ORIGINAL

No. 11-1634

In the Supreme Court of Ohio

APPEAL FROM THE COURT OF APPEALS
EIGHT APPELLATE DISTRICT
CUYAHOGA COUNTY, OHIO
CASE NO. CA-10-095475

MARGARGET BRANCH, et al.,

Plaintiff-Appellee,

v.

CLEVELAND CLINIC FOUNDATION,

Defendant-Appellant.

MEMORANDUM IN SUPPORT OF JURISDICTION OF DEFENDANT-APPELLANT CLEVELAND CLINIC FOUNDATION

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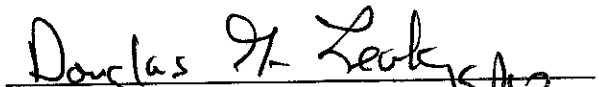

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I. EXPLANATION OF WHY THIS CASE IS OF PUBLIC AND GREAT GENERAL INTEREST

This case is of great public and general interest because the Eighth District Court of Appeals' decision is both legally and factually flawed and, consequently, resulted in a complete usurpation of the jury's role as the finder of fact. the Eighth District issued a result-oriented decision that is internally inconsistent both legally and factually and, more importantly, legally inconsistent with this Court's longstanding precedents, as well as Eighth District opinions and other Appellate Courts. The unjustifiable manner in which the Eighth District chose to reverse a unanimous jury verdict has profound consequences. This Court should take this opportunity to review the Eighth District's legally flawed decision so that the Eighth District and other Courts will be deterred from creating and relying upon legally unsound reasons to interfere with the sanctity of the jury system.

The Eighth District's first misinterpretation of the law involves the issue of demonstrative evidence and the Clinic's in-court demonstration. The Eighth District mistakenly equates the use of an in-court demonstration with established precedent on exhibits admitted into evidence. The ramification on this decision is to remove the discretion of the Trial Court as to what demonstrations should be allowed during trial and, furthermore, effectively eliminates trial strategy and tactics of counsel necessary to respond to evidence produced at trial.

The Eighth District determined that the Clinic's in-court demonstration should not have been permitted because the demonstration was not disclosed to Plaintiff prior to the trial. The in-court demonstration by the Clinic, however, became necessary **only** in response to a new allegation of "missing evidence" raised by Plaintiff for the first time at trial! Indeed, at no time during discovery or trial did Plaintiff produce expert testimony or evidence that the standard of care required maintaining target planning data from the brain surgery on a disc. Despite the failure of evidence that the standard of care requires the creation of a disc containing the target

data, Plaintiff's counsel repeatedly alleged at trial that there was "missing data." As the Dissenting Opinion stated, the Clinic in opening statement stated its intention to counter the allegation and indicated that Dr. Machado would demonstrate this with an in-court reconstruction based on the operative note data, thus eliminating any alleged surprise.

The Clinic's in-court demonstration was legally and factually admissible. Yet, the Eighth District, without providing any legal explanation for doing so, determined that the Clinic's in-court demonstration was erroneously admitted. As a result, the Eighth District has eliminated the particular justice and foundation surrounding a litigant's right to adapt to the ever-changing presentation of issues, arguments and evidence at trial. The prejudicial effect of the Eighth District's elimination of the proper use of demonstrative evidence will have grave consequences for trial courts and litigants throughout Ohio.

Further, the Eighth District made factual misstatements in order to justify its decision. For instance, the Eighth District inaccurately stated that the Clinic's in-court demonstration could only be performed on its own three-dimensional Stealth software. However, the undisputed evidence was that all equipment used for Deep Brain Stimulation, including the Stealth System, are commercially-available. While there are different manufacturers of equipment for DBS, they all use FDA-approved, commercially available and interchangeable software packages. It is important to note that Dr. Bakos, Plaintiff's expert, brought in a commercially-available DBS system to trial, along with a technician, and conducted a demonstration that Plaintiff's counsel did not provide any notice of prior to the testimony.

Interrelated to the obvious error of the Eighth District's decision regarding the Clinic's in-court demonstration is the Eighth District's illogical and legally flawed determination that one sustainable objection to Plaintiff's counsel's statement in the Rebuttal Closing Argument that this case was akin to the BP Oil Disaster constituted reversible error. The Trial Court properly

sustained the objection on the basis that there was no evidence of intentional or willful destruction of evidence and no evidence of a "post-disaster cover-up" as inferred by this comment. However, the Eighth District erroneously held that the Trial Court's sound basis for sustaining the objection precluded Plaintiff from arguing an adverse inference of negligence claim which, by the Eighth District's own acknowledgment, has nothing to do with intentional or willful conduct. The Eighth District had no legal basis to conclude that one sustained objection during Plaintiff's Counsel's Rebuttal Closing Argument constituted reversible error where the Eighth District explicitly stated in its decision that throughout trial, Plaintiff was able to argue and present evidence of allegedly missing data and an adverse inference of negligence. The Eighth District's evident confusion between a claim for an adverse inference of negligence with intentional and willful misconduct should be reviewed by this Court because the Eighth District has essentially redefined the claim for an adverse inference of negligence.

Furthermore, even on the issue of adverse inference of negligence, the legal precedent is that such an argument is relevant in circumstances of an "unexplained" failure to produce evidence. At no point in time was there any evidence that the standard of care requires maintaining a disc with the data planning contained on it. The evidence was, to the contrary, that such a disc is not typically maintained, clearly not providing a basis for the requisite "unexplained" element for an adverse inference of negligence.

Lastly, the Eighth District's determination that the inclusion of a different methods jury instruction constitutes reversible error has completely redefined the law on this issue. The Eighth District conveniently ignored the relevant legal issues and facts presented at trial, including the explicit concessions from Dr. Bakos, that there are many different accepted methods of performing DBS, including procedures going directly through the ventricle. The Eighth District completely misconstrued the law concerning a different methods jury instruction

and, therefore, the decision if allowed to stand, will create confusion over the appropriateness of such a jury charge in Ohio.

Most telling of the obvious errors in the Eighth District's decision are the legal and factual inconsistencies and inaccuracies throughout its decision. For example, the Eighth District held that it was prejudicial and reversible error for the Trial Court to allow the Clinic to present an in-court demonstration of Plaintiff's target/mapping plan. But, at the same time, in addressing the different methods jury charge, the Eighth District inconsistently stated that Plaintiff's target / mapping plan was not an issue at trial and, thus, irrelevant. Additionally, with respect to its ruling on the different methods jury charge, the Eighth District correctly recognized it was bound by an abuse of discretion standard of review. Yet, its conclusion was apparently a result of a *de novo* review as opposed to an abuse of discretion review.

Why this entire case is of public and great general interest worthy of this Court's review is supported by the Dissenting Opinion. The fact that the Dissent arrived at a completely different conclusion than the Majority makes this Court's acceptance of jurisdiction all the more critical. The opposing conclusions created within the Eighth District's split decision undoubtedly warrants this Court's review and resolution. Moreover, the Eighth District's erroneous decision is particularly egregious because it unjustifiably misapplies the law and facts to vacate a unanimous defense verdict that was supported by the evidence and not prejudicially influenced by anything that occurred at trial.

The issues presented herein have implications far beyond the parties of this case and resolution and clarification of the issues will guarantee all litigants in Ohio with equitable treatment. This Court now has the opportunity to provide the proper guidance with respect to the law governing the proper use of demonstrative evidence, the elements of an adverse inference of negligence claim and when a jury charge on different methods is warranted. Accordingly, this

Court should accept jurisdiction of this case in order to correct the obvious injustice caused by the Eighth District's legally and factually flawed decision.

II. STATEMENT OF THE CASE AND FACTS.

On February 19, 2007, Plaintiff, Margaret Branch, underwent a type of stereotactic brain surgery for her debilitating cervical dystonia called Deep Brain Stimulation (DBS) at the Clinic. The procedure was performed by functional neurosurgeon, Andre Machado, M.D., along with movement disorder neurologist, Benjamin Walter, M.D. Dr. Machado created a target plan well documented in his written operative note with the use of imaging and computer technology, along with his specialized training and expertise in this subspecialty area of neurosurgery.

After Dr. Machado placed a burr hole through the skull of the brain, initially on the left side, he inserted a cannula into the brain. An electrode was then passed through the cannula deep into the aimed target of the brain. After detailed microelectrode recording on the left MER Dr. Walter determined the spot for placement of the permanent electrode, which then was successfully placed by Dr. Machado. Drs. Machado and Walter then turned their attention to Margaret Branch's right side of her brain. Unfortunately, while the procedure was being performed on the right side, Dr. Machado observed some bleeding from the tip of the cannula. The bleed was aggressively treated, but the patient suffered a stroke due to the bleeding. The post-operative imaging showed that the bleed originated in the basal ganglia, not in the area of the ventricle. It was undisputed that bleeding and stroke are known complications of DBS and the fact that they occur does not mean that the surgery was performed incorrectly.

Dr. Bakos proposed a theory at trial, through a number of animations, as well as an in-court demonstration with DBS equipment and a technician, that Dr. Machado was "off track" and hit the ventricle which caused the bleeding. Again, Dr. Bakos did not testify that the standard of care required maintaining target planning data on a disc. In contrast, the Clinic witnesses all

testified that only in rare circumstances of a study or teaching purpose would the data be placed on a disc; they all testified that the pertinent target planning data is contained in the operative note of the surgeon, as was done in this case.

As the gatekeeper of evidence, the Trial Court conducted an extensive oral hearing in which it entertained arguments from both sides regarding the Clinics in-court demonstration to refute the claim of "missing" data. In doing so, the Trial Court properly determined that The Clinic's demonstration would be admissible in response to Dr. Bakos' in-court demonstration and Plaintiff's counsel's repeated claim that the target plan data was "missing." The Trial Court explicitly stated that this was the Clinic's demonstrative effort to respond to Plaintiff's arguments relating to "missing" data.

Dr. Machado explained the Stealth software system and how the actual data in Plaintiff's operative note and other medical records were entered into the system and recreated Plaintiff's target plan. Basically, Dr. Machado used the data recorded in 2007 contained in Plaintiff's medical records and entered this data into the same software used in preparation of the target plan for her surgery, to refute the allegation that information was "missing."

Beyond the demonstration refuting the argument of "missing data," there was overwhelming independent evidence that Dr. Machado's care did not deviate from acceptable standard of care. The Clinic's expert, Dr. Starr, testified that this was a bleed that occurred in the intended target and did not originate in the ventricle. Dr. Starr pointed to both the post-operative imaging, as well as Dr. Walter's MER, as evidence that Dr. Bakos' theory of a ventricular bleed was not accurate. Dr. Walter further testified that the recorded cells confirmed that the bleed was from the intended area of the basal ganglia, not the ventricle.

Subsequently, during Rebuttal Closing Arguments, Plaintiff's counsel addressed what Plaintiff continuously referred to as "missing" data. However, Plaintiff's counsel took this one

step further by improperly comparing this case to the BP Oil Disaster. Recognizing that this was improper and inflammatory, the Trial Court sustained the Clinic's objection and noted that "[t]here's no analogy – there's no suggestion that there's anything willful about the destruction of any documents." Clearly, the Trial Court's statement to the parties and the jury was that this case did not involve any type of "cover up" or intentional or willful misconduct and, therefore, there would be no comparison to the BP Oil Disaster. The Trial Court did not preclude Plaintiff's counsel from arguing an adverse inference of negligence, despite the Clinic's position that no such claim existed.

Thereafter, the Trial Court gave its charge to the jury. Included within the jury instructions was a "different methods" charge which was legally and factually supported by the evidence. In addressing the jury instructions, the Trial Court recognized that the trial testimony of Dr. Bakos supported the "different methods" jury charge. As to Dr. Bakos' trial testimony on targeting, he agreed that there were different methods of targeting, i.e. indirect and direct. In fact, Dr. Bakos explicitly agreed that there existed different schools of thought and approaches as to how to approach a DBS, including some surgeons who choose to go through the ventricle.

After the jury was properly charged, it deliberated for approximately **one hour** before returning a **unanimous** defense verdict in favor of the Clinic. The jury explicitly found that the Clinic, through its employees, was not negligent. Plaintiff timely appealed to the Eighth District.

On August 11, 2011, the Eighth District issued its decision reversing the unanimous defense verdict. In doing so, the Eighth District's decision is full of legal and factual inconsistencies. For example, the Eighth District held that the Trial Court abused its discretion in admitting the in-court demonstration of the target/mapping plan and, as a result, Plaintiff was prejudiced and her substantial rights were affected. (Appx. 11). Yet, in addressing Plaintiff's assigned error with respect to the difference methods jury charge, the Trial Court determined that

the same target/mapping plan which was the subject of the in-court demonstration "was not at issue in the case" and was indeed "irrelevant" (Appx. 19). So, in one assignment of error, the Eighth District found that the target/mapping plan was relevant but, at the same time, the Eighth District refused to consider the different methods of arriving at a target/mapping plan because it believed that the target/mapping plan was irrelevant. This obvious inconsistency within the Eighth District's decision is undoubtedly troublesome since the Eighth District found reversible error in the two assigned errors relating to the target/mapping plan.

As to the Eighth District's disposition of Plaintiff's assigned error pertaining to the in-court demonstration, the Eighth District's decision is both legally and factually flawed. For instance, the Eighth District failed to address the proper use of demonstrative evidence as a trial strategy and tactic in direct response to how the theme of Plaintiff's case changed. Despite the fact that the Clinic's in-court demonstration was presented to the jury in order to dispute Plaintiff's arguments and evidence/testimony that there was "missing" data, the Eighth District's Decision is completely devoid of any legal analysis of the use of demonstrative evidence under these circumstances. Next, the Eighth District improperly relied upon its prior decision in *Perry vs. Univ. Hosp. of Cleveland*, Cuyahoga App. No. 83034, 2004-Ohio-4988 which is both legally and factually inapplicable to this case. Indeed the Eighth District repeatedly refers to exhibits admitted into evidence, while the in-court demonstration by Dr. Machado was entirely a demonstration and not admitted into evidence.

Then, the Eighth District's determination that one properly sustained objection to Plaintiff's counsel's statement during Rebuttal Closing Argument pertaining to the BP Oil Disaster was an abuse of discretion is legally flawed because it confused the legal elements of a spoliation of evidence claim with an adverse inference of negligence claim The Eighth District failed to recognize that the only basis for sustaining the objection was to inform the parties and

the jury that there was no evidence of intentional or willful misconduct which has nothing to do, whatsoever, with an adverse inference of negligence claim. As such, the Eighth District's holding that the striking of the BP Oil Disaster statement precluded Plaintiff from arguing an adverse inference of negligence is legally unsound.

As to the different methods jury instruction issue, the Eighth District failed to recognize the legal and factual bases upon which the Trial Court properly charged the jury on different methods.. First, it illogically agreed with Plaintiff's position that the different methods instruction impermissibly "led the jurors to believe that violating the standard of care that had been established did not necessarily mean that negligence had occurred." (Appx. 18). This is a legally inaccurate statement by the Eighth District in that is essentially says a defendant's negligence is excused as a result of a different methods jury charge.

Also, the Eighth District needed to find that the target/mapping plan was irrelevant in order to determine that the Trial Court abused its discretion in giving the different methods jury charge. However, the target/mapping plan was a crucial and wholly relevant part of Plaintiff's case against the Clinic as seen in Plaintiff's own in-court computer demonstration of the target/mapping plan and the testimony of Plaintiff's expert. Moreover, the Eighth District evidently applied the wrong standard of review with respect to the different methods jury instruction, despite its initial clarification that it was bound by the abuse of discretion standard. (Appx. 19). In concluding that "the Trial Court erred," the Eighth District apparently applied a *de novo* review without stating how the Trial Court abused its discretion. (Appx. 19).

It is clear that the legal and factual conflicts and inconsistencies in the Eighth District's jurisprudence requires guidance and clarification from this Court. This Court now has the opportunity to provide all Ohio Appellate Courts and Trial Courts with clarification on the proper use of demonstrative evidence, the different methods jury instruction and a claim for an

adverse inference of negligence. This Court should accept jurisdiction over this entire case in order to address the Eighth District's legally and factually flawed decision.

III. LAW AND ARGUMENT.

1. The Eighth District's Decision Disallowing The Use Of Demonstrative Evidence At Trial Is Both Legally And Factually Flawed, In Direct Conflict With Ohio Legal Precedents And The End Result Will Be Uncertainty Throughout Ohio As To The Proper Use of Demonstrative

In determining that the Trial Court abused its discretion in allowing the Clinic to present an in-court demonstration of Plaintiff's target/mapping plan, the Eight District erroneously treated the Clinic's demonstrative evidence as if it was a trial exhibit to be admitted as evidence. Consequently, the Eighth District has impermissibly created new foundational requirements for the use of demonstrative evidence at trial and, as a result, the Eighth District has effectively eliminated trial strategy and tactics used by parties to adapt to what transpires at trial.

The clear confusion created by the Eight District between the proper use of demonstrative evidence and the admission of a trial exhibit is confirmed in the Eighth District's misapplication of its own decision in *Perry vs. Univ. Hosps. Of Cleveland*, Cuyahoga App. No. 83034, 2004-Ohio-4098. In this case, Dr. Machado's presentation was for demonstrative purpose and was neither marked as a trial exhibit nor admitted into the record as evidence. In *Perry*, the Eighth District addressed the admission of a trial exhibit into evidence and not the use of demonstrative evidence. The Eighth Court held that the Trial Court abused its discretion by admitting into evidence an electronically "manipulated" ultrasound image that was not solely used for demonstrative purposes. *Id.* ¶1 of syllabus. As such, the *Perry* case had no bearing, whatsoever, to the issues raised in this with regard to Dr. Machado's demonstrative in-court presentation.

The Dissenting Opinion properly recognized that there is a clear difference between the use of demonstrative evidence and trial exhibits when it is stated "it was merely demonstrative

evidence and not an actual exhibit that accompanied the jury into the deliberation room for further review, the situation presented in *Perry*." (Appx. 24).

The circumstances surrounding Dr. Machado's in-court demonstration were completely different than the manipulated/re-created ultrasound image in *Perry*. With respect to Dr. Machado's demonstration regarding the target plan, it was simply offered as an illustration for the jury in response to Plaintiff's allegation of "missing" data. Further, the target plan was not a so-called "manipulation." Instead, it was a demonstration of actual data contained in Plaintiff's operative note and medical records that was entered into the computer software, just like Dr. Machado did in February, 2007.

This case presents a classic example of why demonstrative evidence is treated differently than trial exhibits admitted into evidence and given directly to the jury. The Clinic's in-court demonstration was a trial tactic that was in direct response to Plaintiff's new and ongoing attempts at trial to convince the jury that there was "missing" data. As the Eighth District noted in its decision, "[t]hrougout trial, Branch's counsel made much of the fact that Dr. Machado had not saved the fused image of Branch's brain with the target planning data" and "because the evidence was missing, the jury was entitled to draw an inference that the unsaved image and data would have been unfavorable to the Clinic." (Appx. 19-20). The Clinic was compelled to respond to Plaintiff's unsubstantiated claims of "missing" data by presenting an in-court presentation in order to demonstrate for the jury that there was no "missing" data. Contrary to the Eighth District's conclusion, as early as opening statements, Plaintiff was well aware that Dr. Machado was going to demonstrate that there was no "missing" data.

The Clinic's in-court demonstration via Dr. Machado was intended to explain and confirm for the jury that the actual data contained in Plaintiff's operative note and medical records still existed. At trial, Dr. Machado merely demonstrated how Plaintiff's target/mapping

plan was generated by the actual data entered into the computer software, just like he did in February 2007. The demonstration by Dr. Machado was presented for purely demonstrative purpose in direct response to what was transpiring at trial and, thus, the Eighth District mistakenly treated the in-court demonstration as if it was a trial exhibit being admitted into evidence and given to the jury for further review.

This Court should accept jurisdiction of this case in order to address the obvious confusion the Eighth District has created between the use of demonstrative evidence and the admission of trial exhibits into evidence.

2. The Eighth District's Decision Reversing a Unanimous Defense Verdict Based On An Alleged Inability to Argue Adverse Inference of Negligence From One Single Reference To The BP Oil Disaster in Closing Arguments Is Legally And Factually Flawed, In Direct Conflict With Ohio Legal Precedents And Has Erroneously Redefined The Elements Of An Adverse Inference Of Negligence Claim

The Trial Court properly sustained the Clinic's objection to Plaintiff's counsel's explicit comparison of this case to the BP Oil Disaster during Rebuttal Closing Arguments on the basis that there was no evidence of "intentional" or "willful" misconduct. Yet, the Eighth District misconstrued the basis for the Trial Court's exclusion of Plaintiff's counsel's statements alleging intentional misconduct and then erroneously applied the law of an adverse inference of negligence to the Trial Court's ruling. Simply put, the Eight District was evidently confused with what constitutes a claim for spoliation of evidence with a claim for adverse inference of negligence claim. To make matters worse, the Eighth District's decision is completely devoid of any mentioning of the BP Oil Disaster despite the fact that this was the underlying basis for the Clinic's objection and the Trial Court's ruling.

An adverse inference of negligence claim does not require evidence of intentional destruction or suppression of evidence. *Cherovsky vs. St. Lukes' Hosp.* of Cleveland, Cuyahoga App. No. 683326, 1995 WL 738608 . The unexplained failure to produce relevant evidence may

justify the negative inference. *Id.* Whereas, a spoliation of evidence claim requires proof of a willful destruction of evidence by the defendant designed to disrupt the Plaintiff's case. *Smith vs. Howard & Johnson Co., Inc.* (1993) 67 Ohio, St. 3d 28, 615 N.E. 22 1037.

The Eighth District simply mixed up these two claims when it held that Plaintiff was precluded from pursuing a claim for an adverse inference of negligence. The Trial Court properly sustained the Clinic's objection to Plaintiff's counsel's reference to the BP Oil Disaster because Plaintiff had no claim for spoliation of evidence which involves "intentional" or "willful" misconduct. The Trial Court did not sustain the objection as it relates to an adverse inference of negligence claim. Plaintiff was not precluded from arguing an adverse inference of negligence claim in connection with Plaintiff's allegation of "missing" data. In fact, the Eighth District aptly noted on numerous occasions that Plaintiff was permitted to have the jury draw a negative inference from missing evidence through the presentation of the evidence, testimony, opening statements and closing arguments. (Appx. 20-23). The Eighth District improperly intertwined the elements of a spoliation of evidence claim with an adverse inference of negligence claim that has effectively resulted in a confusing and contradictory precedent.

This Court should accept jurisdiction of this case in order to eliminate the confusion of the Eighth District's misinterpretation of a spoliation of evidence claim with a claim for an adverse inference of negligence.

3. The Eighth District's Decision Disallowing The Different Methods Jury Instruction Is Legally And Factually Flawed, Is Internally Inconsistent And Contradictory And Is In Direct Conflict With Decisions Rendered By This Court And Other Appellate Courts Throughout Ohio, Including The Eighth District

If the target/mapping plan was of such importance to the Eighth District's disposition of Plaintiff's assigned error pertaining to the in-court demonstration, it should have been equally important to the Eighth District's disposition of Plaintiff's assigned error concerning the different

methods jury instruction. However, in supporting its finding that a different methods jury charge was not warranted in this case, the Eighth District erroneously concluded that the target/mapping plan was not an issue in this case and, therefore, was irrelevant. (Appx. 19). Not only was this determination inconsistent with the Eighth District's analysis of the in-court demonstration issues, it was completely wrong. Plaintiff's entire case was premised upon Dr. Machado's allegedly flawed target/mapping plan and his failure to follow his plan. Clearly, the position taken by the Eighth District that the target/mapping plan was wholly irrelevant resulted in an obvious misapplication of the law regarding a different methods jury instruction.

The "different methods" jury instruction is appropriate when there is evidence that more than one method of diagnosis or treatment is acceptable for a particular medical condition. *Pesek vs. University Neurologists Assn. Inc.* 87 Ohio St.3d 495, 721 N.E. 2d 1011, 2000-Ohio-483. The "different methods" instruction informs the jury that alternative methods can be used and that the selection of one method over the other is not, in and of itself, negligence. Id. The basis for such an instruction is that jurors, with their limited medical knowledge, should not be forced to decide which of two acceptable medical approaches should have been pursued by the defendant physician. Id.

In this case, the Trial Court's jury instruction on "different methods" properly stated the law applicable to the evidence adduced at trial. As the Trial Court properly noted, evidence of "different methods" of treatment was "all over the case." . Plaintiff's own expert, Dr. Bakos, readily agreed that there were different and equally acceptable approaches to Plaintiff's DBS surgery, including different mapping strategies based solely upon Dr. Bakos' trial testimony, the "different methods" jury charge was clearly warranted, but the Eighth District erroneously ignored this evidence as being irrelevant.

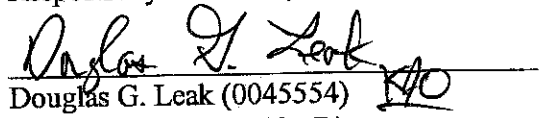
Then, the Eighth District erroneously misinterpreted the legal justification for a different methods jury charge by misconstruing the facts and issues presented at trial. There was ample evidence at trial that it was not negligent to divert from the target/mapping plan and to take a different surgical approach, like through the ventricle. Just because Dr. Machado testified that he did not intend to go through the ventricle does not mean going through the ventricle constituted negligence. The Eighth District completely misconstrued Dr. Machado's testimony and, therefore, its rejection of the different methods jury charge was in error.

This Court should accept jurisdiction over this case in order to correct the Eighth District's misapplication of the different methods jury instruction.

IV. CONCLUSION

The Eighth District's decision is not only legally and factually erroneous and in conflict with this Court and other precedents in the use of demonstrative evidence, the appropriateness of a different methods jury instruction and the elements of an adverse inference of negligence claim, its decision is full of legal and factual inconsistencies that deserves this Court's jurisdiction. The Eighth District has improperly set forth new law that has effectively caused uncertainty in the manner in which jury trials should be conducted. This Court has the opportunity to correct the injustice caused by the Eight District's reversal of a completely appropriate unanimous jury verdict. The Eighth District relied upon legally flawed analyses and conclusions that usurped the role of the jury as the finder of facts. Accordingly, this Court should accept jurisdiction and allow this appeal to proceed so that the important legal issues presented can be reviewed on the merits and reconciled with the existing law in Ohio.

Respectfully submitted,



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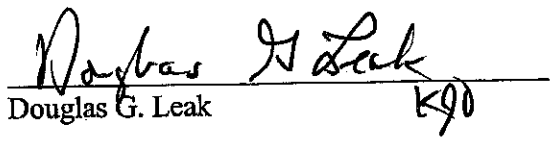

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[Cite as *Branch v. Cleveland Clinic Found.*, 2011-Ohio-3975.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 95475

MARGARET BRANCH, ET AL.

PLAINTIFFS-APPELLANTS

vs.

CLEVELAND CLINIC FOUNDATION

DEFENDANT-APPELLEE

JUDGMENT:
REVERSED AND REMANDED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-696928

BEFORE: Keough, J., Cooney, P.J., and S. Gallagher, J.

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KATHLEEN ANN KEOUGH, J.:

{¶ 1} Plaintiffs-appellants, Margaret and Turner Branch, appeal from the trial court's judgment in favor of the Cleveland Clinic Foundation (the "Clinic") on Branch's medical malpractice claim. For the reasons that follow, we reverse and remand for a new trial.

I. Procedural History

{¶ 2} Branch and her husband refiled their medical malpractice claim against the Clinic in 2009[1] alleging that Branch had suffered a severe brain hemorrhage and stroke during deep brain stimulation (DBS) surgery at the Clinic in February 2007. They asserted claims for medical negligence, lack of informed consent, negligent credentialing, and loss of consortium. They subsequently dismissed their claims for loss of consortium (effectively dismissing Branch's husband as a party to the suit), negligent credentialing, and lack of informed consent (in part).[2] Branch's remaining claims proceeded to a jury trial. After a two-week trial, the jury returned a unanimous defense verdict. In response to an interrogatory, the jury indicated that the Clinic had complied with the standard of care that was owed to Branch.

II. The Trial

{¶ 3} The evidence at trial demonstrated that Branch and her husband own the Branch Law Firm in Albuquerque, New Mexico, and in the 1980s and 1990s, Branch was an extremely successful plaintiff's lawyer. She suffered from numerous medical conditions for years, however, including chronic neck and back pain and depression. The evidence was disputed regarding how much Branch was still working prior to her

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[1]Their first complaint was filed in January 2008 and subsequently dismissed without prejudice.

[2]Branch withdrew that part of the lack of informed consent claim that alleged the Clinic had failed to disclose and/or misrepresented the risk of bleeding during the surgery; she specifically retained that portion of the claim that alleged the Clinic's doctors had misrepresented their experience, success rate, and the doctors who would be participating in Branch's actual surgery.

surgery. Although Branch testified that she was still working approximately 30 hours per week prior to her surgery, medical records indicated that she had told several doctors that she was no longer working as of 2005.

{¶ 4} In 2005, Branch developed cervical dystonia, a neurological condition that caused the muscles in her neck to retract in a manner that forced her head into a downward position. The dystonia exacerbated Branch's depression, causing her to abuse pain medications and attempt suicide.

{¶ 5} In November 2006, Branch was evaluated at the Clinic for DBS surgery for her cervical dystonia. She and her husband met with Dr. Benjamin Walter, a Clinic neurologist specializing in movement disorders, and neurologist Dr. Jerrold L. Vitek. They also met with Clinic neurosurgeon Dr. Andre Machado, who was just finishing his first year as an attending neurosurgeon. Dr. Machado determined that Branch was a potential candidate for DBS surgery. He testified that he discussed the risks and benefits of, and alternatives to, DBS surgery with Branch and her husband that day. The Branches were also given a 10-page document entitled "The Cleveland Clinic Foundation Consent to Participate in a Humanitarian Use Device Therapy," which explained in detail the nature of the DBS procedure and that there were a number of potential complications with the procedure, including "paralysis, coma and/or death" and "bleeding inside the brain (stroke)." On February 15, 2007, Branch signed the consent form acknowledging the potential risks.

{¶ 6} To provide relief from dystonia, the neurosurgeon must access the globus

pallidus internus (GPI), the area of the brain responsible for sending the abnormal impulses that cause the dystonia, and place bilateral electrodes on both sides of the GPI. After the electrodes have been successfully planted, they are programmed to send impulses that relieve the dystonia.

{¶ 7} To reach the GPI, the neurosurgeon drills a burr hole in the top of the patient's skull above the ear. A small tube, known as a cannula, is slowly passed through the brain and towards the GPI. Once the target has been reached, the stylette inside the cannula is removed and an electrode is passed through the cannula and placed at the appropriate spot. The cannula is then removed from the patient's head and the process is repeated on the other side of the skull.

{¶ 8} Prior to surgery, the neurosurgeon must develop a detailed target plan to determine the location of the GPI, the proper placement of the burr holes, and the trajectory paths of the cannulas. To develop his target plan, Dr. Machado used a complex computer software program that fused the magnetic resonance imaging (MRI) and computer tomographic (CT) scans of Branch's head into a single three-dimensional image. From this fused image, Dr. Machado obtained a "probe's eye view" of Branch's brain to develop the target plan. Dr. Machado testified that he plotted a trajectory that was designed to avoid Branch's lateral ventricle.

{¶ 9} During the procedure on February 19, 2007, Dr. Machado drilled the right and left burr holes for Branch's DBS procedure without incident. He inserted three cannulas through the burr hole on the left side, using the predetermined targets, and then

sucessfully inserted a microelectrode. Dr. Machado then proceeded to the right side. A cannula was inserted through the burr hole but Branch's blood pressure dramatically increased and Dr. Machado saw blood coming out of the cannula. The procedure was aborted, but the bleeding was substantial and Branch suffered a stroke that caused significant subsequent neurological deficits during the bleed.

{¶ 10} Branch's expert, Dr. Robert S. Bakos, concluded that Dr. Machado had misplaced the right-side burr hole, misdirected the cannula off its intended trajectory, and breached the lateral ventricle, causing Branch's stroke. Dr. Machado agreed at trial that he would have been off the planned target course if he had pierced the ventricle wall during the procedure, but insisted that had not happened.

{¶ 11} Following the surgery, Branch was hospitalized in the Clinic's intensive care unit for several weeks. One side of her body was paralyzed and she was barely able to speak. She was subsequently transferred to a hospital in Houston, Texas, where Dr. Stanley Fisher, her treating neurologist, confirmed that Branch had suffered a bleed in the right basal ganglia and right lateral ventricle. Dr. Fisher testified that Branch suffered a "significant and permanent injury" due to the bleed and that she "will never be able to function independently."

III. Life Care Planning and Economic Expert Testimony

{¶ 12} Branch called Carroll Highland, a life care planner, and Robert Johnson, an economic expert, to testify regarding her future economic damages. In her first assignment of error, Branch contends that the trial court erred in striking Highland's

testimony on the ground that it was based on hearsay. In her second assignment of error, she contends that the trial court erred in prohibiting Johnson from testifying as a sanction for an alleged discovery violation.

{¶ 13} The jury found no negligence by the Clinic and thus did not consider the issues of either proximate cause or damages. As Highland and Johnson's testimony related only to damages, an issue the jury did not reach, even if this court were to find error in the exclusion of their testimony, any error was harmless.

{¶ 14} Branch's first and second assignments of error are therefore overruled.

IV. The Clinic's Eleventh-Hour Disclosure of its Computer Re-creation

{¶ 15} Branch's expert, Dr. Robert Bakos, testified at trial that Dr. Machado deviated from the standard of care because he breached Branch's right ventricle with the cannula. Dr. Bakos opined that Dr. Machado placed the right side burr hole too medially and was off the intended trajectory when he breached the ventricle wall. During his testimony, Dr. Bakos used a two-dimensional computer animation to demonstrate how proper target planning of Branch's procedure could have avoided the ventricle wall, but he told the jury several times that what they were viewing "[was] not Margaret Branch" nor an actual "probe's eye view" of her brain.

{¶ 16} Dr. Machado had conceded earlier in the trial[3] that despite the bleed, neither the fused image of Branch's brain nor the target planning data for her surgery had been retained by the Clinic following her surgery. But ten minutes before Dr. Machado

[3]Branch called Dr. Machado on cross-examination in her case-in-chief.

was to return to the stand as the final defense witness, defense counsel disclosed that a demonstration had been prepared during which Dr. Machado would re-create his target planning for Branch on a three-dimensional software system for the jury. Although the trial court initially sustained Branch's objection to the just-disclosed re-creation, the trial court reversed its ruling and allowed the demonstration to procede.

{¶ 17} During the demonstration, Dr. Machado told the jury that they were viewing "a three-dimensional reconstruction of [Branch's] face with the head frame as it was placed in the very day of surgery" and that "all the films here belong to [Branch], the films that were used for her surgery." Using data from his operative notes and a newly-created fused image of Branch's brain, Dr. Machado showed the jury the trajectory he had allegedly taken during Branch's procedure.

{¶ 18} In her third assignment of error, Branch contends that the trial court erred in allowing Dr. Machado to perform the computer re-creation because it was disclosed to her only moments before Dr. Machado testified. We agree.

{¶ 19} It is well established that a trial court has broad discretion in the admission or exclusion of evidence. *Rigby v. Lake Cty.* (1991), 58 Ohio St.3d 269, 271, 569 N.E.2d 1056. So long as the discretion is exercised in accord with the rules of procedure and evidence, an appellate court will not reverse absent a clear showing of an abuse of discretion with attendant material prejudice. Id. "Moreover, error predicated on an evidentiary ruling does not warrant reversal of the trial court's judgment unless the court's actions were inconsistent with substantial justice and affected the substantial

rights of the parties." *Perry v. Univ. Hosps. of Cleveland*, Cuyahoga App. No. 83034, 2004-Ohio-4098, ¶25, citing Evid.R. 103(A); Civ.R. 61.

{¶ 20} "'Generally, in order to find that substantial justice has been done to an appellant so as to prevent reversal of a judgment for errors occurring at the trial, the reviewing court must not only weigh the prejudicial effect of those errors but also determine that, if those errors had not occurrred, the jury or other trier of the facts would probably have made the same decision.'" Id., at ¶30, quoting *Cappara v. Schibley*, 85 Ohio St.3d 403, 408, 1999-Ohio-278, 709 N.E.2d 117.

{¶ 21} Prior to opening arguments in this case, the trial judge made it a point to confirm that the parties had shared their demonstrative exhibits with each other. Branch shared her animation with defense counsel at the beginning of trial on July 1, 2010. Branch's counsel even agreed to email the animation to defense counsel. The animation was later used by Dr. Bakos during his testimony. Defense counsel did not cross-examine Dr. Bakos until the morning of July 8, 2010, a full week after she had been allowed to review Branch's demonstrative exhibits. The record reflects that the Clinic used this time to prepare its expert, Dr. Starr, to criticize the animation during his testimony.

{¶ 22} But Branch was not afforded the same opportunity because the Clinic's computer re-creation was not disclosed until ten minutes before Dr. Machado testified. The Clinic offers no explanation as to why defense counsel waited until the morning of July 13, 2010 before disclosing that Dr. Machado would use a computer re-creation while testifying that morning. It is apparent, however, that defense counsel knew of the

re-creation well before the morning of Dr. Machado's testimony and failed to disclose it. During opening argument, defense counsel told the jury that "Dr. Machado will tell you in this particular case he did not go through the ventricle and *he will reconstruct it for you and show you* exactly based on all this how it didn't go through the ventricle." (Emphasis added.) Just before Dr. Machado testified, when Branch's counsel and defense counsel were arguing about whether the Clinic's re-creation should be allowed, the trial judge asked defense counsel "How long have you guys been planning this? * * * You must have conceived this at some other time?" Defense counsel admitted, "I mean, sure." Thus, despite the Clinic's argument to the contrary, the re-creation was not a last-minute response to Dr. Bakos's in-court animation.

{¶ 23} Furthermore, despite the Clinic's assertion that Branch could have generated her own re-creation using Dr. Machado's operative notes, the re-creation could only be performed on the Clinic's three-dimensional "Stealth" software, to which Branch did not have access.

{¶ 24} This court considered an argument similar to that raised by Branch in *Perry*, supra. In *Perry*, the plaintiff alleged that her doctor had mishandled critical ultrasound measurements of her amniotic fluid and precipated a stillborn delivery. During trial, the defendant doctor used a previously undisclosed exhibit to remeasure the amniotic fluid. Id., ¶31. The doctor, with counsel, had downloaded an image from the appellant's original ultrasound and then superimposed calipers on the re-created image to perform the remeasurement. Id. Using the previously undisclosed image, the doctor testified that

his remeasurement established that the amniotic fluid pocket contained a normal amount of fluid. Id. The jury then returned a defense verdict. Id., ¶23.

{¶ 25} On appeal, the plaintiff-appellant argued that the trial court had abused its discretion in admitting the undisclosed exhibit at trial. This court reversed the judgment and ordered a new trial. It stated:

{¶ 26} "*The central factor in our analysis is that the exhibit was not disclosed to [plaintiff] prior to trial.* * * * [T]he perpendicular calipers inserted onto the image to conduct the remeasurement produced critical evidence in the case. [Plaintiff] should have been afforded the opportunity to review the exhibit prior to trial and provided the chance to conduct her own analysis, or to prepare a defense to the remeasurement claims of [the doctor]. However, [plaintiff] never saw the exhibit prior to trial and could not have anticipated its use or prepared to refute its conclusions with her own expert medical testimony. The jury was left to merely accept [the doctor's] assertion that the remeasurement performed with the aid of the inserted calipers produced an accurate result, without an effective challenge from [plaintiff]. [Plaintiff] was denied an opportunity to examine the image and effectively question its authenticity and reliability." Id., ¶26, 32. (Emphasis added.)

{¶ 27} As in *Perry*, we find that the trial court's decision to allow the computer re-creation, despite the Clinic's failure to timely disclose it, prejudiced Branch and affected her substantial rights. By waiting to disclose the computerized reconstruction until only a few minutes before Dr. Machado took the stand, the Clinic effectively

precluded Branch from scrutinizing the computerized reconstruction with her own experts, who had left Cleveland several days earlier, and preparing a proper cross-examination.

{¶ 28} As in *Perry*, the jury in this case was left to merely accept Dr. Machado's assertion that as demonstrated by the computer re-creation, he had followed a safe trajectory that avoided Branch's ventricle. The prejudicial impact of the computer re-creation was especially significant in light of testimony by the Clinic's expert, Dr. Phillip Starr, that without the target plan data, "elements" of the target plan could be reconstructed, "but the entire plan can't be." Dr. Starr, the only neurosurgeon called to testify in support of Dr. Machado, also refused to express any opinion as to whether the ventricle wall had been breached. But despite Dr. Starr's opinion to the contrary, Dr. Machado testified that using the three-dimensional software system, he had, in fact, re-created the "probe's eye view" of precisely the same trajectory he had plotted through Branch's brain, a trajectory that not surprisingly completely avoided the ventricle. Because Branch was effectively precluded from scrutinizing the computerized reconstruction with her own experts, there was no meaningful way for her to dispute that Dr. Machado had just re-created for the jury what the Clinic's expert had testified could not be fully re-created. The prejudicial effect of Branch's inability to effectively challenge Dr. Machado's demonstration because of the Clinic's last-minute disclosure was magnified by the fact that the demonstration was the last piece of evidence the jury saw before deliberating.

{¶ 29} Further, although the Clinic argues that Dr. Machado's demonstration was "simply offered as an illustration for the jury," it is apparent that the re-creation was intended to give the jurors the impression that they were watching a virtual identical reconstruction of the procedure performed on Branch in 2007. But unlike as for Branch's animation, the Clinic was not required to inform the jurors that they were not actually watching a video of Branch's surgery. In fact, the judge told the jury that "Defendant intends at this time to reconstruct the target plan from Dr. Machado's operative notes," reinforcing the jury's misimpression that they were watching a reconstruction of the identical procedure performed on Branch three years earlier.

{¶ 30} Branch was clearly prejudiced and her substantial rights affected by the trial court's decision to allow the computer re-creation by Dr. Machado despite its eleventh-hour disclosure; accordingly, the trial court abused its discretion in allowing the re-creation.

{¶ 31} Branch's third assignment of error is therefore sustained.

V. Directed Verdict on Branch's Claim for Lack of Informed Consent

{¶ 32} Count 2 of Branch's complaint sought damages under a theory of lack of informed consent. Prior to trial, she voluntarily withdrew that aspect of the claim pertaining to the disclosure of the risk of a hemorrhage during the DBS procedure. She reserved her right to pursue a recovery regarding the alleged failure to disclose the experience and qualifications of the Clinic's surgeons. Specifically, Branch alleged that she was misled as to Dr. Vitek's involvement in her surgery and that she was not

informed about Dr. Machado's qualifications or credentials. After the defense had rested, the trial judge granted a directed verdict on the remainder of Branch's informed consent claim. In her fourth assignment of error, Branch argues that the trial court erred in dismissing this aspect of her informed consent claim.

{¶ 33} Civ.R. 50 sets forth the standard for granting a motion for a directed verdict:

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

{¶ 35} A motion for a directed verdict tests the legal sufficiency of the evidence to take the case to the jury. "It is the duty of the court to submit an issue to the jury if there is sufficient evidence to permit reasonable minds to reach different conclusions on that issue; conversely, the court must withhold an issue from the jury when there is not sufficient evidence presented relating to the issue to permit reasonable minds to reach different conclusions." *Harris v. Mt. Sinai Med. Ctr.* (May 28, 1998), Cuyahoga App. No. 72668.

{¶ 36} A motion for directed verdict presents a question of law, not one of fact; hence, we employ a de novo standard of review in evaluating the grant or denial of a

motion for directed verdict. *Grau v. Kleinschmidt* (1987), 31 Ohio St.3d 84, 90, 509 N.E.2d 399.

{¶ 37} In *Nickell v. Gonzalez* (1985), 17 Ohio St.3d 136, 139, 477 N.E.2d 1145, the Ohio Supreme Court held that "[t]he tort of lack of informed consent is established when:

{¶ 38} "(a) The physician fails to disclose to the patient and discuss the material risks and dangers inherently and potentially involved with respect to the proposed therapy, if any;

{¶ 39} "(b) the unrevealed risks and dangers which should have been disclosed by the physician actually materialize and are the proximate cause of the injury to the patient; and

{¶ 40} "(c) a reasonable person in the position of the patient would have decided against the therapy had the material risks and dangers inherent and incidental to treatment been disclosed to him or her prior to the therapy."

{¶ 41} To prevail on a claim for lack of informed consent, medical expert testimony is necessary to establish the significant risks of the proposed treatment or procedure that should have been disclosed. *Ratcliffe v. Univ. Hosps. of Cleveland* (Mar. 11, 1993), Cuyahoga App. No. 61791. See, also, *Bedel v. Univ. OB/GYN Assoc., Inc.* (1991), 76 Ohio App.3d 742, 744, 603 N.E.2d 342.

{¶ 42} Branch contends that the trial court erred in granting the motion for directed verdict on her lack of informed consent claim because the evidence showed that both she

and her husband were under the impression that Dr. Vitek would be handling her DBS procedure. Further, they wanted someone who was experienced in this procedure, and did not want anyone performing the surgery who was not board certified. Instead, Dr. Machado, who had been an attending neurosurgeon for only a year and had handled only between five to ten dystonia cases, and who was not eligible for board certification in the United States because he had received his medical training in Brazil, performed the procedure. Dr. Machado testified that he could not recall what he had told Branch and her husband regarding his training or experience. In light of this evidence, Branch contends that there was a legitimate factual dispute over her claim of informed consent that precluded a directed verdict.

{¶ 43} Branch's argument fails because she presented no testimony as to the third prong of the *Nickell* test: that a reasonable person in Branch's position would have decided against DBS surgery had she been informed of Dr. Machado's qualifications or that Dr. Walter, instead of Dr. Vitek, would perform the microelectrode recording during her surgery. Further, the testimony was clear that Branch and her husband were determined to have Branch's surgery performed at the Clinic. Accordingly, the trial court did not err in entering a directed verdict on Branch's lack of informed consent claim.

{¶ 44} Branch's fourth assignment of error is overruled.

VI. A "Different Methods" Instruction

{¶ 45} As part of their proposed jury instructions, the Clinic requested that the

court charge the jury on "different methods." Over Branch's objection, the jury was instructed as follows:

{¶ 46} "Although some other healthcare provider might have used a method of diagnosis, or treatment, medication, or procedure different from that used by Dr. Machado, this circumstance will not by itself prove that the physician was negligent.

{¶ 47} "You should decide whether the methods of diagnosis, treatment, and procedure used in this case were in accordance with the standard of care."

{¶ 48} In her fifth assignment of error, Branch contends that the trial court erred in supplying the jury with this "different methods" instruction.

{¶ 49} Contrary to Branch's assertion that our review is de novo, it is well-established law that we review the trial court's choice of jury instructions under an abuse of discretion standard. *Fifth Third Bank v. Gen. Bag Corp.*, Cuyahoga App. No. 92793, 2010-Ohio-2086, ¶26, citing *State v. Wolons* (1989), 44 Ohio St.3d 64, 68, 541 N.E.2d 443. "Abuse of discretion" means that the court's decision was unreasonable, arbitrary, or unconscionable. Id.

{¶ 50} The "different methods" instruction informs the jury that alternative methods can be used and that the selection of one method over the other is not in and of itself negligence. *Pesek v. Univ. Neurologists Assoc., Inc.*, 87 Ohio St.3d 495, 498, 2000-Ohio-483, 721 N.E.2d 1011. But the charge is not appropriate in all medical malpractice cases. "By its very terms, in medical malpractice cases, the 'different methods' charge to the jury is appropriate only if there is evidence that more than one

method of diagnosis or treatment is acceptable for a particular medical condition." Id.

{¶ 51} Branch argues that the "different methods" instruction was erroneous because no testimony was offered that recognized alternative methods of treatment. Specifically, she contends that her theory of malpractice was that Dr. Machado deviated from the course he had plotted through her brain and ruptured the ventricle, and that "not a single witness testified that slicing into the highly vascular chamber was a viable option for performing the surgery in this particular instance." Therefore, she contends, by giving the "different methods" instruction, the trial court led the jurors to believe that violating the standard of care that had been established did not necessarily mean that negligence had occurred. We agree.

{¶ 52} The Clinic's expert, Dr. Starr, testified that although he generally tries to avoid the ventricle during DBS surgery, in some surgeries the surgeon must go through the ventricle in order to reach the target. Dr. Machado likewise acknowledged that sometimes the best approach in DBS surgery is to go through the ventricle. This would suggest that an alternative methods instruction was appropriate in this case. But Dr. Machado testified that the target plan he developed for Branch's procedure was to avoid the ventricle, and that if he did in fact hit Branch's ventricle during the procedure (which he denied), he was off his intended trajectory. Thus, as Dr. Machado admitted, there was only one acceptable method of properly performing Branch's procedure: reaching the GPI and inserting the microelectrodes without hitting the ventricle.

{¶ 53} The Clinic contends that the instruction was proper because Branch's

expert, Dr. Bakos, testified that, in medicine, there are different schools of thought as to how to perform surgery and acknowledged that his mapping strategy varies from that of Dr. Starr, the Clinic's expert.[4] But mapping strategy was not at issue in this case; Dr. Machado testified that his pre-operative mapping developed a trajectory that was designed to miss the ventricle. Hence, whether Dr. Bakos would have mapped out fewer tracks to the GPI than Dr. Machado did is irrelevant. Furthermore, Dr. Bakos's acknowledgement that that there are different schools of thought as to how to perform "surgery" did not relate to DBS surgery generally or Branch's procedure specifically.

{¶ 54} Thus, the trial court erred in giving the "different methods" instruction in this case. Because the instruction "'probably misled the jury in a matter substantially affecting the complaining party's substantial rights,'" *Pesek*, at 499, quoting *Becker v. Lake Cty. Mem. Hosp. W.* (1990), 53 Ohio St.3d 202, 208, 560 N.E.2d 165, a new trial is warranted.

{¶ 55} Branch's fifth assignment of error is sustained.

VII. Evidentiary Inference from Missing Evidence

{¶ 56} Throughout trial, Branch's counsel made much of the fact that Dr. Machado had not saved the fused image of Branch's brain with the target planning data on a computer disc, and argued that in all likelihood, the fused image and target planning data would have shown that Dr. Machado deviated from the course that he had plotted and

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[4]Dr. Bakos's approach to DBS surgery is to do the least amount of tracks to the target as possible; other experts and institutions map out more tracks to the target.

breached the ventricle wall. Branch's counsel asserted, and at several points during trial the trial court agreed, that because that evidence was missing, the jury was entitled to draw an inference that the unsaved image and data would have been unfavorable to the Clinic.

{¶ 57} Near the end of his rebuttal argument in closing, Branch's counsel mentioned the "coincidence that the best piece of evidence as to what happened is missing." When defense counsel objected, the trial court sustained the objection, noting there was no evidence of "anything willful about the destruction of any documents," and instructed Branch's counsel to "avoid that topic." In her sixth assignment of error, Branch argues that the trial court erred in precluding counsel from arguing the inference.

{¶ 58} The determination of whether the bounds of permissible argument have been exceeded is within the trial court's discretion and will not be reversed absent an abuse of that discretion. *Pang v. Minch* (1990), 53 Ohio St.3d 186, 194, 559 N.E.2d 1313.

{¶ 59} This court recognized the negative inference that may be drawn from missing evidence in *Cherovsky v. St. Luke's Hosp. of Cleveland* (Dec. 14, 1995), Cuyahoga App. No. 68326, where it stated:

{¶ 60} "'The unexplained failure or refusal of a party to judicial proceedings to produce relevant and competent documentary evidence * * * which would tend to throw light on the issues authorizes, under certain circumstances, an inference or presumption unfavorable to such party.'" Id., quoting 31-A C.J.S. Evidence § 156(2) at pp. 401-402.

Continuing, the court explained that the inference is allowed when "there has been an actual suppression or withholding of the evidence; no unfavorable inference arises where the circumstances indicate that the document or article has been lost or accidentally destroyed, or where the failure to produce it is otherwise properly accounted for * * *." Id.

{¶ 61} *Cherovsky* involved a medical malpractice claim and a spoliation claim based on missing biopsy slides of the plaintiff's lung. The trial court denied the plaintiff's request for a specific adverse inference jury instruction regarding the missing slides, but gave a general instruction on inferences. This court held, for various reasons not applicable to our discussion, that the trial court properly rejected the adverse inference jury instruction. Of note, however, is this court's recognition that a negative inference arose from the missing evidence and the importance this court placed on the opportunity for plaintiff's counsel to argue the negative inference during trial and in closing argument, even though the specific adverse inference instruction was not given. The court stated, "We are satisfied that the trial court gave an adequate general instruction on inferences which gave the plaintiff's counsel the leeway he needed to argue the negative inferences from the missing slides, while, at the same time, properly instructing the jury." Later, the court again stated, "[T]he trial court gave Ohio's standard permissive inference instruction which allowed plaintiff to argue all the adverse inferences she wished from the missing slide evidence. * * * Under this instruction, the jury was permitted but not required, to infer that the missing biopsy slides were unfavorable, i.e.,

did not show cancer." Id. See, also, *Simms Builders v. Liberty Insulation Co.* (Feb. 16, 1983), Warren App. No. 73 (no error in failing to give requested specific adverse inference instruction; inference is permissible and counsel appropriately drew that inference in closing argument for the jury's consideration); *Signs v. Ohio Dept. of Rehab. & Corr.* (Nov. 23, 1994), Franklin App. No. 94API05-628 (jury may draw inference that evidence would be unfavorable to party that fails to produce relevant evidence under the control of party without reasonable explanation).

{¶ 62} Here, the record reflects that although the trial court recognized several times during trial that the jury was entitled to draw a negative inference from the missing evidence, the judge abruptly prohibited Branch's counsel from arguing that inference to the jury during closing argument because there was no evidence the Clinic had willfully destroyed the evidence. But Branch was not required to demonstrate that the Clinic willfully destroyed the evidence to be entitled to the inference. In *Cherovsky*, this court found that there was "no evidence of intentional destruction or suppression of the slides," but nonetheless concluded that the plaintiff could argue the negative inference from the missing slides. Id. The court recognized that the inference is permissive and arises "where there is relevant evidence under the control of a party who fails to produce it without satisfactory explanation." *Cherovsky*, quoting *Signs*, supra.

{¶ 63} Here, the original fused image and target planning data were missing and, hence, Branch was entitled to argue the adverse inference to the jury. The jury was not required to accept the inference (Dr. Machado testified that the fused image and target

planning data are only kept in "rare instances") but Branch was entitled to argue it. By prohibiting counsel from discussing the missing image and target plan data, the trial court unjustly deprived Branch of the benefits of an inference that this court and others have long recognized. We hold, therefore, that the trial court abused its discretion and committed reversible error in precluding Branch's counsel from arguing the negative adverse inference in closing argument.

{¶ 64} Branch's sixth assignment of error is therefore sustained.

Reversed and remanded.

It is ordered that appellants recover from appellee costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

KATHLEEN ANN KEOUGH, JUDGE

SEAN C. GALLAGHER, J., CONCURS;
COLLEEN CONWAY COONEY, P.J., CONCURS IN PART
AND DISSENTS IN PART WITH SEPARATE OPINION.

COLLEEN CONWAY COONEY, J., CONCURRING IN PART AND DISSENTING IN PART:

{¶ 65} I concur in the majority's disposition on the first, second, and fourth

assignments of error. On the remaining assignments, however, I respectfully dissent. I would affirm the jury's verdict and specific finding that Dr. Machado did not deviate from the standard of care. The jury heard the Clinic's expert, Dr. Starr, testify that the brain is "a very vascular structure" with many blood vessels, some too small to be seen in an MRI. Dr. Starr also stated that it is not a deviation from the standard of care to hit the ventricle. The consent form for this procedure advises that stroke is a risk of the procedure.

{¶ 66} I find no error in the trial court's allowing the "attempted re-creation/illustration" that the Clinic indicated in its opening argument would be shown to the jury. Many motions in limine were filed in the instant case, but none related to this allegedly improper demonstration. Moreover, it was merely demonstrative evidence and not an actual exhibit that accompanied the jury into the deliberation room for further review, the situation presented in *Perry*. The fact that the Clinic's expert had stated it cannot be re-created lends further credence to the position it was only demonstrative. I find nothing prejudicial about the attempted re-creation/illustration.

{¶ 67} As Branch's trial counsel stated to the judge, "As long as you indicate that this is an attempt to re-create." (Tr. 1644.) The court complied with this request and instructed the jury that "this is an attempted simulation, or re-creation of the evidence." (Tr. 1656.)

{¶ 68} Branch's counsel knew from the Clinic's opening argument that Dr. Machado would "reconstruct" the procedure for the jury. Branch cannot now complain

that the reconstruction was not disclosed until just minutes before Dr. Machado testified.

{¶ 69} Moreover, I find no prejudice to Branch from the attempted re-creation. The critical testimony of the Clinic's expert, Dr. Starr, indicated that it is not a deviation from the standard of care to hit the ventricle. (Tr. 1152.) He also testified that, in his opinion, Branch had a basal ganglia hemorrhage and not a ventricle bleed. (Tr. 1230.) It was well within the province of the jury to believe this expert testimony.

{¶ 70} I also disagree with the majority's resolution of the fifth and sixth assignments of error. I would find no error in the court's "different methods" jury instruction since different mapping strategies were put forth by the expert witnesses.

{¶ 71} Moreover, I would affirm the court's rejection of the negative adverse inference argument. The majority's reliance on *Cherovsky v. St. Luke's Hosp. of Cleveland* (Dec. 14, 1995), Cuyahoga App. No. 68326, is misplaced. That case involved a claim for spoliation — missing biopsy slides. And this court found in *Cherovsky* that "the unexplained failure" to produce relevant evidence may justify the negative inference. In the instant case, there was no "unexplained failure" or refusal to produce evidence. The testimony of Dr. Starr and Dr. Machado established that this original fused image and target data are not ordinarily retained. This is a satisfactory explanation which was never rebutted by Branch's witnesses.

{¶ 72} Accordingly, I would affirm the jury's verdict.