

**EXHIBIT 2 – HEARING
TRANSCRIPT DOCKET
#295-3 FILED 06/04/14**

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Judge: Okay well then it's not an issue I guess. So you won't disclose the names, that's satisfies that or if you've got some particular hart burn about specific questions or want some added I would suggest you get together and...

**Present final pre-trial proposals at the final pre-trial hearing
They want jury pool for about... [01:10:24.12]*

How soon can we get a juror list, how many are you proposing?

Epperson: what's your average you call, your honor?

Judge: I've only had the one malpractice trial in the past while and I just don't remember how many we called.

Clerk: We usually call anywhere from 40-50. We usually call them 3 weeks in advance. When we send the juror call we would want to send out the questionnaire.

Judge: It will be counsel's responsibilities to get copies, etc. I'm not going to get involved in the mechanics of that. We'll send it out with our normal cover letter. If you feel there needs to be an extra note, make sure that's at the top of the jury questionnaire.

Epperson: It sounds like if we have this ready for the final pretrial, that'll give us enough time.

Clerk: Send out juror notices on the 16th

Judge: No, they may not have a final questionnaire drafted out. Hopefully you'll have a final one so we can send it out the next day

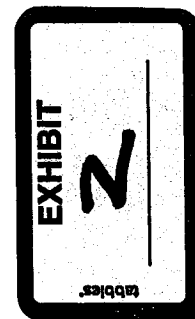
Parker: We'll have one together, highlight the ones that Dave has a problem with or I have a problem with and go from there.

Judge: ... If there is something final we'll talk about it at the final pretrial but I would hope that you come up with something final so we can get it out almost immediately. K that was number 5. Let's go to #6 re Golden Rule arguments at trial.

(decided to address both plaintiffs and defendants motion re golden rule/reptile arguments at the same time)

Parker: Supreme Court in Louder case...it was a personal injury, civil, tort case; defendant was using the golden rule statement. "Ask yourself if you would do the same thing because you impose standard higher to [defendant] than you would to yourself..." This was appealed by Plaintiff. Court said if you aren't speaking to damages,

Judge: How would you anticipate that coming out in trial? What questions would be asked? Would we be asked to put ourselves in the position of the doctor or pa?



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- Parker:* That's interesting because Mr. Epperson can do this too, he can put himself in the place of a party
- Judge:* Well how would you use it? Maybe I can get a better feel for it if...
- Parker:* One of the jury instructions in our brief was the instruction that a health care provider is required to disclose to a patient the information about the patient's health care or condition that a reasonable person would find important in making decisions about their care. [01:23:26.04] at the time of discharge to warn him how to avoid injury following discharge. I don't know how to address it otherwise but to say to a jury, it's up to you, as jurors to decide as a reasonable person what the standard is.
- Judge:* I mean we've got a different standard here than just what a reasonable person would expect her doctor would do. It's a standard of care, not...
- Parker:* That's so interesting because I thought the same for a long time but if you look at the model jury instruction...
- Judge:* That clarifies where you're headed with it. Do you want him to argue the other one?
- Parker:* Well let me say, Mr. Epperson cites two cases, court of appeals cases saying you can't put yourself in the shoes of the plaintiff or defendants. These cases are apples and oranges.
- Epperson:* Your honor, I realize you've had years of experience on the bench. This golden rule has been honored nationally in our area as having the jurors place themselves in the position of the defendant, justice has a blindfold on, that's why we don't rule things based on sympathy, etc. What he's suggesting is that this 15 year old Green case, which there have been two subsequent cases which didn't follow that, but with regard to his... He wants to tell the jury, "If you were Murray Hurley, wouldn't you want to know A, B, C & D?" That is absolutely golden rule. He does it on a jury instruction as well. He says that applies to a *res ipsa* case, that's not an issue in this case. So I just don't see the applicability in this case. I think it's very very dangerous to allow but I think the court has the experience on golden rule and when that line is crossed. And what I wanted to do is alert the court in my reptilian as to the jury voir dire as to the issues that can be damaging in a case and I've had a recent experience in Logan when that was done which I've cited, and we'll talk about that in a second. But your honor, I've indicated why, in my briefing, the two cases... go back to the basic physician standard and I think any reference to having the jurors place themselves in the shoes or the prospective of the plaintiffs is improper and would be prejudicial.
- Judge:* That's your argument on your motion as well, correct?
- Parker:* Just in brief response, the two court of appeals cases never even reference the golden rule at all, they just say the Prosecutor shouldn't have done this when he's talking about the harm suffered about the criminal victim and the supreme court case is 15 years old but we have very close to the same, at least several of the
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same members on the bench, at least justice Durham... it's never been overturned and I believe it's good law. I think it can be abused, but...

Judge: Do you want to respond to the Reptile? I think he's just going to submit it on that.

Parker: Jim and I are not going to try this case any different than we've done for years and years, before anyone thought of a reptile. There's sort of in this parade of horrors and I don't know how to respond because Mr. Epperson has put up so many things. I'll just tell you we're not going to reptile the case. It's not something we've ever done; it's not something we intend to do. So as far as retitling, that's not something that we're going to do. We do want to talk about patient safety.

Judge: Let me just talk about this. You're talking about defending against something; no one knows what you were going to say so it's hard to say you can't say this... because I don't know what you were going to say. But what I have experienced is people talking about, instead of standard of care, they talk about safety rules. Safety is one thing, but safety rules as a substitute for the standard of care, that's what I've seen argued. I don't know if you intended to do that but that seems to be a very popular thing to say instead of talking about the doctor breached the standard of care. (doesn't have anything to do with auto rules, stop signs, etc.) It's a standard of care that a professional is required to maintain in treating their patients and there has to be expert testimony on it and it has nothing to do with any kind of safety rules, but it's hard to get a jury not to agree that dr. should follow the safety rules. No one wants to be unsafe when they go to a doctor or hospital. It applies this sort of above and beyond the standard of care.

Parker: Let me speak to that your honor. ... Mr. Epperson's experts are going to come in and say, this is the standard of care - a, b, c and my experts are going to say, no, this is the standard of care. How is a jury to know what the difference is between the experts and what is the actual standard. I'll ask my expert what is the basis of the standard? Safety.

Judge: Well, but it's an inflammatory term though because instead of saying, because it increases the risk of transfer of infection. Yeah, there is a danger of that, but danger and safety imply something beyond risk of harm. That's different from categorizing it in terms of a safety net of some kind.

Parker: Well all of the American medical association standards of ethics, they all talk about patient safety and putting the interest of the patient first. Every expert I've ever called has said, why do you do it this way instead of that way? Because it's the safer way. Experts won't say it's a safety rule, but... I guess the difference is whether safety is inflammatory. We're saying this isn't a safe practice, the doctors have testified it's not a safe practice. Mr. Epperson can say the opposite. What your honor is asking us to do is say that these standards really don't relate to patient safety. In the main, most standards to relate to patient safety. SO if we're going to be honest and present this to the jury in an honest way, they cannot believe me or think we're being extreme but..

Epperson: Standard of care is well defined by Utah law. It's not a traffic accident case, it's not a rule so the road case. It's a standard of care which must be established by

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expert medical testimony. Then if the experts differ then the jury as the fact finders so finds. But to have them, he refers to well we can look at the rules of ethics saying it's good to be safe, this is what they do is turn it into public safety rules. CV107 (?) says you must decide this case on the facts and the law. That's what we want, your honor, not to try and twist this into something not standard of care. Talked about Logan case: found it wasn't about the community, it was about this specific patient and case. I want to head this off because we need some understanding, it's about these people, it's about standard of care. I think the rest is just so well briefed.

Parker: we're not talking about community safety. We're only going to talk about, you claim this, we claim that, what's the basis of this standard? It's safe, it's more safe to do and that's why it's the standard of care.

Judge: It's difficult for me to know what you're going to argue. I have less concern about how you just described it. What I do have concern is in a case like this where jurors are during voir dire asked how many of you think doctors should follow safety rules? ...Let's have this understanding, [01:52:15.05] RULING: Okay if I make a ruling that you're not to use the word safety, that's unreasonable. I think the word safety has some varying here and as long as it doesn't become substitute for the actual legal standard here which is whether the doctor breached the standard of care applicable to his profession. I think what I'm going to have to do is just see how it goes, you see where I'm going from on it and I will narrowly grant the motion to say that reference to safety rules as essentially becomes as a substitute to the standard of care is misleading to the jury it misstates the ruling of law and the jury instruction that they will ultimately get. Off shoots from that will just have to be handled by question basis. If it becomes a pattern, I think I would take the opportunity to educate counsel as to why I think they are straying into, emphasizing into the area we shouldn't. I can't list everything you can and can't say. You wouldn't want me to, even if I could. There has to be some latitude here. There seems to be some school of thought, among plaintiffs counsel particularly that they are emphasizing safety over the applicable standard. It's not a safety standard, but I'm not going to say you can't use that word. If it starts to take on that character then we'll deal with that at trial. I won't let that happen.

Now as far as the golden rule issue. Again, what the standard is, what the jury will be instructed on. If it's a reasonable person standard that applies to the case they'll be instructed that in the jury instruction. When they start substituting themselves into it, I guess it's flattering to them that you might think they are reasonable people. But that's not the standard. They have to take it objectively. It's what a reasonable person, objectively standing there, without any interest in the outcome of the case would do and for them to make that assessment. Whatever that is, they decide themselves what a reasonable person is, we don't have control over because there is no strict definition. In looking at this Green vs. Louder case I understand it opened up a can of worms on that because it implies you can make golden rule arguments. But at the same time, if they hadn't almost simultaneously referred to reasonable person, I question whether the ruling would have been the same. Essentially they said put yourself in that situation, what would a reasonable person do? They were kind of in tandem, ya know? and I think that was the reason it wasn't seen as prejudicial. I think, in my

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opinion, if the jury is going to be instructed to what the standard is, if it's a reasonable person standard that applies to what you're arguing I think it should be limited to that. You can argue to them that they determine what a reasonable person would do. Ultimately they probably will put themselves in that role because they probably consider themselves to be a reasonable person, maybe that's the only way they can do it but I think to suggest to them to substitute their own judgment as opposed to having made a rational decision as to what a rational person would do interjects too much of a person aspect into it when it's supposed to be objective.

Parker: If in getting ready for trial we, again we're doing this prospectively, to approach the bench and address your honor... but we want to use it when it's more consistent with green v. louder.

Epperson: Your honor my concern is this is the time we try and tailor our case and to not try and have bench conferences and fussing and distract the jury. That's why we're here.

Judge: Well it has potential to be a question by question basis, can I ask this, can I ask that. It's more of a touchy subject. I would, let me just say this. If you are approaching a subject and you feel you may be making an improper question, if you feel you need to have a discussion about that, I don't really have a problem with doing that so long as it doesn't become frequent or become advisory, all of a sudden I'm participating in the plaintiffs case somehow. [01:58:43.29]
RULING: I would just say the golden rule argument is not appropriate to be used in this case. And if you feel you're making an argument that comes close to that you bring it up to me before you say it, if you can. The reason being that I believe it interjects an element of impropriety, and basically that it requires the jury to put themselves in the shoes of the defendant when in fact they are supposed to be making a reasonable person objective assessment. So that's the reason for it. Okay?

Epperson: I believe that you indicated that my motion is granted, but narrowly as you put it.

Judge: Yeah- as far as the reptilian thing from what I understand he's not going to get into the safety thing, again it's impossible for me to say you won't use a reptilian argument because no one really knows what that is. We've got some idea that it refers to inflaming the jury by saying you're going to endanger the community if you let doctors run around doing this. What about the safety of your children, your own safety, ya know. It starts to get them thinking about themselves, which is what the argument is. And I'm just going to have to deal with that if it becomes an issue. I don't think I can- like I said. SO yeah I'm going to grant your motion particularly as it relates to reference to safety rules as a substitute for standard of care. I think that's as clear as I can be.

Parker: But we aren't precluded from the word "safe" coming up if a doctor says [that's the basis of the standard].

Judge: I don't have a problem with you doing that as long as you don't end with that and I would think there should be some explanation as to why that is. Which is what you could limit it to in the first place as far as I'm concerned. Usually there's a

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reason, it may relate to safety, but you don't just say because it's safer. That may be what you tell your kids, don't do that because it's safer, well why?

Parker: Yeah we won't, we'll follow that admonition.

Judge: Yeah it doesn't help the jury much to be told that something's safe verses not save without understanding why. That's really what they need to hear. So I don't think there's anything so inflammatory about the word safe, in and of itself so long as it isn't misleading form the true standard of care is.

Epperson: Just so I'm clear... Will you be drafting your thoughts by way of order?

Judge: No. [02:01:53.20] I'll grant your motion as to, that the term safety rule or like descriptions will not be used to mislead the jury from applying the standard of care as stated in the instructions. That's broad enough, I think, to cover a fair amount of territory. As far as the golden rule, I think the golden rule is inappropriate in this case. Golden rule arguments will not be made. I think they're improper for the reasons I've stated. Okay.

#7: Remote alcohol use

Parker: I think this is generally stipulated to...

Judge: ...defense didn't want to go through and sanitize the medical records.

Epperson: Patient histories may have it, I don't think it's going to hurt you but I don't want to sit and impose a burden to sanitize records.

Parker: Do you have an objection if we do, and show you what we do.

Epperson: I don't think it's necessary, your honor. Again this is what I was trying to avoid.

Judge: Well how strongly to feel about it?

Epperson: What's happened is that this patient had Wernicke's (sp) syndrome as a suggestion and he drank heavily in the remote past. We asked a question of the autopsy guy, Dr. Leis to see signs of that in your brain? He said no. In that point in time I thought I had a theory that might be possible toward the cause of death. We've backed away from that, we're not going to go there. Therefore remote alcohol use is not relevant to death. ...Now to sanitize records from years before... I'm not going to use those.

Parker: Just as long as Mr. Epperson can stipulate that during closing arguments he's not going to say, this fellow has abuse problems, look at these problems.

Epperson: I'll stipulate to that your honor.

Judge: Okay then the order is [02:04:58.05] Witnesses will not refer to alcohol use in this case, since the subject has no relevance to the issues at hand. I suppose if Plaintiffs want to sanitize records they can do that.