The "Reptile Theory:" A Case Law Survey

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I. Introduction

Increasingly, defense attorneys are filing motions to preclude plaintiffs' lawyers from using the "Reptile Theory" litigation strategy. Indeed, a quick search of the "Reptile Theory" on Lexis or Westlaw illustrates the prevalence of such motions in recently filed medical malpractice and personal injury cases. As one court put it:

> Such motions have become something of a fad among defense attorneys. But the Reptile Theory, based on a simplistic notion of brain science, is so vaguely defined that the court would have no idea how to enforce a ruling to exclude it. The court will instruct the jury to decide the case based on the evidence, and that will have to be enough to keep the jurors' reptilian brains at bay.[i]

Whether or not a plaintiff's attorney even intends to employ the reptile strategy, simply using words like "patient safety" in a discovery deposition or as a part of an argument at trial may invite a motion in limine from defense counsel, claiming that such terms fall under the "Reptile" umbrella. Despite this widespread effort by defense counsel to control plaintiffs' lawyers' trial strategies and style of argument, courts across the country routinely deny such motions as premature, unfounded, vague, ill-defined, overbroad, and an improper restraint on trial strategy. This article reviews recent case law from numerous jurisdictions addressing these motions and discusses the founded reasons these motions are denied.

II. The Reptile Theory

By way of brief background, the "Reptile Theory" refers to a litigation strategy outlined by Don Keenan and David Ball in their book *Reptile: The 2009 Manual of the Plaintiff's Revolution,* where the authors advocate appealing to jurors' instincts about safety and self-preservation to motivate them to make a damage award. In their motions, defense counsel argue that plaintiffs' attorneys employ this strategy to get around the prohibition on the so-called "Golden Rule" argument—inflaming jurors' passions and personal biases and asking them to put themselves in the plaintiff's shoes—by instead appealing to jurors' rational thought and survival instincts, inflaming their passions as the conscience of the community to secure larger verdicts.

In reality, the so-called "Reptile Theory" does nothing to inflame juror passions or biases, nor could it since reptiles do not respond based on passion or bias - - their survival instinct is a rational response to a perceived danger. At its core, the "Reptile Theory" is just a reiteration of black letter tort law. It is a trial strategy shifting the focus from creating sympathy for the plaintiff's situation to one emphasizing the defendant's misconduct, which failed to keep the plaintiff safe from the preventable harm he or she suffered.

The general premise of the "Reptile Theory" is establishing the safety rules that a defendant should abide by, and showing that when those rules are broken, people can be harmed. This is the base definition of negligence. At the conclusion of a civil negligence case in New Hampshire courts, the judge will instruct the jury:

> Negligence is the failure to use reasonable care. Reasonable care is the degree of care which an ordinary, prudent person would use under the same or similar circumstances.
>
> The failure to use reasonable care may take the form of action or inaction. That is, negligence may consist of either: doing something that an ordinary, prudent person would not do under the same or similar circumstances; or, failing to do something that an ordinary, prudent person would do under the same or similar circumstances.[ii]

In other words, reasonable care is following the basic safety rules appropriate for the circumstances or situation.

A subset of the "Reptile Theory" is "spreading the tentacles of danger," which means proving the likelihood that breaking the safety rule would harm someone and how much harm breaking those rules will cause. These are the basic definitions of foreseeability and damages on which a jury is instructed.

The standard civil jury instruction for foreseeability is:

> The duty to use reasonable care arises from the risk to others which could be reasonably foreseen....[iii]

The standard civil jury instruction for determining damages then states:

> In determining the amount of damages to allow the plaintiff, you may draw such inferences as are justified by your common experiences and observations of

> mankind, from the evidence of the nature of the injuries and the results thereof....[iv]

Since these concepts are embodied in the black letter law of negligence, one wonders what basis defense lawyers have to file motions challenging presentation of evidence and argument about safety rules. Courts addressing the issue often wonder the same thing.

III. The Case Law

Defense motions *in limine* asking the court to preclude a plaintiff from using the "reptile theory" at trial are essentially based on three concepts. First, that plaintiffs are using safety rules to supplant the standard of care. Second, that plaintiffs are arguing the safety rules are in place to protect the community at large, including the jurors, rather than the individual plaintiff, thereby appealing to juror emotions which should not be allowed. Finally, defendants argue that this strategy is a way to get around the "golden rule" argument, putting the jurors in the plaintiff's shoes, which is universally prohibited from being used in the courtroom. The "reptile theory" does none of these things, however. It is just a method of advocating that safety is the reasonable course of conduct and defendants should be held liable when they act unreasonably, violating safety rules and causing harm to plaintiffs.

Courts addressing these motions and issuing substantive rulings generally agree that plaintiffs may not appeal to the prejudices or sympathies of the jury, nor may they violate the "golden rule."[v] This is consistent with New Hampshire law, because that would "encourage the jury to depart from neutrality and to decide the case on the basis of personal interest and bias, rather than on the evidence."[vi] Almost universally, however, courts refuse to categorically prohibit a trial strategy or entire class of evidence without specific examples of how a strategy is being improperly employed or what evidence is improper and should be precluded, because it would offer plaintiffs "little in the way of objective instructions on prohibited conduct and language."[vii] If presented with this legal issue, our Supreme Court would likely agree since it has already opined that it is proper for a jury to consider "the effect that the defendant's actions had on the plaintiffs and to take that into account when awarding damages[,] . . . drawing such inferences as are justified by [thei]r common experiences and observations of human events...."[viii]

Premature

One of the common reasons courts deny defense motions to preclude the "reptile" litigation strategy is that they are raised prematurely, rather than objecting to improper evidence or argument contemporaneously at trial. Defense motions *in limine* to preclude the "reptile" strategy usually ask the court to preclude the plaintiff from using any variation of the words "safety" or

"safety rules" in their questioning or arguments, thereby misrepresenting the standard of care. Most courts addressing the issue agree that the rules of civil procedure, evidence, and professional responsibility already govern how parties may present their cases and the court will instruct the jury about the standard of care.[ix] Indeed, one court stated:

> The Court has a lengthy code of evidentiary rules, civil procedure rules and ethical codes of conduct for counsel. If plaintiff's counsel fail to comply with those rules, defendants will make contemporaneous objections and the Court will sustain them-not because counsel's conduct is reptilian but because it violates the foregoing rules and codes of conduct.[x]

The bottom line for courts finding such motions premature is that "*orders in limine* which exclude broad categories of evidence should rarely be employed. A better practice is to deal with questions of admissibility of evidence as they arise." [xi]

Ill-defined & Overbroad

Another common reason courts deny defense motions *in limine* to preclude the use of the "reptile" theory or litigation strategy is because they are too broad to effectively impose.[xii]

In *Baxter v. Anderson*,[xiii] an oft-cited case by courts denying "reptile" motions in limine, the court explained the fundamental issue with the majority of such motions:

> Defendants give the Court nothing objective to consider in deciding what language, phrases or evidence the Court should deem improper. Defendants complain about amorphous and ill-defined concepts rather than specific evidence which they believe Plaintiff will introduce or arguments which they believe Plaintiff might make. The Court is being asked to rule on abstract and generalized hypotheticals. In the absence of something more specific, the Court is unable and unwilling to grant their motion.[xiv]

Another court explained, the reason for this is that "argumentative departures from evidentiary rules and standards, including suggesting a standard of safety that exceeds what is required, may be objectionable. At the same time, an appeal to common sense is not."[xv] "Whether a question or line of inquiry is designed to utilize the "reptile theory" is a subjective inquiry, and an order categorically denying the use of this strategy would effectively give

[defendants] license to object or refuse to answer questions that might otherwise be relevant to Plaintiff's case."[xvi]

Improper Prior Restraint on Trial Strategy

At their essence, defense motions *in limine* to preclude use of the reptile theory are attempts at placing improper prior restraints on a plaintiff's trial strategy. Many courts have denied such motions because they impede on the plaintiff's lawyer's advocacy. As the court in *Novotny v. Weatherford Int'l.,*[xvii] said, "[t]here is no law supporting a ban on entire trial strategies. To the contrary, counsel are allowed broad latitude in making their closing arguments."[xviii] Indeed, the *Novotny* court found that "to exclude a group of strategies contained in any one book would be to impose an unnecessary restraint on the practice of law and decline[d] to do so."[xix]

Most courts refuse to "categorically prohibit a trial strategy, particularly without any evidence or examples of how such a theory is likely to arise."[xx] There is no legal basis to limit a lawyer's linguistic choices in a case if that lawyer's presentation comports with the rules of evidence and civil procedure. One court noted that evidentiary rules do not "empower a court to hamper or restrain trial counsel's strategy or techniques for arguing about or presenting otherwise admissible evidence, even if prejudicial."[xxi] This is because "all evidence is meant to be prejudicial; it is only unfair prejudice which must be scrutinized under Rule 403."[xxii] "Unfair prejudice does not mean the damage to a defendant's case from the legitimate probative force of the evidence; rather it refers to evidence which tends to suggest a decision on an improper basis."[xxiii]

A party cannot just limit an opposing counsel's trial strategy under evidentiary rules. Through these types of motions, defendants attempt to summarize a trial strategy from a book and prevent plaintiff's counsel from using it. Just because a defendant does not like a plaintiff's strategy does not mean it can be restricted.[xxiv] Essentially, through these motions defendants are trying to control and manipulate plaintiff's counsel's linguistic choices by limiting words that may appeal to the jury but be harmful to the defendants' case.

IV. Conclusion

Plaintiffs' lawyers must not allow defense attorneys to dictate their litigation or trial strategies. Nor can they let defense attorneys improperly silence them by imposing a prior restraint on the language a plaintiff may use at trial. Most courts addressing these motions agree. The remedies for arguments and evidence with which a defendant disagrees are counter-arguments or contemporaneous objections at trial.

[i] *Furdge v. Wedig*, No. 20-cv-846-jdp, 2022 U.S. Dist. LEXIS 45396 (W.D. Wis. March 15, 2022).

[ii] N.H. Civil Jury Instructions §6.1.

[iii] N.H. Civil Jury Instructions §6.3.

[iv] N.H. Civil Jury Instructions §9.3.

[v] *See, e.g., Regalado v. Callaghan*, 3 Cal. App.5th 582, 597-99 (2016); *Agan v. BNSF Ry.Co.,* 2022 U.S. Dist. LEXIS 155388 (D. Mont. August 26, 2022); *Furdge v. Wedig*, 2022 U.S. Dist. LEXIS 45396 (W.D. Wis. March 15, 2022); *Hebert v. Prime Ins. Co.*, 2020 U.S. Dist. LEXIS 64910 (W.D. La. March 18, 2020); *Coleman v. Home Depot U.S.A., Inc.*, 2016 U.S. Dist. LEXIS 121445 (S.D. Fla. March 20, 2016); *Young v. G.L.M. Transp., Inc.*, 2020 U.S. Dist. LEXIS 264633 (E.D. Tenn. January 2, 2020); *Hensley v. Methodist Healthcare Hosps.*, 2015 U.S. Dist. LEXIS 113565 (W.D. Tenn. August 27, 2015); *Scott v. University of Utah Hosp. and Med. Ctr.*, No. 110917738 (Utah 3rd Dist. February 24, 2015);*Hill v. Capital Digestive Corp.*, 2021 D.C. Super. LEXIS 91 (D.C. Super. Ct. Civ. Div. February 26, 2021); *Jackson v. Washington Hosp. Corp. et al*, No. 2012 CA 003612M (D.C. Super. Ct. Civ. Div. October 23, 2015).

[vi] *Walton v. City of Manchester*, 140 N.H. 403, 406 (1995).

[vii] *Akins v. Riddell, Inc.*, 2022 U.S. Dist. LEXIS 146870 (E.D. Tex. May 10, 2022); *see also end note v, supra.*

[viii] *MacDonald v. Jacobs*, 171 N.H. 668, 672-73 (2019)(internal quotation omitted) (affirming trial court denial of defense motion for mistrial based on plaintiff's use of golden rule in closing argument.).

[ix] *See, e.g., Berry v Wis. Cent. Ltd.*, 2022 U.S. Dist. LEXIS 148799 (W.D. Wis. August 19, 2022); *Kieffaber v. Ethicon, Inc.,* 2021 U.S. Dist. LEXIS 56672 (D.Kan. March 25, 2021); *Dorman v. Anne Arundel Med. Ctr.*, 2018 U.S. Dist. LEXIS 89627 (D.Md. May 30, 2018); *Berry v. N.W. Ark. Hosps., LLC*, 2012 WL 12055084 (Ark. Cir. Ct. March 8, 2012).

[x] *Kieffaber v. Ethicon, Inc.,* 2021 U.S. Dist. LEXIS 56672, at **3-4.

[xi] *Young . GLM Transp.,* Inc. 2020 U.S. Dist. LEXIS 264633 (E.D. Tenn. January 2, 2020) (citing *Sperberg v. Goodyear Tire & Rubber Co.*, 519 F.2d 708, 712 (6th Cir. 1975)).

[xii] *See, e.g., Akins v. Riddell, Inc.*, 2022 U.S. Dist. LEXIS 146870 (E.D. Tex. May 10, 2022); *Berry v Wis. Cent. Ltd.*, 2022 U.S. Dist. LEXIS 148799 (W.D. Wis.

August 19, 2022; *Furdge v. Wedig*, 2022 U.S. Dist. LEXIS 45396 (W.D. Wis. March 15, 2022); *Hebert v. Prime Ins. Co.,* 2020 U.S. Dist. LEXIS 64910 (W.D. La. March 18, 2020); *Young v. G.L.M. Transp., Inc.*, 2020 U.S. Dist. LEXIS 264633 (E.D. Tenn. January 2, 2020); *Beach v. Costco Wholesale Corp.*, 2019 U.S. Dist. LEXIS 57862 (W.D. VA April 4, 2019); *Gannon v. Menard*, 2019 U.S. Dist. LEXIS (S.D. Ind. August 26, 2019); *Baxter v. Anderson*, 277 F. Supp. 3d 860 (M.D. La. 2017); *Coleman v. Home Depot, USA, Inc.,* 2016 U.S. Dist. LEXIS 121445 (S.D. Fla. March 20, 2016); *Hensley v. Methodist Healthcare Hosps.*, 2015 U.S. Dist. LEXIS 113565 (W.D. Tenn. August 27, 2015).

[xiii] *Baxter v. Anderson***,** 277 F. Supp. 3d 860 (La. M. D. 2017).

[xiv] *Id.*

[xv] *Berry v Wis. Cent. Ltd.*, 2022 U.S. Dist. LEXIS 148799 (W.D. Wis. 2022).

[xvi] *Beach v. Costco Wholesale Corp.*, 2019 U.S. Dist. LEXIS 57862 (W.D. VA April 4, 2019).

[xvii] 2018 U.S. Dist. LEXIS 238041(D. N.D. March 14, 2018)

[xviii] *Id.* (citing *Clayton v. Roper*, 515 F.3d 784, 792 (8th Cir. 2008) (recognizing that prosecutors and defense counsel "are free to use colorful and forceful language in their arguments to the jury," so long as they do not stray from the evidence and the reasonable inferences that can be drawn from it)).

[xix] *Id.* (quoting *Upton v. N.W. Ark. Hosps.,LLC*, 2012WL 12055084 at *1 (Ark. Cir. Ct. March 8, 2012).

[xx] *Agan v. BNSF Ry. Co.,* 2022 U.S. Dist. LEXIS 155388 (Montana 2022); *Walden v. Md. Cas. Co.*, 2018 U.S. Dist. LEXIS 208000 (D.Mont. December 1, 2018); *see also Hill v. Capital Digestive Care,* 2021 D.C. Super. LEXIS 91 (DC 2021) (recognizing that "prohibiting the utilization of such a broad potential trial strategy would prejudice the plaintiff by a ruling that ambiguously restricts certain terms, regardless of context."

[xxi] *Jones v. Anesthesia Associates of Charleston, P.A.,* No. 2012-CP-10-0009 (S.C. Ct. Comm. Pleas March 3, 2013).

[xxii] *Id.* (internal brackets omitted) (quoting *State v, Collins*, 727 S.E.2d 751, 757 (S.C. Ct. App. 2012)).

[xxiii] Id. (internal brackets omitted)(quoting *State v. Gilchrist*, 496 S.E.2d 424,429 (S.C. Ct. App. 1998).

[xxiv] *Id.*