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| STATE OF SOUTH CAROLINA | ) | IN THE COURT OF COMMON PLEAS |
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| COUNTY OF GREENVILLE | ) | |
| David Sherman and Harriett Sherman, | ) | C/A No. 2014-CP-23-00535 |
| | ) | |
| *Plaintiffs*, | ) | |
| | ) | |
| Versus | ) | **DEFENDANTS JAMES ROBERT MONROE, JR., M.D. AND GREENVILLE UROLOGY, P.A.'S NOTICE OF MOTION AND MOTION *IN LIMINE* TO EXCLUDE "REPTILE" LITIGATION TACTICS** |
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| James Robert Monroe, Jr., M.D., Palmetto Urology, P.A. d/b/a Palmetto Greenville Urology, and Bon Secours St. Francis Health System, Inc., | ) | |
| | ) | |
| *Defendants*. | ) | |

TO: THE HONORABLE ROBIN B. STILWELL:

Defendants James Robert Monroe, Jr., M.D. ("Dr. Monroe") and Greenville Urology, P.A. (collectively "these Defendants"), hereby respectfully move this Court for an Order *in Limine* to exclude "Reptile" litigation tactics.

## I. BACKGROUND.

This case arises from medical treatment provided by Dr. Monroe, a urologist, to David Sherman ("Plaintiff"). Dr. Monroe treated Plaintiff from 2006 until 2013. Plaintiffs allege that Dr. Monroe was negligent for failing to recommend a prostate biopsy in 2010 and 2011 to rule out cancer, which allegedly caused the cancer to progress to an advanced stage with low probability of cure, resulting in Plaintiff's death. Dr. Monroe and the Defendants' expert witnesses will testify that Dr. Monroe performs biopsies on a routine basis and that no biopsy was warranted in 2010 or 2012, and furthermore when a biopsy was indicated in 2013, Dr. Monroe recommended one and obtained Plaintiff's informed consent for the same.

The relevant factual questions for the jury, therefore, are narrow: whether Dr. Monroe appropriately responded to Plaintiff's overall clinical picture from 2010 through 2012. The Defendants suspect that one strategy Plaintiff's counsel may seek to employ at the trial of this case is to follow the "Reptile" theory of provoking a fear response from jurors by referencing a "safety rule" under which the jury is encouraged to decide the case on the basis of personal interest and bias rather than on the evidence.

For the following reasons, these Defendants move *in limine* and ask that the Court admonish and instruct Plaintiff's counsel that such manipulative and fear-based tactics will not be permitted at trial.

## II. INTRODUCTION TO THE REPTILE.

The "Reptile" theory originates from *REPTILE: The 2009 Manual of the Plaintiff's Revolution.* The premise of the theory is for the plaintiff to establish a broad, over-generalized "umbrella rule" or "safety rule" that plaintiff will allege was violated by Defendants. The *Reptile* authors argue that the valid measure of damages for a Reptile plaintiff is not the amount of harm actually caused in a case, but instead the maximum harm that a defendant's alleged conduct *could have* caused. The intent of this strategy is to prime the jury to return a verdict for the plaintiff out of fear of safety for themselves and their community.

While traditional trial strategies appeal to jurors through reasoning and the evidence, *Reptile* encourages the spreading of "tentacles of danger" to intimidate the jury into deciding the case based upon manufactured fear for their own safety and that of others. The basis of the *Reptile* tactics is that each juror has an inner "reptile" that can be awakened by sensing danger, real or imagined. The theory

goes that if a juror begins to fear of his or her own safety, or the safety of others, emotions override reason and the juror will make decisions out of self-preservation rather than on the evidence.

The *Reptile* teaches, therefore, that **"in trial, your goal is to get the juror's brain out of fritter mode and into survival mode. You do this by framing the case in terms of Reptilian survival.**" *Id.* at 18 (emphasis added). Shockingly, the *Reptile* defines "brain fritter," as "free to do whatever it wants." *Id.* The Plaintiffs are counting on inciting in jurors sufficient fear for personal and community safety that they no longer objectively weigh the evidence or follow the Court's instructions as required by South Carolina Law. The *Reptile* teaches that fear wins over facts.

The *Reptile* strategy encourages plaintiff attorneys to "spread the tentacles of danger" beginning in *voir dire*, opening statement and throughout the trial as a means to manipulate the jurors into a favorable verdict. *Id.* at 35; 58; 138. The *Reptile* is promoted as a means of *exacting revenge for tort reform. See id. at Chapter 3 "*The Toxicology of Tort- "Reform"; Chapter 4 (*Antidote for Tort- "Reform" Poison*) (emphasis added). The strategy violates the golden rule on the most fundamental level and has no place in South Carolina courtrooms. Further, it runs afoul of South Carolina Rules of Evidence 401 and 403. Finally, it deprives defendants of their constitutional rights to a fair and impartial trial.

Such tactics to intentionally inject "terror and anxiety" into the courtroom should not be allowed in this case, and Defendants respectfully request that the Court prohibit Plaintiff from the use of *Reptile* tactics, including in *voir dire*, as they violate South Carolina law.

The *Reptile* strategy calls for the Plaintiff to establish certain "rules" at trial because "**errors and mistakes don't motivate verdicts (especially med mal verdicts); patient safety-rule violations do**." *Reptile*, p. 243 (emphasis added).

**a. Traditional Reptile Questions**

These "rule violations" are created by plaintiffs, in part, through the use of hypothetical safety questions. Such questions are designed so that plaintiffs can argue that any violation of a broad, overgeneralized "safety rule" is a threat to the jurors personally and the community as whole.

The following are sample hypothetical questions found in the *Reptile* that must be answered in the affirmative in order to execute the Reptile strategy:

- Physicians are not allowed to needlessly endanger patients?
- That's standard of care?
- When diagnosing or treating, do doctors make choices?
- Often, several available choices can achieve the same benefit?
- Sometimes some of those are more dangerous than others?
- So you have to avoid selecting one of those more dangerous ones?
- Because that is what a prudent doctor would do.
- Because when the benefit is the same, the extra danger is not allowed.
- The standard of care does not allow extra danger unless it might work better or increase the odds of success.
- So needless extra danger violates the standard of care?
- And there's no such thing as a standard of care that allows you to needlessly danger a patient.

*Reptile*, pp. 64-66.

Another *Reptile* line of questioning is as follow:

- In your judgment, is violating a safety rule prudent?
- Is needlessly endangering the public prudent?
- Everything a doctor does should be ruled by safety?
- A physician must not select choices containing needless risk?
- So if there's more than one way to achieve the same benefit a physician has to choose the one with the least risk?
- Because if there's extra risk, that's needless danger?
- Which would not be prudent?
- No matter how many doctors do it?

## III. THE REPTILE TACTICS SUBVERT THE OBJECTIVITY OF THE JURY AND SHOULD BE PROHIBITED.

The *Reptile* lines of questioning do not seek to address the standard of care for a physician in Dr. Monroe's shoes but instead seeks to establish generalized public safety speculation with the intent to mislead the jury. This emphasis on "safety rules" and their alleged violations moves the focus of the jury beyond the realm of the Plaintiff's burden in a medical malpractice case to show: "(1) 'the generally recognized practices and procedures which would be exercised by competent practitioners in a defendant doctor's field of medicine under the same or similar circumstances,' and (2) a departure by the defendant 'from the recognized and generally accepted' standards, practices and procedures....' " Fletcher v. Medical University of South Carolina, 390 S.C. 458, 702 S.E.2d 372 (Ct. App. 2010) (*citing* Jones v. Doe, 372 S.C. 53, 61, 640 S.E.2d 514, 518 (Ct. App. 2006)).

This speculation as to public safety dangers, which seeks to trigger an irrational response in a jury separate and apart from the facts and evidence presented at trial, has no place under South Carolina law. The focus on "absolute

safety" and the resulting representation to a jury that any violation of a manufactured "safety rule" is equivalent to negligence is especially inappropriate in South Carolina as our Supreme Court has acknowledged that "every medical decision encompasses varying degrees of danger." Pittman v. Stevens, 364 S.C. 337, 343, 613 S.E.2d 378 (2005).

**a. Reptile strategies are improper in *Voir Dire***

*Voir dire*, like the trial itself, should be limited to the purpose allowed under South Carolina law and should not serve as a forum for plaintiff to spread the "tentacles of danger" over the jury panel. "The purpose of *voir dire* is to insure each juror can make a decision based on the evidence presented, rather than hypothetical evidence." State v. South, 285 S.C. 529, 331 S.E.2d 775 (S.C. 1985). Any use by the Plaintiff of the Reptile tactics, which by definition are hypothetical overgeneralizations meant to take a jury off course, should be prohibited during *voir dire*.

**b. *Reptile* strategies are improper "golden rule" arguments.**

The *Reptile* strategy is nothing more than a backdoor attempt to make golden rule arguments that are improper as a matter of law. South Carolina law prohibits the use of golden rule questions asking jurors to put themselves in the shoes of a party which has the tendency to arouse passion and/or prejudice. The South Carolina Court of Appeals, and numerous other courts, have prohibited "golden rule" arguments in both criminal and civil settings. State v. McDaniel, 320 S.C. 33, 462 S.E.2d 882 (Ct.App.1995) (reversing conviction and remanding for new trial in sexual assault/robbery case where solicitor used "you" or a form of "you" some forty-five times, asking the jury to put themselves in place of the victim); Forrestal v.

Magendantz, 848 F.2d 303, 309 (1st Cir.1988) (stating golden rule argument is universally condemned); U.S. v. Teslim, 869 F.2d 316, 328 (7th Cir.1989) (holding it is improper for prosecutor to urge jurors to place themselves in party's shoes); State v. McHenry, 276 Kan. 513, 78 P.3d 403, 410 (2003) (golden rule arguments are not allowed because they encourage jury to depart from neutrality and decide case on improper basis of personal interest and bias); Caudill v. Commonwealth, 120 S.W.3d 635, 675 (Ky.2003) (prohibited golden rule argument is one in which prosecutor asks jurors to imagine themselves or someone they care about in position of crime victim); State v. Carlson, 559 N.W.2d 802, 811-812 (N.D.1997) (golden rule argument is improper and should be avoided in civil and criminal actions); Hayes v. State, 236 Ga.App. 617, 512 S.E.2d 294, 297 (1999) (an improper golden rule argument asks jurors to consider case, not objectively as fair and impartial jurors, but rather from biased, subjective standpoint of litigant or victim). Further, "irrelevant information or inflammatory rhetoric that diverts the jury's attention from its proper role or invites an irrational, purely subjective response should be curtailed." Von Dohlen v. State, 360 S.C. 598, 602 S.E.2d 738 (SC 2004) (citing People v. Haskett, 30 Cal.3d 841, 180 Cal.Rptr. 640, 640 P.2d 776 (1982)).

The *Reptile* strategy is substantially similar to the improper golden rule arguments as it asks jurors to base their verdict not on the evidence of the case but rather on the fear that they or other members of the community could be injured, just as the plaintiff, by the immediate danger of the defendant. *Reptile* tactics, like golden rule arguments, should be prohibited at this trial to preserve juror objectivity.

### c. The *Reptile* Tactics Run Afoul of SCRE 401 and 403

The very premise of the Reptile strategy is to subvert the jury's objectivity and to provoke a subjective response based upon fear. This is incompatible with the jury's duty to weigh the relevant evidence. Rule 401, South Carolina Rules of Evidence (SCRE) states, "'[r]elevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE. Further, "evidence which is not relevant is not admissible." Rule 402, SCRE. The very goal of the *Reptile* strategy is to overgeneralize a very broad "safety rule" to the point that it is no longer directly relevant solely to the facts of the particular case at hand. *Reptile* questions that are hypothetical and generalized are not relevant to the issue of whether Dr. Monroe met the applicable standard of care during her treatment of Plaintiff in late 2009 and early 2010.

Further, even if the evidence is relevant to the issues in this case, it should be excluded under Rule 403, SCRE, because its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury. The *Reptile* strategy is an intentional shift away from the specific facts of the case and is intended to confuse the issues and mislead the jury. To ensure that the objectivity of the jury remains undisturbed and the jury adheres to its duty to weigh the evidence, Plaintiffs should be prohibited in *voir dire* or trial from utilizing the manipulative *Reptile* techniques.

## IV. THE REPTILE'S "SAFETY RULES" GIVE NO DEFERENCE TO THE ACTUAL STANDARD OF CARE.

Under *Reptile* tactics, "[t]o gauge whether a defendant's act or omission was negligent-and whether it represents a community danger, jurors need answers to

these three questions: 1. How likely was it that the act or omission would hurt someone? 2. How much harm could it have caused? 3. How much harm could it cause to other kinds of situations?" *Reptile* at p. 31.

These questions are purportedly meant to stir the Reptile's "dark side" and are much different from the legal burden of proof a Plaintiff must meet at trial. Specifically, the authors of Reptile claim that "**[t]he Reptile has a darker and more potent force: anxiety and terror**, which she uses to keep you from doing what she does not want." *Id.* at pp. 18-19 (emphasis added). As the Reptile authors explain, "**when we face decisions that can impact the safety of our genes, *the Reptile is in full control of our emotions as well as what we think is our rational logic***." *Id.* at p. 19 (emphasis added). To intentionally direct the jury away from deciding whether the burden of proof on the actual elements of negligence has been met offends every notion of justice at trial. The jury should not be manipulated into making decisions based on anxiety and fear rather than on evidence and the focus should not be shifted away from the elements of medical negligence under South Carolina law.

## V. CONCLUSION

The hallmark of a fair judicial process is a fact finder who can objectively weigh the facts in evidence and apply the law as instructed by the Court. *Reptile* litigation tactics expressly encourages its adherents to spread the "tentacles of danger" at trial to manipulate the jury to make decisions based upon fear and anxiety rather than on the evidence. The Defendants are entitled to a jury that can dispassionately weigh the evidence and apply the law. These Defendants, therefore, respectfully request that the Court ensure their right to a fair and impartial trial,

and prohibit Plaintiff's counsel from using *Reptile* litigation tactics at any portion of this trial. For the foregoing reasons, Defendants respectfully request that the Court issue an Order in Limine excluding "Reptile" litigation tactics.

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*Attorneys for Defendants James Robert Monroe, Jr., M.D. and Greenville Urology, P.A.*

December_____, 2015
Charleston, South Carolina

***CERTIFICATE OF SERVICE***

I certify that on this date a copy of the ***DEFENDANTS JAMES ROBERT MONROE, JR., M.D. AND GREENVILLE UROLOGY, P.A.'S NOTICE OF MOTION AND MOTION IN LIMINE TO EXCLUDE "REPTILE" LITIGATION TACTICS*** was served on each party or counsel of record by ☐ mailing, ☐ e-mailing, ☐facsimile, or ☐hand delivery in the manner prescribed by the applicable Rule of Civil Procedure.

This _____ day of_____, 2015.

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