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IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH  
NORTHERN DIVISION

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ANITA and BRIAN JEPPSEN,	)	
	)	
Plaintiffs,	)	<b>DEFENDANTS' REPLY IN</b>
	)	<b>SUPPORT OF THEIR MOTION IN</b>
v.	)	<b>LIMINE RE: REPTILIAN (SAFETY</b>
	)	<b>AND COMMUNITY SAFETY)</b>
	)	<b>ARGUMENTS</b>
BRAD LARSON, M.D., ALPINE	)	
ORTHOPAEDICS, and JOHN AND JANE	)	
DOES 1-10,	)	Case No. 1:12-cv-241
	)	
Defendants.	)	Judge Robert J. Shelby

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Defendants, Brad Larson, M.D. and Alpine Orthopaedics, by and through counsel, David H. Epperson and David C. Epperson, of the law firm of Epperson & Owens, hereby respectfully submit this Reply in Support of their Motion in Limine Re: Reptilian (Safety and Community Safety) Arguments.

## ARGUMENT

### **I DEFENDANTS ARE NOT ASKING THE COURT TO DICTATE PLAINTIFFS' TRIAL STRATEGY, BUT ARE ASKING THAT THE COURT PRECLUDE IMPROPER ARGUMENTS IN THE COURTROOM.**

Plaintiffs argue “Defendants motion apparently seeks to preclude plaintiffs from using any variations of the word “safety” or the phrase “safety rules” at trial.” (Opposition p. 1). Plaintiffs assert “Defendants are requesting that the Court limit the use of words that might appeal to a jury or be harmful to Defendants’ case in what appears to be an effort to control and/or manipulate Plaintiffs’ trial strategy.” (Opposition p. 2).

Defendants are not asking the Court to dictate Plaintiffs’ trial strategy. Defendants are requesting the Court to prevent Plaintiffs from skirting around the standard of care doctrine established by the Utah Supreme Court.<sup>1 2</sup> Defendants are asking for a fair trial, one which does not invoke improper bias, passion, or prejudice on the part of the jurors. Defendants are asking that irrelevant and prejudicial evidence and arguments be precluded, and that a fair trial be provided with an impartial jury. These are basic rights that Defendants deserve.

Plaintiffs want to avoid the merits of their claims by appealing to the jurors’ personal interest in their *own* safety and that of their community. In other words, Plaintiffs claims are

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<sup>1</sup> The general rule is that a person asserting a medical malpractice claim must prove: (1) the standard of care required of physicians under similar circumstances practicing in the same field or specialty, (2) that the applicable standard of care was breached, (3) that the injury to the Plaintiff was proximately caused by the Defendant's negligence, and (4) that damages occurred as a result of Defendant's breach of duty. *Dalley v. Utah Valley Regional Med. Ctr.*, 791 P.2d 193, 195 (Utah 1990). **Note: There is no discussion about causing harm to the jurors, their family, or the community.**

<sup>2</sup> The authors of the: Reptile: The 2009 Manual of the Plaintiff's Revolution explain that plaintiffs’ counsel should couch the defendant’s conduct in terms of the perceived threat to the community’s safety. Thus, every case should be approached using an “umbrella rule” focusing on community safety. The Reptile manual argues that plaintiff’s counsel should use this “umbrella rule” to trump the standard of care that would otherwise govern defendant’s conduct. As the authors of the Reptile Manual explain: “The Reptile is not fooled by defense standard-of-care claims. Jurors are, but not Reptiles. When there are two ways to achieve exactly the same result, the Reptile allows—demands!—only one level of care: the safest.” (Reptile Manual at 62).

merely a placeholder for deep-seated, even subconscious, fears that jurors harbor about themselves and their families. If Plaintiffs can make their case about the individual jurors, who should be untethered to the case, then they have a greater chance for reward. The Reptile Theory teaches to “go beyond your defendant.” (Reptile Manual at 56). Rather than focus on whether the Defendant’s conduct actually caused injury to the Plaintiff, the Reptile Theory asks whether the defendant’s conduct “represents a community danger.” *Id.* By making these types of arguments, Plaintiffs hope to influence the jury to go beyond the facts and the law, and to decide the case for them based on the jurors own personal safety interests.

Plaintiffs should be precluded from making Reptilian arguments, because they have no value, are confusing to the jury, and violate Defendants’ due process rights to a fair trial and impartial jury.

## **II COURTS ARE BECOMING EDUCATED ABOUT THE REPTILIAN STRATEGY AND AUTHORITY IS EMERGING COMDEMNING THIS TRIAL TACTIC.**

Plaintiffs’ assert that “similar [Reptilian] motions have been cropping up more and more frequently, despite the defense bar’s lack of success in prevailing on them.” (Opposition p. 5) Defendants strongly disagree with this assertion. Defense counsel has had tremendous success in prevailing on these motions, and has been effective in educating Utah Courts on these improper trial tactics.

The following are two recent (non-binding) cases where Defense counsel filed motions in limine regarding reptile (community safety and safety rule) arguments. In both cases, the Court granted the motions finding reptilian arguments to be an unfair trial tactic.

The Honorable Judge Clark Waddoups of the United States District Court, District of Utah, recently granted Defense counsel's "Motion in Limine Re: Reptile/Veiled Golden Rule Arguments" in the *Waddoups v. Noorda* case. (Exhibit 1, Judge Clark Waddoups' Order in *Waddoups v. Noorda, M.D.*, p. 2.) Judge Waddoups' granted the entire motion, stating that reptilian and golden rule arguments would take away the oath of the jurors.

Likewise, Judge Heffernon (a State Court Judge in St. George) ruled in *Hurley v. Parry* that Reptilian arguments would not be allowed at trial. (Exhibit 2; Judge Heffernan Motion Rulings in *Hurley v. Parry*, pp. 9-14). Judge Heffernon explained how she has experienced people in the past attempt to talk about safety rules instead of the standard of care. *Id.* at 11. Judge Heffernon believed this to be an inappropriate trial strategy. *Id.* Judge Heffernon stated: "I'll grant your motion...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." *Id.* at 14.

### **Relevant Case Law**

Plaintiffs argue that "Defendants have not identified any law... to exclude permissible references to safety principles applicable in a case such as this." Defendants disagree.

In Defendants opening memorandum, we cited Mangrum and Benson's Utah Evidence Manual for 2013 discussing the Reptilian strategy. Mangrum and Benson stated it was improper to "ask the jurors to assume the responsibility of ensuring the safety of an alleged victim or community, which diverts the jury from their legal duty to impartially apply the law to the facts in order to determine if the accused had committed the crimes [acts] for which he was on trial."

Mangrum and Benson were citing to: *State v. Wright*, 304 P.3d 887, 902 (Utah App. 2013).<sup>3</sup>

Plaintiffs' assert that "Defendants' arguments that allowing Plaintiffs to discuss safety at trial will lead the jury to improperly decide the case on something besides the evidence is also unsupported by the law." (Opposition p. 4). Defendants disagree.

Plaintiffs are essentially attempting to resurrect golden rule arguments by making the jurors step into their shoes (i.e. to make the case about themselves, their family, and their community). Golden Rule arguments are those designed to encourage the jury to depart from their role of impartiality and step into the shoes of a litigant. Such arguments have been condemned and uniformly rejected as improper. *See Blevins v. Cessna Aircraft Co.*, 728 F.2d 1576, 1580 (10th Cir. 1984)("A Golden Rule appeal 'is universally recognized as improper because it encourages the jury to depart from neutrality and to decide the case on the basis of personal interest and bias rather than on the evidence"); *State v. Campos*, 309 P.3d 1160, 1174 (Utah App. 2013)("Applying these standards, our courts have held that 'a prosecutor is prohibited from asking jurors to put themselves in the victims place,' or suggesting 'that the jury has a duty to protect the alleged victim—to become her partisan").

The "Reptile" strategy is a veiled Golden Rule argument because it seeks to have the jurors decide a case not on the evidence presented at trial, but rather, on the potential harms and losses that could have occurred within the community, which includes each juror and his or her family members.

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<sup>3</sup> See also—*State v. Todd*, 173 P.3d 170, 174 (Utah App. 2007), holding that "the prosecutor should refrain from argument which would divert the jury from its duty to decide the case on the evidence."

**III THE STANDARD OF CARE DOCTRINE DOES NOT PERMIT PLAINTIFFS TO MAKE THEIR CASE REVOLVE AROUND THE JURORS, THEIR FAMILY, OR THE COMMUNITY.**

Plaintiffs must establish expert support to show that Dr. Larson breached the standard of care as an orthopedic surgeon practicing in this community, a similar community, or in the nation. The standard involves what a reasonable physician in the same field or specialty would do under similar circumstances.

Plaintiffs wish to twist this doctrine to support their Reptile arguments. Plaintiffs argue “[w]here the community sets the standard for the community’s own safety, considerations of community safety will have a place in negligence cases such as this one.” (Opposition p. 5). Plaintiffs argue for a “community standard” that they believe allows jurors to be the conscience of the community. *Id.* In other words, Plaintiffs want the jurors to feel that their verdict impacts their own safety, their families’ safety, and their community’s safety. This is improper.

**CONCLUSION**

For the foregoing reasons, Defendants respectfully seek this Court’s order, *in limine*, prohibiting “personal safety, community safety, or public safety rule” arguments from being made, introduced or admitted at trial.

DATED this 11 day of March, 2015.

**EPPERSON & OWENS, P.C.**

/s/ David C. Epperson  
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