

IN THE SUPERIOR COURT OF GWINNETT COUNTY

STATE OF GEORGIA

TYRONE WILBURN,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action File
	)	No. 15-A-06468-2
PAUL DUMBRAVICEAN, et al	)	
	)	
Defendants.	)	
_____	)	

**DEFENDANTS’ MOTION IN LIMINE TO EXCLUDE “REPTILE”  
TESTIMONY AND PROHIBIT “REPTILE” LITIGATION TACTICS**

**COME NOW**, Defendants Paul Dumbravicean and Metro Ambulance Services, Inc. d/b/a American Medical Response and move this Honorable Court to exclude the introduction of certain matters that are irrelevant or prejudicial to the material issues of this case and show the Court as follows:

**I. INTRODUCTION & STATEMENT OF FACTS**

This is a simple automobile accident case for which Defendants have already admitted liability. Nonetheless, it is apparent that Plaintiff’s strategy is to follow the *Reptile* theory of provoking a fear response in the jurors by referencing generalized “safety rules” under which the jury is encouraged to decide the case on the basis of personal interests rather than on the evidence presented and the applicable law. Plaintiff clearly intends to rely on allegations that Defendant AMR and its employees other than the driver in this case are engaged in policies and practices that are dangerous to the community in which the jurors are members.

A clear indication of Plaintiff's intention to rely on the *Reptile* theory is contained in Plaintiff's Amended Complaint in which, rather than focusing on the applicable standard of care requiring Plaintiff to operate his vehicle with reasonable care, Plaintiff alleges that Defendant Dumbravicean's violation of the rules of the road and his employer's company policies amounted to negligence and negligence *per se*. (Am. Compl. ¶¶ 14-15). Moreover, Plaintiff alleges in the Amended Complaint that "AMR has knowingly and intentionally engaged in a pattern and policy of allowing dangerous driving by its employees in company-owned vehicles. AMR has turned a blind eye to the dangerous driving by its employees, and has failed to enforce its own corporate policies despite having actual knowledge of its employees' violations of both AMR's so-called 'Safety Policy' and of its employees' violations of Georgia laws including the Rules of the Road intended to promote the safety of the public." (Am. Compl. ¶ 36).

Plaintiff's intentions of pursuing a *Reptile* theory case are further demonstrated by the fact that, despite the fact that this case involves rules of the road for which every licensed driver should be aware (i.e. speeding and failure to obey a traffic signal) and that Defendants admitted liability months ago, Plaintiff plans to call a "liability expert" to testify at trial that Defendant AMR failed to properly train its employees to operate its ambulances. Moreover, Plaintiff states in his discovery responses that the expert will opine at trial that AMR should not have accepted the contract with DeKalb County if it was not able to insure that it could "prevent future harm to either the employees of AMR or the public at large."

(Plaintiff's Supplemental Responses to Defendant Metro Ambulance Services, Inc.'s First Interrogatories, attached hereto as Exhibit "A").

These tactics are improper and highly prejudicial. Defendants therefore move the Court to prohibit Plaintiff's counsel from engaging in such tactics and instruct Plaintiff's counsel that such manipulative and fear-based tactics will not be permitted at trial.

## II. ARGUMENT & CITATION OF AUTHORITY

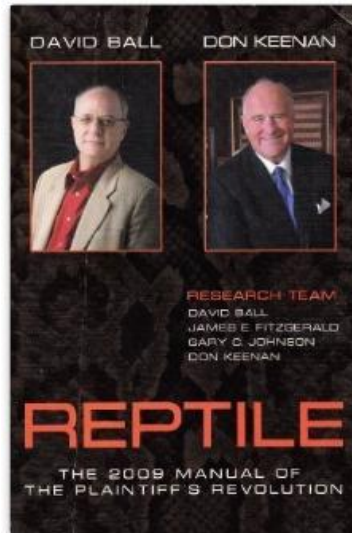
### 1. Reptile tactics are the product of plaintiffs' lawyers attempts to change the focus away from this case and increase verdicts based on fear

Defendants move for an Order prohibiting Plaintiff from eliciting "*Reptile*" testimony and from using "*Reptile*" tactics.<sup>1</sup> The primary goal of the *Reptile* approach is to change the focus from the facts of this one case and, instead, for the Plaintiff, try a case that, according to the *Reptile* adherents, has broad-ranging societal implications. To do this, and in an attempt to lower the legal burden they are required to meet, many plaintiff attorneys resort to the "*Reptile* Theory." The theory was first introduced by plaintiff attorney Don Keenan and his collaborator

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<sup>1</sup> This is a real issue in this case, as one of Plaintiff's counsel, Mr. Allen, was involved in the research that went into the formulation of the *Reptile* theory and practice and specifically advertises himself as a *Reptile* lawyer. His website boasts, "[Charles Allen] was a core member of the research team for the *Reptile* from the beginning. His speech topics include how to use the reptile when working up a case to include, depositions and trial. (<http://www.charlesallenlawfirm.com/Profiles.html>) (last visited June 7, 2016). It further states, "Charles [Allen] presently speaks at seminars across the country to help lawyers learn how to use the *Reptile* and other techniques for depositions and trial preparation." (<http://www.charlesallenlawfirm.com/>) (last visited June 7, 2016).

David Ball<sup>2</sup> in their book entitled REPTILE: THE 2009 MANUAL OF THE PLAINTIFF'S REVOLUTION.



According to Ball and Keenan, the *Reptile* Theory purports to center on the primitive part of the human brain, affectionately referred to as “the reptile,”<sup>3</sup> which controls a person’s survival instincts. The reptilian brain theory was aptly summarized by David Ball in his article *Damages and the Reptilian Brain* published by the American Association for Justice, in which Ball writes:

Whenever anything can potentially affect those chances of survival—even a little--this most primitive thing in your head grabs full control of the entire brain. This includes control of your logical, emotional, and other decision-making resources. As soon as a survival danger crops up, the reptile rearranges the brain’s priorities, placing the reptile’s only concern--survival--on top.

\* \* \*

We like to believe that we base our decisions on rationality and logic. Sorry. Logic is but a fragment of our brains’ functioning. It controls little.

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<sup>2</sup> In *Reptile*, David Ball describes himself as “most influential trial consultant” in America. He was trained in engineering and professional theater direction and writing. REPTILE: THE 2009 MANUAL OF THE PLAINTIFF'S REVOLUTION, back cover.

<sup>3</sup> Throughout the book, the authors refer to the reptile as “she.”

When it comes to survival, logic is subservient to the reptile. When the two conflict, logic either adapts to the reptile's needs or is ignored. When people make survival-related decisions, they obey the reptile--not logic, emotion, intuition, or abstract notions such as justice.

And the reptile's imperative is that safer--even just a little safer--is the only acceptable choice.<sup>4</sup>

Ball advocates "get[ting] the reptile on your side" in jury cases by showing the jury that the defendant's conduct represents a danger to the survival of the jurors and their families. Ball specifically writes:

First, you need to show that the reptile is in danger. When she detects a survival danger, the reptile protects her genes by impelling the juror to protect himself or herself and the community.

In your case, the defendant's misconduct represents a danger that connects to the juror and his or her family.

The second thing you need to show the reptile is that a full and fair damages verdict will diminish the danger for the juror and his or her family--that the proper verdict will enhance community safety by discouraging that kind of dangerous behavior and, conversely, that an improper verdict will not only allow but also encourage it.

The result: The reptile sees a proper damages verdict as her best available choice for survival, *even if it affects her survival by only a very small amount*. So the reptile helps us in "small" cases as much as she does in "large" ones.<sup>5</sup>

The *Reptile* authors argue that no life form is immortal so our existence presupposes the survival of our genes from one generation to the next. If threatened, according to the *Reptile* theory, the most primitive part of the human brain will make us act to protect ourselves and our genes. Otherwise, the primitive

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<sup>4</sup> David Ball, *Damages and the Reptilian Brain*, 45 Trial 24, 24 (Sept. 2009).

<sup>5</sup> *Id.* (emphasis in original).

brain sleeps or “fritters.” Ball and Keenan assert that the plaintiff’s attorney must wake up the reptile in the jurors’ brains and perceive the events that caused injury as a threat to the jurors’ survival. “So 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.”<sup>6</sup>

The basis of the *Reptile* strategy is to appeal to the “reptilian” or “survivalist” instincts of each juror. According to the authors, a juror’s “reptilian” nature will force the juror to “protect him[self] and the community” when the juror senses he or she is in danger as a result of the defendants’ or defendants’ industry’s conduct.<sup>7</sup> The authors advocate that a plaintiff’s attorney must convince each juror that he or she, along with the community as a whole, is in danger as a result of the type of conduct in which the defendants allegedly engaged. Ball and Keenan write that “[t]his gives us our primary goal in trial: To show the immediate danger of the *kind of thing* the defendant did – and how fair compensation can diminish that danger within the community.”<sup>8</sup> The authors further write:

Once you have established the community danger of the defendant’s act or omission, you are most of the way to waking up the Reptile . . . **You must convey to the jurors that they are in charge of the level of required safety in this community, and that by means of their verdict they have great power . . .** You are guardians of the community.<sup>9</sup>

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<sup>6</sup> Keenan and Ball, *supra*, at 18.

<sup>7</sup> *Id.* at p. 17.

<sup>8</sup> *Id.* at 30. (emphasis in original).

<sup>9</sup> *Id.* at 38-39 (emphasis added).

Other authors have further identified and suggested trial techniques to “anger the reptile mind.” “Rule breaking” is presented as one of these trial techniques.<sup>10</sup> Plaintiffs’ attorney Frank Costilla writes that David Ball “tells us that the reptile brain perceives the primary purpose of rules as protection from harm. According to Ball, the reptilian brain, fearing that *rule breaking* by others will affect the reptile’s own safety and security and endanger its offspring, is angered by the rule breaker and thus, becomes the enforcer of sound rules.”<sup>11</sup> Costilla then notes, “If rule breaking produces anger in the reptilian mind, and if in the legal context anger can result in a higher damages verdict for the plaintiff, it is imperative to couch the defendant’s liability in terms of rule breaking in any personal injury damages case.”<sup>12</sup>

The *Reptile* arguments and tactics must be excluded and precluded because they are contrary to Georgia law, they seek to change the standard of care, they are a thinly-veiled attempt to employ the universally-outlawed Golden Rule Argument and they seek to have to the jury decide the case on something other than the facts and law of this case.

**2. In a simple road-wreck case, the *Reptile* tactics seek to change the standard of care**

One of the most important issues that faces the Court and litigants is what standard of care applies. At the outset, it must be determined what duty is owed to

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<sup>10</sup> See Frank Costilla, Jr., *Underlying Principles that Motivate Jurors to Give*, Winter 2008 AAJ-CLE 237, p.2 (2008).

<sup>11</sup> *Id.* (emphasis added).

<sup>12</sup> *Id.*

the plaintiff. In road-wreck cases, whether the driver is a commercial truck driver, an ambulance driver or an everyday driver, the standard is always the same. All drivers owe the public the duty of ordinary care. What makes the use of the *Reptile* tactic all the more offensive in this case is that Defendants have admitted liability for the accident. Nonetheless, Plaintiff insists on pressing a *Reptile* theory of public endangerment.

It is important to note that the standard of care in a road wreck case is the same no matter the caliber or type of driver. In Georgia a motorist has a duty to exercise ordinary care in the operation of a motor vehicle upon the highways. This standard applies to both non-commercial and commercial drivers. *Rios v. Norsworthy*, 266 Ga. App. 469 (2004).<sup>13</sup>

The Court of Appeals has plainly held that in cases involving commercial drivers “the relevant standard of care was the duty to exercise ordinary care under the circumstances. Where the duty is that of ordinary care, [a commercial driver] cannot be found negligent merely because he could have prevented the collision if he had exercised a heightened degree of care.”<sup>14</sup>

Under *Rios*, the standard of care is clear. *Reptile* attorneys attempt to resort to self-crafted rules or industry “best practices” to redefine the standard of care and

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<sup>13</sup> In *Rios*, the Plaintiff was operating his van in an attempt to pass a commercial tractor trailer rig driven by Norsworthy. While merging back over to avoid a head-on collision, Rios crashed into the driver’s front side of the rig. The passenger in Rios’ van sued him for negligence. Rios in turn filed a third-party complaint against Norsworthy, alleging that he caused the crash because he negligently failed to slow down or move to the right during the pass attempt so that Rios could safely complete the pass and merge back into his lane. *Id.*

<sup>14</sup> *Id.* at 473.

insinuate that a “professional driver” has a greater duty than a “normal driver.” But, that is not the law in Georgia. There is no heightened, different, or special duty of care that governs the actions of commercial drivers or operators of ambulances.

The law holds that where the duty is that of ordinary care, a driver cannot be found to be in breach of that duty if he could have prevented the collision had he exercised a heightened degree of care<sup>15</sup> in abiding by some other standard or rule.

In this matter, Plaintiff’s purported liability expert has repeatedly opined that Mr. Dumbravicean had a heightened duty. This certainly undercuts her reliability as an expert in that she is trying to create a new standard of care; and it shows exactly what the Reptile theory is intended to do. It is designed to ignore the applicable standard of care and deflect attention away from the law.

It is clear that Plaintiff will attempt to change the focus of what the law requires of an employer to a generalized safety attack. This is in complete keeping with the *Reptile* theory, which expressly instructs plaintiffs’ attorneys to disregard the legal standard of care and blatantly misinterprets the law. It notes:

[t]he 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. And the Reptile is legally right. The second-safest available choice, no matter how many “experts” say it’s okay, always violates the legal standard of care...<sup>16</sup>

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<sup>15</sup> “[T]he relevant standard of care was the duty to exercise ordinary care under the circumstances. Where the duty is that of ordinary care, [a defendant CMV driver] cannot be found negligent merely because he could have prevented the collision if he had exercised a heightened degree of care.” *Rios v. Norsworthy*, 266 Ga. App. at 473.

<sup>16</sup> Keenan and Ball, *supra*, at 62. (Emphasis omitted).

Given how this case has spiraled out of control in the last months before the close of discovery, it is unclear if Plaintiff intends to try and litigate the issue of duty and breach with regards to the accident. That should not be allowed. But, it is very clear that Plaintiff intends to try and make his individual claims against AMR ones of *Reptilian* importance. In fact, he was overt enough to state that his “liability expert” will opine that AMR should not have accepted the contract with DeKalb if it was not able to insure that it could “prevent future harm to either the employees of AMR or the public at large.”<sup>17</sup>

This is not the law and this should not be allowed.

**3. This line of questioning implies the jury should be awarding speculative damages for harm that might have occurred to the community and/or to award damages on potential harm rather than actual harm based on the facts.**

In order to get past the problems associated with actually applying the applicable standard of care or simply to inflame the jury, many *Reptile* plaintiffs argue to the jury that the Defendant is governed by societal “rules” regarding safety.<sup>18</sup> In fact, the *Reptile* book devotes an entire chapter to encouraging plaintiff attorneys to manufacture “rules” for defendants in an attempt to trigger the juror’s reptilian instinct to protect itself.<sup>19</sup> The book claims that “every wrongful defendant

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<sup>17</sup> (Expert Disclosure of Julia Fox).

<sup>18</sup> While Defendants have admitted liability for the accident, it is apparent that Plaintiff is attempting to craft a *Reptile* argument with regard to his hiring, training and supervision claims against AMR.

<sup>19</sup> David Ball & Don Keenan, REPTILE: THE 2009 MANUAL OF THE PLAINTIFF’S REVOLUTION pp. 51-73 (2009).

act derives from a choice to violate a safety rule.”<sup>20</sup> The book goes on to argue that “no needless danger’ is society’s (thus the Reptile’s) most important safety rule”<sup>21</sup>

The intent behind the “create a rule” tactic is to intentionally mislead jurors into believing that a defendant’s conduct should be judged by fictional societal “safety rules”<sup>22</sup> as opposed to the legal standards that govern the company’s conduct. The *Reptile* strategy seeks to drive jurors into “survival mode” and impel them to protect themselves and their community.<sup>23</sup> The *Reptile* “goal is to get the juror’s brain out of fritter mode and into survival mode.”<sup>24</sup> Keenan and Ball define “brain fritter” as the mindset where jurors feel “free to do whatever [they] want[.]”<sup>25</sup> *Reptile* plaintiffs accomplish this by waging a fear<sup>26</sup> campaign that begins in jury *voir dire* (if not sooner)<sup>27</sup> and continues from opening statement to closing argument.<sup>28</sup>

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<sup>20</sup> *Id.* at 54.

<sup>21</sup> *Id.* at 69.

<sup>22</sup> The *Reptile* Theory encourages plaintiffs to present “rules” to the jury, as opposed to legal standards. *See id.* at 129. A safety rule “must protect people in a wide variety of situations, not just someone who was in your client’s position. If a rule is too specific to accomplish that, then it must be a special case of a more general rule that does.” *See id.* at 52. For example, “[s]tart your opening with one or two major rules...[t]he first rule or two provide the context into which jurors can place the upcoming story of what the defendant did.” *See id.* at 129.

<sup>23</sup> *Id.* at 18-19.

<sup>24</sup> *Id.* at 8.

<sup>25</sup> *Id.*

<sup>26</sup> Practically speaking, the *Reptile* theory does not really sell fear. It is actually much baser than that. What it really seeks to sell is danger. “Fear is an emotion, whereas danger is a threat.” Ann T. Greeley, Ph.D., *A Brief Primer on the Reptile Theory of Trial Strategy: Plaintiff Psychology and the Defense Response* (2015).

<sup>27</sup> The following questions are examples of the types of questions that could be asked during *voir dire* that would fall within the gambit of *Reptile* Strategy:

Under the *Reptile* playbook, personal injury plaintiffs establish a broad, over-generalized safety rule defined as “the widest general rule the defendant violated—wide enough to encompass every juror’s Reptile.”<sup>29</sup> Examples of these simplified over-generalizations include:

- “A company is not allowed to needlessly endanger the public?”<sup>30</sup>
- “So a ‘prudent’ [company] must select the safest way. If [it] selects the second-safest, [the company is] not prudent because [it is] allowing unnecessary danger.”<sup>31</sup>

The *Reptile* authors note that a defense objection to these lines of questioning “will imply there’s something to hide.”<sup>32</sup> And—this is important—the true *Reptile* tactics seek to create the broadest rules that have no real application to the facts of the case.<sup>33</sup>

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Q: Aside and apart from money for damages, how do you feel verdicts might affect **community safety** or things like that?

Q: Do you feel you are a person that could be asked to decide some rules about **community safety** and to make those decisions?

<sup>28</sup> In closing arguments, the *Reptile* Theory advises plaintiffs: “[y]our most important Reptilian task in closing is to show how the dangers represented by this case affect the community.” Keenan and Ball, *supra* at p. 145. Further, it notes: “[a]n effective Reptilian closing funnels the entire case down to a matter of community safety versus danger.” *See id.*

<sup>29</sup> *Id.* at 55.

<sup>30</sup> *Id.* at 57.

<sup>31</sup> *Id.* at 63.

<sup>32</sup> *Id.* at 58.

<sup>33</sup> *Id.* at 60 (advising plaintiff attorneys to avoid case-specific rules, and instead craft safety rules in the most general terms to trigger the reptilian response: “very general = reptilian”); *see also id.* at 53 (encouraging attorneys to create rules that the defendant will agree with or otherwise will “reveal him[] as stupid, careless, or dishonest for disagreeing”).

All of this ignores the law. In Georgia the question of duty is one of law.<sup>34</sup> It is not a question for a layperson and it is certainly not a question for a layperson who is confronted with a non-applicable, hypothetical rule crafted by a *Reptile* lawyer meant to rile a jury or to demean the witness. The law defines the standard of care. These litigation-driven rules do not.

Simply, the applicable duty cannot be replaced with the creation of rules or guidelines. Undoubtedly, repeatedly referring to so-called “safety rules” and “guidelines” instead of the applicable standard of care will confuse and mislead the jurors by suggesting that the recognized duty is found in some “Rule Book.” But, that too is not the case. These cases are fact specific and trying to apply litigation-driven rules created by plaintiffs’ lawyers completely supplants the applicable duty and should not be allowed.

The probative value, if any, of references to safety rules and guidelines is clearly substantially outweighed by the danger of unfair prejudice. References to the alleged existence and potential violation of these “safety rules” and guidelines would cause confusion of the issues and mislead the jury into thinking that there is a cookie-cutter result mandated by the alleged “rule book.” Such a result would satisfy the goal of the *Reptile* Theory by encouraging jurors to ignore the applicable duty. Therefore, because they are irrelevant, prejudicial, and only presented to mislead the jury, such arguments should be precluded.

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<sup>34</sup> *Garvin v. Atlanta Gas Light Co.*, 334 Ga. App. 450, 453 (2015)(“the threshold issue in a negligence action is whether and to what extent the defendant owes a legal duty to the plaintiff. This issue is a question of law.”).

**4. This type of argument seeks to conflate issues of community safety with the actual issues presented in the case**

This approach also implies the jury should be awarding speculative damages for harm that might have occurred to the community and/or to award damages on potential harm rather than actual harm based on the facts. *Reptile* plaintiffs seek damages for the maximum harm that the over-generalized conduct “*could have* caused in other situations.”<sup>35</sup> By emphasizing harm that could have resulted in other situations, *Reptile* plaintiffs aim to spread “tentacles of danger” throughout the jury.<sup>36</sup> The strategy encourages jurors to return a verdict and damages award driven by fear.<sup>37</sup> Under the *Reptile* theory, if a juror begins to fear for his or her own safety, emotions will override reason and the juror will make decisions based on self-preservation.<sup>38</sup>

Clearly understanding the impropriety of this approach, the *Reptile* authors acknowledge that their tactics seek to **supplant** traditional rules of evidence, liability, and damages—referring to their strategy as the “antidote for tort-reform poison.”<sup>39</sup> *Reptile* arguments attempt to shift the jury’s attention away from the facts of the case, the defendant’s alleged conduct, and the actual harm suffered.

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<sup>35</sup> Kennan and Ball, *supra*, at 34 (emphasis added).

<sup>36</sup> *Id.* at 35.

<sup>37</sup> *See id.* at 46.

<sup>38</sup> *See id.* (“[T]he logical part of the brain is the servant, not the master. . . It’s the primitive part of the brain that controls decision-making. It’s the Reptile, even more primitive than the emotional part.”)

<sup>39</sup> *Id.* at 29

Instead, *Reptile* plaintiffs present a parade of horrors based on imagined events.<sup>40</sup> Understanding that what they are doing is wrong and likely offensive to the jury, the authors warn plaintiffs not to divulge their strategies openly and caution that the manual's key terms—"reptile" and "tentacles of danger"—"are not for the jury."<sup>41</sup>

By their own concessions, the creators of this approach acknowledge that it is not right or proper. They should not be allowed to supplant the law and create their own reality - one in which corporate America is out to harm the masses - and ask that the jury award damages based on that false construct. Instead, this case, like all, should be judged on its merits and not some set of hypothetical set of horrors. These arguments and tactics should be excluded.

**5. This type of questioning and argument is also requesting that the jury decide the case on the basis of emotion and prejudice, an improper basis, and not a rational view of the facts of the case.**

Georgia law requires that case be decided without regard to sympathy or prejudice. Georgia law provides that a jury verdict is to be "a true verdict based upon [the jury's] opinion of the evidence according to the laws given [to them] in this charge. [The jury is] not to show favor or sympathy to one party or the other. It is [the jury's duty] to consider the facts objectively without favor, affection, or

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<sup>40</sup> See *id.* at 34 (instructing Reptile plaintiffs to offer jurors a variety of ways in which the defendant's over-generalized conduct "can hurt or kill").

<sup>41</sup> *Id.* at 8.

sympathy to either party.”<sup>42</sup> The law further directs that the jury “should not be influenced by sympathy or prejudice ... for or against either party.”<sup>43</sup>

The *Reptile* arguments are a complete appeal to sympathy and an attempt to invoke the passion of the jury based on references to hypothetical harms. *Reptile* arguments that focus on “personal safety” or “community safety” are intended to elicit fear of future harm if this defendant is not taught a lesson with a substantial verdict. Numerous courts that have confronted similar “community conscience” arguments have denounced them. For instance, the Fifth Circuit Court of Appeals has specifically condemned these types of arguments. In *Westbrook v. Gen. Tire & Rubber Co.*,<sup>44</sup> the court addressed a closing argument that it described as follows:

In closing, [plaintiff’s] attorney told the jury, “You’re going to be the conscience of the community with this verdict.” After a second reference to this communal responsibility, [defendant’s] counsel objected and was overruled. Evidently encouraged, [plaintiff’s] attorney continued to interject into his argument reference to a community standard or expectation which would be disappointed unless the jury returned a large verdict in [plaintiff’s] favor.<sup>45</sup>

The court held that “[s]uch argument is an improper distraction from the jury’s sworn duty to reach a fair, honest and just verdict according to the facts and evidence presented at trial.”<sup>46</sup> But the court did not stop there; it went on to make its position on these types of arguments perfectly clear, holding:

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<sup>42</sup> GEORGIA SUGGESTED PATTERN JURY CHARGES - CIVIL 5<sup>TH</sup> ED. §2.550.

<sup>43</sup> *Id.*

<sup>44</sup> 754 F.2d 1233 (5th Cir. 1985).

<sup>45</sup> *Id.* at 1238.

<sup>46</sup> *Id.*

Our condemnation of a “community conscience” argument is not limited to the use of those specific words; it extends to all impassioned and prejudicial pleas intended to evoke a sense of community loyalty, duty and expectation. Such appeals serve no proper purpose and carry the potential of substantial injustice when invoked against outsiders.<sup>47</sup>

Similarly, the Sixth, Eighth, and D.C. Circuit Courts of Appeals have explained that these types of arguments are not even allowed in criminal cases, where the government carries the much heavier burden:

A prosecutor may not urge jurors to convict a criminal defendant in order to protect community values, preserve civil order, or deter future lawbreaking. The evil lurking in such prosecutorial appeals is that the defendant will be convicted for reasons wholly irrelevant to his own guilt or innocence. Jurors may be persuaded by such appeals to believe that, by convicting a defendant, they will assist in the solution of some pressing social problem. The amelioration of society’s woes is far too heavy a burden for the individual criminal defendant to bear.<sup>48</sup>

Moreover, numerous courts that have addressed these same motions have held that trial efficiency is best served by precluding these types of arguments at the Motion in Limine phase. “[T]he Court sees no legitimate basis for waiting to correct the submission of improper arguments to the jury through rulings on objections or jury instructions when the issue can be resolved via a pretrial exclusionary ruling.”<sup>49</sup>

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<sup>47</sup> *Id.* at 1238-39.

<sup>48</sup> *United States v. Monaghan*, 741 F.2d 1434, 1441 (D.C. Cir.1984), *cert. denied*, 470 U.S. 1085 (1985); *United States v. Johnson*, 968 F.2d 768, 771 (8th Cir. 1992); *United States v. Solivan*, 937 F.2d 1146, 1153 (6th Cir. 1991);

<sup>49</sup> *Faulstick v. S. Tire Mart, LLC*, No. 2:13-cv-00065-KS-MTP, 2014 U.S. Dist. LEXIS 112822, at \*9 (S.D. Miss. Aug. 14, 2014)(granting motion in limine that precluded send a message or serve as the conscience of the community arguments); *Landrum v. Conseco Life Ins. Co.*, No. 1:12cv5, 2014 U.S. Dist. LEXIS 188 (S.D. Miss. Jan. 2, 2014) (granting the defendant’s motion in limine with respect to any request for the jury to send a message or serve as the conscience of the community); *Riley v. Ford Motor Co.*, No. 2:09cv148, 2011 U.S. Dist. LEXIS 84381 (S.D. Miss. July 29, 2011) (same).

The arguments and tactics that Defendants expect are nothing more than “impassioned and prejudicial pleas intended to evoke a sense of community loyalty, duty and expectation.”<sup>50</sup> These are completely improper, as are pleas for sympathy or passion or fear. Plaintiff must be precluded from offering these types of arguments or using these types of questions in *voir dire*.

#### **6. This type of argument patently violates the Golden Rule Argument**

Finally, these types of arguments patently violate Georgia’s prohibition on making Golden Rule Arguments. The “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.”<sup>51</sup> “It 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.”<sup>52</sup>

Any potential references by opposing counsel to violations of “rules” or “community standards” or similar “scare tactics” have no relevance to whether the Defendant satisfied the duty the law placed on him. Such references clearly seek to have the jury to reach a decision based on passion, prejudice, or sentiment and not a proper evaluation of the facts of the case and how they relate to the actions of the parties and the applicable law. Such references would be prejudicial, and should not be allowed.

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<sup>50</sup> *Johnson v. Watkins*, 803 F. Supp. 2d 561, 581 (S.D. Miss. 2011)

<sup>51</sup> *Myrick v. Stephanos*, 220 Ga. App. 520, 523 (1996)(citing *Opatut v. Guest Pond Club*, 188 Ga. App. 478, 481 (1988)).

<sup>52</sup> *Id.*

As evidenced by the following quotations taken from the *Reptile* book, the trial strategy is to directly or indirectly invoke the underpinnings of the Golden Rule by asking each juror to put themselves in the same position as a plaintiff - a position of jeopardy that calls upon survival instincts:

When the Reptile sees a survival danger, even a small one, she protects her genes by impelling the juror to protect himself and the community.

...

It gives jurors personal reason to want to see causation and dollar amount come out justly, because a defense verdict will further imperil him. Only a verdict [for the plaintiff] [10] can make them safer.

...

The juror's decision rests on the Reptilian question of which verdict will make her safer.

...

Just remember that the Reptile does not get involved unless she sees that the danger is to her, and can be ameliorated.

...

The Reptile ignores tragedy because she can't do anything about it. Instead, the trial...is an opportunity for jurors to use the horror of [the plaintiff's case] as a way to make their offspring safer.

...

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.

...

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.

...

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.

...

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.

...

Jurors will do what they can to keep their communities (i.e. themselves) safe when they think their efforts will work.<sup>53</sup>

These techniques should be prohibited at trial because these techniques are admittedly designed to convince the jurors that the consequences of the Defendants' conduct goes beyond the facts of the case and implicates the juror's safety and the safety of their families, and that they are in danger unless a large Plaintiffs' verdict is returned. These techniques constitute a patent Golden Rule argument that asks the jurors to put themselves in the Plaintiff's position, which is impermissible.

### III. CONCLUSION

For the reasons stated above Defendants respectfully request that the Court enter an Order excluding Reptile testimony and prohibiting Plaintiff from engaging in Reptile litigation tactics at trial.

Respectfully submitted this 13<sup>th</sup> day of June, 2016.

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<sup>53</sup> Keenan and Ball, *supra* at pp. 17, 18, 39, 72, 73, 86, 99, 149, 170.

**IN THE SUPERIOR COURT OF GWINNETT COUNTY  
STATE OF GEORGIA**

**TYRONE WILBURN,**

**Plaintiff,**

**v.**

**PAUL DUMBRAVICEAN, and METRO  
AMBULANCE SERVICES, INC. d/b/a  
AMERICAN MEDICAL RESPONSE,**

**Defendants.**

**CIVIL ACTION  
FILE NO. 15-A-06468-2**

**CERTIFICATE OF SERVICE**

I have this date caused to be served upon counsel of record for all other parties in this action a true and correct copy of the foregoing **DEFENDANTS’ MOTION IN LIMINE TO EXCLUDE “REPTILE” TESTIMONY AND PROHIBIT “REPTILE” LITIGATION TACTICS** by depositing same in the United States Mail in an envelope with postage sufficient ensure delivery and addressed to:

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Wilburn v. Dumbravicean et al., Superior Court of Gwinnett County, Civil Action File No. 15-A-06468-2  
**DEFENDANTS' MOTION IN LIMINE TO EXCLUDE "REPTILE" TESTIMONY AND PROHIBIT  
"REPTILE" LITIGATION TACTICS**

This 13<sup>th</sup> day of June, 2016.

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