

IN THE SUPREME COURT OF OHIO

CASE NO. 2008-1133

MICHAEL HODESH
Plaintiff-Appellant

-vs-

JOEL KORELITZ, M.D.; CINCINNATI GENERAL SURGEONS, INC.;
PROASSURANCE COMPANY
Defendant-Appellees

BRIEF OF *AMICUS CURIAE*,
OHIO ASSOCIATION OF JUSTICE
IN SUPPORT OF PLAINTIFF-APPELLANT, MICHAEL HODESH

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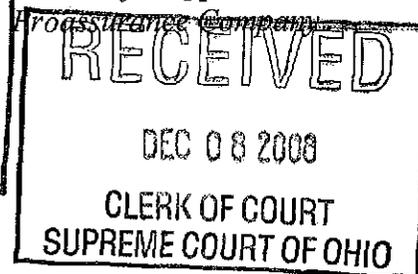
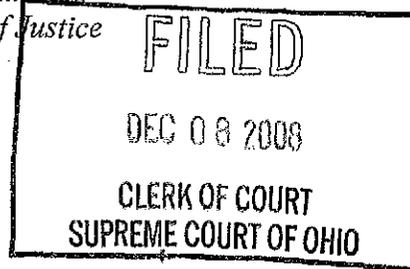


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INTRODUCTION AND INTERESTS OF *AMICUS CURIAE*

This *Amicus Curiae* represents the interests of the Ohio Association for Justice (“OAJ”), formally known as the Ohio Academy of Trial Lawyers. The OAJ is comprised of approximately two thousand (2,000) attorneys practicing personal injury and consumer law in the State of Ohio. These lawyers are dedicated to preserving the rights of private litigants and to the promotion of public confidence in the legal system.

The danger with the First District’s holding in the proceedings below is that virtually any “high-low” settlement agreement which is entered with some, but not all, of the defendants will now be viewed as an invidious “Mary Carter” conspiracy subject to public disclosure and even introduction and debate at trial. Most defendants, particularly health care providers, are willing to enter such arrangements only if confidentiality can be preserved. The reasons for insisting upon such protections vary, but include a desire to preserve their public images and avoid inviting further lawsuits. The entire judicial system, as well as the general public, will suffer substantially if the lower appellate court’s overly broad and non-sensical view of Mary Carter agreements is allowed to persist. The OAJ therefore urges this Court to reinstate the trial judge’s denial of the defense’s post-verdict motion.

ARGUMENT

PROPOSITION OF LAW NO 1: PRE-TRIAL VERDICT CONTINGENT SETTLEMENTS BETWEEN THE PLAINTIFF AND FEWER THAN ALL DEFENDANTS IN WHICH THE SETTLING DEFENDANT(S) REMAIN IN THE TRIAL ARE LEGAL AND ENFORCEABLE SO LONG AS AN ADVERSARIAL RELATIONSHIP CONTINUES TO EXIST AS BEFORE BETWEEN THE PLAINTIFF AND SETTLING DEFENDANT(S). SUCH AGREEMENTS ARE TO BE DISCLOSED TO THE TRIAL COURT *IN CAMERA*. THE DISCOVERY AND USE OF SUCH AGREEMENTS AT TRIAL REST IN THE SOUND DISCRETION OF THE TRIAL COURT

In this case, Jewish Hospital had no incentive to reduce its own liability by increasing that of Dr. Korelitz. This is a *sine qua non* of a Mary Carter agreement in Ohio. It is not present in this case. In fact, the settlement agreement at issue provides four different scenarios under which the hospital retained the incentive to keep damages low.¹ Three of those scenarios provided for a reduction in the hospital's exposure, in direct proportion to a *lower* award against Defendant-Appellee, Joel Korelitz, M.D., alone, or against the two Defendants jointly. Dr. Korelitz's concern that Defendant, The Jewish Hospital, possessed a motive to ally itself against him is inconsistent with the terms of the agreement.

¹ Dr. Korelitz states incorrectly that the hospital had "absolutely no incentive to keep the awarded damages down." (Memorandum in Opposition to Jurisdiction, at 9.) The physician's declaration identifies the central issue of this case, but ignores much of the content of the settlement agreement. The hospital retained the incentive to keep the damages award lower under all of these scenarios: * In the event of a verdict against the hospital only, the hospital would pay between \$175,000.00 and \$250,000.00. * In the event of a verdict against Dr. Korelitz only, in an amount between \$175,000.00 and \$250,000.00, the hospital would be obligated to pay the verdict amount. * If the jury were to award a verdict against both Plaintiff and Dr. Korelitz jointly and severally, the hospital had obligated itself to pay one half of the damages, again with the low being \$175,000.00, and the high being \$250,000.00. * If the jury were to award an apportioned verdict against both Dr. Korelitz and the hospital, again the hospital's share would vary between the low of \$175,000.00 and \$250,000.00. Under each of these scenarios, Jewish Hospital retained the incentive to keep the damages award below \$250,000.00. The difference in payout in all four was up to \$75,000.00, hardly a negligible sum. It is thus inescapable that the hospital's incentive to keep damages down was always maintained by the agreement.

Moreover, this case presents an important opportunity to clarify the standard of review applicable when a settlement agreement is alleged to be a Mary Carter agreement. It is well established that the trial judge is best situated to assess what happened at trial. In this case, not only do the terms of the agreement fail to lend any support to Dr. Korelitz's claim of collusion, but the trial judge found that there was, in fact, no collusion. Far from allying itself against Dr. Korelitz, the hospital defended. The trial judge was better situated to see the effect of the settlement agreement, if any, than an appellate court could be. The Court of Appeals erred when it reviewed the agreement *de novo*, and when it substituted its judgment for that of the trial court.

I. THE COURT OF APPEALS' REVIEW SHOULD HAVE BEEN LIMITED TO INQUIRING WHETHER THE TRIAL COURT ABUSED ITS DISCRETION.

The court of appeals departed from the long-established practices of reviewing disputes concerning the admission of evidence, and motions for new trial on a limited basis. The trial court's actions concerning the agreement between Dr. Korelitz and the hospital should only have been reviewed for an abuse of discretion. But the First District Court of Appeals reviewed *de novo*, offering this explanation:

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.

Hodesh v. Korelitz (Hamilton Ct. App. 2007), 2008 Ohio 2052, P34. It is incorrect to say that the trial judge "failed to exercise any discretion."

The Court of Appeals departed from a well-established standard when it reviewed the trial Court's denial of Appellee's motion for a new trial *de novo*:

It is well-settled law that the decision on a motion for a new trial pursuant to Civ.R. 59 is within the discretion of the trial court. The trial court's decision will be disturbed only upon a showing that

such decision was unreasonable, unconscionable or arbitrary.

Sharp v. Norfolk & W. Ry. (1995), 72 Ohio St. 3d 307, 312, citing *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. Similarly, Dr. Korelitz's claim that the agreement was subject to disclosure prior to trial questions the trial court's regulation of discovery, and is also reviewed only for an abuse of discretion:

A trial court has broad discretion to regulate discovery proceedings. * * * Absent an abuse of discretion, an appellate court must affirm a trial court's disposition of discovery issues. * * * An abuse of discretion connotes an unreasonable, arbitrary, or unconscionable decision.

Hahn v. Satullo (Franklin Ct. App. 2004), 156 Ohio App. 3d 412, 431; see also *Weimer v. Anzevino* (Mahoning Ct. App. 1997), 122 Ohio App. 3d 720, 724; *Vinci v. Ceraolo* (1992) 79 Ohio App. 3d 640.

Indeed, this Court has applied the abuse of discretion standard when the objecting party alleged that a settlement agreement was a Mary Carter agreement:

Because there is no evidence of a collusive agreement between any of the parties, and because Wilson's offer, whatever its effect, was completely gratuitous, we find no abuse of discretion and uphold the court of appeals' judgment affirming the trial court's ruling on this issue.

Vogel v. Wells (1991), 57 Ohio St. 3d 91, 94. In the context of a motion for a new trial, this Court explained that:

It is not the place of this court to weigh the evidence in these cases. In reviewing the order of the trial court, we first find that sufficiently detailed reasoning was specified in writing to allow an appellate court to conduct a meaningful review to determine whether the trial court abused its discretion in ordering a new trial.

Mannion v. Sandel (2001), 91 Ohio St. 3d 318, 322. Citing *Mannion*, this Court has stated, "In situations such as this one, appellate courts should defer to trial judges, who witnessed the trial firsthand and relied upon more than a cold record to justify a decision." *Harris v. Mt. Sinai Med.*

Ctr. (2007), 116 Ohio St. 3d 139, 144-145. The allegation that an Ohio court looked the other way while two parties colluded against a third is a serious one.

The appellate court too easily departed from these well established rules. The difference between *de novo* review and review only for an abuse of discretion is critical in this case. The issue of whether there is a Mary Carter agreement cannot be determined without a factual finding that the plaintiff and a defendant formed an alliance and engaged in collusion. The trial court's ability to determine this fact is unsurpassed by any other court or judge. Abuse of discretion review fits this case, and the Court of Appeals was mistaken to proceed *de novo*.

II. THE SETTLEMENT AGREEMENT BETWEEN APPELLANT AND JEWISH HOSPITAL WAS NOT A "MARY CARTER" AGREEMENT.

Each time this Court has considered claims that a verdict-contingent settlement agreement was a "Mary Carter" agreement, this Court has begun by determining whether the disputed agreement is really a Mary Carter agreement. This case is no different. This Court's precedents have already established a workable and sound framework for determining whether a settlement agreement has corrupted a trial by allying a settling defendant against another defendant.

A. HIGH/LOW AGREEMENTS ARE NOT "MARY CARTER" AGREEMENTS.

Under Ohio law, a "high/low" settlement agreement is not considered collusive, and may not be disclosed to the jury. Ohio law defines the elements of a Mary Carter agreement:

"Mary Carter agreements may incorporate any variety of terms, but 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 v. Wells (Ohio 1991), 57 Ohio St. 3d 91, 93, fn. 1, discussing *Booth v. Mary Carter Paint Co.* (Fla.App.1967), 202 So.2d. 8, overruled by *Ward v. Ochoa* (Fla.1973), 284 So.2d 385.

This Court has specifically held that a high/low agreement is not a Mary Carter agreement. *Ziegler v. Wendel Poultry Servs.* (1993), 67 Ohio St. 3d 10, 16-17, overruled in part, on other grounds, *Fidelholtz v. Peller* (1998), 81 Ohio St. 3d 197, 200. In *Ziegler*, the plaintiff and the settling defendant entered into a high/low settlement. *Id.* at 15-16. The non-settling defendant asked that the argument be voided, or disclosed to the jury in the alternative. *Id.* at 16. But, this Court found that a "high/low" is not an objectionable, "Mary Carter" agreement:

We conclude that the agreement in the present case is not a "Mary Carter agreement" as that term is defined in *Vogel*. **Wendel's exposure to liability was not reduced in proportion to any increase in liability of Wynford over an agreed amount.** The amount of damages assessed against Wynford had no impact on the amount Wendel would pay to Ziegler. **There was no built-in incentive on Wendel's part to increase Ziegler's damages.** See *Soria v. Sierra Pacific Airlines, Inc.* (1986), 111 Idaho 594, 604-605, 726 P.2d 706, 716-717.

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.** See *Jones v. Ruhlin Co.*, 1990 Ohio App. Lexis 4692 (Oct. 24, 1990), Summit App. No. 14568, unreported, at 8, 1990 WL 163864, citing *Vermont Union School Dist. No. 21 v. H.P. Cummings Constr. Co.* (1983), 143 Vt. 416, 469 A.2d 742; *Elbaor*, supra, 845 S.W.2d 240; *Ward*, supra, 284 So. 2d 385. That concern is not present here. **Wendel still had an incentive to keep the amount of damages down, since a higher verdict could result in Wendel paying up to \$ 125,000 more should the jury's verdict have been over \$325,000.** As stated by the court of appeals, **"the fact that Wendel Poultry remained at risk of liability in a significant amount is indicative of a lack of collusive purpose in executing the agreement."** Further, our review of the record does not support Wynford's allegation that Wendel was allied with Ziegler, but instead shows that their positions remained adversarial and that Wendel presented its case with

vigor.

Accordingly, the trial court did not err by approving the agreement or by allowing Wendel to participate in the trial. Likewise, the trial court did not err in refusing to disclose the agreement to the jury. See Evid.R. 408. The law favors prevention of litigation by compromise and settlement. "So long as there is no evidence of collusion, in bad faith, to the detriment of other, non-settling parties, the settlement of litigation will be encouraged and upheld." *Krischbaum v. Dillon* (1991), 58 Ohio St. 3d 58, 69-70, 567 N.E.2d 1291, 1307. [emphasis added]

Ziegler, 67 Ohio St. 3d at 16-17.

Ziegler's analysis is unerring, and is dispositive in this case. The essential elements of a Mary Carter agreement are the high and low settlement terms, coupled with the incentive for the settling defendant to decrease his or her exposure in proportion to increasing liability on the part of other defendants. This sliding scale of liability is what creates an impermissible alliance. It is not present in this case because Jewish Hospital at all times retained the incentive to keep damages down to less than \$250,000.00, whether the verdict should come back against the hospital, against Dr. Korelitz, or both. While the physician points to the provision in the agreement that would relieve the hospital of payment should the jury return a verdict over \$250,000.00 against Dr. Korelitz only, it must be acknowledged that the effect of that term is tempered by the hospital's guarantee of payment.

Since *Vogel* and *Zeigler*, other Ohio courts have found that this Court has developed a workable framework:

A "Mary Carter" agreement is "a contract between a plaintiff and one defendant allying them against another defendant at trial." *Vogel v. Wells* (1991), 57 Ohio St. 3d 91, 93, 566 N.E.2d 154. A Mary Carter agreement may have a variety of terms, but generally has the following provisions: (1) the settling defendant guarantees the plaintiff a minimum payment, regardless of the judgment; (2) the plaintiff agrees not to enforce judgment against the settling defendant; and (3) the settling defendant remains a party in the trial, but its exposure is reduced in proportion to any increase over that agreed amount in the liability of the other co-defendants.

Sometimes the agreements are kept secret. *Id.* at 93, fn. 1.

We conclude the trial court did not err in finding that the agreement between Berdyck and Shinde was not a Mary Carter agreement. First, there is absolutely no evidence in the record of this case to show that Berdyck ever agreed not to enforce any judgment obtained against Dr. Shinde. Second, one of the major dangers of a Mary Carter agreement is the change in the relationship between the plaintiff and the settling defendant. *Ziegler v. Wendel Poultry Serv., Inc.* (1993), 67 Ohio St. 3d 10, 17, 615 N.E.2d 1022, overruled, in part, on other grounds, *Fidelholtz v. Peller* (1998), 81 Ohio St. 3d 197, 690 N.E.2d 502. The settling defendant remains a nominal defendant in the trial while secretly conspiring to aid the plaintiff's case. *Id.* That defendant's exposure to liability is reduced in proportion to any increase in liability of the remaining defendant over the agreed upon amount. 67 Ohio St. 3d at 16. Here, the early offer of up to a \$ 600,000 advance was not accepted by Berdyck. The agreement under which Berdyck received \$ 200,000 in return for relinquishing the right to seek prejudgment interest did not relieve Dr. Shinde of the incentive to keep the damages down at trial because he would have, in all likelihood, paid, by his counsel's own estimate, at least one-half of the \$1.5 million verdict, or \$ 750,000. The fact that Dr. Shinde "remained at risk of liability in a [*84] significant amount is indicative of the lack of collusive purpose in executing" the \$200,000 agreement. *Id.*

Berdyck v. Shinde (Ottawa Ct. App. 1998), 128 Ohio App. 3d 68, 83-84. There is no collusion when the settling defendant remains "at risk of liability in a significant amount." In this case, under four different provisions, the hospital retained the incentive to keep damages down because its exposure varied between \$175,000.00 and \$250,000.00.

Prior to this case, the First District Court of Appeals had similarly found that the absence of a "sliding reduction" in the settling defendant's exposure, linked to the increase in a judgment against a non-settling defendant, was sufficient to show that no Mary Carter agreement was present:

In this case, because QCT and Sohio do not have a sliding reduction in their liability, this agreement is probably not a true Mary Carter agreement within the meaning of *Vogel*. See, e.g., *Ziegler v. Wendel Poultry Serv., Inc.* (1993), 67 Ohio St.3d 10, 16,

Queen City Terminals v. General Am. Transp. Corp. (Hamilton Ct. App. 1993), 1993 Ohio App.

Lexis 5640, fn. 1. Recent authority from the Connecticut Supreme Court is in accord:

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.

Monti v. Wenkert (Conn. 2008), 287 Conn. 101, 126.

B. THE AVAILABILITY OF CONFIDENTIAL HIGH-LOW SETTLEMENT AGREEMENTS MUST BE PRESERVED

Ohio law has long favored settlement agreements for a variety of sound public policy reasons. *Continental West Condo. Unit Owners Assn. v. Howard E. Ferguson, Inc.* (1996), 74 Ohio St. 3d 501, 502, 660 N. E. 2d 431, 432-433; *Fada v. Information Syst. & Networks Corp.* (2nd Dist. 1994), 98 Ohio App. 3d 785, 649 N. E. 2d 904; *Chiampo v. Williams* (September 18, 1991), 9th Dist. No. 14903, 1991 W. L. 184826 *3 (Deborah Cook, J., dissenting). When a global resolution is not possible, high-low arrangements, in particular, permit litigants to avoid potentially catastrophic results, usually either a complete defense verdict or a runaway plaintiff's verdict. Trials are significantly streamlined in such instances as well. Confidentiality is a key component for high-low arrangements, because once the jury has learned that an accord has been reached they are likely to view the agreement as a capitulation by one party or the other and lose their focus (if not complete interest) in the proceedings.

The First District lost sight of the verity that few defendants are likely to ever enter into any settlement arrangements when confidentiality cannot be preserved. This is particularly true in the medical malpractice context, where public disclosure of a physician's or hospital's voluntary payment of a claim may create the perception of incompetence or (even worse) an unwillingness to take cases to trial. Largely for these reasons, Ohio Evid. R. 408 prohibits any

references to even the discussion of settlement at trial. If the lower appellate court's decision is allowed to stand, no defendant will ever be able to enter a high-low or similar type settlement without fearing that a co-defendant will force disclosure to both the jury and general public.

The Seventh District court of appeals recently held that a change in witness testimony after settlement occurs may show bias under Rule 408. *Cummins v. Great Door Supply, Inc.* (Mahoning Ct. App. 2003), 2003 Ohio 4455. This rule is consistent with this Court's precedents concerning what comprises actual collusion under *Zeigler*. In this case, the trial judge was made aware of the existence of a verdict-contingent agreement prior to trial, and found no indication that Jewish Hospital had, in fact, abandon its defense against Plaintiff.

The *Cummins* court clarified that a settlement agreement often makes the settling defendant *less* biased against the remaining defendants:

Appellee believes that these general answers create an inference or presumption of bias that justifies the line of questioning. Appellee is mistaken in this belief. Mrs. McGarry was no longer in an adversarial relationship with Appellee after her settlement, so we cannot infer or presume that she was automatically biased against Appellee because of the settlement. If anything, we would presume that Mrs. McGarry would be less biased against a former co-defendant after the settlement.

Cummins v. Great Door Supply, Inc. (Mahoning Ct. App. 2003), 2003 Ohio 4455, ¶ 35. Quoting one counsel's closing argument, the *Cummins* court very well restated the danger of disclosing settlement agreements to the jury:

"One person and one person only has the duty to make sure that door operated and operated properly. That was Darla McGarry. She was a party. Now she's not. We know why. She's made her deal with the plaintiff. The plaintiff has been compensated." (Tr. p. 104.)

[*P39] The inferences that Appellee's counsel attempted to make in these comments are two inferences prohibited by Evid.R. 408, namely, that a settlement agreement equates with liability, and that the amount of a settlement agreement equates with the actual value

of the injured party's loss. Mrs. McGarry's testimony also violated Evid.R. 403(A) by providing an improper inference to the jury that a settlement agreement equated with complete liability and total compensation for Appellants' claim. For these reasons, we must sustain Appellants' first and second assignments of error. We reverse the judgment of the trial court and remand this case for a new trial. Appellants' third assignment of error has become moot by our decision.

Cummins v. Great Door Supply, Inc. (Mahoning Ct. App. 2003), 2003 Ohio 4455, P 38-39.

Simply stated, the issue is collusion. Jewish Hospital, in this case, cannot reasonably have been believed to have been conspiring with Plaintiff because of the four distinct provisions in the settlement agreement, all representing scenarios under which the hospital would pay less, if the damages award was kept below \$250,000.00. In fact, in three of those scenarios, the hospital would pay less if the verdict *against Dr. Korelitz* was kept below \$250,000.00. Under *Zeigler*, the hospital at all times retained the incentive to defend. For this reason and as a matter of law, the agreement between Plaintiff and the hospital is not a Mary Carter agreement.

CONCLUSION

The First District's unwarranted expansion of the Mary Carter doctrine defies common sense and effectively prohibits health care providers and other defendants from entering into many types of confidential settlement arrangements which Ohio law has long encouraged. For the foregoing reasons, this Court should adopt the Proposition of Law which has been submitted by Plaintiff-Appellant, reverse the opinion of the First District, and reinstate the trial judge's denial of the "Motion to Revoke the Confidentiality Agreement".

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing **Brief** was served by regular U.S. Mail on this 5th day

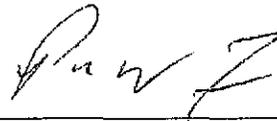
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