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Decision to bar reptile theory questions points to defense strategy

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Before "social distancing" became the term de jure in insurance circles, the equally novel term "social inflation" and its corollary "nuclear verdicts" were used to describe the significant increase in verdicts across the country in a range of cases and in jurisdictions where such verdicts were not expected. There have been various explanations posited for this phenomenon.

In a recent article in the Daily Report, the co-author of the book, "Reptile: The 2009 Manual of the Plaintiff's Revolution," on the use of "reptile theory" tactics, Don Charles Keenan, was glad to take credit for this trend.

Reptile tactics builds on a theory that jurors' basic evolutionary instinct is to survive and that the task of the plaintiffs' lawyer is to convince the jury that their verdict will alleviate the threat to the public posed by the defendant's conduct by awarding damages to the plaintiff in the case before them. Where sympathy was previously the stock and trade of plaintiffs' lawyers, and often still is, the theory uses jurors' fear to invoke anger in them with the goal to overcome defense arguments and to drive the damages awards ever higher.

To accomplish this task, plaintiff's counsel employing this theory focus questioning in discovery and at trial on "safety rules" and on two basic principles: (1) "[t]he Reptile is about community (and thus her own) safety[,]" and (2) "the courtroom is a safety arena." Reptile-trained attorneys thus look for ways to attempt to communicate to juries that "safety" is "the purpose of the civil justice system," and that "fair compensation can diminish… danger within the community."

In a recent decision from Magistrate Judge Andrew Rodovich of the U.S. District Court for the Northern District of Indiana, the court entered a protective order barring certain questions by plaintiff's counsel at the defendant's deposition in a trucking case. Citing opinions from federal courts across the country, defense counsel argued that the expected line of questioning would be improper because the defendant, a truck driver, had not been designated as an expert, but merely a fact witness. The defendant moved to bar certain classifications of questions of the defendant based upon their experience with plaintiff's counsel and gave some examples of "reptile" questioning:

- Safety is your top priority, correct?

• You have an obligation to ensure safety, right?

• You have a duty to put safety first, correct?

• To ensure safety, as a commercial truck driver, you must follow the federal rules governing hours of service, correct?

• And you agree that if someone violates those safety rules and causes an accident, then they should be held responsible for their actions, correct?

Defense counsel pointed in their motion to a specific question that plaintiff's counsel had asked in a deposition in a prior case and which they sought preemptively to bar "[i]f a commercial motor vehicle driver like yourself violated those rules [the Federal Motor Carrier Safety Regulations], that could endanger the public, correct?"

The court granted the motion stating "asking Navar [the defendant] about alleged 'safety rules,' including generalized hypotheticals, would fall outside the scope of permissible discovery. The purpose of a deposition is to discover the facts. Hypothetical questions are designed to obtain opinions and are beyond the scope of the deposition of a lay witness. *Estate of Richard McNamara, III v. Navar and RTR Farming Corp.*, 19 C 109, 2020 U.S. Dist. LEXIS 70813 (N.D. Ind., April 22).

In denying a motion to reconsider filed by counsel for plaintiff, the court stated, "By definition, hypothetical questions are designed to elicit opinions, not 'firsthand, percipient' facts. The order also precludes questions relating to the reasons behind certain regulations. Again, those questions are not designed to obtain facts about how the accident occurred." *Estate of Richard McNamara, III v. Navar and RTR Farming Corp.*, 19 C 109, 2020 U.S. Dist. LEXIS 80660 (N.D. Ind., May 7).

The court's order does not bar the plaintiff entirely from raising these issues in the case; the order only bars the plaintiff from asking the defendant about those issues. It is possible that these issues will be addressed in expert discovery, but even then, it may be improper.

From an evidentiary perspective, the goal of the "reptile theory" is to recast long held improper "golden rule," "send a message," or conscience of the community arguments. The tactic also asks the jurors to place themselves in the position of the plaintiff, which has long been held in Illinois courts to be improper. *Stennis v. Rekkas*, 233 Ill.App.3d 813, 832-33 (1st Dist. 1992); see also *Leggett v. Kumar*, 212 Ill.App.3d 255, 272-73 (2nd Dist. 1991). Preparation for these improper tactics begins by being aware of them and perhaps even moving proactively to bar them as did defense counsel in *Navar*.
