RENDERED: January 21, 2000; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-002710-MR

YENEDESTA TEGEGNE AND
ZELEKE TEGEGNE — APPELLANTS

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE EDWIN SCHROERING, JUDGE
ACTION NO. 95-CI-003151

RONACHAI BANCHONGMANIE, M.D.,
INDIVIDUALLY, AND
D/B/A WOMEN'S HEALTH SERVICES — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: EMBERTON, MILLER, AND TACKETT, JUDGES.

MILLER, JUDGE: The appellants, Yenedesta Tegegne and Zeleke Tegegne, bring this appeal from a Judgment of the Jefferson Circuit Court entered June 11, 1998 upon a defendant's jury verdict. We affirm.

This is an action by appellants based upon allegations that Ronachai Banchongmanie, M.D., negligently performed an abortion upon Mrs. Tegegne on May 13, 1994. Dr. Banchongmanie is a board-certified obstetrician-gynecologist with a substantial practice in that field of medicine. He also provides abortion

services at a separate facility doing business as the "Women's Health Services" in Louisville, Kentucky.

On May 13, 1994, an ultrasound revealed that Mrs. Tegegne was in her first trimester of pregnancy. On that same date, she was seen by Dr. Banchongmanie who performed an abortion. She was seen again by Dr. Banchongmanie on May 19, 1994 and on June 6, 1994. On this latter date, Mrs. Tegegne was also treated at the University of Louisville Hospital emergency room as a result of heavy bleeding. It was determined the bleeding was caused by tissue retention following the abortion which Dr. Banchongmanie performed.

The thrust of appellants' complaint was that Dr. Banchongmanie failed to perform an ultrasound after the abortion. The appellants' expert witness, Dr. Bruce Lucero, testified that this was a deviation from the appropriate standard of care.

The case was submitted to the jury following four days of trial testimony. The jury returned a verdict for defendant concluding that Dr. Banchongmanie was not at fault.

Appellants bring this appeal complaining of an improper instruction and that appellee's counsel was guilty of misconduct in her closing argument.

The instruction which appellants sought reads, in relevant part, as follows:

> It was the duty of the Defendant Ronachai Banchongmanie, M.D. and the employees of Women's Health Services, in treating Plaintiff Yenedesta Tegegne's pregnancy to exercise a degree of care and skill expected of <u>a reasonably competent physician specializing in abortion services and acting</u>

> under similar circumstances . . . . (Emphasis added.)

The court rejected the foregoing instruction, and in lieu thereof, rendered the following:

> It was the duty of the Defendant, Ronachai Banchonngmanie [sic], M.D. in treating Plaintiff, Yendesta [sic] Tegegne to exercise that degree of care and skill expected of a reasonably competent physician specializing in gynecology delivering the medical services about which you have heard evidence and acting under similar circumstances. (Emphasis added.)

We find no significant disparity in the foregoing instructions. If there is a disparity, we are inclined to believe the instruction rendered by the court is more appropriate. In any event, technically incorrect instructions are not grounds for reversal where rights of a losing party are not prejudiced. See Ky. R. Civ. P. (CR) 61.02, and Weaver v. Brooks, Ky., 350 S.W.2d 639 (1961).

There is ample evidence in the record supporting the qualifications of Dr. Banchongmanie. We agree with the trial court in its observation that the standards for a gynecologist might well be higher than those that may be required of an "abortion service provider" in general. We know of no skill that an abortion service provider would possess exceeding that of a physician trained in obstetrics and gynecology. There is evidence in the record that Dr. Banchongmanie has a considerable practice in OB/GYN in Louisville, apart from the abortion clinic. We are of the opinion the instruction complied with the requirement of Blair v. Eblen, Ky., 461 S.W.2d 370 (1970).

We now turn to the complaint regarding appellee's closing argument. At the outset, we should observe that the parties are allowed great latitude in their closing arguments. See Commonwealth Department of Highways v. Reppert, Ky., 421 S.W.2d 575 (1967). There are three portions of appellee's closing argument of which appellants are particularly disturbed. They are as follows:

> The D&C procedure - I mean, the same procedure she had at U of L is the same procedure she had at Dr. Banchongmanie's office. They are not fun, but they are not a major surgery. They are not a major big deal. I've had two of them myself. I don't know if the two ladies there on the jury have ever had a D&C . . . .
>
> . . . .
>
> I believe Mr. Amshoff struck off all of the ladies that did raise their hands and said they had a D&C procedure. The are not -- I had them in connection with miscarriages. They are not -- they're not fun, but they're not . . . .
>
> . . . .
>
> Mr. Amshoff brought three textbooks from the University — I guess they're from the Medical School Library probably, although this is not in the Medical School Library because I went to try find it and it wasn't there.

The essence of appellants' objections to the foregoing remarks is that they constitute an excursion outside the testimony to an extent forbidden by our law. Appellants have directed us to a plethora of authorities condemning such excursions. We are, of course, aware of the fundamental rule that argument of counsel alluding to inadmissible evidence and referring to matters outside the record is prejudicial

misconduct. See City of Newport v. Maytum, Ky., 342 S.W.2d 703 (1961). Simply stated, in arguing the case before the jury, counsel should keep within the record and not argue matters not at issue or not supported by the evidence. See Coombs' Adm'r v. Vibbert, 289 Ky. 463, 158 S.W.2d 957 (1942).

Notwithstanding the foregoing rules which are well-known to the bench and bar, there is an overriding rule that requires the appellate court to affirm any decision that does not affect the substantial rights of the parties. CR 61.01, and Davidson v. Moore, Ky., 340 S.W.2d 227 (1960). Ultimately, the test of harmless error is whether or not there is a reasonable probability that absent error the verdict would have been different. See Crane v. Commonwealth, Ky., 726 S.W.2d 302 (1987). Upon review of the record in this matter, we are unable to conclude with any reasonable certainty that the verdict of the jury was tainted by the remarks of appellee's counsel in closing argument. To conclude such would be sheer speculation.

For the foregoing reasons, the Judgment of Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANTS:

Theodore H. Asmshoff, Jr.
Louisville, KY

BRIEF FOR APPELLEE:

Susan D. Phillips
William P. Swain
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