

**IN THE SUPREME COURT OF OHIO**

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**CASE NO. 11-1634**

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**MARGARET BRANCH,  
Plaintiff-Appellee,**

**-vs-**

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

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

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**PLAINTIFF-APPELLEE'S MOTION FOR RECONSIDERATION**

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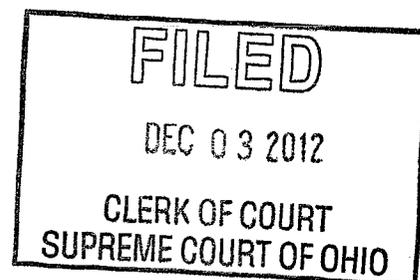
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## MOTION

Plaintiff-Appellee, Margaret Branch, requests that this Court reconsider the opinion that was issued on November 21, 2012, a copy of which is attached as *Exhibit A*. Consistent with Sup. Ct. Prac. R. 11.2(B), no attempt will be made to reargue the positions that had been advanced earlier in these proceedings. Nevertheless, the decision fails to account for critical circumstances that had been identified by the Eighth Judicial District and cited as justifications for a new trial. Indeed, an obvious error has been committed with regard to Plaintiff's inability to cross-examine defense experts about a computerized recreation that was disclosed only at the conclusion of the proceeding. Ultimately, it is evident that this Court failed to comprehend the enormity of the prejudice that had been inflicted. In the interests of fairness and justice, a careful reconsideration of the reversal order is warranted.

Each of the Eighth District's three justifications for ordering a new trial will be separately addressed in the remainder of this Motion.

### **I. THE DEMONSTRATIVE EVIDENCE**

With regard to the first Assignment of Error that has been asserted by Defendant-Appellant, Cleveland Clinic Foundation, this Court does not appear to appreciate that the three-dimensional, probes eye view/real-time re-creation of the deep brain stimulation (DBS) surgery was disclosed to Plaintiff's counsel just ten minutes before Andrea Guelman Gomes Machado, M.D. ("Dr. Machado") was called as the final witness. *Trial Tr. Vol. XII, p. 1573*. The opinion references only in passing that Plaintiff had been "claiming that the simulation was prejudicial and that [Defendant] had not provided adequate notice of its intent to offer the exhibit." *Branch v. Cleveland Clinic Found.*, \_\_\_ Ohio St. 3d \_\_\_, 2012-Ohio-5345, \_\_\_ N.E. 2d \_\_\_, ¶11. The inescapable fact that the demonstration had been concealed until the last possible

moment had been the linchpin of the appellate court's decision to order a new trial. *Branch v. Cleveland Clinic Found.*, 8<sup>th</sup> Dist., Case No. 95475, 2011-Ohio-3975, 2011 W.L. 3505286, ¶22 (Aug. 11, 2011).

Defense counsel did not deny during the discussions with the trial judge, and did not deny during the course of the appeal, that the computer generated recreation could have been disclosed substantially earlier during the trial. She had openly acknowledged, moreover, during the discussions with the trial judge that she was "recreating" the surgery and "calling it demonstrative[.]" *Trial Tr. Vol. XII, p. 1567*. Dr. Machado claimed during his direct examination that he had used **the films of Plaintiff's own brain and reconstructed** a visual depiction of the procedure exactly as it had happened from a probe's eye view. *Trial Tr. Vol. XIII, p. 1668*. The three-dimensional computerized recreation of the stylus passing safely by all the vessels in Plaintiff's brain thus conveyed far more than any chart or animation, and was the last significant piece of evidence that the jurors saw.

It is therefore difficult to fathom how this Court could conclude that Plaintiff "was permitted to use an exhibit that the trial court deemed to be comparable to the [Defendant's] exhibit." *Branch*, 2012-Ohio-5345, ¶18. Plaintiff's counsel had been required to explain that their animated video did not actually depict Plaintiff. *Trial Tr. Vol. VII, p. 886*. Defense counsel even objected because the demonstration was "not the patient." *Id.*, p. 860. And there was no dispute that Plaintiff had disclosed the animation over a week before it was introduced during her expert's direct examination testimony. *Id.*, Vol. I, p. 278. Ample opportunity was afforded for the defense experts to evaluate the production's reliability and help defense counsel prepare an effective cross-examination. *Trial Tr. Vol. I, p. 278*. It is difficult to imagine a more uneven playing field.

Likewise, this Court's reference to the fact that Plaintiff's counsel "had access to the same notes that [Defendant] used in preparing its demonstrative aid" is simply mystifying. *Branch*, 2012-Ohio-5345, ¶18. The neurosurgeon's data could be deciphered only by another neurosurgeon, and Defendant had waited until after Plaintiff's experts had left Cleveland before the production was divulged. *Trial Tr. Vol. XII, p. 1573*. And, Plaintiff's attorney certainly had not arrived to Court that day with the highly-specialized computer software that was needed to convert that data and the fused images of his client's brain (which no longer existed) into his own depiction. There is no avoiding the reality that it was impossible to determine whether the three-dimensional, real-time depiction of the vessel avoiding trajectory was indeed accurate. For all anyone knows, the jury could have been watching the stylus pass safely through the brain of an entirely different patient.

The final justification that was furnished for denying the new trial is simply wrong. This Court has found that Plaintiff "had adequate opportunity to cross-examine clinic doctors with respect to the exhibit despite the minimal notice." *Branch*, 2012-Ohio-5345, ¶18 (emphasis added). The physicians who had been called by the defense, Phillip Starr, M.D. ("Dr. Starr"), Hooman Azmi, M.D., Benjamin Walter, M.D., and Jerrold L. Vitek, M.D. had concluded their testimony and returned to their practices before the curiously-timed disclosure was made. *Trial Tr. Vol. IX, p. 1130-1233; Vol. XI, p. 1391 & 1448-1520; Vol. XII, pp. 1523-1563*. Dr. Starr had actually testified approximately four days earlier that the entire plan could not be re-created. *Id.*, *Vol. IX, p. 1211*. Developing that testimony would have undoubtedly discredited the defense production beyond repair, but Plaintiff's counsel was deprived of the opportunity.

Plaintiff was only able cross-examine one "doctor" – not "doctors" – and that was Dr. Machado himself. With only ten minutes to prepare and lacking both the necessary

computer software, the fused image, and the assistance of a neurosurgeon, there was no chance that Plaintiff's counsel would be able to determine whether the computerized recreation of the surgery truly was accurate.

There has never been any merit to Defendant's far-fetched explanation that the three-dimensional computerized recreation was needed to show that there really was no "missing evidence." As has now been conceded, Plaintiff had disclosed at least a week before trial (if not substantially earlier) that an adverse inference charge was going to be requested as a result of the hospital's inexplicable failure to produce highly relevant surgical information. *Merit Brief of Defendant-Appellant*, p. 25. And the visual demonstration hardly served to simply confirm that nothing had been lost, but was intended to depict the actual (vessel avoiding) DBS procedure that was purportedly performed upon Plaintiff. Dr. Machado was thus able to proclaim to the jurors that he had missed the ventricle "by a lot" as they watched a surgery being skillfully and expertly performed. *Trial Tr. Vol. XIII*, p. 1687. The impressive recreation of the supposed trajectory in Plaintiff's brain did not, however, explain why the original fused images had been discarded even though the patient had suffered a catastrophic stroke while under Defendant's care.

It is apparent that Eighth District had conducted a careful and comprehensive review of the complete trial transcript and fully appreciated the significance of this timing issue. The Court's compelling analysis of Defendant's Assignments of Error correctly observed that:

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

testimony and failed to disclose it. [emphasis added]

*Branch*, 2011-Ohio-3975, ¶22. Once this Court affords due consideration to the critical timing of the disclosure, it becomes evident that a new trial is indeed warranted in this case. The Eight District's decision should have been affirmed.

## II. ADVERSE INFERENCE

Defendant's second Assignment of Error took issue with the Eighth District's determination that an abuse of discretion had been committed when the trial judge impeded Plaintiff's ability to argue that adverse inferences could be drawn from the missing fused images of her brain. In overturning the appellate court's sound decision, this Court has simply accepted defense counsel's assertions as accurate. The decision contends that:

The issue here, however, was not that [Defendant] failed to produce evidence in its control, but that [Plaintiff] disagreed with [Defendant's] standard practice of deleting surgical plans. [Defendant] produced the written records from the surgery that detailed the path the surgeon had used in inserting the probe into the brain.

*Branch*, 2012-Ohio-5345, ¶21.

A "standard practice of deleting surgical plans" was never conclusively established, as Dr. Machado simply testified that he did not think it was possible to save the image that had been "fused" from Plaintiff's MRI and CT scan. *Trial Tr. Vol. III, pp. 508*. And, the notes and target planning data that were prepared identified only the entry point, target point, and trajectory. *Id., p. 504*. The fused image of the Plaintiff's brain was indispensable to preparing the computer generated visualization of the pathway that the stylus was supposed to take. *Id., pp. 504-510*. Accordingly, even Dr. Starr acknowledged that while the MRI and CT scan could be re-fused in theory, only parts of the plan could ever be reconstructed. *Trial Tr. Vol. IX, p. 1211*.

The remainder of this Court's analysis of this issue cannot be reconciled with the

trial transcript. It has been explained that:

More importantly, the trial court did not prevent [Plaintiff] from actually arguing for the adverse inference. The order to avoid references to the topic occurred just moments before the end of [Plaintiff's] closing argument. Up until that point, [Plaintiff] referred to the missing records repeatedly. The trial court did not forbid the jury from considering [Plaintiff's] argument in this respect.

*Branch*, 2012-Ohio-5345, ¶22. The following exchange had actually occurred:

[PLAINTIFF'S COUNSEL]: After the BP –

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

[PLAINTIFF'S COUNSEL]: Fine.

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

You may continue. [emphasis added].

*Trial Tr. Vol. XIV, p. 1926.* As the Eighth District had understood, the issue really had nothing to do with the propriety of the “BP Oil disaster” analogy. *Branch*, 2011-Ohio-3975, ¶62-63. The trial judge went too far by announcing to the jurors that there had been no “willful” destruction and “there is no evidence to support it.” *Trial Tr. Vol. XIV, p. 1926.*

While it is technically true that the jurors were never “forbid[den]” to consider the adverse inference, the Court’s admonishment had precisely the same effect. By implying that “willfulness” was necessary and openly declaring that there was “no evidence” on the issue, he dictated the result that was supposed to be reached. *Trial Tr. Vol. XIV, p. 1926.* “The influence of the trial judge on the jury ‘is necessarily and properly of great weight’ and ‘his lightest word or intimation is received with deference, and may prove controlling.’ This court has accordingly emphasized the duty of the trial judge to use great care that an expression of opinion upon the evidence ‘should be so given as not to mislead, and especially that it should not be one-sided’; that ‘deductions

and theories not warranted by the evidence should be studiously avoided.” *Quercia v. United States*, 289 U.S. 466, 470, 53 S. Ct. 698, 699, 77 L. Ed. 1321 (1933), quoting *Starr v. United States*, 153 U.S. 614, 626, 14 S. Ct. 919, 923, 38 L. E. 2d 841 (1894), and *Hickory v. United States*, 160 U.S. 408, 421-423, 16 S. Ct. 327, 332, 40 L. E. 474 (1896). The Eighth District’s determination that a new trial was warranted by the lower court’s unfortunate commentary upon the evidence was thus entirely consistent with long-established legal precedent.

### III. THE DIFFERENT METHODS INSTRUCTION

This Court properly acknowledged that in *Pesek v. University Neuro. Assn., Inc.*, 87 Ohio St. 3d 495, 498, 2000-Ohio-483, 721 N.E. 2d 1011, the standard was established that the “different methods” charge is appropriate only when two or more medically acceptable approaches have been established by the experts for treating the patient. *Branch*, 2012-Ohio-5345, ¶25-26. There can be no disagreement, moreover, with this Court’s observations that: (1) Plaintiff’s claim is that Dr. Machado was negligent in striking the ventricle wall, and (2) he has denied that he did so. *Id.* at ¶27.

But, after properly framing the scope of the malpractice dispute, the decision then veers well outside those boundaries. The “different method” charge was purportedly warranted because the experts disagreed over whether the planning trajectory was sufficiently safe, had been properly computed, and had been competently performed with minimal tracks into the brain. *Branch*, 2012-Ohio-5345, ¶28. Those distinctions address only the manner in which the surgery was conducted, not the surgical options that were available under the governing standard of care. In even moderately-complicated procedures, there will always be differences in the physicians’ techniques. *Pesek*, does not suggest, however, that such routine distinctions somehow justify a “different methods” charge. *Pesek*, 87 Ohio St. 3d at 498.

The pivotal issue in this case was always over whether or not the ventricle had been breached, thus causing the hemorrhage and stroke. *Branch*, 2012-Ohio-5345, ¶127. On this standard of care issue, there were no disputes. Dr. Machado openly acknowledged that he had decided upon a trajectory that would avoid the highly vascular ventricle wall. *Trial Tr. Vol. III, pp. 545-546; Vol. VIII, pp. 1686 & 1715*. The neurosurgeon further agreed that he would have been off course if he had breached the structure. *Id.*, pp. 545-546. At no point did Dr. Machado or the hospital's experts suggest that, in Plaintiff's case, one acceptable "method" to treating her cervical dystonia was to pierce the vascular lining.

The pernicious influences of the "different methods" charge in a case such as this are difficult to overstate. Plaintiff's entire theory of liability had been predicated upon the undisputed principle that the ventricle wall should not have been breached if the DBS was properly performed in compliance with the standard of care. As was recognized in *Pesek*, 87 Ohio St. 3d 495, 498, the misplaced charge allowed the jurors to conclude that a violation of this undisputed duty was not necessarily negligence. Numerous other courts have reached this same sound conclusion. *Roetenberger v. Christ Hosp.*, 163 Ohio App. 3d 555, 2005-Ohio-5205, 839 N.E. 2d 441 (1<sup>st</sup> Dist. 2005); *Peffer v. Cleveland Clinic Found.*, 177 Ohio App. 3d 403, 2008-Ohio-3688, 894 N.E. 2d 1273 (8<sup>th</sup> Dist. 2008); *Kowalski v. Marymount Hosp., Inc.*, 8<sup>th</sup> Dist. No. 87571, 2007-Ohio-828, 2007 W.L. 613865 (Mar. 1, 2007). If disagreements over the physician's planning and technique are now going to justify the potentially disruptive "different methods" charge, then juries will be routinely advised at the conclusion of nearly every malpractice trial that the failure to follow the medically-accepted approach is excusable.

**CONCLUSION**

For the foregoing reasons, this Court should reconsider the untenable decision of November 21, 2012 and affirm the Eighth Judicial District Court of Appeals.

Respectfully Submitted,

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**CERTIFICATE OF SERVICE**

I certify that a copy of the foregoing **Motion** has been sent by regular U.S. Mail, on this 3<sup>rd</sup> day of December, 2011 to:

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--- N.E.2d ---, 2012 WL 5910949 (Ohio), 2012 -Ohio- 5345  
 (Cite as: 2012 WL 5910949 (Ohio))

**H**

Supreme Court of Ohio.  
 BRANCH, Appellee,  
 v.  
 CLEVELAND CLINIC FOUNDATION, Appel-  
 lant.

No. 2011-1634.

Submitted June 20, 2012.

Decided Nov. 21, 2012.

**BRANCH, APPELLEE, v. CLEVELAND CLINIC FOUNDATION, APPELLANT.**

**Background:** Patient brought action against medical clinic, alleging malpractice in connection with a stroke that patient suffered during deep brain stimulation (DBS) surgery. The Court of Common Pleas, Cuyahoga County, No. CV-696928, entered judgment on jury verdict in favor of clinic. Patient appealed. The Court of Appeals, 2011 WL 3505286, 2011-Ohio-3975, reversed and remanded. Clinic appealed.

**Holdings:** The Supreme Court, McGee Brown, J., held that:

- (1) trial court acted within its discretion in allowing clinic to present late-disclosed demonstrative evidence;
- (2) trial court acted within its discretion in limiting patient's closing argument; and
- (3) jury instruction regarding different methods was not improper.

Reversed.

Pfeifer, J., dissented and filed opinion.

West Headnotes

**[1] Appeal and Error 30** 

30 Appeal and Error

A trial court is in the best position to make

evidentiary rulings and an appellate court should not substitute its judgment for that of the trial judge absent an abuse of discretion; appellate court does not, however, defer to trial court rulings that are unreasonable, arbitrary, or unconscionable.

**[2] Evidence 157** 

157 Evidence

In patient's action against medical clinic alleging malpractice in connection with a stroke that patient suffered during deep brain stimulation (DBS) surgery, trial court acted within its discretion in allowing clinic to present late-disclosed demonstrative evidence in the form of a three-dimensional computer simulation of brain mapping, using data it had retained from the surgeon's notes regarding patient's procedure; trial judge carefully reviewed both parties' arguments and was well aware of the issue's importance, patient was permitted to use an exhibit that the trial court deemed to be comparable to the clinic's exhibit, patient's counsel had access to the same notes that the clinic used in preparing its demonstrative aid, and trial court determined that patient had adequate opportunity to cross-examine clinic doctors with respect to the exhibit despite minimal notice.

**[3] Trial 388** 

388 Trial

Trial court's limiting patient's argument regarding an adverse inference arising from clinic's failure to retain plan developed for surgery, by prohibiting patient from making reference to contemporaneous oil spill disaster involving corporate wrong-doing, was not an abuse of discretion in medical malpractice action; trial court did not prevent patient from actually arguing for the adverse inference, and the order to avoid references to the topic occurred just moments before the end of patient's closing argument.

--- N.E.2d ---, 2012 WL 5910949 (Ohio), 2012 -Ohio- 5345  
 (Cite as: 2012 WL 5910949 (Ohio))

**[4] Health 198H** ↪

198H Health

In patient's action against medical clinic alleging malpractice in connection with a stroke that patient suffered during deep brain stimulation (DBS) surgery, jury instruction that the existence of different methods for performing a procedure does not by itself prove that a physician was negligent was not improper, where patient raised a number of questions about whether the clinic adopted the correct medical approach in her surgery despite the existence of alternative methods, and such questions fell outside the limited medical knowledge expected of juries.

APPEAL from the Court of Appeals for Cuyahoga County, No. 95475, 2011-Ohio-3975. Paul W. Flowers Co., L.P.A., and Paul Flowers; and Becker Law Firm and Michael Becker, for appellee.

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McGEE BROWN, J.

**\*1 MCGEE BROWN, J.**

{¶ 1} This appeal involves three rulings in a medical-malpractice trial. Appellee, Margaret Branch, suffered a stroke during brain surgery performed at appellant, the Cleveland Clinic. As a result, Branch sued the clinic, claiming that its surgeon had struck a ventricle, thus causing the stroke.

{¶ 2} Following a jury trial, verdict was entered for the clinic. Branch appealed, and the Eighth District Court of Appeals found abuses of discretion in three rulings of the trial court. *Branch v. Cleveland Clinic Found.*, 8th Dist. No. 95475, 2011-Ohio-3975, 2011 WL 3505286. The court of appeals found that the trial court abused its discretion in (1) allowing the clinic to use demonstrative evidence recreating the surgery that was provided to counsel for Branch ten minutes before the expert

using it testified, (2) ordering counsel for Branch not to argue an inference that because the best piece of evidence—a computerized image prepared prior to the surgery—was not saved, it must have been adverse to the clinic, and (3) instructing the jury that evidence of alternative medical approaches was not evidence of negligence, because no evidence of recognized alternate methods of treatment was even presented.

{¶ 3} The clinic now asks us to determine that the Eighth District's decision was, in each of these respects, “legally and factually flawed” and inconsistent with our precedent. We agree. Based on the record before us, the trial court did not abuse its discretion in any of the rulings at issue. Therefore, we reverse the judgment of the Eighth District Court of Appeals and reinstate the jury verdict for the clinic.

*Background*

{¶ 4} Evidence at trial demonstrated that Branch is a highly accomplished attorney with a long history of advocating for injured plaintiffs. Prior to the surgery, Branch and her husband, Turner Branch, managed a law firm with approximately 30 staff members and 8 attorneys in Albuquerque, New Mexico.

{¶ 5} Branch testified, however, that in 2003 she noticed symptoms of a neurological disorder known as cervical dystonia. The condition irresistibly drew her head downwards and to the right, causing severe spasms and pain. It led to serious struggles in Branch's career, personal life, and mental health.

{¶ 6} As the condition took its toll, Branch learned that the clinic offered a new procedure for dystonia, known as deep-brain stimulation (“DBS”). In DBS, surgeons implant electrodes within the brain to defeat destructive brain impulses such as those causing dystonia. After consulting with clinic physicians, Branch elected to undergo the surgery.

\*2 ¶ 7} During surgery, Branch suffered a stroke that caused significant damage to her physical and cognitive abilities. Branch then sued the clinic, contending that the clinic committed medical negligence that caused permanent brain damage, partial paralysis, impaired vision and speech, lost ability to pursue her chosen occupation, and severe pain and suffering.

¶ 8} At one time, the complaint also included counts of lack of informed consent and negligent credentialing, as well as a loss-of-consortium claim for Branch's husband, Turner. Before trial, however, Branch dropped all these claims except for a portion of the lack of informed-consent claim relating to the experience, knowledge, and identity of the doctors performing Branch's surgery.

¶ 9} After a two-week trial, a unanimous jury found for the clinic. Branch appealed, and the Eighth District identified three abuses of discretion that warranted reversal and a new trial. *Branch*, 2011–Ohio–3975.

¶ 10} The first error related to the clinic's use of demonstrative evidence. Branch argued at trial that the clinic improperly failed to retain a three-dimensional mapping of her brain that was created before the surgery to assist the surgeon in directing the probe that would be inserted into her brain. The clinic admitted that the surgeon had not saved the electronic image, but countered that it had kept all the surgeon's notes detailing the surgical procedure.

¶ 11} To illustrate the point, the clinic produced a three-dimensional computer simulation of the brain mapping, using data it had retained from the surgeon's notes regarding Branch's procedure. Branch objected, claiming that the simulation was prejudicial and that the clinic had not provided adequate notice of its intent to offer the exhibit. After discussion with counsel, the trial court permitted the clinic to use the exhibit. The Eighth District, however, concluded that the late admission of the evidence prejudiced Branch because she had no opportunity to prepare effective cross-examination.

*Branch*, 2011–Ohio–3975, at ¶ 18, 27.

¶ 12} The second error identified by the Eighth District also involved the surgery plan. At trial, the clinic explained that its computer systems automatically deleted surgery plans unless clinic employees affirmatively saved them, which they typically did for clinical studies only. Branch, however, suggested that the clinic's failure to save the plan after a significant complication was suspicious.

¶ 13} The trial court allowed Branch to refer to this failure repeatedly. But when Branch's counsel began to argue in closing that the failure to maintain the plan was suspicious, and compared the clinic's action to BP's destruction of safety plans after the disastrous 2010 oil spill in the Gulf of Mexico, the trial court ordered Branch to "avoid that topic" because "there's no suggestion that there's anything willful about the destruction of any documents." Branch claims that this directive effectively prevented her from seeking an adverse inference that the plan would have been unfavorable to the clinic, because the clinic had failed to save it. The Eighth District agreed and found that the trial court abused its discretion in the ruling. *Branch*, 2011–Ohio–3975, at ¶ 63–64.

¶ 14} The third and final error identified by the Eighth District related to an instruction given by the trial court at the clinic's request that informed the jury that alternative methods could be used and that the use of one medical approach rather than another did not necessarily constitute negligence. The Eighth District determined that this instruction was not appropriate because the dispute turned on whether a clinic surgeon had violated a standard of care and thus had caused the bleed by improperly striking Branch's ventricle, a vascular structure in the brain. *Id.* at ¶ 49, 51, 54. Therefore, according to the Eighth District, the issue before the jury was not whether the clinic had employed the best of several appropriate medical methods, but rather, whether the method chosen was properly performed. *Id.* at ¶ 51–52.

--- N.E.2d ---, 2012 WL 5910949 (Ohio), 2012 -Ohio- 5345  
 (Cite as: 2012 WL 5910949 (Ohio))

\*3 {¶ 15} The clinic appealed, and this court accepted review. 131 Ohio St.3d 1410, 2012-Ohio-136, 959 N.E.2d 1055.

*Admission of Demonstrative Evidence*

{¶ 16} The clinic's first proposition of law alleges that the Eighth District's decision disallowing the use of demonstrative evidence at the trial was both legally and factually flawed.

[1] {¶ 17} In considering this proposition, we are mindful that a trial court is in the best position to make evidentiary rulings and that an appellate court should not substitute its judgment for that of the trial judge absent an abuse of discretion. *Vogel v. Wells*, 57 Ohio St.3d 91, 95, 566 N.E.2d 154 (1991) (a trial court did not abuse its discretion when it allowed a videotaped reconstruction of an accident to be admitted into evidence); *State v. Cowans*, 87 Ohio St.3d 68, 73, 717 N.E.2d 298 (1999) (a trial court did not abuse its discretion when it allowed a video recreation of a bloodhound's path in tracking a suspect to be admitted into evidence). We do not, however, defer to trial court rulings that are unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 450 N.E.2d 1140 (1983).

[2] {¶ 18} In this case, the trial judge carefully reviewed both parties' arguments and was well aware of the issue's importance. Indeed, before exercising his discretion to allow the demonstration, the judge explained that it was a "tough" decision. The result was not an abuse of discretion. Branch was permitted to use an exhibit that the trial court deemed to be comparable to the clinic's exhibit. Branch's counsel had access to the same notes that the clinic used in preparing its demonstrative aid, and we defer to the trial court's judgment that counsel for Branch had adequate opportunity to cross-examine clinic doctors with respect to the exhibit despite the minimal notice.

{¶ 19} We conclude that the trial court reasonably exercised its discretion in allowing the clinic's demonstration. That court's decision was far from

unreasonable, arbitrary, or unconscionable. The Eighth District's ruling to the contrary was in error.

*Adverse Inference*

\*4 [3] {¶ 20} The clinic next argues that the Eighth District erred in finding that Branch was unable to argue an adverse inference of negligence after the trial court refused to allow her to refer to the BP oil disaster during closing arguments.

{¶ 21} In other words, the clinic challenges the Eighth District's determination that Branch was entitled to argue an adverse inference arising from the clinic's failure to retain the plan developed for surgery. The Eighth District stated that an adverse inference that the missing evidence would be unfavorable to the party who failed to produce it arises " ' "where there is relevant evidence under the control of a party who fails to produce it without satisfactory explanation." ' " *Branch*, 2011-Ohio-3975, at ¶ 62, quoting *Signs v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. No. 94AP105-628, 1994 WL 663454, \*2 (Nov. 22, 1994). The issue here, however, was not that the clinic failed to produce evidence in its control, but that Branch disagreed with the clinic's standard practice of deleting surgical plans. The clinic produced the written records from the surgery that detailed the path the surgeon had used in inserting the probe into the brain.

{¶ 22} More importantly, the trial court did not prevent Branch from actually arguing for the adverse inference. The order to avoid references to the topic occurred just moments before the end of Branch's closing argument. Up until that point, Branch referred to the missing records repeatedly. The trial court did not forbid the jury from considering Branch's argument in this respect.

{¶ 23} The trial court was well within its discretion to determine the boundaries of closing argument absent an abuse of discretion. *Pang v. Minch*, 53 Ohio St.3d 186, 559 N.E.2d 1313 (1990). The Eighth District's ruling to the contrary was in error.

*Jury Instruction Regarding Different Methods*

--- N.E.2d ---, 2012 WL 5910949 (Ohio), 2012 -Ohio- 5345  
 (Cite as: 2012 WL 5910949 (Ohio))

[4] ¶ 24} Finally, the clinic argues that the Eighth District erred in “disallowing the different methods jury instruction.” We agree.

¶ 25} We have previously reviewed the role of the “different methods” jury instruction in medical-malpractice cases. *Pesek v. Univ. Neurologists Assoc., Inc.*, 87 Ohio St.3d 495, 498, 721 N.E.2d 1011 (2000). In *Pesek*, we explained that the instruction is “grounded ‘on the principle that juries, with their limited medical knowledge, should not be forced to decide which of two acceptable treatments should have been performed by a defendant physician.’ ” *Id.*, quoting Dailey, *The Two Schools of Thought and Informed Consent Doctrines in Pennsylvania: A Model for Integration*, 98 Dickinson L.Rev. 713, 713 (1994).

¶ 26} We held in *Pesek* that the different-methods charge is appropriate only if “there is evidence that more than one method of diagnosis or treatment is acceptable for a particular medical condition.” *Id.* at syllabus. Regardless, we found that the trial court erred in giving the instruction in that case because no acceptable alternative methods of treatment were presented; instead, *Pesek* turned on a classic misdiagnosis. *Id.* at 499, 721 N.E.2d 1011.

¶ 27} The Eighth District found that it was error to give the different-methods instruction in this case because Branch claimed that the clinic's surgeon was negligent in striking the ventricle wall. *Id.* at ¶ 51, 721 N.E.2d 1011. The surgeon denied, however, that he had struck the ventricle wall. In other words, the dispute turned on facts, not legal theories. However, this analysis oversimplifies what transpired at trial. In fact, the parties' experts raised a number of questions regarding how different planning and procedures could have prevented the stroke, all of which required the jury to determine whether another medical approach would have been preferable.

\*5 ¶ 28} For example, the parties disputed whether the clinic's planned trajectory into Branch's brain was dangerously close to vascular structures

in the middle of her brain; Branch's experts proposed an alternative trajectory that they claim would have been safer. Similarly, Branch's experts challenged the clinic's approach in creating the map of Branch's brain for surgery and testified to an alternative mapping strategy that the clinic could have employed. Likewise, Branch's experts questioned whether the clinic's surgeon conducted too many “tracks” into Branch's brain while searching for the best site for electrode placement. With respect to each of these issues, medical professionals in the case disagreed about the best method of performing the surgery.

¶ 29} In short, Branch raised a number of questions about whether the clinic adopted the correct medical approach in her surgery despite the existence of alternative methods. These questions fall outside the limited medical knowledge that we expect of juries. Therefore, the trial court did not err in allowing the different-methods instruction.

#### Conclusion

¶ 30} Based on the foregoing, we conclude that the trial court did not abuse its discretion in any of the three rulings at issue. Accordingly, we reverse the decision of the Eighth District Court of Appeals, and we reinstate the jury verdict for the clinic.

Judgment reversed.

O'CONNOR, C.J., and LUNDBERG STRATTON, O'DONNELL, LANZINGER, and CUPP, JJ., concur.

O'CONNOR, C.J., AND LUNDBERG STRATTON, O'DONNELL, LANZINGER, AND CUPP, JJ., CONCUR.

PFEIFER, J., dissents.

**PFEIFER, J., dissenting.**

¶ 31} In this case, we review a court of appeals' review of a trial court's evidentiary and jury-instruction decisions. Our holding is that “the trial court did not abuse its discretion in any of the three

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rulings at issue.” Undoubtedly, this case is a matter of great personal interest for the Branches and a matter of great corporate interest for the Cleveland Clinic Foundation, but it does not meet this court's jurisdictional requirement of a case “of public or great general interest.” Ohio Constitution, Article IV, Section 2(B)(2)(e). I would hold that jurisdiction was improvidently allowed in this case.

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