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# In the Supreme Court of Ohio

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APPEAL FROM THE COURT OF APPEALS  
FIRST APPELLATE DISTRICT  
HAMILTON COUNTY, OHIO  
CASE NOS. C-061013, C-061040, C-0700168, C-0700172

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MICHAEL HODESH  
*Defendant-Appellant,*

v.

JOEL KORELITZ, M.D., et al,  
*Defendants-Appellees.*

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## REPLY BRIEF OF APPELLANT MICHAEL HODESH

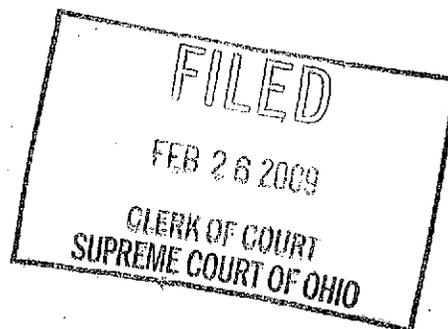
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## REPLY

### I. INTRODUCTION

The determinative issue here must be whether the terms, and effect, of the Contingency Agreement (Agreement) were such that failure to disclose it affected the substantial rights of any party, not simply how other state's courts have defined Mary Carter Agreements or disclosure trends in other jurisdictions. Because there was no demonstrable prejudice to Dr. Joel Korelitz, the trial court did not commit reversible error in denying disclosure. The jury verdict must be reinstated because the court of appeals erred under Ohio law in finding the Agreement at issue to be a Mary Carter Agreement that affected the substantial rights of Korelitz.<sup>1</sup>

Korelitz's Response Brief exalts the superficial aspects of the court of appeals analysis of "possible" or "potential" collusion that confidential agreements may create rather than showing any material effect of non-disclosure on his substantial rights at trial. Importantly, Korelitz never explains any possible way he could have used the Agreement for any legitimate purpose at trial.<sup>2</sup> Affirmance with retroactive application would be inequitable, as no prior Ohio case has held or foreshadowed that this type of Agreement must be disclosed.

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<sup>1</sup> Even Korelitz in his Response has difficulty characterizing this Agreement as a "Mary Carter." Korelitz Brief, p. 12, Prop. Of Law, "...pretrial contingent agreement with Mary Carter provisions..." p. 13, "Mary Carter"-like provisions.

<sup>2</sup> *Ziegler v. Wendel* (1993), 67 Ohio St.3d 10, ov'rd on other grounds, *Fidelholtz v. Peller* (1998), 81 Ohio St.3d 197; Civ. R. 408 precludes litigants from using settlement agreements to show liability or negligence. There was no witness to cross examine for bias. The Agreement was not relevant to the issues in the case, thus, not admissible.

## II. THE CONTINGENCY AGREEMENT TERMS DISCOURAGED COLLUSION AND ALLIANCE

The court of appeals failed to consider that by design this Agreement, on its face, was intended to facilitate settlement and to *discourage* the settling parties from collusion, and mandated a continued three way battle, not any alliance.

The court of appeals decision thus advances Korelitz's interest only, holding that as some verdict contingent agreements have the "potential" for realignment of settling parties and collusion, all must be disclosed and admitted. The court of appeals failed to even consider the danger to the substantial rights of the settling defendant, as admission into evidence would have unfairly prejudiced the Hospital's liability defense, and Hodesh's position of joint and several liability. The Agreement in this case had no relevance to the issues and was not admissible.

There can be no doubt that Hodesh's best case under the Agreement was to convince the jury of joint and several liability and that damages were in excess of Five Hundred Thousand Dollars. And the Hospital as well, having no way of knowing whether the jury's liability verdict would be joint and several, against the Hospital only or against Korelitz only, was thusly and effectively prevented and deterred from encouraging the jury to award high damages against Korelitz only.

The Agreement thus successfully barred any potential alliance and collusion, because of the very real risk that if the verdict was joint and several, or against the Hospital only, the Hospital would have to pay Hodesh much more, up to Two Hundred Fifty Thousand Dollars, rather than One Hundred Seventy Five Thousand, or even considerably less with a low verdict under any contingency.

Because the Agreement explicitly gave Hodesh the right, and Seventy Five Thousand Dollars of incentive, to vigorously present his case for Hospital liability and damages, the

asserted “potential” Hospital strategy to drive up damages against Korelitz would have driven up damages against the Hospital as well, and would have been self defeating.

If the Agreement terms encouraged collusion against Korelitz, Hodesh would never have presented expert nursing testimony against the Hospital and argued in final argument that both Defendants were liable.<sup>3</sup> If the Agreement rewarded collusion, Hodesh surely would have argued for liability only against Korelitz, and the Hospital would have argued that Hodesh suffered damages in excess of Two Hundred Fifty Thousand Dollars. But the Agreement was obviously crafted in such a manner to deter such collusion.

Thus, the Agreement was not a Mary Carter Agreement as defined in Ohio at that time.<sup>4</sup> In fact, it was the exact opposite of a Mary Carter Agreement because it was a contract that *prevented* an alliance between the Hospital and Hodesh against Korelitz. Such agreements do not affect the substantial rights of non-settling parties as they preserve the status quo, and are therefore not relevant to liability, causation and damages, the issues for the jury to decide at trial.

To the extent that the court of appeals reversed on a de novo finding of “potential” collusion or realignment or found a Mary Carter Agreement here that must be admitted, the court of appeals must be reversed.

**A. Confidentiality, discovery and in camera submission.**

The only real question therefore is whether there was reversible error in the trial court’s decision to keep a non collusive contingency agreement confidential during the trial. Hodesh and the Amici have urged this Court to reverse the court of appeals, but also to adopt a common

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<sup>3</sup> Vol. 4, Trial Trans, Nancy Marie Phillips, R.N. testimony, p. 700; Supp. A-20; Vol. 8, Trial Trans. 1209.

<sup>4</sup> *Ziegler v. Wendel* (1993), 67 Ohio St.3d 10, 615 N.E.2d 1022; *Vogel v. Wells* (1991), 57 Ohio St.3d 91, 93, 566 N.E.2d 154, “A Mary Carter Agreement is...a contract between a plaintiff and one defendant allying them against another defendant at trial.”

sense rule that considers the substantial rights of all parties; that where a pretrial verdict contingent Agreement is confidential, but also carefully crafted with high/low caps encouraging continued adversity by the settling parties,<sup>5</sup> the trial court should order in camera submission but also have broad discretion as to how to handle further discovery, disclosure or admission.<sup>6</sup>

Korelitz wrongly claims this is unworkable and a “hindsight analysis,” because there is then only “post-trial” evaluation of adversity. But such an assertion denigrates and underestimates the role of the trial judge at trial.

Whether the trial court upon in camera submission seals, unseals, maintains confidentiality, or reads the submitted agreement or not, he is still on notice of the “potential” for collusion or changed adversity and can remedy any collusion displayed during the trial by several means, including; immediately unsealing the Agreement and reviewing it, ordering disclosure to the non-settling defendant, allowing cross examination for bias if appropriate, or disclose the agreement to the jury in whole or in part, or provide the gist of it in cautionary or final instructions. By this method, the trial court in real time, not hindsight, carefully monitors the evidence and strategies as the trial proceeds to ensure fairness to each party. So long as the trial judge has notice of the issue, he should be trusted to engage in its historic supervisory function as the shepherd of the trial just as in other evidentiary matters.

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<sup>5</sup> This was not a “proportional” verdict agreement, nor a “loan receipt” agreement, where for every dollar increase against Korelitz there was a dollar less for the Hospital to pay other than a low damage award against Korelitz. The high and low caps, mandated adversity, and “30 day” window for settlement totally cured any risk of possible collusion.

<sup>6</sup> By this Hodesh does not urge Ohio to adopt a blanket “settlement privilege,” but rather to recognize the long tradition of confidentiality of settlements in this country, and to allow the trial courts discretion in determining under Civ. Rule 26 whether the agreement is relevant or reasonably calculated to lead to admissible evidence. See, *Goodyear Tire and Rubber Co. v. Chiles Power Supply, Inc.* (6<sup>th</sup> Cir. 2003), 332 F.3d 976.

In discovery disputes, including those over disclosure of confidential settlement agreements, in camera submission is a proper exercise of judicial discretion and within the established law of Ohio, subject to interlocutory appeal if the substantial rights of a party are threatened.<sup>7</sup>

The record shows that the terms of the Agreement were made confidential not for collusion or realignment at trial, but because of understandable distrust of Korelitz, including his integrity, through development of the facts in discovery and depositions.

This discovery had shown, first and foremost, that Korelitz had carelessly violated operating room rules and procedures and compromised patient safety by using uncounted surgical towels inside Hodesh's abdomen, and the operating room nurses had testified that Korelitz did not instruct them to count these towels, contradicting his testimony at that time that he did so instruct.<sup>8</sup>

Further, in a deposition taken in Oregon several months before trial, Dr. Mathisen, the resident assisting at both surgeries, testified that an addendum prepared by Korelitz and a radiologist altered the description of the retained towel in an original x-ray report Dr. Mathisen had seen earlier, to change the description of the object to "stool."<sup>9</sup> Then, after surgically removing an entire twelve by eighteen square inch surgical towel from Hodesh's abdomen, Korelitz falsely reported removing a "fragment." The operating nurses at that removal surgery testified that Korelitz instructed them to not to send the towel to pathology, but to "throw away"

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<sup>7</sup> *Bell v. Mt. Sinai* (1993), 67 Ohio St.3d 60, 616 N.E.2d 181; *Keller v. Kehoe*, 2007-Ohio-6625 (8<sup>th</sup> Dist.). Korelitz did not attempt interlocutory appeal here.

<sup>8</sup> Trial Ct. Docket 96, 173, 174; Berke Dep., 29 (2004); Berke Dep. 7,8 (2006); Murphy Dep. 42 (2005).

<sup>9</sup> Trial Ct. Docket 189; Dr. Mathisen deposition, p.26, 27.

the towel.<sup>10</sup> All of these disturbing facts were discovered before the execution of the Agreement.<sup>11</sup>

Moreover, Dr. Bechamps, the former Chairman of the National Board of State Medical Boards, testified that Dr. Korelitz had breached not only the standard of care but also ethical standards.<sup>12</sup> Then, just a month before trial, Korelitz informed counsel for Jewish Hospital that he intended at trial, *and had planned throughout*, to "...place all of the blame for the retained towel on The Jewish Hospital...."<sup>13</sup> The Agreement was made shortly after this direct threat to the Hospital. The Hospital therefore had ample valid reasons to not only enter the Agreement and stay in the trial to defend its procedures, employees and reputation, but also to keep the Agreement confidential from Korelitz.

Korelitz maintains that the "secrecy"<sup>14</sup> of the Agreement was unfair and "might" have potentially "skewed" the trial adversely to his case, but there is no evidence that it did. This is why the court of appeals erred in failing to review the matter on abuse of discretion of the trial court in deciding before trial to honor the confidentiality requested by counsel. Even Korelitz in his brief concedes that the trial court should have discretion not to disclose the agreement to the

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<sup>10</sup> Trial Court Docket 130, York Dep.

<sup>11</sup> Korelitz ultimately admitted all of these facts at trial, but not bad intent, and modified his earlier testimony as to his alleged instructions of the nurses to count the towels to that of his "normal procedure."

<sup>12</sup> Trial Court Docket 212. The trial court granted Korelitz's motion to redact the portions of Bechamps deposition testimony offering his opinions about ethical issues.

<sup>13</sup> Supp. D-2, Affidavit of Ann Ruley Combs, Esq.

<sup>14</sup> But the record shows Korelitz, and thus the trial court, knew of the existence of some agreement even before the trial began.

jury, if “...such disclosure to the jury will create substantial danger of unfair prejudice, of confusing the issues, or of misleading the jury.”<sup>15</sup>

**B. The Agreement terms were not collusive.**

There would have been no reason or relevance to admission, and although the terms of the Agreement were not collusive or “Mary Carter-like” terms, a jury without explanation of how and why the Agreement was entered could have well been confused. The very purpose of the trial and the issues for jury determination would have been distorted and misleading if Hodesh and the Hospital would have had to present evidence on development and negotiation of the Agreement and its terms, and the reasons for the challenged terms:

- Hodesh agreed not to assert any punitive damage claim against the Hospital because Korelitz was not an employee of the Hospital.<sup>16</sup>
- The Hospital agreed to bring Dr. Bechamps live to the trial, but it is hard to see any prejudice to Korelitz. He had already testified, and in any event, the Hospital ultimately did not bring the doctor live, apparently at the request of Korelitz.<sup>17</sup>
- The Hospital Vice President struck a provision allowing Hodesh informal access to its employees, further evidence of the non-collusive intent of the parties and the careful crafting of the Agreement.<sup>18</sup>

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<sup>15</sup> Korelitz brief, p. 12, Prop. Of Law No 1.

<sup>16</sup> The punitive damage claim was against Korelitz only, and if admitted, the trial court would have had to explain this provision to the jury.

<sup>17</sup> Supp. D-2, Aff. Of Ann Ruley Combs. Counsel would have been forced to testify as to the arrangements with the doctor, and the mechanics of expert depositions and live testimony.

<sup>18</sup> Supp. E-12, Contingency Agreement, para. 12. The Hospital Vice President would have had to testify as to this negotiation and why she struck the provision.

- The provision that the contingent agreement was “not a settlement”<sup>19</sup> meant either party could have withdrawn before the verdict without having the agreement enforced by the trial court, making it similar to the agreement in *Vogel v. Wells*, which this Court upheld because of a similar provision.<sup>20</sup>
- Where the Agreement memorialized admissions as to causation, these were only admissions that had been previously made by the Hospital.

None of the terms therefore were indicative of collusive intent, just a civil attempt by attorneys to help make the *process* of the trial go as smoothly as possible, maintain confidentiality, and memorialize previous admissions and undisputed facts. Introduction of this Agreement would have led to trial within a trial as to the meaning of the Agreement terms, why certain provisions were negotiated and included, and would have unfairly diverted the jury’s attention away from the proper issues for the jury of liability, causation and damages.

### **III. KORELITZ WAIVED OR INVITED ANY CLAIMED ERROR, AND ANY SUCH ERROR WAS HARMLESS**

The doctrine of invited error holds that a party may not claim error by the trial court where the party invited such error by its own inaction in failing to bring such error timely to the attention of the trial court.<sup>21</sup> Similarly, this Court has held that, “...failure to timely advise the court of possible error, by objection or otherwise, results in a waiver of the issue for purposes of appeal.”<sup>22</sup>

<sup>19</sup> *Id.*, Contingency Agreement, page 1. This provision would have been confusing to jurors not experienced in contract negotiations and would have probably necessitated a jury instruction.

<sup>20</sup> *Vogel v. Wells* (1991), 57 Ohio St.3d 91, 566 N.E.2d 154.

<sup>21</sup> *Center Ridge Ganley, Inc. v. Stinn* (1987), 31 Ohio St.3d 311, 312; *Hal Artz Lincoln Mercury v. Ford Motor Co.* (1986), 28 Ohio St.3d 20, 502 N. E.2d 590.

<sup>22</sup> *Goldfuss, Admr. v. Davidson* (1997), 79 Ohio St.3d 116, 120, 121; 679 N.E.2d 1099.

The parties agree that once Korelitz raised the issue of disclosure of an agreement in chambers, the trial court delayed opening statements and convened a hearing on the issue the next morning on the record.<sup>23</sup> Although he represented to the trial court that he had been “frantically researching these issues,” Korelitz submitted only a single case citation, *Ziegler*,<sup>24</sup> for the court to review.

Hodesh, responding to Korelitz’s description of a Mary Carter agreement, rightfully stated that in his opinion under *Ziegler* there was not a Mary Carter Agreement, “no agreement to collude,” and represented to the court that regardless of any agreement with the Hospital, Hodesh intended to present the case to the jury as one of joint and several liability against the Hospital.<sup>25</sup> The Court then instructed counsel to submit in camera any high low agreements, but if there was a “Mary Carter” agreement, it should be disclosed.<sup>26</sup>

Korelitz thereafter during the entire course of eight days of trial neither cited nor presented, orally or in writing, any other case law from Ohio or any other jurisdictions, never renewed his motion for disclosure, never raised any evidence of collusion, never submitted further law defining a Mary Carter Agreement, or alleged any evidence of alliance between Hodesh and the Hospital. Korelitz never asked the court to allow him cross examination of any witness on the issue for bias, nor proffered any evidence or requests related to the Agreement.

Korelitz was represented at all times by two capable lawyers, Mr. Calderhead and Mr. Peschke. If these capable attorneys had “frantically researched” the law of Mary Carter

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<sup>23</sup> While there is no record in chambers, Korelitz cited the “Ziegler case” without citations. The trial court then asked Korelitz’s counsel to present any authority he had the next day.

<sup>24</sup> 67 Ohio St.3d 10, 615 N.E.2d 1022.

<sup>25</sup> Supp. A-10, 11; Vol. 2, Trial trans. p. 156,157. *Ziegler*, 67 Ohio St.3d 10, 17.

<sup>26</sup> Even under Korelitz’s suggested Proposition of Law this ruling appears to be proper.

Agreements as represented to the trial court,<sup>27</sup> they must have decided for strategic reasons to sit on the research and not to bring any fruit of their research to the court's attention in a timely manner during the trial. It was only on the filing of the post trial Motions several weeks after the verdict that Korelitz presented any other authority to the trial court.<sup>28</sup>

Korelitz cannot in good faith claim the trial court denied him opportunity to object or proffer the relevance of admission of the Agreement during the trial, as the record shows Korelitz briefed and filed at least fourteen written pleadings just before and during trial, and argued several legal issues orally during trial, without any evidence of arbitrariness or obstruction by the trial court.<sup>29</sup> Further, on several occasions the trial court reconsidered other earlier rulings and even changed several favorably to Korelitz.<sup>30</sup>

No trial judge is perfect. It is the rarest of trials where some trial error is not raised by one or another of the parties. This Court recently cited with approval former Chief Justice Rehnquist's strict construction of Rule 61 of the Federal Rules of Civil Procedure. "Courts must disregard all error and defects that do not affect a party's substantial rights."<sup>31</sup>

Hodesh unquestionably carried his heavy burden of a plaintiff in a medical malpractice case; to prove by a preponderance of evidence that the actions or inaction of Korelitz in surgery to examine the surgical area, and to remove the towel before closing, fell beneath the standard of care for like practitioners under the same or similar circumstances and that such violation caused

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<sup>27</sup> Supp., A-7, 8; Trial transcript, Vol. I, pp. 153, 154.

<sup>28</sup> Trial Ct. Docket. 208, 211.

<sup>29</sup> T.d. 118, 122, 126, 127, 143, 144, 150, 151, 152, 156, 165, 168, 169, 180; example of oral proffer by Korelitz during trial; Vol. 4, Trial trans., p. 647

<sup>30</sup> See, for example, Vol. 4, Trial trans., p. 718.

<sup>31</sup> *Grundy v. Dhillon*, 2008-Ohio-6324, citing, *McDonough Power Equip., Inc. v. Greenwood* (1984), 464 U.S. 548, 553, 104 S. Ct. 845, 78 L.Ed. 663; also see Ohio Civ. Rule 61.

harm and damage directly and proximately.<sup>32</sup> The Agreement, and the lack of disclosure of it, therefore had no material or substantial effect on Korelitz's rights.

Neither the court of appeals nor Korelitz in his brief contend that the jury's verdict or narrative answer to the interrogatory as to how Korelitz was negligent was improper or wrong.<sup>33</sup> Admission of the Agreement would not have affected this finding or allowed any different trial strategy of Korelitz. Thus, any waived or invited error of the trial court concerning non-disclosure of the Contingency Agreement during trial was harmless, not plain error.<sup>34</sup>

This Court recently reaffirmed that courts should "rarely apply the plain error doctrine" in civil cases to reverse or set aside a verdict where the complaining party failed to preserve such objection at the proper time.<sup>35</sup> The trial court's pre-trial rulings certainly did not bar cross examination or later reevaluation by the court of the earlier ruling.<sup>36</sup> Pre-trial rulings on evidentiary matters, to preserve error, can and must be revisited by the parties and the court at the proper time during trial.<sup>37</sup> At a sidebar following jury instructions, Korelitz asked only that the Agreement be read into the record after the trial ended, not as evidence for the jury to consider in deliberations.<sup>38</sup> This was the first mention of the issue of the Agreement Korelitz had made in almost two weeks of trial and he did not ask for admission by instruction or otherwise to the jury before they left to deliberate.

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<sup>32</sup> *Bruni v. Tatsumi* (1976), 46 Ohio St.2d 127, 346 N.E.2d 673.

<sup>33</sup> Supp. A-1, Vol. 9, Trial trans. 1341; Supp. B-2; The doctor "...failed to examine the abdominal cavity and remove a foreign body (a towel)..."

<sup>34</sup> Ohio Civil Rule 61; Ohio Evid. R. 103 (A).

<sup>35</sup> *Grundy v. Dhillon*, 2008-Ohio-6324; *Goldfuss v. Davidson* (1997), 79 Ohio St.3d 116, 697 N.E. 1099 (syll.)

<sup>36</sup> Korelitz argues that he could not cross examine without examining the Agreement, but if that was so, he should have made that point to the trial court at the appropriate time.

<sup>37</sup> Evid.R.103 (A) (2); Evid.R.104.

<sup>38</sup> Supp.A-14, A-57; Vol. 8 Trial trans. P. 1329-1330.

Korelitz therefore failed to preserve any claim of reversible error by the trial court, invited error, and the court of appeals erred in setting aside the verdict.

**IV. AFFIRMANCE WITH NEW DISCLOSURE RULES SHOULD BE PROSPECTIVE**

**A. This is a case of first impression.**

Hodesh understands the argument of Korelitz that Ohio should review national trends in the Mary Carter arena, and that this Court may by this case set up some rules for trial courts in the handling of verdict contingent agreements in Ohio.

But, as even Korelitz concedes, Ohio law was not settled before this trial as to disclosure rules for verdict contingent agreements.<sup>39</sup> The court of appeals opinion clearly creates important new rules and obligations for Ohio trial judges and attorneys. At the time of this trial, the lead Ohio cases, *Vogel* and *Ziegler*, gave at best vague and ambiguous guidance to the bench and the bar as to what the differences are between “Mary Carter” agreements and “high low” agreements and what to do with either one.

This Court may well agree with the court of appeals and affirm its decision that all such agreements must be disclosed, but the rules enunciated there are clearly new ones. Ohio law on whether such a ruling of first impression should be applied retroactively, or prospectively, requires the application of a three pronged test, as enunciated most recently in *DiCenzo v. A-Best Prods. Co.* (2008).<sup>40</sup>

**1. Ohio law did not foreshadow the court of appeals decision.**

*Vogel* and *Ziegler* approved exclusion of the agreements in evidence and nowhere held that future courts must follow the principle of mandatory disclosure and admission held by the

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<sup>39</sup> Korelitz Brief, p. 15.

<sup>40</sup> 120 Ohio St.3d 149, Para. 28.

court of appeals. *Ziegler*, in particular, the case Korelitz cited to the trial court and Hodesh, is most fairly read directly approving and foreshadowing exclusion of agreements where there is money at stake between the high and low and where the contracting parties therefore intend to present their cases against each other “with vigor.”<sup>41</sup>

Korelitz then suggests the impossible, that a Public Utility Commission (PUCO) case holding side agreements discoverable and admissible decided *after this trial ended* can be used as a “foreshadowing” case to defeat prospective application.<sup>42</sup> But at the time of this trial, the most recent pronouncement by this Court was a unanimous decision that side agreements were *not* discoverable or admissible if they were [privileged or] “not reasonably calculated to lead to admissible evidence.”<sup>43</sup>

Korelitz also cites a 2008 federal court order where that court relied on the court of appeals decision *in this case*.<sup>44</sup> That order, like the later PUCO case decided months after this order, cannot possibly have provided any notice of foreshadowing to the trial court and parties, as it was decided over two years after the trial in this case.

Notably, in each reported assertion of a Mary Carter agreement in Ohio following *Vogel* and *Ziegler* the appellate courts upheld the trial court’s decision not to admit the asserted Mary Carter settlement agreement in evidence,<sup>45</sup> or the issue was not reached because the parties

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<sup>41</sup> *Ziegler*, 67 Ohio St.3d 10, 17.

<sup>42</sup> *Ohio Consumer Council v. Pub. Util. Comm.* (Sept. 2006), 111 Ohio St.3d 300, rejecting a general settlement privilege in Ohio.

<sup>43</sup> *Constellation NewEnergy, Inc. v. Pub. Util. Comm.* (2004), 104 Ohio St.3d 530, 2004-Ohio-6767, also, see, Civ. Rule 26 (C).

<sup>44</sup> *Thomas and Marker Constr. Co. v. Wal-Mart Stores, Inc.* (S.D. Ohio), 2008 WL 3200642.

<sup>45</sup> *Berdyck v. Shinde* (1998), 128 Ohio App.3d 68, 713 N.E.2d 1098 (6<sup>th</sup> Dist.); *Ziegler v. Wendel Poultry* (1991), 91-LW-4471 (3d Dist.) (rev. on other grounds)

achieved a settlement that made such determination moot.<sup>46</sup> There is absolutely nothing in any of those cases which would foreshadow this decision.

Having no Ohio authority to reasonably argue for retroactive application, Korelitz reaches to other jurisdictions. But interestingly, the two most recent high Court decisions endorsed prospective application in this complex area.<sup>47</sup> In *Monti v. Wenkert*, a case factually very similar to this one, the Court held that while thereafter in Connecticut all “verdict contingent” agreements must be disclosed to the parties, the court, and to the jury in some (discretionary) fashion, it was inequitable to apply newly minted disclosure rules to the parties before the Court.<sup>48</sup>

Although Illinois and Florida courts may revoke or require disclosure and admission of collusive Mary Carter agreements, those rules do not apply to agreements very similar to this Agreement, where there is no incentive for collusion and no realignment of the settling parties.<sup>49</sup>

Other jurisdictions which have engaged in an analysis of the circumstances of the individual case before it for prejudice have determined that failure to disclose, although error by the trial court, absent evidence of actual prejudice, was not reversible error and jury verdicts were reinstated or affirmed.<sup>50</sup>

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<sup>46</sup> *Hale v. Spitzer Dodge, Inc.*, 2006-Ohio 3309 (10<sup>th</sup> Dist.); *Satterfield v. St. Elizabeth Health Ctr.*, 2005-Ohio-710 (7<sup>th</sup> Dist.); *Nalley v. Ireland*, Case No. A0603970 (C.P. Ham. Co. 11/20/2007 Entry)

<sup>47</sup> *Saleeby v. Rocky Elson Construction* (S. Ct. Fla.), 2009-FL-0205.617, pages 5-7 (discussion with approval of prospective application of prohibiting Mary Carter agreements in *Dousdourian v. Carsten* (Fla. 1993), 624 So.2d 241); *Monti v. Wenkert*, (Conn. 2008), 947 A.2d 261.

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

<sup>49</sup> *Gulf Industries, Inc. v. Nair* (Fla. App.), 953 So.2d 590, limiting *Dousdourian v. Carsten*; *Wingo v. Rockford Mem. Hosp.* (Ill. App. 1997), 686 N.E.2d 722.

<sup>50</sup> *Ryals v. Hall Lane Moving and Storage* (1996), Ct. of App. 94-748; *Stephens v. Bohlman* (1996), Ore. App. 381, pet. den., 324 Or. 18; *Slusher v. Ospital*, (1989), 777 P.2d 437 (Utah); *Soria v. Sierra Pacific Airlines, Inc.* (1986), 111 Idaho 594; 726 P.2d 706.

The Pennsylvania *Hatfield* case, prominently cited by Korelitz, did remand for trial, but that was on reversal of an interlocutory appeal, not reversal of a jury verdict. The trial court once again was instructed to decide in its discretion what portions to disclose to the jury, but only if, "...such a clear potential for bias exists, which would not be apparent to the factfinder...."<sup>51</sup> Here there was no such potential for bias, as the jury was well aware that the defendants were adversaries, and that the central factual dispute on liability was between the defendants.

In *Newman*, the Missouri Court found that the trial court should have discretion to *defer disclosure* while assuring the parties were achieving a fair trial by monitoring the proceedings, and because the agreement did not disrupt the adversarial nature of the trial there, the failure to disclose was not reversible error.<sup>52</sup> That is exactly what occurred here.

In *Ratterree*, the Kansas Court had to reverse and remand because the agreement was never made of record at all so that the agreement could be reviewed, but even then allowed discretion, ruling that on remand the trial court should determine whether this was an agreement that, "...although appearing to be a Mary Carter agreement, because of the circumstances of the case will not actually result in aligning the plaintiff and one of the defendants." If so, the agreement would not be disclosed.<sup>53</sup> Here, the trial court has already reviewed the Agreement, made it of record for appellate courts, and determined there was no realignment.<sup>54</sup> There is no need here for remand, as the Agreement was properly excluded from introduction at trial.

Several other cited cases involved loan receipt agreements, which involve the actual payment of money to the Plaintiff by one Defendant before the trial to be repaid if the verdict

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<sup>51</sup> *Hatfield v. Continental Motors* (1992), 610 A.2d 446.

<sup>52</sup> *Newman v. Ford Motor Company* (Mo. 1998), 975 S.W. 2d 147.

<sup>53</sup> *Ratterree v. Bartlett* (1985), 238 Kan. 11, 707 P.2d 1063.

<sup>54</sup> Appendix D., Trial court decision.

against the non-settling Defendant is over the payment, thus directly inducing collusion to achieve high damage awards.<sup>55</sup>

It is significant that in the several cases cited by Korelitz as similar ones where jury verdicts were reversed, either the trial court had denied repeated attempts during trial to disclose the agreement or allow cross examination, or specifically found prejudice throughout the record.<sup>56</sup> These cases cited by Korelitz therefore are not at all similar, as the collusion and prejudice was manifest at trial.

Indeed, based on *Ziegler, Vogel*, and Ohio cases following in the courts of appeals Ohio, any foreshadowing would have most likely led any experienced trial judge and counsel on July 17, 2006 to believe that Ohio would follow jurisdictions that allow the type of broad discretion urged by Hodesh and the Amici in the handling of pre trial settlement agreements, not mandatory disclosure.

## **2. Retroactive application would cause an inequitable result.**

The second prong of *Dicenzo* is whether application of the rules would retard or promote the purpose behind the rule. As the purpose of the rule is a fair trial for all parties, and Korelitz was not prejudiced, retroactive application would retard the rules as admission in a new trial would have no rationale whatsoever, particularly here where the Hospital would certainly not remain as a party in any new trial.

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<sup>55</sup> *The Bedford School Dist. v. Caron Constr.* (N.H. 1976), 367 A.2d 1051; *Gatto v. Walgreen Drug Co.* (Ill. 1975), 337 N.E.2d 23. *Helton v. Firestone* (1983), 662 S.W.2d 473.

<sup>56</sup> *Elbaor v. Smith* (Tex. 1992), 845 S.W.2d 240, 246, counsel for settling defendant characterized plaintiff's damages as "devastating," "astoundingly high," and "astronomical.;" *General Motors v. Lahocki* (Md. App. 1980), 410 A.2d 1039, 1044, 1045; the record showed the trial judge found collusion and had to intercede repeatedly.

But most important is the third prong, the inequitable result retroactive application would cause. It would be exquisitely inequitable to vacate the jury's verdict and remand the case for a new trial. Mr. Hodesh was injured by Korelitz almost nine years ago and achieved a reasonable verdict from a jury after an eight day trial that was remarkably fair. Further, while Hodesh would be the party most affected by the burden of a new trial, the record shows that Hodesh at the trial followed all court orders, that he never collusively argued that the Hospital should not be held liable by the jury, and there has been no evidence or argument that that the result would be any different at a new trial.

The remand suggested by Korelitz would unwind the settlement between Hodesh and the Hospital and force the parties to retake and update many of the twenty two discovery depositions at a huge expense. A new jury would have to be empaneled, and would rehear essentially the same case with the possible addition of the introduction of all or part of the Agreement.<sup>57</sup> The trial would have to include a trial within a trial to explain to the jury the Agreement, settlement provisions, and other provisions and the overall purpose of the Agreement. Counsel might be required to testify, as well as the Vice President of Jewish Hospital and the supervisor of Pro Assurance Insurance Company.

A lengthy new trial would waste precious judicial resources. Surely no jury could find for Korelitz on liability or causation on this record, unless the admission of the Agreement improperly prejudiced them against the Hospital. There was no evidence in the record that non disclosure affected the damages awarded, and prejudice to Korelitz in that regard is hard to see

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<sup>57</sup> It is unclear what witness would be impeached by the Agreement or what if any effect the Agreement would have on the jury. Introduction could indeed increase the damages against Korelitz, or could lead to a joint and several liability verdict inconsistent with the prior verdict by confusing the issues.

where Korelitz never even called his named, and previously deposed, expert damages witnesses, Drs. Yaffee (internist) and Head (psychiatrist), to testify, nor asked to read their depositions into evidence.

Anything other than prospective application would be inequitable and inconsistent with Ohio law under *Dicenzo*.

**B. Korelitz was not prejudiced by non disclosure.**

The best evidence that there was no prejudicial effect of the court's ruling on the trial or Korelitz's strategy was pointed out by the Hospital on page twenty eight of its Amicus Brief; the sworn admissions of Korelitz's attorney and Pro Assurance's Ohio supervisor at the pre judgment interest hearing, who stated that their only interest in the Agreement was how possible set off might affect settlement negotiations, that Korelitz's counsel was reporting the conduct of the trial daily to Pro Assurance, and that there was no impact of the Agreement on their strategy or course of the trial.<sup>58</sup> Such admissions of material facts are judicial admissions and generally considered to be binding.<sup>59</sup>

The trial judge here carefully presided over the trial and found no evidence of prejudice whatsoever.<sup>60</sup> There was more than ample evidence supporting the jury's verdict on liability, causation and damages, and in fact, the trial court held the evidence against Korelitz was overwhelming.<sup>61</sup> Korelitz has never pointed to any prejudice he actually suffered, any specific

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<sup>58</sup> Jewish Amicus Brief, p.27, 28, citing Prejudgment Interest Trans. Pp. 76, 77, 193, 217

<sup>59</sup> Evid R. 801(D)(2)(c).

<sup>60</sup> T.d. 240.

<sup>61</sup> Id.

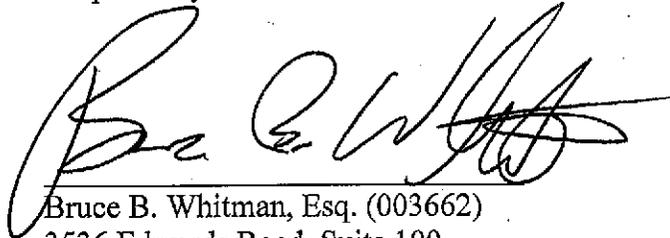
strategy he would have changed or how indeed, how he could have used the Agreement in any proper way at trial.

V. **CONCLUSION**

Because the court of appeals mooted issues on appeal, it has made it difficult for this Court to afford the parties any finality. But, the court of appeals erred and therefore must be reversed and the verdict reinstated. If this Court does not have the authority to decide the mooted issues as subsumed by the reversal, Hodesh respectfully requests that this Court offer guidance so that this case does not ultimately result in piecemeal appeals in the future.

If this Court affirms, under *DiCenzo* it should apply the case prospectively and reinstate the jury's verdict, and either return the case to the court of appeals for determination of the mooted issues on an expedited basis, again with guidance, or determine those issues under the Court's inherent authority before remand.

Respectfully submitted,



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A copy of the foregoing has been served on this 25<sup>th</sup> day of February, 2009, by ordinary U.S. Mail, upon the following:

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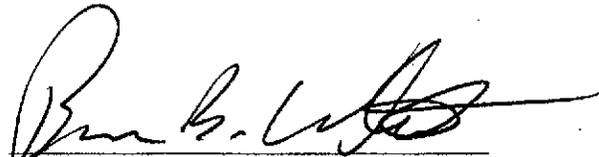
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