

ORIGINAL

No. 11-1634

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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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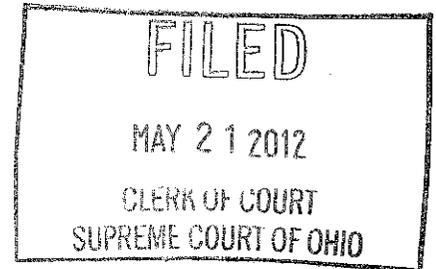
**MARGARGET BRANCH, et al.**

**Plaintiff-Appellee**

**v.**

**CLEVELAND CLINIC FOUNDATION**

**Defendant-Appellant**



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

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## I. INTRODUCTION

Plaintiff-Appellee Margaret Branch raises several meritless legal and factual arguments in an attempt to convince this Court that the Eighth District's erroneous Decision should not be disturbed. The Trial Court conducted a completely fair trial to both parties in which none of its rulings were even remotely close to an abuse of discretion. The Eighth District issued a result-oriented Decision that contains no justifiable legal or factual basis upon which to reverse a unanimous jury verdict that was well-reasoned and supported by the evidence. Similarly, Appellee's Merit Brief presents this Court with no legally or factually sound reason upon which the Eighth District's Decision should be allowed to stand.

If the Eighth District's Decision is not reversed by this Court, Ohio Courts and litigants will not have the proper guidance with respect to the law governing the proper use of demonstrative evidence, the elements of an adverse inference of negligence claim and when a jury charge on different methods is warranted. Moreover, this Court should reverse the Eighth District's contradictory and inconsistent Decision so that the Eighth District and other Courts will be deterred from creating and relying upon legally and factually unsound grounds in order to interfere with the sanctity of the jury system.

## II. LAW AND ARGUMENT

### **PROPOSITION OF LAW NO. 1: Appellee Presents Both Factually And Legally Flawed Arguments That Do Not Adequately Address the Eighth District's Misinterpretation Of The Law Concerning The Proper Use Of Demonstrative Evidence**

At the outset, it is necessary to clarify for this Court that Dr. Machado's in-court demonstration was presented by The Clinic in direct response to Appellee's new claim of "missing data" which was raised for the first time on the eve of trial and became Appellee's developing and prevalent theme of the trial. Dr. Machado's in-court demonstration was

warranted in order to refute Appellee's unfounded claim that The Clinic engaged in some type of malicious or conspiratory conduct with respect to not preserving the fused image of Appellee's target plan. The Clinic was compelled to refute Appellee's "missing data" claim by presenting an in-court demonstration that clarified for the jury that there was no "missing data." Instead, all of the data used for Appellee's DBS surgery is permanently contained in her medical records and, thus, The Clinic had an absolute right to prove this via Dr. Machado's in-court demonstration.

Dr. Machado's in-court demonstration was not presented in order to defend against Appellee's underlying allegations of medical negligence of proximate cause. There was overwhelming evidence and expert testimony to **disprove** Appellee's theory of negligence that the target/mapping plan was off and, as a result, this led to injury to vessels of the ventricle and hit the wall. Independent of Dr. Machado's in-court demonstration, the jury was free to believe The Clinic's defense that the procedure did not go through Appellee's ventricle. There was overwhelming evidence that Appellee's bleed, as confirmed by subsequent radiographic imaging, originated in the basal ganglia, i.e. the intended target for DBS surgery for Appellee's dystonia. Additionally, Dr. Benjamin Walter, The Clinic's movement disorder neurologist, confirmed through the microelectrode records that the cannula absolutely did not go through the ventricle as claimed by Appellee.

The unanimous defense verdict was clearly supported by the evidence because Appellee could not prove the essential elements of a medical malpractice action. Dr. Machado's in-court demonstration was presented so that the jury would not be prejudicially influenced by Appellee's new and warrantless claim of "missing data."

**A. Dr. Machado's In-Court Demonstration Was Not a Last Minute Impromptu Disclosure**

In addressing this Proposition of Law, it is imperative that the entire Oral Hearing and the Trial Court's ruling on Dr. Machado's in-court demonstration be clarified for this Court. (Tr. 1563-1587). Appellee is simply wrong where she states that the Trial Court initially ruled against the in-court demonstration. (Appellee's Merit Brief, pg. 13-16). To the contrary, the Trial Court was initially inclined to allow Dr. Machado to present the in-court demonstration (Tr. 1567-1568). The Trial Court explicitly stated that "I'm inclined to let it in" after The Clinic's counsel explained the purpose of the in-court demonstration, i.e. in order to respond to Appellee's allegation of "missing data" by simply applying the actual data taken from Appellee's operative note." (Tr. 1566-1568).

After the Trial Court's original inclination to allow Dr. Machado's in-court demonstration, the Trial Court conducted an extensive Oral Hearing in which it entertained arguments from the parties' counsel. Admittedly, the Trial Court indicated midway through the Oral Hearing that it may not allow the in-court demonstration. (Tr. 1578). However, the Trial Court continued to hear further oral arguments.

Ultimately, the Trial Court ruled that Dr. Machado could perform the in-court demonstration. The crux of the Trial Court's ruling was twofold: 1) it was demonstrative evidence; and 2) The Clinic had a right to respond to Appellee's claim of "missing data" and Appellee's own elaborate animations and in-court demonstration by their expert and a computer technician from the University of Rochester. Evidently, Appellee wants this Court to believe that the Trial Court changed its mind. However, the record undoubtedly confirms that the Trial Court was initially inclined to allow Dr. Marchado's in-court demonstration and then affirmed its inclination to allow it after a very thorough Oral Hearing. (Tr. 1583-1587).

Next, contrary to Appellee's initial argument in response to this Proposition of Law, Dr. Machado's in-court demonstration was not a "last-minute disclosure" or an "eleventh hour disclosure," as incorrectly characterized by the Eighth District. As the Dissent correctly noted, The Clinic's counsel informed everyone in Opening Statements that during Dr. Machado's trial testimony, Dr. Machado was going to reconstruct Appellee's surgery. (Eighth District's Decision at ¶68; Tr. 369-370). As such, there exists no basis, whatsoever, for either the Eighth District or Appellee to claim that Dr. Machado's in-court demonstration was either impromptu or a surprise.

Interestingly, Appellee actually references the underlying bases upon which the Trial Court properly allowed for Dr. Machado's in-court demonstration, i.e. **"the missing evidence has really become the issue in this case. . . ."** and it was a "vital" defense demonstration. (Appellee's Merit Brief, pg. 7). (Emphasis Added). As previously briefed and addressed above, Appellee raised the "missing data" issue for the very first time just prior to the trial and then vigorously pursued this unwarranted "missing data" claim throughout trial. The first time The Clinic had any indication that Appellee was going to raise an issue about allegedly "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. Then, as the Trial Court correctly recognized, Appellee's "missing data" really became the central theme of Appellee's case at trial.

The development and aggressive pursuit of Appellee's trial theme of "missing data" mandated that The Clinic defend itself with Dr. Machado's in-court demonstration. It was completely appropriate for Dr. Machado to show the jury how Appellee's actual data taken directly from her medical records could be inputted into commercially - available software in

order to show the trajectory of Appellee's target plan. Appellee's suggestion to the jury that The Clinic somehow did something to hide Appellee's data could not go unchallenged. This is why the Trial Court properly allowed Dr. Machado to conduct his in-court demonstration with Appellee's actual data.

The Eighth District's erroneous Decision with respect to Dr. Machado's in-court demonstration is egregious because it effectively denied Dr. Machado's right to defend himself against serious and unwarranted allegations bordering on intentional misconduct. The Eighth District's Decision is also troublesome for Courts and litigants throughout all of Ohio because it has set forth confusing and misleading law with respect to the proper use of demonstrative evidence.

**B. The Eighth District and Appellee's Reliance Upon *Perry vs. Univ. Hosps. Of Cleveland*, 8<sup>th</sup> Dist. No. 83034, 2004-Ohio-4098, 2004 WL 1753169 (Aug. 5, 2004) Is Misplaced**

Both the Eighth District and Appellee confuse the proper use of demonstrative evidence and the admission of a trial exhibit. In failing to acknowledge the distinction between demonstrative evidence and trial exhibits, both the Eighth District and Appellee improperly rely upon the *Perry* case. The *Perry* case has no application to this case either legally or factually, since it addressed the actual admission of a trial exhibit into evidence that was electronically altered and manipulated. Whereas, Dr. Machado did an in-court demonstration which is completely different than the manipulated trial exhibit at issue in *Perry*.

Like the Dissent noted, this Court should similarly distinguish between the use of demonstrative evidence and trial exhibits. The Eighth District's erroneous reliance upon the *Perry* case has effectively eliminated such a distinction and, consequently, has redefined the law with respect to the use of demonstrative evidence.

**C. Appellee's Claim That There Was An Unexcused Failure To Disclose Is Without Merit**

Appellee improperly claims that she fully disclosed her demonstrative evidence whereas The Clinic failed to reciprocate. For example, Appellee believes that The Clinic had full access to Appellee's expert's in-court demonstration, but nothing could be further from the truth. Unbeknownst to The Clinic, Dr. Bakos appeared at Court with a much more elaborate 2D animation than expected and with the assistance of an unidentified computer technician from the University of Rochester. Contrary to Appellee's contention, The Clinic had no prior notice and, thus, no time or opportunity to adequately prepare for the elaborate 2D animation presented by Dr. Bakos and the computer technician.

Next, The Clinic is compelled to respond to Appellee's misleading statement that the "missing data" had been the "subject of motion practice." (Appellee's Merit Brief, pg. 20). This is absolutely untrue and, in fact, Appellee does not cite to any motion practice in the record pertaining to "missing data." That's because the very first indication that Appellee was going to turn The Clinic's failure to preserve her target planning data on disk was one week before the commencement of trial when Appellee filed her request for Supplemental Jury Instruction on an Adverse Inference Negligence. It was Appellee who pursued a last-minute claim concerning "missing data" that required The Clinic to switch gears and defend an unwarranted and new claim that undoubtedly suggested some wrong doing on the part of The Clinic.

Finally, it is worth pointing out the inconsistency in Appellee's stance as to the timing of any claims regarding "missing data." On the one hand, Appellee stated that her counsel was fully prepared to question Dr. Machado about the "missing data" during the discovery phase of the case when Dr. Machado was deposed. (*Id.*) Yet, Appellee unjustifiably claims that her counsel was completely unprepared to cross-examine Dr. Machado when he presented his in-

court demonstration at trial. However, the record undoubtedly confirms that Appellee's counsel vigorously cross-examined Dr. Machado with regard to the reliability of the in-court demonstration. (Tr. 1728-1734; 1769-1771). Obviously, Appellee's counsel was completely prepared to effectively cross-examine Dr. Machado with respect to the in-court demonstration, which the Trial Court correctly recognized at the Oral Hearing. (Tr. 1586-1587).

**D. Appellee Was On Notice Of Dr. Machado's In-Court Demonstration And, Therefore, Had Ample Time And Opportunity To Prepare**

As noted by the Dissent, Appellee was given notice as early as Opening Statements of The Clinic's intention to have Dr. Machado reconstruct Appellee's target/mapping plan by extracting the actual data from the medial records and inputting it into a commercially available software. Appellee's claim that The Clinic "missed the point" of the Eighth District's Decision with respect to the software is clearly without merit. (Appellee's Merit Brief, pg. 21). It was the Eighth District that "missed the point" when it based its Decision on its erroneous belief that "the recreation could only be performed on The Clinic's three-dimensional Stealth software, to which Branch did not have access." (Decision at ¶23.) Not only is this statement unsupported by the record, it is simply not true and, therefore, should not have served as a basis for the Eighth District's flawed Decision.

The record establishes to the contrary, i.e. all equipment used for DBS surgery, including the Stealth system, is commercially available to the public at large (Tr. 1665; 1672; 1688). In fact, Appellee's expert, Dr. Bakos, brought in a commercially available DBS system to trial. Moreover, Appellee's counsel had every opportunity throughout the course of pre-trial discovery to take the actual data from Appellee's medical records and have them inputted into any computer system at any time. So, neither the Eighth District nor Appellee can justifiably state

Appellee's counsel did not have the opportunity to adequately prepare for Dr. Machado's in-court demonstration.

It is ironic how Appellee can argue on the one hand that The Clinic did not give prior notice of the in-court demonstration when it was Appellee who pushed the issue of "missing data" upon The Clinic on the eve of trial. Prior to submitting the proposed jury instruction on an Adverse Inference of Negligence, the "missing data" claim was never an issue. At no time did Appellee's experts opine that the failure to maintain the fused image on a disc constituted negligence. Appellee never presented this claim in either any of the expert reports or discovery depositions. Clearly, it was The Clinic who was not on notice that the "missing data" issue was going to be Appellee's theme of the case at trial.

**E. The In-Court Demonstration Was Essential To Address Appellee's "Missing Data" Claim Which Was Intended To Distract The Jury From The Underlying Medical Negligence Allegations**

Appellee mistakenly states that Dr. Machado's in-court demonstration was the highlight of the direct examination of Dr. Machado's the entire defense case-in-chief and "filled a gaping hole in the defense." (Appellee's Merit Brief, pg. 23). This is simply untrue. As previously discussed, The Clinic presented overwhelming evidence and expert testimony that clearly refuted Appellee's allegations of both medical negligence and proximate cause. There was **never** a gaping hole in The Clinic's defense to these allegations. Interestingly, Appellee is correct in saying a "unanimous defense verdict was relatively predictable." (*Id.*, pg. 24). A unanimous defense verdict was predictable because of the evidence and testimony presented throughout the trial; not a result of Dr. Machado's in-court demonstration.

The "hole" that needed to be addressed by The Clinic was Appellee's new and unwarranted claim that there was "missing data" regarding Appellee's target mapping/plan.

Apparently, Appellee's trial strategy was to surprise The Clinic with a claim meant to influence the jury that was never made during discovery; never raised in any of Appellee's expert reports; and never raised by Appellee's experts in their depositions. Neither the Eighth District nor Appellee can justifiably say that The Clinic was not allowed to respond with Dr. Machado's in-court demonstration in order to demonstrate for that jury that there was never any "missing data." Instead, Appellee's actual data could be extracted from her medical records, inputted into a computer program and then used to recreate her target mapping/plan. It was necessary for the jury to hear and see why Appellee's claim of "missing data" was meritless.

**F. Appellee Presents No Case Law Or Other Legal Authority That Holds That There Is No Distinction Between Demonstrative Evidence And Trial Exhibits**

The Dissenting Opinion correctly noted the distinction between the use of demonstrative evidence and trial exhibits. In determining that the Majority misapplied its decision in *Perry*, the Dissent stated that Dr. Machado's in-court demonstration "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*." (Decision at ¶66). This is why demonstrative evidence is treated differently than trial exhibits admitted into evidence and given directly to the jury.

Appellee presents this Court with no case and no other legal authority that contradicts the Dissent's distinction between demonstrative evidence and evidence admitted as trial exhibits and sent directly to the jury for its consideration. Instead, Appellee provides this Court with several cases that are inapplicable to this case both factually and legally. (Appellee's Merit Brief, pg. 25).

The Eighth District herein held that the Trial Court abused its discretion in allowing Dr. Machado's in-court demonstration because it determined that it constituted an "Eleventh-Hour Disclosure." (Decision at ¶30). However, only one of all the cases cited by Appellee pertains to any issues concerning notice or surprise. In *Tritt vs. Judd's Moving & Storage, Inc.*, 62 Ohio App. 3d 206, 574 N.E. 2d 1178 (10<sup>th</sup> Dist. 1990), the Tenth District Court of Appeals held that the defendant's expert's testimony on an out-of-court experiment should have been excluded because it was unexpected. However, the primary reason for excluding the defendant's expert's testimony was because it was offered to counter the cross-examination testimony of the plaintiff's expert that was actually elicited by the defendant's counsel and never a part of the plaintiff's case in the first place. *Id.* at 212. In other words, it was the defense that created the issue upon which its expert based his out-of-court experiment and, consequently, the plaintiff was surprised by the out-of-court experiment.

The *Tritt* case has no bearing upon this case, because Dr. Machado's in-court demonstration was in direct response to the new and unwarranted claim of "missing data" **raised by Appellee**. Unlike the *Tritt* case, The Clinic did not create the "missing data" issue upon which Dr. Machado's in-court demonstration was presented to refute. Dr. Machado's in-court demonstration was appropriate to counteract a claim/issue raised by Appellee whereas the defendant's expert's out-of-court experiment in *Tritt* was properly excluded because the defense created the claim/issue.

Next, the remainder of the cases relied upon by Appellee all address the vast dissimilarities between out-of-court experiments and the real incidents/events at issue. See, *Bush vs. Hoelker*, 10<sup>th</sup> Dist. No. 89AP-185, 1989 WL 119992 (Oct. 12, 1989) (experimental photographs should have been excluded because of the uncertainty of the accuracy of what they

purported to represent); *Figueroa vs. Toys-R-Us Ohio, Inc.*, 8<sup>th</sup> Dist. No. 70463, 1997 WL 156720 (Apr. 3 1997) (Out-of-court experiments were too dissimilar to be of any probative value); *United States of America vs. Baldwin*, 418 F. 3d 575 (6<sup>th</sup> Cir. 2005) (the videotape experiment was substantially dissimilar to the event at issue); *Brewer vs. Sky Climber, Inc.*, 2<sup>nd</sup> Dist. No. 8071, 1984 WL 5329 (June 14, 1984) (photographs did not accurately reflect that which it was alleged to); *State vs. Zerla*, 10<sup>th</sup> Dist No. 93APA09-1304, 1994 WL 714456 (Dec. 22, 1994) (the out-of court experiment was dissimilar in that it was not conducted under circumstances similar to those involved).<sup>1</sup>

In this case, Dr. Machado's demonstrative in-court presentation was of Appellee's actual data taken directly from her operative note and medical records. This **was not** an out-of-court experiment that started at ground zero. Dr. Machado simply entered Appellee's actual data into commercially-available computer software, just like Dr. Machado did in February 2007. (Tr. 1664-1689). As such, Dr. Machado's in-court demonstration was not misleading or confusing to the jury that its admission constituted an abuse of discretion on the part of the Trial Court. None of the cases upon which Appellee relies can support the Eighth District's finding that The Trial Court abused its discretion.

**PROPOSITION OF LAW NO. 2: Just Like The Eighth District, Appellee Confuses The Legal Elements Of A Spoliation Of Evidence Claim With An Adverse Inference Claim, Which Had Nothing To Do With The Trial Court's Sustaining Of One Objection To The BP Oil Disaster Comparison During Rebuttal Closing Arguments**

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<sup>1</sup> Although the defendant's failure to disclose information in discovery was an issue at the trial court level, it was not the subject of the appellate decision. *Zerla, supra* at 5.

**A. Appellee Was Never Prevented From Arguing An Adverse Inference Of Negligence Claim**

Contrary to the Eighth District's Decision and Appellee's argument, the fact that the Trial Court correctly sustained one objection to Appellee's comparison of this case to the BP Oil Disaster during Rebuttal Closing Argument did not prevent Appellee from arguing to the jury a claim for an Adverse Inference of Negligence. In fact, by the Eighth District's own admission, Appellee's case was essentially premised upon this particular claim throughout the entire trial:

**Throughout the 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 had plotted and breached the ventricle wall. Branch's counsel asserted, and several points during the trial the Trial Court agreed, that because that evidence was to draw an inference that the unsaved image and data would have been unfavorable to the Clinic.**

(Decision at ¶56). (Emphasis Added).

Neither the Eighth District nor Appellee can logically claim that the Trial Court's prohibition of any comparison to the BP Oil Disaster prevented Appellee from arguing an Adverse Inference of Negligence Claim. Clearly, both the Eighth District and Appellee ignored the Trial Court's comments that the claim of "missing data" became the central theme of Appellee's case. Appellee was permitted to present evidence and testimony that went directly to an Adverse Inference of Negligence claim. Moreover, Appellee's counsel was allowed to argue a claim for an Adverse Inference of Negligence during Closing Arguments. As such, the sustaining of the objection to the BP Oil Disaster comparison had no effect, whatsoever, on Appellee's Adverse Inference of Negligence claim.

**B. The Trial Court's Properly Sustained The BP Oil Disaster Comparison Because Appellee's Counsel Was Attempting to Argue Some Type Of Intentional Misconduct On The Part Of The Clinic.**

In the summer of 2010 when this case was being tried, the entire world was watching the events of the BP Oil Disaster unfold throughout the media. In fact, Appellee's counsel admitted in Rebuttal Closing Argument that "everybody is reading about it." (Tr. 1926). It cannot be disputed that the BP Oil Disaster triggered anger and resentment against BP for what many perceived as "criminal conduct." So, when Appellee's counsel attempted to compare this case to the BP Oil Disaster during Rebuttal Closing Arguments, The Clinic's counsel immediately objected and the Trial Court correctly sustained the objection. The sole basis for the Trial Court's ruling had everything to do with Appellee's counsel's inference that there was some type of intentional misconduct on the part of The Clinic. The Trial Court's ruling had nothing to do at all with any claim for an Adverse Inference of Negligence claim. (Tr. 1925-1926).

It is worth noting that in her Merit Brief, Appellee fails to address the entire context of her counsel's comments during the Rebuttal Closing Argument. Appellee fails to quote the relevant portion just prior to The Clinic's objection and the Trial Court's ruling (Appellee's Merit Brief, pg. 27). It is necessary to consider the entire exchange as opposed to just a portion:

**This was the killer. Oh, this target planning, this target planning, it's just the same thing as the operative report.**

Folks, if I didn't make that clear by now, then I have failed Margaret Branch like they failed Margaret Branch.

This target planning shows the thinking, why they selected point - - why they selected the entry point, where they selected - - where they selected the GPi. You can't recreate history. You can't do that.

**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.**

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

It is a complete mystery how the Trial Court's sustaining of an objection limited **only** to the BP Oil Disaster comparison had anything to do with "the missing image and target plan data." (See Decision at ¶63). There is simply no correlation between the basis of the Trial Court's ruling on the BP Oil Disaster comparison and Appellee's claim for an Adverse Inference of Negligence. As such, there is no basis for the Eighth District's grand leap to conclude that Appellee was precluded from arguing an Adverse Inference of Negligence, especially when Appellee presented and argued this claim throughout the entire trial.

**C. The Eighth District's Decision And Appellee's Respective Positions Are Illogical**

As previously discussed, the Eighth District and Appellee fail to recognize that the **only** basis for the Trial Court's ruling was that Appellee's counsel went well beyond an Adverse Inference of Negligence claim when he made a comparison of this case to the disastrous and high profile BP Oil Disaster. By misreading the real basis for the Trial Court's ruling, the Eighth District misapplied its decision in *Cherovsky vs. St. Luke's Hosp. of Cleveland*, 8<sup>th</sup> Dist. No. 68326, 1995 WL 738608 (Dec. 14, 1995) The Eighth District improperly intertwined the elements of a Spoliation of Evidence claim with an Adverse Inference of Negligence claim. As the Dissent correctly noted, the majority's reliance upon *Cherovsky* was misplaced. As a result, the Eighth District has left Ohio with a confusing precedent with respect to the claims for an Adverse Inference of Negligence and Spoliation of Evidence.

**PROPOSITION OF LAW NO. 3: Appellee Is Misdirected In Her Position That The Eighth District's Decision Disallowing The Different Methods Jury Instruction Is Legally And Factually Sound And Is Not Internally Inconsistent And Contradictory**

**A. The Eighth District Misinterpreted And Misapplied The Law With Respect To A Different Methods Jury Charge**

Appellee incorrectly argues that the Eighth District “did nothing more than abide by this Court’s ruling in *Pesek vs. Univ. Neuro. Assoc., Inc.* 87 Ohio St. 3d 495, 2000-Ohio-483, 721 N.E. 2d 1011.” (Appellee’s Merit Brief, pg. 30). As more fully briefed in The Clinic’s Merit Brief, the Eighth District simply misinterpreted the legal justification for a different methods jury charge as set forth in this Court’s *Pesek* Decision. Once again, the Eighth District ignored the sound reasoning of the Trial Court and in doing so, has created legal precedent that is both misleading and confusing with respect to the different methods jury instruction.

It is worth noting that the Trial Court conducted an Oral Hearing on the jury instructions and explicitly addressed the different methods jury charge:

**THE COURT: Might - - you got your Dr. Bakos [Appellees’ expert], talks about indirect, direct. I mean, this is all over the case. You should decide the methods and care and treatment used in the care are in accordance with the private standard of care.**

(Tr. 1815) (Emphasis Added).

The Trial Court was undoubtedly correct in finding that “difference methods” was all over the case because Appellee’s expert made numerous concessions to this effect:

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. **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. **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. 892; 955-957; 996).

With Mr. Bakos' admissions and the trial testimony of The Clinic's expert, Dr. Starr, a different methods jury charge properly given by the Trial Court.

Of importance, The Eighth District completely failed to address how the Trial Court's ruling on the different methods jury charge was an abuse of discretion or how Appellee was prejudiced. The Eighth District's Decision is totally devoid of any legal analysis or review of the Trial Court's jury instructions as a whole and how Appellee's substantial rights were materially affected. All the Eighth District did was set forth confusing law on the different methods jury instruction when it summarily agreed with Appellee that the different methods jury instruction "led the jurors to believe that violating the standard of care that had been established did not necessarily mean that negligence occurred." (Decision at ¶51). The problem with the Eighth District's holding is that Appellee failed to prove her case that there was any violation of the standard of care in the first place.

Appellee's reliance upon the decision in *Kowalski vs. Marymount Hos., Inc.*, 8<sup>th</sup> Dist. No. 87571, 2007-Ohio-828, 2007 WL 613865 (Mar. 1, 2007) and *Roetenberger vs. Christ. Hosp.*, 163 Ohio App. 3d 555, 2005-Ohio-5205, 839 N.E. 2d 441 (1<sup>st</sup> Dist. 2005) is misplaced. In *Kowalski*, the Eighth District held that the issue was not whether the physician followed an accepted method of diagnosis, but rather, whether the physician was negligent in failing to properly recognize that the observed symptoms were indications of heart disease. *Kowalski, supra* at ¶22. Since the *Kowalski* case did not involve different methods of diagnosis, a different methods jury charge was not warranted. Unlike the *Kowalski* case, as the Trial Court correctly noted, evidence of different methods of treatment was "all over the case." (Tr. 1815).

Similarly, the *Roetenberger* decision is inapplicable herein. In the *Roetenberger* case, there was no factual basis to support a different methods jury charge because there existed no evidence that any method of treating the medical conditions different from the actual procedure performed was within the standard of care. *Id.* at ¶16. In the instant case, there was plenty of

evidence 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 did not intend to go through the ventricle did not constitute negligence. This is because it is well known and recognized that an inadvertent hitting of the ventricle, in and of itself, does not constitute a negligent act. (Tr. 549; 1152; 1155; 1187-1188; 1215; 1718). Moreover, The Clinic presented convincing evidence that Dr. Machado never hit the ventricle.

**B. The Eighth District's Decision Is Full Of Legal And Factual Inconsistencies and Inaccuracies**

Contrary to Appellee's unwarranted claim, The Clinic is not engaging in "repeated belittling" of the Eighth District. (Appellee's Merit Brief, pg. 33). The Clinic is merely pointing out the obvious inconsistencies within the Eighth District's Decision which formed the bases of its erroneous reversal of a justified unanimous defense verdict.

There is no dispute that in addressing Dr. Machado's in-court demonstration that the Eighth District determined that the target/mapping plan was relevant enough to find prejudicial and reversible error. Yet, at the same time, in justifying its holding with respect to the different methods jury charge, the Eighth District determined that the target mapping/plan was not an issue and, thus, not relevant. Before this Court, The Clinic is compelled to point out the Eighth District's internally inconsistent Decision because such a legally and factually flawed Decision has left Courts and litigants with a precedent that is erroneous, misleading and confusing. In no way is The Clinic "belittling" the Eighth District.

**III. CONCLUSION.**

Appellee fails to adequately refute the fact that the Eighth District's Decision is not only erroneous and in direct conflict with this Court's precedents and those of other appellate courts, its Decision is based upon inconsistent and contradictory findings of law and facts. There can be

no doubt that the Eighth District issued a legally and flawed Decision with the intent to reverse a unanimous defense verdict that was unquestionably supported by the evidence.

This Court should reverse the Eighth District's Decision since it is in conflict with this Court and other precedents with respect to the use of demonstrative evidence, the elements of an Adverse Inference of Negligence claim and the appropriateness of a different methods jury instruction. If allowed to stand, the Eighth District's Decision will inevitably cause uncertainty in the manner in which jury trials should be conducted.

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 21<sup>st</sup> day of May,

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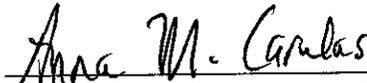
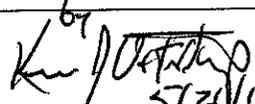
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