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IN THE THIRD 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, v. SOUTHWEST EMERGENCY PHYSICIANS, L.L.C. and MICHAEL O. TREMEA, M.D., DEFENDANTS.	**PLAINTIFFS' MOTION IN LIMINE AND MEMORANDUM CONCERNING REPTILE BASED OBJECTIONS AT TRIAL** Case No. 160907576 Judge Keith Kelly

BRIEF STATEMENT OF RELIEF REQUESTED AND GROUNDS FOR REQUEST

During civil tort trials, Defendants often object that a line of argument, evidence or testimony is an impermissible "reptilian tactic or strategy." Defendants take issue with words and phrases such as safety and objective community standards, asking the Court to control

virtually every word from counsel and witnesses on the basis that it is a "reptile strategy."

However, safety, objective standards, and being careful are the foundations of tort law. Claims that the mere mention of safety or community drives jurors to abandon reason and common sense are attacks on the entire jury system itself. Courts reject such attacks. "We do not view juries as emotional slot machines and do not suppose them to be so."[1] Instead, courts review even "hyperbolic" argument of counsel "with some level of confidence in the maturity of [the] citizens selected to sit in a [jury] trial."[22] Any legitimate evidence or advocacy technique can be abused or overused. Overly broad and vague objections and motions *in limine* attempting to prohibit entire lines of argument, evidence, and gag the use of certain words or phrases wastes judicial resources and inhibits efficient trial process. Plaintiffs bring this motion to address the so-called reptile objection and reduce or eliminate such unnecessary objections during the course of trial.

1. NO SCIENTIFIC BASIS EXISTS FOR THE SO-CALLED REPTILE STRATEGY.

Defendants use "Reptile" as a shorthand objection that something is impermissible or inadmissible during trial and in pre-trial motion practice. The Reptile moniker finds its genesis ina book entitled *Reptile: The 2009 Manual of the Plaintiff's Revolution*. The book is premised on allegedly "groundbreaking work"[3] by Paul D. Maclean that the brain consists of "three parts which include the 'reptilian complex.'"[4] According to the theory, a reptilian brain

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[1] *United States v. Cochran*, 697 F.2d 600, 607 (5th Cir. 1983).

[2] *Id.*

[3] *Id.* at 13.

[4] *Id.*

overpowers the cognitive and emotional parts of the brain when basic life functions become threatened.[5] The *Reptile* authors suggest that plaintiff's attorneys elicit a "Reptilian" response in jurors. Therefore, the goal of the Plaintiffs' lawyer "is to get the juror's brain … into survival mode."[6]

Defendants argue that any strategy mentioned in the Reptile book violates Rule 403 by causing confusion or prejudice amongst the jurors. Defendants frame their objections as a reaction to and prophylactic against so-called Reptilian tactics. Maclean advanced his theory in the 1960s, a time when mind control concepts were taken seriously amongst academics. The reptile brain theory has long since been discredited.[7] The notion that verbal communication could influence a reptile brain, even if such an individualized and compartmentalized brain exists, has been rejected.[8] Attempting to single out any one aspect of what we call consciousness is doomed to failure. "We have been educated to speak to a 'rational' brain that does not, in reality, exist. If we speak to jurors as if they have a purely reptilian brain, we make

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[5] *Id.* at 17.

[6] *Id.* at 18.

[7] *See, e.g.,* Wikipedia, Triune brain (MacLean's dated hypothesis regarding a "reptilian" brain "is no longer espoused by the majority of comparative neuroscientists in the post-2000 era"), *available at* https://en.wikipedia.org/wiki/Triune_brain (last visited Aug. 12, 2015). *See also* BenThomas, *Revenge of the Lizard Brain,* Guest Blog, Scientific American Blog Network (while theidea of a separate, subconscious "reptile" brain "holds a certain allegorical appeal: The primal lizard--a sort of ancestral trickster god--lurking within each of us," "MacLean's pet hypothesis doesn't hold up under scrutiny."), *available at* http://blogs.scientificamerican.com/guest- blog/revenge-of-the-lizard-brain/ (last visited Jan. 27, 2017).

[8] In a 2003 study, the author concluded that "There is little evidence that the 'protoreptilian formation' is involved in any major way in vocal communication … a set of neural structures termed the 'communication brain' mediate vocal communication in mammals, and [] this modeldoes not fit well into the triune brain scheme of brain organization." John D. Newman, *Vocal Communication and the Triune Brain*, 79 PHYSIOLOGY & BEHAVIOR 495, 495 (2003), *abstract available at* http://www.sciencedirect.com/science/article/pii/S0031938403001550 (last visited Aug. Jan. 26, 2017).

the same mistake."[9] "As a marketing tool, this conception of the Reptile is brilliant. But for the lawyer who might literally apply the admonition to appeal only to the 'logic' of the Reptile, it is folly."[10] There is no reptilian brain or valid scientific foundation upon which to suppose one exists. Fortunately, jurors are not mindless robots who can be so easily manipulated. Unfortunately, the Reptile book marries a rejected psychological theory to traditional tort law elements and standards. Simply because the Reptile authors reference safety or community does not make mention of either objectionable. Safety, as in virtually every tort case, is a primary issue in this case. Any suggestion that an appeal to this non-existent reptile brain can trigger a passion or prejudice fails and cannot provide the basis on which to prohibit references to either community or safety.[11]

2. REFERENCE TO "COMMUNITY" OR "SAFETY" IS APPROPRIATE IN CIVIL CASES.

References to "safety" and "community" do not violate any rule of evidence. Relevant evidence is broadly defined as evidence having "any tendency to make a fact [of consequence indetermining the action] more or less likely than it would be without the evidence." Utah R. Evid. 401. Long before "the Reptile," Utah courts recognized juries act as the conscience of the community. For example, in 1995 the Utah Court of Appeals stated that "[t]he standard of

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[9] Jill P. Holmquist, *The Reptile Brain, Mammal Heart and (Sometimes Perplexing) Mind of theJuror: Toward a Triune Trial Strategy*, THE JURY EXPERT (July 2010), *available at* http://www.thejuryexpert.com/2010/07/the-reptile-brain-mammal-heart-and-sometimes- perplexing-mind-of-the-juror-toward-a-triune-trial-strategy/ (last visited Jan. 26, 2017).

[10] *Id.*

[11] Even the defense bar agrees that there is no scientific basis for the mystical powers ascribed tothe so-called *Reptile* strategy. *See, e.g.,* Stephanie West Allen, et al., *Atticus Finch Would Not Approve: Why a Courtroom Full of Reptiles Is a Bad Idea,* 22 THE JURY EXPERT 1-4 (May 2010)(noting that the basic assumptions of the Reptile theory are incorrect, the "predictable" fear response the theory is supposed to elicit is unpredictable, and jurors recoil when treated like reptiles).

the reasonable, prudent person describes a prototype individual who personifies '*a community ideal of reasonable behavior'* without identification with a particular individual."[12]

Deterrence is a *primary* motivation for tort liability, while compensation is secondary. "Tort liability has a powerful deterrent effect on future conduct and would do much to protect other children from being harmed under similar circumstances. Tort liability might also providenecessary funds to rehabilitate the victim."[13] "Existing public education efforts of the judiciary should be modified… Speaking points might include: the democratic role of the jury as the collective community conscience."[14] Providing compensation to tort victims "protects societal interests in human life, health, and safety *and deters harmful behavior* by requiring individuals whose conduct harms those around them to bear the full cost of their actions."[15]

Juries in Utah are charged with consideration of the community safety standard in a negligence action. For example, in *Trujillo v. Utah Dep't of Transp.*, the court stated that the jury determines whether the defendant acted with "ordinary, reasonable care" because the jury is "uniquely qualified to judge whether conduct falls above or below the standard of reasonable conduct deemed to have been set by the *community*."[16] "Tort law inevitably

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[12] *Summerill v. Shipley*, 890 P.2d 1042, 1046 n.7 (Utah Ct. App. 1995)(emphasis added).

[13] *S.H. By & Through R.H. v. State*, 865 P.2d 1363, 1365 (Utah 1993).

[14] *See*, Committee on Improving Jury Service, Final Report to the Utah Supreme Court and UtahJudicial Council 5 (Admin. Office Courts, 2000) available at https://www.utcourts.gov/resources/reports/jury/jury.htm

[15] *Scott v. Universal Sales, Inc.*, 2015 UT 64, ¶48

[16] *Trujillo v. Utah Dep't of Transp.,* 986 P.2d 752 (Utah Ct. App. 1999)(emphasis added). *See also 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.2d298 (Colo. 1974).

involves balancing individual and social interests."[17] The traditional roles of tort law exposes and remedies threats to the public welfare.[18] 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 courtsbecome 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.[19]

The "chief advantage of" an objective reasonable person standard "is that it enables the triers of fact . . . to look to a *community* standard rather than an individual one."[20] Thus, the "reasonable man" standard keeps a jury focused on what "*society* requires of its members for the protection of their own interests and *the interests of others*."[21] Indeed, "[w]here a defendant's negligence is to be determined, the 'reasonable man' is a man who is reasonably 'considerate' of *the safety of others* and does not look primarily to his own advantage."[22]

Courts, including Utah courts, specifically recognize the jury's role in serving as the conscience of the community. For example, *State v. Pierren*, upheld jury instructions

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[17] *See* THOMAS H. KOENIG & MICHAEL L. RUSTAD, IN DEFENSE OF TORT LAW 1 (2001).

[18] *Id.* at 3.

[19] 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).

[20] 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").

[21] *Id.* cmt. b. (emphasis added).

[22] *Id.* cmt. f. (emphasis added).

applying community standards to determine whether certain images appealed to the prurient interest: "in this case, you the jury, and you alone are the exclusive judges for expressing the view of the average person and of the *common conscience of the community* and the embodiment ofcommunity standards."[23]

Reminding the jury of its role as the conscience of community is nothing more than a reminder to act as objective decision makers. Removing that concept from a civil tort trial leaves jurors adrift and left to decide the matter based solely upon their subjective views. Counsel seeks to simply remind the jury of its role in representing the community when determining whether the defendant met or fell below the reasonable person standard. In a tort context, the framework under which the jury must evaluate the defendant's liability necessarily includes an evaluation ofthe community standards against which it gauges the defendant's conduct.

In a medical malpractice action juries are instructed, "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."[24] Juries are further told "to consider the evidence in this case, but you are not expected to abandon your common sense. You are

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[23] 583 P.2d 69, 71 (Utah 1978)(emphasis added); *White v. HA, Inc.*, 782 P.2d 1125, 1135-36 (Wyo. 1989) ("*the jury as the conscience of the community*, should be given the right to analyze duty and resulting economic responsibility for factually ignoring reasonable safety precautions")(J. Urbigkit dissenting from the court's decision to uphold summary judgment) (emphasis added); and *Kentucky Fried Chicken of Cal., Inc. v. Superior Court*, 927 P.2d 1260, 1278 (Cal. 1997) ("The jury is a repository of collective wisdom and understanding concerning the conditions and circumstances of everyday life that it can bring to bear on the determination of what conduct is reasonable. *As the conscience of the community*, the jury plays an essential role in the application of the reasonable person standard of care") (citing Prosser & Keeton, TORTS 175 (5th ed. 1984)) (emphasis added).

[24] See, MUJI 2d CV 301C

permitted to interpret the evidence in light of your experience."[25] Thus, Utah juries act as the collective We, i.e. the jury's employee their collective wisdom and common-sense.

When determining whether the defendant has acted as a reasonably careful person would in a similar situation, the jury necessarily evaluates what the broader community would consider reasonable care to be. Thus, it is important for and helpful to the jury to understand its role in establishing that standard. It is well within the latitude given to counsel in opening and closing to present the facts, framework, and issues of the case to the jury. Some twenty-two states and the District of Columbia expressly tell new jurors that they represent their community or act as the "conscience of the community" when serving as jurors in a case.[26]

There is nothing new, novel or unique about informing jurors that they act as the conscience of the community and that the case involves safety.[27] MUJI CV107 tells jurors not to decide the case on the basis of personal sympathies, passions or prejudices. Each side will

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[25] See, MUJI 2d CV 119.

[26] *See, e.g.,* Jury Service in Arizona: Your Right . . . Your Responsibility, 3:19–3:38 (Arizona Supreme Court), *available at* http://supremestateaz.granicus.com/ MediaPlayer.php?publish_id=67de63d5-52bd-1032-ab3e-cc6697c41001 ("Serving as a juror directly impacts the quality of life in our communities. We make decisions on behalf of every Arizonan"); New Juror Orientation Video, 5:36–6:01 (District of Columbia Superior Court), *available at* http://www.dccourts.gov/internet/jurors/petitjury/main.jsf ("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"); Justice for All: A Juror Orientation Video, 16:45–16:50 (State of Oregon Judicial Department), *available at* http://courts.oregon.gov/OJD/jurorinfo/pages/index.aspx (same); Jury Service Video, 1:50–1:56 (Judiciary of Rhode Island) ("You will hold justice in your collective hands as the conscience ofour community").

[27] *United States v. Solivan*,937F.2d114.6,1151(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.2d1289, 1342-43 (11th Cir. 1982) (accord); *United States v. Lewis*, 547 F.2d 1030, 1036 (8th Cir. 1976) (accord); *People v. Harlan*, 8 1).3d 448, 508 (Colo. 2000) ("It is not error for a prosecutor [in a criminal case] 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). *See also Witherspoon v. Illinois*, 391 U.S. 510, 519 (1968) (recognizing the jury's role as the conscience of the community); United States v. Spock, 416 F .2d165,182 (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. on other grounds, 526 P.2d1298 (Colo. 1974).

offer competing theories as to why the Defendant failed to act as a reasonable person. The jury must then reach its decision, not on the basis of their personal views, but as an objective reflection of the community ideal of reasonable behavior. The jury's role as the conscience of the community is well recognized. Hiding from jurors their admitted and established role dishonors their service.

Similarly, attempting to limit reference to safety is an attack on the very foundations of tort law. From the very beginning, safety rules played the main role in medical negligence cases.The earliest documented American physician malpractice case, *Cross v. Guthery*,[28] involved a charge of negligence in the performance of a mastectomy. The court ruled against the physician, reasoning he had set out to perform "with skill and safety" yet did so "contrary to all the well known rules and principles of practice in such cases."[29] Because tort law is founded upon safety, motions to prohibit references to 'safety' as an impermissible word should be denied.

CONCLUSION

The right of an attorney to discuss the merits of a case in jury argument is very wide,[30] and counsel has the right to state fully their views as to what the evidence shows and as to the conclusions to be fairly drawn from the evidence; a defendant may disagree with counsel's

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[28] 2 Root 90 (1794).

[29] *Id.*

[30] *E.g., Ward v. H.B. Zachry Constr. Co.,* 570 F.2d 892, 895 (10th Cir. 1978) ("Under federal law, counsel has great latitude in arguments to the jury.") (citation omitted); *see also Bennett v.Nucor Corp.,* 656 F.3d 802, 813 (8th Cir. 2011) (counsel may have "wide latitude in arguing inferences from the evidence presented").

view,but it is ultimately for the jury to decide what conclusions to draw.[31] Asking the jury to make a common-sense inference based on the evidence is not improper argument.[32] Indeed, the Model Utah Jury Instructions tell jurors, "[Y]ou are not expected to abandon your common sense" but may "interpret the evidence in light of your experience."[33] Objections and requests to restrict and limit the very words that can be used at trial, based entirely on a debunked 1960s mind control theory, should be rejected.

DATED this: April 5, 2021

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[31] *E.g., Cassim v. Allstate Ins. Co.,* 94 P.3d 513, 521 (Cal. 2004) (citations omitted). *See also State v. Lafferty,* 2001 UT 19, ¶ 86, 20 P.3d 342 (an attorney "has the right to draw inferencesand use the information brought out at trial in his closing argument") (citations omitted), *cert.denied,* 534 U.S. 1018 (2001).

[32] *State v. Larsen,* 2005 UT App 201, ¶ 10, 113 P.3d 998.

[33] MODEL UTAH JURY INSTRUCTIONS, 2ND ED. CV119.

CERTIFICATE OF SERVICE

I, hereby certify that on this 5th day of April, 2021, I caused true and correct copies of **PLAINTIFFS' MOTION IN LIMINE AND MEMORANDUM CONCERNING REPTILE BASED OBJECTIONS AT TRIAL** to be served via the Court's e-filing system, upon the following:

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