No. 2008-1133

In the Supreme Court of Ohio

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

MICHAEL HODESH
Defendant-Appellant,

v.

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

BRIEF OF APPELLEES JOEL KORELITZ, M.D. AND CINCINNATI GENERAL SURGEONS, INC.

BRUCE B. WHITMAN (0003662)
3356 Edwards Road, Suite 100
Cincinnati, OH 45208
Tel: (513) 321-3940
Fax: (513) 321-3929
E-mail: bbwhits123@aol.com

Attorney for Appellant Michael Hodesh

IRENE C. KEYSE-WALKER (0013143)
(COUNSEL OF RECORD)
TUCKER ELLIS & WEST LLP
1150 Huntington Building
925 Euclid Avenue
Cleveland, Ohio 44115-1475
Tel: (216) 592-5000
Fax: (216) 592-5009
E-mail: ikeyse-walker@tuckerellis.com

Attorney for Appellees Joel Korelitz, M.D. and Cincinnati General Surgeons, Inc.

JEFFREY M. HINES (0070485)
KAREN A. CARROLL (0039350)
RENDIGS, FRY, KIELY & DENNIS, LLP
Fourth & Vine Tower, Suite 900
One West Fourth Street
Cincinnati, OH 45202
Tel: (513) 381-9200
Fax: (513) 381-9206
E-mail: jhines@rendigs.com
kcarroll@rendings.com

Attorneys for Amici Curiae The Jewish Hospital of Cincinnati and The Health Alliance of Greater Cincinnati

PETER D. TRASKA (0079036)
ELK & ELK CO., LTD.
6105 Parkland Blvd.
Mayfield Hts., OH 44124
Tel: (800) 355-6446

Attorney for Amicus Curiae Ohio Association for Justice

DAVID C. CALDERHEAD (0039013)
JOEL PESCHKE (0072526)
TRIONA, CALDERHEAD & LOCKEMEYER
2021 Auburn Ave.
The Adam Riddle House
Cincinnati, OH 45219
Tel: (513) 576-1060
Fax: (513) 576-8792
E-mail: dcalderhead@tcl-law.net
jpeschke@tcl-law.net

Attorneys for Appellees Joel Korelitz, M.D. and Cincinnati General Surgeons, Inc.

PAUL W. FLOWERS (0046625)
(COUNSEL OF RECORD)
PAUL W. FLOWERS CO., L.P.A.
Terminal Tower, 35th Floor
50 Public Square
Cleveland, OH 44113
Tel: (216) 344-9393
Fax: (216) 344-9395
E-mail: pwf@pwfco.com

Amicus Curiae Chairman, Ohio Association for Justice

TABLE OF CONTENTS

Page

Page

TABLE OF AUTHORITIES

Page

CASES

Page

Page

Page

STATUTES

RULES

Page

TREATISES

I. INTRODUCTION

The Second District Court of Appeals correctly held that the Trial Court committed reversible error when it denied pretrial efforts by Defendants-Appellees Joel Korelitz, M.D. and Cincinnati General Surgeons, Inc. (collectively "Dr. Korelitz") to discover, and failed to require the pretrial disclosure of, a contingent verdict agreement entered into between Plaintiff-Appellant Michael Hodesh and Defendant-Amicus Curiae Jewish Hospital of Cincinnati ("Hospital"). Hodesh and his amici argue that the Trial Court was correct when it abdicated its obligation to consider the agreement and prophylactic measures that would ensure a fair trial; or alternatively, that this Court should overlook the error in *this* case.

"As is true in so many areas of jurisprudence, secrecy is the first enemy of justice." *Elbaor v. Smith* (Tex. 1992), 845 S.W.2d 240, 254 (Doggett, J., dissenting). Justice Doggett's dissent in *Elbaor* forcefully argues that the solution to the potential "skewing" effect of increasingly complex contingent verdict agreements utilized in modern litigation is to regulate the effect of such agreements, not ban them. That is, courts should implement "procedural safeguards that remove the veil of secrecy from such settlements," including "discovery of them by the non-settling parties; their pretrial disclosure to the court; thorough explanation of the nature of their terms to the jury at the beginning of trial; and restriction of a settling defendant's leading questions of the plaintiff's witnesses." Id.

In the 15 years plus since *Elbaor*, courts have universally compelled the disclosure of any pretrial contingent verdict agreements "that has the *potential* of affecting the manner in which a case is tried" to the court and non-agreeing party or parties. *In re Alcorn* (Ariz. 2002), 41 P.3d 600, 608 ¶ 28 (emphasis in original). Further, the majority of jurisdictions have, like Justice Doggett, rejected the assumption that "twelve ordinary citizens are incapable of assessing facts after full disclosure of all the surrounding circumstances" (id. at 252), and imposed a general rule of disclosure to the jury (subject to exceptions) in lieu of an outright ban on contingent verdict agreements that have "Mary Carter"-like provisions.

When and how to advise the jury of such agreements is a matter for trial court discretion – a necessity given the "wide variety of settlement arrangements that are limited only by the ingenuity of counsel and the willingness of the parties to sign." *Maule Indus. v. Roundtree* (Fla. App. 1972), 264 So.2d 445, 447; *Newman v. Ford Motor Co.* (Mo. 1998), 975 S.W.2d 147, 149. But that discretion cannot be exercised when the contingent verdict agreement requires the parties to maintain its secrecy, and the trial court fails to order its production or disclosure. That is what occurred here, and that is why Dr. Korelitz is entitled to a new trial.

II. COUNTERSTATEMENT OF THE CASE AND FACTS

Hodesh filed this medical malpractice action against Dr. Korelitz and the Hospital on July 3, 2002, following the removal of a surgical towel that remained in Hodesh's abdominal cavity after a sigmoid colectomy procedure. Hodesh also alleged spoliation and fraud against Dr. Korelitz and sought punitive damages on those claims.

While acknowledging his ultimate responsibility for the patent's health and safety during surgery, Dr. Korelitz and his experts testified that the surgical nurses employed by the Hospital had breached their duty to properly count and track items placed inside the patient during the procedure. The Hospital acknowledged that duty, but claimed that in this case it was Dr. Korelitz's responsibility to keep track of the surgical towels because towels were not generally used for sigmoid colectomy procedures performed at the Hospital.

A. The Contingency Agreement.

Two-and-a-half weeks before the scheduled trial date of July 16, 2006, Hodesh and the Hospital entered into a confidential "Contingency Agreement" (Supp., Tab E), an agreement that "by virtue of its contingent nature," is not "a settlement." (Id. at E-1.) Instead, the Agreement anticipates that the Hospital will remain a party at trial and lists a series of "Contingencies" that will determine the amount paid by the Hospital, based on the verdicts returned against Dr. Korelitz and the Hospital.

Specifically, the Hospital's post-trial payment obligation varies according to: 1) whether the jury verdict is against none, one, or both defendants; 2) if against both,

whether there is a joint and several or apportioned verdict; and 3) the total amount of damages awarded. (Id. at E-1 – E-2, ¶ 1-5.)

Under the third contingency (which governs a jury verdict that Dr. Korelitz alone is liable), the Hospital's monetary obligations are reduced in proportion to an increase in damages awarded against Dr. Korelitz. (Id. at E-1 – E-2, ¶ 3.)

First, if the jury award against Dr. Korelitz is $175,000 or less, the Hospital will pay an amount that, when combined with the award against Dr. Korelitz, totals $175,000. (Id.) Thus, if the jury were to award only $5,000 against Dr. Korelitz, the Hospital would pay $170,000 – a figure that would steadily decrease with each increase of the award against Dr. Korelitz, resulting in a $0 obligation on the part of the Hospital if the jury returns an award of $175,000 against Dr. Korelitz.

Second, if the jury verdict against Dr. Korelitz is between $175,001 and $250,000, the Hospital must make up any difference between the verdict and $250,000 – that is, the Hospital will pay $74,999 if the jury awards $175,001, and a decreasing amount proportionate to the increase of the award against Dr. Korelitz, with the Hospital paying $0 if the jury returns a verdict against Dr. Korelitz for $250,000. (Id.)

Third, if the jury returns a verdict against Dr. Korelitz for more than $250,000, the Hospital will owe $0. (Id.) If Dr. Korelitz does not pay the judgment within 30 days (i.e., he files post-trial motions or appeals), the Hospital pays Hodesh $175,000 and is dismissed "with prejudice." (Id.)

Following the six "Contingencies," the Agreement contains four provisions governing Hodesh's and the Hospital's conduct of trial:

- Hodesh will neither assert any punitive damage claim against the Hospital nor look to the Hospital for any punitive damage verdict or judgment (Supp., E-3, ¶ 8);
- The Hospital will not contest Hodesh's claim that in addition to the surgery required to remove the towel, Hodesh's hernia surgery was the result of the retained towel, along with related pain and suffering (id., ¶ 10);
- The Hospital would bring its expert, whose testimony criticizing Dr. Korelitz had been recorded on videotape, to trial for purposes of testifying live (id., ¶ 11); and
- The Hospital would "cooperate" with Hodesh in providing Hospital employees and medical records at trial "as requested" (id., ¶ 12).

Finally, the Agreement contains three provisions governing its nature and scope:

- It "is not to be construed as an admission of liability" on the part of the Hospital (Supp., E-3, ¶ 13);
- It is not a settlement (id. at E-4, ¶ 14); and
- Hodesh and the Hospital "shall maintain the confidentiality of this Agreement; and, no party shall disclose its terms without the expressed consent of the other party or as required by law or court order" (id., ¶ 15).

B. <u>Is Kept Secret.</u>

During proceedings in chambers on the first day of trial, counsel for Dr. Korelitz expressed his belief that Hodesh and the Hospital had entered into some kind of agreement. He requested that any such agreement be disclosed so that if the agreement were "a Mary Carter," the court could grant Dr. Korelitz additional peremptory challenges, allow cross-examination on the agreement, or impose other measures as

appropriate. The discussion and Court rulings were placed on the record the next day (Supplement ("Supp."), Tab A), at which time the Trial Court reiterated its ruling of the day before to counsel for Hodesh:

> If there is a high/low agreement between you and the Hospital, you are to relay that to me in confidence. I will keep that in camera and not reveal it to the other side. You do not have to tell me if there is one or is not one. If there is one, then you would do that.

(Tr. (7/17/06) at 153-54; Supp. at A-7 – A-8.) But if Hodesh and the Hospital had entered into a Mary Carter agreement, the agreement had to be disclosed before trial began:

> [HODESH'S COUNSEL]: * * * [Yesterday] the Court ordered that if there is such an agreement, we submit it at some point before the end of the trial in camera to the Court and that the Court would keep that matter confidential * * * if there is a plaintiff's judgment, the Court would review it with respect to any setoff claimed by one party or another based on that agreement.
>
> * * *
>
> THE COURT: That related only to a high/low agreement which would remain confidential until after the trial. He is talking about a Mary Carter agreement. That would not remain confidential until after the trial because it would be too late for him then.

(Tr. at 151, Supp., at A-5.) See, also, id. at 152, Supp. at A-6:

> [A] Mary Carter * * * is different than a high/low agreement[;] if that's in existence, I should know that and I would not keep it confidential.

Counsel for Hodesh replied, "[a]s far as I know, I don't have any Mary Carter"; stated that he had agreed to keep "negotiations" confidential; and invited "[i]f the hospital

would choose to disclose anything or feels there is a necessity under this discussion to disclose anything we may have discussed" (id. at 152). Counsel for Dr. Korelitz again cited the Court and counsel to this Court's decision in "*Ziegler versus Wendel Poultry*, 67 Ohio St.3d 10, a 1993 case" and reiterated "there needs to be some statement on the record by counsel for the Hospital and plaintiff's counsel as to * * * whether or not there is an agreement * * * with regards to settle or to cooperate together in presenting the evidence in this case." (Tr. at 154-55, Supp. at A-8 – A-9.)

Notwithstanding its inability to consider the nature of an agreement it had never seen, the Trial Court refused to consider the possibility of cooperation clauses or other hallmarks of a Mary Carter agreement. (Id. at A-9.) Instead, it put the burden on Dr. Korelitz to prove the terms of the undisclosed agreement:

> THE COURT: You have no evidence there is such a thing. * * * First of all, the lawyers in this case are not on trial. * * * And to assume that there is some sort of a collusion between the plaintiff and one of the defendants, I'm not going to assume that unless you can come up with some evidence to indicate to me that I should at least suspect it or assume it. I haven't done that. That's overruled.

(Id. at A-9 – A-10.) As Dr. Korelitz's pointed out: "How can I present the evidence unless I know whether or not there is an agreement?" (Id. at 156, Supp. at A-10.)

C. Until Judgment is Entered on the Jury Verdict.

The case proceeded to trial. After Hodesh rested, the Trial Court granted Dr. Korelitz's motion for directed verdict on Hodesh's spoliation, fraud and punitive damage claim. (Tr. at 1062-66, 2d Supp. 35-39.) After both sides rested and the jury was

charged, the Trial Court stated that counsel for Hodesh had submitted a document under seal the day before, "and he indicated to me that it was a high/low," but the Court had not reviewed the document or confirmed the nature of its terms:

> THE COURT: There is a sealed document in chambers given to me by [counsel for Hodesh] yesterday and he indicated to me that it was a high/low with the Jewish Hospital. I have not opened it. It is still sealed.

Counsel for Hodesh continued to argue the Agreement's confidentiality:

> THE COURT: When the jury returns its verdict, what do I do?
>
> * * *
>
> We unseal it?
>
> [HODESH' COUNSEL]: I think I have to talk to the Hospital. I am honoring confidentiality which I agreed to on behalf of Mr. Hodesh.

(Id. at 1332, 2d Supp. 42.)

Following two days of deliberations, the jury returned interrogatories and verdicts in favor of Hodesh, and awarded $775,000. Seven jurors found in favor of the Hospital. (Tr. at 1340, 2d Supp. 43; Jury Verdicts, 2d Supp. 6.) Eight jurors concluded that Dr. Korelitz was liable, although only seven agreed as to the description of his alleged negligence and the $775,000 award, and only seven signed the verdict form. (Id. at 1341, 1342, 2d Supp. 44-45; Verdict Form, 2d Supp. 1.)

Counsel for Hodesh continued to object to any disclosure of the sealed Contingency Agreement until the verdict was reduced to judgment. (Tr. at 1346-47, 2d

Supp. 46-47.) Even after a judgment entry was signed, Hodesh objected to any disclosure of the Agreement to Dr. Korelitz. (Id. at 1347-48, 2d Supp. 47-48.) The Trial Court, however, provided a copy to Dr. Korelitz post-judgment (with restrictions), so that Dr. Korelitz could prepare post-trial motions. (Id. at 1348-51, 2d Supp. 48-51.)

D. Necessitating Reversal and a New Trial.

Because the verdict was against Dr. Korelitz and not against the Hospital, the third contingency of the Contingency Agreement between Hodesh and the Hospital applied. (Supp. at E-1 – E-2, ¶ 3.) And because the verdict against Dr. Korelitz exceeded $250,000, the Contingency Agreement provided that the Hospital's payment obligation was $0:

> In the event there is a verdict against Korelitz and not [the Hospital] for more than $250,000.00, Hodesh will not look to [the Hospital] for any payment and will recover all from Korelitz.

(Id.) Dr. Korelitz did not pay the $775,000 judgment within 30 days. Therefore, the Hospital paid $175,000 and Hodesh filed no appeal against the Hospital and dismissed the Hospital "with prejudice." (Supp. at E-2, ¶ 3; Appearance Docket (Hospital Amicus Br., Exh. D), R. 228 (dismissal entry filed 9/05/06).)

On October 31, 2006, the Trial Court denied Dr. Korelitz's motions for new trial, remittitur, setoff, and revocation of the confidential agreement. (Id., R. 240, 241; Memorandum of Decision (10/27/06) ("Tr. Op."), Appx. to Hodesh's Brief, Exh. B.) On February 13, 2007, the Trial Court granted Hodesh's motion for prejudgment interest ("PJI"). (Appearance Docket, R. 272.)

On appeal, Dr. Korelitz asserted seven Trial Court errors: 1) allowing Hodesh and the Hospital to maintain "a secret 'Mary Carter' Agreement"; 2) refusing to grant a set off of the Hospital's $175,000 payment to Hodesh; 3) denying Dr. Korelitz's motion to bifurcate the trial of Hodesh's allegations of intentional misconduct against Dr. Korelitz; 4) precluding cross-examination on Hodesh's prior inconsistent statements; 5) instructing the jury on "lost business opportunity" damages; 6) denying Dr. Korelitz's motion for new trial; and 7) awarding prejudgment interest. (Opinion (5/02/08) ("App. Op."), Hodesh Appx., Exh. C, ¶ 19-25.) Dr. Korelitz's insurer (which had intervened in the prejudgment interest proceedings) asserted four errors relating to PJI. (Id. at ¶ 44-48.) Hodesh cross-appealed from the directed verdict on his spoliation, fraud and punitive damage claims. (Id. at ¶ 67-68.)

Because it reversed based on Dr. Korelitz's First Assignment of Error (erroneous refusal to compel discovery and disclosure of the Contingency Agreement), the Court of Appeals held that "the remaining assignments of error are moot." (Id., ¶ 43.)

The Court of Appeals agreed "with the jurisdictions requiring that [Mary Carter] agreements be subject to pretrial discovery and admitted into evidence, with some qualifications" (id. at ¶ 33), and held that the provisions of the Contingency Agreement reducing payments by the Hospital in proportion to an increase in Dr. Korelitz's liability, as well as the cooperation and confidentiality provisions, met the definition of a Mary Carter agreement set forth by this Court in *Vogel v. Wells* (1991), 57 Ohio St.3d 91. (Id., ¶ 36.)

The Trial Court committed reversible error because "[a]t the very least," it "had a duty to examine the agreement before trial at the request of Korelitz's counsel * * * so that it could determine it was, in fact, a Mary Carter agreement." (Id., ¶ 37.) Had it done so, the proper procedure would have been for the Agreement to 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." (Id.)[1]

Resolution of Dr. Korelitz's First Assignment of Error also rendered moot his insurer's assignments of error relating to PJI (id., ¶ 49). The Court of Appeals rejected Hodesh's cross-appeal. (Id., ¶ 67-84.)

Hodesh appealed and this Court accepted jurisdiction only of the "Mary Carter" proposition of law.

---

[1] Although unnecessary to its ruling, the Court of Appeals further concluded "that there exists some evidence of collusive activity in this case." (Id., ¶ 40.) The Court noted, for example, that the Hospital's opposition to Dr. Korelitz's pretrial motion to bifurcate the negligence and intentional misconduct proceedings could have been motivated by a litigation strategy to increase the chances that Dr. Korelitz alone would be held at fault, but could also be motivated by a desire to elevate the damages beyond the $250,000 which would reduce the Hospital's payment obligation to $0. (Id., ¶ 40.) Further, the Court found "inexplicable" the Hospital's decision to excuse a juror who "had been a defendant in a recent personal injury action" and "appeared inclined to challenge damages and weigh the evidence with a sympathetic ear toward the defendants." (Id., ¶ 41.)

III. ARGUMENT

Proposition of Law No. 1

> **When a pretrial contingent verdict agreement with Mary Carter provisions is entered into between the plaintiff and one or more, but not all, defendants in a multi-defendant tort action, 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 and either remains a party to the action or retains some financial interest in the litigation, 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 unfair prejudice, of confusing the issues, or of misleading the jury.**

The Second District Court of Appeals properly construed Ohio law to hold that the Trial Court committed reversible error when it failed to require Hodesh and the Hospital to disclose the existence and terms of their contingent verdict agreement. It is the terms of the agreement – not its label – that mandate whether precautionary measures must be taken to ensure that non-agreeing parties receive a fair trial, and secrecy is inimical to the implementation of such ameliorative measures.

A. This Court Should Follow the Trend of Prophylactic Judicial Supervision Over Contingent Verdict Agreements.

For over 75 years, courts have analyzed a wide variety of contingent verdict agreements, the terms of which are "limited only by the ingenuity of counsel and the willingness of the parties to sign." *Maule Indus. v. Roundtree* (Fla.App. 1972), 264 So.2d 445, 447; *Newman v. Ford Motor Co.* (Mo. 1998), 975 S.W.2d 147, 149. The

common thread of those decisions is that those agreements that venture beyond a simple "high/low" covenant not to execute that is *unaffected* by any verdict against a non-agreeing defendant, or that have provisions governing the claims or arguments to be made or witnesses presented at trial, or provide for other forms of cooperation, must be disclosed to the court, to the non-agreeing defendant and, absent limited exceptions, to the jury.

1. The classic "high/low" covenant not to execute has no provision relating to the liability of a non-agreeing defendant, limiting claims or arguments at trial, or other "Mary Carter"-like provisions.

Contingent verdict agreements "are known by a number of other names, including: loan agreements * * * high-low contracts * * * Gallagher covenants * * * guarantee agreements * * * and sliding scale agreements."). Benedict, "It's a Mistake to Tolerate the Mary Carter Agreement," 87 Colum.L.Rev. 368, 386, fn.4.

Despite the somewhat confusing nomenclature, some jurisdictions (including Ohio) have distinguished classic "high/low" covenants not to execute from "Mary Carter" contingent verdict agreements. In the former, the plaintiff and defendant make a rational evaluation of liability and damages, and agree to place a "floor" and "ceiling" on a jury's determination of same *as to that defendant.* Thus, under a "high-low" agreement, a defendant guarantees the plaintiff a minimum payment regardless of the jury verdict as to that defendant's liability, and the plaintiff agrees to collect no more than a maximum amount from that defendant, regardless of the jury verdict as to that defendant's liability. See *Ziegler v. Wendel Poultry Services, Inc.* (1993), 67 Ohio St.3d

10, 15-16, over'ld on other grounds, *Fiedelholtz v. Peller* (1998), 81 Ohio St.3d 197 (terms of agreement whereby one defendant's insurer guaranteed plaintiff's estate payment of $325,000 regardless of jury verdict in exchange for agreement by plaintiff not to collect more than $450,000 from insured if verdict exceeded that amount, was a "high-low" agreement).

As was the case in *Ziegler*, the "high/low" agreement can protect insureds from excess verdicts (the plaintiff agrees not to execute any judgment against the insured in excess of a policy limits ("ceiling")), while the plaintiff is protected by a "floor" that guarantees some recovery. The key to the "high/low," however, is that the "high" and the "low" is dependent *solely* upon the jury's verdict as to the agreeing defendant's liability. See *Ziegler*, 67 Ohio St.3d at 16 (because the "amount of damages assessed against" the *non*-agreeing defendant "had no impact" on the amount the *agreeing* defendant would pay, the trial court did not err in allowing the agreeing defendant to participate in the trial and refusing the non-agreeing defendant's request that the agreement be disclosed to the jury).

A "Mary Carter" contingent verdict agreement, in contrast, includes provisions that define the *agreeing* defendant's required payment according to the jury's verdict against the *non*-agreeing defendant. Specifically, the agreeing defendant's obligation to plaintiff is reduced in proportion to any increase (over an agreed amount) of damages awarded against a non-agreeing party. In addition, the agreeing defendant will continue to participate in the lawsuit, and the agreement usually is to be kept confidential. *Vogel*

v. Wells (1991), 57 Ohio St.3d 91, 93, fn.1; *Ziegler*, 81 Ohio St.3d at 16. See also 7 Williston on Contracts § 15:2 (4th Ed.):

> Under [Mary Carter agreements], one or more, but fewer than all, tort defendants will agree with the tort plaintiff to pay him a specified maximum sum of money (often the limits of any policy of insurance), with the amount to be reduced or eliminated by any collectible judgment the plaintiff obtains against the remaining, non-agreeing defendant. In addition, the agreement will permit or require the agreeing defendants to continue to participate in the lawsuit (which of course they have an incentive to do, since it is in their financial interest that the plaintiff obtain as large a judgment against the non-agreeing defendant as possible), and will often provide that, since the parties have already agreed to the maximum recovery against the agreeing defendants, the plaintiff will not execute on any judgment obtained against them. Finally, such agreements will often provide that they do not constitute admissions of liability by the agreeing defendants or releases by the plaintiff (to avoid the possibility that the release of one joint tortfeasor might release any other, i.e., the non-agreeing defendant), and covenants by both parties that they will not disclose the terms or existence of the agreement unless required to do so by a court.

In both *Vogel* and *Ziegler*, the agreeing parties had disclosed the agreement to the court and the non-agreeing party before the start of trial. See *Vogel*, 57 Ohio St.3d at 93-94; *Ziegler*, 67 Ohio St.3d at 15-16. Therefore, this Court had no need to consider whether pretrial disclosure was mandatory. And because this Court affirmed the trial courts' conclusions in *Vogel* and *Ziegler* that neither agreement had "Mary Carter" provisions, neither the validity of "Mary Carter" agreements nor the procedures for describing or disclosing the agreement to the jury were at issue. This case squarely presents both questions.

2. The universal rule – contemporaneous disclosure of the existence and terms of contingent verdict agreements.

Hodesh and his amici offer this Court propositions of law that uniformly omit the one requirement essential to the enforcement of pretrial verdict contingent agreements (other than a classic high/low covenant not to execute) – ***the agreeing party must disclose the existence of the agreement and its terms to the court and non-agreeing parties***. Non-agreeing parties are entitled to information relevant to the alignment of the parties, and absent disclosure, a court cannot consider whether procedural safeguards are needed to prevent "'a cloud of doubt * * *over the proceedings because of the information withheld from the jurors.'" App. Op., ¶ 42, quoting *Hashem v. Les Stanford Oldsmobile, Inc.* (Mich. App. 2005), 697 N.E.2d 558, 572.

Disclosure of contingent verdict agreements is neither a new nor burdensome concept. As noted, in both *Vogel* and *Ziegler* the agreeing parties disclosed the terms of their discussions in open court before trial, even though neither agreement was a "Mary Carter" agreement (the "discussion" between plaintiff's counsel and the defendant's insurer in *Vogel* did not constitute any agreement at all, while the oral agreement between plaintiff and one defendant in *Ziegler* was a simple high/low).

Nor is pretrial disclosure burdensome or detrimental to settlements. Like any other discovery issue, protective orders provide a means for limiting the scope of disclosure. See, e.g., *Thomas & Marker Const. Co. v. Wal-Mart Stores, Inc.* (S.D. Ohio Aug. 6, 2008), U.S.D.C. No. 3:06-cv-406, 2008 WL 3200642, at *2 (applying Ohio law to order production of a suspected Mary Carter agreement where "the Parties already

have a protective order in place that can be applied"); accord *Kiln Underwriting Ltd v. Jesuit High School of New Orleans* (E.D. La. Aug. 27, 2008), U.S.D.C. Nos. 06-04350, 06-05057, 06-05060, 2008 WL 4190991, at *7 (requiring pretrial disclosure of confidential settlement agreement within limits of protective order, as relevant to question of whether it contemplates a "Mary Carter" agreement).

Required disclosure is also fully consistent with Ohio law. See, e.g., *Ohio Consumers' Council v. Pub. Util. Comm.* (2006), 111 Ohio St.3d 300 (remanding for compelled discovery of settlements and side agreements). As this Court held in *Ohio Consumers' Council,* Ohio recognizes no "settlement privilege"; "[i]ndeed, Evid.R. 408 provides that evidence of settlement may be used for several purposes at trial, making it clear that discovery of settlement terms and agreements is not always impermissible." Id. at ¶ 92.

Further, requiring disclosure will not, as suggested by Amicus OAJ, discourage settlements. Because the very purpose of contingent verdict agreements "is to proceed with the trial," such agreements may actually "result in an increased number of trials." *Dosdourian v. Carsten* (Fla. 1993), 624 So.2d 241, 245. Conversely, the non-agreeing party's knowledge of the terms of a contingent verdict agreement may encourage that party to settle. Id.

Equally unsupported is the qualification in the propositions of law submitted by Hodesh and OAJ that pretrial disclosure of verdict contingent agreements be limited to a trial court's "in camera" review. The federal court applying Ohio law in *Thomas & Marker* cited two reasons for rejecting such a rule. First, "Mary Carter agreements are discoverable and admissible in Ohio." 2008 WL 3200642, at *2 (citing the appellate decision in this case). Second, disclosure – not in camera review – was necessary because the agreement "may be relevant to the credibility of witnesses who may be called at trial"; "may be relevant to any damages that may ultimately be awarded," "may be relevant if it has the effect of a Mary Carter agreement"; and is otherwise discoverable. Id. at *3.

3. The majority rule – contingent verdict agreements are enforceable but subject to judicial supervision – is consistent with Ohio law.

The majority of jurisdictions considering "Mary Carter"-like contingent verdict agreements have opted in favor of active judicial supervision over a per se rule of prohibition. See "Validity and effect of 'Mary Carter' or similar agreement, etc.," 22 A.L.R.5th 483; 7 Williston on Contracts § 15:2 (4th Ed.):

> Perhaps most courts will uphold "Mary Carter" agreements as long as they are disclosed to the court, the non-agreeing defendant and, to one degree or another, the jury. Other courts have established additional procedures to mitigate the skewing of the judicial process that results from such agreements, and as long as these are followed, the agreements will be upheld.

Six states have found "Mary Carter" agreements to be void.[2] The difficulty with a "per se" rule, however, is "the huge variety and form that settlement agreements may take and that might qualify to one extent or another as having 'Mary Carter' attributes, such that a *per se* ban might result in voiding agreements that have little or no negative impact on the judicial process." Williston at § 15:2 (footnote omitted).

Thirteen states mandate broad disclosure of all contingent fee agreements to the court and non-agreeing party[3] while two others – California[4] and Oregon[5] – have statutes

---

[2] Florida (*Dosdourian v. Carsten* (Fla. 1993), 624 So.2d 241); Nevada (*Lum v. Stinnett* (Nev. 1971), 488 P.2d 347); New Mexico (*Watson Truck & Supply Co., Inc. v. Males* (N.M. 1990), 801 P.2d 639); Oklahoma (*Cox v. Kelsey-Hayes Co.* (Okla. 1979), 594 P.2d 354); Texas (*Elbaor v. Smith* (Tex. 1993), 845 S.W.2d 240); and Wisconsin (*Trampe v. Wisconsin Tel. Co.* (Wis. 1934), 252 N.W. 675.

[3] Connecticut (*Monti v. Wenkert* (Conn. 2008), 947 A.2d 261); South Dakota (*Corn Exchange Bank v. Tri-State Livestock Auction Co., Inc.* (S.D. 1985), 368 N.W.2d 596); Kansas (*Ratterree v. Bartlett* (Kan. 1985), 707 P.2d 1063); Maryland (*Gen. Motors Corp. v. Lahocki* (Md. 1980), 410 A.2d 1039); Oklahoma (*Cox v. Kelsey-Hayes Co.* (Okla. 1979), 594 P.2d 354); Illinois (*Gatto v. Walgreen Drug Co.* (Ill. 1975), 337 N.E.2d 23); West Virginia (*Gum v. Dudley* (W.Va. 1997), 505 S.E.2d 391); Minnesota (*Johnson v. Moberg* (Minn. 1983), 334 N.W.2d 411); Arkansas (*Firestone Tire & Rubber Co. v. Little* (Ark. 1982); 639 S.W.2d 726); Arizona (*Mustang Equip., Inc. v. Welch* (Ariz. 1977), 564 P.2d 895); New York (*In re Matter of 8th Jud. Dist. Asbestos Litig.* (N.Y. 2007), 872 N.E.2d 232).

[4] See Ann.Cal.C.C.P. § 877.5 (if notice of intent to enter into a sliding-scale agreement is not served on all non-signatory defendant tortfeasors at least 72 hours prior to entering into the agreement, the agreement is not effective).

[5] R.S. § 31.815 (when a covenant to sue or not to enforce a judgment is given, "the claimant shall give notice of all of the terms of the covenant to all persons against whom the claimant makes claims").

governing disclosure. See, e.g., *Corn Exchange Bank v. Tri-State Livestock Auction Co., Inc.* (S.D. 1985), 368 N.W.2d 596, 599-600:

> [W]ithout proper disclosure the trial court never arrives at the question of whether the agreement should be revealed to the jury. It is obvious, therefore, that discovery of such agreements is imperative. Furthermore, it cannot be left to counsel for one of the agreeing parties to determine if an agreement is the kind that should be given to the jury and thus is discoverable. Any agreement between some, but not all, of the litigants should be disclosed upon the request of any party in accordance with our rules of procedure, whether or not the agreement is a "Mary Carter" agreement. Then, if requested, the trial court can determine if the agreement should be made known to the jury.

Ten states have expressly held that upon disclosure, trial courts have discretion to determine whether contingent verdict agreements should be admitted into evidence.[6]

Fourteen states hold that the disclosure of a "Mary Carter" agreement to the jury is mandatory, although four of the 14 states allow some discretion in the *method* and *scope* of that mandatory admission, and most keep the amounts of payment from the jury.[7]

---

[6] West Virginia (*Reager v. Anderson* (W.Va. 1988), 371 S.E.2d 619); Arkansas (*Firestone Tire & Rubber Co. v. Little*, supra, 639 S.W.2d 726); Mississippi (*Smith v. Payne* (Miss. 2002), 839 So.2d 482); Louisiana (*Stockstill v. C.F. Indus., Inc.* (La. 1996), 665 So.2d 802); New York (*In re Matter of 8th Judicial Dist. Asbestos Litig.*, supra, 872 N.E.2d 232); Florida (*Gulf Indus., Inc. v. Nair* (2007), 953 So.2d 590 (high-low agreements)); Alaska (*Bohna v. Hughes, Thorsness, Gantz, Powell & Brudin* (Alaska 1992), 828 P.2d 745); South Carolina (*Poston v. Barnes* (S.C. 1987), 363 S.E.2d 888); Connecticut (*Monti v. Wenkert*, supra, 947 A.2d 261); Maine (*Dongo v. Banks* (Me. 1982), 448 A.2d 885).

[7] **Mandatory** – Oregon (*Grillo v. Burke's Paint Co., Inc.* (Ore. 1976), 551 P.2d 449); Idaho (*Soria v. Sierra Pacific Airlines, Inc.* (Idaho 1986), 726 P.2d 706).

Discretion as to Method – Louisiana (*Thibodeaux v. Ferrellgas, Inc.* (La. 1998), 717 So.2d 668); Missouri (*Carter v. Tom's Truck Repair, Inc.* (Mo. 1993), 857 S.W.2d 172);

Ohio precedent suggests that this Court would follow the majority of jurisdictions holding that disclosure and regulation – as opposed to the definition and outright ban of "Mary Carter" agreements – is the preferable manner for ensuring the integrity of trial proceedings. In *Shearer v. Shearer* (1985), 18 Ohio St.3d 94, for example, this Court rejected potential "collusive" litigation as a basis for prohibiting intrafamilial litigation, noting that "'[i]n all other cases, we rely upon the standard remedies of perjury, the efficacy of cross-examination, the availability of pretrial discovery, and the good sense of juries'" to guard against collusive behavior. Id. at 98, quoting *Primes v. Tyler* (1975), 43 Ohio St.2d 195, 201. The same principles apply to guard against the potential of collusive behavior arising from a "secret" contingent verdict agreement.

Maryland (*Gen. Motors Corp. v. Lahocki* (Md. 1980), 410 A.2d 1039); New Hampshire (*Bedford School Dist. v. Caron Const. Co., Inc.* (N.H. 1976), 367 A.2d 1051).

Jury Not to Hear Amounts – *Thibodeaux*, 717 So.2d at 673-74 (the trial court should not inform the jury of the exact amounts involved or specific ratios regarding the agreeing defendant's financial interest); *Carter*, 857 S.W.2d at 175-78 (the court should inform the jury of the existence of the agreement and its basic terms, but not the amount or any insurance coverage); *Bedford School Dist.*, 367 A.2d 1051 (agreement was admissible, but not amount of agreement).

But see *Lahocki*, 410 A.2d at 1046-47 (err not to disclose full agreement to jury, which was entitled to know "precisely" the "circumstances" between the parties); *Corn Exchange Bank*, 368 N.W.2d 596, 600 (jury must be informed of contents of the agreement if agreeing defendant will gain financially from the plaintiff's verdict or have its liability reduced by increasing the non-agreeing defendant's liability); *Hagarty v. Campbell Soup Co.* (Neb. 1983), 335 N.W.2d 758, 764-65 (full Mary Carter agreement should have been admitted into evidence).

B. Subjective, Hindsight Analyses of Litigation Strategy and "Adversity" Do Not Provide a Workable Rule for Ensuring Fair Trials.

Hodesh and his amici offer propositions of law based on unworkable, hindsight, subjective evaluations of "adversity" at trial. The Hospital's proposition renders all pretrial contingent verdict agreements "legal and enforceable" so long as some unspecified person or entity determines at some unspecified time that "a true adversarial relationship continues to exist * * *." Hodesh's and OAJ's propositions of law require the "in camera" submission of a pretrial contingent verdict agreement, but are silent both as to when the "in camera" submission should occur, and as to whether the agreement is to be submitted under seal.

Hodesh's argument makes it clear that he is asking this Court to approve the procedure followed in this case – submission under seal and post-trial evaluation of "adversity." See, e.g., Hodesh Br. at 16 (the trial judge correctly ruled that "the law of Ohio did not require him to * * * read the agreement"); 17-18 (the trial judge was "on notice * * * to watch for collusion" at trial); 19-20 (the trial judge allowed full post-trial briefing on the effect of the Contingency Agreement on the presentation of evidence). Such a procedure makes no sense. A trial judge would not know whether to disclose a pretrial contingent verdict agreement until it has already tainted trial proceedings. See Hodesh Br. at 13 (emphasis added) ("*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 * * *"). Nor does Hodesh explain how a trial court is to

distinguish trial strategy from "taint" when it refuses to even learn whether the parties *have* a pretrial agreement, much less the nature of any terms of any such agreement that might impact trial proceedings.

Further, as the Court of Appeals points out, it makes little sense to "seal" the agreement for the purpose of "delaying any sort of examination, including whether the agreement could potentially influence the conduct of the parties, until the conclusion of the case." (App. Op., ¶ 37.) Even the Trial Court recognized that disclosing a Mary Carter agreement after trial would be "too late." (See Tr. at 151, Supp. at A-5.)

The Hospital suggests that "it is by no means novel" for courts to conclude that contingent verdict agreements may remain secret so long as the parties appeared to remain "adverse" at trial. (See Hospital Br. at 32-33.) The cases cited in footnote, however (id. at 33), do not support that suggestion. The agreement considered in *Tuscon v. Gallagher* (Ariz. 1972), 493 P.2d 1197, was disclosed to "all parties to the action and the judge * * * before trial." *Tuscon v. Gallagher* (Ariz. App. 1971), 483 P.2d 798, 800. The agreement considered in *Jensen v. Beaird* (Wash. App. 1985), 696 P.2d 612, was also apparently disclosed prior to trial, since the court of appeals concluded that "any coercive effect of the agreement could have been negated through introduction of the agreement into evidence, cross-examination, and limiting instructions to the jury, none of which was attempted by" the non-agreeing party. Id. at 619. Finally, in *Ponderosa Timber & Clearing Co. v. Emrich* (Nev. 1970), 472 P.2d 358, the agreement was *voided* because it "should have been disclosed" and was not, and the agreeing defendant was

required to pay half of the jury verdict (id. at 627, fn.1). Even so, a strong dissent would have also granted a new trial. Id. at 628.

No jurisdiction applies a rule of disclosure based on hindsight interpretations of litigation strategies. To the contrary, the detrimental effect of secrecy has long been identified as the primary concern accompanying verdict contingent agreements.

One of the earliest cases to consider a contingent verdict agreement pointed out the most obvious flaw of "hindsight" review – the trial court could not determine whether the agreeing parties had reached a "settlement" which would preclude the agreeing defendant's continuing participation at trial until after the trial had been completed. See *Trampe v. Wisconsin Tel. Co.* (Wis. 1934), 252 N.W. 675. The plaintiff in *Trampe*, a passenger injured in an automobile accident, settled with one of the joint tortfeasors (Wren) prior to filing suit, but included Wren as a defendant in the action. After trial, but prior to the entry of judgment, the non-agreeing defendant demanded that the plaintiff "advise the court whether any settlement had been made with the defendant Wren prior to the trial." 252 N.W. at 675. When the plaintiff refused, the court ordered an investigation, which disclosed an agreement under which Wren paid the plaintiff a sum certain, while retaining the potential of obtaining contribution from the non-agreeing defendant if the verdict exceeded a certain amount. The trial court concluded, based upon its observation of the trial, that the parties to the agreement had intended no fraud and the non-agreeing defendant had not been prejudiced, and enforced the agreement.

The Wisconsin Supreme Court reversed, holding that the plaintiff had no cause of action at all against Wren, either at the time the complaint was filed or at the time it went to trial. Id. at 676-77. Rejecting the trial court's hindsight evaluation, the Supreme Court distinguished cases in which the terms of a prior settlement "were made known to the other tort-feasor" before trial. "It is the effect of the concealment from the court of the existence of this settlement" – not just the proposed distribution of the verdict – that caused the court concern. Id. at 676.

In *Ward v. Ochoa* (Fla. 1973), 284 So.2d 385, as here, the trial court declined to require the disclosure of a pretrial contingent verdict agreement. See id. at 386-87 (non-agreeing defendants "feared the existence of a type of agreement known as the 'Mary Carter Agreement'" and filed a pretrial motion to produce, denied by the trial court). The court of appeals concluded that the denial was error, but that any prejudice could be obviated by ordering the agreeing defendant's payment to be set off from the judgment. The Florida Supreme Court reversed, holding that the hindsight set-off was "insufficient" to correct "possible injustice" from the undisclosed agreement:

> Secrecy is the essence of such an arrangement, because a court or jury as trier of the facts, if apprised of this, would likely weigh differently the testimony and conduct of the signing defendant as related to the non-signing defendants.

Id. at 387. Because it was impossible to determine how the jury would have weighed the testimony and evidence had it known of the agreement, a new trial was required.

Perhaps the best argument against the "determine-the-effect-of-the-secret-agreement-in-hindsight" rule proposed by Hodesh and his amici was succinctly explained in a Texas opinion dissenting from the majority's per se ban of "Mary Carter" agreements:

> As is true in so many areas of jurisprudence, secrecy is the first enemy of justice.

Elbaor v. Smith (Tex. 1992), 845 S.W.2d 240, 254 (Doggett, J., dissenting). See, also, *Gen. Motors Corp. v. Lahocki* (Md. App. 1980), 410 A.2d 1039, 1043 ("Of the three characteristic found in [Mary Carter] agreements, secrecy is the one that has been most frequently condemned"). Non-agreeing parties are entitled to learn of agreements that are predicated in any part on the verdict against the non-agreeing party or that may impact the trial proceedings. Even if considered a "settlement",[8] the agreement can be admitted "to show bias or prejudice of a witness" (Evid.R. 408), and Ohio does not recognize a "settlement privilege" (*Ohio Consumers' Council v. Pub. Util. Comm.* (2006), 111 Ohio St.3d 300).

The nature and scope of disclosure to the jury, as well as the implementation of any of a myriad of procedural safeguards, is properly left to the discretion of the trial judge. An explanation by the agreeing parties of continuing adversity would be a factor militating in favor of limited disclosure, while provisions requiring cooperation,

---

[8] As treatises point out, Mary Carter agreements avoid "settlement" language "to avoid the possibility that the release of one joint tortfeasor might release any other, i.e., the non-agreeing defendant." Williston on Contracts § 15:2 (4th Ed.).

specifying arguments that will or will not be made by the agreeing parties, or reducing the agreeing defendant's payment in proportion to the increase in damages against the non-agreeing defendant (all of which were present in the Contingency Agreement executed by Hodesh and the Hospital) would militate in favor of broader disclosure. All of those considerations will determine the "procedural safeguards that remove the veil of secrecy" upon the remand and retrial of this matter.

C. **The Court of Appeals Correctly Reversed.**

Hodesh argues somewhat inconsistently that the Court of Appeals should have affirmed the trial judge's conclusion "that the law of Ohio did not require him to disclose or read the agreement"; that "[r]eading or not reading the Agreement pre-trial would not have changed the trial court's decision"; and that "the Mary Carter issue" is solely a matter of "collusion, an evidentiary matter" that can only be derived from the conduct at trial – i.e., "the literal language of the Agreement would not control." (Hodesh Br. at 16-17.) Hodesh's arguments fail, both individually and when considered as a whole.

First, the law of Ohio *does* require disclosure. See *Ohio Consumers' Council v. Pub. Util. Comm.* (2006), 111 Ohio St.3d 300 (compelling production of settlement and side agreements). Accord *Thomas & Marker Const. Co. v. Wal-Mart Stores, Inc.* (S.D. Ohio), 2008 WL 3200642 (applying Ohio law to compel production of agreements suspected of being "Mary Carter" agreements).

Second, the law of Ohio *does* define Mary Carter agreements by "the literal language of the Agreement." See *Vogel*, 57 Ohio St.3d at 93, fn.1 (the "three basic

provisions of a Mary Carter agreement are: 1) "the settling defendant guarantees the plaintiff a minimum payment"; 2) "the plaintiff agrees not to enforce" the judgment against the settling defendant; and 3) "the settling defendant remains a party in the trial, but his exposure is reduced in proportion to any increase in the liability of his co-defendants over an agreed amount"). Had the Trial Court applied these three elements to the Contingency Agreement, it would have necessarily concluded that: 1) the Hospital "guaranteed Hodesh a minimum payment of $175,000.00, regardless of the Court's judgment"; 2) "Hodesh agreed not to enforce the Court's judgment" against the Hospital; and 3) the Hospital "remained a defendant in the trial, but its exposure was reduced in proportion to an increase in the liability of Korelitz" (i.e., the agreement contained a 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") (App. Op., ¶ 36).

In addition, *Vogel*'s "fourth element: that the agreement be kept secret between the settling parties" (57 Ohio St.3d at 93, fn.1) was also present (App. Op., ¶ 36) and the Contingency Agreement had provisions relating to arguments Hodesh and the Hospital

would *not* advance,[9] and cooperation by the Hospital in producing records and witnesses at trial.[10]

Finally, Hodesh's argument that actual trial proceedings – not "the literal language of the Agreement" – determine the need for disclosure, is not supported by reason or law. Parties put their agreements in writing so that the "literal language" they choose *does* control. The law of contracts would no longer exist if the terms of parties' written agreements could only be determined by their subsequent actions.

The error of the Trial Court in refusing to require the pretrial discovery of the Contingency Agreement is sufficient alone to affirm the appellate court decision vacating the judgment on the jury verdict. It is the potential or possibility that a jury would consider and weigh evidence differently, or be misled, that requires courts to consider the need for procedural safeguards. See, e.g., *Dosdourian v. Carsten* (Fla. 1993), 624 So.2d 241, 244 ("Even possible collusion between the plaintiff and the settling defendant creates an inherently unfair trial setting that could lead to an inequitable attribution of guilt and damages to the nonsettling defendant").

---

[9] The Hospital would not contest Hodesh's claims that he required both additional surgery to remove the towel "and a hernia operation" in addition to pain and suffering; Hodesh agreed that he would "assert no cause of action for punitive damages" against the Hospital and "will look to Korelitz only for any punitive damage verdict and judgment." (Supp., Tab E, at E-3, ¶ 8, 10.)

[10] The Hospital agreed to bring its expert, whose testimony had been videotaped, "to Cincinnati on July 24, 2006 for purposes of testifying [live] at trial" and agreed to "cooperate" in providing hospital "employees and medical records at trial" as requested by Hodesh. (Supp., Tab E, at E-3, ¶ 11, 12.)

The flaw in an "actual" – as opposed to "potential" – collusion test is well illustrated in this case. The Hospital and its counsel "take umbrage" (Hospital Amicus Br. at 2) at both arguments made on appeal and the Court of Appeals' conclusion that the Contingency Agreement was "of the collusive ilk" (id. at 3). They vigorously defend "what may have appeared as 'collusion' or a 'secret alliance' to the cursory observer" as necessary and reasonable trial strategy (id. at 20). But the Hospital's proposed proposition of law adopts the very hindsight analysis of trial conduct that it now deplores. The Hospital's own brief exemplifies the strife and discord that would follow a rule of law requiring trial judges to remain ignorant of the terms of pretrial contingent verdict agreements but remain vigilant for signs of "collusion" prompted by those unknown terms.

The inescapable fact is that post-hoc dissections of the Hospital's and Hodesh's litigation strategy would be unnecessary had the Contingency Agreement been disclosed to the court and Dr. Korelitz and, as appropriate, explained to the jury. Had the jury known that the Hospital's obligations were reduced to $0 if the verdict against Dr. Korelitz exceeded a certain sum, and that the Hospital agreed that it would "not contest" the need for Hodesh's first and second surgeries "in addition to pain and suffering related thereto" (Sup. at E-3, ¶ 10), they might have taken a different view of the Hospital's decision not to cross-examine the treating physician who changed his testimony at trial by attributing continuing pain and abdominal pain alleged by Hodesh to surgeries required by the retained towel (Tr. 670-693, 2d Supp. 11-34); or not argue damages in

closing (Tr. at 1262, 2d Supp. 41). Pretrial disclosure to the court and Dr. Korelitz would have eliminated the need to examine in hindsight why the Hospital opposed bifurcation (see App. Op., ¶ 40), excused a seemingly defense-oriented juror (id., ¶ 41), or decided not to have an expert deposition read into the record after the Trial Court ruled that Dr. Korelitz could read those portions of the deposition in which the expert stated his opinion that Hodesh had no "permanent sequelae" (Tr. at 1149, 2d Supp. 40).

The Trial Court pointed out "the lawyers in this case are not on trial" (Tr. at 155, Supp. at A-9), but created a situation where the duty to disclose a pretrial contingent verdict agreement is dependent upon counsel's conduct at trial. See Tr. Op. at 3, ¶ 1 (emphasis added):

> Since the Court has already found no evidence of collusion, in bad faith, between Plaintiff and hospital to the detriment of Dr. Korelitz, *there was no duty to reveal the contents of the agreement to the doctor.*

Such a rule, if adopted, would not only prove to be unworkable but also open a Pandora's box of litigation discord.

D. The Court of Appeals Correctly Remanded for a New Trial.

This Court has long recognized the rule of *in statu quo ante* – a case is reinstated at the point the error occurred. *Armstrong v. Marathon Oil Co.* (1987), 32 Ohio St. 397, 418 (punctuation and citation omitted) ("it is basic law that an action of the Court of Appeals in reversing the cause and remanding the case to the Court of Common Pleas for further proceedings has the effect of reinstating the cause to the Court of Common Pleas *in statu quo ante*. The cause is reinstated on that docket of the court below in precisely

the same condition that obtained before the action that resulted in the appeal and reversal"). The error in this case occurred when the Trial Court denied Dr. Korelitz's request for pretrial disclosure of the Contingency Agreement, and the Court of Appeals correctly reversed for further proceedings from that point.

1. Correct standard of review.

Both OAJ and the Hospital argue that the Court of Appeals erred when it applied a "de novo" standard of review to the Trial Court's denial of Dr. Korelitz's *motion for new trial.* (OAJ Amicus Br. at 3-4; Hospital Amicus Br. at 30.) The Court of Appeals never even addressed the Trial Court's denial of Dr. Korelitz's Motion for New Trial. That error (see Assignment of Error Number Six, App. Op., ¶ 24), like the errors in Assignments 2, 3, 4, 5 and 7 (id., ¶ 20-23, 25), were "rendered moot" by the Court of Appeals' disposition of the First Assignment of Error. (Id., ¶ 43.)

Hodesh's amici misinterpret the language of the Court of Appeals in ¶ 34 of its Opinion (emphasis added):

> Here, Korelitz argues that the agreement entered into between Jewish Hospital and Hodesh is a Mary Carter agreement * * *. 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.

It is clear that the Court of Appeals was addressing the error in the Trial Court's *pre*-trial – not *post*-trial – rulings.

Hodesh's "standard of review" argument is equally misplaced. Hodesh argues that the Court of Appeals "misinterpreted the record" when it reviewed the Trial Court's pretrial actions under a "de novo" standard of review, because Dr. Korelitz's First Assignment of Error was based on the Trial Court's "ruling that the law of Ohio did not require him to disclose or read the agreement." (See Hodesh Br. at 16.)[11]

"De novo" is precisely the standard that applies when an appellant challenges a trial court ruling that was based on the trial judge's erroneous understanding of what "the law of Ohio * * * required * * *." "When the trial court's order contains an error of law in misconstruing or misapplying the law, then the appellate court reviews the matter de novo." *Cook v. Toledo Hosp.* (2006), 169 Ohio St.3d 180, at ¶ 18 (reviewing order to produce confidential incident reports under "de novo" standard of review). Here, the Trial Court's decision that pretrial contingent agreements are not discoverable presented a question of law to be reviewed de novo.

Further, contract interpretation is a matter of law reviewable de novo. *Ignazio v. Clear Channel Broadcasting, Inc.* (2000), 113 Ohio St.3d 276, ¶ 19. Therefore, courts that follow the proper rule of law by requiring disclosure of pretrial contingent verdict agreements will also apply a rule of law in construing those agreements, subject to an appellate court's de novo review. See *Gulf Indus., Inc. v. Nair* (Fla. 2007), 953 So.2d

[11] See, also, OAJ Amicus Br. at 3 (arguing that the Trial Court's pretrial ruling presented an "evidentiary" issue subject to an abuse of discretion standard).

590, 593 (holding that both the question of whether a contingent verdict agreement is legally permissible, and whether it must be disclosed to the jury are reviewed "de novo").

2. No waiver.

Hodesh's argument that Dr. Korelitz's failure to "object" during the trial constitutes waiver (Hodesh Br. at 31-33), is based on the faulty premise that the pretrial proceedings in this case were analogous to a motion in limine. See Hodesh Br. at 31 ("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 waived on appeal"). Here, Dr. Korelitz sought discovery of the Contingency Agreement so that the Court could take precautionary measures to counteract any "skewing" effect the Agreement might have on trial proceedings. Without knowledge of what those terms were, there was no way for Dr. Korelitz to know when, and under what circumstances, the proceedings were affected. Dr. Korelitz repeatedly and forcefully argued that if the Agreement was a Mary Carter agreement, he should be given additional peremptory challenges, have the right to cross-examine Hodesh and Hospital witnesses regarding possible bias, and the agreement should be disclosed to the jury. (Supp., Tab A, pp. 148-158.) No more is required to preserve the Trial Court error in allowing Hodesh and the Hospital to maintain the secrecy of the agreement.

3. No "harmless error."

The Trial Court's failure to review and compel the pretrial disclosure of the Contingency Agreement were inconsistent with substantial justice and affected the

substantial rights of Dr. Korelitz. See, e.g., *In re Matter of 8th Jud. Dist. Asbestos Litig.* (N.Y. 2007), 872 N.E.2d 232, 234, 235 (rejecting intermediate court's conclusion that non-disclosure of contingent verdict agreement "did not warrant reversal absent evidence of collusion"; non-agreeing defendant "was deprived of its right to a fair trial" by non-disclosure); *Gen. Motors Corp. v. Lahocki* (Md. App. 1980), 410 A.2d 1039, 1046 (where contingent verdict agreement was kept secret, "prejudice is shown warranting a new trial"); *Dosdourian v. Carsten* (Fla. 1993), 624 So.2d at 244 ("Even possible collusion * * * creates an inherently unfair trial setting").

Characterizing Hodesh's and the Hospital's insistence on secrecy as "harmless" simply rewards parties for failing to disclose pretrial contingent verdict agreements, erasing any incentive for pretrial disclosure.[12] Trial judges would be reluctant to force a second jury through a second trial following the belated disclosure of a contingent verdict agreement, and would thus be amenable to an argument that "actual adversity" at trial proved there was "no duty" to disclose in the first place. And even if an appellate court were to conclude that the agreeing parties did have a duty to disclose their agreement,

---

[12] The fact that the Contingency Agreement was executed nearly three weeks before trial distinguishes this case from the case cited by the Hospital in support of "harmless error." (Hospital Br. at 31, fn.100). In *Johnson v. Moberg* (Minn. 1983), 334 N.W.2d 411, the agreement was not entered into until *after the parties had rested*, "so it had no influence on the testimony at trial." Id. at 415. Even so, when the case was retried on liability (required by a faulty jury charge) "the settlement agreement will, of course, be known and will be relevant evidence as bearing on the credibility of the testimony on liability." Id.

they could rely on "harmless error" to force *non*-agreeing parties – parties who did not breach any duty – to prove prejudicial collusion.

Finally, even if this Court were to find "harmless" error, the remedy would not be reinstatement of the jury verdict (Hodesh Br. at 35, 47). Rather, it would be a remand for further consideration of Dr. Korelitz's alternative request of a "set-off"[13] (see App. Op., ¶ 20 (Second Assignment of Error)) and alternate bases for ordering a new trial (id., ¶ 21-24 (Assignments of Error 3, 4, 5 and 6)) – all of which were rendered "moot" by the Court's determination that a new trial was required as a result of the First Assignment of Error. See, e.g., *Wagner v. Roche Labs.* (1996), 77 Ohio St.3d 116, 124 (reversing and remanding for court of appeals to address assignments of error "found moot" by appealed decision).

4. No basis for "prospective only" application.

Finally, Hodesh asks this Court to apply any "new definitional and disclosure rules relating to Mary Carter agreements" prospectively only, and reinstate the verdict and judgment via that avenue. (Hodesh Br. at 37.) This case comes nowhere close to the

[13] In *Ponderosa Timber & Clearing Co. v. Emrich* (Nev. 1970), 472 P.2d 358, the trial court required "that the contracting parties either file a disclaimer or a satisfaction of judgment to the extent of one-half thereof" as a sanction for non-disclosure of a contingent verdict agreement. Id. at 360, fn. 1. As applied to this case, that would require Hodesh and the Hospital to disclaim or declare satisfied $387,500.00 of the total award of $775,000.00. At a minimum, Hodesh should not be rewarded by receiving his full damages of $775,000.00 from Dr. Korelitz *and* $175,000.00 from the Hospital pursuant to the terms of the Contingent Agreement.

"exceptional circumstances"[14] required before this Court will decline to apply a ruling to the case before it.

First, Hodesh erroneously argues (pp. 38-39) that the Contingency Agreement created contract or "vested rights" that would be taken away if this Court were to affirm the Court of Appeals. No such rights existed or were taken away. The Court of Appeals did not void the agreement, it simply held that the Trial Court erred when it refused Dr. Korelitz's attempt to discover the agreement, and abdicated its obligation to conduct the pretrial review of the Agreement necessary to determine whether and how it should be made known to the jury. As this Court held in *Ohio Consumers' Council v. Pub. Util. Comm.* (2006), 111 Ohio St.3d 300, Ohio has never recognized any "settlement privilege" that would allow a party to avoid discovery of a settlement agreement, and Evid.R. 408 anticipates that settlement negotiations are admissible to show bias of a witness. In short, the Contingency Agreement is enforceable, but Hodesh and the Hospital, invited Trial Court error when they insisted on maintaining its confidentiality.

Nor do the facts of this case satisfy the three-pronged test in *DiCenzo* for otherwise applying a ruling prospectively only. The first prong requires this Court to consider "whether the decision establishes a new principle of law that was not foreshadowed in prior decisions * * *." *DiCenzo*, 130 Ohio St.3d 149, paragraph two of the syllabus. Neither the definition of Mary Carter agreements utilized by the Court of

[14] *DiCenzo v. A-Best Prods. Co.* (2008), 120 Ohio St.3d 149, ¶ 28.

Appeals nor its disclosure requirements establish a new principle of law. The Court of Appeals quoted this Court's decision in *Vogel v. Wells* for the elements of a Mary Carter agreement. (App. Op., ¶ 30.) Further, in both *Vogel* and *Ziegler*, the agreeing parties disclosed their agreements prior to trial to both the court and opposing counsel – clearly foreshadowing the necessary predicate for the trial court to determine that neither agreement needed to be disclosed to the jury. Disclosure is also foreshadowed in this Court's ruling that settlement agreements are discoverable (*Ohio Consumers' Council v. Pub. Util. Comm.* (2006), 111 Ohio St.3d 300) and Evid.R. 408 (settlements may be admitted to prove "bias or prejudice of a witness").

Second, this Court must consider "[w]hether retroactive application of the decision promotes or retards the purpose behind the rule defined in the decision * * *." *DiCenzo*, paragraph two of the syllabus. The purpose of disclosure of pretrial contingent verdict agreements is to "remove the veil of secrecy"[15] that is often the bane of achieving justice and remove the "cloud of doubt"[16] on a jury verdict issued without the knowledge of the surrounding circumstances set forth in the Contingency Agreement. Those goals would hardly be promoted by a rule that permitted Hodesh and the Hospital to benefit from their invited error.

---

[15] *Elbaor v. Smith* (Tex. 1992), 845 S.W.2d 240, 254 (Doggett, J., dissenting).

[16] App. Op., ¶ 42, quoting *Hashem v. Les Stanford Oldsmobile, Inc.* (Mich. App. 2005), 697 N.E.2d 558, 572.

Finally, *DiCenzo* states that this Court must consider "whether retroactive application of the decision causes an inequitable result." *DiCenzo*, paragraph three of the syllabus. There is no such inequity. Hodesh and the Hospital may still carry out their Contingency Agreement and make their arguments to a jury. They simply cannot do so in secrecy.[17]

---

[17] Notably, none of the decisions setting forth the rule of disclosure and describing the circumstances under which contingent verdict agreements must be disclosed to the jury, refused to apply the decision to the case before them. See *In re Matter of 8th Judicial District Asbestos Litigation* (N.Y. 2007), 872 N.E. 2d 232, 235-236 (reversed and remanded for a new trial holding where high-low agreement had not been disclosed to all parties); *Ratterree v. Bartlett* (Kan. 1985), 707 P.2d 1063, 1067 (reversed and remanded for a new trial); *Hashem v. Les Stanford Oldsmobile, Inc.* (Mich. 2005), 697 N.W.2d 558, 571-573 (reversed and remanded, recognizing it was a matter at first impression, court ordered that "should any similar agreements" arise where some but not all defendants settle and the settling defendants remain in the case, "the trial court must draft a means of disclosure [of the agreement] that reasonably ensures fairness to each litigant."); *Hatfield v. Continental Imports, Inc.* (Pa. 1992), 610 A.2d 446, 452 (reversed and remanded because the jury was entitled to know about the Mary Carter Agreement); *Poston v. Barnes* (S.C. 1987), 363 S.E.2d 888, 890-891 (reversed and remanded for a new trial, settlement agreement between plaintiff and one defendant should have been disclosed to jury). See, also, *Fullenkamp v. Newcomer* (Ind. 1987), 508 N.E.2d 37, 40 (reversing and remanding for retrial with inherent application of new law regarding discoverability and admissibility of high-low and Mary Carter Agreements at retrial); *Corn Exchange Bank v. Tri-State Livestock Auction Co., Inc.* (S.D. 1985), 368 N.W.2d 596, 600 (same); *Firestone Tire & Rubber Co. v. Little* (Ark. 1982), 639 S.W.2d 726, 728 (same); *Gen. Motors Corp. v. Lahocki* (Md. 1980), 410 A.2d 1039, 1044-1047 (same); *The Bedford School Dist. v. Caron Constr. Co., Inc.* (N.H. 1976), 367 A.2d 1051 (same); and *Gatto v. Walgreen Drug Co.* (Ill. 1975), 337 N.E.2d 23, 29 (same.)

IV. CONCLUSION

For all the reasons set forth more fully above, this Court should affirm the decision of the Court of Appeals.

Respectfully submitted,

Irene C. Keyse-Walker (0013143)
(COUNSEL OF RECORD)
TUCKER ELLIS & WEST LLP
925 Euclid Avenue, Suite 1100
Cleveland, Ohio 44115-1414
Tel: (216) 592-5000
Fax: (216) 592-5009
E-mail: ikeyse-walker@tuckerellis.com

David C. Calderhead (0039013)
Joel Peschke (0072526)
TRIONA, CALDERHEAD & LOCKEMEYER
2021 Auburn Ave.
The Adam Riddle House
Cincinnati, OH 45219
Tel: (513) 576-1060
Fax: (513) 576-8792
E-mail: dcalderhead@tcl-law.net
jpeschke@tcl-law.net

Attorney for Appellees Joel Korelitz, M.D. and Cincinnati General Surgeons, Inc.

CERTIFICATE OF SERVICE

A copy of the foregoing has been served this 22nd day of January, 2009, by U.S. Mail, postage prepaid, upon the following:

Bruce B. Whitman
3356 Edwards Rd., Suite 100
Cincinnati, OH 45208

Attorney for Appellant Michael Hodesh

Jeffrey M. Hines
Karen A. Carroll
Rendigs, Fry, Kiely & Dennis, LLP
Fourth & Vine Tower, Suite 900
One West Fourth St.
Cincinnati, OH 45202

Attorneys for Amici Curiae The Jewish Hospital of Cincinnati and The Health Alliance of Greater Cleveland

Peter D. Traska
Elk & Elk Co., Ltd.
6105 Parkland Blvd.
Mayfield Hts., OH 44124

Attorney for Amicus Curiae Ohio Association for Justice

Paul W. Flowers
Paul W. Flowers Co., L.P.A.
Terminal Tower, 35th Floor
50 Public Square
Cleveland, OH 44113

Amicus Curiae Chairman, Ohio Association for Justice

Elaine O. Keys-Nack

One of the Attorneys for Appellees Joel Korelitz, M.D. and Cincinnati General Surgeons, Inc.

078501.000012.1031313.1