

community.

Of Reptiles and Velcro: the Brain's Negativity Bias and Persuasion, 15 Nev. L.J. 605. 620 (2015). Under Georgia law, jurors are only permitted to take “protecting the community” into account in the second phase of a bifurcated trial in which an award of punitive damages is at issue. In all other circumstances, it is improper to appeal to that allegedly reptilian instinct by suggesting that there is more at stake in a case than the legal rights of the parties then before the Court. As was stated by the Supreme Court of Missouri,

The trial court did not view or understand plaintiff's argument to be a request for damages adequate to compensate for injury and expense but rather a request for a money verdict adequate to satisfy those items and also adequate to perform the function of deterring others from like conduct. It is, of course, true, as plaintiff argues and Prosser in his *Law of Torts*, Fourth Edition, p. 23, observes, that compensatory damage verdicts, in themselves, serve to admonish others that if they negligently injure another they will be required to compensate him with money damages. That this admonishment has the overall social effect of deterring like conduct and the prevention of harm cannot be doubted. Nevertheless, juries cannot be told directly or in effect that they may consider punishment or deterrence as an element of damages and include a sum of money in their verdict so as to punish the defendant or deter others from like conduct unless the pleadings, evidence and instructions warrant the separate submission of punitive damages under the law. To do otherwise, would eliminate the distinction between compensatory and punitive damages, a distinction long part of the law of this state, and would cloud every verdict to a point where the court could not know whether the compensatory damage verdict did or did not include a punitive sum.

Smith v. Courter, 531 S.W.2d 734, 747-748 (Mo. 1976).¹ Missouri is not the only State in which Courts have evaluated the “send them a message” argument and found it to be improper in compensatory damages cases. See, e.g., Jackowitz v. Lang, 975 A.2d 531, 539 (N.J. Sup. Ct. App. Div. 2009) (“The case law informs us that the use of a ‘send a message’ argument is clearly inappropriate in criminal cases, may be inappropriate in punitive damage cases, and is clearly inappropriate in civil compensatory damage cases.”).

A health care practitioner is liable to a patient in compensatory damages if he or she makes a decision, or performs a medical procedure, or acts or fails to act in a setting in which the exercise of professional judgment is required, and that conduct is found to not conform to the applicable standard of care. Expert testimony is required to establish a violation of the standard of care. Here, Ms. DePew made the decision to perform an injection upon Ms. Dixon dorsally rather than ventrally. If there is expert testimony that performing injections of the kind received by Ms. Dixon at AppleCare dorsally violates the applicable standard of care, that is a basis for recovery for malpractice, assuming it resulted in harm. If there is such expert

¹ This case was overruled in Tune v. Synergy Gas Co., 833 S.W.2d 10 (Mo. 1994), but the basis for doing so reinforced rather than weakened the prohibition against use of the “send them a message” argument in civil cases involving only claims for compensatory damages. Smith v. Courter held that such an argument is a ground for reversal only if the amount of the verdict is excessive. Tune held that when such arguments are made, there is a rebuttal presumption of error without regard to whether the verdict was excessive.

evidence, evidence on why performing the procedure dorsally is fatally flawed and why the injection should have been given ventrally is relevant and admissible. However, if there is no such evidence, it would be both irrelevant and prejudicial to present evidence to the effect that although Ms. DePew's decision on where to administer the injection did not violate the standard of care, she really should have done it another way because the risk of harm would have been greatly reduced. The reason for that should be obvious. Whatever harm was done to Ms. Dixon has been done, and if she has been harmed by medical negligence she is entitled to be compensated for her loss. But evidence that another procedure should have been used, even if the procedure that was used did not violate the applicable standard of care, is irrelevant to establishing liability in this case, because a decision to perform a procedure which is permissible under the standard of care cannot, as a matter of law, be found to be an act of medical negligence. Suggesting that a health care practitioner who elected to follow a procedure that did not violate the standard of care should have used a different, safer procedure is an argument that relates not in the slightest to Plaintiffs' claims in this case. It implies that perhaps the provider should somehow be instructed to not use the same admittedly permissible but allegedly more risky procedure in the future. That is the function of an award of punitive damages. Plaintiffs assert that Defendants have acknowledged that the appropriateness of what

Ms. DePew did is a relevant issue, but that assertion is without merit because in the context of medical malpractice cases, “appropriateness” means “consistent with the standard of care.”

The Court considered whether it would be proper to admit the dorsal versus ventral evidence under a limiting instruction that such evidence could not be used to enhance any award of damages that might be awarded to Plaintiffs for the purpose of deterring the conduct of Defendants. However, to be accurate the instruction would also need to advise the jurors that such evidence is not relevant to the liability of Plaintiffs to Defendants unless there is expert evidence that the dorsal injection violated the applicable standard of care. The question then becomes “what is such evidence relevant to?” Plaintiffs’ contention it should be heard by the jury because that would “help the jury understand the whole story” fails in light of the prohibition against the admission of evidence which is not relevant to any issue the jury must decide. If the choice of an injection site did not violate the standard of care, evidence which compares the relative risks inherent in choosing that site over a different site is both irrelevant and prejudicial. In ordinary personal injury litigation a jury is authorized to base its decision on whether a defendant exercised reasonable care by considering where the conduct in question fell within the range of possible ways of behaving that were available in a given situation. Medical malpractice cases are

different. Juries cannot find a health care practitioner liable for malpractice based upon evidence that an alternative means of executing a procedure would have reduced the risk of harm, absent evidence the procedure employed violated the standard of care. Unless there is expert testimony that Ms. DePew's decision to do the injection dorsally violated the standard of care, Plaintiffs shall make no reference to the alleged superiority of doing injections ventrally or to the diminution in risk the use of that procedure allegedly would have produced. Defendants' motion to bar such evidence and argument is GRANTED, subject to reconsideration if the requisite expert evidence referred to above is presented.

SO ORDERED, this 19th day of February 2016.



STEPHEN G. SCARLETT, SR.
Judge, Superior Courts
Brunswick Judicial Circuit