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IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

NORTHERN DIVISION

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ANITA and BRIAN JEPPESEN, )

Plaintiffs, )

v. )

BRAD LARSON, M.D., ALPINE )  
ORTHOPAEDICS, and JOHN AND JANE )  
DOES 1-10, )

Defendants. )

**DEFENDANTS' MOTION AND  
MEMORANDUM IN LIMINE RE:  
REPTILIAN (SAFETY AND  
COMMUNITY SAFETY)  
ARGUMENTS**

Case No. 1:12-cv-241

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 Motion in Limine regarding "Reptilian (Safety and Community Safety) Arguments.

## INTRODUCTION

This case is not about the jurors, their family, or the community. Therefore, Plaintiffs' counsel should be precluded from arguing in *voir dire* and during trial that the jurors have the power to improve the safety of themselves, their family members, and their community by rendering a verdict that will reduce or eliminate dangerous conduct such as that alleged against Defendant Brad Larson, M.D. This trial tactic is being taught in plaintiff's trial advocacy courses and is based on a book by David Bell and Don Keenan entitled "Reptile: The 2009 Manual of the Plaintiff's Revolution," and has been attempted by several Utah Plaintiff lawyers.

The thesis of the "Reptile" is that jurors, like all humankind, have brains consisting of three parts which include the reptilian complex. The reptilian complex, also known as the reptilian brain, includes the brain stem and the cerebellum which control our basic life functions such as breathing, hunger, and survival, and instinctively the reptilian brain overpowers the cognitive and emotional parts of the brain when those life functions become threatened. *Id.* at 17. Mr. Ball and Mr. Keenan posit that "[w]hen the Reptile sees a survival danger, even a small one, she protects her genes by impelling the juror to protect himself and the community." *Id.* at 17, 19, 73. The authors suggest that reducing danger in the community facilitates survival, which awakens the reptilian part of the brain in each juror and overcomes logic or emotion. *Id.* at 45.

The authors further suggest that plaintiff's lawyers must appeal to the jurors' own sense of self-protection in order to persuade and prevail. According to Mr. Ball and Mr. Keenan, appealing to a juror's self-protective interests will reverberate and convince better than any other argument. Because the most powerful thinking occurs when one is protecting one's life, a

lawyer can communicate most effectively by converting every issue into one of self-protection or its cousin, community safety. By linking each argument in some way to a juror's sense of personal or community safety, this plaintiff's strategy gives jurors a compelling reason to rule in favor of a plaintiff over the defendant despite what their logic—and the evidence-- might tell them. Mr. Ball and Mr. Keenan instruct plaintiff lawyers to “use powerful Reptilian imperative to use devastating events as a springboard from which to create safety.” The authors further instruct that “[e]very injury presents a hope for a safer future. Position the jurors as the cultivators of that hope.”

### **ARGUMENT**

#### **“PERSONAL SAFETY, COMMUNITY SAFETY, AND PUBLIC SAFETY RULE” ARGUMENTS ARE IMPROPER, BECAUSE THEY BYPASS THE STANDARD OF CARE DOCTRINE LAID OUT BY THE UTAH SUPREME COURT AND UTAH’S HEALTHCARE MALPRACTICE ACT.**

The elements for proving a medical malpractice cause of action are clearly established in the State of Utah. As noted by the Utah Supreme Court:

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.<sup>1</sup>

There is no reference of “personal safety, community safety, or safety rules” in the medical malpractice framework laid out by the Utah Supreme Court.

It is one thing to mention the word safety. It is yet another to abuse the word “safety”

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<sup>1</sup> *Dalley v. Utah Valley Regional Med. Ctr.*, 791 P.2d 193, 195 (Utah 1990) (citations omitted). See also *Martin v. Mott*, 744 P.2d 337, 338 (Utah Ct. App. 1987); *Hoopiiaina v. Intermountain Health Care*, 740 P.2d 270, 271 (Utah Ct. App. 1987); *Robinson v. Intermountain Health Care*, 740 P.2d 262, 264 (Utah Ct. App. 1987).

and have it take center stage. This case is not about the jurors' personal safety, or the community's safety.<sup>2</sup> Nor is this case about safety rules. This case being a medical malpractice action, invokes the standard of care doctrine. It does not invoke a safety rules doctrine (which is commonly used in motor vehicle accident cases).

Defense counsel has seen first-hand the unfairly prejudicial effect that safety rule arguments can have on a jury.<sup>3</sup> It distracts the jury from the actual facts and the law, and permits them to decide the case based on fear, passion, and prejudice. Safety rule arguments provoke the jury to fear for their personal safety and that of their community. This is unfairly prejudicial, because it distracts the jurors' from their true role as triers of fact.<sup>4</sup>

Any evidence about "personal safety, community safety, or public safety rules" is irrelevant to the legal issues raised in this case. Such evidence will not make the factual determination of any issue more or less probable and therefore is irrelevant to the controversy at hand. F.R.E. 401. Evidence which is not relevant is not admissible. F.R.E. 402. Furthermore, even if "personal safety, community safety, or public safety rules" evidence is relevant to the legal issues raised in this case, this Court should exclude such evidence because its probative

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<sup>2</sup> In Mangrum and Benson's Utah Evidence manual for 2013, the Reptilian strategy was discussed. They said 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." Exhibit 1.

<sup>3</sup> See *Friedli v. Grover*(2013) voir dire and closing arguments transcripts showing the prejudicial effect Reptilian arguments can have in a medical malpractice jury trial. Attached as Exhibit 2.

<sup>4</sup> During the course of the upcoming trial, the Court will give a number of instructions to the jury, which may include something akin to Utah Civil Jury Instruction 107. Though jury instructions are not law, they attempt to interpret the law. CV107 states: "**You must decide this case based on the facts and the law, without regard to sympathy, passion or prejudice. You must not decide for or against anyone because you feel sorry for or angry at anyone.**" (emphasis added). Reptilian arguments improperly invoke passion, prejudice, and fear of safety.

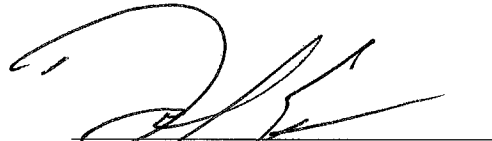
value is substantially outweighed by the danger of unfair prejudice, confusion of the issues and misleading the jury. F.R.E. 403.

**CONCLUSION**

For the foregoing reasons, Defendants respectfully seek this Court's order, *in limine*, prohibiting any mention, comment, reference, evidence, testimony or argument regarding "personal safety, community safety, or public safety rules" from being made, introduced or admitted at trial.

DATED this 18 day of February, 2015.

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



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*And Alpine Orthopaedics*