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IN THE THIRD JUDICIAL DISTRICT COURT

SALT LAKE COUNTY STATE OF UTAH

Joshua and **Jamie Terry**, individually and as the heirs of and on behalf of the Estate of **Kycie Terry**, deceased, Plaintiffs, vs. **Southwest Emergency Physicians, LLC** and **Michael O. Tremea, MD,** Defendants.	**Defendants' Opposition to Plaintiffs' Motion in Limine "Concerning Reptile Based Objections at Trial"** Case No. 160907576 Judge Keith Kelly Tier 3

Defendants Southwest Emergency Physicians, LLC, and Michael O. Tremea, MD, through their counsel of record, respectfully submit their Memorandum in Opposition to Plaintiffs' Motion in Limine "Concerning Reptile Based Objections at Trial." Plaintiffs' motion in limine should be denied for the reasons stated herein.

Introduction

Citing *United States v. Cochran*, 697 F.2d 600, 607 (5th Cir. 1983), Plaintiffs open their brief with imagined objections from Defendants to Reptile Theory evidence arguments, asserting that such objections are "hyperbolic" and that juries are capable of hearing evidence without abandoning reason and common sense.[1] Plaintiffs urge the court to prohibit such objections at trial without limitation. Defendants note here that they have neither asserted any objection or filed any motion in limine seeking to prevent Plaintiffs' from making "entire lines of argument" or "to control virtually every word from counsel and witnesses." Regardless, Plaintiffs' motion is an overbroad and vague attempt to handcuff Defendants at trial and inject improper arguments and evidence at trial. The court should deny the motion and reserve rulings on objections at trial.

A. Plaintiffs' motion does not seek to exclude or admit a specific piece of evidence and is, therefore, not a proper motion in limine.

"The purpose of motions in limine is not to re-iterate matters which are already set forth elsewhere in the Rules of Civil Procedure or Rules of Evidence, but, rather, to identify specific issues which are likely to arise at trial, and which, due to their complexity or potentially prejudicial nature, are best addressed in the context of a motion in limine." *Smith v. Union Ins. Co.*, No. 3:15-CV-00162-MPM-RP, 2017 WL 5171855, at *1 (N.D. Miss. June 15, 2017). "[A] motion setting forth a lengthy laundry list of matters, most of them of a highly vague nature

[1] The "hyperbolic" statement Plaintiffs invoke by citing *Cochran* was not an objection but, rather, a prosecutor's description of a kilo of cocaine in the possession of the criminal defendant as a "sack of white death." *Id.* at 607. The Fifth Circuit Court of Appeals concluded that this statement should not have been made but, ultimately, found that the statement was harmless given the "overwhelming evidence of [the defendant's] guilt."

constitutes an improper 'shotgun' motion which fails to meet this court's standards for motions in limine." *Id.* Case law "disfavors and has often stricken 'shotgun' motions in limine whereby a party seeks to have the court exclude a lengthy list of every potential piece of evidence which the attorney can think to bring to the court's attention." *Lonoaea v. Corrections Corp. of Am.*, 665 F. Supp.2d 677, 687 (N.D. Miss. 2009); *see also Hanley v. Warburg Pincus Capital Co., L.P.,* Civil Action No. 96-390TUCFRZ, 2005 WL 6295802, at *1 (D. Ariz. Dec. 7, 2005) (finding it improper to make a "blanket preclusive ruling" requested by an "overbroad and vague" motion in limine).

Rather than moving to exclude or admit a specific piece of evidence or argument, Plaintiffs' motion in limine instead seeks an order from this Court prohibiting Defendants from *objecting* to a myriad of vaguely defined arguments and phrases Plaintiffs may employ at trial. The motion is without limitation, asserting that Defendants may not object to any "line of argument, evidence or testimony" that could be considered "Reptile" related.

Plaintiffs' motion is far too vague and overbroad to be considered a proper motion in limine. *See Hanley*, 2005 WL 6295802, at *1. Beyond mention of "safety" or "community," Plaintiffs' motion gives little guidance on what type of argument or evidence would fall within the boundaries of a court order prohibiting objections from Defendants. *See In re C.R. Bard, Inc., Pelvic Repair Sys. Products Liab. Litig.*, Civil Action No. 2:10-CV-01224, 2013 WL 3282926, at *2 (S.D.W. Va. June 27, 2013) (denying motions in limine because the court could not rule on them "without knowing the particular piece of evidence" at issue or the argument to be made and the context in which such evidence or argument would arise). Further, Plaintiffs' motion

contemplates preclusion of *all* objections, whether based on foundation, relevance, or Rule 403. Plaintiffs' motion in limine is an improper, blanket attempt to preclude Defendants' right to object at trial. The court should, therefore, deny the motion, reserving rulings on objections to introduction of evidence and argument at trial. *See Rivera v. Salazar*, 2008 WL 2966006, at *1 (S.D. Tex July 30, 2008) ("Evidentiary rulings 'should often be deferred until trial so that questions of foundation, relevancy and potential prejudice can be resolved in proper context.").

B. Plaintiffs' motion in limine seeks to allow exactly what Plaintiffs condemn as junk science.

Should the court consider the merits of Plaintiffs' motion in limine, the court should deny the motion because the motion seeks to allow improper evidence and argument at trial. Plaintiffs take an unusual—albeit creative—approach to the Reptile Theory argument. Rather than assert the ordinary reasons to admit Reptile Theory as a legitimate basis to jettison the prima facie elements of a medical negligence claim, Plaintiffs here argue that Reptile Theory is without scientific basis and, *ergo*, any objection to the use of Reptile Theory arguments at trial must also be illegitimate. Make no mistake, Plaintiffs seek to admit what they condemn as illegitimate: the replacement of the standard of care in a medical negligence action with arguments about "community safety standards" or "safety rules," both of which are part and parcel of Reptile Theory.[2] Indeed, Plaintiffs go to great lengths to convince the court that references to

[2] "Reptile" strategy is a veiled Golden Rule argument because it urges jurors to decide a case not on the evidence but, rather, on the potential harms and losses that might occur within the community—including the jurors and their families. As shown by the following quotations from the book by David Bell and Don Keenan entitled "Reptile: The 2009 Manual of the Plaintiff's Revolution,"the strategy is to invoke the Golden Rule by asking each juror to put themselves in the same position as the plaintiff:

"community" and to "safety" standards are part of a medical negligence claim. As discussed below, Plaintiffs' arguments—irrespective of whether they are based on Reptile Theory or not—

- Safety rules are powerful trial tools. But the only kind of safety-rule violation the Reptile cares about is the kind that can endanger her. The greater the danger, the more the Reptile cares. (51)

- Every case needs an umbrella rule. The umbrella rule is the widest general rule the defendant violated — wide enough to encompass every juror's Reptile. Here's the umbrella rule for almost every plaintiff's—even commercial—case:

  A driver [or physician, company, policeman, lawyer, accounting firm, etc.] is not allowed to needlessly endanger the public [or patients]. In some case, you may want to word it this way: "A [physician] is never allowed to gamble needlessly with the safety of the pubic [or patients, etc.]." **If you omit "needlessly," the defendant can escape, because there are almost always unavoidable risks: risks of surgery, act of God, unavoidable event, etc. The defendant is at fault only for creating or allowing danger beyond that.** (55-56)

- In shaping the rule, go beyond your specific kind of defendant. **Instead of "A lawyer is never allowed to needlessly endanger a client's interests," go wider: "Any professional hired to give advice—such as a doctor, a lawyer, or an accounting firm —is never allowed to needlessly endanger whoever hired him." This broadened version touches more people.** (56)

- Another negligence characteristic the Reptile loves: The more dangerous something is, the more careful a _____ [e.g. driver, doctor, products manufacturer] must be. (66)

- The Reptile is not fooled by defense standard-of-care claims. Jurors are, but not Reptiles. When there are two or more ways to achieve exactly the same result, the Reptile allows — demands— only one level of care: the safest. . . . Here's how:

  1. A doctor [or whatever] is never allowed to **needlessly endanger** a patient [or whoever]. **In other words, a "prudent" [or careful, depending on the instruction] doctor does not needlessly endanger a patient.**

  2. When there's more than one available way to achieve exactly the same level of benefit, the doctor is not allowed to **select a way that carries more danger** than the other. That would allow unnecessary danger, which doctors are not allowed to do.

  3. So a "prudent" doctor must select the safest way. If she selects the second-safest, she's not prudent because she's allowing unnecessary danger. (62-63)

All of these strategies are designed with one purpose in mind: to elicit a "Reptilian" response in jurors, thus invoking their passion and prejudice to protect the safety of the community. Such are veiled "Golden Rule" tactics. *Reptile: The 2009 Manual of the Plaintiff's Revolution,* at 51, 55-56, 62-63, 66 (emphasis added).

really amount to "Golden Rule" arguments and pleas to jurors' emotions, both of which Utah courts have long deemed improper.

1. Plaintiffs seek to introduce impermissible "Golden Rule" arguments to determine liability and damages in a medical negligence action.

Plaintiffs should not be allowed to ask the jury to place themselves in the position of a party or to otherwise urge them to act on behalf of the community at large for purposes of determining liability or damages. Such references, evidence, or argument are inadmissible "Golden Rule" arguments because they serve no purpose but to inflame the passions and prejudice of the jury and because they offer no probative value on any remaining issue in the case. *See* Utah R. Evid. 403.

Plaintiffs' attempt to surreptitiously inject Golden Rule arguments into this trial—through Reptile Theory or simply by arguing that Plaintiffs may urge jurors to step into their shoes to judge Defendants' medical care—has been rejected by Utah courts. In a Utah Third District case pursued by none other than Plaintiffs' counsel, Judge Barry Lawrence, after considering the defendant's motion in limine to bar Reptile Theory and Golden Rule arguments at trial and the same arguments Plaintiffs advance here, issued an order, in part, barring any party from arguing or inferring (1) that jurors should send a message to the community with their verdict; (2) asking the jury to prevent "this" from happening again; (3) that jurors should apply either a general "safety standard" or a "community standard of safety" based on the jurors' own beliefs; (4) that jurors serves as the "conscience of the community" in rendering a verdict; and (5) that jurors should be swayed by emotion, sympathy, passion, or prejudice rather than by the facts and the

applicable law. *See* Order, *Lois Smith v. Volkswagen Southtowne, Inc., et al.*, Case no. 130908362 PI, June 7, 2018, attached as **Exhibit A.** In addition, at least one Utah federal district court has rejected frank Reptile Theory trial strategy. Judge Clark Waddoups granted the defendants motion in limine to bar the plaintiff from using veiled Golden Rule or "Reptilian" arguments or evidence at trial. *See Waddoups v. Noorda*, M.D., No. 1:11-cv-00133 (D. Utah June 18, 2014), attached as **Exhibit B.** A recent, non-binding, but persuasive example comes from another medical malpractice case tried in St. George.

True, the Supreme Court of Utah ruled in *Green v. Louder* that "Golden Rule" arguments are "are improper only 'with respect to damages,'" 29 P.3d 638, 648 (Utah 2011) (citing *Shultz v. Rice*, 809 F.2d 643, 651-52 (10th Cir. 1986) (other citation omitted)); however, unlike *Green v. Louder*—a case involving a car crash—this action involves the standard of care concerning the diagnosis and treatment of pediatric diabetic ketoacidosis and alleged developing brain edema, issues far afield of a typical lay juror's experience and knowledge. As such, expert witnesses must define the standard of care applicable to Defendants and how a breach, if any, caused Plaintiffs' damages. *See, e.g., DeAdder v. Intermountain Healthcare, Inc.*, 308 P.3d 543, 547-548 (Ct. App. Utah 2013) (holding that, in order to recover on a claim for medical malpractice, a plaintiff must produce expert testimony to establish that a health care provider breached the applicable standard of care, and that the breach proximately caused the plaintiff's injury). Jurors may not use their own experiences in this case to determine the standard of care or whether Defendants breached that standard. *See* Utah Model Jury Instructions 2d, CV301C.[3]

[3] Utah Model Jury Instruction CV301C states, in pertinent part, as follows:

Judge Thomas Wilmore in the First District used the same reasoning to distinguish *Green* from application of Golden Rule arguments to determine liability in medical malpractice actions, concluding such arguments were improper. *See Collier v. Grover*, 2013 WL 5951254, at *2 (Utah Dist. Ct. July 10, 2013), attached as **Exhibit C** Likewise, Judge Barry Lawrence distinguished *Green* in a Third District medical negligence action in rejecting the same arguments Plaintiffs advance here and concluded as follows:

> This is a medical malpractice case and so the relevant measure of defendants' conduct is the applicable standard of care—to be established by qualified medical experts. Plaintiff's standard of care experts may rely on what they believe is the standard of care as established by medical practitioners in this medical community. By this Order, the Court does not intend to limit the scope of any standard of care *expert* (provided, of course, that they meet the proper foundational requirements and were properly disclosed.)
>
> However, it would be inappropriate to argue to the jury—either directly or inferentially—that a lesser, or different standard of care applies—such as a "community standard." Although plaintiff correctly points out that one of [the] goals of tort law is to enhance safety and prevent future injuries to the extent possible, their argument is misplaced. Those concepts are the reasons that we have laws that allow for recovery in tort cases; they are baked into this State's jurisprudence. The jury's job is to apply *that* law to the facts of this case; not to apply their subjective concept of what safety should be.

Order, *Sprague v. Avalon Care Center, et al.*, Case no. 140908104, Third Judicial District Court, September 22, 2017, attached as **Exhibit D**.

By asking the jury to put themselves in Plaintiffs' position for purposes of liability (i.e., the "Golden Rule") or to act as the "conscience of the community," Plaintiffs would be asking jury members to disregard the experts' opinions on the applicable standard of care and substitute

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> The standard of care is established through expert witnesses and other evidence. *You may not use a standard based on your own experience or any other standard of your own.* It is your duty to decide, based on the evidence, what the standard of care is. The expert witnesses may disagree as to what the standard of care is and what it requires. If so, it will be your responsibility to determine the credibility of the experts and to resolve the dispute.

(Emphasis added.)

their own opinion for what medical treatment they would have wanted to receive or to judge what would protect their community. *See also,* Point 3, *infra.* Plaintiffs should be prohibited from any evidence, argument, or suggestion that would ask the jury to render their verdict for any reason other than the evidence and expert testimony in the record. Plaintiffs should not—and cannot—be allowed to ask the jury to substitute their own opinions about the standard of care for those of the expert witnesses.

2. Plaintiffs improperly seek to appeal to jurors' emotions.

Evidence or argument regarding personal or community safety should be precluded because it asks the jury to decide the case based on personal or community interest, and emotion, rather than based on the facts and applicable law. This principle is well-developed. In *State v. Wright,* 304 P.3d 887 (Ct. App. Utah 2013), the Utah Court of Appeals held that a prosecutor's closing argument, "You have the power to make that [(the abuse)] stop," to be improper because it 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.* at 41, 304 P.3d at 902. In criminal cases, "the prosecutor should refrain from argument which would divert the jury from its duty to decide the case on the evidence." *State v. Todd,* 173 P.3d 170, 175 (quoting authority). Such emotional arguments are also barred for civil cases: "You must decide this casebased 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." Model Utah Jury Instructions 2d, CV107. Because "reptile" arguments, i.e., appeals to protect the "community," are

designed to appeal to emotion, rather to than facts and law, they should be excluded from this trial. These arguments take away the jurors' oath and duty to decide cases based upon the facts and evidence presented, and, instead, permit the jurors to improperly decide cases based upon their emotions—including passion, prejudice, and bias.

3. Utah law governing medical negligence claims does not condone a "community" standard of care or "safety rules" as standards by which jurors should evaluate Defendants' care.

Plaintiffs assert that, as the "conscience of the community," Utah juries may consider a "community safety standard" in determining the standard of care applicable to Defendants in this medical negligence action and whether Defendants breached that standard. Pl. Br., at 7. Specifically, Plaintiffs assert that the jury, when determining whether Dr. Tremea has acted reasonably and within the standard of care, "necessarily evaluates what the broader community would consider reasonable care to be." *Id.* at 8.

Plaintiffs cite three Utah cases to support their argument: *Summerill v. Shipley*, 890 P.2d 1042, 1046 n.7 (Ct. App. Utah 1995); *Trujillo v. Utah Department of Transportation*, 986 P.2d 752 (Ct App. Utah 1999); and *State v. Pierren*, 583 P.2d 69, 71 (Utah 1978). *Summerill* concerned a four-vehicle crash involving a 16-year-old driver, and the district court instructed the jury that the applicable duty was "to use reasonable care to avoid injuring other people or property." 890 P.2d at 1043. "Reasonable care," as the instruction defined, was what "an ordinary, prudent person uses in similar situations." *Id.* The Utah Court of Appeals agreed that the jury instruction "accurately defines the general standard of care a defendant must meet in order to defeat a claim of negligence," but it found that the trial court had erred in not also

instructing the jury concerning the duty of care applicable to a minor engaged in an adult activity. *See id.* at 1044. The appellate court reasoned that omission of an instruction that the jury should hold the minor defendant to the same standard as an adult engaged in the same activity may have given the jury the impression that a less stringent standard applied. *See id.* at 1046. In so reasoning, the court made the comment cited in Plaintiffs' brief that "[t]he standard of the reasonable, prudent person describes a protype individual who personifies 'a community ideal of reasonable behavior' without identification with a particular individual." *Id.* at 1046 n.7 (citing W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 32, at 174–75 (5th ed. 1984).

The *Summerill* matter, however, did rely on expert witnesses to define the standard of care; rather, the jury could well decide based on their own experiences and judgment what a reasonably, prudent driver would do in similar circumstances. As discussed further below, this case involves a standard of medical care that falls beyond the ordinary experiences of lay jurors and, as such, jurors in this case may not draw upon what they believe is reasonable and prudent care. Instead, Utah law requires that expert witnesses, not the jurors, define the applicable standard of care. The *Summerill* court's comments on a "community ideal" therefore should not guide the analysis here.

The *Trujillo* case—another car crash case—involved the alleged negligence of UDOT and its general contractor, Ball & Brosamer, Inc., in diverting traffic during a road resurfacing construction project. *See id.* at 755-756. Ball's contract with UDOT obligated it to supervise traffic in the construction zone and also required Ball to propose an alternative traffic plan if it determined that UDOT's plan unsafe or inadequate. *See id.*

The appeal in *Trujillo* was from an order granting summary judgment to the defendants, and the plaintiff argued that, in granting summary judgment to the general contractor, Ball, the district court failed to recognize factual disputes concerning whether the defendant had acted with "ordinary, reasonable care under the circumstances." *Id.* at 764 (citations omitted). Reversing the summary judgment, the appellate court concluded that questions of material fact "permeate[d]" the question of the contractor Ball's potential liability and that a jury was more properly suited to decide the issue. *Id.*

Plaintiffs cite *Trujillo* for the proposition that Utah juries in all negligence cases determine "ordinary, reasonable care" according to "standards set by the community." Pl. Br., at 5. The complete quotation from *Trujillo* states that 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*.'" *Trujillo*, 986 P.2d at 764. As the appellate court explained, the question of the defendant general contractor's duty of care in *Trujillo* was to "'perform the work required by its contract . . . with that degree of care ordinarily possess and exercised by other contractors doing the same or similar work *in [the same] locality.*'" *Id.* at 763 (emphasis added) (brackets in original) (quoting *Andrus v. State*, 541 P.2d 1117, 1121 (Utah 1975). In other words, the duty addressed in *Trujillo* was specific to a general contractor's duty of care in abiding by its contractual obligations as defined by the contractor's locale, or "community"—hence, the Court of Appeals' statement that juries are best suited to judge a general contractor's conduct "falls above or below the standard of reasonable conduct *deemed to have been set by the community*." *Id.* at 764.

The *Trujillo* Court's statements—at least as they concern the standard of reasonable care—are completely inapplicable in this case. The duty of care as it is defined for a general contractor in carrying out its contractual obligations in no way applies to a physician in a medical negligence action, especially because a general contractor's duty of care is defined by the degree of care taken by other contractors in the same vicinity. *See id.* at 763. On the other hand, Utah courts long ago rejected a "community" or locality standard of care in medical negligence actions. *See Swan v. Lamb*, 584 P.2d 814, 817 (Utah 1978) (holding standard of care defined by experts in the same field throughout the nation and discarding standard of care defined by "vicinity"). Consequently, *Trujillo* does not apply as Plaintiffs suggest.

The third Utah case Plaintiffs cite, *State v. Pierren*, concerned jury instructions in a criminal matter involving charges of distributing pornographic materials. 583 P.2d 69, 70. The defendant challenged his guilty verdict on appeal by, in part, claiming that the court had erred "in failing to define to the jury the geographical limitations of the phrase 'community standards'" used to determine whether the material was pornographic under the applicable statute. *Id.* at 71.[4] Indeed, the criminal statute in place at the time defined "contemporary community standards" as "those current standards in the vicinage where an alleged offense has occurred, is occurring, or will occur." *Id.* (citing Utah Code § 76-10-1201(12) (1953); *State v. International Amusements*,

[4] Section 76-10-1203 (1953) established that

> Any material or performance is pornographic if:
> (a) The average person, applying contemporary community standards, finds that, taken as a whole, it appeals to prurient interest in sex;
> (b) It is patently offensive in the description or depiction of nudity, sexual conduct, sexual excitement, sadomasochistic abuse, or excretion; and
> (c) Taken as a whole it does not have serious literary, artistic, political or scientific value.

565 P.2d 1112 (Utah 1977) (holding criminal statute's term "vicinage" did not mean a state-wide geographic area and was limited to jurisdiction from which jury was assembled for required determination of pornographic material). For the application of "contemporary community standards" under the statute, the district court had instructed the jury to apply "current standards in the Weber County area" to evaluate whether the defendant had distributed material that could be considered pornographic under the statute. In addition, the district court admonished the jury that they alone were "the exclusive judges for expressing the view of the average person and of the common conscience of the community and the embodiment of community standards." In quoting this last phrase in support of their arguments, Plaintiffs completely ignore the context in which the court gave the instruction—that is, a criminal case involving community standards for determining pornographic material. The Court should refuse to extend the *Pierren* reasoning to the standard of care to be applied in this medical malpractice action.

References to "community standards" or to a jury's role as the "conscience of the community" make sense in the cases Plaintiffs cite because the underlying standards at issue were explicitly measured by community and geographic area. These references also make sense in the context of ordinary negligence cases that do not require the opinions of expert witnesses to establish the standard of care. *See, e.g., Graves v. North Eastern Services, Inc.*, 345 P.3d 619, 627 (Utah 2015) (recognizing medical malpractice exception to general rule that jurors, as ordinary persons representing a particular community, can judge the standard of care in a negligence action).

In this case, however, the jury will hear what constitutes reasonable care and the standard of care from expert witnesses. The jury will be instructed to determine liability based only on those experts' opinions, not their own or what could be considered "community" standards. *See* MUJI 2d CV301C ("The standard of care is established through expert witnesses and other evidence. *You may not use a standard based on your own experience or any other standard of your own.*"). By asking the jury to put themselves in Plaintiffs' position or to view themselves as the "conscience of the community" for purposes of liability (and that is, indeed, what Plaintiffs seek to do), Plaintiffs would be asking jury members to disregard the experts' opinions on the applicable standard of care and substitute their own opinions for what medical treatment they would have wanted to receive or what treatment would protect the community at large. Plaintiffs should be prohibited from any evidence, argument, or suggestion that would ask the jury to render their verdict for any reason other than the evidence and expert testimony in the record.

4. Plaintiffs' retained standard-of-care expert witness, Michael Tunik, MD, does not define the applicable duty of care using "safety," "safety rules," or "community" as standards.

Because this case involves issues beyond the knowledge and experience of lay jurors, expert testimony is required to establish each element of Plaintiffs' claim for medical negligence. Accordingly, Plaintiffs disclosed Michael G. Tunik, MD, to opine regarding the standard of care. Defense counsel deposed Dr. Tunik on October 25, 2018. *See* Tunik Deposition Pages, attached as **Exhibit E**. During the entirety of his deposition, Dr. Tunik made no mention of a "community" standard of care or a duty of care defined by vicinity. In forming his opinions concerning the standard of care applicable to Dr. Tremea, a physician practicing in St. George,

Utah, Dr. Tunik relied on his own 32 years of practice in pediatric emergency medicine and the "probably three or four hundred DKA cases" he has handled during his career at Bellevue Hospital Center in New York. Exhibit E (Tunik Depo., at 10-11). At no time did Dr. Tunik assert that the standard of care applicable in St. George was different than the standard applicable in New York. To the contrary, Dr. Tunik's opinions confirmed a national standard of care applicable to all emergency medicine physicians.

Nor did Dr. Tunik define the applicable standard of care using the concept of "safety," "safety rules." In fact, Dr. Tunik articulated opinions concerning the standard of care applicable to Dr. Tremea only in terms of reasonableness. This is consistent with Utah's Model Jury Instruction on the definition of the standard of care in medical negligence actions, which makes no mention of "safety rules" or "safety." *See* MUJI 2d CV301C. Rather, the definition of "standard of care" relies entirely on the reasonable prudence of physicians practicing in the same specialty as the defendant.[5] No expert witness in this case has defined the applicable standard of care as a community standard, and no expert witness has cited any "safety rules." Urging the jury that they are to use a "community standard," use undefined "safety rules," or that they act as the "conscience of the community" invites error because such arguments ask the jury to use a

[5] CV301C states as follows:
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]. This is known as the "standard of care." The failure to follow the standard of care is a form of fault known as either "medical negligence" or "medical malpractice." (They mean the same thing.)
The standard of care is established through expert witnesses and other evidence. You may not use a standard based on your own experience or any other standard of your own. It is your duty to decide, based on the evidence, what the standard of care is. The expert witnesses may disagree as to what the standard of care is and what it requires. If so, it will be your responsibility to determine the credibility of the experts and to resolve the dispute.

standard different from the standards set forth by the retained expert witnesses and set forth by the instructions they will receive.

Conclusion

Plaintiffs' Motion in Limine "Concerning Reptile Based Objections at Trial" is too overbroad and vague to be considered a valid motion in limine. The court should therefore deny the motion and reserve ruling on objections at trial. If the court considers the merits of Plaintiffs' motion, the court should still deny the motion as an improper attempt to introduce "Golden Rule" arguments, appeal to jurors' emotions, and inject concepts of "safety" and "community" standards into a trial where the standard of care is defined by experts. In doing so, the Court should order barring any party from arguing or inferring (1) that jurors should send a message to the community with their verdict; (2) asking the jury to prevent "this" from happening again; (3) that jurors should apply either a general "safety standard" or a "community standard of safety" based on the jurors' own beliefs; (4) that jurors serves as the "conscience of the community" in rendering a verdict; and (5) that jurors should be swayed by emotion, sympathy, passion, or prejudice rather than by the facts and the applicable law.

Dated this 19th day of April, 2021.

NELSON NAEGLE, PLLC

/s/ Brandon B. Hobbs
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 19th day of April, 2021, I served the foregoing **Defendants' Opposition to Plaintiffs' Motion in Limine "Concerning Reptile Based Objections at Trial"** on the persons identified below as indicated:

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