

IN THE SUPREME COURT OF OHIO

CASE NO. 11-1634

**MARGARET BRANCH,
Plaintiff-Appellee,**

-vs-

**CLEVELAND CLINIC FOUNDATION,
Defendant-Appellant.**

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

**MERIT BRIEF OF
PLAINTIFF-APPELLEE, MARGARET BRANCH**

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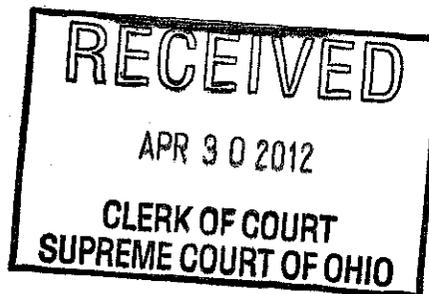
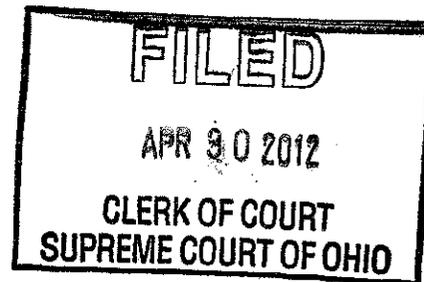


TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES.....ii

INTRODUCTION..... 1

STATEMENT OF THE CASE.....3

STATEMENT OF FACTS5

ARGUMENT 13

PROPOSITION OF LAW NO. I: THE EIGHTH DISTRICT'S DECISION DISALLOWING THE USE OF DEMONSTRATIVE EVIDENCE AT TRIAL IS BOTH LEGALLY AND FACTUALLY FLAWED, IN DIRECT CONFLICT WITH OHIO LEGAL PRECEDENTS AND THE END RESULT WILL BE UNCERTAINTY THROUGHOUT OHIO AS TO THE PROPER USE OF DEMONSTRATIVE EVIDENCE. 13

A. THE LAST-MINUTE DISCLOSURE 13

B. THE PRIOR PRECEDENT..... 16

C. THE UNEXCUSED FAILURE TO DISCLOSE 17

D. THE SUPPOSED FAILURE TO OBJECT 20

E. THE ALLEGED INCONSEQUENTIAL DEMONSTRATION.....22

F. DEMONSTRATIVE EVIDENCE VS. TRIAL EXHIBITS.....24

PROPOSITION OF LAW NO. II: THE EIGHTH DISTRICT'S DECISION REVERSING A UNANIMOUS DEFENSE VERDICT BASED ON AN ALLEGED INABILITY TO ARGUE ADVERSE INFERENCE OF NEGLIGENCE FROM ONE SINGLE REFERENCE TO THE BP OIL DISASTER IN CLOSING ARGUMENTS IS LEGALLY AND FACTUALLY FLAWED, IN DIRECT CONFLICT WITH OHIO LEGAL PRECEDENTS AND HAS ERRONEOUSLY REDEFINED THE ELEMENTS OF AN ADVERSE INFERENCE OF NEGLIGENCE CLAIM......25

A. DEVELOPMENT OF THE ADVERSE INFERENCE.....26

B. THE TRIAL COURT'S ERROR.....27

C. DEFENDANT'S MISGUIDED LOGIC28

PROPOSITION OF LAW NO. III: THE EIGHTH DISTRICT'S DECISION DISALLOWING THE DIFFERENT METHODS JURY INSTRUCTION IS LEALLY AND FACTUALLY FLAWED, IS INTERNALLY INCONSISTENT AND CONTRADICTORY AND IS IN DIRECT CONFLICT WITH DECISIONS RENDERED BY THIS COURT AND OTHER APPELLATE COURTS THROUGHOUT OHIO, INCLUDING THE EIGHTH DISTRICT......29

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A. STANDARDS FOR JURY INSTRUCTIONS29
B. THE TRIAL COURT’S ERROR 30
C. THE SUPPOSED INCONSISTENCY33
D. THE CONTINUED VIABILITY OF THE *PESEK* STANDARD34
CONCLUSION35
CERTIFICATE OF SERVICE35

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TABLE OF AUTHORITIES

Page(s)

CASES

Austerberry v. United States
(6th Cir. 1948), 169 F.2d 583, 59327

Branch v. Cleveland Clinic Found.,
131 Ohio St.3d 1410, 2012-Ohio-136, 959 N.E.2d 10554

Brewer v. Sky Climber, Inc.
(June 14, 1984), 2nd Dist. No. 8071, 1984 W.L. 532925

Bush v. Hoelker
(Oct. 12, 1989), 10th Dist. No. 89AP-185, 1989 W.L. 11999225

Cherovski v. St. Luke's Hosp. of Cleveland
(December 14, 1995), 8th Dist. No. 68326, 1995 W.L. 739608 28

Christopher v. Cleveland Bldrs. Supp. Co.
(Mar. 2, 1989), 8th Dist. No. 55069, 1989 W.L. 1895716

City of Akron v. Roth
(1913), 88 Ohio St. 456, 103 N.E. 465 1

Drake v. Bucher
(1966), 5 Ohio St. 2d 37, 39-40, 213 N.E. 2d 182, 184-18513

Figueroa v. Toys-R-Us Ohio, Inc.
(Apr. 3, 1997), 8th Dist. No. 70463, 1997 W.L. 15672025

Haynal v. Nordonia Hills City Sch. Dist.
(July 5, 2001), 9th Dist. No. 20276, 2001 W.L. 753270 29

Hubbard v. Cleveland, Columbus & Cincinnati Hwy.
(2nd Dist. 1947), 81 Ohio App. 445, 76 N.E.2d 721, 724 26

Kowalski v. Marymount Hosp., Inc.
(Mar. 1, 2007), 8th Dist. No. 87571, 2007-Ohio-828, 2007 W.L. 613865 31

Marshall v. Gibson
(1985), 19 Ohio St.3d 10, 12, 482 N.E.2d 583, 585 29

Nemir v. Mitsubishi Motors Corp.
(6th Cir. 2004), 381 F.3d 540, 55516

One Beacon Ins. Co. v. Broadcast Develop. Grp., Inc.
(6th Cir. 2005), 147 Fed. Appx. 535, 540-541, 2005 W.L. 207749927

Pang v. Minch
(1990), 53 Ohio St.3d 186, 195, 559 N.E.2d 1313, 1322 29

Patton-Tully Transp. Co. v. Barrett
(6th Cir. 1930), 37 F.2d 516, 51927

Peffer v. Cleveland Clinic Found.
(8th Dist. 2008), 177 Ohio App. 3d 403, 2008-Ohio-3688, 894 N.E. 2d 1273 31, 33

Pesek v. University Neuro. Assoc., Inc.,
87 Ohio St.3d 495, 2000-Ohio-483, 721 N.E.2d 101130, 31, 33, 34

Roetenberger v. Christ Hosp.
(1st Dist. 2005), 163 Ohio App.3d 555, 2005-Ohio-5205, 839 N.E.2d 441 31

Rogers v. T.J. Samson Comm. Hosp.
(6th Cir. 2002), 276 F.3d 228, 23227

Schaffter v. Ward
(1985), 17 Ohio St.3d 79, 82-83, 477 N.E.2d 1116, 1118-1119 16

Spatz Wholesale Floral, Inc. v. Midwestern Indem. Co.
(Jan. 13, 1992), 5th Dist. No. CA-8511, 1992 W.L. 1280416

State of Ohio v. Ahmed,
103 Ohio St.3d 27, 51, 2004-Ohio-4190, 813 N.E.2d 637, 663-664 29

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<i>State of Ohio v. Zerla</i> (Dec. 22, 1994), 10 th Dist. No. 93APA09-1304, 1994 W.L. 714456	25
<i>Tritt v. Judd's Moving & Storage, Inc.</i> (10 th Dist. 1990), 62 Ohio App.3d 206, 574 N.E.2d 1178	25
<i>United States of Am. v. Baldwin</i> (6 th Cir. 2005), 418 F.3d 575, 580	25
<i>Westfield Ins. Co. v. Galatis,</i> 100 Ohio St. 3d 216, 2003-Ohio-5849, 797 N.E. 2d 1256	34
OTHER AUTHORITIES	
Civ. R. 10	3
Civ. R. 10(D)(2)	3
<i>Painter & Pollis, OHIO APPELLATE PRACTICE (2011-12 Ed.) 243, Section 8:42</i>	13

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INTRODUCTION

It has often been remarked that the Supreme Court cannot serve as a “court of correction” for every litigant who is dissatisfied with an appellate court rulings. As in every other state with a three-tier judicial system and burgeoning dockets, the function of the high court is to resolve conflicts amongst the appellate districts and settle issues affecting wide segments of state’s populous. Indeed, Ohio’s Constitution was amended in 1912 to limit discretionary appellate review to civil “cases of public or great general interest[.]” *Art. IV, Sec. 2(B)(2)(e), Ohio Const.; City of Akron v. Roth* (1913), 88 Ohio St. 456, 103 N.E. 465.

But now Defendant-Appellant, Cleveland Clinic Foundation (“Clinic”), expects this court to sit as its own “court of correction.” There has been no suggestion that the Eighth Judicial District created a dangerous precedent by misinterpreting or misapplying a constitutional, statutory, or regulatory provision. No request has been made for the adoption of a new legal rule or standard. Nor has there has been any effort to establish that the decision that has been rendered in favor of Plaintiff-Appellee, Margaret Branch, has produced a certifiable conflict with any of the tens of thousands of opinions that have been issued throughout the course of Ohio jurisprudence.

Defendant is simply demanding instead that this Court overturn a decision “full of legal and factual inconsistencies[.]” and that “clearly interfered with the sanctity of the jury system.” *Defendant-Appellants’ Merit Brief, pp. 1 & 16*. It is now more apparent than ever that granting such relief will only ever benefit Defendant, as the circumstances surrounding this highly fact-intensive medical malpractice action are unlikely to ever surface again in an Ohio courtroom.

As will be developed in the remainder of this Brief, Defendant’s unrelenting criticisms of the Eighth District’s ruling are all unfounded. Countless representations

set forth in its brief that are either unsupported by, or are completely inconsistent with, the actual trial record. Every effort has been made, moreover, to avoid squarely confronting the appellate court's well-reasoned justifications for the order of reversal. Once the tiresome bombast is set aside, the conclusion becomes inescapable that there is nothing to "correct" in the majority's eminently sensible opinion.

STATEMENT OF THE CASE

This medical malpractice action was commenced on January 28, 2008. *Cuyahoga C.P., Case No. 648886.* The Complaint alleged that Plaintiff-Appellee, Margaret Branch, had suffered a severe brain hemorrhage and stroke during a deep brain stimulation (DBS) surgery, which had been negligently performed by a neurosurgeon employed by Defendant-Appellant, Cleveland Clinic Foundation. Plaintiff, Turner Branch, raised a claim for loss of consortium. Their counsel was unable to secure all the necessary medical records from Defendant and were precluded from submitting the affidavit of merit required by Civ. R. 10(D)(2). The lawsuit was then dismissed, without prejudice, on June 30, 2008.

Plaintiffs re-filed their Complaint on June 26, 2009. *Cuyahoga C.P., Case No. 696928.* Separate claims were raised for Medical Negligence (Count One), Lack of Informed Consent (Count Two), Negligent Credentialing (Count Three), and Loss of Consortium (Count Four).¹ *Complaint, pp. 4-7.* Appended to the Complaint was an affidavit from Robert Bakos, M.D. ("Dr. Bakos"), confirming that "the standard of care was breached and said breach caused injury to Plaintiff Margaret Branch." *Complaint, Exhibit A, paragraph 5.* Defendant submitted an Answer denying liability on July 16, 2009.

Based upon the discovery that was conducted, Plaintiffs withdrew the claims for loss of consortium, negligent credentialing, and lack of informed consent (in part) in a Notice which was filed on June 30, 2010. Plaintiff, Turner Branch, was thus no longer a party to the action.

The remaining claims proceeded to trial before Retired Judge James Porter on July 1, 2010. Over the course of the next two weeks, numerous witnesses were called

¹ In Count Five, Plaintiffs challenged the constitutionality of the requirement set forth in Civ. R. 10 for an affidavit of merit.

and exhibits were introduced. On July 20, 2010, the jury returned a unanimous defense verdict. *Apx., p. 0001*. In response to an interrogatory, they indicated that Defendant had been found to have complied with the standard of care that was owed. *Tr. Tran. Vol. XVI, p. 1967*.

On July 28, 2010, Plaintiffs filed their Notice of Appeal. Two days later, Defendant filed a Motion for Attorney Fees, Expenses and Costs. Plaintiffs' Memorandum in Opposition followed on August 16, 2010. The matter was scheduled for an evidentiary hearing to be held on September 8, 2010. *See Journal Entry dated August 12, 2010*. Further briefing was submitted by the parties. Defendant then issued a Notice of Withdraw of the Motion for Sanctions on September 7, 2010.

On August 11, 2011, the Eighth District issued an opinion reversing the trial court and ordering a new trial. *Branch v. Cleveland Clinic Found.*, 8th Dist. No. 95475, 2011-Ohio-3975, 2011 W.L. 3505286. The majority concluded that prejudicial errors had been committed as a result of (1) accepting the untimely disclosure of a computerized recreation of Plaintiff's surgery, (2) supplying an unsupported "different method" instruction to the jury, and (3) prohibiting any consideration of an adverse inference that was authorized under Ohio law. Defendant then petitioned this Court for discretionary review of the issues of "public and great general interest" that had supposedly been implicated by the ruling, which was granted over Plaintiff's opposition on January 18, 2012. *Branch v. Cleveland Clinic Found.*, 131 Ohio St.3d 1410, 2012-Ohio-136, 959 N.E.2d 1055.

STATEMENT OF FACTS

The following facts were established during the course of the two-week jury trial. Plaintiff-Appellee, Margaret Branch, had been born in 1953 and grew up in a military family. *Trial Tr., Vol. XI, pp. 1289-1292*. After graduating from college, she served in the U.S. Army. *Id., pp. 1292-1293*. She received an honorable discharge and attended law school at the University of New Mexico. *Id., pp. 1293-1294*. Plaintiff initially worked as a defense attorney, but eventually started representing plaintiffs in personal injury and mass tort actions. *Id., pp. 1295-1296*.

Plaintiff married Turner Branch in 1984. *Trial Tr., Vol. XI, p. 1315*. They were soon law partners and often worked up to 80 hours a week. *Id., pp. 1296 & 1319-1321*. Plaintiff focused upon issues affecting women, such as the breast implant litigation she handled in the late 1980's. *Id., Vol. III, pp. 555 & 565*. According to Edward L. Romaro, who was the former U.S. Ambassador to Spain, Plaintiff was known as one of the preeminent lawyers in Albuquerque. *Id., p. 582*. She was also a co-founder of the New Mexico Women's Bar Association and had received countless awards both for her work as an attorney and her humanitarian efforts. *Id., Vol. IV, pp. 649-650; Vol. XI, pp. 1309-1311*.

Plaintiff had her tribulations, and she had struggled with depression throughout her adult life. *Trial Tr., Vol., III, p. 588; Vol. XI, pp. 1323-1324*. In approximately 2005, she developed cervical dystonia. *Id., Vol. IV, p. 654; Vol. XI, pp. 1324, 1455-1458, 1467 & 1473*. This neurological condition caused the muscles in her neck to retract in a manner which forced her head into a downward position. *Id., Vol. II, pp. 415-416 & 420-421; Vol. IX, p. 1185; Vol. XI, p. 1473*. In addition to interfering with most of her normal everyday activities, Plaintiff experienced regular pain and discomfort. *Id., Vol. IV, p. 642 & 647-648*. She would often wear a cervical collar to

force her head upright. *Id.*, Vol. XII, p. 1610. The dystonia exacerbated Plaintiff's depression and she soon found that she was abusing pain medications. *Id.*, Vol. XI, pp. 1318 & 1324.

By 2006, Plaintiff was only working about 30 hours a week in the office and at home. *Trial Tr.* Vol. XI, pp. 1326-1327. She and her husband started exploring treatment options at various medical institutions, and soon learned of the Cleveland Clinic. *Id.*, Vol. IV, pp. 658-660. Jerrold L. Vitek, M.D. ("Dr. Vitek") had been promoted by the hospital as one of the leading physicians performing DBS surgery.² A call was placed to the Clinic and an appointment was scheduled with the neurologist. *Id.*, p. 660. Perhaps as a result of their well-publicized charitable efforts, Plaintiffs were identified by the foundation for their "major gift" potential. *Id.*, Vol. X, p. 1271.

On November 3, 2006, Plaintiff and her husband met with Benjamin Walter, M.D. ("Dr. Walter"), who was one of Defendant's neurologists specializing in movement disorders. *Trial Tr.*, Vol. XI, pp. 1448 & 1454. Her symptoms had become particularly severe during the few preceding months. *Id.*, Vol. XII, pp. 1525-1526; Vol. XIII, p. 1771. Dr. Walter was able to confirm the diagnosis of primary cervical dystonia. *Id.*, Vol. XI, pp. 1455-1456. Dr. Vitek was also consulted for a second opinion and concurred. *Id.*, pp. 1458-1459. Dr. Walter arranged for a neurosurgeon, Andre Guelman Gomes Machado, M.D. ("Dr. Machado"), to also meet with Plaintiff that day. *Id.*, Vol. III, p. 534; Vol. XI, pp. 1463-1464.

Dr. Machado had been born in Brazil, where he also received his medical training. *Trial Tr.*, Vol. III, p. 492. He thus was not eligible for Board certification in the United States. *Id.*, pp. 491-492. He was just finishing his first full year as an attending neurosurgeon. *Id.*, p. 493. Dr. Machado was performing DBS surgery about

² Both Plaintiffs mistakenly refer to Dr. Vitek as "Dr. Vitocheck." *Trial Tr.* Vol. IV, p. 660; Vol. XI, pp. 1380-1381.

once a week, primarily for patients with Parkinson's disease and tremors. *Id.*, pp. 493-494. He had only handled between 5-10 dystonia cases as an attending. *Id.*, p. 494.

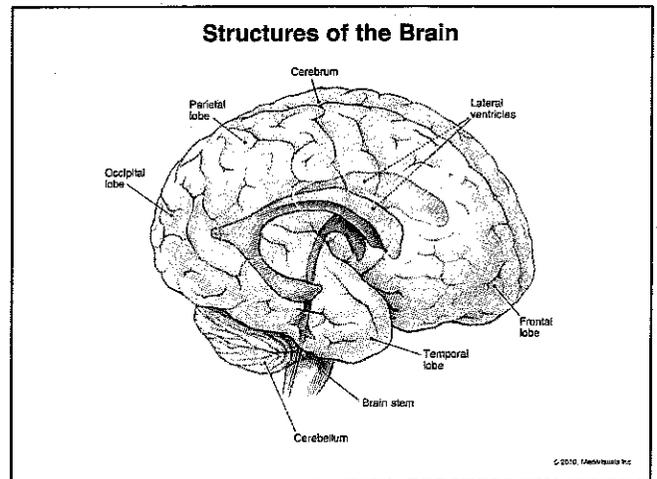
DBS surgery has been developed relatively recently. *Trial Tr.*, Vol. IX, pp. 1131-1134 & 1138. In order to furnish relief from dystonia, the neurosurgeon has to access the globus pallidus internus (GPI), which is a small structure located deep within the brain. *Trial Tr.*, Vol. IV, pp. 826-827; Vol. XII, p. 1623. Electrodes have to be placed on both sides of this organ, which then provide stimulation through a small electrical current. *Id.*, p. 824. The neurosurgeon begins the DBS procedure on one side by drilling a "burr hole" in the top of the skull above the ear. *Id.*, Vol. XIII, pp. 1747-1748; *Trial Deposition of Milind Deogaonkar, M.D.*, p. 30. A small tube, known as a cannula, is slowly passed through the brain and towards the GPI. *Trial Tr.*, Vol. III, p. 545; Vol. IX, p. 1160, 1212 & 1661. A "stylette" is first placed in the tube, which blocks the opening and prevents tissue from being damaged. *Id.*, Vol. IX, pp. 1160-1161 & 1212; Vol. XIII, pp. 1699-1700. The path along which the cannula is extended is known as the "trajectory." *Id.*, Vol. III, p. 504; Vol. VI, p. 862.

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

In order to successfully reach the GPI, "target planning" must be carefully

performed in advance of the procedure. *Trial Tr., Vol. III, p. 515; Vol. VI, p. 826; Vol. IX, p. 1192.* The term “stereotactic” refers to the three-dimensional targeting process. *Id., Vol., XII, p. 1592.* Although several methods have been developed over the years, Dr. Machado used a common approach, which combined them. *Id., Vol. III, pp. 539; Vol. XII, pp. 1627-1629.* A complex computer software program, known as “Stealth,” fused the patient’s head magnetic resonance imaging (MRI) and computer tomographic (CT) scans into a single image. *Id., Vol. III, pp. 504-505; Vol. XIII, pp. 1683-1685.* Coordinates were then identified to plot a trajectory from the burr hole to the target. *Id., Vol. III, p. 510.*

The neurosurgeon is assisted by a neurologist, who makes sure they are headed on the right track. *Trial Tr. Vol. VI, p. 840; Vol. XI, pp. 1474-1475.* A tiny microelectrode, attached to the end of the cannula, allows the neurologist to listen to the brain cell



activity as the device is extended. *Id., Vol. IX, pp. 1212-1213 & 1233.* Cells located in different portions of the brain emit unique signals, which assist with determining whether the cannula is on track. *Id., Vol. XI, pp. 1477-1480 & 1491; Vol. XII, pp. 1628-1629.* By making more than one pass towards the target, the physicians are able to generate a three-dimensional map of the structure. *Id., Vol. IX, pp. 1142-1144; Vol. XI, p. 1483; Vol. XII, pp. 1629-1630.*

As the surgeon, Dr. Machado was ultimately responsible for selecting both the location of the burr hole and the trajectory to be followed. *Trial Tr., Vol. III, pp. 536-537.* Defendant’s neurologist, Dr. Walter, explained that the surgeon was also charged

with creating a safe passage. *Id.*, Vol. XI, p. 1520. Patient safety is paramount. *Id.*, Vol. III, p. 514.

Dr. Machado plotted a trajectory, which was designed to avoid Plaintiff's lateral ventricle.³ *Trial Tr.*, Vol. III, p. 514. The wall of this chamber in the brain is surrounded by veins. *Id.*, Vol. III, p. 516; Vol. XIII, p. 1775. This structure must be avoided whenever possible. *Id.*, Vol. III, pp. 516-518; Vol. XI, pp. 1517 & 1546; Vol. XIII, p. 1775. The neurosurgeon acknowledged that if he breached this ventricle, he would have been off the planned course. *Id.*, Vol. III, pp. 545-546.

Plaintiff signed a standardized consent form on February 15, 2007. *Trial Tr.*, Vol. XI, pp. 1385-1386. The surgery began four days later at 7:55 a.m. *Id.*, Vol. VIII, pp. 1023-1024; Vol. XI, p. 1385. Plaintiff remained awake during the surgery, which was necessary in order to maintain the brain cell activity. *Id.*, Vol. XI, p. 1495 & 1497-1498. Plaintiff had advised one of Defendant's Certified Registered Nurse Anesthetists, Tara Schurigyn ("Schurigyn"), that she had taken Xanax and Valium. *Trial Tr.*, Vol. VIII, p. 1033. That "really stuck out" in Schurigyn's mind because patients usually should not take those suppressants prior to DBS surgery. *Id.*, p. 1033. The medications "depress their recordings" and the surgical team "may not get as accurate of a picture." *Id.* Schurigyn believed she mentioned Plaintiff's ingestion of Xanax and Valium to both Dr. Machado and the anesthesiologist. *Id.*, pp. 1033-1034.

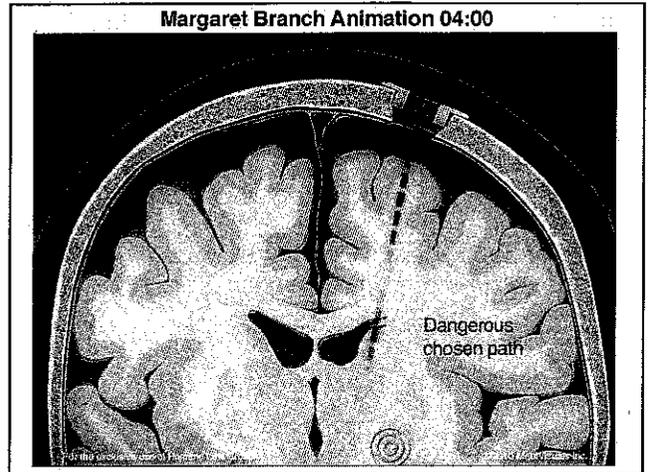
Dr. Machado began on the left side of Plaintiff's head and was able to place the electrode next to the GPI after the third pass through the burr hole. *Trial Tr.*, Vol. III, pp. 542-543. He then proceeded to the right side, at which point Plaintiff started becoming anxious. *Id.*, Vol. III, pp. 542-543; Vol. VIII, p. 1024. During the second pass, the neurosurgeon saw blood coming out of the cannula. *Id.*, Vol. III, pp. 542-543;

³ The photographs which appear in this Brief can all be found on the disc which has been included in the record, titled "Branch Trial Demonstratives."

Vol. XI, p. 1480, 1501 & 1512-1513. Plaintiff's blood pressure also increased. *Id., Vol. III, p. 543; Vol. VIII, pp 1025-1026.* He announced to the room that they had a bleed. *Id., Vol. VIII, p. 1018.* Nurse Anesthetist Schurigyn had never encountered this before. *Id., Vol. VIII, p. 1018.* The resulting hemorrhage (*i.e.*, bleed) was substantial. *Id., Vol. XI, p. 1541; Vol. XIII, p. 1727.*

However, the procedure was not halted. *Id., Vol. XI, p. 1503; Vol. XIII, p. 1751.*

Dr. Bakos, M.D. had examined the circumstances surrounding the surgery on behalf of Plaintiff. *Trial Tr.,*



Vol. VI, p. 864. He is a board certified neurosurgeon, who has been practicing in New York for over three decades. *Id., pp. 815-817 & 836.* Throughout his career, Dr. Bakos had held a number of important posts and had furnished instruction to countless medical students. *Id., pp. 818-819.* The neurosurgeon had been involved in over one thousand target planning surgeries. *Id., p. 823.* Dr. Bakos had never testified before a jury, and had previously conducted reviews and issued reports largely at the request of defense attorneys and insurance companies. *Id., pp. 845-846.*

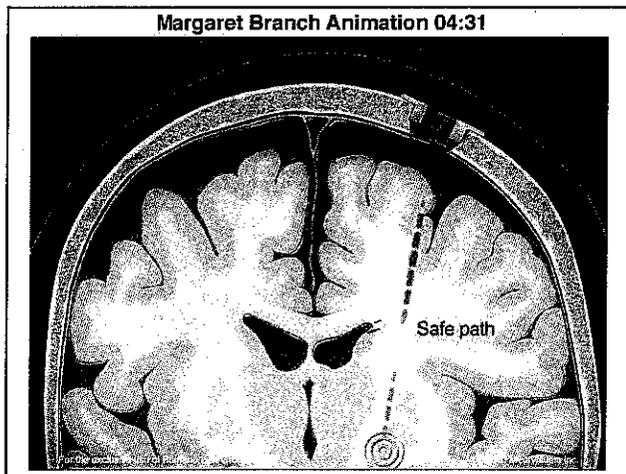
Dr. Bakos' investigation confirmed that Plaintiff suffered a stroke when the cannula breached the ventricle. *Trial Tr., Vol. VI, pp. 866-867 & 881-883.* Dr. Machado had misplaced the burr hole and misdirected the cannula off the intended trajectory. *Id., p. 867.* When the cannula was withdrawn, air was sucked into the veins and ventricle. *Id., p. 872.* There was no other plausible explanation for the simultaneous and dangerous rise in blood pressure. *Id., p. 876.* At that point, brain tissue was being destroyed. *Id., p. 875.* The procedure should have been stopped. *Id.,*

pp. 876-877. Had the surgery been handled appropriately, the hemorrhage would have been avoided. *Id.*, p. 910.

Dr. Machado has acknowledged that Plaintiff suffered a stroke and sustained neurological deficits during the surgery. *Trial Tr.*, Vol. XIII, pp. 1709-1710. The Clinic neurosurgeon agreed that he would have been off course if he had pierced the ventricle wall. *Trial Tr.*, Vol. III, pp. 545-546. Even he appreciated that the hospital should be held accountable if a breach caused a stroke. *Id.*, Vol. III, pp. 547-548; Vol. XIII, pp. 1722-1723. The only neurosurgical liability expert who was called on behalf of the defense (other than Dr. Machado himself), Phillip Starr, M.D. ("Dr. Starr"), was largely in agreement. *Id.*, Vol. IX, p. 1216. Tellingly, he refused to express an opinion about whether Plaintiff's ventricle wall had been struck during the DBS procedure. *Id.*, pp. 1215-1216.

Following the surgery, Plaintiff was confined in Defendant's intensive care unit for several weeks. *Trial Tr.*, Vol. II, p. 417. One side of her body was completely paralyzed. *Id.*, Vol. III, pp. 594-595.

She was barely able to speak, and was slurring her words when she attempted to do so. *Id.*, p. 593.



Plaintiff was eventually transferred to the Methodist Hospital in Houston and was examined by Stanley Fisher, M.D. ("Dr. Fisher") on April 3,

2007. *Trial Tr.*, Vol. II, pp. 407-408 & 414; Vol. XI, p. 1348. He is a neurologist who specializes in movement disorders. *Id.*, Vol. II, pp. 407 & 409. He was able to confirm that Plaintiff had suffered "very large bleeding in the area of the right basal ganglia."

Id., p. 419. She sustained profound cognitive impairments as a result and was “dramatically impaired.” *Id.*, pp. 459-460. Plaintiff’s neuropsychologist, Ronald Ruff, Ph.D. (“Dr. Ruff”), has verified this assessment and confirmed that the losses are permanent. *Trial Deposition of Ronald Ruff, Ph.D.*, pp. 59, 65-67 & 106-107. Because she could no longer read and perform other rudimentary tasks, Plaintiff could not return to work as an attorney. *Id.*, Vol. II, p. 441, 450-451 & 458; Vol. III, p. 578; Vol. IV, pp. 615-616 & 698; Vol. XI, p. 1334. Further care and treatment will be required indefinitely into the future. *Id.*, p. 460; *Trial Deposition of Ronald Ruff, Ph.D.*, pp. 66-67.

ARGUMENT

Propositions of Law are required by S. Ct. Prac. R. 6.2(B)(4) and are supposed to be able to “serve as a syllabus for the case if appellant prevails.” *Painter & Pollis, OHIO APPELLATE PRACTICE (2011-12 Ed.) 243, Section 8:42*. Lacking an unsettled legal issue of public or great general importance, Defendant has furnished case-specific criticisms of the Eighth District’s reasoning instead. *Merit Brief of Defendant-Appellant, pp. 23-37*. Such “Assignments of Error” are completely inappropriate at this final stage of the appeal, thereby justifying a dismissal of the proceedings. *Drake v. Bucher* (1966), 5 Ohio St. 2d 37, 39-40, 213 N.E. 2d 182, 184-185. And apart from Defendant’s inability to identify any useful legal precedents that could potentially be memorialized in a syllabus, none of their disagreements with the majority’s decision possess merit.

**PROPOSITION OF LAW NO. I: THE EIGHTH DISTRICT’S
DECISION DISALLOWING THE USE OF
DEMONSTRATIVE EVIDENCE AT TRIAL IS BOTH
LEGALLY AND FACTUALLY FLAWED, IN DIRECT
CONFLICT WITH OHIO LEGAL PRECEDENTS AND THE
END RESULT WILL BE UNCERTAINTY THROUGHOUT
OHIO AS TO THE PROPER USE OF DEMONSTRATIVE
EVIDENCE.**

A. THE LAST-MINUTE DISCLOSURE

Perhaps the most critical component of a safe and successful DBS procedure is the stereotactic “target planning” that is required to be performed. *Trial Tr., Vol. VI, p. 826; Vol. IX, p. 1192*. As Dr. Machado had explained, a trajectory between the “burr hole” in the skull and the target within the brain is computed during this process. *Id., Vol. III, p. 504*. A computer software program is utilized to merge the patient’s CT and MRI scans into a single fused image. *Id., pp. 504-505*. The coordinates for the target can then be determined. *Id., p. 510*. A defense expert had written that planning a trajectory that avoids visible blood vessels, sulci, and ventricles, prevents a stroke. *Id., Vol. IX, pp. 1205-1206*.

Dr. Machado conceded that the fused image of Plaintiff's brain had not been kept following her surgery. *Trial Tr., Vol. III, pp. 506-507*. The neurosurgeon also had not saved the target planning data on a disc, which he insisted was only done "on some very rare occasions[.]" *Id., p. 507*. Apparently, the fact that Plaintiff had suffered a stroke in the midst of the DBS procedure was not sufficient cause to preserve the information in this instance. Dr. Machado had understood that the data would be erased after a few months if it was not saved. *Id., pp. 510-511*.

Dr. Machado was the final witness who was called in the defense case-in-chief. *Trial Tr., Vol. XII, p. 1563*. Shortly before he took the stand, defense counsel disclosed that an elaborate demonstration had been prepared during which the neurosurgeon would recreate in real-time his target planning on the software system before the jurors. *Id., p. 1564*. It was stressed by defense counsel that the allegations of missing evidence "has really become the key issue in this case ***." *Id., p. 1565*.

In his ensuing objection, Plaintiff's counsel did not mince words in explaining how prejudicial such an impromptu demonstration would be to his client's case. *Trial Tr., Vol. XII, pp. 1568-1569*. Because the actual fused image had been forever lost, there could be no guarantees (apart from Dr. Machado's unsubstantiated assertions) that the one that was produced in court would be precisely the same as that which he had utilized three years earlier. *Id., pp. 1568-1569*. And as the court recognized, the first notice of this proposed in-court demonstration had been supplied just ten minutes earlier. *Id., p. 1573*. The trial judge proceeded to explain to defense counsel that the demonstration would not be permitted:

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

In this part of the case I'm disinclined to let [Dr. Machado] go forward with the recreation with what he's going to call

the real thing. ***

Id., p. 1578.

Defense counsel then re-argued her position with greater fervor. *Trial Tr. Vol. XII, pp. 1579-1585*. Inexplicably, the judge then reversed himself.

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

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

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

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

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

Id., p. 1585.

At various points in the proceedings, defense counsel had justified her own objections upon Plaintiff's purported impairment of her ability to question witnesses. *Trial Tr., Vol. IX, p. 1122; Vol. XI, p. 1434*. The trial judge had even struck Plaintiff's life care planning testimony primarily out of concern for the Defendant's right to cross-examination. *Id., Vol. IX, p. 1080*. But when Plaintiff's counsel observed that he could not possibly question Dr. Machado about the previously undisclosed recreation in an effective manner, he was told:

THE COURT: You'll go do a good job. You'll do what you always do. There's no way to create the perfect image, is there?

Id., Vol. XII, p. 1587. The cryptic assurance did nothing to rectify the marked disadvantage that had been created solely by Defendant's failure to share the presentation plans in a timely fashion. Plaintiff's counsel was furnished with a continuing objection. *Id., p. 1645*.

The discretion afforded to trial courts with regard to evidentiary rulings is not

unbridled. *Christopher v. Cleveland Bldrs. Supp. Co.* (Mar. 2, 1989), 8th Dist. No. 55069, 1989 W.L. 18957, p. *2; *Nemir v. Mitsubishi Motors Corp.* (6th Cir. 2004), 381 F.3d 540, 555. A reversal will be in order when an abuse of discretion is committed that prejudices a party. *Schaffter v. Ward* (1985), 17 Ohio St.3d 79, 82-83, 477 N.E.2d 1116, 1118-1119; *Spatz Wholesale Floral, Inc. v. Midwestern Indem. Co.* (Jan. 13, 1992), 5th Dist. No. CA-8511, 1992 W.L. 12804, p. *2.

The trial court's original ruling was correct. Prior to opening arguments, the judge had made it a point to confirm that the parties had shared their demonstrative exhibits with each other. *Trial Tr., Vol. I, p. 278*. Defense counsel noted that Plaintiff had an "animation" she still needed to review, and she was afforded time to do so. *Id.* This customary courtesy enabled her to arrange for one of the defense experts to criticize the demonstration. *Trail Tr. Vol. IX, p. 1165*.

No explanation was ever offered for why the "vital" defense demonstration had not been disclosed to Plaintiff earlier trial. Even if the recreation had been divulged during the first few days of the proceedings, an opportunity still would have existed to confer with the Plaintiff's testifying experts about whether the data and software that Dr. Machado planned to utilize could accurately recreate the fused image and the trajectory that was followed through Plaintiff's brain. By waiting until only a few minutes were left before Dr. Machado took the stand as the final defense witness, Plaintiff was effectively precluded from preparing a proper cross-examination.

B. THE PRIOR PRECEDENT

Defendant should have expected that a new trial would be ordered on appeal, as the Eighth District was merely following an established precedent that requires litigants in Cuyahoga County to disclose their demonstrative exhibits to each other in order to avoid the pernicious consequences of unfair surprise. In *Perry v. University*

Hosps. of Cleveland, 8th Dist. No. 83034, 2004-Ohio-4098, 2004 W.L. 1753169, a medical malpractice action had been brought against an OB/GYN who had allegedly mishandled critical ultrasound measurements of the plaintiff's amniotic fluid and precipitated a stillborn delivery. *Id.*, at ¶2-12. During the trial, the defendant used a previously undisclosed "exhibit to perform a remeasurement of the amniotic fluid pocket[.]" *Id.*, ¶31. He and his attorney had extracted an image from the original ultrasound upon which they superimposed calipers to recreate the measurement. *Id.*, ¶16. The defendant "testified that his remeasurement, using the previously undisclosed image, now with the imposed perpendicular calipers, established that the two-by-two pocket he found contained a normal amount of amniotic fluid." *Id.*, ¶31. The jury then returned a defense verdict. *Id.*, ¶23.

In ordering a new trial, the Eighth District observed that the "central factor in our analysis is that the exhibit was not disclosed to [plaintiff] prior to trial." *Id.*, ¶26 (footnote omitted). Judge Gallagher's opinion reasoned that:

*** [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 defendant]. 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 defendant'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. [emphasis added]

Id., ¶32. Because the plaintiff "was clearly prejudiced and her substantial rights were impacted by the admission of this exhibit," an abuse of discretion was found. *Id.*, ¶33.

C. THE UNEXCUSED FAILURE TO DISCLOSE

Defendant's first "Proposition of Law" is devoted primarily to arguing that the

computerized recreation of the DBS surgery was both necessary under the facts of this case and an appropriate demonstration under Ohio law. *Merit Brief of Defendant-Appellant*, pp. 23-30. The Eighth District had not disagreed, as the majority found instead that the trial judge had abused his discretion only by allowing the demonstration to be concealed throughout the course of the trial and disclosed just ten minutes before the presentation was to begin. *Branch*, 2011-Ohio-3975, ¶15-31. The entire discourse on the general acceptance of demonstrative evidence is thus immaterial.

As the Eighth District had observed, Defendant had offered “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.” *Branch*, 2011-Ohio-3975, ¶22. Defendant’s Merit Brief remains equally silent on this critical question. *Merit Brief of Defendant-Appellant*, pp. 23-30. The attorneys had conceded during the discussions with the judge that they had conceived the plan to furnish the demonstration earlier in the proceedings. *Trial Tr. Vol. XII*, p. 1574. Indeed, during opening statements defense counsel had remarked 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. And he said his practice as he tries to, especially for dystonia, not to go through the ventricle. [emphasis added]

Trial Tr. Vol. II, pp. 369-370. At the time, Plaintiff’s counsel took this remark to mean that the surgery would be “reconstructed” through the surgeon’s recollection, blow-ups of the pertinent records, and perhaps even still photographs and models as is commonplace in medical malpractice trials. It was not until twelve days later that defense counsel disclosed that the demonstration would actually consist of a new fused image and a real-time depiction of the cannula proceeding along the plotted trajectory

and avoiding the ventricle. *Id.*, Vol. XII, pp. 1563-1564.

The trial judge plainly abused his discretion by requiring only Plaintiffs to share their demonstrative exhibits. *Trial Tr. Vol. I, p. 278*. As with much of the Brief, there is no truth to Defendant's representation that Plaintiff's counsel "did not provide any notice" of the demonstration that was performed by Dr. Bakos. *Merit Brief of Defendant-Appellant, p. 8*. The record actually confirms that defense counsel took full advantage of the opportunity to review Plaintiff's animations at the beginning of the proceedings. *Trial Tr. Vol. I, p. 278*. When Dr. Bakos' demonstration commenced six days later and defense counsel raised an objection, the trial judge immediately asked: "Haven't you seen it?" *Id.*, Vol. VII, p. 860. Defense counsel never denied that she had been afforded an opportunity to inspect the complete presentation, and complained vaguely instead that:

He's not doing it. He has someone else doing it. It's not the patient. I just object to it.

Id., p. 860. The trial judge then overruled the half-hearted objection. *Id.* The hospital's attorney was not only able to conduct a well-prepared cross-examination of Plaintiff's neurosurgeon, but also had sufficient time to arrange for one of her own experts to criticize the demonstration. *Id.*, Vol. IX, p. 1165. Later near the conclusion of the trial, defense counsel confirmed that before Dr. Bakos testified she "saw all of the different exhibits and demonstratives and everything he planned to do." *Id.*, Vol. XII, pp. 1563-64.

While imploring this Court to accept jurisdiction and overturn the Eighth District's decision, Defendant had maintained that Dr. Machado's computerized recreation "became necessary **only** in response to a new allegation of 'missing evidence' raised by Plaintiff for the first time at trial!" *Defendant's Memorandum in Support of Jurisdiction, p. 1* (emphasis original). The fact that the target planning data had been

discarded had actually been acknowledged during discovery and had been the subject of motion practice. Recognizing this inescapable reality, Defendant's position has now evolved to: "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." *Merit Brief of Defendant-Appellant*, p. 25. Even this revised criticism is inaccurate, as Dr. Machado had been questioned about the loss of the evidence almost six months prior to the commencement of the trial. *Deposition of Andre Machado, M.D. taken January 14, 2010*, p. 94.⁴

D. THE SUPPOSED FAILURE TO OBJECT

In an effort to deflect attention from its own admitted violation of both the *Perry* rule and the trial court's order to share demonstrative exhibits, Defendant has criticized Plaintiff for having "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 [her] surgery." *Merit Brief of Defendant-Appellant*, p. 29. All that was disclosed in opening statement was that Dr. Machado would "reconstruct it for you and show you exactly based on all this how it didn't go through the ventricle." *Trial Tr. Vol. II*, pp. 369-370. This passing remark was hardly a cause for concern, as a physician has every right to "reconstruct" a medical procedure "exactly" as it occurred through memory and with the assistance of previously-disclosed records, photographs, and models. Defense counsel stopped well short of mentioning that she also intended to "reconstruct" the missing fused image of Plaintiff's brain and demonstrate in real-time how the cannula passed safely by the ventricle while burrowing towards the GPI.

It was not until the end of the trial, however, that Plaintiff's counsel learned that

⁴ The video tape of the deposition was filed with the Clerk of Courts on June 30, 2010.

the events that had occurred three years earlier in the operating room were going to be recreated with a three-dimensional Stealth software program that may, or may not, have been capable of duplicating the procedure "exactly." Despite his serious disadvantage, Plaintiff's counsel was able to elicit a concession from Dr. Machado that it was "possible" that the software had been updated since 2007. *Trial Tr. Vo. XIII, p. 1770*. The neurosurgeon could not know for sure, and was quick to proclaim that: "The software is the same. There may be small updates in one version or the other." *Id., p. 1771*. There was, of course, no time left for this dubious assertion to be investigated and discredited.

Citing Dr. Machado's own testimony, Defendant has insisted that the mapping software "is commercially available to the public at large." *Defendant's Merit Brief, p.8 (citations omitted)*. The hospital has plainly missed the point of the appellate court's ruling: Until the disclosure was finally made ten minutes before Dr. Machado took the stand, Plaintiff had no way of (1) knowing the neurosurgeon had prepared a new fused image and constructed the three-dimensional visual demonstration, (2) determining which software package had been utilized, and (3) making the necessary arrangements to challenge his recreation methodology. The supposed "public" availability of the software, even if true, is simply immaterial.

In addition to the updated software, there were other reasons to suspect Dr. Machado's claim that the recreation was identical to that which had been performed in 2007. The only other neurosurgeon called by the defense, Dr. Starr, had testified a few days earlier that "elements of the plan can be reconstructed, but the entire plan can't be." *Trial Tr., Vol. IX, p. 1211* (emphasis added). The defense witness acknowledged that:

Q. Can we agree, doctor, because we don't have the target planning, the raw data on [Plaintiff], we don't have the

ability to look at the probe's eye view to confirm that Dr. Machado's trajectory path was safe?

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

Id., p. 1209. Had Plaintiffs' counsel been afforded the opportunity to review Dr. Machado's computerized re-creation earlier in the proceedings, he could have developed the defense expert's criticisms of the attempted reconstruction in substantially greater detail for the jurors. Dr. Starr was safely back in California, however, when the announcement was made as Dr. Machado was about to take the stand and begin his three-dimensional, real-time display.

E. THE ALLEGED INCONSEQUENTIAL DEMONSTRATION

In an effort to trivialize the profound impact that the computerized display had upon the proceedings, Defendant has assured this Court that the demonstration "was not offered to actually re-create the events involving" Plaintiff. *Merit Brief of Defendant-Appellant*, p. 24. Although defense counsel implored the trial judge to allow the presentation and successfully convinced him to reverse his initial decision to sustain Plaintiff's objection, this Court is now supposed to believe that the demonstration really was not that important. *Trial Tr.*, Vol. XII, p. 1563-1645.

Unlike Dr. Bakos' generic demonstration, every effort was made to convince the jurors that they were witnessing Plaintiff's surgery precisely as it had occurred on February 19, 2007. Defense counsel had promised them during opening argument that Dr. Machado would "reconstruct it for you and show you exactly based on all this how it didn't go through the ventricle." *Trial Tr. Vol. II*, pp. 369-370 (emphasis added). The neurosurgeon did his best to live-up to this emphatic commitment by advising the jurors that they were viewing "a three-dimensional reconstruction of the patient's face with the head frame as it was placed in the very day of surgery." *Id.*, at 1668.

Furthermore, "all the films here belong to [Plaintiff,] the films that were used for her surgery." *Id.*, p. 1668. Despite his own expert's testimony to the contrary, Dr. Machado insisted that even without the original fused image he had successfully recreated the probe's eye view of the same trajectory he had plotted through the Plaintiff's brain. *Id.*, p. 1731-1733.

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

Not surprisingly, the recreation of the surgery in real-time footage was the highlight of the direct examination of Dr. Machado and the entire defense case-in-chief. *Trial Tr. Vol. XIII*, pp. 1667-1689. As was confirmed by a defense expert, the impressive three-dimensional software image conveyed far more than the operative notes could. *Id.*, Vol. IX, p. 1194. The jurors were shown the trajectory that was computed in-court on a fused image of Plaintiff's purported brain that had just been prepared. *Id.*, Vol. XIII, p. 1683. With Dr. Machado guiding them from the witness stand, they toured the pathway that supposedly had been taken, which avoided all veins and vascular structures. *Id.*, pp. 1667-1689. Defendant's neurosurgeon was thus able to confirm that he had missed the ventricle "by a lot[.]" *Id.*, p. 1687. His own standard of care expert had been unable to reach such a conclusion with sufficient medial certainty. *Id.*, Vol. IX, pp. 1215-1216.

The visually stunning recreation filled a gaping hole in the defense. As previously noted, Dr. Starr was the only neurosurgeon who had been called by the defense to testify in support of Dr. Machado. He refused, however, to express any

opinion as to whether Plaintiff's ventricle wall had been breached. *Trial Tr., Vol. IX, pp. 1215-1216*. While he was unwilling to agree that the standard of care had been violated, the defense expert acknowledged that it was certainly possible for the corner of the chamber to be hit while proceeding down a trajectory toward the GPI. *Id., pp. 1221-1223*. Apart from the in-court recreation, which had been permitted over strenuous objection, the only competent evidence that had been presented to the effect that the ventricle wall had been avoided was Dr. Machado's own otherwise unsubstantiated assertions.

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

F. DEMONSTRATIVE EVIDENCE VS. TRIAL EXHIBITS

There is no merit to the contrived notion that "demonstrative evidence" does not need to comply with the same standards as trial exhibits. *Defendant's Merit Brief, p. 24*. By all appearances, Defendant has failed to locate a single decision from any court in any jurisdiction recognizing that the former are entitled to more forgiving treatment. *Id., pp. 23-30*. Since the impact upon the jury is just the same regardless of the label

that is attached, the overwhelming consensus of authority recognizes that reproductions and recreations do indeed have to satisfy the same general requirements of admissibility and reliability. *Bush v. Hoelker* (Oct. 12, 1989), 10th Dist. No. 89AP-185, 1989 W.L. 119992 (abuse of discretion found when photographs were used to recreate an accident scene in misleading fashion); *Figuroa v. Toys-R-Us Ohio, Inc.* (Apr. 3, 1997), 8th Dist. No. 70463, 1997 W.L. 156720 (panel concludes that the trial judge had improperly admitted demonstrative evidence, consisting of testimony related to an out-of-court experiment); *United States of Am. v. Baldwin* (6th Cir. 2005), 418 F.3d 575, 580 (defendant's proffered video did not closely enough replicate the actual conditions to warrant admission into evidence); *State of Ohio v. Zerla* (Dec. 22, 1994), 10th Dist. No. 93APA09-1304, 1994 W.L. 714456, p. *6 (out-of-court experiment was so dissimilar that it was inadmissible); *Tritt v. Judd's Moving & Storage, Inc.* (10th Dist. 1990), 62 Ohio App.3d 206, 574 N.E.2d 1178 (decision upheld to exclude model of accident scene that conveyed misleading impression about lighting conditions); *Brewer v. Sky Climber, Inc.* (June 14, 1984), 2nd Dist. No. 8071, 1984 W.L. 5329 (trial court properly excluded photograph of scaffolding that did not depict actual conditions). By adhering closely to the established precedents, the appellate court justifiably determined that that the trial judge had irreparably skewed the proceedings by affording only Defendant an opportunity to review the opposing party's demonstrative exhibits in time to prepare a meaningful response.

PROPOSITION OF LAW NO. II: THE EIGHTH DISTRICT'S DECISION REVERSING A UNANIMOUS DEFENSE VERDICT BASED ON AN ALLEGED INABILITY TO ARGUE ADVERSE INFERENCE OF NEGLIGENCE FROM ONE SINGLE REFERENCE TO THE BP OIL DISASTER IN CLOSING ARGUMENTS IS LEGALLY AND FACTUALLY FLAWED, IN DIRECT CONFLICT WITH OHIO LEGAL PRECEDENTS AND HAS ERRONEOUSLY REDEFINED THE ELEMENTS OF AN ADVERSE INFERENCE OF NEGLIGENCE CLAIM.

A. DEVELOPMENT OF THE ADVERSE INFERENCE

A substantial portion of Plaintiff's case had been devoted to Defendant's failure to maintain the fused image of her brain and the original target planning data. *Trial Tr., Vol. II, pp. 319-332*. Even defense counsel had acknowledged that this had become a "key issue." *Id., Vol. XII, p. 1565*. There was never any dispute that records should be kept of everything surgeons do. *Id., Vol. III, p. 515*. A defense expert agreed that it made sense to maintain the core analysis when there has been a serious complication. *Id., Vol. IX, p. 1193*.

Dr. Machado had testified that it had been "heart breaking" when the stroke had developed during the DBS procedure he was performing. *Trial Tran., Vol. XIII, p. 1710*. This was apparently his first experience with a significant surgical complication. *Id., Vol. III, pp. 496-497*. Dr. Machado had saved the target planning information and data on occasion in the past, but not this time. *Id., Vol. III, p. 507*. The process of determining what had happened to cause the stroke was thus made substantially more difficult for Plaintiff's experts.

When a party destroys, damages, alters, or loses evidence that is known, or should be known, to be relevant to an actual or potential lawsuit, the jury is entitled to draw all reasonable inferences against that party with regard to what the evidence might have shown. *The Bermuda* (1865), 70 U.S. 514, 550, 18 L.Ed. 200. Put differently, "where relevant evidence which would properly be part of a case is within the control of the party whose interest it would naturally be to produce it, and he fails to do so, without satisfactory explanation, the jury may draw an inference that such evidence would be unfavorable to him." *Hubbard v. Cleveland, Columbus & Cincinnati Hwy.* (2nd Dist. 1947), 81 Ohio App. 445, 76 N.E.2d 721, 724, citing 20 AMERICAN JURISPRUDENCE 188. Therefore, if the jurors had determined that the loss of the fused

image and target planning data was caused by the unjustified or careless actions or inactions, they would have been entitled to infer that such evidence, if available, would have been favorable to the Plaintiff and adverse to the hospital. *Rogers v. T.J. Samson Comm. Hosp.* (6th Cir. 2002), 276 F.3d 228, 232 (Kentucky law); *One Beacon Ins. Co. v. Broadcast Develop. Grp., Inc.* (6th Cir. 2005), 147 Fed. Appx. 535, 540-541, 2005 W.L. 2077499 (Kentucky law); *Patton-Tully Transp. Co. v. Barrett* (6th Cir. 1930), 37 F.2d 516, 519; *Austerberry v. United States* (6th Cir. 1948), 169 F.2d 583, 593. In all likelihood, an inference that the fused image and target planning data would have shown that the trajectory breached the ventricle wall would have been determinative in the outcome of this hotly-contested malpractice action.

B. THE TRIAL COURT'S ERROR

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

[PLAINTIFF'S COUNSEL]: After the BP –

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

[PLAINTIFF'S COUNSEL]: Fine.

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

You may continue.

Id., p. 1926. The admonishment was startling, as nothing had been mentioned about any "willful" destruction of documents. *Id.* As the aforementioned authorities attest, Plaintiff did not need to show "willfulness" in order to be entitled to the legally

recognized inference. Yet, her counsel was flatly prohibited from making any mention at all of this important evidentiary doctrine.

At no less than two points in the proceeding, the trial court had properly recognized that the jury was entitled to draw inferences from the missing evidence. *Trial Tr., Vol. I, p. 276; Vol. XII, p. 1576*. Moments before the jurors were to receive their final instructions and begin deliberations, however, they were admonished that “there’s no evidence to support it” and essentially directed to disregard the inference. *Id., Vol. XIV, p. 1926*. All the time and effort which Plaintiff had devoted to developing this component of the case had thus been thoroughly undermined.

C. DEFENDANT’S MISGUIDED LOGIC

Much of the analysis that has been furnished under this “Proposition of Law” is devoted to the supposed impropriety of ever mentioning the “BP Oil disaster” during closing argument. *Merit Brief of Defendant-Appellant, pp. 31-33*. Once again, Defendant is dancing around the actual basis for the Eighth District’s ruling. The trial judge had exceeded his discretionary authority not by sustaining the objection to the analogy, but by proceeding to admonish Plaintiff’s counsel to avoid the topic of the missing data “because there is no evidence to support it.” *Branch, 2011-Ohio-3975, ¶156-63*. The astonishing rebuke effectively nullified a critical aspect of Plaintiff’s case, which her counsel had spent over two weeks developing for the jurors.

Defendant nevertheless insists that the appellate court had “mixed up” the tort claim for spoliation with the adverse inference that Ohio’s evidentiary standards have long permitted. *Merit Brief of Defendant-Appellant, pp. 32-33*. In truth, “spoliation” was never mentioned in the majority opinion. *Branch, 2011-Ohio-3975, ¶156-64*. The majority took care instead to identify the requirements for the evidentiary inference that had been recognized in *Cherovski v. St. Luke’s Hosp. of Cleveland* (December 14,

1995), 8th Dist. No. 68326, 1995 W.L. 739608, and several other authorities.

As has been the case throughout these proceedings, Defendant has not suggested that the legal standards governing either spoliation and the adverse inference are somehow inconsistent or uncertain in Ohio. No attempt has been made, moreover, to demonstrate that the judicial authorities that the Eighth District cited are somehow flawed. The majority simply concluded that nothing that had transpired throughout the course of the trial justified the court's startling comments upon the viability of the adverse inference claim. *Branch*, 2011-Ohio-3975, ¶62-63. Given that the loss of the fused image and original target planning data had been admitted by Dr. Machado, and Plaintiff was under no obligation to show any willfulness on Defendant's part, the jury should have been left to determine whether the evidence that had been presented justified the adverse inference that Ohio law has long recognized. The Eighth District thus did not err in determining that a second justification existed for ordering a new trial.

PROPOSITION OF LAW NO. III: THE EIGHTH DISTRICT'S DECISION DISALLOWING THE DIFFERENT METHODS JURY INSTRUCTION IS LEALLY AND FACTUALLY FLAWED, IS INTERNALLY INCONSISTENT AND CONTRADICTORY AND IS IN DIRECT CONFLICT WITH DECISIONS RENDERED BY THIS COURT AND OTHER APPELLATE COURTS THROUGHOUT OHIO, INCLUDING THE EIGHTH DISTRICT

A. STANDARDS FOR JURY INSTRUCTIONS.

It should go without saying that the jury charge should furnish a correct and complete statement of the applicable law. *Marshall v. Gibson* (1985), 19 Ohio St.3d 10, 12, 482 N.E.2d 583, 585; *Haynal v. Nordon Hills City Sch. Dist.* (July 5, 2001), 9th Dist. No. 20276, 2001 W.L. 753270, p. *1. It is a familiar tenet of Ohio appellate law that jurors are presumed to follow the instructions supplied from the bench. *Pang v. Minch* (1990), 53 Ohio St.3d 186, 195, 559 N.E.2d 1313, 1322; *State of Ohio v. Ahmed*,

B. THE TRIAL COURT'S ERROR

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

Now, I told you I'd have to skip around, and I'm about to do some of that. We talked about the issues. We talked about the standard of care, about the different methods of treatment.

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.

You shall decide whether the methods of diagnosis, treatment and procedure used in this case were in accordance with the standard of care. [emphasis added]

Id., Vol. XV, pp. 1943-1944. The parties' objections to the charge were preserved before the jurors began their deliberations. *Id., pp. 1964-1965*.

Despite all the misplaced hyperbole, the Eighth District's opinion did nothing more than abide by this Court's ruling in *Pesek v. University Neuro. Assoc., Inc.*, 87 Ohio St.3d 495, 2000-Ohio-483, 721 N.E.2d 1011. The trial judge had supplied a "different methods" instruction that was virtually identical to the one submitted by the Defendant in the instant action. *Id.*, 87 Ohio St.3d at 498. Just as in the proceedings below, the testifying physicians had been in agreement over the treatment that was required, once the patients' condition was identified. *Id.*, at 499. The only dispute

had been with whether the condition had been timely diagnosed and the treatment started. *Id.* The Supreme Court of Ohio held in the syllabus that:

[I]n medical malpractice cases, the “different methods” charge to the jury is appropriate only if there is evidence that more than one method of diagnosis or treatment is acceptable for a particular medical condition. [emphasis added].

Id. at 495. The defense verdict was thus overturned and a new trial was ordered “because the instruction ‘probably misled the jury in a matter substantially affecting the complaining party’s substantial rights.’” *Id.* at 499, citing *Becker v. Lake Cty. Mem. Hosp. W.* (1990), 53 Ohio St.3d 202, 208, 560 N.E.2d 165, 171.

This same result was also reached in *Kowalski v. Marymount Hosp., Inc.* (Mar. 1, 2007), 8th Dist. No. 87571, 2007-Ohio-828, 2007 W.L. 613865, and again in *Peffer v. Cleveland Clinic Found.* (8th Dist. 2008), 177 Ohio App. 3d 403, 2008-Ohio-3688, 894 N.E. 2d 1273. In both instances, defense verdicts were reversed because the “different methods” charge had been furnished without proof that the standard of care recognized alternative methods of diagnosis or treatment. *See also Roetenberger v. Christ Hosp.* (1st Dist. 2005), 163 Ohio App.3d 555, 2005-Ohio-5205, 839 N.E.2d 441 (“different methods” instruction was erroneous).

No such testimony was offered in the instant case. Dr. Machado had acknowledged that he had decided upon a trajectory that would avoid the highly vascular ventricle wall. *Tr. Trans. Vol. III, pp. 545-546; Vol. XIII, pp. 1686 & 1715.* The neurosurgeon agreed that, if he breached this structure, he would have been off course. *Id., Vol. III, pp. 545-546.* No other proof was offered to the contrary.

In attempting to salvage the untenable defense verdict, Defendant has attempted to justify the “different methods” charge upon the testimony of Dr. Bakos. *Merit Brief of Defendant-Appellant, p. 35.* All that Plaintiff’s expert had conceded was that there

were “different schools of thought and approaches as to how to perform a given surgery” in general. *Tr. Trans. Vol. VII, p. 956*. He then denied that he had employed an approach to DBS mapping that differed from that practiced in other medical centers. *Id.*, at 956.

The fact that various surgeons across the country did not use precisely the same mapping techniques hardly justified a different methods charge. As Dr. Bakos had explained, he was not criticizing Dr. Machado for the approach he had plotted to reach the GPI. *Tr. Trans. Vol. VII, pp. 996-997*. Plaintiff’s theory of malpractice was that Dr. Machado deviated from his plans and ruptured the patient’s ventricle. *Id.*, pp. 1001-1002. Not a single witness testified that slicing into the highly vascular chamber was a viable option for performing the surgery in this particular instance. To the contrary, Dr. Machado openly acknowledged that he was trying to avoid the structure. *Id.*, Vol. XIII, pp. 1685-1686. The whole point of his computerized recreation that is the subject of the first “Proposition of Law” was to visually demonstrate to the jurors how the ventricle had been missed “by a lot[.]” *Trial Tr. Vol. XIII, p. 1687*.

The only other support that has been cited to justify the “different methods” charge is Dr. Starr’s testimony “that there is a variability between surgeons and other institutions as to how to perform DBS surgery (Tr. 1144).” *Merit Brief of Defendant-Appellant, p. 35*. The defense expert had merely claimed that the surgery was “not standardized exactly how much time you spend doing it or how many different penetrations of the brain that you make.” *Trial Tr. Vol. IX, p. 1144*. He further confirmed that Dr. Machado had followed the “very standard approach to this kind of surgery.” *Id.* Since Plaintiff’s experts had never criticized Defendant’s neurosurgeon for the time he had spent on the surgery or the number of penetrations he had elected to take, Dr. Starr’s testimony could not have possibly justified a “different methods”

instruction. Plaintiff's theory of liability had been simply that once a trajectory had been plotted to avoid a ventricle, it was imperative for the patient's safety that the surgeon remain on-track. *Id. Vol. VII, pp. 1001-1002*. Not a single defense expert was willing to suggest that veering off course and into a vascular structure was an accepted "different method" that had been available to Dr. Machado. But that is exactly what the court's misplaced instruction conveyed. *Pesek*, 87 Ohio St. 3d at 498-499.

C. THE SUPPOSED INCONSISTENCY

Defendant's repeated belittling of the appellate court for purportedly finding that the target planning was both relevant and irrelevant are indicative of its penchant for vacuous reasoning. *Defendant's Merit Brief, pp. 16 & 37*. Read in context, the majority was actually remarking that the accuracy of the target planning was not a disputed issue in the case. *Branch*, 2011-Ohio-3975 ¶53. At no point did the opinion even insinuate that the pre-operative preparations were "irrelevant." *Id.* All the experts (as well as Dr. Machado himself) were in agreement that the standard of care required a safe trajectory to be plotted to the GPI. *Trial Tr. Vol. III, p. 515; Vol. VI, p. 826; Vol. IX, p. 1192*. The parties' dispute was over whether the neurosurgeon had properly followed the plotted trajectory while passing the stylus through Plaintiff's brain. *Id., Vol. VII, pp. 1001-1002*.

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

misinformed on a critical point of law and a new trial is therefore necessary.

D. THE CONTINUED VIABILITY OF THE PESEK STANDARD

In the end, this final "Proposition of Law" is devoted to arguing that the Eighth District either misinterpreted the evidence or misapplied the facts to the unquestioned legal standards. No attempt has been made to demonstrate that the holdings of *Pesek*, 87 Ohio St. 3d 495, and its progeny are flawed, outdated, or unworkable under the standards that were established in *Westfield Ins. Co. v. Galatis*, 100 Ohio St. 3d 216, 2003-Ohio-5849, 797 N.E. 2d 1256. While organizations such as the Ohio Hospital Association, Ohio State Medical Association, and Ohio Association of Civil Trial Attorneys have not hesitated in recent years to urge this Court to overturn established precedents in their *amicus curiae* filings, none of them have seen the need to do so in the case *sub judice*. No valid justification exists for this Court to disturb the Eighth District's admirable adherence to the consensus of established case law.

CONCLUSION

Far from having “usurped the jury’s role as the finder of fact by issuing a result-oriented decision[,]” the Eighth District justifiably concluded that Plaintiff is entitled to a second trial free of surprise demonstrative exhibits, prejudicial admonishments from the trial judge, and misleading jury instructions. Because the unerring ruling does not implicate, or even remotely threaten, any issues of public or great general importance, this appeal should either be dismissed as improvidently allowed or the appellate court should be affirmed in all respects.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

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