

IN THE STATE COURT OF CARROLL COUNTY
STATE OF GEORGIA

KAYLA J. CATHCART, Individually and)
as the Natural Mother of ZHAILYN R.L.)
CATHCART, a minor; and JUDY WILLIS,)
Individually and as the Temporary Guardian)
of ZHAILYN R. CATHCART, a minor,)
)
Plaintiffs,)
vs.) CIVIL ACTION
) FILE NO. 13-S-00414
JOAN H. ZELLER, M.D.; FREDERICK W.)
MARTIN, M.D.;)
TANNER MEDICAL CENTER, INC.;)
TANNER HEALTH SERVICE, INC., d/b/a)
TANNER MEDICAL CENTER/)
CARROLLTON; and WEST GEORGIA)
OBSTETRICS & GYNECOLOGY, P.C.,)
)
Defendants.)

DEFENDANTS’ MOTIONS IN LIMINE

COME NOW Defendants John H. Zeller, M.D., Frederick W. Martin, M.D., West Georgia Obstetrics & Gynecology, P.C. and Tanner Medical Center, Inc. (collectively “Defendants”) and hereby file their Motions in Limine as follows:

INDEX OF DEFENDANTS’ MOTIONS IN LIMINE

- 1) Defendants request that this Court prohibit any use by Plaintiffs’ counsel of medical literature for purposes other than for proper impeachment.
- 2) Defendants move to exclude all testimony from any witness regarding alleged statements made to Plaintiffs regarding the medical care provided by Defendants.
- 3) Defendants request that this Court prevent counsel for Plaintiffs from posing any question during *voir dire* that is overly broad, opines on the law, or prejudices the action.
- 4) Defendants request the exclusion of any testimony that infers simply because Plaintiff Zhailyn Cathcart sustained an injury, the Defendants were negligent.

- 5) Defendants request the exclusion of any testimony regarding statements or conversations expressing regret, mistake, apology or error on the part of Defendants.
- 6) Defendants request the exclusion of any “hindsight” evaluations by Plaintiffs’ witnesses.
- 7) Defendants request the exclusion of any and all evidence related to the suspension of Dr. Martin’s medical license and hospital privileges, which occurred over twenty years ago.
- 8) Defendants request that if Plaintiffs intend to present Zhailyn Cathcart at trial, that the Court require the Minor also be present during voir dire to protect Defendants’ right to a fair trial.
- 9) Defendants request that Plaintiffs’ experts be precluded from providing opinions which were not previously disclosed.
- 10) Defendants request that Plaintiffs be precluded from invoking the so-called “Golden Rule” argument.
- 11) Defendants request that Plaintiffs be precluded from asking the jury to “send a message.”
- 12) Defendants request the exclusion of any testimony concerning the relative financial status of the parties.
- 13) Defendants request the exclusion of any lay testimony concerning medical diagnoses.
- 14) Defendants request the exclusion of all references to any liability insurance policies held by Defendants.
- 15) Defendants request the exclusion of any and all evidence of other claims, lawsuits, or malpractice claims made against Defendants.

DEFENDANTS' MOTION IN LIMINE NO. 1 AND MEMORANDUM OF LAW IN SUPPORT

COME NOW, Defendants and file this Motion in Limine No. 1 and Memorandum of Law in Support, showing this Court as follows:

I. MOTION IN LIMINE NO. 1

Defendants request that Plaintiffs' counsel be prohibited from reading treatises during the direct examination of Plaintiffs' expert witnesses and from asking Plaintiffs' expert witnesses to read directly from treatises. Defendants also request that this Court prohibit any use by Plaintiffs' counsel of medical literature for purposes other than for proper impeachment.

II. MEMORANDUM OF LAW IN SUPPORT OF MOTION IN LIMINE NO. 1

“An expert may testify as to his opinions derived from a book, and his credibility may be tested by reference to a standard treatise in his field of expertise. However, medical articles are not themselves admissible as evidence.” Austin v. Kaufman, 203 Ga. App. 704, 709 (1992) (internal citations omitted). “While an expert witness may support his opinion by reference to books, statistical sources and other learned sources, his testimony is inadmissible when it is merely a restatement of a textbook opinion rather than an independent expression of his own expert opinion.” Spruell v. Smith, 185 Ga. App. 484, 484 (1987) (quoting Dept. of Transp. v. Brand, 149 Ga. App. 547, 547 (1979)). In Spruell, the trial court excluded the plaintiff's counsel from asking his expert witness to “state what the text said with respect to the subject under consideration.” Id. at 484. The Court of Appeals held that this was improper questioning. Id.; see also Dean v. State, 250 Ga. 77, 82 (1982) (“An expert may testify to his opinions derived from a book . . . [b]ut it is improper for counsel to simply ask an expert witness to name

authorities which agree with his position on a particular issue. Such a question calls for the hearsay opinion of the book's author, not the expert witness' opinion.”).

By contrast, medical literature may be read into evidence when used to impeach a witness on cross-examination, if the witness or another expert acknowledges the reliability of the literature. O.C.G.A. § 24-8-803(18). Such literature, even when admitted for cross-examination purposes, shall not be received as exhibits. Id.

DEFENDANTS' MOTION IN LIMINE NO. 2 AND MEMORANDUM OF LAW IN SUPPORT

Defendants file this Motion in Limine No. 2 and Memorandum of Law in Support, showing this Court as follows:

I. MOTION IN LIMINE NO. 2

Defendants move to exclude all argument, questions from counsel, and/or testimony from Plaintiffs or other witnesses regarding alleged statements made to Plaintiffs or such witnesses regarding the medical care provided by Defendants.

II. MEMORANDUM OF LAW IN SUPPORT OF MOTION IN LIMINE NO. 2

It is anticipated in this case that Plaintiffs may seek to testify that non-party medical providers stated their disapproval of the care provided by Defendants or opined that such care caused her injury. However, testimony by a witness regarding an individual's alleged out-of-court statement is hearsay and is inadmissible under Georgia law if, if offered for the truth of the matter asserted in the statement. See O.C.G.A. §§ 24-8-801(c), 24-8-802. A witness's testimony regarding what another individual allegedly said to that witness, or to other individuals or witnesses, clearly falls under Georgia's definition of impermissible hearsay. See Armstead v. State, 255 Ga. App. 385, 389 (2002). Therefore, any alleged out-of-court statement made by a physician to Plaintiffs or other witnesses regarding his or her opinions of the care at issue is hearsay and, therefore, inadmissible. Atl. Coastline R.R. v. Clinard, 93 Ga. App. 64, 66 (1955).

DEFENDANTS' MOTION IN LIMINE NO. 3 AND MEMORANDUM OF LAW IN SUPPORT

Defendants file this Motion in Limine No. 3 and Memorandum of Law in Support, showing this Court as follows:

I. MOTION IN LIMINE NO. 3

Defendants request that this Court prevent counsel for Plaintiffs from posing any question during *voir dire* that is general or overly broad, or that requires a potential juror to opine on matters of law, to state his or her attitude or knowledge of the law, to weigh the merits of various laws, to prejudge the action, or to respond to improper hypotheticals.

II. MEMORANDUM OF LAW IN SUPPORT OF MOTION IN LIMINE NO. 3

It is well established in Georgia that while the right to examine jurors individually during *voir dire* is broad, it is by no means unlimited. Curtis v. State, 224 Ga. 870, 871 (1968). The purpose of *voir dire*, as contemplated by the Supreme Court of Georgia, is to "allow both parties an opportunity to ascertain the ability of the prospective juror to decide the case on its merits, with objectivity and freedom from bias and prior inclination." Waters v. State, 248 Ga. 355, 363 (1981); accord Stewart v. State, 262 Ga. App. 426, 427 (2003) (finding the "single purpose" of *voir dire* is ascertainment of impartiality of jurors). The Georgia Legislature has codified, through O.C.G.A. § 15-12-133, the four matters of examination to which *voir dire* is limited: (1) any opinion as to which party should prevail; (2) any relationship or acquaintance between the juror and the parties or their counsel; (3) any fact or circumstance indicating any bias, leaning, or inclination of the juror on the subject matter of the action, the parties, or their counsel; and (4) the religious, fraternal, and social connections of the juror. O.C.G.A. § 15-12-133 (2009).

In addition to the subject matter of *voir dire* questioning, Uniform Superior Court Rule 10.1, applicable to the state courts by way of O.C.G.A. § 15-7-43, articulates four methods of

questioning not to be employed by counsel during *voir dire*. See Ga. Unif. Super. Ct. R. 10.1 (2009); § 15-7-43 (2009). First, "[h]ypothetical questions are discouraged, but may be allowed in the discretion of the court." Ga. Unif. Super. Ct. R. 10.1. Second, "[i]t is improper to ask how a juror would act in certain contingencies or on a certain hypothetical state of facts." Id. Third, "[n]o question should be framed so as to require a response from a juror which might amount to a prejudgment of the action." Id. Fourth, "[q]uestions calling for an opinion by a juror on matters of law are improper." Id.

Finally, while hypothetical questions are not *per se* improper, they improperly influence jurors when counsel asks that jurors assume that certain facts will be proven at trial. Waters, 248 Ga. at 363 (finding improper, "If the State's evidence shows that Mr. Waters did the shooting, and if he himself said he did the shooting, would you be willing to listen to any other evidence about how it could have happened?"); see also Atlantic Zayre, Inc. v. Meeks, 194 Ga. App. 267, 270 (1990). Absolutely prohibited are "[h]ypothetical questions involving evidence or requiring a response from a juror which might amount to a prejudgment of the case" Pinion v. State, 225 Ga. 36, 37 (1969) (refusing to allow counsel to ask jurors, "Do you, at the moment, believe the defendant innocent?"). See also Stewart, 262 Ga. App. at 427-428; Watkins v. State, 191 Ga. App. 87, 90 (1989) (finding improper, "The fact that someone may have had something to drink but isn't drunk, isn't under the influence of alcohol, and then drives, is that something that you're going to hold against that person?").

Counsel also has no right to simply outline the evidence to be presented by counsel at trial and then ask jurors' opinions of that evidence. See Shields v. State, 202 Ga. App. 659, 660 (1992); Blankenship v. State, 258 Ga. 43, 45 (1988). The Court of Appeals of Georgia long ago distinguished between acceptable and unacceptable hypotheticals:

While hypothetical questions embodying a substantial outline of the case proposed to be made are not proper, because such questions tend to cause a juror to pledge himself to a future action if the evidence turns out to be that pronounced by the hypothetical question, and thus to prejudge the case, nevertheless questions which only seek to ascertain that the juror's mind is free of preconceptions which might cause him to do just this are entirely proper.

Atlanta Joint Terminals v. Knight, 98 Ga. App. 482, 488 (1958).

DEFENDANTS' MOTION IN LIMINE NO. 4 AND MEMORANDUM OF LAW IN SUPPORT

Defendants file this Motion in Limine No. 4 and Memorandum of Law in Support, showing this Court as follows:

I. MOTION IN LIMINE NO. 4

Defendants request the exclusion of any testimony or questioning inferring that simply because Minor Zhailyn Cathcart sustained an injury, the same requires a finding of negligence. Such an argument is merely an attempt to assert the doctrine of *res ipsa loquitur*, which is barred in medical malpractice actions.

II. MEMORANDUM OF LAW IN SUPPORT OF MOTION IN LIMINE NO. 4

The doctrine of *res ipsa loquitur* is inapplicable to medical malpractice cases in Georgia. See Oakes v. Magat, 263 Ga. App. 165, 168 (2003); Kapsch v. Stowers, 209 Ga. App. 767, 767 (1993); Austin v. Kaufman, 203 Ga. App. 704, 705 (1992). Even if there is an unintended result from medical services, it does not automatically raise an inference of negligence. Oakes, 263 Ga. App. at 168. Conversely, it is presumed that medical or surgical services were performed in an ordinarily skillful manner. Shea v. Phillips, 213 Ga. 269, 271, 98 S.E.2d 552, 555 (1957). A medical provider does not guarantee the results of treatment or of a procedure, and proof simply that care or treatment results in an unexpected outcome, or is followed by unexpected or less than optimal results instead of beneficial results, neither establishes nor supports an inference of lack of proper care, skill or diligence. Clemons v. Atlanta Neurological Institute, P.C., 192 Ga. App. 399, 401, 384 S.E. 2d 881, 883 (1989). Furthermore, in medical malpractice cases, a standard must be used to measure the acts of the defendant to determine if a reasonable degree of skill and care was exercised. Kapsch, 209 Ga. App. at 767; Austin, 203 Ga. App. at 705.

DEFENDANTS' MOTION IN LIMINE NO. 5 AND MEMORANDUM OF LAW IN SUPPORT

Defendants file this Motion in Limine No. 5 and Memorandum of Law in Support, showing this Court as follows:

I. MOTION IN LIMINE NO. 5

Any statements, testimony, argument, or questions or suggestions regarding statements of regret, mistake, error, or apology made by Defendants regarding their care and treatment of Plaintiff Kayla Cathcart and Minor Zhailyn Cathcart should be excluded by this Court. See O.C.G.A. § 24-4-416 (previously O.C.G.A. § 24-3-37.1).

II. MEMORANDUM OF LAW IN SUPPORT OF MOTION IN LIMINE NO. 5

Defendants request that the Court prevent Plaintiffs from referring in any way to any alleged expressions of regret, mistake, error, or apology by Defendants or any other healthcare provider. O.C.G.A. § 24-4-416(b) provides:

In any claim or civil action brought by or on behalf of a patient allegedly experiencing an unanticipated outcome of medical care, any and all statements, affirmations, gestures, activities or conduct expressing benevolence, regret, apology, sympathy, commiseration, condolence, compassion, mistake, error or a general sense of benevolence which are made by a health care provider or an employee or agent of a health care provider to the patient, a relative of the patient, or a representative of the patient and which related to the unanticipated outcome shall be inadmissible as evidence and shall not constitute an admission of liability or an admission against interest.

Based on the express language of O.C.G.A. § 24-4-416(b), Defendants request that this Court exclude any and all statements, affirmations, gestures, activities or conduct expressing benevolence, regret, apology, sympathy, commiseration, condolence, compassion, mistake, or error that may have been made by Defendants or any other healthcare provider to Plaintiffs prior to trial. See Airasian v. Shaak, 289 Ga. App. 540 (2008) (decided under predecessor O.C.G.A. § 24-3-37.1).

DEFENDANTS' MOTION IN LIMINE NO. 6 AND MEMORANDUM OF LAW IN SUPPORT

Defendants file this Motion in Limine No. 6 and Memorandum of Law in Support, showing this Court as follows:

I. MOTION IN LIMINE NO. 6

Defendants anticipate that Plaintiffs' witnesses may attempt to offer retrospective critiques of the care and treatment provided to Plaintiffs. "Hindsight" evaluations—i.e., evaluations based upon information not reasonably available to Defendants during their care and treatment of Plaintiffs—would be irrelevant, and highly prejudicial and should be excluded.

II. MEMORANDUM OF LAW IN SUPPORT OF MOTION IN LIMINE NO. 6

Under Georgia law, hindsight evidence is not relevant to a determination of negligence. Brannen v. Prince, 204 Ga. App. 866, 871 (1992); see also Mercker v. Abend, 260 Ga. App. 836, 839 (2003). This is particularly true in a case alleging medical malpractice and deviations from the standard of care:

[U]nder Georgia law, "hindsight" evaluations of a [medical provider's] treatment of a patient may not be considered in determining whether a [medical provider] met the requisite standard of care in the treatment of a patient. . . . Thus, the only relevant determination, is whether, given the information available to the [medical provider] at the time, the [medical provider] met the requisite standard of care.

Cahela v. JGlasper D. Bernard, D.O., P.C., 155 F.R.D. 221, 226 (N.D. Ga. 1994); see also Haynes v. Hoffman, 164 Ga. App. 236, 238 (1982). "[I]t is well recognized that an after-the-fact assessment of facts or evidence cannot be the basis of a negligence claim so long as the initial assessment was made in accordance with the reasonable standard of medical care." Smith v. Finch, 285 Ga. 709 (2009). For this reason, Defendants request that the Court preclude Plaintiffs' witnesses from offering improper opinions based on hindsight or information not available to Defendants at the time they rendered care to Plaintiffs.

DEFENDANTS' MOTION IN LIMINE NO. 7 AND MEMORANDUM OF LAW IN SUPPORT

Defendants file this Motion in Limine No. 7 and Memorandum of Law in Support, showing this Court as follows:

I. MOTION IN LIMINE NO. 7

Defendants anticipate that Plaintiffs may seek to introduce evidence related to the suspension of Dr. Martin's medical license and hospital privileges, which occurred over twenty years ago. Such evidence would be irrelevant, and highly prejudicial and should be excluded.

II. MEMORANDUM OF LAW IN SUPPORT OF MOTION IN LIMINE NO. 78

The circumstances under which Dr. Martin's license and hospital privileges were suspended occurred over twenty years prior to the care at issue and bear no relation to the medical care of Plaintiff Kayla Cathcart and Minor Zhailyn Cathcart. As shown below, evidence regarding medical care or other events outside of the care at issue and the particular facts of a revocation is irrelevant and should be excluded. Even if it were slightly relevant, the subject evidence could only serve to inflame the jury against Dr. Martin. Accordingly, the prejudicial effect of such evidence would far outweigh any potential probative value.

"It is the general rule applicable in all negligence actions that evidence of similar acts or omissions on the part of the defendant on other and different occasions is not admissible." Johnson v. Meyers, 118 Ga. App. 773, 774 (1968). This rule exists "because the issue to be tried is only the negligence or non-negligence of the defendant at the time of the alleged negligent act, which must be determined by the circumstances surrounding that act and not by reputation of the alleged tortfeasor." Carlisle v. Abend, 288 Ga. App. 150, 151 (2007). The rule finds its roots both in the common law and in O.C.G.A. § 24-4-404, which deems the "general character of the parties and especially their conduct in other transactions" to be irrelevant.

Consistent with this rule, the Georgia courts have long held that evidence relating to a physician's conduct in other transactions is irrelevant and properly excluded by the trial court. E.g., Carlisle, supra; Johnson, supra; Williams v. Naidu, 168 Ga. App. 539, 540 (1983). This is because such evidence improperly focuses upon the defendant's general character or reputation, not the circumstances surrounding the defendant's treatment of the plaintiff in particular. 288 Ga. App. at 391. See also, Williams v. Memorial Med. Ctr., 218 Ga. App. 107, 108 (1995) (affirming exclusion of evidence that a physician did not pass his board examination because it "has little if any relevance to the issue of whether the physician complied with the standard of care required in his treatment in a given case"; citing former O.C.G.A. § 24-2-2).

The alleged events that led to the suspension of Dr. Martin's license and hospital privileges occurred prior to the events and, thusly, do not involve his care of the Plaintiffs. Accordingly, the only possible purpose for evidence regarding these events would be to prejudice Dr. Martin and the West Georgia OB/GYN Defendants. Any possible relevancy would be far outweighed by the potential prejudice inasmuch as such evidence would unduly influence and confuse the jury's determination of the only matters at issue, to wit: his compliance with standard of care in treating Plaintiffs and causation regarding any alleged act or omission on the part of Dr. Martin. As such, Plaintiff should be prohibited from cross-examining Dr. Martin regarding his prior medical license suspension and hospital privileges suspension and from seeking to introduce any evidence relating to this subject matter based on relevancy issues.

DEFENDANTS' MOTION IN LIMINE NO. 8 AND MEMORANDUM OF LAW IN SUPPORT

Defendants file this Motion in Limine No. 8 and Memorandum of Law in Support, showing this Court as follows:

I. MOTION IN LIMINE NO. 8

It is anticipated that Plaintiffs will present Zhailyn Cathcart, a severely impaired minor, during the trial of this case to evoke sympathy from the jury. Defendants request that if Plaintiffs intend to present Zhailyn Cathcart at trial, that the Court require the Minor also be present during *voir dire* to protect Defendants' right to a fair trial.

II. MEMORANDUM OF LAW IN SUPPORT OF MOTION IN LIMINE NO. 8

“All of the parties in a case are entitled to a fair trial, and one element of a fair trial is that decisions by the jury and the judge be based solely on the evidence and the law, and not on bias — sympathy for or prejudice against one party or the other that is not based solely on the evidence.” Kesterson v. Jarrett, 291 Ga. 380, 386-87 (2012); See Smith v. Phillips, 455 U. S. 209, 217 (1982) (“Due process means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen.”); Alabama G. S. R. Co. v. Brown, 140 Ga. 792, 795 (1913) (“The courts will see to it that the jury are kept free from influences which may tend to bias or prejudice their minds for or against the cause of either party they are empaneled to try.”).

While the Georgia Supreme Court in Kesterson held that a party may not be excluded from her own trial because her physical and mental condition may evoke sympathy, it also proposed various, more appropriate measures the parties may take to address undue prejudice. Kesterson v. Jarrett, 291 Ga. App. at 387. One such measure is questioning jurors during *voir*

dire. Id. Requiring Zhailyn Cathcart's presence at *voir dire* and allowing counsel to examine potential jurors to ascertain whether any jurors are prejudiced for or against one side, in light of Zhailyn Cathcart's condition, will allay some concern about inappropriate jury sympathy.

DEFENDANTS' MOTION IN LIMINE NO. 9 AND MEMORANDUM OF LAW IN SUPPORT

I. MOTION IN LIMINE NO. 9

Defendants request that Plaintiffs' experts be precluded from providing opinions which were not previously disclosed during the course of discovery.

II. MEMORANDUM OF LAW IN SUPPORT OF MOTION IN LIMINE NO. 9

Pursuant to O.C.G.A. § 9-11-26, Plaintiffs' experts should be precluded from providing additional opinions which were not previously disclosed. O.C.G.A. § 9-11-26(b)(4)(A)(i) allows a party to require the opposing party to identify all expert witnesses the opposing party plans to call at trial and to state the subject matter about which the expert will testify, the opinions the expert will render, and a summary of the grounds for each opinion. O.C.G.A. § 9-11-26(e)(1)(b) further requires a party to supplement disclosures made under the above Section. A failure to comply with these discovery provisions must, therefore, result in the offending party's expert being precluded from testifying on the subject matter at issue. See Jones v. Livingston, 203 Ga. App. 99 (1992).

DEFENDANTS' MOTION IN LIMINE NO. 10 AND MEMORANDUM OF LAW IN SUPPORT

I. MOTION IN LIMINE NO. 10

Defendants request that Plaintiffs be precluded from invoking the so-called “Golden Rule” argument, including “Reptile” arguments and questions concerning safety, safety rules, and safest decisions.

II. MEMORANDUM OF LAW IN SUPPORT OF MOTION IN LIMINE NO. 10

Defendants anticipate that Plaintiffs may encourage jurors to place themselves in Plaintiffs’ position (or in their family's position), and thereby suggest that the jurors consider the outcome they would want if they were faced with a similar situation. The so-called “Golden Rule” argument “urges the jurors to place themselves in the position of plaintiff or to allow such recovery as they would wish if in the same position.” Myrick v. Stephanos, 220 Ga. App. 520, 522 (1996); see also Jackson v. State, 282 Ga. 494, 499 (2007); Futch v. State, 286 Ga. 378, 382-83 (2010). However, “[i]t is improper because it asks the jurors to consider the case, not objectively as fair and impartial jurors, but rather from the biased, subjective standpoint of a litigant.” Myrick at 522. Furthermore, invocation of the so-called Golden Rule is reversible error. Id. For these reasons, this Court should prohibit any jury argument that implicates the Golden Rule.

This includes Plaintiff’s “Reptile” arguments and questions concerning safety, safety rules and safest decisions from the book by David Bull and Don Keenan, Reptile: The 2009 Manual of The Plaintiff's Revelation. Those questions and arguments are nothing more than thinly-veiled Golden Rule arguments. “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 could have occurred within the community—which includes the jurors and their

families. As shown by the following quotations from *Reptile*, the strategy is to directly or indirectly invoke the Golden Rule by asking each juror to put themselves in the same position as the Plaintiff—a position of jeopardy that calls upon survival instincts:

- So as with all things Reptilian, you show that the **safer decision for the community** (and thus the individual juror) is a fair verdict for your client. *Reptile* at 99 (emphasis added).
- **No Reptile can protect herself alone. She protects herself by protecting the community.** The concept of “No man is an island” shows the Reptile that what’s good for the community connects directly to her, individually – and is good for her. *Id.* at 149 (emphasis added).
- But the Reptile is not particularly concerned with your client. Our research revealed a different picture: the Reptile is concerned with *the Reptile* – meaning the individual juror – his world and family, their survival, and little else. *Id.* at 169 (italics in original).
- A case framed in terms of **community endangerment** is Reptilian. A hospital acquired infection case turns Reptilian when jurors see that the victim could have been anyone who walked through the doors. “Anyone” means the community. “Community” includes juror #3 and her children. *Id.* at 170 (emphasis added).
- Jurors will do what they can to keep their communities (i.e. themselves) safe when they think their efforts will work. *Id.* at 227.

Although Plaintiffs’ counsel may not specifically ask jurors to put themselves in the shoes of plaintiffs presenting arguments regarding “safety” has the same intent and mischief. That is to have jurors base their verdict not on the evidence of the case but rather on the fear that they or other members of their family or community could be injured and to have them view compensating the plaintiffs as diminishing danger to themselves and the community.

Accordingly, this Court should rule that Plaintiffs’ counsel cannot make any such argument.

DEFENDANTS' MOTION IN LIMINE NO. 11 AND MEMORANDUM OF LAW IN SUPPORT

I. MOTION IN LIMINE NO. 11

Defendants request that Plaintiffs be precluded from asking the jury to “send a message” because Plaintiffs are not seeking punitive damages.

II. MEMORANDUM OF LAW IN SUPPORT OF MOTION IN LIMINE NO. 11

Plaintiffs may ask the jury to “send a message” with its verdict. As a general matter, it is improper to argue that the jury should send a message to the defendant in a civil case where punitive damages are not sought. Norfolk Southern Railway. v. Jones, 219 Ga. App. 602 (1995). Such instructions are improper because, on their face, they urge the jury to render its verdict based on passion and prejudice. See Id. When punitive damages are not before the jury, as they are not in this case, any such argument constitutes reversible error. Id.

Accordingly, for these reasons, this Court should rule that Plaintiffs’ counsel cannot make any such jury argument.

DEFENDANTS' MOTION IN LIMINE NO. 12 AND MEMORANDUM OF LAW IN SUPPORT

I. MOTION IN LIMINE NO. 12

Defendants request the exclusion of any testimony concerning the relative financial status of the parties because such testimony is irrelevant.

II. MEMORANDUM OF LAW IN SUPPORT OF MOTION IN LIMINE NO. 12

Plaintiffs may attempt to elicit testimony concerning the relative financial status of the parties. However, absent special circumstances not present here, the financial condition of a party is irrelevant and inadmissible. Brackin v. Brackin, 222 Ga. 226 (1966); Smith v. Satilla Pecan Orchard and Stock Company, 152 Ga. 538, 545 (1922); Brunswick & Western Railroad Company v. Wiggins, 113 Ga. 842 (1901). Evidence of the parties' financial circumstances would serve only to prejudice the jury, and such evidence would not provide the jury with any information relevant to the issue of whether the Defendants are liable to Plaintiffs.

Accordingly, for these reasons, this Court should prohibit any jury argument that implicates a party's financial status.

DEFENDANTS' MOTION IN LIMINE NO. 13 AND MEMORANDUM OF LAW IN SUPPORT

I. MOTION IN LIMINE NO. 13

Defendants request the exclusion of any lay testimony concerning medical diagnoses because a lay witness is not competent to give such testimony.

II. MEMORANDUM OF LAW IN SUPPORT OF MOTION IN LIMINE NO. 13

Evidence regarding references to medical opinions by Plaintiffs' treating healthcare practitioners, other than by physician testimony, either in person or introduced by deposition, are inadmissible. The diagnosis and potential continuance of a disease are medical questions to be established by physicians as expert witnesses and not by lay persons. Eberhart v. Morris Brown College, 181 Ga. App. 516 (1987). "A lay witness is not competent to give what amounts to a medical opinion relative to [her] injuries or the effect thereof." Eberhart, supra. See also Bowles v. CSX Transportation, Inc., 206 Ga. App. 6 (1992); Magnan v. Miami Aircraft Support, Inc., 217 Ga. App. 855 (1995).

Accordingly, the Court should exclude any testimony or evidence concerning lay testimony with regards to medical diagnoses.

DEFENDANTS' MOTION IN LIMINE NO. 14 AND MEMORANDUM OF LAW IN SUPPORT

I. MOTION IN LIMINE NO. 14

Defendants request the exclusion of all references to any liability insurance policies held by Defendants, including the fact that Defendants' counsel has been retained by any insurance company.

II. MEMORANDUM OF LAW IN SUPPORT OF MOTION IN LIMINE NO. 14

Reference to insurance. The Court should exclude all references to any liability insurance policies held by Defendants. Insurance is irrelevant to the issues in this case and would be highly prejudicial if made known to the jury. See City Council of Augusta v. Lee, 153 Ga. App. 94, 99 (1980). The Georgia appellate courts have repeatedly declared that "not only is a liability insurance policy of a litigant not admissible in evidence, but disclosure to the jury of the mere existence of such a contract is grounds for a mistrial." Moore v. Price, 158 Ga. App. 566, 567 (1981); See also Denton v. Con-Way Southern Express, 261 Ga. 41, 42 (1991) (recognizing that introduction of insurance can be grounds for mistrial because the evidence is "highly prejudicial and can influence the entire case").

In light of the irreversible prejudice Defendants would suffer should the jury learn of their insurance, Plaintiffs should not be allowed to do indirectly what they cannot accomplish directly. For example, the Plaintiffs should not be permitted to question Defendants' experts about their medical malpractice insurance in an attempt to illustrate bias. The logic of this exclusionary rule also extends to bar reference to the affiliation of an expert witness with the Defendants' insurers. Thomas v. Newnan Hospital, 185 Ga. App. 764 (1988) (upholding trial court's exclusion of cross-examination related to expert's relationship as consultant to insurance

carrier for defendants). Any minimal probative or impeachment value that might be found in this evidence would be heavily outweighed by its prejudicial impact. See, e.g., Denton, 261 Ga. at 42; Moore, 158 Ga. App. at 567. Therefore, all evidence and testimony regarding insurance coverage should be excluded from the trial of this case.

***Voir dire* questions concerning liability insurance.** Under Georgia law, attorneys are expressly prohibited during *voir dire* from questioning the jury as to insurance when the trial court, in qualifying the jury panel, has previously asked the proper qualifying questions. Whatley v. Sim Grady Machinery Company, 218 Ga. 838 (1963); Corley v. Harris, 171 Ga. App. 688 (1984).

It is anticipated that the Court will qualify the jury as to whether there are any officers, directors, shareholders or employees of Defendants' professional liability insurer. Beyond this question from the Court, Defendants object to the Plaintiffs further addressing the jury or potential jurors on this subject matter, as such questions would imply insurance coverage and would constitute an improper reference to the existence of liability coverage for the Defendants. Such questions would be improper, irrelevant, highly prejudicial, and should not be permitted in *voir dire* or otherwise. See Chambers v. Gwinnett Comm. Hosp., Inc., 253 Ga. App. 25 (2001); Warren v. Ballard, 266 Ga. 408 (1996).

Hiring by Insurance Company. Any evidence that Defendants' counsel is retained by any insurance company is inadmissible. Strickland v. Stubbs, 218 Ga. App. 279 (1995).

DEFENDANTS' MOTION IN LIMINE NO. 15 AND MEMORANDUM OF LAW IN SUPPORT

I. MOTION IN LIMINE NO. 15

Defendants request the exclusion of any and all evidence of other claims, lawsuits, or malpractice claims made against Defendants.

II. MEMORANDUM OF LAW IN SUPPORT OF MOTION IN LIMINE NO. 15

The Court should disallow evidence of other claims, lawsuits, or claims for malpractice filed against Defendants. Such evidence would be irrelevant and prejudicial, and would distract the jury from the issues in this case.

O.C.G.A. § 24-4-404(b) states that “[e]vidence of other crimes, wrongs, or acts shall not be admissible to prove the character of a person in order to show action in conformity therewith.” Courts have interpreted this Code Section to hold that, as a general rule in a suit for negligence, evidence of the Defendant's similar acts or omissions on other and different occasions are not admissible. Holt v. Grinnell, 212 Ga. App. 520, 521 (1994); Gunthorpe v. Daniels, 150 Ga. App. 113 257 S.E. 2d 199 (1979).

The Georgia Court of Appeals has stated:

The general character of parties and especially their conduct in other transactions are irrelevant matters. A party's conduct on the occasion at issue in the case may be proved only by the facts of that event and not by evidence of the party's prior acts or general character for carelessness or recklessness. Such evidence is not probative of the issue at hand and may prejudice the jury against the party as to the question of liability in the particular case. One party is not permitted to influence the jury to find against the other party on account of some act which he may have committed on another occasion, in a different situation and with other parties.

Taylor v. Racetrac Petroleum, inc., 238 Ga. App. 761, 762 (1999) (citations omitted). These principles are solidly embedded in Georgia law. See, Royal v. Ferrellgas, Inc., 254 Ga. App. 696, 701 (2002).

Georgia courts have ruled on numerous occasions that evidence of other transactions cannot be used as evidence to establish wrongdoing. See, Royal v. Ferreilgas, Inc., 254 Ga. App. 696 (2002) (evidence of prior code violations excluded); Ament v. Bennett's Fine Jewelry, 249 Ga. App. 683 (2001); Taylor v. Racetrac Petroleum, Inc., 238 Ga. App. 761 (1999); State Farm Mut. Auto. Ins. Co. v. Drury, 222 Ga. App. 196 (1996) (evidence of history of tardy premium payments excluded as evidence that insured failed to timely pay premium).

Georgia courts have been especially careful to exclude evidence of prior acts in medical malpractice cases. See, Byrd v. Medical Center of Central Ga., Inc., 258 Ga. App. 286 (2002); Williams v. Memorial Medical Center, Inc., 218 Ga. App. 107 (1995); Johnson v. Myers, 118 Ga. App. 773 (1986). In Johnson v. Myers, the trial court prohibited the plaintiff from asking the defendant, an orthopedic surgeon, about other, similar operations performed at another hospital where staff members of that hospital had requested that he curtail his use of the hospital because they believed his operations to be excessive. 118 Ga. App. at 775. The Court of Appeals upheld the trial court's exclusion of the evidence. Id. In Byrd, the Court of Appeals held that the trial court properly refused to allow the plaintiff to introduce evidence about an unrelated professional disciplinary action taken against the defendant doctor. 258 Ga. App at 292.

The only facts relevant to *this* case are those pertaining to Defendants' care of Plaintiffs, and not treatment provided to other patients. Plaintiffs should be required to try their case based upon relevant facts and should not be permitted to make a general assault on the character and medical abilities of Defendants. Such evidence would distract the jury, prejudice them against Defendants, and force Defendants to defend the care of other patients, thereby unnecessarily expanding the scope of the trial.

Accordingly, the Court should exclude any testimony or evidence concerning other claims, allegations, or lawsuits involving Defendants.

This 18th day of February, 2016.

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CERTIFICATE OF SERVICE

This is to certify that I have served true and correct copies of **DEFENDANTS' MOTIONS IN LIMINE** upon all counsel of record by U.S. Mail to said parties at their last known addresses as follows:

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This 18th day of February, 2016.

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