TERENCE L. ROONEY (5789)
BRADLEY R. BLACKHAM (8703)
SNOW, CHRISTENSEN & MARTINEAU
Attorneys for Defendants
10 Exchange Place, Eleventh Floor
PO Box 45000
Salt Lake City, UT 84145
Telephone: (801) 521-9000

IN THE THIRD JUDICIAL DISTRICT COURT

SALT LAKE COUNTY, STATE OF UTAH

DAVID SCOTT and DEBRA SCOTT, Plaintiffs, vs. HUNTSMAN CANCER INSTITUTE, UNIVERSITY OF UTAH HOSPITAL AND MEDICAL CENTER, THE UNIVERSITY OF UTAH AND THE STATE OF UTAH, Defendants.	**DEFENDANTS' MEMORANDUM IN SUPPORT OF MOTION IN LIMINE RE: REPTILE THEORY** Case No. 110917738 Judge: Su J. Chon

The University of Utah Hospital and Medical Center, University of Utah, and State of Utah (collectively "the University") respectfully submit the following Memorandum in Support of Motion in Limine re: Reptile Theory.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

INTRODUCTION AND BACKGROUND

It is anticipated that Plaintiffs' counsel will, throughout the course of trial, argue that the jury has the power to improve the safety of themselves, their family members and their community by rendering a verdict that will reduce or eliminate allegedly "dangerous" or "unsafe" conduct. This trial tactic is being taught in plaintiff's trial advocacy courses throughout the country. The strategy is based on a book by David Bell and Don Keenan entitled "Reptile: The 2009 Manual of the Plaintiff's Revolution."

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's 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."

Such "reptile" arguments or tactics have no place in this trial, or at any trial for that matter. Any questions or argument from Plaintiff's counsel suggesting that a community standard of care or a general safety standard applies as opposed to the standard of care established through expert testimony presented at trial should be precluded. Likewise, any questions or argument from Plaintiff's counsel suggesting that protecting personal safety, community safety or patient safety is the standard of care and should be the jury's goal in rendering a verdict should be precluded.

Moreover, any question or argument from Plaintiff's counsel suggesting that protecting against needless endangerment of patient safety is the standard of care and should be the jury's goal in rendering a verdict should be precluded. Finally, any argument that the jury send a message about what type of health care is acceptable in this community should be precluded. These types of questions and arguments are designed to appeal to the jury's sense of fear for

their own safety and fear for the safety of the community in general rather than applying the standard of care as established by expert testimony and the instructions given by the Court.

ARGUMENT

I. EXAMPLES OF REPTILE THEORY IN MEDICAL MALPRACTICE CASES

Perhaps the primary problem with the "reptile" strategy is that it creates a false legal standard by which the care at issue in a medical malpractice case is to be judged. Rather than assisting the jury in understanding the baseline standard of care followed in the medical community and what that standard requires in a particular case, reptilian questioning and arguments lure the jury into focusing on community safety rules that are a higher or different standard than the standard of care as established by the medical community.

Rather than simply addressing the concept of reptile theory, it seems more appropriate to give the Court concrete examples of the reptile strategy in a medical malpractice case. The impetus for this Motion is the fact that Plaintiffs' counsel has attempted to utilize reptile tactics in other cases. As explained herein, at least one Court has precluded him from using such tactics. In yet another case, where no Motion in Limine was filed, Plaintiffs' counsel made the issue of community safety the primary theme of his case. The following excerpts are taken from the trial transcript in *Friedli v. Grover, M.D.—filed* in the First Judicial District Court, Civil Action No. 060102383, and decided on March 5, 2013 (Honorable Kevin K. Allen, presiding). Plaintiffs' counsel, Michael Worel and Charles Thronson, took part in this trial. As the Court will see, the plaintiff's overarching theme was safety rules and community safety, in contrast to the actual issue of standard of care. In pertinent part, the trial transcript from that case reads as follows:

Voir Dire Arguments by Plaintiffs' counsel Michael Worel:

> Safety rules are there so the person may not get injured, but then you also said other people might not get injured. That's the reason for safety rules.
>
> How many people have safety rules in their jobs? Nurse to be, there's all kind of safety rules. I bet you have had classes on safety rules, haven't you? (p. 20)
>
> Would you agree or disagree with this statement: When it comes to following rules — and we have said that medicine has rules, safety rules — when it comes to following rules, no one in any profession should needlessly endanger others? Does anyone disagree with that statement? If you do, I would like to know.
>
> Do you agree or disagree that if someone, regardless of the profession, needlessly endangers others by choosing to ignore safety rules and someone suffers harm or losses, they suffer an injury, that person that chooses to ignore it should be accountable for those actions? (pp. 22-23)
>
> (Exhibit 1, *Friedli v. Grover,* Michael Worel Voir Dire)

Closing Arguments by Plaintiffs' counsel Michael Worel:

> Did you know that all of the laws that we have — to the very essence of the law, court laws, is called safety for the masses. Safety for the masses. That's the summation of everything we have.
>
> It's safety for our community, for our acquaintances, for our friends, for our families. That's the essence of the law as you are going to apply it. (pp. 6-7)
>
> The point is, you may have been under the mistaken impression that this case was just about that family, and it's not. It is not. This case and your decisions are much more than that.
>
> I think you understood in voir dire when I asked you, "Do you guys agree in the concept that full justice in the right case can benefit all in the community because it can shape how things happen in the future?" Do you remember us discussing that? And you saying, "Yeah, I get how that can be."
>
> This case, they are representatives of the community. This case affects so much more than the Friedli family. And I think you have gotten an idea of that as we have been going through it. (p.8)

> You have the right to change actions of how people will approach a similar situation in the future, be it this doctor or any doctor. (p.8)
>
> Do you realize enforcing the rules against a rule-breaker makes everyone safe? And this is a safety rules case, ladies and gentlemen. Make no mistake about it. It may be applying in the medical community, but it is a safety case, and you have seen everyone agree with that.
>
> It's safety rules — you know, safety rules in the medical community, safety rules in any other profession are there for the same reasons. They are there because they are there to protect people. Safety rules are there to be followed. If safety rules aren't followed, people get hurt or they die. That's the simple truth of that. Think of the tragedies that will happen if we the community say, "It's okay to ignore the safety rules." (pp. 9-10)
>
> Well, the law, by putting you in this box and being in the jury, said, "This time, this time you have got that power." You have the power to do the right thing for the community. And I'm going to trust you, that your, that you're going to come up collectively —
>
> MR OWENS: I renew my objection. This isn't about the community.
>
> THE COURT: Mr. Worel, if you would, just move on from that area, please. Thank you. (p. 10)
>
> And I'm going to ask you when you are finished and you do that and you come up with a verdict, I want you — it to be a verdict that you can lean back and you can — held your head high and you can be proud of. And it would be verdict that will send a message that we want quality medical care. (p. 50)

(Exhibit 2, *Friedli v. Grover,* Michael Worel Closing Argument)

The University seeks to preclude Plaintiffs' counsel from making similar statements in this trial. Further, the University seeks to preclude Plaintiff's counsel from presenting or eliciting related evidence. The strategy employed by Plaintiff's counsel in the *Friedli v. Grover* case in 2013 is textbook "reptile." Keenan and Ball argue in their book that, because everyone agrees with the general rule that "doctors are never allowed to needlessly endanger their

patients," the reptile strategy should frame medical malpractice cases so that any medical decision other than the absolute safest choice for a patient constitutes negligence. It distills the case down to the theory that "the only allowable choice is the safest available choice" because any other choice needlessly endangers a patient. *Id.* at 64-66. Such an argument is simply legally incorrect. The point of this medical malpractice lawsuit is not to ensure "safety for the masses." The jury's purpose is not to do the right thing for the community. As explained below, such statements fly in the face of Utah law and misstate the juror's role in the case. This case is about whether the University breached the standard of care and caused harm to Plaintiffs, nothing less and nothing more.

In an article entitled "Litigating Reptiles" David Marshall identifies the kinds of questions that may be posed to defendants or defense experts to propogate a reptile strategy,

- A doctor must not needlessly expose a patient to an unnecessary danger, true?
- It would not be reasonable for any physician to expose a patient to unnecessary harm, true?
- It would violate the Hippocratic Oath, true?
- You learned a long time ago that doctors should not needlessly endanger a patient, true?
- It's an important rule, true?
- It should be followed by all doctors, true?
- And it is a safety rule to protect patients' interests, true?
- It protected you when you were a patient, true?
- You, as a doctor, must follow this rule, true?

- The rule, when enforced, ensures public safety, true?
- Violation of safety rules by physicians can hurt anybody, true?
- If a safety rule is broken, and a patient is harmed thereby, do you believe the rule breaker should be held responsible for the harm that was caused?
- Safety rules should be enforced, true?
- If safety rules are not enforced, those rules lose their value as a rule, true?
- If a doctor has more than one course of action to choose between, the doctor should choose the one that is safest for the patient, true?
- A doctor must not choose a dangerous course of conduct if a safer choice exists, true?
- If fifty percent of the doctors in a given town needlessly endanger the patient that they are caring for, does that make it reasonable and prudent for other doctors in that community to needlessly endanger their patients?

(A copy of this article is attached hereto as Exhibit 3.) Again, these questions, and others like them, focus on creating a false legal standard by which the care at issue in a medical malpractice should be judged. By focusing on community safety rules that are higher or different than the baseline standard of care that exists in the medical community, a Plaintiffs can create the false illusion that a defendant has violated a "standard of care" when in fact they have not done so.

II. UTAH LAW PROHIBITS THE "REPTILE" STRATEGY

A. Reptile Strategy is Prohibited by Controlling Utah Case Law.

Though Utah Courts have never directly addressed the term "reptile theory," the Utah appellate Courts have certainly addressed the underlying concepts and tactics. The "reptile" strategy 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, or may yet occur, within the community, which includes each juror and his or her family members. Such tactics have been expressly forbidden in Utah. For example, in *State v. Wright,* 304 P.3d 887, 902 (Utah App. 2013), the Court found that the Prosecutor's closing statement—"You have the power to make that [(the abuse)] stop" to be beyond the scope of a fair reply. The Court found that the statement appealed to the juror's emotions by contending that the jury has a duty to protect the alleged victim—to become her partisan—which diverts their attention from their legal duty to impartially apply the law to the facts." *Id.* Likewise, in *State v. Todd,* 173 P.3d 170, 174 (Utah App. 2007), the court held that "the prosecutor should refrain from argument which would divert the jury from its duty to decide the case on the evidence."

This type of argument was recently addressed, at length, by the Utah Court of Appeals in *State v. Campos,* 309 P.3d 1160 (Utah App. 2013). In *Campos,* the defendant had shot and severely injured his neighbor after an argument. The prosecutor began his closing remarks by stating that the case was about "civilized society." In other words, jurors were to assume the responsibility of ensuring the safety of society (i.e. "the community"). He closed his remarks by focusing on the same theme.

> [O]ur whole system of law is based on the concept of justice. Which simply means when you commit a crime like this, when you gun down your fellow neighbor in the most tragic of ways, stealing from him his ability to run, his ability to bike, his ability to walk his daughter down the aisle, when you do something like that on the streets of our community then you should be held accountable. Hold Mr. Campos accountable for his actions and to do that, find him guilty on all counts.

Id. at ¶48. The Utah Court of Appeals unambiguously found the prosecutors argument to be improper. The Court explained that the "prosecutor appealed to the passions of the jury and the jury's duty to society to argue that Campos should be found guilty because of the tragic consequences suffered by Serbeck."

In doing so, the Court explained that counsel is "prohibited from asking jurors to put themselves in the victim's place or suggesting that the jury has a duty to protect the alleged victim-to become her partisan." *Id.* at ¶51. The Court further explained that "**reference to the jury's societal obligation is inappropriate when it suggests that the jury base its decision on the impact of the verdict on society.**" *Id.* (emphasis added). Perhaps most importantly, the Court warned that "the determination of guilt must not be the product of fear or vengeance but rather intellectually compelled after a disinterested, impartial and fair assessment of the testimony that has been presented." *Id.* at ¶50. The same reasoning holds true for civil cases.

This case law stands in sharp contrast to the reptile strategy. As evidenced by the following quotations taken from "Reptile," the reptile trial strategy is to directly or indirectly invoke the concepts of societal obligation, self preservation and community safety by asking jurors to put themselves in the same position as the plaintiff—a position of jeopardy that calls upon survival instincts:

- When the Reptile sees a survival danger, even a small one, she protects her genes by impelling the juror to protect himself and the community. Reptile at 17, 18 & 73.

- It gives jurors personal reason to want to see causation and dollar amount come out justly, because a defense verdict will further imperil him. Only a verdict [for the plaintiff] can make them safer. *Id*. at 39

- The juror's decision rests on the reptilian question of which verdict will make her safer. *Id.* at 72.

- Just remember that the Reptile does not get involved unless she sees that the danger is to her, and can be meliorated. *Id.* at 80.

- The reptile ignores tragedy because she can't do anything about it. Instead, the trial…..is an opportunity for jurors to use the horror of [the plaintiff's case] as a way to make their offspring safer. *Id.* at 86.

- So as with all things Reptilian, you show that the **safer decision for the community** (and thus the individual juror) is a fair verdict for your client. *Id.* at 99 (emphasis added).

- **No Reptile can protect herself alone. She protects herself by protecting the community.** The concept of "No man is an island" shows the Reptile that what's good for the community connects directly to her, individually — and is good for her. *Id.* at 149 (emphasis added).

- But the Reptile is not particularly concerned with your client. Our research revealed a different picture: the Reptile is concerned with *the Reptile* — meaning the individual juror — his world and family, their survival, and little else. *Id.* at 169 (italics in original).

- A case framed in terms of **community endangerment** is Reptilian. A hospital-acquired infection case turns Reptilian when jurors see that the victim could have been anyone who walked through the doors. "Anyone" means the community. "Community" includes juror #3 and her children. *Id.* at 170 (emphasis added).

- Jurors will do what they can to keep their communities (i.e. themselves) safe when they think their efforts will work. *Id.* at 227.

These tactics are clearly precluded in Utah. Pursuant to the Utah Court of Appeals holding in *Campos*, any question or argument by Plaintiff's counsel appealing to the jury's innate interest in protecting themselves and the community at large by applying a community standard of care, rendering judgment based on sending a message as to the type of care that is acceptable in the

community, eliminating medical decisions and treatment that is perceived to needlessly endanger patient safety or encouraging medical decisions and treatment that is perceived to heighten patient safety should be precluded because they all culminate in an express or implied request that the jury depart from its role of impartiality and decide the case on basis of personal interest—protecting themselves, *i.e.*, "personal safety" and protecting people in their family and community, *i.e.*, "community safety."

Reptile theory is very similar to Golden Rule arguments that have been precluded in Utah and throughout the country. Such 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. Todd*, 173 P.3d 170, 174 (Utah App. 2007)("A prosecutor is prohibited from asking jurors to put themselves in the victim's place"); *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").

Although Plaintiffs and their counsel may not specifically ask jurors to put themselves in the shoes of Plaintiffs; presenting arguments regarding "personal safety" or "community safety" has the same intent and mischief—that is to have jurors base their verdict not on the evidence of

the case but rather on the fear that they or other members of their family or community could be injured and to have them view compensating the Plaintiffs as diminishing danger to themselves and the community.

B. Both the Utah Federal District Court and Utah State Trial Courts have Precluded Reptile Tactics.

Though not controlling on this Court, at least one Court has precluded Plaintiffs' counsel from using such tactics. Specifically, Judge Clark Waddoups of the Utah Federal District Court granted an almost identical defense motion regarding Reptile Theory in the case of *Waddoups v. Noorda*, 1:11-cv-00133. Judge Waddoups precluded the plaintiff from arguing the issues of "personal safety" and "community safety." While Judge Waddoups' ruling is not controlling in this matter, it is certainly persuasive.[1]

Another trial court judge in the state of Utah has also addressed the issue of "community safety" and "safety rule" arguments and found them improper. Judge Pamela Heffernan addressed the issue in *Hurley v. Parry* a medical malpractice case in state court in St. George. At a Motion in Limine hearing, Judge Heffernan ruled as follows:

> 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 have 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

[1] The University has attached the Utah Federal District Court's Order from that matter as Exhibit 4.

> rules. No one wants to be unsafe when they go to a doctor or hospital. It applies sort of above and beyond the standard of care.[2]

Judge Heffernan's concerns echo those of the University in this matter. The point of this medical malpractice lawsuit is not to ensure "safety for the masses." The jury's purpose is not to "do the right thing for the community." Such statements fly in the face of Utah law and misstate the juror's role in the case. This case is about whether the University breached the standard of care and caused harm to Plaintiffs, nothing less and nothing more. The University seeks to preclude Plaintiffs' counsel from making similar statements in this trial.

C. Mangrum and Benson on the Reptile Theory.

These same concepts were discussed in Mangrum and Benson's Utah Evidence manual for 2013. The manual explains it is 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." Utah Evidence, Magrum and Benson, pp. 34-36 (2013). Mangrum and Benson's Evidence manual also said it was improper to "violate the Golden Rule by asking the juror to put themselves in the shoes of one of the parties for the purposes of accessing damages." *Id.*

D. Reptile Strategy Contradicts the Utah Model Jury Instructions.

The Reptile strategy is also antithetical to well established Utah jury instructions. During the course of the upcoming trial, the Court will give a number of instructions to the jury which

2 *See* Transcript attached hereto as Exhibit 5, pg. 11.)

will include Utah Civil Jury Instruction 107. CV107 reads: "**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). CV107 establishes that jurors must not be governed by sympathy, passion or prejudice. Yet, arguments of "personal safety" and community safety" are premised on eliciting fear or passion in jurors of future harm if a verdict is not entered in favor of Plaintiffs. Such arguments are a blatant appeal to the jury to abandon its duty to render a verdict predicated on evidence and the law of the case, and instead, substitute their judgment influenced by fear or passion.

Furthermore, Utah Civil Jury Instruction 301(c) is the standard of care instruction that will be given in this case. It reads, in part: "**A [health care provider] [doctor] is required to use that degree of learning, care, and skill used in the same situation by reasonably prudent [providers] [doctors] in good standing practicing in the same [specialty] [field].**" (emphasis added). This jury instruction establishes that the standard of care to be applied in the case is (1) a medical standard as opposed to community safety standard; and (2) is a baseline standard as opposed to a heightened, "anything that promotes safety should be done" standard. Yet reptilian questions and arguments seek to equate in jurors' minds any failure to follow the safest possible course of action with a breach of the standard of care. This sleight-of-hand substitution of legal standards is set up by a series of legally irrelevant and vague questions posed to defendants and their experts establishing agreement with the broad proposition that health care providers should not expose patients to unnecessary danger or risk followed by detailed questions designed to establish that safer options could have been chosen by providers in treating the patient at issue.

E. Defendants' Due Process Right to an Impartial Jury and Fair Trial.

The Utah Constitution does not guarantee the right to a jury trial in a civil case. However, "both the United States Constitution and the Utah Constitution guarantee an accused the right to a fair and impartial jury." (*See State v. Wach*, 24 P.3d 948, 956 (Utah 2001)). The 10th Circuit explained it best in *Skaggs v. Otis Elevator Co.*, 164 F.3d 511, 515 (10th Cir. 1999), "The Seventh Amendment to the United States Constitution guarantees a litigant in a civil proceeding the right to a trial by jury. Although the Seventh Amendment does not contain language identical to that found in the Sixth Amendment, which specifically guarantees a criminal defendant the right to an impartial jury, the right to a jury trial in a civil case would be illusory unless it encompassed the right to an impartial jury." The Court went on to say "the denial of trial by an impartial jury is also a denial of due process." *Id.*

Allowing Plaintiffs and their counsel to make arguments regarding "personal safety" and "community safety" violates these essential elements. First, it threatens the impartiality of the jurors. Second, as noted above, it asks the jury to ignore the directions—jury instructions—given by the court. Further, by allowing Plaintiffs and their counsel to make these arguments regarding "personal safety" and "community safety" as opposed to the damages actually sustained by Plaintiffs, Defendants are deprived of the constitutional right to a fair trial. Due process does not permit courts to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of "personal safety" or "community safety." A defendant is only liable for conduct that harmed the Plaintiffs. A defendant is not liable for potential harm to those who are strangers to the litigation. Thus, Due Process specifically prohibits damage

awards based on potential harm that could have been inflicted on other members of the community. It is well established in Utah that a plaintiff "must prove the fact of damages, and evidence must do more than merely give rise to speculation that damages in fact occurred; it must give rise to a reasonable probability that plaintiff suffered damage as a result of breach, and plaintiff must also prove amount of damages." *(See Atkin Wright & Miles v. Mountain States Telephone & Telegraph Co.,* 709 P.2d 330 (Utah 1985)).

III. QUESTIONS OF PERSONAL OR COMMUNITY SAFETY ARE SIMPLY IRRELEVANT

Finally, and perhaps most fundamentally, reptile strategy should be prohibited because it raises issues that are irrelevant to the legal issues raised in this malpractice action. The legal issues to be addressed by the jury include: (1)What is the applicable standard of care; (2) Did the University breach the applicable standard of care owed to Plaintiffs; (3) was the University's breach a proximate cause of injury or loss to the Plaintiffs; and (4) whether Plaintiffs suffered actual injury or loss. "Personal safety" and "community safety" are irrelevant to these legal elements. Plaintiffs and their counsel should be precluded from making any arguments, asking questions about or presenting evidence concerning "personal safety" or "community safety." Any question or argument about "personal safety" or "community safety" goes beyond the scope of any damages suffered by Plaintiffs and includes potential harm posed to the community.

Any evidence or argument related to "personal safety" or "community safety" is irrelevant to the legal issues raised in this case. Such evidence will not make the factual determination of (1) what is the standard of care in the medical community for a given situation;

and (2) whether the care at issue in the case met that baseline standard any more or less probable and therefore is irrelevant to the controversy at hand. Specifically, evidence about "personal safety" or "community safety" will not make it more or less likely that the University breached the standard of care in this case. If anything, reptile theory arguments will distract from the fundamental legal questions that the jury is to evaluate.

The standard of care that applies to every healthcare provider is to "use of that degree of learning, care, and skill used in the same situation by reasonably prudent providers in good standing practicing in the same specialty." MUJI CV301C; *see also Farrow v Health Services Corp.* 604 P.2d 474, 476 (Utah 1979). This is not a standard that the local "community" sets regarding its own safety. Indeed, requesting that the jury set or enforce "community safety rules" manifests a fundamental misunderstanding of the issue of standard of care.

In other words, "standard of care," as used in malpractice cases, is a term of art with a specific definition, and is not based on what the jury, or other members of the community believe is safe. The standard of care that applies to every healthcare provider is to "use that degree of learning, care, and skill used in the same situation by reasonably prudent providers in good standing practicing in the same specialty." MUJI CV301C; *see also Farrow v Health Services Corp.* 604 P.2d 474, 476 (Utah 1979). This standard does not require perfect care, or the "best" or "safest" practices conceivable. *See e.g. Burke v Skaggs,* 867 A.2d 213, 217 (D.C. Ct. App. 2005)("[e]stablishing the standard of care is essential to a prima facie case of negligence because physicians are not expected to be perfect"); *Kehle v Andriani* 2009 WL 5511550, *7 (treatment does not have to be perfect to meet the standard of care); *see e.g. Henson v. Mobile Infirmary*

Association, 646 So.2d 559 (Ala. 1994)(explaining that "an opinion as to the safest method of any medical procedure may or may not be the same as an opinion as to what is required by reasonable care, skill and diligence"); *Palandijian v. Foster*, 842 N.E.2d 916, 920-921 (Mass. 2006)(explaining that standard of care "does not require physician to provide the best care possible"). Rather, the question is one of reasonableness within the given medical specialty.

In short, a jury applying this legal standard is being asked whether the healthcare provider's treatment met the baseline standard of care followed within the given medical specialty, not whether there might be some other safer alternative. Any suggestion otherwise misstates the law, and diverts the jury from its obligation to apply the law to the facts. *State v Wright*, 2013 UT App 142, ¶39 304 P. 3d 887, 901 (argument by counsel that appeals to jurors emotions by contending that the jury has a duty to protect the victim, thereby diverting the jury's attention from their legal duty to apply the law to the facts, is improper.)

CONCLUSION

For the foregoing reasons, Defendants University of Utah Hospital and Medical Center, University of Utah, and the State of Utah, respectfully seeks this Court's order, *in limine*, prohibiting any argument, questioning of witnesses or presentation of evidence suggesting that a community standard of care or a general safety standard applies as opposed to the standard of care established through expert testimony presented at trial should be precluded. Likewise, any argument, questioning of witnesses or presentation of evidence suggesting that protecting personal safety, community safety or patient safety is relevant and should guide the jury's verdict should be precluded. Moreover, any argument, questioning of witnesses or presentation of

evidence suggesting that protecting against needless endangerment of patient safety is relevant and should guide the jury's verdict should be precluded. Finally, any argument, questioning of witnesses or presentation of evidence urging the jury to send a message about what type of health care is acceptable to them or the general community should be precluded.

DATED this 12th day of January, 2015.

SNOW, CHRISTENSEN & MARTINEAU

By /s/ Bradley R. Blackham
Terence L. Rooney
Bradley R. Blackham
Attorneys for Defendants

CERTIFICATE OF MAILING

I hereby certify that I caused a true and correct copy of the foregoing **DEFENDANTS' MEMORANDUM IN SUPPORT OF MOTION IN LIMINE RE: REPTILE THEORY** to be served on the following individuals this 12th day of January, 2015 by:

[x] Electronic filing with Court
[ ] U.S. mail, postage prepaid
[ ] Hand delivery
[ ] Electronic mail
[ ] Facsimile

Charles H. Thronson
PARSONS BEHLE & LATIMER
One Utah Center
201 South Main Street, Suite 1800
Salt Lake City, UT 84111
Attorneys for Plaintiffs

Michael A. Worel
DEWSNUP KING & OLSEN
36 South State Street, Suite 2400
Salt Lake City, UT 84111
Attorneys for Plaintiffs

/s/ Christopher W. Droubay