

ORIGINAL

No. 11-1634

In the Supreme Court of Ohio

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

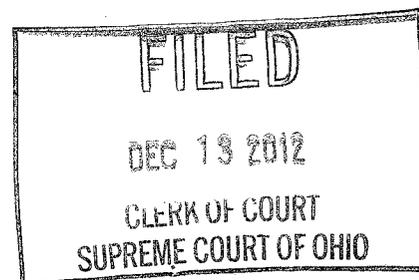
MARGARET BRANCH, et al.

Plaintiff-Appellee

v.

CLEVELAND CLINIC FOUNDATION

Defendant-Appellant



**DEFENDANT-APPELLANT CLEVELAND CLINIC FOUNDATION'S
MEMORANDUM OPPOSING PLAINTIFF-APPELLEE'S MOTION FOR
RECONSIDERATION**

Michael Becker, Esq.
Becker Law Firm Co., L.P.A.
134 Middle Avenue
Elyria, OH 44035

Paul Flowers, Esq.
Terminal Tower, 35th Floor
50 Public Square
Cleveland, OH 44113-2216

John Romano, Esq.
Romano Law Group
1005 Lake Avenue
Lake Worth, FL 33460
Attorneys for Plaintiff-Appellee

DOUGLAS G. LEAK (0045554)
(COUNSEL OF RECORD)
dleak@ralaw.com
ANNA MOORE CARULAS (0037161)
acarulas@ralaw.com
INGRID KINKOPF-ZAJAC (0066446)
ikinkopf-zajac@ralaw.com
Roetzel & Andress, LPA
One Cleveland Center, Ninth Floor
1375 East Ninth Street
Cleveland, OH 44114
Telephone: 216.623.0150/Facsimile: 216.623.0134
*Attorneys for Defendant-Appellant
The Cleveland Clinic Foundation*

MEMORANDUM

I. INTRODUCTION

On November 21, 2012, this Court issued its Decision in which it properly reversed the Eighth District Court of Appeals and reinstated the unanimous defense verdict that was justifiably entered in favor of The Cleveland Clinic Foundation. *Branch vs. Cleveland Clinic Foundation*, ___ Ohio, St. 3d ___, 2012-Ohio-5345, ___ N.E. 2d ___. Now, Plaintiff seeks reconsideration of this Court's well-reasoned and legally sound Decision, but her Motion for Reconsideration does not present any new legitimate grounds to warrant this Court's reconsideration. Supreme Court Rules of Practice 11.2(B) explicitly states that "a motion for reconsideration shall not constitute a reargument of the case." Yet, Plaintiff's Motion for Reconsideration does exactly that by re-arguing the same legal and factual points that were already raised in Plaintiff's Merit Brief and presented at Oral Argument. A comparison of Plaintiff's Merit Brief and Motion for Reconsideration shows that they are significantly equivalent and, therefore, there exists no basis, whatsoever, for this Court to reconsider its Decision.

More specifically, Plaintiff wants this Court to reconsider **all three** Propositions of Law on the grounds that this Court failed to fully consider and/or appreciate the legal arguments previously raised by both parties. So, not only does Plaintiff contend that this Court failed to fully consider and/or appreciate just one Proposition of Law, Plaintiff claims that this Court's Decision, in its entirety, did not fully address all of the legal and factual issues raised in this appeal.

Nothing could be further from the truth. Indeed, this Court undoubtedly reviewed, analyzed and ruled upon all of the arguments presented in the briefing stage and the Oral

Argument and being raised, again, in Plaintiff's Motion for Reconsideration. Therefore, there exists no reason for this Court to reconsider its Decision.

More importantly, this Court's Decision was not made in error. Rather, this Court properly considered each and every legal and factual issue presented in this appeal and in doing so, this Court correctly reversed the Eighth District's result-oriented Decision that was marred with multiple errors. This Court justifiably reinstated the unanimous jury verdict that was both legally and factually sound.

Plaintiff fails to present any new arguments which would give this Court any reason to reconsider its Decision. Consequently, Plaintiff has not met the requirements of S.Ct. Prac. R. 11.2(B) and, therefore, Plaintiff's Motion for Reconsideration must be denied.

II. IN-COURT DEMONSTRATION

The only basis upon which Plaintiff claims that this Court should reconsider The Clinic's Proposition of Law No. 1 with respect to the use of demonstrative evidence is that Plaintiff claims that "this Court does not appear to appreciate" the facts and legal arguments whereas, "it is apparent that Eighth District had conducted a careful and comprehensive review of the complete trial transcript and appreciated the significance of this issue." (Plaintiff's Motion for Reconsideration, pp. 1, 4). Basically, Plaintiff disagrees with this Court's conclusions of law and fact and, instead, believes that the Eighth District got it right. (*Id.*) In taking such a position, Plaintiff is effectively accusing this Court of not reviewing the briefs and the trial transcript and not appreciating the legal arguments. Plaintiff improperly claims that "[o]nce 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." (*Id.*, pg. 5). In other words, Plaintiff argues that this Court

should reconsider its Decision because it arrived at the wrong conclusion the first time around. This argument is undoubtedly unfounded and without merit.

To the contrary, this Court adequately addressed Plaintiff's claim that they were surprised by the in-court demonstration and then properly rejected Plaintiff's position. Clearly, this Court analyzed Plaintiff's arguments, considered the entire trial record/transcript and simply disagreed with Plaintiff's position. This Court's Decision was not made in haste, but based upon sound reasoning. It is disingenuous for Plaintiff to suggest that this Court did not fulfill its duty as a reviewing Court to fully address, consider and rule upon all legal and factual arguments.

Once again, Plaintiff fails to acknowledge that Dr. Machado's in-court demonstration was presented by The Clinic in direct response to Plaintiff's new claim of "missing data" which was raised for the first time on the eve of trial and became Plaintiff's developing and prevalent theme of the trial. Dr. Machado's in-court demonstration was warranted in order to refute Plaintiff's unfounded claim that The Clinic engaged in some type of malicious or conspiratory conduct with respect to not preserving the fused image of Plaintiff's target plan. The Clinic was compelled to refute Plaintiff'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.

Next, contrary to Plaintiff's repeated argument, Dr. Machado's in-court demonstration was not a "last-minute disclosure" or an "eleventh hour disclosure," as incorrectly characterized by the Eighth District. The Clinic's counsel informed everyone in Opening Statements that during Dr. Machado's trial testimony, Dr. Machado was going to reconstruct Plaintiff's surgery.

(Eighth District's Decision at ¶68; Tr. 369-370). As such, there exists no basis, whatsoever, for Plaintiff to claim that Dr. Machado's in-court demonstration was either impromptu or a surprise.

The development and aggressive pursuit of Plaintiff'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 Plaintiff's actual data taken directly from her medical records could be inputted into commercially - available software in order to show the trajectory of Plaintiff's target plan. Plaintiff's suggestion to the jury that The Clinic somehow did something to hide Appellee's data could not go unchallenged.

This is why this Court recognized that the Trial Court properly allowed Dr. Machado to conduct his in-court demonstration with Plaintiff's actual data. Of importance, this Court pointed out how carefully the Trial Court reviewed the parties' respective arguments and the importance of the issue at hand. *Branch*, supra at ¶¶ 18-19. Additionally, Plaintiff was not prejudiced from the in-court demonstration because Plaintiff had her own exhibit that was comparable and, also, Plaintiff had access to the same data as used by The Clinic. *Id.* at pg. 18. Contrary to the Court of Appeal's conclusion, the data was available for all parties to utilize in any commercially-available navigation system. This Court's holding on the in-camera inspection was correct and, thus, does not warrant reconsideration.

III. ADVERSE INFERENCE OF NEGLIGENCE

Plaintiff continuously misquotes and mischaracterizes the context in which the Trial Court properly sustained The Clinic's objection to Plaintiff's counsel's reference to the BP Oil Disaster during Rebuttal Arguments. The Clinic cannot re-emphasize enough that its counsel's objection was made solely because Plaintiff's counsel attempted to compare this case to the highly publicized events surrounding the devastating BP Oil explosion:

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).

Just like Plaintiff's Merit Brief, Plaintiff's Motion for Reconsideration fails to quote the relevant portion of Plaintiff's counsel's Rebuttal Argument just prior to The Clinic's objection and the Trial Court's ruling. The Trial Court properly sustained The Clinic's objection because there was no comparison between the BP Oil Disaster and Plaintiff's claim for an Adverse Inference of Negligence.

As this Court correctly held in its Decision, the Trial Court's sustaining of the objection to the BP Oil Disaster was appropriate because there was no comparison between this case and such a disastrous event like the BP Oil Disaster. *Branch*, supra at ¶¶20-23. In so holding, this Court correctly recognized the entire context of The Clinic's objection and the Trial Court's ruling:

...But when Branch's counsel began to argue in closing that the failure to maintain the plan was suspicious, and compared The Clinic's actions 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."

Id. at ¶3.

Moreover, as this Court aptly noted in its Decision, Plaintiff was permitted to argue an Adverse Inference of Negligence Claim throughout the trial and during Closing Arguments. *Id.* at ¶¶13, 22. Contrary to Plaintiff's repeated arguments, the fact that the Trial Court correctly sustained one objection to Plaintiff's comparison of this case to the BP Oil Disaster during Rebuttal Closing Argument did not prevent Plaintiff from arguing to the jury a claim for an Adverse Inference of Negligence. In fact, by the Eighth District's own admission, Plaintiff'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.

Branch vs. Cleveland Clinic Foundation, 8th Dist. No. 95475, 2011-Ohio-3975, 2011 WL 3505286 at ¶22. (Emphasis Added).

Plaintiff cannot 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 Plaintiff ignored the Trial Court's comments that the claim of "missing data" became the central theme of Plaintiff's case. Plaintiff was permitted to present evidence and testimony that went directly to an Adverse Inference of Negligence claim.

Moreover, Plaintiff'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 Plaintiff's Adverse Inference of Negligence claim.

This Court properly reviewed and analyzed the entire context of The Clinic's objection to the Trial Court's ruling with respect to the BP Oil Disaster. There simply exists no reason for this Court to review and analyze this issue again.

IV. DIFFERENT METHODS JURY INSTRUCTION

Plaintiff merely asserts in her Motion for Reconsideration that this Court was wrong in holding that the Trial Court did not err in giving the different methods jury charge. After agreeing with this Court's reliance and interpretation of *Pesek vs. University Neurologists Assoc., Inc.* 87 Ohio St.3d 495, 721 N.E. 2d 1011 (2000), Plaintiff states that this Court's Decision "then veers well outside those boundaries" of a different methods jury charge. (Plaintiff's Motion for Reconsideration, pg.7). In other words, Plaintiff essentially disagrees with this Court's holding but, once again, this is not an appropriate argument for a Motion for Reconsideration. Plaintiff neither raises any new arguments nor claims that this Court failed to consider a previously raised argument pertaining to the different methods jury charge.

Moreover, the different methods jury charge was supported by the evidence presented at trial. At the Oral Hearing conducted by the Trial Court on the jury instructions, the Trial Court 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 “different methods” was all over the case because Plaintiff’s expert made numerous concessions to this effect. Then, this Court conducted a very thorough review of the trial transcript and listed the alternative methods of treatment that supported the different methods jury charge. *Branch*, 2012-Ohio-5345 at ¶¶28-29. After listing the alternative methods, this Court properly concluded:

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.

Id. at ¶29. (Emphasis Added).

This Court’s holding on the different methods jury charge is correct and, thus, there exists no grounds to reconsider it.

IV. CONCLUSION.

Plaintiff’s Motion for Reconsideration is an improper re-argument of the case which is strictly prohibited pursuant to Sup. Ct. Prac. R. 11.2(B). Each of Plaintiff’s arguments in her Motion for Reconsideration is virtually identical to those arguments contained in her Merit Brief and presented at the Oral Argument. Plaintiff presents nothing new which would warrant this Court’s reconsideration of its legally and factually sound Decision.

Not one of this Court’s findings and/or holding can be deemed to have been made in error. Additionally, there is nothing to even remotely suggest that this Court did not review the entire record/trial transcript or that it failed to fully analyze and rule upon all legal arguments. As such, The Clinic requests that this Court deny Plaintiff’s Motion for Reconsideration.

Respectfully submitted,

Douglas J. Leak ~~KDO~~ 12/13/12
ANNA MOORE CARULAS (0037181)

acarulas@ralaw.com

INGRID KINKOPF-ZAJAC (0066446)

ikinkopf-zajac@ralaw.com

DOUGLAS G. LEAK (0045554)

Roetzel & Andress, LPA

One Cleveland Center, Ninth Floor

1375 East Ninth Street

Cleveland, OH 44114

Telephone: 216.623.0150

Facsimile: 216.623.0134

*Attorneys for Defendant-Appellee
The Cleveland Clinic Foundation*

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 13th day of December, 2012:

Michael Becker, Esq.
Becker Law Firm Co., L.P.A.
134 Middle Avenue
Elyria, OH 44035

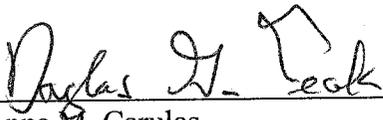
Attorney for Plaintiffs-Appellants

Paul Flowers, Esq.
Terminal Tower, 35th Floor
50 Public Square
Cleveland, OH 44113-2216

Attorney for Plaintiffs-Appellants

John Romano, Esq.
Romano Law Group
1005 Lake Avenue
Lake Worth, FL 33460

Attorney for Plaintiffs-Appellants



Anna M. Carulas
Ingrid Kinkopf-Zajac
Douglas G. Leak
*Attorneys for Defendant-Appellee
The Cleveland Clinic Foundation* K20 dt/3/12