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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.	**DEFENDANT'S REPLY 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 ("the University") respectfully submits the following Reply Memorandum in Support of its Motion in Limine re: Reptile Theory.

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INTRODUCTION

One fact is abundantly clear from Plaintiffs' opposition memorandum—Plaintiffs' counsel intend to utilize the Reptile Theory at trial. Plaintiffs argue that it is not improper to remind the jury of its role as the conscience of the community or harbingers of community safety. In fact, Plaintiffs concede that they will ask the jury to reach a verdict that will protect the community, promote patient safety and balance "social interests." Perhaps even more alarming, Plaintiffs state that it is the jury's role to "set the standard for the community's own safety." These statements are patently false and run contrary to all medical malpractice case law in the state of Utah. It is not the jury's role or prerogative to set the standard of care or to render judgment based on what it subjectively believes will best promote patient safety.

Indeed, Plaintiffs' use of the term "community standard" in their briefing is legally incorrect and is a prime example of why the University's motion should be granted to avoid confusion and reversible error. The jury's role is to apply the objective standard of care that already exists within the medical community as presented to the jury through expert testimony. It is a straightforward process that does not entail the jury becoming harbingers of community safety or setting "community" safety standards. Plaintiffs take the position that they are free to urge the jury to decide the case based on a subjective standard set by the jury as opposed to tried and tested medical standards.

Finally, Plaintiffs misstate the scope of the University's memorandum. Plaintiffs state that the University's Motion seeks to "(1) preclude in advance plaintiffs from utilizing any variation of the word 'safety' or the phrase 'safety rules'" and (2) preclude the plaintiffs from

using any form of the "Golden Rule" argument." The University's argument, however, is far more nuanced. The University has asked the Court to prohibit any argument, questioning of witnesses or presentation of evidence suggesting that (1) a community standard of care or a general safety standard applies as opposed to the standard of care established through medical expert testimony; (2) protecting personal safety, community safety or patient safety should guide the jury's verdict; (3) protecting against needless endangerment of patient safety should guide the jury's verdict; and, (4) the jury should send a message about what type of health care is acceptable to them or the general community.

The University is not seeking to preclude Plaintiffs from using the word "safety" or exploring the issue of safety with witnesses. The University acknowledges that safety is a factor that is considered by the medical community in establishing standards of care. It is not, however, the only factor. Plaintiffs should be permitted to explore the role safety plays in establishing the standard of care in this case, but Plaintiffs should not be permitted to directly or indirectly suggest to the jury that it ignore the standards set forth by expert testimony and instead apply a general "safety standard" or "community standard" based on what it subjectively believes to be an acceptable level of care in the community. Further, Plaintiffs should be precluded from making "golden rule" type arguments to the jury that appeal to the jury's passions, prejudice and fear and distract the jury from fulfilling its proper role in this case. Such arguments have been repeatedly considered and rejected by Utah's appellate courts in recent decisions.

ARGUMENT

I. PLAINTIFFS FUNDAMENTALLY MISUNDERSTAND WHAT STANDARD OF CARE IS AND HOW STANDARD OF CARE IS TO BE APPLIED

To a large degree, Plaintiffs' entire argument is premised on an incorrect understanding of the term standard of care. Plaintiffs argue that the standard of care is a "community standard" and that the community (i.e. the jury) "sets the standard for the community's own safety."[1] This is simply incorrect. It is neither the jury nor the local community that sets the standard of care for healthcare professionals. To the contrary, "[t]he standard of care and the deviation from the standard of care . . . are not established by a reasonable person standard as in other areas of negligence law." *Moon v. St. Thomas Hosp.*, 983 S.W.2d 225, 229 (Tenn. 1998). Due to the technical and complex nature of a medical doctor's services, expert medical testimony must be presented at trial in order to establish the standard of care as established by the medical community. *Chadwick v Nielsen*, 763 P.2d 817, 821 (Utah Ct. App. 1988); *Anton v. Thomas*, 806 P.2d 744 (Utah Ct. App. 1991).

Standard of care is a term of art that is legally defined. It is not a standard established by what the jury or other members of the community at large believe is safe or an acceptable level of care. Rather, the standard of care requires healthcare providers to "use that degree of learning, care, and skill used in the same situation by reasonably prudent providers in good

[1] In support of this argument that the standard of care is a safety standard set by the community, Plaintiff cites *Trujillo v. Dep't of Transp.*, 986 P.2d 752 (Utah Ct. App. 1999). This is not a medical malpractice case. *Trujillo* is a general negligence case in which a reasonable person standard was applied. Or in other words, the standard in a general negligence case is reasonable conduct within the community. This case is entirely unhelpful and does not address the standard of care in medical malpractice cases.

standing practicing in the same specialty." MUJI CV301C; *see also Farrow v Health Services Corp*. 604 P.2d 474, 476 (Utah 1979). Significantly, the standard of care 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 **as defined by the medical community**.

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 or a different level of care that is more acceptable to the community at large. Any suggestion otherwise misstates well established Utah medical malpractice 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.)

The University acknowledges that safety is a factor considered by the medical community in establishing the standard of care, which can be explored at trial within reason. Plaintiffs go much further than simply wanting to explore how safety factors into the standard of care. Plaintiffs argue that the term "standard of care" and "safety standard" are synonymous. This is incorrect. Safety is one of a number of factors that must be considered by the medical community in establishing standards of care. Other factors include efficiency, effectiveness, best utilization of available resources and cost. If safety was the only concern, hospitals would be required to assign no more than a single patient to a nurse. Anyone who has been a hospitalized or visited a loved one who has been hospitalized knows this is not the case. If safety was the only concern, full body MRI and CT scans would be required for every patient injured in an automobile accident as opposed to targeted radiology studies based on the clinical assessment and professional judgment of physicians. Again, real world experience teaches us this is not the case. Plaintiffs have not cited a single case, rule, statute or jury instruction standing for the proposition that "standard of care" and "safety standard" are one in the same. Every reported Utah medical malpractice case employs the term "standard of care." In sum, Plaintiffs' "community standard" or "safety standard" argument is legally incorrect and should be precluded at trial because it confuses the legal definition of standard of care and runs the risk of confusing the jury into applying an incorrect legal standard.

II. LEGAL AUTHORITY SUPPORTS THE UNIVERSITY'S MOTION

Plaintiffs do not explain why they be allowed to substitute safety rules or community safety for the standard of care. Instead, Plaintiffs resort to conclusory one-liners such as "safety

is indisputably the purpose and goal of the standard of care"[2] and "[t]he 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." Plaintiffs fail to actually refute the University's argument and supporting legal authority.

This exact issue was addressed in a prior case with Plaintiffs' counsel just a few months ago. Specifically, Judge Clark Waddoups of the Utah Federal District Court granted a similar defense motion regarding Reptile Theory in the case of *Waddoups v. Noorda*, 1:11-cv-00133. Much of Plaintiffs' Opposition memorandum in this matter is very similar to the opposition memorandum filed in *Waddoups.* Judge Waddoups obviously was not persuaded by the arguments made by counsel and precluded counsel from arguing the issues of "personal safety" and "community safety." While Judge Waddoups ruling is not controlling in this matter, it is certainly persuasive.[3]

Utah State trial court judges have also addressed the issue of "community safety" and "safety rule" arguments and found them to be 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:

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[2] Plaintiffs cite no authority to support such a sweeping statement. Safety may be a factor, but it is not the be all and end all of 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").

[3] The University has attached the briefing and the Court's Order from that matter as Exhibit 4 to its Initial Memorandum.

> 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 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.[4]

(Emphasis added.) Judge Heffernan's concerns echo those of the University in this matter.

Most recently, Judge Keith Kelly addressed this same issue in a ruling from the bench in November of 2014 in *Turner v. University of Utah Hospital and Clinics, et al.*, Civil Action No. 040917707. With the exception of Mr. Thronson, counsel for the parties in the present case were also involved in the *Turner* case. After considering the arguments presented by both parties, Judge Kelly ruled as follows:

> I will enter an order that the parties are not to argue in a way to ask the jury to decide the case based on passion or prejudice. There are to be no arguments that this case is about sending a message. There is no argument to be made about a community standard of care. There are to be no arguments other than applying the standard of care that will come in through the expert witnesses. And I will enforce the rules the Utah appellate authorities have given regarding arguments. And we do not have a punitive damage case today in this trial. There's not to be arguments about sending a message or punishing. So I'm going to direct counsel for defendants to prepare that order.
>
> . . .
>
> I think – I intentionally did not include in my order the word safety. Because they may – it appears to me that this case is about a nursing standard of care designed to promote patient safety. That's what it appears – everybody agrees that it's a procedure – it's an issue that everybody agrees is applied for moving a spine

[4] (*See* Transcript attached as Exhibit 5 to the University's Initial Memorandum.)

> injured patient to prevent further injury. That sounds like safety to me. So I would consider it to be inappropriate for me to prevent the party from talking about safety. **But that's different than suggesting that jurors need to apply a community standard of care, or to apply some general safety standard.** That's why my order includes that no party is to argue that the jury should apply other than the standard of care – the nursing standard of care that comes in through the evidence.

(Emphasis added; 11/14/14 Pretrial Conference, audio recording of the hearing will be provided to the Court upon request.)[5] In other words, Judge Kelly did not prohibit the plaintiff from discussing the issue of safety as it applies to the standard of care, but did place a number of other proper restrictions on plaintiff's counsel. This is precisely the type of ruling that the University seeks from this Court.[6]

Plaintiffs tangentially cite a number of cases and articles they claim support their "safety rule" and "community safety" arguments but fail to provide any substantive analysis of their many footnotes. A careful examination of the cited material reveals that the cases cited simply do not support Plaintiffs' position in this matter. For example, Plaintiffs cite *State v Wright* for the premise that "Plaintiffs are free to explore the Hospital's safety standards at trial with whatever terms they would like to use." (Memorandum in Opposition, p. 5); *State v Wright*, 2013 UT App 142, 304 P.3d 887, 901. This is patently incorrect and misconstrues the overall point of the case. While Plaintiffs accurately quote a single sentence from *Wright*, the opinion

[5] Plaintiff's counsel objected to a proposed order drafted by defense counsel, and Judge Kelly ultimately declined to sign the order and let his oral ruling from the bench stand as his ruling on the matter.

[6] Plaintiffs also argue that similar reptile Motions have been rejected by other Utah trial courts. Plaintiffs, however, fail to attach any actual Order or language from those Courts.

makes it exceedingly clear that Plaintiffs cannot use "whatever terms they would like to use" when arguing to the jury. To the contrary, the court in *Wright* concluded that the prosecutor's remarks during closing arguments in that case were inappropriate for one of the very same reasons argued by the University in support of this Motion. In *Wright*, the prosecutor argued to the jury in closing, that the child-victim of sexual abuse "just wants him to stop hurting her. **You have the power to make that stop.**" *Id.* at ¶38 (emphasis added). While the Court allowed some of the build-up to the final statement, because Defendants had opened the door, with regard to the final statement about the jury having the power to "make that stop", the court ruled that the statement was improper.

> It does not rebut any statements made by Wright; instead, the statement calls on the jury to assume the responsibility of ensuring [the victim's] safety. Such a statement appeals to the jurors' 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 apply the law to the facts**.

Id. at ¶39 (emphasis added). *State v Wright* does not justify Plaintiffs' stated intent "to explore the Hospital's safety standards at trial with whatever terms they would like to use." (Memorandum in Opposition at p. 5). To the contrary, reptile strategies pose the exact same problem that was addressed in *Wright*. Such tactics divert the jury from their legal duty to apply the law to the facts.

Additionally, Plaintiffs' argument that "the Utah Supreme Court has recognized that the jury's role is to serve as the conscience of the community" is patently incorrect. The only Utah case cited by Plaintiffs to support their argument does not support Plaintiffs' position, and is readily distinguishable from this case. In *State v Young*, 853 P.2d 327 (Utah 1993), the court

explained, among other things, the obligations of sentencing juries in capital crime cases. A capital sentencing jury primarily makes a moral determination, not a factual one. *Id.* at 374. Although the determination must be fact based, the evaluation of those facts may and should involve emotional responses of anger, retribution, sympathy, and mercy. *Id.* at 382. In contrast, these responses should not influence the determination of guilt. Jury instructions must not confuse these two roles. The Utah Supreme Court then explained that they expect sentencing juries to express the "conscience of the community." *Id.*

This language has no application to this case. Nonetheless Plaintiffs attempt to expand this conscience of the community role to any and all juries, including civil juries. This approach wholly ignores the context and holding of the case. The court in *Young* expressly pointed out that jury instructions should not confuse the roles of a sentencing jury and a jury determining guilt. That is precisely what Plaintiffs have done in their opposition memorandum: confuse the role of a sentencing jury with the role of a civil jury. Unlike a sentencing jury, civil juries must not "involve emotional responses of anger, retribution, sympathy, and mercy." Rather, civil juries are instructed that "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 or angry at anyone." MUJI 2d CV107. Plaintiffs' argument and reliance on the *Young* case belies their true intent, to arouse emotion in the jury, in the hopes of diverting the jury from deciding the case on the facts and the law.

III. THE UNIVERSITY DOES NOT SEEK A PRIOR RESTRAINT ON THE USE OF SPECIFIC WORDS BUT DOES SEEK AN ORDER PRECLUDING PLAINTIFFS FROM CONFUSING THE JURY AS TO ITS ROLE AND THE STANDARDS TO BE APPLIED IN DECIDING THE CASE

Plaintiffs accuse the University of attempting to "muzzle" them. As addressed above, the University does not ask the Court to dictate specific words that Plaintiff may or may not use at trial or to wholly prohibit Plaintiffs from exploring the issue of safety. Rather, the University requests an order from the Court, similar to Judge Keith Kelly's order in the *Turner* case, preventing Plaintiffs from suggesting to the jury, through questioning of witnesses or argument, that judgment should be entered based on anything other than the standard of care as presented through expert testimony. Appeals to the jury's passions, prejudices or fears or arguments that a community standard of care or general safety standard should drive the jury's decision in this case are improper and should not be allowed. The University seeks a fair trial, one which does not invoke improper bias, passion, or prejudice on the part of the jurors. The University asks that irrelevant and prejudicial evidence and arguments be precluded, and that a fair trial be provided with an impartial jury. These are basic rights that every party deserves.

The University's Motion does not constitute a request for a prior restraint on the use of certain words or phrases that unfairly shackle Plaintiffs. Courts routinely limit inappropriate or irrelevant arguments. For example, in *Boyle v. Christensen*, 251 P.3d 801 (Utah 2011), the Utah Supreme Court ordered a new trial after defense counsel made irrelevant and inappropriate arguments related to the McDonald's coffee case. The Court reasoned that the "sole" purpose of making such a statement was to appeal to the jury's passions. *Id.* at 818. The Supreme Court

reasoned that the reference was irrelevant and would likely cause the jury to focus on issues other than the facts of the case at hand. *Id.* The same analysis is applicable with respect to Plaintiffs' "community safety" arguments in this case.[7]

Plaintiffs put forth a sweeping argument that "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." This statement is false. Plaintiffs have not cited a single medical malpractice case to support this argument. As set forth above, the fact is that Courts routinely prohibit such behavior. In fact, Utah trial courts and the Utah Federal District Court have prohibited such "conscience of the community" arguments in medical malpractice cases. Indeed, allowing such arguments has been found to be reversible error in other jurisdictions. *Maercks v. Birchansky*, 549 So.2d 199 (Fla. Ct. App. 1989)(holding that closing argument in medical malpractice case was impermissible and warranted a new trial because plaintiff's counsel, among other things, three times asked the jury to act as the "conscience of the community" and "send a message with its verdict."); *Suarez v. Ashford Presbyterian Community Hosp., Inc.*, 4 F.3d 47, 51 (1st Cir. 1993)(holding, in a medical malpractice case, that such "conscience of the community" arguments were "outrageous" and noting that the case should be decided "dispassionately upon the law and the evidence.").

[7] As mentioned above, a recent non-binding, but persuasive example comes from another medical malpractice case in a state court in St. George. Judge Pamela Heffernan ruled in the *Hurley v. Parry* case that arguments involving personal safety, community safety, and public safety would not be allowed at trial because they are misleading. She also stated that safety rule and golden rule arguments were improper and rejected the argument that the *Green v. Louder* case, 29 P.3d. 638 (Utah 2001), should apply in a medical malpractice case. [Note: Discussion of the *Green v. Louder* case in Section IV.]

IV. AN ORDER SETTING FORTH CLEAR STANDARDS OF EXPECTED CONDUCT IS APPROPRIATE AND NEEDED

Despite acknowledging no limits to what they may argue at trial and taking positions in their briefing that are contrary to black letter law, Plaintiffs' counsel nevertheless conclude their opposition to the University's Motion by arguing that they are experienced trial counsel and should simply be trusted that they understand the "rules." The impetus for this Motion, however, is the fact that Plaintiffs' counsel has effectively and prejudicially utilized improper reptile tactics in other cases. As noted in the University's initial memorandum, at least one other court has precluded Plaintiffs' counsel in this case from using such tactics. In yet another case, where no such order was in place, Plaintiffs' counsel took full advantage and made the issue of community safety the primary theme of his case. The University cited excerpts from that case in its initial memorandum. This is the medical malpractice case of *Friedli v. Grover, M.D.*, in Civil No. 060102383. The tactics employed by Plaintiffs' counsel in the *Friedli* trial bear repeating and illustrate exactly why an order is needed in this case despite Plaintiffs' argument that they should be trusted to abide by the "rules" in the present case.

> MR. 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 rule 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)

MR. WOREL: 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)[8]

[8] Attached as Exhibit 2 to the University's Reply Memorandum in Support of Motion in Limine re: Reptile Theory.

Counsel's tactics in that case are exactly what the University is trying to avoid in this case. Noticeably absent from any of any of the arguments made by Plaintiffs' counsel in the *Friedli* case was any mention of the actual standard of care. Rather, the thrust of Plaintiffs' presentation to the jury was an emotional appeal to the jury's passions and prejudices and a request that it apply an incorrect legal standard to the care at issue in that case.

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 are contrary to Utah law and misstate the jury'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 an order precluding Plaintiffs' counsel from employing the same tactics that were effectively and prejudicially employed in the *Friedli* trial.

V. GOLDEN RULE ARGUMENTS ARE IMPROPER

Plaintiffs erroneously rely on *Green v. Louder*, 29 P.3d 638 (Utah 2001), in order to argue that golden rule arguments are allowed. In *Green*, defense counsel asked the jurors to put themselves in the defendant's position and to determine whether defendant's actions were reasonable. *Id.* at 647-48. The Court held that such statements were permissible because they went to the issue of liability, not damages. In other words, defense counsel was merely asking the jury to assess whether they would have acted in the same manner as the defendant. In pertinent part, defense counsel made the following statements to the jury:

> *"Look how close those cars are to having a head on collision and then ask yourself if you would do the same thing."*

> *"Before you impose standards on Lloyd Louder higher than you pose [sic] on yourself, you must realize that he is only held to be the reasonable person, not the perfect person."*
>
> *"How many of you, the standard of the reasonable person, would stay that close to a head on collision with a car coming in your own lane without trying to get somewhere else."*
>
> *"[A] verdict that Louder was even partially at fault for this accident is to say in your heart, well I have never been seconds from an imminent head on collision...."*

Id. at 648. Such questioning was merely part of a reasonable person analysis.

Such Golden Rule questioning, however, would be completely inappropriate in this case. *Green* dealt with a simple automobile collision that involved a reasonable person standard, whereas this is a complex medical malpractice case. This distinction was directly addressed by the Court in *Grover v. Collier*, 2013 WL 5951254 (Utah Dist. Ct. July 10, 2013).[9] Therein, Judge Willmore of the Utah First District Court concisely explains why the reasoning in *Green v. Louder* does not apply to medical malpractice cases:

> The Court finds that such "golden rule" arguments on the issue of liability would be improper in this matter. Unlike the case *Green v. Louder*, 2001 UT 62,.¶ 36, 29 P.3d 638, the "reasonable person" standard is based on the care that other qualified doctors would ordinarily use and should not be based on the juror's own experiences. In *Green*, the court found that it was proper to use golden rule arguments on the issue of liability when determining fault in a car accident. In this matter, the standard of care will be presented through expert testimony and the jury should base their decision on this evidence. *See Farrow v. Health Services Corp.*, 604 P.2d 474, 477 (Utah 1979). Although jury instructions have not been prepared, the Court also finds the Model Utah Jury Instructions persuasive in precluding such "golden rule" statements from being presented to the jury. *See* MUJI 2d CV3.26 ("You may not use a standard based on your own experience or any other standard of your own.)".

[9] A copy of this case is attached as Exhibit 1.

Id. at 2.[10] Judge Willmore is correct. As explained above, the standard of care in medical malpractices cases is based on expert testimony. Asking the jurors to apply a reasonable person standard, as in the *Green* case, would be error. Again, Plaintiffs' argument regarding this issue is based on the incorrect understanding of the nature of standard of care in this matter.

CONCLUSION

For the foregoing reasons, the University 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 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 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.

[10] Moreover, *Green v. Louder* case is thirteen years old. Since that time, two criminal cases have confirmed that Golden Rule arguments were improper. In *State v. Todd,* 173 P.3d 170, 174 (Utah App. 2007), the court held "A prosecutor is prohibited from asking jurors to put themselves in the victim's place." (Emphasis added). Likewise, in *State v. Campos*, 309 P.3d 1160, 1174 (Utah App. 2013), the Court held that "applying these standards, our courts have held that 'a prosecutor 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")(emphasis added). The prosecutor was making golden rule arguments and the court held it was improper to ask the empaneled jurors to put themselves in the victim's place.

DATED this 4th day of February, 2015.

SNOW, CHRISTENSEN & MARTINEAU

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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 4th day of February, 2015 by:

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