessary to perform his professional employment, when permitted by a Disciplinary Rule, or when required by law. Unless the client otherwise directs, a lawyer may disclose the affairs of his client to partners or associates of his firm. It is a matter of common knowledge that the normal operation of a law office exposes confidential professional information to non-lawyer employees of the office, particularly secretaries and those having access to the file; and this obligates a lawyer to exercise care in selecting and training his employees so that the sanctity of all confidences and secrets of his clients may be preserved. If the obligation extends to two or more clients as to the same information, a lawyer should obtain the permission of all before revealing the information. A lawyer must always be sensitive to the rights and wishes of his client and act scrupulously in the making of decisions which may involve the disclosure of information obtained in his professional relationship. Thus, in the absence of consent of his client after full disclosure, a lawyer should not associate another lawyer in the handling of a matter; nor should he, in the absence of consent, seek counsel from another lawyer if there is a reasonable possibility that the identity of the client or his confidences or secrets would be revealed to such lawyer. Both social amenities and professional duty should cause a lawyer to shun indiscreet conversations concerning his clients.

EC 4-3 Unless the client otherwise directs, it is not improper for a lawyer to give limited information from his files to an outside agency necessary for statistical, bookkeeping, accounting, data processing, banking, printing, or other legitimate purposes, provided he exercises due care in the selection of the agency and warns the agency that the information must be kept confidential.

EC 4-4 The attorney-client privilege is more limited than the ethical obligation of a lawyer to guard the confidences and secrets of his client. This ethical precept, unlike the evidentiary privilege, exists without regard to the nature or source of information or the fact that others share the knowledge. A lawyer should endeavor to act in a manner which preserves the evidentiary privilege; for example, he should avoid professional discussions in the presence of persons to whom the privilege does not extend. A lawyer owes an obligation to advise the client of the attorney-client privilege and timely to assert the privilege unless it is waived by the client.

EC 4-5 A lawyer should not use information acquired in the course of the representation of a client to the disadvantage of the client and a lawyer should not use, except with the consent of his client after full disclosure, such information for his own purposes. Likewise, a lawyer should be diligent in his efforts to prevent the misuse of such information by his employees and associates. Care should be exercised by a lawyer to prevent the disclosure of the confidences and secrets of one client to another, and no employment should be accepted that might require such disclosure.

EC 4-6 The obligation of a lawyer to preserve the confidences and secrets of clients continues after the termination of employment. A lawyer should also provide for the protection of the confidences and secrets of clients following the termination of the practice of the lawyer, whether termination is due to death, disability, or retirement. For example, a lawyer might provide for the personal papers of the client to be returned to the client and for the papers of the lawyer to be delivered to another lawyer or to be destroyed. In determining the method of disposition, the instructions and wishes of the client should be a dominant consideration.

(Amended, eff 2-1-03)

DISCIPLINARY RULES

DR 4-101 PRESERVATION OF CONFIDENCES AND SECRETS OF A CLIENT.

(A) "Confidence" refers to information protected by the attorney-client privilege under applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.

(B) Except when permitted under DR 4-101(C), a lawyer shall not knowingly:

(1) Reveal a confidence or secret of his client.

(2) Use a confidence or secret of his client to the disadvantage of the client.

(3) Use a confidence or secret of his client for the advantage of himself or of a third person, unless the client consents after full disclosure.

(C) A lawyer may reveal:

(1) Confidences or secrets with the consent of the client or clients affected, but only after a full disclosure to them.

(2) Confidences or secrets when permitted under Disciplinary Rule or required by law or court order.

(3) The intention of his client to commit a crime and the information necessary to prevent the crime.

(4) Confidences or secrets necessary to establish or collect his fee or to defend himself or his employees or associates against an accusation of wrongful conduct.

(D) A lawyer shall exercise reasonable care to prevent his employees, associates, and others whose services are utilized by him from disclosing or using confidences or secrets of a client, except that a lawyer may reveal the information allowed by DR 4-101(C) through an employee.

CANON 5

A Lawyer Should Exercise Independent Professional Judgment on Behalf of a Client

ETHICAL CONSIDERATIONS

EC 5-1 The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the

RULE 103

Ohio Court Rules

RULES OF EVIDENCE

Article I. GENERAL PROVISIONS

RULE 103 Rulings on Evidence

RULE 103. Rulings on Evidence

(A) Effect of erroneous ruling.

Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

(1) Objection. In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or

(2) Offer of proof. In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked. Offer of proof is not necessary if evidence is excluded during cross-examination.

(B) Record of offer and ruling.

At the time of making the ruling, the court may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. It may direct the making of an offer in question and answer form.

(C) Hearing of jury.

In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury.

(D) Plain error.

Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court.

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RULE 408

Ohio Court Rules

RULES OF EVIDENCE

Article IV. RELEVANCY AND ITS LIMITS

RULE 408 Compromise and Offers to Compromise

RULE 408. Compromise and Offers to Compromise

Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

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2710.07

Statutes and Session Law

TITLE [27] XXVII COURTS -- GENERAL PROVISIONS -- SPECIAL REMEDIES

CHAPTER 2710: UNIFORM MEDIATION ACT

2710.07 Confidentiality of mediation communications.

2710.07 Confidentiality of mediation communications.

Except as provided in sections 121.22 and 149.43 of the Revised Code, mediation communications are confidential to the extent agreed by the parties or provided by other sections of the Revised Code or rules adopted under any section of the Revised Code.

Effective Date: 10-29-2005

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Section 10.

CONSTITUTION OF UNITED STATES

ARTICLE I. LEGISLATIVE DEPARTMENT

Section 10. Powers Denied to the States

Section 10. Powers Denied to the States

No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress.

No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

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RULE 1.6

Ohio Court Rules

RULES OF PROFESSIONAL CONDUCT

I. CLIENT-LAWYER RELATIONSHIP

RULE 1.6 CONFIDENTIALITY OF INFORMATION

RULE 1.6: CONFIDENTIALITY OF INFORMATION

(a) A lawyer shall not reveal information relating to the representation of a client, including information protected by the attorney-client privilege under applicable law, unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by division (b) or required by division (c) of this rule.

(b) A lawyer may reveal information relating to the representation of a client, including information protected by the attorney-client privilege under applicable law, to the extent the lawyer reasonably believes necessary for any of the following purposes:

(1) to prevent reasonably certain death or substantial bodily harm;

(2) to prevent the commission of a crime by the client or other person;

(3) to mitigate substantial injury to the financial interests or property of another that has resulted from the client's commission of an illegal or fraudulent act, in furtherance of which the client has used the lawyer's services;

(4) to secure legal advice about the lawyer's compliance with these rules;

(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding, including any disciplinary matter, concerning the lawyer's representation of the client;

(6) to comply with other law or a court order.

(c) A lawyer shall reveal information relating to the representation of a client, including information protected by the attorney-client privilege under applicable law, to the extent the lawyer reasonably believes necessary to comply with Rule 3.3 or 4.1.

Comment

[1] This rule governs the disclosure by a lawyer of information relating to the representation of a client during the lawyer's representation of the client. See Rule 1.18 for the lawyer's duties with respect to information provided to the lawyer by a prospective client, Rule 1.9(c)(2) for the lawyer's duty not to reveal information relating to the lawyer's prior representation of a former client, and Rules 1.8(b) and 1.9(c)(1) for the lawyer's duties with respect to the use of such information to the disadvantage of clients and former clients.

[2] A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation. See Rule 1.0(f)

RULE 61

Ohio Court Rules

RULES OF CIVIL PROCEDURE

TITLE VII. JUDGMENT

RULE 61 Harmless Error

RULE 61. Harmless Error

No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

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RULE 61

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RULE 61 Harmless Error

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No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

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AUDREY MONTI ET AL. *v.* NAOMI E. WENKERT ET AL.
(SC 18028)
(SC 18029)

Rogers, C. J., and Norcott, Katz, Zarella and Schaller, Js.

Argued February 14—officially released May 27, 2008

Frank H. Santoro, for the appellants (defendant Mark J. Decker et al.).

Carey B. Reilly, with whom were *Cynthia C. Bott*, and, on the brief, *Christopher D. Bernard*, for the appellees (plaintiffs).

Opinion

KATZ, J. The defendant Mark J. Decker, individually and doing business as Ellington Family Practice, appeals from the judgment of the trial court, rendered after a jury trial, against him for damages and prejudgment interest in favor of the plaintiffs, Audrey Monti and Robert Monti, coadministrators of the estate of their seventeen year old daughter, the decedent, Lisa Monti (Lisa), for negligent treatment of Lisa's respiratory illness. In his consolidated appeals to this court,[1] the defendant contends that the trial court improperly denied his motion to set aside the verdict on the grounds that: (1) the jury had returned an impermissible compromise verdict; (2) the trial court improperly had sent the jury back to reconsider only the issue of noneconomic damages; (3) the nondisclosure of a settlement agreement reached during trial between the plaintiffs and the named defendant, Naomi E. Wenkert, and her medical practice group, the Institute of Living Medical Group, P.C., prejudiced the defendant and tainted the verdict; and (4) the plaintiffs failed to engage in a precomplaint inquiry to determine whether there was a good faith basis to bring a malpractice action, as required by General Statutes (Rev. to 1999) § 52-190a (a). The defendant also contends that the trial court improperly awarded prejudgment interest to the plaintiffs. We are not persuaded by the defendant's contentions, and, accordingly, we affirm the judgment of the trial court.

The jury reasonably could have found the following facts. On or about November 8, 1996, Lisa went to the defendant's office complaining of an earache. A physician's assistant attended to her and prescribed an antibiotic. On November 14, Lisa returned to the office complaining of a headache, loss of appetite, ear pain, chills and body aches. She was told to rest, drink fluids and continue on the medication. On November 15, Lisa went to the emergency room at Rockville General Hospital (hospital) complaining of a rash, fever, earache, headache and loss of appetite. The hospital staff told the plaintiffs that they believed that Lisa had suffered an adverse reaction to the antibiotic she had taken, and she was prescribed a different medication and went home. Lisa returned to the hospital on November 16 because her symptoms had worsened to include throat tightness, difficulty swallowing, and an increased respiratory rate. At that time, she was admitted to the hospital's intensive care unit. The defendant was Lisa's attending physician from the day after she was admitted to the hospital, November 17, 1996, until he discharged her from the hospital on November 20. During her time in the intensive care unit, Lisa had trouble sleeping and appeared restless and anxious. On the basis of statements made by physicians and nurses in the hospital, Audrey Monti was led to believe that some of Lisa's

symptoms were not physiological, but, rather, were Lisa's psychological reaction to her fear of what was happening to her in the hospital. In one such statement, a nurse told Audrey Monti that Lisa was not trying to get better. When the defendant discharged Lisa, he indicated to the plaintiffs that there was nothing medically wrong with her.

Believing that Lisa was having a psychological reaction, on November 21, 1996, the day after Lisa's discharge from the hospital, Audrey Monti took her to see her regular psychiatrist, Wenkert, at the Institute of Living (institute). When Lisa arrived at Wenkert's office building, she collapsed just outside the door in "severe respiratory distress," but recovered shortly afterwards and began to breathe more normally. At that time, Lisa exhibited blueish, purple lips—a condition later determined to be cyanosis or an indication that an individual is not moving oxygen into their blood. Wenkert diagnosed Lisa as having a panic attack, conducted the scheduled counseling session with her, and prescribed Ativan, a sedative used to treat anxiety. Lisa died later that evening at approximately 9:30 p.m. An autopsy determined that Lisa's death was the result of acute respiratory distress syndrome, which was caused by a viral infection that neither the defendant nor Wenkert had diagnosed. Additional facts will be set forth as necessary.

The record also reveals the following relevant procedural history. On or about October 20, 1998, the plaintiffs filed a two count complaint against Wenkert, the Institute of Living Medical Group, P.C., and the institute, accompanied by a certificate of good faith. Wenkert in turn filed an apportionment complaint, pursuant to General Statutes §§ 52-102b and 52-572h, against the hospital and the defendant, alleging that their negligence in failing to diagnose Lisa's condition had been the cause of her death. Wenkert's complaint did not include a certificate of good faith. On or about, May 18, 1999, the plaintiffs filed their own complaint against the defendant, alleging that he was negligent in his treatment of Lisa. This complaint also did not include a certificate of good faith.

Thereafter, the defendant filed a motion to strike the plaintiffs' complaint on the ground that they had failed to file a certificate of good faith evidencing the statutorily required precomplaint inquiry, which the trial court, *Teller, J.*, denied. Subsequently, the defendant filed a motion for summary judgment on the same ground. While that motion was pending, the plaintiffs made a motion to file an amended complaint against the defendant that did include a certificate of good faith, which the trial court, *Aurigemma, J.*, granted over the defendant's objection. On January 6, 2003, after a hearing, the trial court, *Peck, J.*, denied the defendant's motion for summary judgment on the ground that the plaintiffs'

amended complaint included a certificate of good faith.

Prior to trial, the plaintiffs withdrew their claims against the institute and the hospital, leaving only claims against Wenkert and the defendant. See footnote 1 of this opinion. Trial began on February 9, 2005. On or about March 18, 2005, after the plaintiffs had rested their case, Wenkert and the plaintiffs entered into a settlement agreement, wherein Wenkert remained in the case, but the plaintiffs were guaranteed certain minimum and maximum damages awards, depending on the jury's verdict. The agreement was not disclosed to the defendant.

At the close of evidence, the trial court instructed the jury as to liability and both economic and noneconomic damages, and sent it to deliberate. During its deliberations, the jury sent three notes to the court regarding its lack of unanimity as to one of the defendants, and the court instructed them each time to continue deliberations. The jury thereafter returned its initial verdict, finding in favor of Wenkert but against the defendant and awarding only economic damages. The trial court stated to the parties that, although the jury reasonably had found that the defendant had breached the standard of care and awarded economic damages, it unreasonably had failed to award noneconomic damages in light of the evidence, and the court intended to send the jury back to reconsider the issue of noneconomic damages. The defendant objected to the trial court's decision to charge the jury to reconsider only the issue of noneconomic damages. Additionally, the defendant moved for a mistrial claiming that the jury had reached an impermissible compromise verdict. The court denied the motion and, over the defendant's objection, instructed the jury to reconsider its award of zero noneconomic damages. The jury returned its final verdict, awarding the plaintiffs $750,000 in economic damages and $1 million in noneconomic damages against the defendant.

Thereafter, the defendant filed a motion to set aside the verdict against him on essentially four grounds, each of which the court rejected. The court first concluded that the failure of the plaintiffs to include a certificate of good faith in their original complaint against the defendant was not a basis upon which to set aside the verdict because: (1) the circumstances did not evidence the lack of a good faith precomplaint inquiry; (2) the defendant had not requested that the court conduct a factual inquiry into the basis for good faith; and (3) in any event, there was no evidence that there was a lack of good faith and setting aside the verdict would not be an appropriate sanction for the lack of a good faith certificate. Second, the court concluded that, given the facts of the case, it properly had sent the jury back to reconsider the issue of noneconomic damages with appropriate instructions as to that issue. The court explained that "[t]here was substantial

and uncontroverted evidence of antemortem pain and mental suffering and loss of enjoyment of life. Given these circumstances the court narrowed its instructions to reconsideration of noneconomic damages."

Third, with respect to the defendant's claim that the circumstances surrounding the jury's deliberations indicated that its first verdict reflected an impermissible compromise verdict, the trial court reasoned that a compromise verdict was not the only reasonable explanation under the circumstances for the jury's decision awarding no noneconomic damages. More specifically, the court reasoned that: its original instructions to consider noneconomic damages were permissive, not mandatory; the jury's last note had indicated that it may have been struggling with the amorphous nature of such damages; and the jury may have determined that it was unfair for damages based on Lisa's pain and suffering ultimately to go to the plaintiffs. The trial court also concluded, however, that any errors in the original verdict were remedied by the jury's reconsideration of the issue of noneconomic damages because the jury ultimately rendered a verdict in harmony with the evidence presented at trial.

Finally, with regard to the plaintiffs' and Wenkert's nondisclosure of their agreement, the trial court concluded that the agreement was not an impermissible settlement agreement because it did not give Wenkert an incentive to increase the defendant's liability. The court also determined that the agreement had not clearly prejudiced the defendant because: Wenkert and the defendant had had an adversarial relationship from the beginning of the trial; the agreement had been entered into late in the trial (after discovery, jury selection, and the presentation of the plaintiff's case-in-chief); and neither Wenkert nor the plaintiffs significantly changed their trial strategy after they had entered into the agreement. The trial court thereafter rendered judgment in favor of the plaintiffs with respect to the claims against the defendant, and after a hearing, the trial court also awarded prejudgment interest. These consolidated appeals followed, wherein the defendant renews the claims that he raised in his motion to set aside the verdict and challenges the award of prejudgment interest. We reject each of these claims.

To the extent that most of the defendant's claims relate to the court's denial of his motion to set aside the verdict, we set forth the well settled standard of review for such claims. "The trial court possesses inherent power to set aside a jury verdict which, in the court's opinion, is against the law or the evidence. . . . [The trial court] should not set aside a verdict where it is apparent that there was some evidence upon which the jury might reasonably reach their conclusion, and should not refuse to set it aside where the manifest injustice of the verdict is so plain and palpable as clearly

to denote that some mistake was made by the jury in the application of legal principles . . . . Ultimately, [t]he decision to set aside a verdict entails the exercise of a broad legal discretion . . . that, in the absence of clear abuse, we shall not disturb."[2] (Internal quotation marks omitted.) *Jackson* v. *Water Pollution Control Authority*, 278 Conn. 692, 702, 900 A.2d 498 (2006); see also *Edmands* v. *CUNO, Inc.*, 277 Conn. 425, 452–53, 892 A.2d 938 (2006); *Howard* v. *MacDonald*, 270 Conn. 111, 126–27, 851 A.2d 1142 (2004).

I

The defendant first contends that the verdict should have been set aside because the trial court acted improperly in response to the jury's original verdict, awarding the plaintiffs economic damages, but no noneconomic damages, by instructing the jury to reconsider noneconomic damages. Specifically, the defendant contends that the totality of circumstances indicated that the jury had reached an impermissible compromise verdict, which requires a new trial as to both damages and liability. By extension, the defendant contends that the trial court improperly invaded the province of the jury when it instructed the jury to reconsider only the issue of noneconomic damages, without permitting it to reconsider liability in order to remedy the compromise verdict. We are not persuaded by the defendant's contentions.

The following additional facts are relevant to the resolution of these claims. After the close of evidence, the court instructed the jury as to liability and damages. In its instructions on damages, the court indicated to the jury that, inter alia, "in addition to economic damages, you must also—you may also consider noneconomic damages." It provided some instruction as to the nature of each type of damages, distributed special interrogatories and verdict forms, and sent them to deliberate. On the first day of deliberations, the jury sent a note to the court indicating that it had reached a decision as to one defendant but was deadlocked as to the other defendant.[3] The court did not deliver a formal "Chip Smith" charge,[4] but simply instructed the jury to make an effort to reach a unanimous verdict.[5] After several more days of deliberations, the jury sent another note inquiring as to whether it could render a verdict for one defendant but remain deadlocked as to the other. Again, the trial court did not deliver a formal Chip Smith charge. Rather, it responded that the jury could be deadlocked as to one defendant and not the other, and then sent the jury back to deliberate further.[6] One day later, the jury sent another note, stating that it had reached a partial verdict but were hopelessly deadlocked at five to one on one of the special interrogatories. The trial judge then delivered a formal Chip Smith charge and sent the jury back for deliberation. Later that day, the jury returned with a verdict for Wenk-

ert and a plaintiffs' verdict against the defendant in the amount of $750,000 in economic damages and no noneconomic damages.

Following this verdict, the trial court excused the jury and discussed with the parties its intention to reject the jury's verdict as to the defendant because the award of zero noneconomic damages shocked the conscience of the court.[7] Thereafter, the trial court reinstructed the jury on some general principles, including the role of the judge and the jury, the requirement of unanimity and the specific issue of noneconomic damages. Over the defendant's objection on the ground that the jury must reconsider both liability and damages, the court then asked the jury to reconsider the issue of noneconomic damages only. Shortly after retiring for more deliberations, the jury submitted yet another note to the court stating: "[T]he jury is still very unclear regarding the range of noneconomic damages we should be considering that would be acceptable . . . . Currently there continues to be great disagreement as to what we should consider." The court instructed the jury that there was no specific range of noneconomic damages that it should consider, but that it simply should do its best to come up with an award "that is fair, just, and reasonable."[8] The jury ultimately returned with a noneconomic damage award of $1 million, for a total verdict of $1,750,000, which the court accepted.

A

We first consider the defendant's contention that the trial court should have set aside the verdict because the jury reached a compromise verdict. "In this state it is required that jury verdicts be unanimous, requiring each juror to decide the case individually after impartial consideration of the evidence with the other jurors." (Internal quotation marks omitted.) *McNamee* v. *Woodbury Congregation of Jehovah's Witnesses*, 194 Conn. 645, 647, 484 A.2d 940 (1984). "Connecticut has long accepted the possibility of juror disagreement and the fact that mistrials are a natural consequence of the unanimity requirement." *State* v. *Sawyer*, 227 Conn. 566, 585, 630 A.2d 1064 (1993). A compromise verdict is a "verdict which is reached only by the surrender of conscientious convictions upon one material issue by some jurors in return for a relinquishment by others of their like settled opinion upon another issue and the result is one which does not command the approval of the whole panel," and, as such, is not permitted. *Murray* v. *Krenz*, 94 Conn. 503, 509, 109 A. 859 (1920).

Once a jury has rendered a verdict that it claims is unanimous, it has long been the rule in our courts to presume the regularity of the deliberation processes of the jury and to decline to inquire into those deliberative processes. See Practice Book § 16-34 ("Upon an inquiry into the validity of a verdict, no evidence shall be received to show the effect of any statement, conduct,

event or condition upon the mind of a juror nor any evidence concerning mental processes by which the verdict was determined. . . . [A] juror's testimony or affidavit shall be received when it concerns any misconduct which by law permits a jury to be impeached."). Accordingly, we do not resort to "assumptions" and "conjecture" when analyzing the basis of a jury's verdict.[9] See *Rosenblatt* v. *Berman*, 143 Conn. 31, 37, 119 A.2d 118 (1955); see also *McNamee* v. *Woodbury Congregation of Jehovah's Witnesses*, 193 Conn. 15, 26, 475 A.2d 262 (*Healey, J.*, concurring) ("[a]s a general rule, a strong presumption of regularity attaches to every step of a civil proceeding, including jury deliberations, and the burden is on the party seeking a new trial to show affirmatively that irregularity exists" [internal quotation marks omitted]), on appeal after remand, 194 Conn. 645, 484 A.2d 940 (1984); *Meek* v. *Wal-Mart Stores, Inc.*, 72 Conn. App. 467, 490–92, 806 A.2d 546 (concluding presumption of regularity of jury deliberations such that no compromise verdict had been rendered had not been overcome because reasons for verdict other than compromise existed and no evidence of juror misconduct or manifest disregard of court's instructions), cert. denied, 262 Conn. 912, 810 A.2d 278 (2002). Moreover, "it is well established that, [i]n the absence of a showing that the jury failed or declined to follow the court's instructions, we presume that it heeded them." (Internal quotation marks omitted.) *State* v. *Carpenter*, 275 Conn. 785, 828, 882 A.2d 604 (2005).

In the present case, the defendant has presented no evidence of juror misconduct, nor anything to suggest that the jury did not follow the court's instructions that they needed to reach a unanimous verdict. See footnote 5 of this opinion. Although the circumstances surrounding the deliberations might suggest that there was a debate over the defendant's liability, our review of the record and the jury's notes seeking assistance from the court indicates nothing out of the ordinary. It is not unusual for juries to send notes to the court seeking assistance or indicating confusion or disagreement. Indeed, all of the jury's notes indicate that it was endeavoring to adhere closely and carefully to the court's instructions and do the most thorough job possible. See footnote 3 of this opinion.

In addition, although it is possible that the initial verdict was a compromise—liability and economic damages in exchange for no noneconomic damages—it is equally, if not more, reasonable to assume that the jury reached a unanimous and firm decision as to liability, but was confused about noneconomic damages. As the trial court noted in its decision denying the defendant's motion to set aside the verdict, the jury could have misunderstood the permissive language in the court's original instruction that "you may consider noneconomic damages" to mean that it was permissible for the jury to decline to consider such damages. The

fact that the jury, upon reconsideration of the issue, expressed confusion as to how to determine an appropriate noneconomic damages award further suggests that the initial verdict was one based on misunderstanding, not a compromise reached after a bargaining process. Presented with various reasonable explanations for the jury's behavior, we cannot say that it was an abuse of discretion for the trial court to decline to grant the defendant's motion to set aside the verdict due to a compromise verdict.

B

The defendant next claims that the jury's reconsideration following its initial verdict should not have been limited to the issue of noneconomic damages. The defendant asserts that this claim is linked in a significant way to the claim we have addressed in part I A of this opinion. He contends that, because the circumstances indicate that one member of the jury had compromised his belief that the defendant was not liable in return for a verdict awarding zero noneconomic damages, the remedy, whether reconsideration or a new trial, should have included both liability and damages, not merely the award of noneconomic damages. In other words, the defendant contends that the problems with the compromise verdict were exacerbated by the narrow scope of the trial court's reconsideration instructions. On the basis of our analysis in part I A of this opinion, this claim also must fail.

Pursuant to General Statutes § 52-223,[10] the trial court was permitted to send the jury back for the reconsideration of the verdict up to three times. It long has been the rule that, when resubmitting a case, the trial court need not require the jury to reconsider all of the issues in the case. *State* v. *Bradley*, 134 Conn. 102, 114–15, 55 A.2d 114 (1947) (not improper for court to instruct jury to reconsider two of three counts in indictment), cert. denied, 333 U.S. 827, 68 S. Ct. 453, 92 L. Ed. 1112 (1948); see also *Van Nesse* v. *Tomaszewski*, 265 Conn. 627, 634, 829 A.2d 836 (2003) (not improper for court to send jury back to reconsider issue of damages only); *Cruz* v. *Drezek*, 175 Conn. 230, 240–42, 397 A.2d 1335 (1978) (not improper for court to send jury back to reconsider whether verdict was excessive). Similarly, we have concluded that it is permissible for the trial court to order a new trial limited to certain issues, if the issues are separable. *Fazio* v. *Brown*, 209 Conn. 450, 455, 551 A.2d 1227 (1988) ("[a]lthough . . . a trial court may limit a retrial to a specific issue or issues, [this authority is] clearly confined . . . to situations '[w]here the error as to one issue or issues is separable from the general issues . . . [and] such . . . limitation does not work injustice to the other issues or the case as a whole' " [citation omitted]), quoting *Murray* v. *Krenz*, supra, 94 Conn. 507. By contrast, if the court concludes that the verdict is a compromise verdict, "a

new trial confined to the single [issue] of damage[s] will be a serious injustice to the [party seeking the new trial as] [h]e has never had the issue of liability determined by the conscientious conviction of all of the jur[ors]; and that he is entitled to have." (Internal quotation marks omitted.) *Mahon* v. *B.V. Unitron Mfg., Inc.*, 284 Conn. 645, 660, 935 A.2d 1004 (2007).

In light of our determination in part I A of this opinion that it was not an abuse of discretion for the trial court to presume regularity in the jury's finding of liability, and to reject the defendant's assertion that the verdict was a compromise verdict, there was no reason to send the jury back to reconsider that issue. Put differently, the defendant had the issue of liability determined by the conscientious conviction of all of the jurors and, therefore, the issue of noneconomic damages reasonably was bifurcated by the court without inflicting injustice.[11] Any confusion that might have existed as to the issue of noneconomic damages properly was cured by the trial court's instructions and the jury's reconsideration.

II

The defendant next contends that the verdict contingent settlement agreement that Wenkert and the plaintiffs reached during the trial should have been disclosed to him. Although the defendant does not contend that such agreements are per se improper, he contends that, under the facts of this case, the secrecy of the agreement was improper, because it unduly prejudiced him in that its nondisclosure deprived him of the opportunity to challenge certain evidence and impeach Wenkert's expert witness. We conclude that the plaintiffs should have disclosed the agreement, but that this error did not prejudice the defendant.

The following additional facts and procedural history are relevant to our resolution of this claim. The defendant conceded at oral argument that he and Wenkert were adversaries at trial. Our review of the trial record shows that the defendant attempted to prove that Lisa had presented no alarming symptoms when he discharged her from the hospital, but that her condition rapidly had deteriorated thereafter, and that it was Wenkert whom the plaintiffs really thought was liable. The defendant stated in his summation: "[W]hy wasn't [the defendant] made a party when this lawsuit was commenced against [Wenkert] in 1998? . . . He wasn't sued because he wasn't negligent. . . . After [Wenkert] got sued she decided she was going to defend herself by, among other things, blaming somebody else." Wenkert attempted to prove that she had relied on the plaintiffs' representations to her that the defendant thoroughly had evaluated Lisa at the hospital and determined there was nothing medically wrong, adding that, had the defendant made the plaintiffs aware of a more serious condition, Wenkert would not have diagnosed Lisa as

suffering from a panic attack. The plaintiffs attempted to prove that both physicians' conduct fell below the standard of care.

During the course of the trial, the plaintiffs and Wenkert executed a high-low settlement agreement (agreement).[12] The agreement acknowledged that Wenkert's Pennsylvania based liability insurance company was in "[r]ehabilitation/[l]iquidation" and that a Pennsylvania court had issued a stay barring its payment of any claims. At that time, it was unclear whether Wenkert would be eligible for reinsurance. The plaintiffs and Wenkert agreed therein that the plaintiffs would recover a maximum of $1 million and a minimum of $300,000, depending on the verdict, from either Wenkert's reinsurer or the Connecticut Guaranty Fund.[13] In exchange, the plaintiffs relinquished rights to recovery against Wenkert personally and any rights to prejudgment or postjudgment interest and costs.

At the time the agreement was fully executed, the plaintiffs had rested their case, and Wenkert had testified. Part of the plaintiffs' case included the expert testimony of Thomas Gualtieri, a psychiatrist, that Wenkert's conduct had fallen below the standard of care because she failed to recognize that Lisa's purple lips (cyanosis) were a sign of a more serious condition than a panic attack. During her own testimony, Wenkert testified that, when Audrey Monti had called to make an appointment on the day that Lisa died, she told Wenkert that Lisa had been in the hospital with an allergic reaction, that she had been through a thorough work-up and that X rays had been taken, but that Lisa was discharged and said to be fine. Wenkert further testified that Audrey Monti had informed her that Lisa needed to see her because she was anxious and "panicking." The plaintiffs questioned Wenkert on cross-examination about her assessment of Lisa's symptoms and condition, and her ultimate conclusion that Lisa was merely hyperventilating, despite noticing that her lips had turned purple. The plaintiffs also questioned Wenkert about whether she would have made the same decision to see Lisa had Audrey Monti told her that Lisa had a more serious condition. Wenkert admitted that she would have directed Lisa to go to the hospital if there was some more serious medical condition, such as viral pneumonia, involved. In his closing argument, the plaintiffs' counsel focused on the defendant's allegedly negligent actions, but also argued that Wenkert's conduct had fallen below the standard of care and that she had missed a chance to save Lisa's life.

After trial and the split verdict between the defendant and Wenkert, the defendant became aware of the agreement. He was unable to obtain a copy directly from the plaintiffs, and therefore he made a motion for order to the trial court requesting that the plaintiffs disclose the agreement to him, which the court granted.

Shortly before the defendant filed his motion to set aside the verdict, the plaintiffs disclosed the agreement to him, pursuant to the court's order. Thereafter, in ruling on the defendant's motion to set aside the verdict, the trial court determined that the agreement was not the problematic type of secret settlement agreement known as a "Mary Carter agreement,"[14] and its nondisclosure had not prejudiced the defendant.

We note at the outset that the agreement in the present case differs significantly from the usual settlement agreement, wherein a settling defendant is withdrawn from the case and released from liability. Under the high-low settlement agreement in the present case, the settling defendant remained in the case and the extent of her liability was predicated on the amount of the verdict. Whether such an agreement must be disclosed, is an issue of first impression in this state. We therefore look to other jurisdictions for guidance. Although both parties agree that the agreement at issue is not a Mary Carter agreement, we look to that type of agreement as the starting point of our analysis because the other jurisdictions that have considered the issue have done so in reference to the rules governing the validity and disclosure of Mary Carter agreements.

A Mary Carter agreement "is a contract by which one or more defendants in a multi-party case secretly align themselves with the plaintiff and agree to continue as active defendants in the suit while working to aid in the plaintiff's case; in exchange, their own maximum liability will be diminished proportionately by increasing the liability of the nonagreeing defendant or defendants." *Vermont Union School District No. 21* v. *H.P. Cummings Construction Co.*, 143 Vt. 416, 426–27, 469 A.2d 742 (1983). It has four distinct features: "[(1) the] agreeing defendants must remain in the action in the posture of defendants . . . [(2) the] agreement must be kept secret . . . [(3) the] agreeing defendants guarantee to the plaintiff a certain monetary recovery regardless of the outcome of the lawsuit . . . [and (4) the] agreeing defendants' liability is decreased in direct proportion to the increase in the nonagreeing defendants' liability." Id., 427. Because these agreements secretly alter the adversarial nature of the relationship between the parties, they raise a serious threat to the fairness of the trial for the nonsettling defendant. *Dosdourian* v. *Carsten*, 624 So. 2d 241, 244 (Fla. 1993).

Some states note similar risks with regard to high-low agreements; those agreements "where the defendant and [the] plaintiff agree to a minimum and [a] maximum amount of a judgment notwithstanding the jury verdict . . . ." *27th Avenue Gulf Service Center* v. *Smellie*, 510 So. 2d 996, 998 (Fla. App. 1987); see also *Gulf Industries, Inc.* v. *Nair*, 953 So. 2d 590, 592–93 (Fla. App. 2007); *Hashem* v. *Les Stanford Oldsmobile, Inc.*, 266 Mich. App. 61, 84–85, 697 N.W.2d 558 (2005),

application for leave to appeal dismissed, 711 N.W.2d 375 (Mich. 2006). These agreements do not have the liability-shifting feature of a Mary Carter agreement, and leave an incentive for the settling defendant to work to make the verdict as small as possible. *Hashem* v. *Les Stanford Oldsmobile, Inc.*, supra, 84–85. They do, however, set a fixed range of damages against the settling defendant and could therefore affect a shift in the proceedings. For example, the settling defendant might expend less resources to defend against liability, knowing that he will have to pay some minimum amount regardless of the verdict. Similarly, the plaintiff might more vigorously pursue liability against the nonsettling defendant because there is no cap on a verdict against him.

Although only a handful of states have declared Mary Carter agreements to be per se invalid,[15] the majority of states to consider the issue has, in light of policies encouraging the settlement of disputes, simply adopted rules to curb abuses attendant to any type of verdict contingent settlement, whether Mary Carter or high-low agreements, requiring these agreements to be disclosed to the court, to the other codefendants and sometimes to the jury. See, e.g., *Mustang Equipment, Inc.* v. *Welch*, 115 Ariz. 206, 208–11, 565 P.2d 895 (1977); *Burkett* v. *Crulo Trucking Co.*, 171 Ind. App. 166, 177–79, 355 N.E.2d 253 (1976); *Smith* v. *Payne*, 839 So. 2d 482, 486–87 (Miss. 2002); *Carter* v. *Tom's Truck Repair, Inc.*, 857 S.W.2d 172, 176–78 (Mo. 1993); *In the Matter of Eighth Judicial District Asbestos Litigation*, 8 N.Y.3d 717, 722–23, 872 N.E.2d 232, 840 N.Y.S.2d 546 (2007); *Grillo* v. *Burke's Paint Co.*, 275 Or. 421, 426–28, 551 P.2d 449 (1976); *Slusher* v. *Ospital*, 777 P.2d 437, 444 (Utah 1989); *State ex rel. Vapor Corp.* v. *Narick*, 173 W. Va. 770, 773, 320 S.E.2d 345 (1984). Disclosure to the jury, however, is not automatic; rather, whether and the extent to which the agreement is disclosed is an evidentiary issue within the sound discretion of the trial court. See, e.g., *Soria* v. *Sierra Pacific Airlines, Inc.*, 111 Idaho 594, 603–605, 726 P.2d 706 (1986), on appeal after remand, 114 Idaho 1, 752 P.2d 603 (1987); *Ratterree* v. *Bartlett*, 238 Kan. 11, 29–30, 707 P.2d 1063 (1985). For example, these agreements may be used to impeach the settling defendant if he testifies at trial, but are not permitted to be used for the purpose of proving liability or damages.[16] See, e.g., Cal. Civil Proc. Code § 877.5 (Deering 2008); *Stockstill* v. *C.F. Industries, Inc.*, 665 So. 2d 802, 812–13 (La. App. 1995), cert. denied, 669 So. 2d 428 (La. 1996); *General Motors Corp.* v. *Lahocki*, 286 Md. 714, 727–30, 410 A.2d 1039 (1980); *Bedford School District* v. *Caron Construction Co.*, 116 N.H. 800, 804–806, 367 A.2d 1051 (1976); *In the Matter of Eighth Judicial District Asbestos Litigation*, supra, 723; *Hatfield* v. *Continental Imports, Inc.*, 530 Pa. 551, 558–60, 610 A.2d 446 (1992).

Like these jurisdictions, it is the sound public policy

of Connecticut to encourage parties to settle their disputes and to avoid protracted litigation. *Cardenas* v. *Mixcus*, 264 Conn. 314, 321, 823 A.2d 321 (2003); *Allstate Ins. Co.* v. *Mottolese*, 261 Conn. 521, 531, 803 A.2d 311 (2002); see also General Statutes § 52-192a. We agree that these types of verdict contingent settlement agreements, under most circumstances, serve this end. We also agree, however, that these agreements and their potential effect on the adversarial balance of the proceedings can pose a threat to the fairness of the trial for nonsettling defendants. For that reason, we adopt the following rule. All verdict contingent settlement agreements promptly must be disclosed to the court and any nonsettling defendants. Congruent with § 4-8 (a) of the Connecticut Code of Evidence, such agreements may not be used to prove liability or damages. The trial court may, however, in the exercise of its discretion, permit these agreements to be used for the limited purpose of showing the bias or prejudice of a witness[17] with an appropriate cautionary instruction, provided that the evidence is not otherwise barred by other rules.[18] As with any other evidentiary ruling raising nonconstitutional concerns, a trial court's decision as to whether to admit such an agreement, and for what purpose, would be reviewed for an abuse of discretion. *State* v. *George J.*, 280 Conn. 551, 592, 910 A.2d 931 (2006), cert. denied, U.S. , 127 S. Ct. 1919, 167 L. Ed. 2d 573 (2007).

We agree with the defendant that the agreement in the present case was not a Mary Carter agreement because it did not contain the liability shifting provision characteristic of those agreements. It was, nevertheless, a high-low agreement bearing similar risks. Therefore, it was improper for the plaintiffs and Wenkert not to have disclosed it promptly upon its execution *both* to the court and to the defendant. With the above principles in mind, therefore, we must determine whether their failure to do so was so prejudicial to the defendant so as to warrant a reversal. See *Ryals* v. *Hall-Lane Moving & Storage Co.*, 122 N.C. App. 134, 138, 468 S.E.2d 69 (1996) (refusing to determine whether agreement was invalid Mary Carter agreement and concluding that reversal was not proper because defendant was not prejudiced by nondisclosure of agreement).

In the present case, the agreement did not change the adversarial alignment of the parties. The record makes clear that Wenkert and the defendant were adversaries from the beginning of the litigation, when Wenkert's apportionment complaint brought the defendant into the case. Wenkert attempted throughout the trial to prove that, when diagnosing Lisa as having a panic attack, she had relied on the defendant's representation to the plaintiffs that Lisa had been medically cleared. The defendant asserted that Lisa's symptoms had escalated after she left the hospital and that he was, therefore, not negligent in failing to diagnose her

more serious condition. Significantly, the agreement was executed after the plaintiffs rested their case and after Wenkert testified in her own defense, maintaining her strategy of attempting to shift liability to the defendant and to prove that her own conduct did not fall below the standard of care or cause Lisa's death. Thus, there is no evidence that the agreement created a more adversarial relationship between the defendant and Wenkert than that which predated the agreement.

Moreover, because the plaintiffs and Wenkert executed the agreement after the plaintiffs had rested their case and the plaintiffs and Wenkert had testified, the value of the agreement for impeachment purposes of those witnesses is dubious at best. Our review of the transcripts and the record, has revealed no evidence that the nondisclosure of the high-low agreement impaired the defendant's cross-examination of the plaintiffs or Wenkert, or the defendant's ability to present his own defense.[19]

The defendant nonetheless contends that, had he known about the agreement, he would have: (1) offered the agreement into evidence and utilized it on cross-examination; (2) cross-examined Gualtieri, the plaintiff's psychiatric expert; (3) more aggressively cross-examined Wenkert's psychiatric expert, Gerry Rosenbaum; (4) put on his own psychiatric expert; and (5) more aggressively pursued Wenkert on cross-examination or in closing arguments. With regard to the defendant's first contention, again, we fail to see how the defendant would have impeached the plaintiffs or Wenkert with the agreement, because, even after they had signed the agreement, it remained in the plaintiffs' interests to obtain high verdicts against both Wenkert and the defendant. The defendant's other contentions similarly have little merit. Knowledge of the agreement could not have changed the defendant's incentive to cross-examine witnesses zealously or to pursue as vigorously as possible his original strategy of showing that there were no telltale signs for him of Lisa's true condition at the time of her discharge from the hospital. Thus, we conclude that the defendant was not prejudiced by the nondisclosure of the agreement so as to warrant a reversal.

III

The defendant also maintains that the trial court should have set aside the verdict because the plaintiffs had failed to satisfy the statutory prerequisite to suit under § 52-190a of conducting a precomplaint inquiry into whether there was a good faith basis to bring the action against the defendant. He concedes that the plaintiffs' amended complaint included a certificate of good faith, which, under this court's holding in *LeConche* v. *Elligers*, 215 Conn. 701, 711–15, 579 A.2d 1 (1990), cured that particular filing defect. He also concedes that "evidence of the precomplaint inquiry is the certifi-

cate of good faith." He contends, however, that the statute imposes a separate obligation to conduct such an inquiry, which is not necessarily cured by the amended complaint's certificate. The defendant maintains that the only evidence demonstrating such an inquiry, an "ex post facto assertion" to that effect by the plaintiffs' counsel,[20] cannot apply retroactively to demonstrate that the plaintiffs had conducted the necessary inquiry at the time that they filed their complaint against him. We reject the defendant's claim.

The following additional facts are relevant to the resolution of this issue. At the hearing on the defendant's motion to strike on August 9, 1999, the defendant argued that the court should strike the complaint because neither Wenkert's apportionment complaint nor the plaintiffs' complaint against him included a certificate of good faith. Counsel for the plaintiffs then stated on the record: "In this case . . . we did investigate a claim against [the defendant] and were not able to have somebody who we could rely on file a good faith certificate. We then sue[d] only [Wenkert]." The court denied the motion to strike without an oral or written opinion, and the record reflects no motion for articulation. Subsequently, the defendant filed a motion for summary judgment on the ground that the plaintiffs' complaint against him was legally insufficient because they had not filed a certificate of good faith with it. Nearly one year prior to ruling on the motion for summary judgment, the trial court, over the defendant's objection, had granted the plaintiffs' request to file an amended complaint that included a certificate of good faith.[21] At the hearing on the motion for summary judgment, the plaintiffs' counsel noted that "there is a provision for addressing the merits of the good faith certificate under [§] 52-190a, but that . . . can be done after completion of discovery upon proper motion." He then asserted: "I do have a reasonable basis [for the claim against the defendant] and at some point . . . if the court determines that it is appropriate to make that inquiry, I would be happy to provide the basis for the good faith certificate." The trial court orally denied the defendant's motion for summary judgment, stating: "[T]he basis of your motion for summary judgment is that there was a failure to file a good faith certificate and the complaint has been amended and now there is a good faith certificate. So, on that basis alone . . . and given in light of the decision in *LeConche*, it's the court's view that the motion for summary judgment should be . . . denied."

The day before the start of evidence at trial, the trial court considered motions in limine filed by the plaintiffs and the defendant. The plaintiffs had moved to preclude evidence at trial as to their attorney's statement concerning the precomplaint investigation and their written response to the defendant's request for an admission that they originally had been unable to obtain an opinion

of a health care provider to support a claim against the defendant. The defendant filed his own motion in limine to preclude "expert testimony on the standard of care and deviations therefrom . . . as a result of [the] plaintiffs' binding judicial admissions that no such evidence is available" because the plaintiffs originally had failed to proffer a good faith basis for their action. The trial court granted the plaintiffs' motion and denied the defendant's motion. The defendant then made an oral motion for the trial court "to conduct an inquiry pursuant to [§] 52-190a [into the] basis for [t]he plaintiff's good faith certificate," which the trial court denied on the basis of its determination that the issue had been before the court on numerous occasions.

At the time the plaintiffs filed their complaint against the defendant, § 52-190a (a) provided in relevant part: "[An] attorney or party filing [an action to recover damages resulting from personal injury or death in which it is alleged the injury or death resulted from the negligence of a health care provider must make] a reasonable inquiry as permitted by the circumstances to determine that there are grounds for a good faith belief that there has been negligence in the care or treatment of the claimant. The complaint or initial pleading shall contain a certificate . . . that such reasonable inquiry gave rise to a good faith belief that grounds exist for an action against each named defendant. For purposes of this section, such good faith may be shown to exist if the claimant or his attorney has received a written opinion . . . of a similar health care provider . . . that there appears to be evidence of medical negligence. In addition to such written opinion, the court may consider other factors with regard to the existence of good faith. If the court determines after the completion of discovery, that such certificate was not made in good faith and that no justiciable issue was presented against a health care provider that fully cooperated in providing informal discovery, the court . . . shall impose upon the person who signed such certificate, a represented party or both, an appropriate sanction . . . ." General Statues (Rev. to 1999) § 52-190a (a). Although the legal requirements of the statute present questions of law over which we exercise plenary review; *Lydall, Inc.* v. *Ruschmeyer*, 282 Conn. 209, 246, 919 A.2d 421 (2007); a trial court's determination as to whether the good faith precomplaint investigation requirement has been met is reviewed for an abuse of discretion. See *David M. Somers & Associates, P.C.* v. *Busch*, 283 Conn. 396, 407, 927 A.2d 832 (2007).

In *LeConche* v. *Elligers*, supra, 215 Conn. 711–15, this court construed the same version of the statute at issue in this case when considering whether the requirements therein were jurisdictional. The court held that the trial court improperly had dismissed a complaint for lack of subject matter jurisdiction because: (1) the operative complaint did not include a certificate of good faith;

and (2) the trial court found that the statement of the plaintiffs' counsel in a certificate of good faith that the plaintiffs sought to submit in conjunction with a proposed amended complaint did not establish a reasonable precomplaint inquiry. Id. This court concluded that the failure to file a certificate of good faith is a nonjurisdictional defect that may be cured by timely amendment of the complaint. Id., 711. Although the court stated that "[t]he statute . . . requires a factual inquiry by the [trial] court [after discovery] regarding the sufficiency of the precomplaint investigation"; id., 708; that statement must be understood in proper context. The court determined that "the statute *permitted* the plaintiffs in this case to establish a reasonable precomplaint inquiry by reference to factors beyond the certificate evidencing their good faith"; (emphasis added) id., 709; and, therefore, the trial court improperly had "based its finding of a lack of reasonable precomplaint inquiry on an unduly limited factual inquiry and record . . . ." Id. The court did not conclude that, in every case, a certificate of good faith is per se inadequate to establish that a plaintiff has conducted the requisite inquiry. Indeed, the court stated: "The purpose of the certificate is to evidence a plaintiff's good faith derived from the precomplaint inquiry. It serves as an assurance to a defendant that a plaintiff has *in fact* made a reasonable precomplaint inquiry giving him a good faith belief in the defendant's negligence." (Emphasis added.) Id., 711.

Even if we were to assume, without deciding, that it was improper for the trial court, after discovery had concluded, not to follow the mandate of § 52-190a and to conduct the hearing inquiring into the basis for the plaintiffs' certificate of good faith, the defendant has not met his burden of showing that any such impropriety was harmful. See *State* v. *George J.*, supra, 280 Conn. 592. This case proceeded through a month long trial, in which the jury, as a finder of fact, had the opportunity to hear evidence as to whether the defendant's negligent treatment of Lisa was the cause of her death. The purpose of the good faith certificate is to prevent frivolous suits. *LeConche* v. *Elligers*, supra, 215 Conn. 710. The sanction for certificates not filed in good faith may be "an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion or other paper, including a reasonable attorney's fee," as well as discipline of the attorney who filed the certificate. General Statutes (Rev. to 1999) § 52-190a (a). In *LeConche*, we also assumed, without deciding, that the sanction for filing a false certificate *may* be dismissal of the complaint. *LeConche* v. *Elligers*, supra, 712; see also General Statutes § 52-190a (c) (current revision of statute includes new subsection, added in 2005, providing that dismissal is appropriate sanction for filing false certificate). In the present case, there is no allegation of fraud, and

§ 52-190a provides us with no basis on which we could set aside a jury verdict because of the failure to conduct a precomplaint inquiry. Certainly any questions as to the original basis for the action against the defendant have now been resolved by a jury verdict.

IV

Finally, the defendant contends that the trial court improperly awarded prejudgment interest pursuant to General Statutes (Rev. to 1999) § 52-192a (b).[22] He contends that, because the plaintiffs had made separate offers of judgment to the defendant and to the defendant doing business as Ellington Family Practice, each for $1 million, the threshold for the award of prejudgment interest is $2 million, which is more than the plaintiff recovered against him. The plaintiffs respond that the defendant and his medical practice are one and the same for purposes of this litigation and, therefore, the threshold for an award of prejudgment interest was $1 million. We agree with the plaintiffs.

The following additional facts are relevant. Prior to trial, the plaintiffs filed two offers of judgment. The first offered to stipulate judgment in the amount of $1 million as against "Mark J. Decker, only." The second was identical in amount and language, except that it stipulated judgment as against "Mark J. Decker, d/b/a Ellington Family Practice, only." After the jury returned a verdict against the defendant for $1.75 million, which was more than the $1 million offer of judgment, the trial court awarded prejudgment interest on that amount at a rate of 12 percent, pursuant to § 52-192a.

"[I]t appears well settled that the use of a fictitious or assumed business name does not create a separate legal entity . . . [and that] [t]he designation [doing business as] . . . is merely descriptive of the person or corporation who does business under some other name . . . . [I]t signifies that the individual is the owner and operator of the business whose trade name follows his, and makes him personally liable for the torts and contracts of the business . . . ." (Citations omitted; internal quotation marks omitted.) *Edmands* v. *CUNO, Inc.*, supra, 277 Conn. 454 n.17, citing *Bauer* v. *Pounds*, 61 Conn. App. 29, 36, 762 A.2d 499 (2000).

In light of the aforementioned principles, the defendant was individually liable for the entire verdict. Thus, his acceptance of the offer of judgment for $1 million would have ended the litigation entirely as to the count against him and the identical count against the defendant doing business as Ellington Family Practice. It is of no significance that the plaintiffs made two offers of judgment. Moreover, there is nothing in the record to overcome the presumption that the defendant and his medical practice should be treated as one entity. Accordingly, it was not improper for the trial court to award prejudgment interest.[23]

The judgment is affirmed.

In this opinion the other justices concurred.

[1] The plaintiffs initially filed the present action against Naomi E. Wenkert, Wenkert's medical practice group, the Institute of Living Medical Group, P.C., and Wenkert's employer, the Institute of Living (institute). Wenkert and her medical practice group then filed an apportionment complaint against Rockville General Hospital (hospital) and Mark J. Decker, individually and doing business as Ellington Family Practice. In response, the plaintiffs filed a complaint against those defendants. Prior to trial, the plaintiffs withdrew their claims against the hospital and the institute. Because Wenkert and the Institute of Living Medical Group, P.C., were treated as one entity at trial we refer to them collectively as Wenkert. Although Wenkert is listed as a party on this appeal, judgment was rendered in her favor, and she has not filed any briefs or an appearance in this court. We therefore refer to Decker, in his individual capacity and doing business as Ellington Family Practice, as the defendant.

The defendant first appealed the trial court's judgment to the Appellate Court and later appealed from the trial court's decision awarding prejudgment interest. The Appellate Court granted the defendant's request to consolidate the appeals, and we thereafter transferred the appeals to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-1.

[2] To the extent that the defendant contends that we treat his challenge to the decision not to set aside the verdict as "mixed questions of law and fact," we note that the abuse of discretion standard encompasses a determination of whether the court applied the correct law to the facts. See *ACMAT Corp.* v. *Greater New York Mutual Ins. Co.*, 282 Conn. 576, 582, 923 A.2d 697 (2007) ("Under the abuse of discretion standard of review, [w]e will make every reasonable presumption in favor of upholding the trial court's ruling, and only upset it for a manifest abuse of discretion. . . . [Thus, our] review of such rulings is limited to the questions of whether the trial court correctly applied the law and reasonably could have reached the conclusion that it did." [Internal quotation marks omitted.]); see also *State* v. *Campbell*, 225 Conn. 650, 654, 626 A.2d 287 (1993) (clear misconception of governing law is abuse of discretion).

[3] During the course of its deliberations, the jury sent approximately ten notes to the judge. The majority of these notes were requests for clarification of instructions or requests for certain portions of testimony to be read back to it.

[4] "The purpose of the [Chip Smith] instruction is to prevent a hung jury by urging the jurors to attempt to reach agreement. It is a settled part of Connecticut jurisprudence . . . . D. Borden & L. Orland, 5 Connecticut Practice Series: Connecticut Criminal Jury Instructions (2d Ed. 1997) § 4.4, p. 245. Better than any other statement . . . it makes clear the necessity, on the one hand, of unanimity among the jurors in any verdict, and on the other hand the duty of careful consideration by each juror of the views and opinions of each of his fellow jurors . . . . *State* v. *Feliciano*, 256 Conn. 429, 439, 778 A.2d 812 (2001)." (Internal quotation marks omitted.) *State* v. *O'Neil*, 261 Conn. 49, 60, 801 A.2d 730 (2002).

[5] The court stated in relevant part: "I hope you will reflect a little bit about [the jury] process, and what the process means. And, I know I instructed you earlier, in my instructions, that you really do have to give proper regard to the opinions of everybody. We certainly don't want you to violate your conscience. . . . I don't know . . . who's on what side or what the issue is, and it's not important what it is. But, I think for anybody that might be in the minority you have to reflect a little bit about . . . where you stand and why your position may be a little bit different from the others. And, try to go back and see if you can, as best you can, reach a unanimous verdict."

[6] The trial court stated in relevant part: "[A]s to your question about whether or not you are permitted to render a verdict on one physician and be undecided or deadlocked on the other, the answer to that is, yes. But, it's obviously preferable that you reach a unanimous verdict . . . with respect to both defendants, as to the entire case. . . . I will now send you back to deliberate some more."

[7] The trial court stated: "[E]ven if you say, you know, you can make an argument about physical or mental suffering, certain[l]y there's no question that Lisa lost her life, and to have no damages for the loss of enjoyment of a life of a [seventeen] year old shocks the conscience of the court, I can't accept that verdict, and I won't."

[8] The trial court responded to the jury's note by instructing it in relevant

part: "[W]hat you should consider are those elements of damages . . . that are included in the charge. Physical pain and suffering, and loss of enjoyment of life. . . . [T]he fact that you came up with zero, under the facts . . . of this case . . . that under all the circumstances it was not reasonable for you, the jury, to conclude that there was zero noneconomic damages. That's what I was telling you. I wasn't suggesting to you, and I cannot suggest to you, that there is a particular range that you should consider. And it doesn't matter what's acceptable to the court . . . . [T]here's no precise mathematical formula, there's no fixed rule . . . you have to do your best to make a fair estimate taking into account your common observation and experience in applying your common sense to do your very best, to come up with an award that is fair, just, and reasonable."

[9] In light of this well established presumption, we decline to adopt the totality of the circumstances approach that the defendant urges, which is used by a few federal courts of appeals. See, e.g., *Mekdeci* v. *Merrell National Laboratories*, 711 F.2d 1510, 1514–15 (11th Cir. 1983) (indicia of compromise verdict included insufficient compensatory damages award; numerous notes to trial court asking for clarification on specific issue; request to deliver verdict with explanation of reasons; and note indicating deadlock); see also *Yarbrough* v. *Sturm, Ruger & Co.*, 964 F.2d 376, 379 (5th Cir. 1992) ("[i]n determining whether a jury reached a compromise verdict, we examine the 'totality of circumstances' and consider any indicia of compromise apparent from the record and other factors that may have caused a verdict for damages that would be inadequate if the jury actually found liability").

[10] General Statutes § 52-223 provides: "The court may, if it judges the jury has mistaken the evidence in the action and has brought in a verdict contrary to the evidence, or has brought in a verdict contrary to the direction of the court in a matter of law, return them to a second consideration, and for the same reason may return them to a third consideration. The jury shall not be returned for further consideration after a third consideration."

[11] We note that it is no longer per se inadequate for the jury to award economic damages but no noneconomic damages. *Wichers* v. *Hatch*, 252 Conn. 174, 185–89, 745 A.2d 789 (2000) (disavowing previous per se rule).

[12] A copy of the agreement indicates that the plaintiffs signed it on March 18, 2005, and Wenkert's counsel signed it on March 6, 2005.

[13] Specifically, the agreement provided that if the plaintiffs obtained a verdict of $1 million or more against Wenkert, the plaintiffs would recover either $1 million from the reinsurer or $600,000 from the Connecticut Guaranty Fund. In the event of a recovery of between $300,000 and $1 million, then the reinsurer would pay the amount of the verdict or the Connecticut Guaranty Fund would pay $600,000 or the verdict, depending on which was the lesser sum. A verdict of $300,000 or less would result in a payment of $300,000 by the reinsurer or the Connecticut Guaranty Fund. Finally, in the event of a verdict for the defendant, either the reinsurer or the Connecticut Guaranty Fund would pay $300,000.

[14] This type of agreement derives its name from the case, *Booth* v. *Mary Carter Paint Co.*, 202 So. 2d 8 (Fla. App. 1967).

[15] *Dosdourian* v. *Carsten*, supra, 624 So. 2d 246; *Schwartz* v. *Eliades*, 113 Nev. 586, 590–91, 939 P.2d 1034 (1997); *Cox* v. *Kelsey-Hayes Co.*, 594 P.2d 354, 359–60 (Okla. 1978); *Elbaor* v. *Smith*, 845 S.W.2d 240, 250 (Tex. 1992).

[16] The Kansas Supreme Court has set forth the following rule in this respect: "When a settlement agreement is entered into between the plaintiff and one or more, but not all, alleged defendant tortfeasors, the parties entering into such agreement shall promptly inform the court in which the action is pending and the other parties to the action of the existence of the agreement and its terms. If the action is tried to a jury and a defendant who is a party to the agreement is a witness, the court shall, upon motion of a party, disclose the existence and content of the agreement to the jury unless the court finds in its discretion such disclosure to the jury will create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury. The disclosure of the settlement agreement to the jury herein required shall be no more than the court deems necessary to apprise the jury of the essential nature of the agreement and the possibility the agreement may bias the testimony of the parties who entered into the agreement. In no instance shall the amount of the settlement or any specific contingencies be disclosed to the jury, except the jury shall be apprised in general terms of the financial interest in the outcome of the case of any defendant who is a party to such an agreement." *Ratterree* v. *Bartlett*, supra, 238 Kan. 29–30.

[17] Congruent with the limited exceptions under § 4-8 (b) of the Connecticut

Code of Evidence, we caution trial judges to be extremely careful in exercising their discretion when considering any exception.

[18] We need not decide whether other principles might apply to any other limitations on or other uses of the evidence. See, e.g., General Statutes § 52-216a (providing that agreements not to bring action or release defendant from liability are inadmissible at trial); but see *Donner* v. *Kearse*, 234 Conn. 660, 676, 662 A.2d 1269 (1995) ("§ 52-216a does not erect a total bar that prevents a jury from ever considering the terms of a release agreement as evidence").

[19] The plaintiffs' counsel questioned both Wenkert and Gerry Rosenbaum, her psychiatric expert, extensively about Wenkert's assessment of Lisa's condition when she had arrived at Wenkert's office. After Wenkert rested, the defendant went on to present his case, including three medical experts (an infectious disease specialist, another family practice physician and a pulmonary specialist) who testified that the defendant's conduct had not fallen below the standard of care.

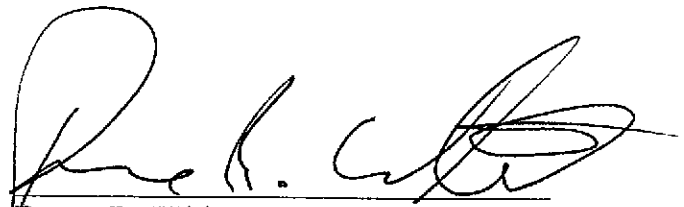
[20] We presume that the defendant is referring to the following statement made by the plaintiff's counsel at the hearing on the defendant's motion to set aside the verdict: "We did, in fact, make a presuit investigation. [The attorney at the motion to strike hearing stated] that at the time we filed the action against [Wenkert], we did not have a good faith basis for suing [the defendant]. He did not say that we didn't have a good faith basis when we sued [the defendant]. And in fact, I have a good faith basis. I was the one who had the good faith basis. I was the one who signed the certificate and I will represent to the court that it was prior to the time that we filed suit against [the defendant]."

[21] The plaintiffs explained at oral argument on the defendant's summary judgment motion that they previously had not filed a request to amend their complaint to include a good faith certificate because the trial court had denied the defendant's motion to strike the complaint. It was not until the defendant renewed the claim, this time in his motion for summary judgment, that the plaintiffs decided to file the good faith certificate out of concern that they would not be permitted later to amend were the court to grant the defendant's motion.

[22] General Statutes (Rev. to 1999) § 52-192a (b) provides in relevant part: "After trial the court shall examine the record to determine whether the plaintiff made an 'offer of judgment' which the defendant failed to accept. If the court ascertains from the record that the plaintiff has recovered an amount equal to or greater than the sum certain stated in his 'offer of judgment', the court shall add to the amount so recovered twelve per cent annual interest on said amount, computed from . . . the date the complaint in the civil action was filed with the court if the 'offer of judgment' was filed not later than eighteen months from the filing of such complaint. If such offer was filed later than eighteen months from the date of filing of the complaint, the interest shall be computed from the date the 'offer of judgment' was filed. . . ."

[23] In a footnote in his brief, the defendant contends that the proper interest rate was 8 percent, not 12 percent, because § 52-192a was amended in 2005 to revise the rate. See Public Acts 2005, No. 05-275, § 4. Public Act 05-275 expressly applies to actions accruing on or after October 1, 2005; thus the rate of interest properly was calculated at 12 percent.

Respectfully submitted,



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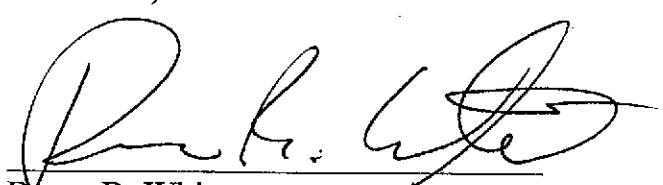
Certificate of Service

I hereby certify that a copy of the Appendix was sent by ordinary U.S. mail to counsel of record for Appellees Joel Korelitz and Cincinnati General Surgeons, Inc.: Irene C. Keyse-Walker, Tucker, Ellis & West LLP, 2250 Huntington Building 925 Euclid Avenue, Cleveland, Ohio 44115-1475 and David Calderhead, Triona, Calderhead & Lockemeyer, 2021 Auburn Avenue, Cincinnati, Ohio 45219 on December 5, 2008.



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