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IN THE SUPREME COURT OF OHIO

CASE NO. 11-1634

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MARGARET BRANCH,  
Plaintiff-Appellee,

-vs-

CLEVELAND CLINIC FOUNDATION,  
Defendant-Appellant.

ON APPEAL FROM THE EIGHTH APPELLATE DISTRICT  
CUYAHOGA COUNTY, OHIO, CASE NO. 95475

MEMORANDUM OPPOSING JURISDICTION OF  
PLAINTIFF-APPELLEE, MARGARET BRANCH

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## STATEMENT OF ISSUES PUBLIC AND GREAT GENERAL IMPORTANCE

When the dramatic hyperbole and baseless disparagements of the appellate court are set aside, it becomes evident that no issues of public or great general importance have been implicated in this appeal. The majority's opinion relied entirely upon established precedent and simply found that three separate errors justified a new trial. *Branch v. Cleveland Clinic Found.*, 8<sup>th</sup> Dist. No. 95475, 2011-Ohio-3975, 2011 W.L. 3505286. Defendant-Appellant, Cleveland Clinic Foundation, is simply demanding that this Court correct a perceived injustice, nothing more.

The underlying malpractice action is based upon a deep brain surgical (DBS) implant procedure that had gone awry, and left the patient seriously and permanently disabled. As a result of the unusual circumstances that arose during the trial before retired Judge James Porter, there is little reason to believe that the unfortunate mistakes that were committed will reoccur in future lawsuits. Accordingly, further review by this Court would be unlikely to produce any meaningful precedents. Despite Defendant's protests to the contrary, not a single judicial opinion from any court anywhere has been identified that actually conflicts with the Eighth District's sound reasoning. Indeed, Defendant's Memorandum only cites four judicial decisions – two from this Court and two from Cuyahoga County – none of which suggest that the seriously suspect defense verdict can be salvaged.

What is particularly surprising about the Memorandum in Support of Jurisdiction is the complete absence of any citations to the evidentiary record. That is undoubtedly because Defendant has no interest in accurately describing the events that had actually transpired during the two week jury trial. For example, in an effort to create the illusion that "the Eighth District made factual misstatements" the hospital has fumed that Plaintiff's expert "brought in a commercially-available DBS system to trial, along with a

technician \*\*\*." *Defendants' Memorandum*, p. 2. Defendant has neglected to mention that the image that was displayed was purely generic, and the trial judge even had Plaintiff's counsel warn the jurors that they were not viewing his client's actual skull. *Trial Tr. Vol. VII*, p. 848.

In the end, there is no dancing around the reality that the Eighth District carefully examined a complex medical malpractice action and concluded that prejudicial errors had been committed in three separate instances. No new legal principles were established and no prior precedent were overturned. Each of the trial court's mistakes are easily correctable, and are unlikely to arise again in future trials. No issues of public or great general importance are therefore at stake in this appeal.

#### **STATEMENT OF THE CASE AND FACTS**

The following facts were established during the course of the two-week jury trial. Plaintiff-Appellee, Margaret Branch, was an accomplished attorney who practiced in Albuquerque, New Mexico. *Trial Tr. Vol. XI*, pp. 1295-1296. She was one of the founders of the New Mexico Women's Bar Association and received countless awards both for her work as an attorney and her humanitarian efforts. *Id.*, Vol. IV, pp. 649-650; Vol. XI, pp. 1309-1311.

In approximately 2005, Plaintiff developed cervical dystonia. *Id.*, Vol. IV, p. 654; Vol. XI, pp. 1324, 1455-1458, 1467 & 1473. This neurological condition caused the muscles in her neck to retract in a manner that forced her head into a downward position. *Trial Tr. Vol. II*, pp. 415-416 & 420-421; Vol. IX, p. 1185; Vol. XI, p. 1473. In addition to interfering with most of her normal everyday activities, the lawyer experienced regular pain and discomfort. *Id.*, Vol. IV, p. 642 & 647-648.

Defendant had been promoting DBS surgery to relieve cervical dystonia, which had been developed relatively recently. *Trial Tr.*, Vol. IX, pp. 1131-1134 & 1138. The

procedure requires the neurosurgeon to access the globus pallidus internus (GPI), which is a small structure located deep within the brain. *Id.*, Vol. IV, pp. 826-827; Vol. XII, p. 1623. Electrodes have to be placed on both sides of this organ, which then provide stimulation through a small electrical current. *Id.*, p. 824. The neurosurgeon begins the DBS procedure on one side by drilling a “burr hole” in the top of the skull above the ear. *Id.*, Vol. XIII, pp. 1747-1748; *Trial Deposition of Milind Deogaonkar, M.D.*, p. 30. A small tube, known as a cannula, is slowly passed through the brain and towards the GPI. *Id.*, Vol. III, p. 545; Vol. IX, p. 1160, 1212 & 1661. A “stylette” is first placed in the tube, which blocks the opening and prevents tissue from being damaged. *Id.*, Vol. IX, pp. 1160-1161 & 1212; Vol. XIII, pp. 1699-1700. The path along which the cannula is extended is known as the “trajectory.” *Id.*, Vol. III, p. 504; Vol. VI, p. 862.

Once the target has been reached, the stylette is removed from the cannula. *Trial Tr.*, Vol. III, p. 545; Vol. XIII, pp. 1752-1755. The electrode is then passed through the cannula and placed at the appropriate spot. *Id.* Successfully relieving the dystonia requires placing the electrodes within sufficiently close proximity to the target. *Id.*, Vol. III, p. 540; Vol. VI, p. 826. The cannula is then removed from the patient’s head. *Id.*, Vol. XIII, pp. 1754-1755. The neurosurgeon repeats the process on the other side of the skull. *Id.*, Vol. X, p. 1509. Once they have successfully been planted, the electrodes are programmed to provide the appropriate level of stimulation to relieve the patient’s dystonia. *Id.*, Vol. II, p. 432; Vol. XI, p. 1507.

In order to successfully reach the GPI, “target planning” must be carefully performed in advance of the procedure. *Trial Tr.*, Vol. III, p. 515; Vol. VI, p. 826; Vol. IX, p. 1192. Although several methods have been developed over the years, the neurosurgeon who was assigned to Plaintiff, Andre Guelman Gomes Machado, M.D. (“Dr. Machado”), used a common approach, which combined them. *Id.*, Vol. III, pp.

539; Vol. XII, pp. 1627-1629. A complex computer software program, known as "Stealth," fused the patient's head magnetic resonance imaging (MRI) and computer tomographic (CT) scans into a single image. *Id.*, Vol. III, pp. 504-505; Vol. XIII, pp. 1683-1685. Coordinates were then identified to plot a trajectory from the burr hole to the target. *Id.*, Vol. III, p. 510.

Dr. Machado plotted a trajectory that was designed to avoid Plaintiff's lateral ventricle. *Trial Tr.*, Vol. III, p. 514. The wall of this chamber in the brain is surrounded by veins. *Id.*, Vol. III, p. 516; Vol. XIII, p. 1775. This structure must be avoided whenever possible. *Id.*, Vol. III, pp. 516-518; Vol. XI, pp. 1517 & 1546; Vol. XIII, p. 1775. The neurosurgeon acknowledged that if he breached this ventricle, he would have been off the planned course. *Id.*, Vol. III, pp. 545-546.

During the second pass on the right side of Plaintiff's skull, Dr. Machado saw blood coming out of the cannula. *Trial Tr.* Vol. III, pp. 542-543; Vol. XI, p. 1480, 1501 & 1512-1513. Plaintiff's blood pressure also rose markedly. *Id.*, Vol. III, p. 543; Vol. VIII, pp 1025-1026. Dr. Machado announced to the room that they had a bleed. *Id.*, Vol. VIII, p. 1018. Nurse Anesthetist Schurigyn had never encountered this complication before. *Id.*, Vol. VIII, p. 1018. The resulting hemorrhage (*i.e.*, bleed) was substantial. *Id.*, Vol. XI, p. 1541; Vol. XIII, p. 1727. However, the procedure was not halted. *Id.*, Vol. XI, p. 1503; Vol. XIII, p. 1751.

Plaintiff's standard of care expert, Robert S. Bakos, M.D. ("Dr. Bakos") confirmed that Plaintiff suffered a stroke when the cannula breached the ventricle. *Trial Tr.*, Vol. VI, pp. 866-867 & 881-883. Dr. Machado had misplaced the burr hole and misdirected the cannula off the intended trajectory. *Id.*, p. 867. When the cannula was withdrawn, air was sucked into the veins and ventricle. *Id.*, p. 872. There was no other plausible explanation for the simultaneous and dangerous rise in blood pressure. *Id.*, p. 876. At

that point, brain tissue was being destroyed. *Id.*, p. 875. The procedure should have been stopped. *Id.*, pp. 876-877. Had the surgery been handled appropriately, the hemorrhage would have been avoided. *Id.*, p. 910.

Dr. Machado has acknowledged that Plaintiff suffered a stroke and sustained neurological deficits during the surgery. *Trial Tr.*, Vol. XIII, pp. 1709-1710. Defendant's neurosurgeon agreed that he would have been off course if he had pierced the ventricle wall. *Trial Tr.*, Vol. III, pp. 545-546. Even he appreciated that the hospital should be held accountable if a breach caused a stroke. *Id.*, Vol. III, pp. 547-548; Vol. XIII, pp. 1722-1723.

The only neurosurgical liability expert who was called on behalf of the defense (other than Dr. Machado himself), Phillip Starr, M.D. ("Dr. Starr"), was largely in agreement. *Trial Tr.* Vol. IX, p. 1216. Tellingly, he refused to express an opinion about whether Plaintiff's ventricle wall had been struck during the DBS procedure. *Id.*, pp. 1215-1216.

Following the surgery, Plaintiff was confined in Defendant's intensive care unit for several weeks. *Trial Tr.*, Vol. II, p. 417. One side of her body was completely paralyzed. *Id.*, Vol. III, pp. 594-595. She was barely able to speak, and was slurring her words when she attempted to do so. *Id.*, p. 593.

After the parties rested, the jury returned a unanimous defense verdict. In response to an interrogatory, they indicated that Defendant had been found to have complied with the standard of care that was owed. *Tr. Tran.* Vol. XVI, p. 1967. As a result of three separate errors, each of which thoroughly undermined the validity of the jurors' findings, the Eighth District reversed the final order and remanded the proceedings for a new trial. *Branch*, 2011-Ohio-3975.

## ARGUMENT

Defendant's three Propositions of Law will be separately addressed in the remainder of this Memorandum. None of them possess merit.

**PROPOSITION OF LAW NO. I: 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  
EVIDENCE.**

A major issue that arose during discovery concerned Defendant's troubling failure to preserve the data that would have allowed the original target planning to be evaluated. Dr. Machado conceded during the trial that the fused image of Plaintiff's brain had not been kept following her surgery. *Trial Tr., Vol. III, pp. 506-507*. The neurosurgeon also had not saved the target planning data on a disc, which he insisted was only done "on some very rare occasions[.]" *Id., p. 507*. Apparently, the fact that Plaintiff had suffered a stroke in the midst of the DBS procedure was not sufficient cause to preserve the information in this instance.

Dr. Machado was the final witness who was called in the defense case-in-chief. *Trial Tr., Vol. XII, p. 1563*. Shortly before he took the stand, defense counsel disclosed that an elaborate demonstration had been prepared during which the neurosurgeon would recreate his target planning on the software system before the jurors. *Id., p. 1564*. It was stressed by defense counsel that the allegations of missing evidence "has really become the key issue in this case \*\*\*." *Id., p. 1565*. When objections were raised to the untimely disclosure and unreliability of the recreation, the trial judge explained:

I think the fact that you have not disclosed this, you have not given them the opportunity to think about it, to talk to his own experts about it.

In this part of the case I'm disinclined to let [Dr. Machado] go

forward with the recreation with what he's going to call the real thing. \*\*\*

*Id.*, p. 1578.

Defense counsel then proceeded to re-argue her position with respect to the supposed importance of the recreation. *Id.*, pp. 1579-1585. Inexplicably, the judge then reversed himself.

THE COURT: I've got to make a ruling. It's discretionary. It's a tough question. I'm going to let [Dr. Machado] show it.

[PLAINTIFF'S COUNSEL]: Going to let him show it?

THE COURT: I'm going to let him show it, yes.

[PLAINTIFF'S COUNSEL]: Judge, you just said on the record you're not going to let her show it.

THE COURT: Well, you people are very effective counsel, do you understand? This is not an easy spot I'm sitting in.

*Id.*, p. 1585. Plaintiffs' counsel was furnished with a continuing objection. *Id.*, p. 1645.

Predictably, the recreation of the target planning process was the highlight of the direct examination of Dr. Machado and of the entire defense case-in-chief. *Trial Tr.*, Vol. XIII, pp. 1667-1689. As was confirmed by a defense expert, the impressive three-dimensional software image conveyed far more than the operative notes could. *Id.*, Vol. IX, p. 1194. The jurors were shown the trajectory that was computed in-court on a fused image of Plaintiff's purported brain that had just been prepared. *Id.*, Vol. XIII, p. 1683. With Dr. Machado guiding them from the witness stand, they toured the pathway that supposedly had been taken, which avoided all veins and vascular structures. *Id.*, pp. 1667-1689. Defendant's neurosurgeon was thus able to confirm that he had missed the ventricle "by a lot[.]" *Id.*, p. 1687. His own standard of care expert had been unable reach such a conclusion with sufficient medial certainty. *Id.*, Vol. IX, pp. 1215-1216.

There is no truth to Defendant's assurances that the "demonstration regarding the

target plan \*\*\* was simply offered as an illustration for the jury \*\*\*.” *Defendant’s Memorandum*, p. 11. In stark contrast to Plaintiff’s generic depictions, the jurors had been advised that they would be witnessing the DBS procedure precisely as it had been performed in the operating room. At the outset of the production, Dr. Machado announced that they were viewing “a three-dimensional reconstruction of the patient’s face with the head frame as it was placed in the very day of surgery.” *Id.*, at 1668. Furthermore, “all the films here belong to [Plaintiff,] the films that were used for her surgery.” *Id.*, p. 1668. Despite his own expert’s testimony to the contrary, Dr. Machado insisted that even without the original fused image he had successfully recreated the probe’s eye view of the same trajectory he had plotted through the Plaintiff’s brain. *Id.*, p. 1731-1733.

The trial judge had worsened the situation by emphasizing to the jurors that “Defendant intends at this time to reconstruct the target plan from Dr. Machado’s operative notes.” *Id. Tr. Trans. Vol. XIII*, p. 1656. The hospital was not required, as Plaintiff was when their own demonstration had been played, to alert the jurors that they were not actually witnessing a video of her surgery. *Id.*, Vol. VII, p. 886.

The visually stunning recreation filled a gaping hole in the defense. As previously noted, Dr. Starr was the only neurosurgeon who had been called by the defense to testify in support of Dr. Machado. He refused, however, to express any opinion as to whether Plaintiff’s ventricle wall had been breached. *Trial Tr.*, Vol. IX, pp. 1215-1216. While he was unwilling to agree that the standard of care had been violated, the defense expert acknowledged that it was certainly possible for the corner of the chamber to be hit while proceeding down a trajectory toward the GPI. *Id.*, pp. 1221-1223. Apart from the in-court recreation, which had been permitted over strenuous objection, the only competent evidence that had been presented to the effect that the ventricle wall had

been avoided was Dr. Machado's own otherwise unsubstantiated assertions.

Since his experts had left Cleveland several days earlier, Plaintiff's counsel had no one to consult about the claims and descriptions that had just been asserted. He was forced into the unenviable position of having to cross-examine a neurosurgeon about the details of a visually impressive target planning demonstration he (and everyone else in the courtroom) had just witnessed for the first time moments earlier. Secure in his knowledge that no more witnesses would be testifying who possessed the expertise to contradict him, Dr. Machado was insistent that the fused image he had just produced on the computer was precisely the same as that which had been used during Plaintiff's target planning three years earlier. *Trial Tr., Vol. XIII, pp. 1769-1770.*

Despite his serious disadvantage, Plaintiff's counsel was able to elicit a concession from Dr. Machado that it was "possible" that the software had been updated since 2007. The neurosurgeon could not know for sure, and was quick to proclaim that: "The software is the same. There may be small updates in one version or the other." *Id., p. 1771.* There was, of course, no time left for this dubious assertion to be investigated.

In addition to the updated software, there were other reasons to suspect Dr. Machado's claim that the recreation was identical to that which had been performed three years earlier. The only other neurosurgeon called by the defense, Dr. Starr, had testified a few days earlier that "elements of the plan can be reconstructed, but the entire plan can't be." *Trial Tr., Vol. IX, p. 1211* (emphasis added). The defense witness acknowledged that:

Q. Can we agree, doctor, because we don't have the target planning, the raw data on [Plaintiff], we don't have the ability to look at the probe's eye view to confirm that Dr. Machado's trajectory path was safe?

A. We can't reconstruct it completely. No. [emphasis

added].

*Id.*, p. 1209.

As is customary, the judge had required the parties to share their demonstrative exhibits with each other at the outset of the trial. *Trial Tr. Vol. I*, p. 278. Defendant now insists that the video recreation was not disclosed at that time because it supposedly “became necessary **only** in response to a new allegation of ‘missing evidence’ raised by Plaintiff for the first time at trial!” *Defendant’s Memorandum*, p. 1 (emphasis original). The fact that the target planning data had been discarded had actually been acknowledged during discovery and had been the subject of motion practice. See e.g., *Motion in Limine to Preclude Plaintiffs from Offering Any Evidence, Testimony, Remarks and/or Arguments Pertaining to an “Adverse Inference” or Spoliation of Evidence dated July 6, 2010*. Following further argumentation in chambers, the trial judge determined on the first day of trial that Plaintiff could seek the adverse inference allowed for a negligent or unintentional loss of relevant evidence. *Trial Tr. Vol. I*, pp. 269-277. Twelve days later, and ten minutes before Dr. Machado was to take the stand as the final defense witness, defense counsel finally disclosed the computerized recreation that had been produced. *Trial Tr. Vol. XII*, pp. 1564-1573. No prior opportunity had been afforded to review the demonstration despite ample time to do so.

There is no merit to Defendant’s contrived contention that “demonstrative evidence” does not need to comply with the same standards as trial exhibits. *Defendant’s Memorandum*, p. 10. Since the impact upon the jury is the same regardless of the label that is affixed to the demonstration, the overwhelming consensus of authority recognizes that reproductions and recreations do indeed have to satisfy the same general requirements of admissibility and reliability. *Bush v. Hoelker* (Oct. 12,

1989), 10<sup>th</sup> Dist. No. 89AP-185, 1989 W.L. 119992 (abuse of discretion found when photographs were used to recreate an accident scene in misleading fashion); *Figueroa v. Toys-R-Us Ohio, Inc.* (Apr. 3, 1997), 8<sup>th</sup> Dist. No. 70463, 1997 W.L. 156720 (panel concludes that the trial judge had improperly admitted demonstrative evidence, consisting of testimony related to an out-of-court experiment); *United States of Am. v. Baldwin* (6<sup>th</sup> Cir. 2005), 418 F.3d 575, 580 (defendant's proffered video did not closely enough replicate the actual conditions to warrant admission into evidence); *State of Ohio v. Zerla* (Dec. 22, 1994), 10<sup>th</sup> Dist. No. 93APA09-1304, 1994 W.L. 714456, p. \*6 (out-of-court experiment was so dissimilar that it was inadmissible); *Tritt v. Judd's Moving & Storage, Inc.* (10<sup>th</sup> Dist. 1990), 62 Ohio App.3d 206, 574 N.E.2d 1178 (decision upheld to exclude model of accident scene that conveyed misleading impression about lighting conditions); *Brewer v. Sky Climber, Inc.* (June 14, 1984), 2<sup>nd</sup> Dist. No. 8071, 1984 W.L. 5329 (trial court properly excluded photograph of scaffolding that did not depict actual conditions). A new trial is therefore warranted in this instance, irrespective of whether the eleventh hour video production was marked as a trial exhibit.

**PROPOSITION OF LAW NO. II: 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.**

Plaintiff's counsel was nearing the end of his rebuttal argument when he addressed the "coincidence that the best piece of evidence as to what happened is missing[.]" *Trial Tr., Vol. XIV, pp. 1925-1926*. He was starting to draw an analogy to the "BP oil disaster" when an objection was raised and immediately sustained. *Id.*, p.

1926. The following then transpired:

[PLAINTIFF'S COUNSEL]: After the BP –

THE COURT: I said sustained. There's no analogy – there's no suggestion that there's anything willful about the destruction of any documents.

[PLAINTIFF'S COUNSEL]: Fine.

THE COURT: And you will avoid that topic, because there is no evidence to support it.

You may continue. [emphasis added]

*Id.*, p. 1926. The evidentiary record thus confirms that there is no validity to Defendant's representation that: "Plaintiff was not precluded from arguing an adverse inference of negligence claim in connection with Plaintiff's allegation of 'missing' data." *Defendant's Memorandum*, p. 13.

If the reference to the BP Oil disaster was improper, then the logical response was to simply prohibit Plaintiff's counsel from attempting to draw the analogy. Inexplicably, the trial judge proceeded instead to forbid even argumentation about the missing evidence and announced to the jurors that the claim was unsubstantiated. *Trial Tr. Vol. 14*, p. 1926. Substantial time and effort had been devoted over the previous two weeks to demonstrate that Plaintiff was entitled to the inference that is allowed when an opponent destroys, damages, alters, or loses evidence that is known, or should be known, to be relevant to an actual or potential lawsuit. *The Bermuda* (1865), 70 U.S. 514, 550, 18 L.Ed. 200; *Hubbard v. Cleveland, Columbus & Cincinnati Hwy.* (2<sup>nd</sup> Dist. 1947), 81 Ohio App. 445, 76 N.E.2d 721, 724, citing 20 AMERICAN JURISPRUDENCE 188; *Rogers v. T.J. Samson Comm. Hosp.* (6<sup>th</sup> Cir. 2002), 276 F.3d 228, 232 (Kentucky law); *One Beacon Ins. Co. v. Broadcast Develop. Grp., Inc.* (6<sup>th</sup> Cir. 2005), 147 Fed. Appx. 535, 540-541, 2005 W.L. 2077499 (Kentucky law); *Patton-Tully Transp. Co. v. Barrett* (6<sup>th</sup> Cir. 1930), 37 F.2d 516, 519; *Austerberry v. United States* (6<sup>th</sup> Cir. 1948), 169 F.2d

583, 593. Because she was unjustly deprived of the benefit of an inference that Ohio law has long recognized, Plaintiff is entitled to a new trial.

**PROPOSITION OF LAW NO. III: THE EIGHTH DISTRICT'S DECISION DISALLOWING THE DIFFERENT METHODS JURY INSTRUCTION IS LEALLY 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**

After the parties had rested, Defendant proposed that the trial court supply the jurors with the "different methods" charge. *Tr. Trans. Vol. XIV, p. 1815*. Plaintiff strenuously objected because the testimony was uncontroverted that there was only one proper way to perform the DBS procedure in her situation, which was to plot and follow a trajectory that avoided striking the ventricle wall. *Id., pp. 1815-1817*. The trial judge nevertheless decided to proceed with the instruction. *Id., at 1817*. The jurors were thus advised that:

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.

*Id., Vol. XV, pp. 1943-1944.*

In determining that the charge was misleading under the particular facts of this case, the Eighth District carefully adhered to the syllabus of *Pesek v. University Neuro. Assoc., Inc.*, 87 Ohio St.3d 495, 2000-Ohio-483, 721 N.E.2d 1011, which has long instructed that:

[I]n 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. [emphasis added].

The jury's defense verdict was overturned and a new trial was ordered in that instance "because the instruction 'probably misled the jury in a matter substantially affecting the

complaining party's substantial rights.” *Id.* at 499, citing *Becker v. Lake Cty. Mem. Hosp. W.* (1990), 53 Ohio St.3d 202, 208, 560 N.E.2d 165, 171. See also, *Kowalski v. Marymount Hosp., Inc.* (Mar. 1, 2007), 8<sup>th</sup> Dist. No. 87571, 2007-Ohio-828, 2007 W.L. 613865; *Peffer v. Cleveland Clinic Found.* (8<sup>th</sup> Dist. 2008), 177 Ohio App. 3d 403, 2008-Ohio-3688, 894 N.E. 2d 1273; *Roetenberger v. Christ Hosp.* (1<sup>st</sup> Dist. 2005), 163 Ohio App.3d 555, 2005-Ohio-5205, 839 N.E.2d 441.

While Defendant's neurosurgeon, Dr. Machado, had confirmed that there was only one way to properly perform the DBS procedure, the hospital has attempted to justify the “different methods” charge strictly upon the testimony of Dr. Bakos. *Defendant's Memorandum*, pp. 7 & 14. All that Plaintiff's expert had conceded was that there were “different schools of thought and approaches as to how to perform a given surgery” in general. *Tr. Trans. Vol. VII*, p. 956. He then denied that he had employed an approach to DBS mapping that was different from that in other medical centers. *Id.*, at 956.

The fact that various surgeons across the country did not use precisely the same mapping techniques hardly justified a different methods charge. As Dr. Bakos had explained, he was not criticizing Dr. Machado for the approach he took to reaching the GPI. *Tr. Trans. Vol. VII*, pp. 996-997. Plaintiff's theory of malpractice was that Dr. Machado deviated from the course that he had plotted through the brain and ruptured the patient's ventricle. *Id.*, pp. 1001-1002. Not a single witness testified that slicing into the highly vascular chamber was a viable option for performing the surgery in this particular instance. To the contrary, Dr. Machado openly acknowledged that he was trying to avoid the structure. *Id.*, Vol. XIII, pp. 1685-1686.

Defendant's repeated belittling of the appellate court for purportedly finding that the target planning was both relevant and irrelevant are indicative of its penchant for

specious reasoning. *Defendant's Memorandum*, pp. 4, 7-8, & 14-15. Read in context, the majority was actually remarking that the target planning was not a disputed issue in the case. *Branch*, 2011-Ohio-3975 ¶153. At no point did the opinion even insinuate that the pre-operative preparations were "irrelevant." *Id.* All the experts (as well as Dr. Machado himself) were in agreement that the standard of care required a safe trajectory to be plotted to the GPI. *Trial Tr. Vol. III, p. 515; Vol. VI, p. 826; Vol. IX, p. 1192.* There were no alternative methods for planting the electrodes that complied with the governing standard of care.

By furnishing the unwarranted "different methods" charge, the trial judge led the jurors to believe that violating the standard of care by veering off the plotted course did not necessarily mean that negligence had occurred. Avoiding the vein surrounding the ventricle was just one possible approach, according to this misplaced instruction, from others which could have been selected. The entire theory of Plaintiff's malpractice claim was laid to waste, which had also been the case in *Pesek, Kowalski, and Peffer*. The Eighth District justifiably concluded that the jury had been misinformed on a critical point of law and a new trial is necessary.

### CONCLUSION

Since no issues of public or great general interest have been implicated by the Eighth District's sound ruling, this Court should decline to exercise jurisdiction over this appeal.

Respectfully Submitted,

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**CERTIFICATE OF SERVICE**

I certify that a copy of the foregoing **Memorandum** has been sent by e-mail and regular U.S. Mail, on this 25<sup>th</sup> day of October, 2011 to:

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