Who's Afraid of the REPTILE MOTION *In Limine?*

Educating the Court about Using Safety Rules and The Role of the Jury

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On the eve of weeklong medical malpractice trial, lining up our exhibits and handling the usual defense motions, this popped into the Inbox:

DEFENDANTS' NOTICE OF MOTION AND MOTION *IN LIMINE* TO EXCLUDE "REPTILE" LITIGATION TACTICS

It was 10 pages long and claimed plaintiffs' counsel was about to engage in improper and possibly unethical conduct that the Court needed to stop.

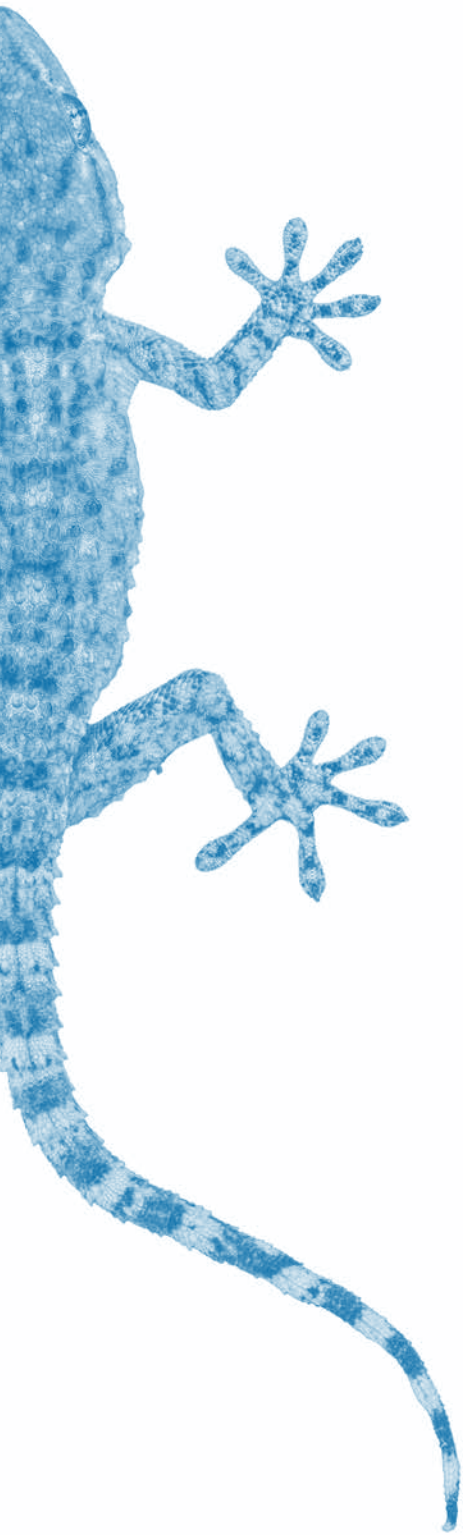
One option was to ignore the motion and focus on the more important tasks for trial: witness preparation, marking exhibits and putting the finishing touches on proposed jury charges. The other option was to use it as an opportunity to educate the Court that the motion was really an improper attempt to use the Rules of Evidence to undermine a trial strategy.

By now, almost every trial lawyer in America has heard of REPTILE: The 2009 Manual of the Plaintiff's Revolution, by David Ball and Don Keenan (Balloon Press 2009). The book and related materials discuss pulling together several age-old tactics and strategies, such as highlighting safety rules and forcing the defense to be specific in its claims, rather than merely floating unlikely possibilities of what happened to injured plaintiffs. It suggests ideas, strategies and a methodology for preparing and presenting a plaintiff's injury case, with the same goal as many books written on trial strategy: 1. Help the reader think about how to advocate the facts fairly and ethically for the benefit of the client. 2. Avoid behavior like a negative stereotype the jury may have of trial lawyers. 3. Trust the jury's ability to understand the case you present, rather than telling jurors what to think.

At the same time, the book suggests reminding the jury to reflect upon the importance of its role as the conscience of the community because its verdict represents society's view of what's permissible conduct. Can the defense really say a "strategy" of reminding the jury of the importance of their verdict is prejudicial or improper and should be stifled with a motion in limine?

No. But as the use of these strategies have gained popularity among plaintiffs' attorneys, some in the defense bar are bent on doing their best to thwart them. Scan the publications and articles published by the Defense Research Institute, industry associations, and large defense firms, and you are sure to find articles advising defense attorneys how to handle "Reptile" tactics and tips for limiting their use in trial. These include filing motions in limine like the one we confronted.

Given the current defense trend of filing motions like this, it seemed helpful to suggest some ideas to counter these arguments. Although the defense bar disguises such motions as an attempt to limit allegedly improper or unsavory "Reptile" techniques, its members really seek to erect barriers for plaintiffs attorneys



seeking justice for their injured clients by referencing well recognized rules, concepts, and the jury's legitimate role as the voice of the community.

The Attack: Bar the Golden Rule and Safety Rules

If you have never heard of Reptile, many of the tactics it espouses will seem familiar: 1) Identify the specific safety rules that apply to (and may even be recognized by) the Defendant and show they were broken. 2) Show the Defendant agrees with the importance of such rules —many of which the Defendant itself may have used or recognized as part of its own practice or procedure —to protect members of the public, including your client. 3) And show how those rules were violated and caused harms and losses. Courts and even defense attorneys agree this approach is nothing new.

Keenan and Ball build on these "tactics" for their book, which recognizes the reptilian nature in us all, including jurors, to protect themselves and their own from wrongdoers. However, the lesson of the Reptile is really nothing more than reminding us what we are required to do in any tort case: establish the duty, including by showing the defendant recognizes that duty and show how the defendant's violation of it resulted in harm.

In the minds of the defense, however, Reptile has become shorthand for claimed violations of South Carolina Rules of Evidence, Rules 401 and 403. So, what can be done to understand the misperception?

The Golden Rule: Not Golden!

The usual guise for these Reptile motions is that the plaintiff is violating the Golden Rule. A 'Golden Rule' argument is one in which the jurors are directly asked to put themselves in the victim's shoes. It is improper because such a request is meant to destroy the jury's impartiality, and to arouse passion and prejudice.[1] Most of the South Carolina jurisprudence concerning the Golden Rule involves criminal trials. But, the Golden Rule argument is also barred in civil cases when an attorney asks the jury "what would compensate them for a similar injury, or asks the jurors to award damages in the amount that they would want for their own pain and suffering."[2] To be impermissible in a civil matter, a "Golden Rule" argument must strike at the sensitive area of financial responsibility and must hypothetically request the jury to consider how much they would wish to receive in a similar situation.[3]

The Reptile book does not instruct or suggest attorneys violate the Golden Rule. However, this has not stopped the defense bar from claiming the tactics espoused in the book are impermissible. As one recent South Carolina defense motion in limine regarding "reptile" tactics explained,

> *Though one employing the "reptile" strategy may not specifically ask jurors to put themselves in the shoes of the plaintiff, the intent is the same, in that it asks jurors to base their verdict not on the evidence of the case, but rather on the fear that they or their family or community members could be injured, as plaintiff was, by the immediate danger of other similar conduct by the defendant. Jurors thus view compensating the plaintiff as reducing such danger.*

This argument falls flat because it suggests that an attorney requesting a jury to consider the impact of the verdict on the community is improper argument and should be prohibited.

Safety Rules Are Proper Evidence

Defense motions to bar "Reptile" strategies also argue that using terms or concepts like "Patient Safety" or "Patient Safety Rules" is improper because the jury "is encouraged to decide the case on the basis of personal interest and bias rather than evidence."[4] They suggest that these purported rule violations are created by Plaintiffs and do not exist in medical or other professions. This is simply unsupported argument.

Indeed, a recent case in South Carolina cites a company's influenza immunization protocol policy that was to "protect patients, visitors, and other health care workers…[such that] the influenza vacci-

1 *State v. Daniels*, 401 S.C. 251, 255, 737 S.E.2d 473, 475 (2012), *citing Brown v. State*, 383 S.C. 506, 680 S.E.2d 909 (2009).

2 75A Am. Jur. 2d *Trial* § 547 (2013).

3 *Id.*

4 *See*, e.g., Defendants' Motion in Limine, p. 1, *Jones v. Clark, et al.* (2012-CP-10-0009).

nation will be viewed as a health competency and patient safety requirement" was not unreasonable.[5] Another court held that a change to the overall layout of an MRI project did not substantially change the project from a "patient safety" perspective.[6]

Similarly, Steeves v. U.S., 294 F.Supp. 446, 455 (D.S.C. 1968) recognizes that a violation of a rule or regulation which is designed primarily for the safety of hospital patients will constitute negligence if the violation proximately results in the injury. Further, the Restatement (Second) of Torts § 285 (1965) recognizes that standards of conduct of reasonable man may be established by statute, regulation, court's interpretation of statute or regulation, judicial decision, or as determined by trial judge or jury under facts of a case.

Thus, attempts by defense counsel to suggest that safety rules should be excluded because they are made up plaintiff lawyer concepts for trial are not supported by well recognized law and the reality of the use of such rules by industry and others.

The Response, Part I: Barring Use of a Strategy Is Not a Proper Motion *in Limine*

Quare: Could Plaintiff's counsel seek to prohibit a legitimate defense strategy designed to show plaintiff is malingering, exaggerating, or lying on the basis that the strategy is unfair? Of course not.

When faced with a motion to bar a lawyer's "tactics," take a step back and ask what rule limits "tactics." Typically, the defense cites Rule 403 of the Rules of Evidence and claim that the "reptile" tactic should be excluded as prejudicial.

A tactic is the way an attorney uses evidence to achieve a goal. To employ the tactic of blaming the plaintiff for his injuries in a car crash, for example, the defense attorney may improperly try to show the plaintiff was not wearing a seatbelt. Seat belt use is not admissible as evidence — but the tactic of blaming the plaintiff for something else is of course permissible. Remind the judge of the distinction between a permissible tactic versus attempting to use improper evidence.

The Response, Part II: "Voice of the Community"

Defense motions regarding "Reptile" blur the line between a prohibited Golden Rule argument and proper argument reminding the jury that it serves as the voice and conscience of the community. Lest a court be fooled, the South Carolina Supreme Court has specifically distinguished between the Golden Rule argument and a charge that the jury is acting for the community.[7] The former is improper and the latter is not. As the Court explained in Daniels, "A charge that the jury is acting for the community, however, is not similar to a Golden Rule argument in that it does not ask the jury to consider the victim's perspective."[8] Even in criminal cases, "reminding the jury that it expresses the conscience of the community maintains a proper focus on the defendant."[9] As to punitive damages in civil cases, the jury "truly is the conscience of the community, because it is charged with responsibility for determining the reprehensibility of conduct and what the appropriate punishment and deterrent may be."[10]

The Response, Part III: Rules are Rules

Third, defense attorneys trying to stop plaintiff's attorneys from invoking safety rules to establish the breach of the standard of care may cloak their argument as one aimed only at limiting the verboten Golden Rule. This is a veiled attempt to try to force plaintiffs to try a case in a vacuum, where the standard of care or what's reasonable is subjective rather than objective, and "reasonable" is defined within the court room. It is well established that a party can use non-conformity with industry standards, regulations, or other rules as evidence of negligence.[11] (The fact finder may consider relevant standards of care from various sources in determining whether a defendant breached a duty owed to an injured person in a negligence case. The standard of care in a given case may be established and defined by the common law, statutes, administrative regulations, industry standards, or a defendant's own policies and guidelines). It is well established that even a violation of a defendant's own rules, policies and proce-

5 *AnMed Health v. S.C. Dep't. of Employment and Workforce, 404* S.C. 224, 229, 743 S.E.2d 854, 857 (Ct. App. 2013) (emphasis added)

6 *MRI at Belfair, LLC v. S.C. DHEC,* 394 S.C. 567, 578, 716 S.E.2d 111, 116 (Ct. App. 2011).

7 *State v. Daniels,* 401 S.C. 251, 255, 737 S.E.2d 473, 475 (2012).

8 Id.

9 *U.S. v. Runyon,* 707 F.3d 475, 514-15 (4th Cir. 2013). *See also Tucker v. Moore,* 56 F.Supp.2d 611, 635 (D.S.C. 1999).

10 *Jimenez v. Chrysler Corp.,* 74 F.Supp.2d 548, 577 (D.S.C. 1999), *overturned on other grounds by* 269 F.3d 439 (4th Cir. 2001).

11 *See Madison ex rel. Bryant v. Babcock Ctr., Inc., 371* S.C. 123, 140, 638 S.E.2d 650, 659 (2006)

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dures is admissible as evidence of negligence.[12] (Relevant rules of a defendant are admissible in evidence in a personal injury action regardless of whether rules were intended primarily for employee guidance, public safety, or both, because violation of such rules may constitute evidence of a breach of the duty of care and the proximate cause of injury);[13] (When a defendant adopts internal policies or self-imposed rules and thereafter violates those policies or rules, jury may consider such violations as evidence of negligence if they proximately caused a plaintiff's damages).

In the motion *in limine* filed in our case, Defendants surprisingly suggested our claimed rule violations were created by Plaintiffs and did not exist in medical or other professions. However, when one uses Google to search the term "patient safety rule," the top hit is on the U.S. Health and Human Services website. The term "patient safety rule" appears 7 times on that page. One can even download the 83 page Patient Safety and Quality Improvement Rule.[14] Another HHS site concerns patient safety organizations and has a "Frequently Asked Questions" page that states, in part:

> *The term "safety" refers to reducing risk from harm and injury, while the term "quality" suggests striving for excellence and value.*

Various hospitals use the term "patient safety" in advertising their services. The Medical University of South Carolina, for example, proudly proclaims:

> *MUSC again received an "A" rating for patient safety from the Leapfrog Group in the Fall 2013 Hospital Safety Score. This is the third year in a row that MUSC has been given this distinction. The Leapfrog Hospital Safety Scoresm grades hospitals on data related to how safe they are for patients. For more information, visit www.hospitalsafetyscore.org.*

(Emphasis added). The Journal of Patient Safety publishes articles including one that explains the development of Leapfrog's patient safety score for U.S. hospitals. Even the Joint Commission, an independent, not-for-profit organization that accredits and certifies more than 20,000 health care organizations and programs in the United States, has a web page devoted to "Patient Safety." Several articles referenced on the page include the following topics:

- Should medical malpractice prevention be considered separately or as an integral part of comprehensive health care safety improvement?
- Progress in patient safety: a glass fuller than it seems.
- Patient safety: threats and solutions.

Indeed, medical malpractice insurance carriers discuss and recognize the importance of patient safety, as well as the need for rules to try to achieve it. The jury should be able to consider the rules when a defendant's violation of those rules results in an injury.

Conclusion

To serve their clients and serve the law, plaintiffs attorneys present the evidence to the jury in a way that makes it relevant to their world. Some of the tactics offered in Reptile help do that. As defense attorneys fight against using "Reptile" tactics, attorneys for plaintiffs must help courts understand that the proper scrutiny should be on the admissibility of evidence, not how the plaintiff plans to use it.

In our case, we wrote a proposed order and submitted it in reply to Defendants' motion in limine regarding "Reptile" tactics. The seasoned trial judge joked about his alligator belt and sent us into the courtroom without further addressing the motion. But this motion is sure to strike again. When it does, these thoughts may help you prepare an effective reply.

If you are interested in reading our proposed Order, you can download it from our blog at www.kahnlawfirm.com.

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12 *Tidwell v. Columbia Ry., Gas & Elec. Co.*, 109 S.C. 34, 95 S.E. 109 (1918)

13 *Caldwell v. K-Mart Corp.*, 306 S.C. 27, 31-32, 410 S.E.2d 21, 24 (Ct. App. 1991)

14 73 FR 70732, Nov. 21, 2008.

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