

[Home](#) / [Our Sources](#) / [About Us](#) / [FAQs](#) / [Advanced Search](#)





Not what you're looking for? [Try an advanced search.](#)

Buy This Entire Record For \$7.95 

Download the entire decision to receive the complete text, official citation, docket number, dissents and concurrences, and footnotes for this case.

[Learn more about what you receive with purchase of this case.](#)

Buy Now

Add To Cart

04/07/93 EVETTE RICE v. FAMILY PLANNING CLINIC FOR

April 7, 1993

**EVETTE RICE, PLAINTIFF/APPELLANT,
v.**

**FAMILY PLANNING CLINIC FOR REPRODUCTIVE HEALTH; RICHARD O. MANNING, M.D.; AND DOES A THRU
E, DEFENDANTS/APPELLEES**

APPEALED FROM THE CIRCUIT COURT OF DAVIDSON COUNTY AT NASHVILLE, TENNESSEE. No. 89C-302 and 89C-3314. THE HONORABLE HAMILTON GAYDEN, JUDGE

Cantrell, Todd, Koch, Jr.

The opinion of the court was delivered by: Cantrell

In this medical malpractice action the jury returned a verdict for the defendants. The plaintiff asserts that she was prejudiced by the trial Judge's refusal to charge the jury that performing a second trimester abortion outside a hospital violated Tenn. Code Ann. § 39-4-201, et seq. *fn1 In addition, the plaintiff complains about the trial Judge's actions in the following particulars: allowing the use of a treatise in the redirect examination of the plaintiff's expert witness; placing conditions on the admission of testimony against a co-defendant; admitting certain hospital records; and in failing to charge the pattern jury instruction provided by 8 Tennessee Practice, T.P.I. - Civil § 616 (2d ed. 1988) concerning a physician's duty not to abandon the patient. We find no reversible error in the trial below.

I.

The plaintiff went to the Family Planning Clinic on February 22, 1988, for an abortion. In the records generated prior to the procedure, the age of the fetus ranges from 9 to 15 weeks. No satisfactory explanation appears for the conflict. The defendant, Dr. Manning, examined the patient for the first time on the date of the procedure and estimated the gestational period at 12 to 13 weeks. He says he recommended an ultrasound examination even though the clinic was not equipped for such a procedure, but the plaintiff refused because of the additional delay and expense. The plaintiff denies that the conversation took place and denies answering Dr. Manning that she was 9 to 10 weeks pregnant.

After starting the procedure, Dr. Manning discovered conclusively that the patient was 15 weeks pregnant. He performed an abortion procedure appropriate for a 15-week pregnancy and initially thought he had a good result. However, the plaintiff began to bleed in the recovery room, and Dr. Manning had her transported by ambulance to Nashville's Baptist Hospital where he explained her condition to the physician on duty. The hospital chose to observe her for the next six hours when she went into shock from the loss of blood. In an emergency operation the plaintiff's attending physician at Baptist Hospital performed a total hysterectomy.

In this action against Dr. Manning and the Family Planning Clinic, the plaintiff alleged that the defendants violated the standard of care by performing an abortion procedure without determining that the plaintiff was in the second trimester of her pregnancy, by using the wrong procedure, and by performing the procedure outside the hospital in violation of Tenn. Code Ann. § 39-4-201, et seq. Although the lawyers for Dr. Manning and the plaintiff had discussed the constitutionality of the statute prior to the date of the trial, and the state attorney general had previously rendered an opinion that the statute was unconstitutional, no agreement had been reached which would have removed that issue from the case. Neither party informed the attorney general that the constitutionality of the statute was in question in this action. On the first day of the trial the Judge proposed that the parties proceed without reference to the statute and if the jury returned a defense verdict he would grant a new trial should the attorney general choose to defend the statute. The parties agreed to this procedure and proceeded to trial.

After the verdict for the defendants, the plaintiff raised the issue of the constitutionality of the statute in a motion for a new trial and the defendants notified the attorney general. The attorney general filed a response refusing to defend the statute. The trial Judge overruled the motion for a new trial.

II.

The plaintiff insists that the trial Judge erred in refusing to charge that performing a second trimester abortion outside a hospital was negligence per se. *fn2

The difficulty we have with this issue is the agreement by plaintiff's counsel's to go to trial without the benefit of the statute on the promise that the trial Judge would order a new trial if the attorney general subsequently changed his position on the statute's constitutionality. In fact, the trial Judge gave the plaintiff a choice: the granting of a continuance so that the constitutionality of the statute could be cleared up or proceeding under the court's proposal. The plaintiff elected to proceed with the trial. Having contributed to the alleged error, the plaintiff cannot now complain. See Tenn. R. App. Proc. 36(a).

In addition, we think the trial Judge would have been justified in refusing to charge the statute because of the serious question raised about its constitutionality. *fn3 The U.S. Supreme Court had held in two separate opinions that prohibiting outpatient procedures in a clinic after the first trimester was an impermissible burden on a woman's right to an abortion. *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 438-39, 103 S.Ct. 2481, 2497, 76 L. Ed. 2d 687 (1983); *Planned Parenthood Ass'n of Kansas City, Mo., Inc. v. Ashcroft*, 462 U.S. 476, 481-82, 103 S.Ct. 2517, 2520, 76 L. Ed. 2d 733 (1983). The Tennessee attorney general had previously given an opinion that the statute was unconstitutional. 12 Op. Tenn. Att'y Gen. No. 364 (1983). Contrary to the plaintiff's assertion in her brief, the Supreme Court has not reversed itself on the question of requiring second trimester abortions to be performed in a hospital. While the Supreme Court overruled portions of *Acron* in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. , 120 L. Ed. 2d 674, 112 S.Ct. 2791 (1992), the Court did not readdress the unconstitutionality of requiring second trimester abortions to be performed in hospitals.

III.

The plaintiff also asserts that the trial Judge committed reversible error in allowing Dr. Manning's lawyer to read from a learned treatise in the redirect examination of one of the defendants' expert witnesses.

The subject of the expert's testimony was whether the standard of care required an ultrasound examination before performing a second trimester abortion. The witness had testified on direct that the standard of care did not require an ultrasound on all second trimester abortions. On cross-examination plaintiff's counsel got the witness to acknowledge that *Obstetrics and Gynecology*, published by the American College of Obstetricians and Gynecologists, was a learned treatise and then proceeded to read excerpts from ...

{ **Buy This Entire Record For \$7.95**  }

Download the entire decision to receive the complete text, official citation, docket number, dissents and concurrences, and footnotes for this case.

[Learn more about what you receive with purchase of this case.](#)

Buy Now

Add To Cart

[Home](#) / [Our Sources](#) / [About Us](#) / [FAQs](#) / [Advanced Search](#)

copyright 2020 LRC, Inc. [About Us](#)

[PRIVACY POLICY](#)

