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Proven Strategies to Outsmart the Reptile Theory

By Bryan E. Stanton

Trained counsel are educating judges about the reptile-theory mind game, and judges are listening.

This article attempts to outline potential strategies to combat the reptile theory in practice: *i.e.*, it offers a roadmap, if you will. It also attempts to suggest successful strategies that you can use to defend against the fear of nuclear verdicts, the main motivation behind the growing anti-reptile movement. To prepare this article, a detailed search of Westlaw for all references to the reptile theory, in pleadings and filings, nationwide, was conducted. This comprehensive search of our courts establishes the degree to which the theory has been briefed, discussed more below. Not only are trained counsel educating courts about the mind game, but judges are also listening, and in some cases, they are entering orders affecting how reptilian efforts will be either allowed or limited at trial.

Before briefly introducing the reptile theory and delving into several notable cases, there are a couple items worth mentioning. First, at the recent DRI Trucking Seminar that exclusively concerned the reptile theory (*Outsmarting the Trucking Reptile at Trial*), Bill Kanansky, Jr., Ph.D., mentioned his observation of a relatively new effort among plaintiffs' counsel, which was intentionally *not* to use the reptile theory during discovery and instead to spring it on the defense at trial only. This strategy would seem to cripple the ability to formulate a response in advance of trial. This potential trend alone provides reason to exercise caution, yet not to jump to conclusions, when your opponent fails to invoke the reptile theory during discovery. It is recommended that even if opposing counsel uses the "deferred action" approach, you should stick to the plan and not sway too far off course. Secondly, it is worth stating that each case is unique, so no particular counter strategy will always work. We cannot change the facts, after all. Further, there are certain areas of practice, such as medical malpractice, transportation liability, and general negligence, which are more likely to have plaintiffs engage in the reptilian approach, too. Thus, it is imperative that you are familiar with any nuances in your jurisdiction's law that may affect the manner in which your court will receive the prosecution and defense of a reptilian-tried case.

Meet the Reptile

Without question, you must know the reptile theory before defending against

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it, educating anyone about it, or arguing for it to be excluded from your case. On the exterior, the reptile theory is an in-vogue strategy, designed to produce greater income for plaintiffs' counsel. At its core, it is nothing beyond an attempt to impose a deceptive con on the human mind. To combat any strategy, particularly one rooted in trickery, careful planning focusing on understanding the opponent's strategy is necessary. To do that, you must take time to learn about the strategy and reptile theory.

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There are numerous resources available to assist with staying on course and not losing your mind while trying to defend a case in which you are being "reptiled." Many resources are available to gather knowledge about the basic concept behind the reptile theory. The theory originates from *Reptile: The 2009 Manual of the Plaintiff's Revolution*, authored by Don C. Keenan and David Ball, who advocate, through the book, persuading jurors by appealing to their "reptile brains," the "oldest" part of the brain and the part responsible for primitive-survival instincts. Some practitioners have engaged in efforts to obtain a copy of the book, but there reportedly are great restrictions on who can actually buy it. (Believe it or not, civil defense counsel are typically not on the list of qualified purchasers.)

Five Reptile Theory Cases, Five Reptile Theory Defeats

Due to the relative infancy of the reptile theory and a myriad of other reasons, as of today we do not have a plethora of easily identified available cases from which to mine information. This will undoubtedly change as the popularity of the reptile theory continues to grow. Nonetheless, our detailed search identified several cases in which the reptile theory was briefed. Several cases stood out, including five mentioned below, two involving trucking cases. Each case was tried within the last two years, and each experienced some degree of the use of the reptile theory during discovery as evidenced by the filing of motions in limine directed at the heart of the beast.

While limited courts not mentioned here seemingly encourage the practice of reptiling jurors, several notable cases exist that may be useful as roadmaps for others attempting to "level the playing field." The five identified cases had a commonality of strikingly similar procedural efforts by defense counsel to exclude the reptilian efforts by opposing counsel. Each defense counsel filed a pretrial motion to limit or exclude the reptile arguments. Most importantly, each case ended in a defense verdict at trial.

Turner v. Salem and U.S.A. Logistics, Inc., Trucking Accident

Turner v. Salem and U.S.A. Logistics, Inc., 14-CV-289-DCK (W.D. N.C.), concerned a disputed-liability trucking accident, resulting in a wrongful death action. A vehicle operated by the plaintiff's decedent, Cathy Bazen, and a semi-tractor trailer operated by Jonathan Salem, an agent for U.S.A. Logistics, Inc., were involved in the collision. The main issue at trial was which vehicle exited its lane of travel into the other's lane to cause the crash. Before trial, the defense filed a short and concise motion in limine, seeking to exclude the Golden Rule (*i.e.*, "put yourself in the plaintiff's shoes") or reptile arguments. In its ruling, the court prohibited Golden Rule arguments and "discouraged" the reptile theory arguments, stating that it would handle objections in court as needed if reptile theory arguments were raised. During trial, there were continued efforts by the plaintiff's counsel to engage in reptilian arguments, and the court favorably ruled for the defense. A defense verdict was entered at trial and judgment was entered August 8, 2016.

Botey v. Green, Trucking Accident

Botey v. Green, 12-CV-1520 (M.D. Pa.), also involved a disputed-liability trucking accident. The facts surrounding the accident were contested, but the defense argued that the plaintiff, Jonathan Botey, struck the left side of the FFE Transportation Services, Inc.'s, tractor-trailer as its driver, defendant Robert Green, was negotiating a left turn. The defense filed a detailed motion in limine, seeking to preclude improper reptile theory tactics. In its motion in limine ruling, the court ruled that the defendant's motion was premature because no reptile theory questions had been heard; the motion was denied without prejudice to object at trial. A defense verdict was entered at trial and judgment was filed June 22, 2017. A motion for new trial has been filed and is pending.

Hensley v. Methodist, Medical Malpractice

Hensley v. Methodist, 13-2436-STA-CGC (W.D. Tenn.), was a medical malpractice case that alleged that substandard medical treatment by various providers to the minor plaintiff caused or contributed to his death. The child had a neck injury from a screwdriver, and the parties' dispute primarily concerned whether the providers properly diagnosed internal bleeding.

The defense filed a succinct motion in limine specific to the reptile theory and educated the court about its history and the reasons why it is not the law in Tennessee. The court denied the motion to exclude the reptile theory because the defendant had not identified specific evidence of its use. However, in the order, the court also stated that the "Court will be cognizant of appeals to the jurors' prejudice, and any attempt by either party to appeal to the prejudice or sympathy of the jury will not be condoned." A defense verdict was entered at trial and judgment was entered in favor of the defendants on September 17, 2015.

Randolph v. QuickTrip, Slip and Fall

The *Randolph v. QuickTrip*, 16-cv-01063-JPO (D, Kan.), matter involved premises liability allegations. Mike Ran-

dolph claimed that he was injured due to QuickTrip's not properly marking a recently mopped area. The defense filed a motion in limine against reptile arguments. The plaintiff argued that the standard Kansas jury instruction (126.02, duty to maintain land) caused QuickTrip's self-imposed safety rules not only to be relevant, but a mandatory consideration. In fact, that particular instruction includes as an element that a jury would consider "[t]he individual and *social* benefit of maintaining the land" in reasonably safe a condition. The plaintiff supplied the emphasis on "social."

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In a pretrial ruling, the court excluded the introduction of safety rules to the jury at that juncture, but the court noted that the ruling was without prejudice to the defense's objecting to questions at trial. The trial transcript was not available for review. However, plaintiff's counsel reportedly engaged in limited efforts to make community-type arguments in closing arguments. Fortunately for the defense, the efforts were not successful because a verdict was entered for the defense at trial and judgment was entered May 25, 2017. There was no appeal.

Melott v. SSM Healthcare of Oklahoma, Medical Malpractice

Another case is presently pending on appeal with the Oklahoma Supreme Court that is worth mentioning. In that medical malpractice case, *Mary Melott v. Holloway* (Okla.), the defense successfully argued during pretrial motions in limine that the phrase "patient safety rules," or other phrases beginning with the words "patient safety," would be prohibited at trial. The trial resulted in a defense verdict in favor of multiple medical providers. Judgment for the defense was filed July 7, 2016. One of the issues on appeal is whether the ruling disallowing plaintiff's counsel from using the phrases referenced above denied the plaintiff the right to a fair trial.

Roadmap: Practice Considerations

Based on these cases, there appears to be promise and hope that continued hard work by the defense not only may level the playing field, but it also may reverse the nuclear verdict trend. Although certainly not inclusive, five suggestions to consider for your current and future cases include (1) learning about the reptile theory; (2) educating the judge, early and often; (3) preparing a motion in limine to exclude the reptile theory; (4) preparing all witnesses for reptile questioning; and (5) preparing your oral argument to the judge either at your hearing on a motion in limine or at trial. To be more concise, these can actually be summarized as only one basic consideration: preparation. Said another way, to circumvent the plaintiffs' reptile attack, you should prepare the following three categories of people: yourself, the judge, and your witnesses.

Over Prepare and Prepare More

As lawyers, we are not strangers to preparation. First learned in law school, tested for weeks in advance of the bar exam, and polished throughout our careers, the importance of excessive preparation to defend clients against the reptile theory cannot be overstated. And while we all prepare in our own ways, it would be illogical to avoid following a roadmap that has proved to lead to success.

Educate Your Judge About the Reptile Theory

The conventional wisdom of educating your trier of fact, early and often, has been frequently taught at legal seminars. In most jurisdictions, judges do not spend the amount of time that practitioners spend keeping up to date on the latest trial strategy trends. They are more worried about things such as declining judicial budgets, excessive caseloads, and efficiently and effectively handling trials.

Educate and Prepare Your Witnesses for the Reptile Theory

You should incorporate sufficient time to discuss the reptile theory into your regular witness preparation time. To maximize your return of good testimony, one suggested reading is *Outsmarting the Lizard*, published in For The Defense in December 2015 (vol. 57, no. 12, at 70). This provides a good, practical approach to dealing with real-world questions at deposition.

Of course, there are many extremely competent companies available for hire to assist in preparing your particularly important witness. Many of those companies will also assist in developing your overall case theme, or assist with other aspects of trial preparation.

Motion in Limine Targeting the Reptile Theory

You could, and should, have a well-equipped arsenal of canned motions in limine briefs on the reptile theory ready to file. The issue should be included in your standard motions in limine. There really is no excuse for not having these briefs at your disposal. If your database is empty or outdated, fret not: there are countless filed examples available. Aside from obtaining the examples filed in the cases mentioned here, the "Trial Court Documents" search option through Westlaw offers an excellent starting point. Most organizations such as DRI contain member file-sharing databases. Of course, you can also always email a friend.

During recent DRI educational events, practitioners shared their approaches to defending against the reptile theory. One advocated not referencing the theory in any pleadings, fearing that it might accidentally educate opposing counsel about the reptile theory. In my opinion, this is the wrong approach because it fails to consider your opponent's potential plans to use the deferred action strategy at trial only.

Be Ready at Trial for a Reptile Battle

As defense counsel, we should be prepared to explain the reasons why specific

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reptile-argument questions should not be permitted during trial. The five cases referenced above should encourage all defendants to appreciate the fact a court cannot, and will not, speculate in advance of a trial about how witnesses will be questioned at trial. Therefore, the true battleground for defending the reptile theory will be each and every time opposing counsel attempts to use reptile questions during opening statements, while questioning witnesses, and during closing arguments at trial.

Conclusion

It is important to gather a fundamental understanding of the concept of the reptile theory before defending a client in a litigated case. You should not be bashful about educating your court about it, preferably early in a case when it is apparent that it will be a tactic. To avoid being on the wrong side of a potential nuclear verdict, you also should educate your witnesses, particularly corporate representatives and party-defendant witnesses.

Regardless of whether your opposing counsel deploys the reptile theory during discovery, you should file a motion in limine to prepare for trial properly. In fact, if the plaintiffs' bar's response to the defense bar's success in countering the reptile theory turns out to be the deferred action approach (*i.e.*, springing the use of the theory for the first time at trial), sound preparation is even more important.

Based on our examination of several recent court rulings on such motions in limine, it generally appears that the majority of courts discourage the reptile theory, but nearly all defer the decision regarding its use to the time of trial. Without examining each trial transcript for what transpired, we are left guessing about the precise decisions of each court. A wise practitioner leaves nothing to chance and instead prepares for the worst.

Staying current on how the plaintiffs' bar chooses to deploy the reptile theory is a necessity to protect our clients. Consider this roadmap and others prepared by defense counsel, which are readily available on the internet. You would also be wise to search periodically for the status of other cases in which the reptile theory appears. FD