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**In the Supreme Court of Ohio**

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

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**MARGARGET BRANCH, et al.**

Plaintiff-Appellee

v.

**CLEVELAND CLINIC FOUNDATION**

Defendant-Appellant

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**MERIT BRIEF OF DEFENDANT-APPELLANT  
THE CLEVELAND CLINIC FOUNDATION**

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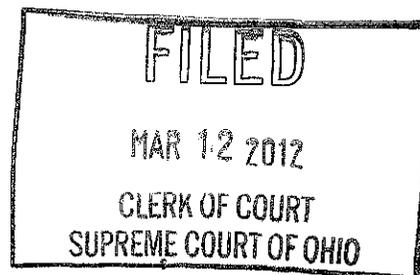
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## I. STATEMENT OF THE CASE

This case arises from the Eighth District Court of Appeals' erroneous Decision that vacated a unanimous jury verdict in favor of Defendant-Appellant The Cleveland Clinic Foundation ("The Clinic"). In doing so, the Eighth District usurped the jury's role as the finder of fact by issuing 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 opinions from the Eighth District and other Appellate Courts. The Eighth District's Decision should be reversed in its entirety as a result of its creation and reliance upon legally unsound reasons that clearly interfered with the sanctity of the jury system.

On June 26, 2009, Plaintiff-Appellee Margaret Branch ("Appellee") refiled her medical malpractice case against The Clinic. Appellee's husband, Turner Branch, was initially a party to this action in which he asserted a loss of consortium claim. However, on June 30, 2010, the day before the commencement of the trial, Mr. Branch's loss of consortium claim along with a negligent credentialing claim and part of Appellee's lack of informed consent claim were voluntarily dismissed.

Appellee's medical malpractice action stemmed from her stereotactic brain surgery performed on February 19, 2007 at The Clinic. Appellee's stereotactic brain surgery, called Deep Brain Stimulation (DBS), was performed for her debilitating cervical dystonia. The procedure was performed by functional neurosurgeon, Andre Machado, M.D., along with movement disorder neurologist, Benjamin Walter, M.D.

On July 1, 2010, a jury trial commenced and lasted approximately two weeks. On July 20, 2010, the jury returned a **unanimous** defense verdict in merely one hour. Of importance, the

jury never addressed the issues of either proximate cause or damages since it found that there was no deviation from the standard of care by The Clinic or its employees. (Tr. 1967).

At trial, one of the crucial issues with respect to Appellee's DBS surgery for her dystonia involved the "target planning" that was used to perform the surgery. The target plan for the surgery was created on a computer in order to reflect the entry point for the surgery, the target point for the surgery and the trajectory for the surgery. (Tr. 504). The actual target plan data used for Appellee's surgery was written in Dr. Machado's operative report and, therefore, it is contained within the medical records. (Tr. 506). In other words, the target plan data used for Appellee's DBS surgery is permanently preserved in her medical records. (Tr. 505-507; 511; 1640-1642).

With regard to the "fused image" of the target plan, it is not routinely maintained in the medical records or on any type of disk. (Tr. 506-507). In addition to Dr. Machado's trial testimony that Appellee's target planning data is not maintained on a disk but, instead, is permanently contained in her medical records, The Clinic's other witnesses also confirmed that this is the normal practice for DBS surgery. For instance, Dr. Miland Deogaonkar, a Clinic neurosurgeon, testified that there exists no rule or regulation requiring that the data be maintained on any type of disk. In fact, Dr. Deogaonkar stated that he very rarely, if at all, places target planning data on a disk. (Video Deposition of Dr. Deogaonker, Tr. 24-26). Dr. Philip Starr, The Clinic's neurosurgery expert witness, also testified that he does not save his target planning data on a disk because like this case, such data is permanently made a part of a patient's medical records and operative report. (Tr. 1151; 1193).

In neither Appellee's Complaint nor any of her expert reports produced before trial did Appellee raise any allegations with respect to "missing data" or that Appellee's target planning

data should have been preserved on a disk. (See Appellee's Complaint; Tr. 887-888; 933). The first time Appellee indicated that there may be a claim related to the alleged "missing data" was in her Request for Supplemental Jury Instruction for an Adverse Inference of Negligence filed on June 24, 2010 – merely one week before the trial was scheduled to commence.

Since there were no actual claims for either spoliation of evidence or an adverse inference of negligence concerning Appellee's target planning data, Appellee's last minute attempt to submit a jury instruction on an adverse inference of negligence was addressed with the Trial Court on the second day of trial, just before opening statements. (Tr. 208-227). After The Clinic's counsel confirmed that there were never any claims for either spoliation of evidence or an adverse inference of negligence, the Trial Court stated the following with respect to Appellee's intention to make a case out of the alleged "missing data:"

THE COURT: That's dangerous ground. We've talked about that. I think it's mistrial area. So we want to be careful.  
(Tr. 274).

Then, during Appellee's counsel's opening statements, with respect to the target plan data, Appellee's counsel incorrectly stated that it was "missing." (Tr. 308). Appellee's counsel stated:

... And there is evidence that is - - **was not preserved** that may have accurately reflected the target planning that should have been done in this case.

\* \* \*

Now, when a patient has a serious complication all medical data should be maintained for core analysis of the cause of the complication. This makes common sense. One, you want to be able to tell the patient what happened. Secondly, you want to be able to learn so it doesn't happen again.

**Margaret Branch's planning target was not saved.**

\* \* \*

The software will tell you in retrospect, if you look at it, whether  
or  
Not someone was right on the targets that they chose. **That is  
missing.**

\* \* \*

Of course, things would have been a lot easier to figure out had  
that software been preserved on the computer. **Her personal  
target data is missing.** And the evidence will show that Dr.  
Machado in the past has saved that. The evidence will show that  
all one has to do to save it is press a save button.

\* \* \*

**The document that will – would have shown what exactly he  
was seeing in pretarget planning is missing.**

\* \* \*

... **There are missing records.** I mentioned that.

\* \* \*

... This is a target planning. This will show - - **if it was available,**  
it would show exactly why this doctor chose those coordinates that  
he mentions in his operative note. Without that, we can't tell if he  
even began off the wrong course because of X or Y or Z. **That is  
missing.**

\* \* \*

... **That missing target planning data. . .**

\* \* \*

... **That is missing**

(Emphasis Added). (Tr. 287; 293; 308; 313; 319; 332-333).

Based upon Appellee's counsel's opening statements in which it became apparent  
that Appellee was going to make an issue of the target planning data not being placed on a  
disk, The Clinic's counsel was compelled to clarify that there was no "missing data" with

respect to Appellee's target plan/mapping. The following comments were made by The Clinic's counsel during opening statements in order to confirm that The Clinic was going to vigorously disprove Appellee's "missing data" claim:

He [Appellee's counsel] has made a claim that they did not keep the information. It's missing.

Every - - - I'm going to show you in a minute - - these doctors have detailed operative notes that they dictate at the time. And there are also handwritten notes with all the exact parameters of every mathematical calculation that was used in this case.

Sometimes they put these on a disk if they later want to use it for a speech or lecture or something.

Their experts are not critical of the fact that a disk wasn't made. Dr. Starr will say I don't keep these on a disk. The information is all there in the operative notes. **And for him to say that there is data missing, there will be no support, no evidence for that.**

\* \* \*

**This is Dr. Machado's detailed operative note and he'll go through it in detail.** They [Appellee] say, "well, we don't know what happened. We can't tell because they didn't save it on a computer."

**Everything is right here in the operative note. It has exact details of all the different coordinates he [Dr. Machado] used, specifically all the numbers from the midline and so forth.**

(Emphasis Added) (Tr. 343-344; 374).

Also during The Clinic's opening statements, it was explicitly established that Dr. Machado was going to reconstruct Appellee's DBS surgery from the actual data from the medical records:

**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) (Tr. 369-370).

As early as The Clinic's opening statements, Appellee was placed on notice that The Clinic intended to defend Appellee's **new claim** for "missing data" by reconstructing for the jury Appellee's actual data contained in her medical records. (*Id.*) Appellee raised this new claim of "missing data" for the first time just before the trial and, therefore, The Clinic reacted accordingly by informing the jury, the Trial Court and Appellee that Dr. Machado would be reconstructing Appellee's target plan/mapping via the actual data contained in her medical records. Of importance, Appellee neither objected nor filed a motion in limine to preclude Dr. Machado from demonstrating the procedure after it became evident during The Clinic's opening statements that Dr. Machado was going to do so during his trial testimony.

Appellee's counsel then pursued this unwarranted "missing data" issue with The Clinic's expert, Dr. Starr. For example, Appellee's counsel made the following inquiries of Dr. Starr:

Q. Doctor, you are aware that the target planning data is unavailable for us; you are aware of that? **For Margaret Branch, it's missing, or unavailable, you are aware of that, right?**

\* \* \*

Q. You are aware of that?

A. I'm aware that the specific plan from a three-dimensional software image that was used to plan the case was not permanently recorded. **Yes. But there are other records of the surgery, such as Dr. Machado's operative note.**

Q. Sure. But you recognize that the true software target data will show a lot more than merely Dr. Machado's dictated operative report, true?

A. It will show the planned trajectory.

(Emphasis Added). (Tr. 1193-1194).

As to Appellee's claim of "missing data" the theme of Appellee's case was that Appellee's target plan/mapping could not be reconstructed without the data being preserved on a disk. For example, with Dr. Starr, Appellee's counsel cross-examined him about the inability to recreate and look at Dr. Machado's target plan/mapping without the actual raw data. (Tr. 1209; 1211;1214). In fact, Appellee's counsel attempted to have Dr. Starr reconstruct a target plan/mapping with the use of an MRI of a cadaver as opposed to Appellee's actual data. (Tr. 1217-1222).

Despite Appellee's contention that her target plan/mapping could not be reconstructed due to the alleged "missing data," Appellee presented her own in-court demonstration of targeting through her expert, Dr. Robert Bakos. (Tr. 858-864). In fact, Dr. Bakos assisted Appellee's counsel in crafting a 2D animation of what Dr. Bakos believed happened in this case. (Tr. 868). Then, the elaborate 2D animation was played for the jury while Dr. Bakos narrated what he believed the animation depicted with respect to Appellee. (Tr. 868-891). In the courtroom, a computer technician assisted Appellee's counsel and Dr. Bakos in the presentation of this in-court demonstration. (*Id.*). The Clinic had no prior notice that Appellee was going to present an elaborate animated demonstration via Dr. Bakos and with the assistance of a computer technician from the University of Rochester (Tr. 1564; 1581-1585).

In response to Appellee's in-court demonstration of the target planning, The Clinic informed Appellee's counsel and the Trial Court that it had its own demonstration. It was explained how Dr. Machado would input the actual data from Appellee's medical records into the Stealth software used for Appellee's surgery in order to show the trajectory of Appellee's target plan. (Tr. 1563-1565). As to the Stealth software, in its Decision, the Eighth District inaccurately stated that the Clinic's in-court demonstration could only be performed on its own

three-dimensional Stealth software. To the contrary, the undisputed evidence was that all equipment used for Deep Brain Stimulation, including the Stealth System, is commercially available to the public at large. (Tr. 1665; 1672; 1688). While there are different manufacturers of equipment for DBS, they all use FDA-approved, commercially available and interchangeable software packages. (*Id.*) Anyone who participates in DBS surgery can simply take the actual data, load it into any of the commercially available software packages and derive the same target plan/mapping. (*Id.*) It is important to note that Dr. Bakos, Appellee's expert, brought in a commercially-available DBS system to trial, along with a technician, and conducted a demonstration that Appellee's counsel did not provide any notice of prior to the testimony. (Tr. 858-864).

When Dr. Machado's proposed in-court demonstration was raised, the Trial Court conducted an extensive oral hearing in which it entertained arguments from both sides. (Tr. 1563-1587). The Clinic's counsel informed the Trial Court that Dr. Machado's in-court demonstration was intended to confirm and show the jury that there was no "missing data" as argued by Appellee from opening statements throughout the entire trial. (Tr. 1564-1565). The reason The Clinic had to have Dr. Machado conduct the in-court demonstration was because the alleged "missing data" issue became a new and key issue in the entire trial immediately after Appellee's counsel stated in opening statements that Appellee's data was missing. (Tr. 1565-1566). Consequently, Dr. Machado had the right to demonstrate for the jury that Appellee's target plan/mapping was not missing but, instead, could be reconstructed with the actual data contained in her medical records and operative note. (Tr. 1566-1567).

At this point, there was a lengthy exchange between the parties and the Trial Court as to how Dr. Machado was going to take Appellee's actual data from the medical records and

demonstrate for the jury how her target plan/mapping was generated. (Tr.1567-1587). Additionally, it was pointed out to the Trial Court how Appellee's expert, Dr. Bakos, was allowed to bring in a computer system from the University of Rochester and with the assistance of a computer technician from the University, input numbers into the system. (Tr. 1564; 1581-1585).

After conducting the hearing, the Trial Court properly determined that The Clinic's demonstration would be admissible in response to Dr. Bakos' in-court demonstration and Appellee's new and unsubstantiated claim that her target plan data was "missing." The Trial Court noted as follows:

**. . . you [Appellee] created a big to do about this, the original stuff, and I think you have recreated an image in the jury's mind that those big billboards constitute the history of the case and the trajectory you marked –**

**\* \* \***

**. . . This is their [The Clinic] attempt to reconstruct the scene, and she's going to have to lay a foundation for it to justify it.**

**\* \* \***

. . . I indicated that I would explain this is a recreation, and we're missing something, we don't have the missing thing.

**This is a demonstrative effort by the Plaintiff [sic] to respond to some of your arguments.**

(Emphasis Added). (Tr. 1585-1587; 1644).

After the Trial Court recognized that The Clinic should be allowed to refute Appellee's allegations of "missing data," Appellee's counsel stated to the Trial Court "[a]s long as you indicate that this is an attempt to recreate." (Tr. 1644). Then, during the trial testimony of Dr. Machado and prior to the in-court demonstration, the Trial Court instructed the jury as follows:

The Court understands that Defendant intends at this time to reconstruct the targeting plan from Dr. Machado's operative notes.

**You're instructed that this is an attempted simulation, or recreation of the evidence, and like all other evidence you will attach such weight, if any, as you find appropriate.**

(Emphasis Added). (Tr. 1656).

During Dr. Machado's trial testimony, Dr. Machado laid a proper foundation with respect to the creation of the in-court demonstration of the target plan. (Tr. 1664-1689). Dr. Machado explained the Stealth software system and how the actual data in Appellee's operative note and other medical records were entered into the system and recreated Appellee's target plan. (*Id.*). Basically, Dr. Machado used the data recorded in 2007 contained in Appellee's medical records and entered this data into the same software used in preparation of the target plan for her surgery (*Id.*).

Then, during Dr. Machado's cross-examination following his in-court demonstration, Appellee's counsel vigorously questioned the reliability of Dr. Machado's demonstration versus the actual "fused image" in February 2007. (Tr. 1728-1734; 1769-1771). Dr. Machado effectively explained to the jury in response to Appellee's counsel's inquiry that the fused image he recreated in the courtroom was essentially the same fused image he created in February 2007. (Tr. 1732-1733). Once again, the purpose of Dr. Machado's in-court demonstration was to explain and show the jury that the actual data contained in Appellee's operative note and medical records still existed. More importantly, The Clinic was compelled to present Dr. Machado's in-court demonstration in order to refute Appellee's claim of "missing data" that was raised for the very first time on the eve of trial.

After The Clinic rested its case and the Trial Court addressed a Motion for a Directed Verdict and other matters, the parties presented their respective closing arguments. Although the Trial Court previously rejected any claims for spoliation of evidence or adverse inference of negligence because The Clinic did not maintain the target planning data on some type of disk, Appellee's counsel attempted to address the "missing data" during his rebuttal closing arguments. (Tr. 269-277; 1925-1926).<sup>1</sup> In fact, Appellee's counsel took this one step further by comparing this case to the BP Oil Disaster. (*Id.*). Recognizing that this was improper, 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." (*Id.*).

The Trial Court's sustaining of The Clinic's objection was specifically limited to Appellee's counsel's inflammatory and prejudicial comparison of this case to the BP Oil Disaster, and this is confirmed by the following:

And is it just a coincidence that the best piece of evidence as to what happened is missing? Is it a coincidence? **You know, it's like the BP Oil Disaster. Everybody is reading about it. It's like after the explosion.**

MS. CARULAS: **Objection.**

THE COURT: **Sustained.**

MR. BECKER: **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.**

MR. BECKER: Fine.

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

(Emphasis Added). (Tr. 1925-1926).

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<sup>1</sup> Appellee's counsel admitted that there was no claim for spoliation of evidence or punitive damages. (Tr. 272).

The total extent of the Trial Court's limitation of Appellee's counsel's rebuttal closing argument was that Appellee's counsel could not make an analogy between this case and the BP Oil Disaster. Contrary to the Eighth District's misinterpretation, the above colloquy had nothing to do, whatsoever, with an adverse inference of negligence claim or a prohibition on Appellee's counsel to argue an adverse inference of negligence during closing arguments.

Thereafter, the Trial Court gave its charge to the jury. Included within the jury instructions was a "different methods" instruction which was legally and factually supported by the evidence. (Tr. 1943-1944). In addressing the jury instructions with the parties, the Trial Court recognized that the trial testimony of Appellee's own expert, Dr. Bakos, supported the "different methods" jury charge:

**. . . you got your Dr. Bakos, talks about indirect, direct. I mean, this is all over the case. You should decide the methods and the care and treatment used in the care are in accordance with the private standard of care.**

(Emphasis Added). (Tr. 1815).

As to Dr. Bakos' trial testimony on targeting, he agreed that there were different methods of targeting, i.e. indirect and direct. (Tr. 953-955; 996). In fact, Dr. Bakos explicitly agreed that there existed different schools of thought and approaches as to how to perform a DBS surgery. For example, Dr. Bakos testified as follows:

**Now, had that been me I would have said, what am I doing at 17? I want to be between 20 and 22. . .**

**\* \* \***

**Q. . . . if you are doing target planning and doing a procedure, learning from your passes on the left side, should you take what you learn on the left-side when you consider what you are doing on the right side?**

**A. In my practice, I would.**

\* \* \*

Q. But what should he have learned on the left side and what didn't he apply?

A. **Again, I would rather address myself. . . .**

\* \* \*

Q. And you understand that the approach that was done at The Cleveland Clinic, that is done at many, many centers around the country, is not just to go and find one target in the GPI and place the macroelectrode at that point in time, but instead to do that mapping out before finding a place for the final electrode; are you aware of that?

A. The first about how much of the country? I know many places where people try to go directly to the target. And I don't know the percentages.

Q. **Okay. You understand that there are, as in all areas of medicine, different schools of thought and approaches as to how to perform a given surgery, true?**

A. **Within confines, yes.**

\* \* \*

Q. Now, are you aware, sir, **your approach is to do the less amount of tracks as possible. That's what you told the jury.**

A. **I think the least amount is best for patient safety.**

Q. **You are aware there are other experts and institutions who disagree and take a different approach, true?**

A. **And I with them. Yes.**

Q. **You would agree that Dr. Starr... takes a different mapping strategy than what you have espoused here to the jury, true?**

A. **Yes.**

\* \* \*

Q. Sir, was there a transcript in your file, notes where specifically someone had been consulted and advised the Branches or their attorneys, that they do their recording between 15 and 25 millimeters, yes or no?

A. I believe there was.

\* \* \*

Q. **Relative to targeting are there two schools of thought on how to target or is there just one school? Is there just one way to do targeting, right?**

A. What I think has happened here is we have lost the view that **myself and my colleagues use both direct and indirect. . . .**  
My objection to what Dr. Machado has been, was that **he did the direct, which I have no problem with. . . .**

(Emphasis Added). (Tr. 871; 892; 955-957; 965; 996).

In addition to Dr. Bakos establishing that there exists different schools of thought with respect to performing DBS surgery, The Clinic's expert, Dr. Starr, similarly testified to different schools of thought:

Q. **Is there variability between surgeons and institutions as to how many tracks are performed or what ones practiced here versus a different institution?**

A. **Yes, there is.** The microelectrode recording technique is a standard. While it is a standard technique in this kind of surgery, it's not standardized exactly how much time you spend doing it or how many different penetrations of the brain that you make. **Some people might do one penetration, but many groups – most groups do multiple penetrations for this target and may go up to even five penetrations per side.**

Q. And was the approach used in this particular case by Dr. Machado a reasonable approach and consistent with the standards?

A. It was a very standard approach to this kind of surgery.

(Emphasis Added). (Tr. 1144).

After the jury was properly charged, it deliberated for approximately one hour before returning a **unanimous** defense verdict in favor of The Clinic. Once again, the jury found that The Clinic, through its employees, was not negligent. Therefore, the jury never considered the issues of either proximate cause or damages. (Tr. 1967). As the Dissent correctly noted, there was ample evidence in support of the jury's defense verdict. Appellee's theory of negligence was that the target plan/mapping was off and as a result, this led to injury to the vessels of the ventricle wall. However, it was established that it is not negligent to go through the ventricle and hit the wall. (Tr. 549; 1152; 1155; 1187-1188; 1215; 1715; 1718). Also, even if one plans to avoid the ventricle, an inadvertent hitting of the ventricle wall or going into the ventricle does not constitute a negligent act. (*Id.*).

More importantly, independent of Dr. Machado's in-court demonstration, the evidence established that the procedure did not go through Appellee's ventricle. (Tr. 1155-1156; 1230; 1502; 1536; 1555). The nature of Appellee's bleed, as confirmed through subsequent radiographic imaging, originated in the basal ganglia, i.e. the intended target for DBS surgery for Appellee's dystonia. (*Id.*). Clearly, the jury simply chose to believe The Clinic's evidence and experts and rejected the opinions of Dr. Bakos, who never performed this procedure, was retired and had questionable credibility. (Tr. 912-916; 923-925).

Appellee timely appealed to the Eighth District Court of Appeals. Appellee raised six Assignments of Error, three of which are the subject of this appeal, i.e. 1) that the Trial Court abused its discretion in permitting The Clinic to present an in-court demonstration; 2) that the Trial Court abused its discretion with respect to her counsel's rebuttal closing arguments; and 3) that the Trial Court abused its discretion in giving the different methods jury instruction.

On August 11, 2011, the Eighth District issued its decision reversing the jury's 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, Appellee was prejudiced and her substantial rights were affected. (Appx. 14-15 at ¶¶ 27-28). Yet, in addressing Appellee's assigned error with respect to the different 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. 22 at ¶53). So, in one assignment of error, the Eighth District found that the target/mapping plan was relevant to the in-court demonstration 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 Appellee'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 Appellee's case changed. Despite the fact that The Clinic's in-court demonstration was presented to the jury in order to dispute Appellee's new and unsubstantiated 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*, 8th Dist. No. 83034, 2004-Ohio-

4988, which is both legally and factually inapplicable to this case. Indeed, the Eighth District repeatedly referred 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 Appellee's counsel's statement during rebuttal closing argument pertaining to the BP Oil Disaster was an abuse of discretion is legally and factually flawed. First, and foremost, the Eighth District's decision is completely devoid of any mentioning of Appellee's counsel's reference to the BP Oil Disaster, which was the sole bases for The Clinic's objection and the Trial Court's ruling (Tr. 1925-1926; Appx. 22-26 of ¶¶ 56-64). Instead, the Eighth District confused the legal elements of a spoliation of evidence claim with an adverse inference of negligence claim, which had nothing to do with the Trial Court's sustaining of The Clinic's objection to the BP Oil Disaster comparison. (*Id.*)

The Eighth District failed to recognize that the only basis for sustaining the objection was to inform the parties and the jury that Appellee's counsel's reference to the BP Oil Disaster was improper, because 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 Appellee from arguing an adverse inference of negligence is both legally and factually 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 Appellee'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. 21 at ¶51).

This is a legally inaccurate statement by the Eighth District in that it 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 Appellee's case against The Clinic as seen in Appellee's own in-court computer demonstration of the target/mapping plan and the testimony of Appellee'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. 22 at ¶54). 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. (*Id.*).

The legal and factual inconsistencies and the flawed conclusions in the Eighth District's decision were adequately addressed in the Dissenting Opinion. First, from an evidentiary standpoint, the Dissent properly recognized that the jury was justified in finding that The Clinic, through its employees, did not deviate from the standard of care and then returning a unanimous defense verdict in favor of The Clinic (Appx. 27-28 at ¶¶65, 69). The Dissent recognized that a stroke is a risk of any DBS surgery and that hitting the ventricle in such a highly vascular procedure is not a deviation from the standard of care. (*Id.*).

As to Dr. Machado's in-court demonstration, the Dissent properly distinguished between the use of demonstrative evidence and the admission of actual evidence that goes to the jury. The Dissent properly determined that Dr. Machado's in-court demonstration was presented as demonstrative evidence and that the Trial Court correctly clarified for the jury that it was "merely an attempted simulation or re-creation of the evidence." (Appx. 27 at ¶¶66-67).

Additionally, Appellee could not reasonably complain surprise since The Clinic's counsel stated in opening statements that Dr. Machado was going to reconstruct the surgery for the jury. (Appx. 27-28 at ¶68).

The Dissent also found that the different methods jury instruction was warranted because "different" mapping strategies were put forth by the expert witnesses for both sides. (Appx. 28 at ¶70). With respect to the disposition of the assigned error concerning Appellee's rebuttal closing argument, The Dissent further determined that the majority improperly relied upon the Eighth District's own decision in *Cherovsky vs. St. Luke's Hosp. of Cleveland*, 8<sup>th</sup> Dist. No. 68326, 1995 WL 738608 (Dec. 15, 1995) by essentially confusing the claims for spoliation of evidence and an adverse inference of negligence (Appx. 28 at ¶71). Finally, the Dissent noted how the majority misinterpreted the meaning of an "unexplained failure" or refusal to produce evidence. (*Id.*).

As brought to light by the Dissent, it is clear that the legal and factual conflicts and inconsistencies in the Eighth District's jurisprudence require 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's review of the Eighth District's legally and factually flawed Decision warrants a reversal of the Eighth District's Decision and reinstatement of the **unanimous** verdict in favor of The Clinic.

## **II. STATEMENT OF THE FACTS**

Appellee presented to The Clinic on November 3, 2006 for evaluation for DBS surgery for cervical dystonia. Appellee was initially seen by a movement disorders fellow, Jawad Bajwa, M.D., and then movement disorders neurologist, Dr. Benjamin Walter. Appellee reported a past

medical history of hypertension, chronic pain, depression and a surgical history of hysterectomy. Additionally, in the Movement Disorders Questionnaire that Appellee completed before her arrival at The Clinic, Appellee reported that she had chronic pain since 1989 and dystonia since 2005. Appellee's chief complaints were "neck spasms, involuntary movement of head, head stays down on chest, muscle pain in neck and trapezius, memory problems." (Tr. 1454-1458; Exhibits "JJ-XX").

In the initial evaluation, Appellee reported chronic pain, neck flexion with significant pain and difficulty with speech and swallowing. Appellee stated that her flexion improved with her holding up her right chin with her hand. Appellee further reported disability in her employment, driving, reading and every day living. Additionally, Appellee suffered from short term memory loss, like where she put her keys, purse and other items. (*Id.*).

On the same day, neurologist, Dr. Vitek, was consulted by Dr. Walter. Basically, Dr. Vitek provided Dr. Walter with a quick curbside consultation. The plan was to start Appellee on a pre-operative regimen of imaging studies and a neuropsychological evaluation to determine her candidacy for DBS surgery. (Tr. 1458-1463; Exhibits "JJ-XX"). Dr. Walter also arranged for her to see another neurologist, Dr. Itin, for possible Botox therapy. Because Appellee was from out of town, efforts were made to accommodate her and, thus, Dr. Itin was able to see Appellee the same day. Dr. Itin thought that Appellant could benefit with a final attempt at Botox therapy. (Tr. 1463-1464; Exhibits "JJ-XX").

Dr. Walter also consulted neurosurgeon, Dr. Machado, who evaluated Appellee that same day. Following his evaluation, Dr. Machado determined that Appellee was a potential candidate for DBS surgery and, thus, he discussed the risks, benefits and alternatives of DBS surgery with her and her husband, Turner Branch. (Tr. 1607-1614). The Branches were also given a 10-page

document entitled “The Cleveland Clinic Foundation Consent to Participate in a Humanitarian Use Device Therapy.” This document explained in great detail the nature of the procedure and further documented that there were a number of potential complications with the procedure, including “Paralysis, coma and/ or death, bleeding inside the brain (stroke), among others.” Appellee signed the consent form acknowledging the potential risks. (Tr. 1614-1619; Exhibit “E”).

Based on the pre-operative work-up as well as the general destination of electrodes, a detailed target-plan was performed by Dr. Machado prior to surgery both with the use of computer-technology as well as his experience and expertise in this area. The locations of placement of the burr holes were determined during this process as were the routes for the cannulas placed. (Tr. 1623-1637).

On February 19, 2007, Appellee underwent the DBS procedure performed by Dr. Machado and Dr. Walter, along with the nursing and anesthesia staff. The procedure consisted of bilateral placement of permanent electrodes, which would then be hooked up to an impulse generator in Appellee’s chest that was to be inserted at a later date. (Tr. 1638-1643; Exhibits “JJ- XX”).

During the procedure, Dr. Machado drilled the burr holes without incident, with the right burr hole being done followed by the left. Continuing then on the left side, again based on the predetermined targets, a cannula was inserted through the burr hole. Dr. Machado's visualization of where this was going ended at the insertion site. The coordinates and planned angle of the cannula's path were basically dependent on how the machine was programmed. Three such electrodes were inserted, one at a time, to determine the boundaries of the desired target which, in this case, was the globus pallidum. In other words, one electrode was used to determine the

bottom boundary of the target, one the lateral boundary and one the anterior boundary. (Tr. 1656-1705; Exhibits “JJ-XX” -- Appellee’s operative report).

Once the cannula was inserted at the desired length, the stylet was removed and a temporary microelectrode was inserted. The procedure was then hands-off because of the electrical current used and was remotely controlled by Dr. Walter. This temporary microelectrode delivered audio information about the cells, one neuron at a time, to Dr. Walter who listened to the information and determined the type of neuron it was, and thus, the level of the electrode. The audio information basically sounded like radio static, but the patterns of the sounds enabled Dr. Walter to identify the type of cell it was. This part of the procedure was tedious and took a long time, while Dr. Walter listened to the cells to better define the boundaries of the target. (*Id.*).

As stated above, three separate tracks were performed with these microelectrodes and the boundaries of the target area were better defined. Using this information, the macroelectrode or permanent electrode was then placed in the target area. This was the electrode that would remain in place and subsequently be wired to the impulse generator. For dystonia patients, the desired location was the globus pallidum, which was believed to be the area of the brain responsible for sending the abnormal impulses that cause the dystonia. The goal was to place the electrodes in and fire impulses that block the abnormal impulses sent from the brain. (*Id.*).

The procedure on the left side of Appellee’s brain and the permanent electrode was placed successfully and without incident. While the procedure was being performed on the right side, Dr. Machado observed some bleeding from the tip of the cannula. The bleeding and blood pressure were aggressively treated and the attempt to place the right DBS electrode was aborted. (Tr. 1705-1709).

Appellee was noted to have weakness in her left arm following the bleed. Therefore, Appellee was urgently taken for a CT Scan of the brain, which revealed a hematoma centered in the right lentiform nucleus of the brain. Following the CT scan, Appellee was taken to the NICU and remained in the NICU where she continued to improve until her discharge on March 1, 2007. (Tr. 1709-1710). Her husband arranged for her to be returned to Houston, Texas for rehabilitation.

### III. LAW AND ARGUMENT

#### FIRST PROPOSITION OF LAW

#### **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**

The admission of experimental or demonstrative evidence is within the discretion of the trial court. *Vogel vs. Wells*, 57 Ohio St. 3d 91, 566 N.E. 2d 154 (1991). Demonstrative evidence is admissible if the experiment or demonstration is relevant, conducted under substantially similar conditions as those of the actual occurrence and the evidence of the experiment does not consume undue time, confuse the issues or mislead the jury. *State vs. Jackson*, 86 Ohio App. 3d 568, 621 N.E. 2d 710 (1993).

To render experiments or demonstrations admissible, the conditions need not be identical with those existing at the time of the occurrence in question. *Id.* at ¶ 1. Any dissimilarities between the experiment and the incident generally goes to the weight of the evidence rather than its admissibility. *Id.* at ¶ 2.

With respect to Dr. Machado's in-court demonstration regarding the target plan, it was simply offered as an illustration for the jury. Dr. Machado explained and demonstrated to the jury what the actual data contained in Appellee's operative note and medical records reflected

when entered into the computer software, just like he did in February 2007. (Tr. 1664-1689). It was not offered to actually recreate the events involving Appellee. The demonstration by Dr. Machado was presented for purely demonstrative purposes. Therefore, the demonstration was not so inherently misleading to the jury that its admission was an abuse of discretion by the Trial Court.

Moreover, Appellee was permitted to extensively cross-examine Dr. Machado and to emphasize the dissimilarities between the in-court demonstration and the events involving Appellee. (Tr. 1728-1734; 1769-1771). Any dissimilarities between Dr. Machado's in-court target plan demonstration and the actual occurrence properly went to the weight given to the demonstration rather than its admissibility. Thus, the Trial Court did not abuse its discretion in allowing Dr. Machado's in-court target plan demonstration.

Additionally, the Trial Court properly allowed Dr. Machado's in-court demonstration in direct response to the in-court demonstration by Appellee's expert, Dr. Bakos, and also Appellee's counsel's questions and statements concerning the "missing" materials. As the Trial Court aptly noted, Appellee presented an elaborate in-court demonstration in which Dr. Bakos attempted to explain to the jury what he believed occurred in this case and how The Clinic's target plan was allegedly negligent. During this demonstration, a computer technician assisted both Dr. Bakos and Appellee's counsel in displaying this sophisticated and "high tech" presentation. (Tr. 858-864). Clearly, The Clinic had the right to respond to Appellee's in-court demonstration with its own. In fact, The Clinic's in-court demonstration was more reliable and accurate than Appellee's because Dr. Machado took Appellee's actual data directly from the medical records.

The most glaring error in the Eighth District's Decision with respect to Dr. Machado's in-court demonstration is the Eighth District's total failure to appreciate the circumstances surrounding the necessity of Dr. Machado's in-court demonstration. Appellee never asserted an allegation of "missing data" until one week before the commencement of trial when she filed her Request for Supplemental Jury Instruction for an Adverse Inference of Negligence. In neither Appellee's Complaint nor through any of her experts did Appellee raise a "missing data" claim. In fact, Appellee's expert, Dr. Bakos, never opined in either his expert report or at his discovery deposition that it was negligent for The Clinic to not maintain Appellee's target planning data on a disk. In other words, The Clinic had no notice, whatsoever, throughout these proceedings that Appellee was going to make an issue about allegedly "missing data." (Tr. 272-274)

The fact that this "missing data" issue came as a complete surprise to The Clinic on the eve of trial is reflected in the extensive oral arguments entertained by the Trial Court just after *voir dire* and before opening statements. (Tr. 269-278). The Clinic vigorously argued that Appellee's "missing data" claim was basically sprung upon it when Appellee sought an adverse inference of negligence jury charge (Tr. 272-274). Thereafter, Appellee's claim that there was "missing data" became the central theme of her case as demonstrated in Appellee's counsel's opening statements and closing arguments and during the examinations of practically all trial witnesses. It was inevitable that The Clinic had to adjust its defense in order to establish that Appellee's target plan/mapping was not "missing" but, in fact, could be reconstructed by extracting the data from the medical records.

Contrary to the Eighth District's characterization of Dr. Machado's in-court demonstration as an "eleventh hour disclosure," Appellee was well aware at the outset of the trial that Dr. Machado was going to reconstruct the surgery for the jury. As the Dissent correctly

noted, The Clinic's counsel informed the jury in opening statements that during Dr. Machado's trial testimony, Dr. Machado was going to reconstruct Appellee's surgery. (Appx. 27-28 at ¶68; Tr. 369-370 at ¶68). Despite this notification of The Clinic's plan to have Dr. Machado recreate the DBS surgery, Appellee neither objected nor filed a Motion in Limine to such a demonstration by Dr. Machado. As such, there was no basis, whatsoever, for Appellee to claim that Dr. Machado's in-court demonstration came as a surprise.

To make matters even worse, the Eighth District completely mischaracterized the facts with regard to the software used by Dr. Machado for the in-court demonstration. The Eighth District was simply wrong when it stated: "the re-creation could only be performed on the Clinic's three-dimensional "stealth" software, to which Branch did not have access." (Appx. 13 at ¶23). This is not true and not supported by either the trial transcript or the record upon appeal. To the contrary, the Stealth software system used for Appellee's DBS is FDA approved and commercially available to the public. While there are different manufacturers for DBS Equipment, they are all commercially available and have interchangeable software packages. (Tr. 1665; 1672; 1688).

The Eighth District apparently misstated the facts with respect to the Stealth software as another justification for finding that the Trial Court abused its discretion in allowing Dr. Machado's in-court demonstration. The Eighth District could not reasonably conclude that Appellee did not have access to the software when her own expert, Dr. Bakos, brought in a commercially available DBS system to trial and conducted a demonstration with assistance of a computer technician. (Tr. 868-891).

Additionally, during Dr. Machado's trial testimony, Dr. Machado confirmed that there are several different software systems that can be used to obtain the same results for a

target/mapping plan (Tr. 1665). Dr. Machado uses the Stealth supplied by Medtronic while there are other software systems available from Brain Lab, Electra and another company that Dr. Machado could not recall the name. (*Id.*). All these software packages are FDA approved and do the same thing with respect to coordinating the target/mapping plan. (Tr. 1780). So, all DBS software packages were available to Appellee and, in fact, Appellee's expert utilized a DBS software package for his own in-court demonstration. As such, the Eighth District's inaccurate statement that a software package was unavailable is further proof of its legally and factually flawed decision.

Finally, the jury was undoubtedly made aware that Dr. Machado's demonstration was not supposed to represent an actual depiction of the events of February, 2007. The Trial Court explicitly informed the jury that Dr. Machado's in-court demonstration was a simulation/recreation of the evidence. (Tr. 1656). Appellee could not show how she was prejudiced by Dr. Machado's testimony, especially when she was permitted to thoroughly cross-examine Dr. Machado and to point out the dissimilarities between his demonstration and the events of February, 2007. Once again, the dissimilarities went to the weight of Dr. Machado's testimony rather than its admissibility. Accordingly, the Trial Court did not abuse its discretion with respect to Dr. Machado's testimony.

In determining that the Trial Court abused its discretion in allowing the Clinic to present an in-court demonstration of Appellee'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 Eighth 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, supra*. 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 District 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 has no bearing, whatsoever, to the issues raised in this case 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. 27 at ¶66). 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 Appellee'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 Appellee'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 Appellee'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]hroughout 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. 22-23 at ¶56). The Clinic was compelled to respond to Appellee'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."

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

Finally, contrary to the Eighth District's conclusion, as early as opening statements, Appellee was well aware that Dr. Machado was going to demonstrate that there was no "missing data". Yet, Appellee neither objected nor filed a motion in limine after it became evident in opening statements that Dr. Machado was going to demonstrate for the jury Appellee's surgery. Appellee was not surprised by Dr. Machado's in-court demonstration, especially when it was presented in direct response to Appellee's unwarranted claims of "missing data."

This Court should eliminate the obvious confusion that the Eighth District has created between the use of demonstrative evidence and the admission of trial exhibits into evidence and hold that the Trial Court properly exercised its discretion in allowing Dr. Machado's in-court demonstration.

### **SECOND PROPOSITION OF LAW**

**The Eighth District's Decision Finding that Appellee Had The Inability to Argue An Adverse Inference of Negligence From One Single Reference To The BP Oil Disaster in Rebuttal 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 has broad discretion to control the proceedings before it. *State ex. Rel. Butler vs. Demis*, 66 Ohio St.2d 123, 420 N.E. 2d 116 (1981). A trial court's limitation in closing arguments should not be reversed absent an abuse of discretion. *Pang vs. Minch*, 53 Ohio St. 3d 186, 559 N.E. 2d 1313 (1990). Thus, the determination of whether remarks made during closing arguments exceeded the bounds of permissible argument is a discretionary function to be performed by the trial court. *Id.*

The general rule is that counsel in closing argument may comment upon evidence adduced at trial, but it is improper for counsel to comment on evidence which was excluded or declared inadmissible by the trial court. *Drake vs. Caterpillar Tractor Co.*, 15 Ohio St.3d 346, 474 N.E. 2d 291 (1984). Counsel is prohibited from making statements in closing arguments which are intended to get evidence before the jury which counsel was not entitled to have the jury consider in the first place. *Id.* In other words, it is improper for counsel to make remarks about matter he/she knows or ought to know cannot be shown by admissible evidence. *Maggio vs. Cleveland*, 151 Ohio St. 136, 84 N.E. 2d 912, paragraph two of the syllabus (1949).

In this case, Appellee's counsel readily admitted that there was no claim for spoliation of evidence and/or punitive damages. (Tr. 272) Additionally, when Appellee submitted to the Trial Court her proposed jury instruction on an adverse inference of negligence due to the alleged failure to preserve Appellee's target plan data on some type of disk, the Trial Court properly rejected Appellee's proposed jury instruction. In essence, Appellee had no basis, whatsoever, to claim that The Clinic had somehow lost, misplaced or destroyed Appellee's target plan data. To the contrary, Appellee's target plan data remains a part of Appellee's operative note and medical records.

Despite no claim or evidence that The Clinic somehow lost, discarded, misplaced or destroyed Appellee's target plan data, during rebuttal closing arguments, Appellee's counsel improperly commented that Appellee's data was "missing" and then he attempted to make an analogy of this case to the BP Oil Disaster. Yet, prior to closing arguments, Appellee's counsel was well aware that there were no claims for spoliation of evidence or punitive damages and that there was no basis for an adverse inference of negligence concerning Appellee's target plan data. These claims were extensively addressed and rejected by the Trial Court and, in fact, Appellee's counsel admitted that Appellee had no claims for spoliation of evidence and/or punitive damages.

Nevertheless, Appellee's counsel attempted to comment on "missing data" and refer to a highly publicized national disaster and alleged cover-up in order to sway the jury and invoke the passion and prejudice of the jury. Undoubtedly, this was completely improper and the Trial Court correctly sustained The Clinic's objection to Appellee's counsel's comments. The Trial Court's limitation of Appellee's rebuttal closing arguments on this subject was proper and well within its discretion.

More importantly, the Trial Court properly sustained The Clinic's objection to Appellee'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 Appellee's counsel's statements regarding the BP Oil Disaster and then the Eighth District erroneously applied the law of an adverse inference of negligence to the Trial Court's ruling. Simply put, the Eighth District was evidently confused with what constitutes a claim for spoliation of evidence with a claim for an 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. (Tr. 1925-1926). This Court should simply reverse the Eighth District's Decision herein on the sole basis that there was no legal or factual basis for the Eighth District to make this an issue about an adverse inference of negligence where the Trial Court's correct ruling was limited to the BP Oil Disaster referenced by Appellee's counsel.

However, The Clinic is compelled to address the Eighth District's legally flawed holding that Appellee was prevented from arguing an adverse inference of negligence. An adverse inference of negligence claim does not require evidence of intentional destruction or suppression of evidence. *Cherovsky, supra*. 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.*, 67 Ohio, St. 3d 28, 615 N.E. 2d 1037 (1993).

The Eighth District simply mixed up these two claims when it held that Appellee was precluded from pursuing a claim for an adverse inference of negligence. The Trial Court

properly sustained the Clinic's objection to Appellee's counsel's reference to the BP Oil Disaster because Appellees 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. Appellee was not precluded from arguing an adverse inference of negligence claim in connection with Appellee's allegation of "missing data." In fact, the Eighth District aptly noted on numerous occasions that Appellee 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. 23-26 at ¶¶ 56-63). 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.

Furthermore, the Dissent properly determined that the majority's reliance upon the *Cherovsky* decision was misplaced. (Appx. 28 at ¶71). First, the *Cherovsky* case involved a spoliation of evidence claim which this case does not. Next, the *Cherovsky* decision noted that an adverse inference of negligence claim may be pursued if there exists an "unexplained failure" or refusal to produce relevant evidence. In this case, there was **no** "unexplained failure" or a refusal to produce relevant evidence. As established throughout the entire trial, the original fused image is not ordinarily retained. Instead, the actual data of Appellee's target/mapping plan is permanently contained in the medical records.

This Court should eliminate the confusion of the Eighth District's misinterpretation of a spoliation of evidence claim with a claim for an adverse inference of negligence claim by holding that the Trial Court properly exercised its discretion in sustaining The Clinic's objection to Appellee's counsel's inflammatory and prejudicial reference to the BP Oil Disaster.

### **THIRD PROPOSITION OF LAW**

#### **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, The Eighth District And Other Appellate Courts Throughout Ohio**

The purpose of the jury charge is to clearly and concisely state the principles of law necessary for the jury to accomplish the purpose desired. *Cleveland Elec. Illum. Co. vs. Astorhurst Land Co.*, 18 Ohio St.3d 268, 480 N.E. 2d 794 (1985). A jury instruction is proper if it correctly states the law and is applicable in light of the evidence adduced at trial. *Murphy vs. Carrollton Mfg. Co.*, 61 Ohio St.3d 585, 575 N.E. 2d 828 (1991). It is well within the discretion of the Trial Court to determine whether the evidence presented at trial is sufficient to require a particular jury instruction. *State vs. Wolons*, 44 Ohio St.3d 64, 541 N.E. 2d 443 (1989). When considering the appropriateness of a jury instruction, the reviewing Court must review the instructions as a whole and determine whether the jury instruction probably misled the jury in a manner that materially affected the complaining party's substantial rights. *Becker vs. Lake Cty. Mem. Hosp. West*, 53 Ohio St.3d 202, 560 N.E. 2d 165 (1990).

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, 2000-Ohio-483, 721 N.E. 2d 1011. 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." (Tr. 1815). Appellee's own expert, Dr. Bakos, readily agreed that there were different and equally acceptable approaches to Appellee's DBS surgery. For example, Dr. Bakos explicitly agreed to the following:

1. In medicine, there are different schools of thought as to how to perform a surgery;
2. Dr. Bakos' approach to DBS surgery is to do the least amount of tracks as possible whereas other experts and institutions disagree and take different approaches; and
3. The Clinic's expert, Dr. Starr, takes a different mapping strategy than what Dr. Bakos espouses to.

(Tr. 871; 892; 953-957; 965; 996).

Based solely upon Dr. Bakos' trial testimony, the "different methods" jury charge was clearly warranted. Additionally, The Clinic's expert, Dr. Starr, testified that there is a variability between surgeons and other institutions as to how to perform DBS surgery (Tr. 1144). Undoubtedly, between Dr. Bakos and Dr. Starr, a different methods jury charge was warranted, because as the Trial Court acknowledged, evidence of different methods was "all over the case." (Tr. 1815).

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. In fact, it is well recognized that an inadvertent hitting of the ventricle

during DBS surgery does not in itself constitute a negligent act. (Tr. 549; 1152; 1155; 1187-1188; 1215; 1718). The Eighth District completely misconstrued Dr. Machado's testimony and, therefore, its rejection of the different methods jury charge was in error.

Even if a "different methods" jury charge was not warranted, which The Clinic denies, Appellee failed to show in the record how the Trial Court's jury instructions, as a whole, led to the wrong verdict. The **unanimous** defense verdict rendered by the jury was supported by the evidence and, thus, Appellee could not establish that the "different methods" jury instruction corrupted the remainder of the jury instructions.

Moreover, the Eighth District evidently applied the wrong standard of review with respect to the different methods jury charge. In its Decision, the Eighth District explicitly rejected Appellee's position that the Trial Court's jury charge on difference methods was governed by a *de novo* review:

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 instruction under an abuse of discretion standard.

(Appx. 20 at ¶49).

Although the Eighth District properly recognized that Appellee's assigned error on the different methods jury instruction was governed by the abuse of discretion standard of review, the Eighth District simply concluded that the Trial Court "erred" in giving the different methods jury instruction. (Appx. 22 at ¶ 54). The Eighth District's Decision is completely devoid of any abuse of discretion review of the Trial Court's jury charge, i.e. how was the Trial Court's giving of the different methods jury instruction unreasonable, arbitrary or conscionable? The Eighth District's failure to apply the proper standard of review is further proof of its legally and factually flawed reasoning.

Finally, if the target/mapping plan was of such importance to the Eighth District's disposition of Appellee's assigned error pertaining to the in-court demonstration, it should have been equally important to the Eighth District's disposition of Appellee'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. 14-15 at ¶¶ 27-28; Appx. 22 at ¶ 53). Not only was this determination inconsistent with the Eighth District's analysis of the in-court demonstration issues, it was completely wrong. Appellee'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.

This Court should reverse the Eighth District's legal and factual misapplication of the different methods jury instruction properly given by the Trial Court.

#### **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 elements of an adverse inference of negligence claim and the appropriateness of a different methods jury instruction, its Decision is also full of legal and factual inconsistencies that deserves a reversal and a reinstatement of the jury's **unanimous** verdict in favor of The Clinic. 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 should correct the injustice caused by the Eighth 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 reverse the Eighth District's decision and reinstate the **unanimous** verdict that the jury, as the trier of the fact, properly returned in favor of The Clinic.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and accurate copy of the foregoing has been served upon the following party via regular U.S. mail, postage prepaid, this 12<sup>th</sup> day of March, 2012:

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ORIGINAL

IN THE SUPREME COURT OF OHIO

MARGARET BRANCH, et al.,

Appellees,

v.

THE CLEVELAND CLINIC  
FOUNDATION,

Appellant.

11-1634

On Appeal from the Cuyahoga County  
Court of Appeals Eighth District  
Case No. CA-10-095475

NOTICE OF APPEAL OF APPELLANT  
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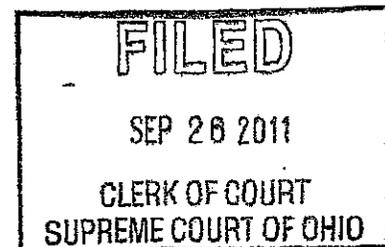
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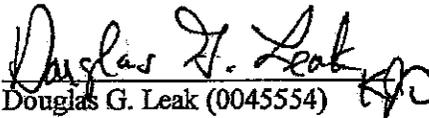


**Notice of Appeal of Appellant**  
**The Cleveland Clinic Foundation**

Appellant The Cleveland Clinic Foundation hereby gives notice of appeal to the Supreme Court of Ohio from the decision rendered by the Cuyahoga County Court of Appeals, Eighth District, entered in Court of Appeals Case No. 95475 on August 11, 2011.

This case is one of public and great general interest that warrants a review by the Ohio Supreme Court. A Memorandum in Support of Jurisdiction is being filed contemporaneously with this Notice of Appeal.

Respectfully submitted,



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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

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JOURNAL ENTRY AND OPINION  
No. 95475

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**MARGARET BRANCH, ET AL.**

PLAINTIFFS-APPELLANTS

vs.

**CLEVELAND CLINIC FOUNDATION**

DEFENDANT-APPELLEE

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**JUDGMENT:  
REVERSED AND REMANDED**

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

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

**RELEASED AND JOURNALIZED:** August 11, 2011

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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<sup>1</sup> 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).<sup>2</sup> 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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<sup>1</sup>Their first complaint was filed in January 2008 and subsequently dismissed without prejudice.

<sup>2</sup>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

successfully 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<sup>3</sup> 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

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<sup>3</sup>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 proceed.

{¶ 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 occurred, 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 precipitated 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.<sup>4</sup> 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 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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<sup>4</sup>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.