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IN THE THIRD JUDICIAL DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH

DAVID SCOTT and DEBRA SCOTT, Plaintiffs, vs. UNIVERSITY OF UTAH HOSPITAL AND MEDICAL CENTER, Defendant.	**PLAINTIFFS' RESPONSIVE MEMORANDUM IN OPPOSITION OF DEFENDANT'S MOTION IN LIMINE RE: "REPTILE THEORY"** Case No. 110917738 Judge Su Chon

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INTRODUCTION AND BACKGROUND FACTS

In the weeks leading up to March 4, 2010, plaintiff David Scott had a mild headache that resolved with ibuprofen. Out of an abundance of caution, however, Mr. Scott's primary care physician sent him for an MRI, never contemplating the disaster which would follow. This MRI was admittedly misread by defendant University of Utah employee neurosurgeon Dr. Randy Jensen, who compounded the problem by telling Mr. and Mrs. Scott that Mr. Scott was suffering from potentially lethal "brain cancer" (he was not) and needed to have brain surgery as soon as possible "to save his life" (he did not).

On March 4, 2010, brain surgery was performed by Dr. Jensen and his assistant, Dr. Lee. During the procedure, one of these surgeons cut into an artery in Mr. Scott's brain, causing a massive hemorrhagic stroke. As a result, Mr. Scott has been left permanently and totally disabled. No cancer was ever found.

Trial in this case is set to begin February 17, 2015. In advance of this trial, defendant University has filed a motion in limine that, at its core, seeks two things: (1) to preclude in advance plaintiffs from utilizing any variations of the word "safety" or the phrase "safety rules;" and (2) preclude the plaintiffs from using any form of the "Golden Rule" argument.

The crux of defendant's argument to exclude these two items is based on its apparent fear of certain litigation suggestions set forth in an evidently magical six-year old trial technique handbook entitled "Reptile: The 2009 Manual of the Plaintiff's Revolution."[1] Out of the

[1] Unfortunately, plaintiffs' counsel have not read the book and are therefore apparently missing out on the vast powers which this tome contains.

hundreds of plaintiff and defense trial technique books published over the last 30 years, this mystical and mysterious "Book of the Black Arts" has so paralyzed defendants with fear that, like here, they are everywhere filing re-treaded and boilerplate motions and memoranda to exclude use of certain well-established trial techniques. Predictably, they are also losing everywhere, as will be set forth *infra*.[2]

ANALYSIS

In its motion, defendant requests this Court to issue a broad order barring plaintiffs and their counsel from referring to medical or hospital standards of care as "rules," or "safety rules," or even use the word "safety." In addition, defendant requests the Court to issue a broad order barring plaintiffs' counsel from discussing with the jury their role as the conscience of the community at trial. As set forth above, this type of motion is now routinely filed in injury and malpractice cases such as this and, as evidenced below, has no merit whatsoever.

There is no legal basis for an order barring plaintiffs' counsel and experts from referring to rules, from pointing out issues of patient safety, or from arguing to the jury as the conscience of this community. Plaintiffs' counsel are entitled to argue the facts in this case on behalf of their clients, and there is nothing improper about referring to safety rules broken by defendant's employees alleged to have violated applicable standards of care, or asking the jury to protect patient safety. Defendant's motion simply seeks to improperly control and manipulate plaintiffs'

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[2] Defendant begins its memorandum with an introduction and argument section that quotes and interprets this book. However, the admissibility of evidence is not based on how some trial consultant believes the evidence will affect the jury. Rather, the Utah Rules of Evidence, statutes, and supporting case law are the guide. There is certainly no doubt that the medical malpractice insurance industry provides educational courses designed to teach insurance defense attorneys how to influence juries with arguments, phrasing and general confusion of the issues. These techniques are appropriate so long as they do not conflict with the law and the rules.

trial strategy by asking the Court to limit the use of words that may appeal to the jury and be harmful to the defendant's case.

Presentation and use of medical or hospital "safety rules" to establish the applicable standard of care and demonstrate breaches of that standard are completely appropriate and in no way improper or misleading. It is common language used by medical providers, hospital policies and procedures, as well as hospital accreditation agencies.

The questions to be decided by the jury in this case turn on whether the defendant breached its standards of care. The words "standard" and "rule" are synonymous. *See Black's Law Dictionary* (8th Ed. 2004) [defining **Rule** as "generally, an established and authoritative **standard** or principle; **a general norm mandating or guiding conduct or action in a given type of situation**."] (emphasis added). There is no basis in law—not to mention the English language—for barring plaintiffs' counsel and his experts from referring to medical or hospital rules at trial.

Plaintiffs clearly understand their legal burden of proof under Utah law.[3] Pursuant to Utah law, plaintiffs have the burden to establish that the defendant's employees violated the applicable standards of care, and that those violations caused plaintiffs' harms and losses. Plaintiffs and their experts are fully prepared to comply with this burden, as defendant well knows. There is no strict manner set forth in the medical malpractice statute or in case law that dictates the precise way in which the plaintiff must prove standards of care, other than it must be

[3] Plaintiffs' counsel have a combined seven decades of litigation and trial experience in medical malpractice cases. They know the concepts of burdens of proof and standards of care.

proven by a doctor/expert who is familiar with the standard of care.[4] Plaintiffs will do so precisely in accord with the rules.

Now, however, defendant seeks a broad order preventing plaintiffs and their counsel from making any mention, comment, juror or witness questions, witness testimony or argument regarding personal safety, community safety, patient safety, needlessly endangering patient safety, measures that can be taken to safeguard or improve patient safety or measures that could potentially lessen patient safety. As plaintiffs understand the motion, defendant's specific contentions are that such legal arguments (1) are irrelevant and will lure the jury into focusing on community safety rules that are higher different standards than the standard of care as established by the medical community; (2) ask jurors to decide the case based on something other than the evidence; and (3) violate the Utah case law, the Model Jury Instructions and the Utah Constitution.

Every single one of these arguments are demonstrably in error and have been rejected by the large majority of courts which have addressed them, including the Court in defendant's most recent trial. 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. Defendant has 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. Defendant's motion should be denied.

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[4] *DeAdder v. Intermountain Health Care, Inc.*, 308 P.3d 543, 550 (Utah Ct. App. 2013).

I. REFERENCES TO SAFETY ARE—AND ALWAYS HAVE BEEN—APPROPRIATE IN DISCUSSING THE STANDARD OF CARE AND BREACH THEREOF.

Defendant contends that references to safety are irrelevant and will only persuade the jury to require defendant to comply with a higher standard of care than what the standard of care actually is. This contention fails for the following reasons:

Defendant does not explain what other "higher" standard it believes plaintiffs intend to ask the jury to adopt. It is nonsense to argue that the simple questioning of witnesses concerning safety and avoiding unnecessary and acknowledged risks in relation to relevant standards of care heighten that standard.

Second, medical negligence cases all involve personal injury or death as the alleged harm, which injury or death the standard of care is intended to avoid. The standard of care in all medical negligence cases is, by very definition, a patient safety issue. This case is perhaps the best example of that fact.

Third, defendant's relevance argument asks the Court to narrow Rule 401 to define "relevant evidence" as only evidence one side likes.[5] The plaintiffs are free to explore the defendant's safety standards at trial with whatever terms they would like to use.[6] If defendant

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[5] *Id.* at 15-16 (arguing that "personal safety" and "community safety" are irrelevant because they are not specifically used in the listed elements of proof).

[6] *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)

would like to instruct its witnesses to deny that the standards of care are intended for patient safety, it is at liberty to do so. The fact that the community standard of care is in place for the safety of defendant's patients is not irrelevant, it just doesn't help defendant. But that is not the standard of admissibility.[7]

Defendant has cited no binding or persuasive authority that precludes a witness or attorney from referring to safety—individual, community or otherwise—in a medical negligence case, or in any other tort case for that matter. That is because safety is indisputably the purpose and goal of the standard of care.

II. DISCUSSING SAFETY DOES NOT ASK THE JURY TO DECIDE THE CASE ON ANYTHING OTHER THAN THE EVIDENCE.

Defendant contends that introducing the concept of safety into the trial will cause the jury to decide the case based on something other than the evidence. This contention is supported by no law, conflicts with undisputed evidence, and seeks to improperly limit plaintiffs' trial presentation in violation of the law and the rules.

As already discussed, safety is the sum and substance of the standard of care. That will be the undisputed evidence. A tort action "inevitably involves balancing individual and social

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(observing that prosecutor's comments "relie[d] only on evidence presented at trial and appeal[ed] to the jury to make a common sense inference based on the evidence").

[7] *State v. Maurer*, 770 P.2d 981, 984 (Utah 1989) (quoting M. Graham, *Handbook of Federal Evidence* § 403.1, at 182-83 (2d ed. 1986)) ("[A]ll effective evidence is prejudicial in the sense of being damaging to the party against whom it is offered").

interests."[8] Indeed, one of the traditional roles of tort law has been to expose and remedy threats to the public welfare.[9] As Deans Prosser and Keeton recognized 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.[10]

This concept is illustrated in the fact that the standard of care in medical negligence cases in Utah is a "community standard."[11] It is the equivalent of the general "reasonable person" standard for negligence cases applied to a medical malpractice case. "The chief advantage of" such an objective standard "is that it enables the triers of fact . . . to look to a *community* standard rather than an individual one."[12] It can hardly be contended, therefore, that considerations of community safety have no place in negligence cases, professional or otherwise, where it is the community that sets the standard for the community's own safety.[13]

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[8] *See* Thomas H. Koenig & Michael L. Rustad, In Defense of Tort Law 1 (2001).

[9] *Id.* at 3.

[10] 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).

[11] *Nixdorf v. Hicken,* 612 P.2d 348, 352 (Utah 1980). *See also id.* at 351 (the plaintiff must establish the standard of care required of the defendant as a practicing physician "in the community").

[12] 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").

[13] *Trujillo v. Utah Dep't of Transp.,* 986 P.2d 752 (Utah Ct. App. 1999) (the jury must determine whether the defendant's conduct comported with "ordinary, reasonable care under the circumstances" because juries are "uniquely qualified to judge whether conduct falls above or below the standard of reasonable conduct deemed to have been set by the community") (internal quotation marks and citations omitted).

Nor does reminding the jury of its role violate the proscription on Golden Rule damages arguments. The use of golden rule arguments is improper only with respect to damages;[14] and is not improper when urged on the issue of ultimate liability.[15]

The Utah Supreme Court has recognized that the jury's role is to serve as the conscience of the community,[16] and it has recognized the propriety of allowing the jury to place itself in the shoes of a party—here, the defendant—to determine the reasonableness of the party's conduct in light of the applicable standard of care.[17] Reminding the jury of its proper role and asking jurors to think about the consequences of their decision in enforcing the community standard of care is not asking them to place themselves in the plaintiff's shoes and award damages for injury to someone else.[18] To hold otherwise would be to find prejudice in the jury's knowledge of its own duties. Defendant has not identified, and Plaintiff has not found, a single authority prohibiting,

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[14] *Green v. Louder,* 29 P.3d 638, 648 (Utah 2001) (quoting *Shultz v. Rice,* 809 F.2d 643, 651-52 (10th Cir. 1986) (other citation omitted)).

[15] *Green,* 20 P.3d at 648 (quoting *Shultz,* 809 F.2d at 652 (other citation omitted)).

[16] *E.g., State v. Young*, 853 P.2d 327, 382 ("We expect sentencing juries to express the 'conscience of the community'"), quoting *Witherspoon v. Illinois*, 391 U.S. 510, 519 n. 15 (1968); *State v. Pierren*, 583 P.2d 69, 71 (Utah 1978) (affirming as appropriate a jury instruction that the jury was "the common conscience of the community"). *See also United States v. Solivan,* 937 F.2d 1146, 1151 (6th Cir. 1991) ("Unless calculated to incite the passions and prejudices of the jurors, appeals to the jury to act as the community conscience are not per se impermissible.") (citation omitted); *United States v. Kopituk,* 690 F.2d 1289, 1342-43 (11th Cir. 1982) (accord); *United States v. Lewis,* 547 F.2d 1030, 1036 (8th Cir. 1976) (accord); *People v. Harlan,* 8 P.3d 448, 508 (Colo. 2000) ("It is not error for a prosecutor . . . to refer to the jurors as the 'conscience of the community.'") (citation omitted), *overruled on other grounds by People v. Miller,* 113 P.3d 743 (Colo. 2005); *United States v. Spock,* 416 F.2d 165, 182 (1st Cir. 1969) (accord); *Simpson v. Anderson,* 517 P.2d 416, 418 (Colo. Ct. App. 1973) ("jurors collectively represent a cross-section of the conscience of the community"), *rev'd on other grounds,* 526 P.2d 298 (Colo. 1974).

[17] *Green*, 29 P.3d at 648 (finding proper comments by a defense lawyer asking the jury to put themselves in the defendant's shoes and consider the propriety of his actions was appropriate and did not violate the proscription on golden rule arguments).

[18] *See, e.g., State v. Daniels,* 737 S.E.2d 473, 475 (S.C. 2012) ("A charge that the jury is acting for the community . . . is not similar to a Golden Rule argument in that it does not ask the jury to consider the victim's perspective").

in a civil case, a plaintiff's discussion of the jury's role in enforcing the community standard of care applicable to a civil defendant. *See* state-by-state listing of judicial commentaries regarding the role of community standards in a jury's determinations. (Ex. 1).

This is where defendant's reliance on criminal law is misplaced. Defendant relies on *State v. Campos*[19] for the proposition that any reference to safety amounts to a request that the jury decide the case on something other than the evidence. *Campos* and the other criminal authorities defendant references do not and cannot set the standard for this civil case because the jury is deciding completely different issues.

Campos involved two statements by the prosecutor in a felony attempted murder trial that the Utah Court of Appeals found improper: (1) a comment that the defendant took the law into his own hands contrary to civilized society, and (2) a comment about the criminal defendant being held accountable when he robs the victim of "his ability to run, his ability to bike, his ability to walk his daughter down the aisle."[20] The Court agreed with the defendant that these statements by the prosecutor "were inflammatory and inappropriately appealed to passion and prejudice"[21] because they "call[ed] to the attention of the jurors matters which they would not be justified in considering in determining their verdict."[22] The jury was deciding guilt for a crime, not civil damages. The Court had particular unease concerning the prosecutor's statement about robbing the victim of his ability to run, ride a bike, and walk his daughter down the aisle because

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[19] 2013 UT App 213, 309 P.3d 1160.

[20] 203 UT App 213, ¶¶ 48-53.

[21] *Id.* ¶ 49.

[22] *Id.* ¶ 50.

these statements "prompted the jury to put themselves into the shoes of the victim and to consider matters outside the evidence."[23]

This is the point on which defendant focuses,[24] and it is the point at which the comparison to this civil tort case breaks down. Civil damages were not at issue in *Campos*; it was a criminal case where the only issue for the jury was whether the defendant was guilty of attempted murder. Were *Campos* a civil case, the prosecutor's comments about the effects of the gunshot wound on the victim's life would have been not only appropriate, but necessary for the jury's determination of the appropriate damages to award the plaintiff, who, ironically, also suffered paralyzing injuries.[25] Here, it may well be prejudicial to the defendant that David Scott has lost "his ability to run, his ability to bike, his ability to walk his daughter down the aisle," but it is not—and indeed *cannot* be—unfairly prejudicial,[26] and in fact is indisputably relevant and necessary evidence. *Campos's* comments concerning the propriety of discussing the jury's societal obligations were expressly limited to the criminal context,[27] and for very good reason.

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[23] *Id.* ¶ 49.

[24] Supporting Memo, 7 (quoting *Campos's* statements that "counsel" (in fact, the case limited these statements exclusively to criminal prosecutors) 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," and "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" but omitting the rest of the sentence, which is "and the criminal justice system rather than the facts of the case").

[25] *See, e.g.*, MUJI 2d CV2004 (defining noneconomic damages and listing items for consideration in awarding noneconomic damages, such as extent of injuries, pain and suffering, the extent to which the plaintiff was prevented from pursuing his ordinary affairs, the extent to which the plaintiff was limited in the enjoyment of life, etc.).

[26] Utah R. Evid. 403.

[27] Defendant's quotations from *Campos* omitted these references. "[R]eference to the jury's societal obligation" was discussed in context of "the criminal justice system." *Campos*, 2013 UT App 213, ¶ 51. *Campos's* criticism of the prosecutor's focus on what we would deem "general damages" was because such comments were not related to "what the law required" in that criminal case. *Id.* ¶ 52.

A criminal jury *must not* consider the victim's "general damages" in determining guilt because such evidence is wholly irrelevant to the only issue before them: Whether the defendant is guilty of the crime charged.[28] *Campos* does not help defendant. Likewise, the reference to Judge Heffernan's ruling (specifically permitting plaintiff to reference patient safety) does not help defendant.

Finally, defendant references the MUJI instructions advising the jury not to decide the case based on sympathy, passion or prejudice, and then leaps to the conclusion that any discussion of community safety will cause the jury to find for plaintiffs based on "fear or passion" instead of the evidence.[29] Discussing the community standard of care and the jury's role in enforcing that standard would do no more to elicit fear or passion than simply hearing the facts of the case concerning defendant's substandard care of David Scott. If defendant is concerned about plaintiffs scaring the jury, defendant is free to comfort their hypothetical fears with the contrary argument, that the hospital employees did not breach the applicable community standard of care, and that the jury can speak for the community in saying that defendant has no fault for David Scott's injuries, which of course is precisely what defendant will do. The jury will be instructed on the elements plaintiffs must prove and not to decide based on passion or

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[28] *Id.* (noting that the prosecutor's statements concerning the victim's inability to run, bike, walk, etc. "was a direct appeal to the passions of the jury. It suggested to the jury that it should find Campos guilty out of vengeance or sympathy for the victim rather than based on what the facts and the law required").

[29] Supporting Memo, 11-12.

prejudice, and the law presumes the jury will follow those instructions.[30] No one is asking the jury to ignore the Court's instructions.

Plaintiff will present evidence that defendant breached the community standard of care (which standard was intended for the safety of the community), that this breach caused David Scott to become paralyzed, and that Mr. Scott has suffered and should be awarded properly compensable damages. The law authorizes plaintiffs to address the jury's role and ask it to enforce the community standard. No authorities preclude such argument, which is proper and should be allowed.

III. DISCUSSION OF SAFETY DOES NOT VIOLATE ANY CONSTITUTIONAL RIGHTS.

Defendant lastly contends that its due process right to a fair and impartial jury is violated by plaintiffs' discussion of safety.[31] In support of this contention, defendant merely reiterates its other arguments, and then concludes, without relevant analysis or legal authorities, that this must be a constitutional violation.

Plaintiffs reiterate their responses to defendant's other arguments. No law anywhere precludes a plaintiff from addressing the purpose and stated goal of a standard of care, from discussing the jury's role as the conscience and voice of the community in enforcing that

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[30] *See also State v. Wright*, 2013 UT App 142 ¶ 42, 304 P.3d 887 ("in the absence of any circumstances suggesting otherwise, courts presume that the jury follows" instructions that they are not to be influenced by sentiment, sympathy, passion, prejudice, or public feeling) (citations omitted).

[31] Supporting Memo, 13-14.

standard, or from asking the jury to compensate the plaintiffs for their harms resulting from the defendant's breach of that community standard.

The only potential constitutional violation would be denying plaintiffs' due process rights by imposing improper limits on their ability to present their case in the way they see fit within the bounds of the law and the rules.

> Counsel is not required to make such a lukewarm and sterile argument that the jury is unable to determine which side of the case he is on, and likewise counsel must be indulged the privilege of flights of oratory. The final argument is designed to be persuasive, and so long as it is based upon the facts and issues raised by the evidence and not so inflammatory as to influence the jury to render an improper verdict, the argument is not intrinsically improper.[32]

Defendant has offered no more than conjectural, exaggerated and remote dangers of jury confusion, which have never been realized in any decision defendant has identified or plaintiffs have found. The fact that a book called *The Reptile*, like countless other books, offers opinions about arguments and cross-examination the authors think plaintiffs' attorneys may consider does not constitute legal authority authorizing this Court to limit or micromanage the Scotts' evidence and arguments, be they reptile, mammal or marsupial.

As set forth above, many personal injury defendants have filed these same boilerplate motions, and comprehensively lost the vast majority of them, both in Utah and elsewhere. *See e.g.*, *Poulson, et al. v. Malan, DDS*, Second Judicial District Court, Weber County, Utah, Case No. 110908109 (2014), (Judge Ernie W. Jones presiding); *Riding et al. v. Bankhead, DDS*,

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[32] *Rainbow Express, Inc. v. Unkenholz*, 780 S.W.2d 427, 434 (Tex. Ct. App. 1989).

Fourth Judicial District Court, Provo Department, Utah, Case No. 080402505 (2014) (Judge Laycock presiding); *Jackson v. Tri City Medical Clinic P.C.*, Case No. 070402402, (Judge Laycock presiding) (plaintiffs' counsel in that case are the same counsel in the instant case); *Friedli v. Grover, M.D.*, First Judicial District Court, Civil Action No. 060102383 (2013), (Judge Kevin K. Allen presiding) [cited in defendant's memorandum] (plaintiffs' counsel in that case are the same counsel in the instant case).

Most recently, in *Turner v. University of Utah Hospitals and Clinics, et al.*—filed in the Third Judicial District Court, Civil Action No. 040917707 (2014) (Judge Keith Kelly presiding) (involving the same defense counsel as the instant case) Judge Kelly denied defendant University's virtually identical motion.

Courts around the country have held similarly. *See e.g., Simpson v. Anderson*, 517 P.2d 416, 418 (Colo. Ct. App. 1973) [Jurors collectively 'represent a cross-section of the conscience of the community.']; *State v. Daniels*, 737 S.E.2d 473, 475 (S.C. 2012) ['A Charge that the jury is acting for the community . . . is not similar to a Golden Rule argument in that it does not ask the Jury to consider the victim's perspective.']; *MCI Sales & Service, Inc. v. Hinton*, 329 S.W.3d 475 (Tx. 2010). As one court held:

> Defendant moves to exclude trial tactics described in *Reptile: The 2009 Manual of the Plaintiff's Revolution* at trial. Courtroom demeanor and/or presentation of evidence are governed by the Arkansas' Rules of Civil Procedure, Rules of Evidence and Model Rules of Professional conduct. The Arkansas Bar Association has admitted all of the attorneys involved in this matter, and this Court has no reason to believe that the aforementioned rules will be violated. It is well known that many attorneys study trial treatises and manuals in an attempt to hone their skills or understand their

> adversaries. While unfamiliar with the book at issue, this Court feels that to exclude a group of strategies contained in any one book would be to impose an unnecessary restraint on the practice of law, and declines to do so. Should any issues of conduct arise during the trial, they will be addressed at that time. Defendant's Motion in Limine to Exclude the "Reptile" should be and hereby is denied.

Upton v. N.W. Ark. Hosp., LLC

CONCLUSION

This Court should deny defendant's invitation to preclude plainly relevant evidence concerning medical or hospital safety rules and entirely proper argument referring to patient safety simply because it will be damaging to their defense against plaintiffs' claims, as this is an improper basis for excluding such evidence. *See People v. Dist. Ct.*, 785 P.2d 141, 147 (Colo. 1990) ["All effective evidence is prejudicial in the sense of being damaging or detrimental to the party against whom it is offered."]. Further, statements by plaintiffs' counsel to the jury to act as the conscience of the community in this case by entering a verdict that promotes patient safety has virtually universally been found to be proper.

Plaintiffs respectfully request this Court to deny defendant's motion.

DATED this 28th day of January, 2015.

/s/ Charles H. Thronson
CHARLES H. THRONSON
PARSONS BEHLE & LATIMER

MICHAEL A. WOREL
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Attorneys for Plaintiffs

CERTIFICATE OF FILING

I hereby certify that on this 28th day of January, 2015, I electronically filed the foregoing, **PLAINTIFFS' RESPONSIVE MEMORANDUM IN OPPOSITION OF DEFENDANT'S MOTION IN LIMINE RE: "REPTILE THEORY,"** with the Clerk of the Court using the CM/ECF systems that will send an electronic notification to counsel of record for all of the parties, including:

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EXHIBIT 1

ALABAMA:

"Serving as a juror is a privilege that we all share as citizens of the United States. Only by having people like you participate in this process can we ensure that all persons in federal court will be afforded their constitutional right to have a jury pool drawn from a fair cross-section of the community."

http://www.als.uscourts.gov/jury/

ALASKA:

"As a juror, you are providing an important public service. You are also helping to uphold an essential part of the American system of justice – the right to a trial by a jury made up of persons representing a fair cross section of the community."

http://courts.alaska.gov/jury/jury-trial.htm

"Jurors play an extremely important role in the American justice system. Impartial juries representing a fair cross section of the community are essential to guaranteeing to all of us our constitutional right to trial by jury"

http://courts.alaska.gov/jury/

ARIZONA:

VIDEO 3:28 – 3:46 "Serving as a juror directly impacts the quality of life in our communities. We make decisions on behalf of every Arizonan, not only helping to uphold our laws but also to ensure that everyone is treated equally under the law and receives the benefit of a fair trial."

http://www.azcourts.gov/juryduty/JuryServiceInformation.aspx

CALIFORNIA

VIDEO 1:49-2:02 "We trust in the community to make the right decision. This is our democratic ideal, to truly impart justice that is of the people, by the people and for the people."

http://www.courts.ca.gov/juryservice.htm

COLORADO:

VIDEO 17:28-18:14: "In other words, the right to a trial by jury guarantees that decisions are made by reasonable, impartial and fair members of the community. The most important decisions made in a courtroom are made by you, the jury. Your role in the courtroom is more important than the roles of the lawyers, and even the role of the Judge.

Because when members of the community come together as a jury, and see the evidence in the same way, there's great confidence in their decision. Being on a jury is a major event. It is democracy in action. Thank you."

http://www.courts.state.co.us/Jury/

DISTRICT OF COLUMBIA

VIDEO 5:36-6:01 "…you get the unique opportunity to serve the community, to serve the greater good. You are all here because you are the community, you represent the community. This is your place of community justice. Jury service, like a democracy, is a collective effort"

VIDEO 12:05-12:27 "Jurors must involve themselves in some of the most personal, sensational and significant issues in the community. These are real cases, with real people and real consequences; and jurors are there front and center to keep things fair, to hold people accountable, to hold the system accountable and to represent the community"

http://www.dccourts.gov/internet/jurors/petitjury/main.jsf

FLORIDA

VIDEO 0:12-0:24 "Everyday people like you, not the government, decide disputes affecting your community. When you serve as a juror, you're not only protecting the rights of you and your family, you're making our democracy stronger"

VIDEO 1:00-1:04 "But jurors aren't strangers, they're people from your community."

VIDEO 1:46-1:55 "It (jury service) is important because jury service allows a group of everyday people to make decisions affecting the life, liberty and property of one of their own."\

VIDEO 7:10-7:19 "We trust our fellow citizens to make many of the important decisions regarding the laws that determine how we live together in our communities."

http://www.flcourts.org/resources-and-services/education-outreach/court-system-videos/psa-jury-service.stml

Thus, it is the jury's duty, having been chosen from a cross-section of the community and acting as the community's conscience, to determine what that community ideal of reasonable behavior is. In negligence cases, the jury is asked to determine whether the Defendant's conduct was reasonable under the circumstances. The Utah Court of Appeals in *Summermill v. Shipley* made clear that the standard for a reasonable prudent person describes a prototype individual who "personifies a community ideal of reasonable behavior." 890 P.2d 1042 (Utah Ct. App. 1995).

GEORGIA

"Serving in a jury helps keep our society safe and just"

http://georgia.gov/blog/2013-08-28/jury-duty-myths-and-information

VIDEO 1:45-3:01 "We don't take just retired people or people who have time on their hands. We want the whole community represented. We want people who are people engaged in their ordinary work but who take time off to hear a case as well as others. We want a full sampling of the community because that's who we are entrusting our lives and our honor and our most important issues. What we ask jurors to do are things that they're really experts on. They're more expert than we judges are in judging ordinary human behavior just because they are living in the community and they meet all sorts of people and they find themselves in a great variety of situations and so, our legal system is based on the idea that they can hear a witness testify and make a good judgment about whether thatwitness is telling the truth or whether the witness really remembers. By including a broad spectrum of the community in the jury pool, we're assured of a broader perspective in the jury that actually sits on the case."

http://www.youtube.com/watch?v=wq14fiVUFN8&feature=player_embedded

ILLINOIS:

Cook County Court Juror Video

VIDEO 2:11-2:16 "Your decision-making role in the lives of your fellow citizens is indeed a huge responsibility"

http://www.cookcountycourt.org/FORJURORS/JurorVideo.aspx

IOWA

"This is one of those times when the community comes to you and interrupts your normal routine for a brief period for the good of everyone. If only people with lots of leisure time were on juries, those juries would not be truly representative of the community"

http://www.iowabar.org/?page=FAQSPublic

MICHIGAN

Berrien County, Michigan Website

"Jury service is a vital function of democracy and it is crucial that the jury pool be representative of the entire community."

http://www.berriencounty.org/Jury

MONTANA

"Pursuant to 28 U.S.C. § 1861, all litigants "have the right to grand and petit jurors selected at random from a faircross section of the community.". . . The pure randomized process ensures that the

mathematical odds of any single name being picked are substantially equal and that jurors represent a fair cross section of the community, without regard to race, gender, national origin, age or political affiliation."

http://www.mtd.uscourts.gov/jurorinfo.html

NEBRASKA

Lancaster, Nebraska City Website –and- 4th Judicial District of Nebraska in Douglas County (same text on both sites)

"As a juror, you participate in an important public process and fulfill a civic obligation. All persons accused of a crime or involved in a civil dispute have a constitutional right to have a jury decide their cases. When you serve on a jury, you make important decisions affecting other people's lives as well as your own community."
http://lancaster.ne.gov/election/jury/faq.htm
http://clerk.dc4dc.com/frequently-asked-questions/jury#

NEVADA:

"In a very real sense, therefore, the people, as well as the accused, must rely upon the jury for the protection of life, liberty or property."

http://www.washoecourts.com/jury/Jury%20Handbook.pdf

NEW HAMPSHIRE

VIDEO 1:17-1:42 "It is remarkable when you think about it that under our system of government, some of the most serious decisions concerning individuals are made by a panel of their fellow citizens, a jury. People like you, representing a cross-section of the community, determine the facts in a case apply the law and render a verdict. That is a solemn duty, and one that I know you will carry out faithfully."

VIDEO 3:24-3:50 "The names are drawn at random so that our jurors will represent a very diverse group of citizens, and a true cross-section of the community, and that's the strength of the jury system. Citizens from all walks of life whose solemn duty it is to be fair and impartial, make decisions based on facts without prejudice or bias toward any person or issue involved in the trial."

http://www.courts.nh.gov/SpecialSessions/mediaplayer2/Jury-Orientation-Video.html

NEW JERSEY:

"The jury represents the community"

http://www.judiciary.state.nj.us/process.htm

Monmouth County, New Jersey Court Website

"Welcome to jury duty. Thank you for serving as a juror, representing the community that is Monmouth County"
http://www.judiciary.state.nj.us/juryreporting/monmouth/

New Mexico

Chief Justice Thank You video-Third District Court, Dona Ana County

"American jurors have been a key part of our justice system, and in a larger sense a key part of our democracy throughout our nation's history, over and over around the world we see news accounts of people struggling to get a voice in their own governments, to get a voice in what happens in their own communities, to get a voice in thedestiny of their own countries. In America we take for granted what we have, because here we have citizen control of two important positions of ultimate power in any government by the people, the ballot box and in this country the jury box. In this country, we pick our own leaders and we peacefully resolve our own conflicts. . . It's important that all citizens be represented on juries, be able to participate in our juries, to make sure that our juries truly represent our communities and our society. . . I just want end by emphasizing how much we appreciate what you do for our justice system and for your own communities, you help resolve your communities' conflicts peacefully and by applying the rule of law."

www.thirddistrictcourt.com/chief_justice_thankyou_video.php

New York

VIDEO 16:56-17:15 "But this is the important part, remember that when we serve jury duty, as many thousands of us do all the time all over the country, we are not only guaranteeing the rights of others to a fair trial but guaranteeing the same rights for ourselves and our families"

VIDEO 18:28-18:41 "Today, our jury pools represent the entire community, in all its diversity. Today, every eligible person in our state has the opportunity to serve"
http://www.nyjuror.gov/JO_VideoScripts.shtml (Petit Jury Orientation)

"In jury rooms throughout the country, the community directly participates in the community project called "justice." The American jury system empowers citizens to announce the standard of care they will demand in their communities; the medical care they expect from their doctors; the level of responsibility they expect from each other; and the safety they expect from manufacturers who sell products in the community."

https://www.nycourts.gov/court-innovation/Fall-2008/chavez.pdf

OREGON

VIDEO 16:45-16:50 "We ask people in the community to gather and render a voice of the community"

http://courts.oregon.gov/OJD/jurorinfo/pages/index.aspx

PENNSYLVANIA

"Citizens randomly selected for jury duty become the fact-finders in cases presented to them. By giving equal weight to diverse voices, a jury represents the common sense of ordinary people. Each year, thousands of Pennsylvanians serve as jurors in communities throughout the state."

http://www.pacourts.us/learn/jury-duty

RHODE ISLAND

VIDEO 1:52-1:57 "You will hold justice in your collective hands as the conscience of our

community"

http://www.courts.ri.gov/JuryService/default.aspx

TEXAS

"The collective conscience of the jury adds a humanistic touch to the strict demands of the law so as to allow a more equitable judgment. The jury system improves the quality of justice and is the sole means of keeping its administration attuned to community standards.

http://www.courts.state.tx.us/tjc/jury-home.htm

As noted by the Honorable Tom C. Clark, Texan and former justice of the United States Supreme Court, "The jury system improves the quality of justice and is the sole means of keeping its administration attuned to community standards."

http://www.courts.state.tx.us/tjc/juryinfo/civic_duty.asp

WISCONSIN:

"Juries serve several important purposes:
1. They decide the facts in a case as presented by evidence and testimony at criminal and civil trials
2. They provide a means by which community values and sentiments are reflected in the Court process;and
3. They foster the public's acceptance of legal decisions."

http://www.barroncountywi.gov/index.asp?SEC=%7B6C32E64E-EDF4-487E9DCDE8EBD725B08D%7D&Type=B_BASIC

The Second Restatement of Torts clearly explains that role of the trier of fact in a negligence case is to look at the community at large and express what the community standard is. See Restatement (Second) Torts § 283 cmt. C (1965).