



OUR FIRM'S TRIAL VICTORY AGAINST A REPTILE PLAINTIFF LAWYER

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A lot of ink has been spilled lately about so-called reptile litigation tactics practiced by certain plaintiff lawyers. We see such tactics employed often in many kinds of lawsuits, from commercial disputes to construction claims and personal injury lawsuits. They arise in the ways pleadings are drafted, depositions are taken, and trials are conducted. We recognize them and rebut them as they arise. The following success story involves a case where reptile litigation tactics were attempted at trial . . . and the plaintiff lost.

Our firm recently obtained a defense verdict in favor of two physician clients in a medical malpractice case venued in the Riverside County (California) Historic Courthouse. I had the privilege of second chairing this jury trial with lead counsel, Deborah Olsen deBoer. In the case, plaintiff alleged that the doctors negligently discontinued the blood thinning medication, Coumadin, without obtaining his informed consent, and failed to diagnose a pulmonary embolism/deep vein thrombosis. After a nearly four-week trial, the jury found that each doctor complied with the standard of care in the management of the patient's Coumadin and his medical condition.

This was the first jury trial in which our firm has directly confronted the so-called "Reptile Theory" as part of opposing counsel's litigation and trial strategy.

By way of background, the "Reptile Theory" was popularized by a 2009 book created for the plaintiffs' bar across the nation.¹ This theory holds that the trial goal of the plaintiff's bar should be to get the juror's brain into its "reptilian" survival mode, based on the assumption that a triggering of the "reptilian" portion of the brain by some type of "survival danger" results in an instinctive reaction of the juror to protect his or herself and the community.

The underlying intention is to insert an improper "Golden Rule" argument in attempts to appeal to jurors' concerns about their own safety and the safety of the community, and to have the jurors use their role as a jury to protect the community, rather than decide the facts of the particular case. The theory purports to require that healthcare providers make the "safest possible choice" in all circumstances regardless of what the actual standard of care requires.

The lynchpin of the theory is to have the client agree at deposition to certain "umbrella" (basic) rules or principles of safety and that all similarly-situated individuals have a duty to follow those principles to protect the safety of individuals generally and the community at large. Such questions at deposition can appear innocuous at first blush. This is why defense counsel should prepare their client to respond according to the applicable jury instructions and the law, and not concede or accept any of counsel's "basic safety principles."

For example, in a medical malpractice case, the physician should not simply agree to questions such as: "in your medical training were you taught some *basic safety principles* when caring for patients?" or "would you agree that a doctor is never allowed to *needlessly endanger a patient*?" The kneejerk response is

¹ Don Keenan and David Ball, *Reptile: The 2009 Manual of the Plaintiff's Revolution* (New York: Balloon Press, 2009).

inevitably yes to both questions, but when one appreciates that neither question relates to the legal standards of care applicable to medical negligence, the response must be more nuanced and anticipatory of the looming reptile trial strategy. Appropriate responses should include language echoing the applicable jury instructions, and as it specifically applies to healthcare professionals, ultimately framed in terms of the physician's education, training, experience and independent medical judgment. Similar types of questioning can take place in other settings too.

At our clients' depositions, counsel's intentions became clear as he attempted to construct the umbrella rules. Accordingly, on the eve of trial we filed a Motion in Limine to preclude plaintiff's use of irrelevant and prejudicial evidence or argument regarding the "reptile theory." It was necessary to explain to the court that the "reptile theory," by appealing to the jury's survival instincts based on the umbrella rules attempts to subvert the actual standard of care and expert evidence requirement in medical negligence cases.

In arguing the medical negligence case, the reptile plaintiff's attorney will condition the jury to ignore the jury instructions related to the standard of care, expert testimony and acceptable alternative methods of care, and instead adopt the concept that a "prudent" doctor must choose the safest possible choice of care, regardless of what medical experts may opine. In so doing, the "reptile theory" seeks to appeal to the jurors' subjective judgments about the best interests of themselves and/or the community rather than their impartial judgments predicated on the evidence and the law. In appealing to the jurors' self-interest, the theory attempts to revive "golden rule" arguments that have been prohibited in California and most other jurisdictions.

The Court granted our Motion in Limine and issued an order prohibiting plaintiff's attorney from straying beyond the applicable standard jury instructions, specifically CACI numbers 501, 502, 505 and 506, during the trial, including jury selection. This order rendered the "reptile theory" unavailable for plaintiff's counsel; he was unable to appeal to the self and/or community interests of the jurors, and a fair and impartial trial was had with the jury able to consider the evidence based on the appropriate and relevant jury instructions, rather than irrelevant standards of "safety" and bias.

Regardless of the actual science supporting the "reptile theory," it would behoove all defense counsel to be on notice and preclude such prejudicial and damaging tactics, because at the very least they will confuse, mislead or improperly condition the jury. Additional preparation for clients' depositions and evidentiary motions to preclude irrelevant argument and evidence to the jury are essential to deflecting the modern "reptile" movement.

CAVEAT: THE FOREGOING DOES NOT CONSTITUTE LEGAL ADVICE. PLEASE CONSULT AN ATTORNEY FOR INDIVIDUAL ADVICE REGARDING INDIVIDUAL SITUATIONS.