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UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

NORTHERN DIVISION

ANITA JEPPSEN and BRIAN JEPPSEN, Plaintiffs, v. BRAD LARSON, M.D., ALPINE ORTHOPAEDICS, and JOHN and JANE DOES 1-10, Defendants.	**PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION IN LIMINE RE: REPTILE ARGUMENTS** Case No. 1:12-cv-241 Judge Robert J. Shelby

Plaintiffs hereby submit their Memorandum in Opposition to Defendants' Motion in Limine re: Reptilian (Safety and Community Safety) Arguments.

ARGUMENT

Defendants motion apparently seeks to preclude plaintiffs from using any variations of the word "safety" or the phrase "safety rules" at trial. Defendants reference a six-year old trial technique handbook entitled "Reptile: The 2009 Manual of the

Plaintiff's Revolution," which they allege contains suggestions for litigating cases. Plaintiff has not read this specific book, but similar motions have been cropping up more and more frequently, despite the defense bar's lack of success in prevailing on them.

The admissibility of evidence at trial is determined by the Federal Rules, and relevant statutes and case law. There have been countless educational courses and materials over the years designed to teach attorneys how to persuasively present their cases to juries. Use of these techniques is appropriate, as long as they do not conflict with the applicable rules and law. However, there is no legal basis for an order barring Plaintiffs or their experts from referring to rules, from pointing out issues of patient safety, or from arguing to the jury as the conscience of the community. 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.

The use of "safety rules" to establish standard of care or demonstrate breaches of the standard of care is entirely appropriate. This is common language used by medical providers and other medical professionals, and is easily understood by juries. In fact, Black's Law Dictionary defines "**rule**" as "generally, and established and authoritative **standard** or principle; ***a general norm mandating or guiding conduct or action*** in a given type of situation." See Black's Law Dictionary (8th Ed. 2004) (emphasis

added). Plaintiffs should be allowed to use all such terminology to prove their case to the jury, which requires them to prove the defendant breached the standard of care.

Defendants motion, if granted, would presumably prohibit Plaintiffs from making any mention or comment, asking any question, eliciting any testimony, or making any argument in any way related to personal safety, community safety, or patient safety. This is because, according to Defendants, these arguments/evidence would lead the jury to decide the case on something besides the evidence, and will lead the jury into focusing on community safety rules that are somehow higher or different than the standard of care in the field of medicine. However, these arguments and fears are in error and have been rejected by the large majority of courts which have addressed them.

Negligence cases arising out of medical malpractice, such as this one, all involve some type of injury or death, which the standard of care is intended to avoid. Therefore, by definition the standard of care in all medical negligence cases is a patient safety issue. Defendants' request that this Court narrowly interpret Rule 401 to exclude arguments regarding personal and community safety based on the absence of those specific terms in the listed elements of proof. Such a request is improper and

unsupported by the law.[1] Safety is undisputably the purpose and goal of the standard of care, and Plaintiffs should be allowed to use these terms, or any other terms they choose.

Defendants' argument 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. The undisputed evidence at trial will be teat safety is essentially the sum and substance of the standard of care. One traditional role of tort law is to expose and remedy threats to the public welfare. Deans Prosser and Keeton stated long ago:

> The "prophylactic" factor of preventing future harm has been quite important in the field of torts. The courts are concerned not only with compensation of the victim, but with admonition of the wrongdoer. When the decisions of the courts become known, and defendants realize that they may be held liable, there is of course a strong incentive to prevent the occurrence of the harm. Not infrequently one reason for imposing liability is the deliberate purpose of providing that incentive.

W. Page Keeton, et al., Prosser and Keeton on the Law of Torts § 4, at 25 (5th ed. 1984); William L. Prosser, Handbook on the Law of Torts 23 (3d ed. 1964). This still holds true.

The standard of care in negligence cases based on medical malpractice in Utah is a community standard. *Nixdorf v. Hicken*, 612 P.2d 348, 352 (Utah 1980). See

[1] See *State v. Wright*, 304 P.3d 887, 901 (Utah Ct. App. 2013) ("Generally speaking, in argument to the jury, counsel for each side has considerable latitude and may discuss fully from their viewpoints the evidence and the inferences and deductions arising therefrom"), quoting *State v. Tillman*, 750 P.2d 546, 560 (Utah 1987); *State v. Lafferty*, 20 P.3d 342 (Utah 2001) (an attorney "has the right to draw inferences and use the information brought out at trial in his closing argument") (citations omitted). See also *State v. Larsen*, 113 P.3d 998, 1001-02 (Utah Ct. App. 2005)

also id. at 351 (the plaintiff must establish the standard of care required of the defendant as a practicing physician "in the community"). This is an objective standard that "enables the triers of fact . . . to look to a ***community*** standard rather than an individual one." RESTATEMENT (SECOND) OF TORTS § 283 cmt. c (emphasis added). See also *id. § 295A* cmt. b & c (conformance to a custom may imply conformance to a community standard of reasonable care, but custom cannot establish a standard "at the expense of the rest of the community"). Where 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.

Defendants' reliance on the jury instructions is also unfounded. Plaintiffs do not see how discussing the community standard of care and the jury's rule as the "conscience of the community" in enforcing that standard would be more likely to elicit fear or passion in the jurors than the discussion of the facts of this case concerning the negligent treatment by Dr. Larson would. However, if Defendants have these concerns, they can address them by making their own arguments to the jury to the contrary, i.e. that Dr. Larson did not breach the applicable standard of care in the community and that the jury can speak for the community in saying that Dr. Larson is not at fault for Plaintiffs' injuries. Plaintiffs anticipate this is precisely what Defendants intend to do, whether they use that exact phrasing or not. No one is asking the jury to disregard the

instructions given to them by the Court, and they will have to decide if Plaintiffs have proved the elements of negligence in this case based on the evidence presented to them.

Motions of this nature have become a common defense tactic to improperly silence plaintiffs and their attorneys by asking a court to dictate a party's trial strategy or impose a prior restraint on the words a witness or attorney can or cannot use at trial. Defendants have not identified any law authorizing a court to dictate a party's trial strategy, nor to exclude permissible references to safety principles applicable in a case such as this. In fact, the law authorizes the plaintiffs to address the jury's role and ask the jury to enforce the community standard. Defendants' motion should be denied.

CONCLUSION

For the foregoing reasons, Defendants' Motion in Limine should be denied.

DATED this 5th day of March, 2015.

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