

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.

ATTORNEY FOR APPELLANTS:

BRYON LEE CIYOU
Ciyou & Dixon, P.C.
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE:

TRACY S. PREWITT
JOSHUA W. DAVIS
O'Bryan Brown & Toner
Louisville, Kentucky



**IN THE
COURT OF APPEALS OF INDIANA**

RICKEY D. MILLER and JENNIFER MILLER,)
)
Appellants,)
)
vs.)
)
ART DUNCAN, M.D.,)
)
Appellee.)

No. 22A01-0907-CV-316

APPEAL FROM THE FLOYD CIRCUIT COURT
The Honorable J. Terrence Cody, Judge
Cause No. 22C01-0703-CT-155

June 9, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Rickey D. Miller and Jennifer Miller appeal the judgment entered on their medical malpractice action against Art Duncan, M.D., after the jury returned its verdict in favor of Dr. Duncan.

We affirm.

ISSUE

Whether the judgment must be reversed because the trial court abused its discretion in sustaining Dr. Duncan's objection during the Millers' closing argument and in admonishing the jury.

FACTS

On October 11, 2005, Rickey Miller underwent hernia repair surgery. Subsequent to the surgery, he was diagnosed with cauda equine syndrome – nerve damage at the base of the spine – and suffered the loss of bladder and bowel control. On March 1, 2007, the Millers filed a medical malpractice against Dr. Duncan.¹ On June 1 through June 4, 2007, their action alleging that Dr. Duncan was negligent in his administration of epidural anesthesia was tried before a jury. Dr. Duncan, the attending nurse during the anesthesia procedure, and several expert witnesses testified. By stipulation, the jury was informed that the Medical Review Panel members had unanimously concluded that the evidence did

not support the conclusion that Dr. Duncan failed to comply with the appropriate standard of care and that his conduct was not a factor in the injuries and damages of which [the Millers] complain.

¹ The action initially included several other defendants but by the time of trial, only Dr. Duncan remained.

(Tr. 741).

The Millers' counsel began his closing argument by asserting that Mr. Miller's post-procedure problems had "changed his entire life," and "changed Rick's life." (Tr. 745). Counsel for Dr. Duncan began her closing argument by agreeing that Mr. Miller's "complication" changed the Millers' lives, asserting that Dr. Duncan did "not dispute that." (Tr. 758). When the Millers' counsel was scarcely more than a minute from the end of his rebuttal closing argument, he asserted that in "judg[ing] the facts . . . in this case," the jury "ha[d] to consider what Rick and Jennifer have been through and what they will go through," and further asserted that counsel could

promise . . . that regardless of what you alls [sic] decision here, Rick and Jennifer will have to live with that for the rest of your life. Dr. Duncan will go back to doing his business, go back to practicing . . .

(Tr. 786-87). At this point, counsel for Dr. Duncan objected. In a sidebar at the bench, Dr. Duncan's counsel asserted that the argument was "totally improper," as "say[ing] there's no affect [sic] on Dr. Duncan's life." (Tr. 787). Counsel for the Millers responded that it was a "proper" and "fair comment." *Id.* The trial court then stated that it would "not . . . ignore the remark that it's not without consequence to Dr. Duncan." *Id.*

The trial court held that it would sustain the objection, and then admonished the jury

that . . . [the Millers' counsel]'s comments about Dr. Duncan going on with this business, going on with his life. Yes that's true, but this has gone on since shortly after . . . the occurrences of October 11, 2005 and the results so it's not without consequence to him. He's had to live with it too, and I think as [the Millers' counsel] said, you don't park your common sense at the door.

(Tr. 789).

Counsel for the Millers made no objection to the trial court's decision to admonish the jury or to the language of the admonition; nor did he move for a mistrial in that regard.² Subsequently, the jury returned a unanimous verdict in favor of Dr. Duncan.

DECISION

The Millers argue that the trial court's admonishment to the jury, "made in the final minutes of the plaintiff's [sic] closing argument of a week-long medical malpractice trial, . . . conveyed to the jury that the judge believed the doctor was burdened by the litigation." Millers' Br. at 1. Thus, they conclude, the trial court abused its discretion "in handling the objection which proceeded [sic] it and crossed the barrier of impartiality and prejudiced the case." *Id.* We disagree.

Final rebuttal argument may comment upon the evidence and suggest reasonable inferences to be drawn therefrom. *Foster v. Owens*, 844 N.E.2d 216, 223 (Ind. Ct. App. 2006), *trans. denied*. The trial court has broad discretion in determining what is improper argument. *Foster*, 844 N.E.2d at 223; *see also, Chaiken v. Eldon Emmor & Co., Inc.*, 597 N.E.2d 337, 345 (Ind. Ct. App. 1992), *trans. denied*.

² Immediately after the trial court admonished the jury, counsel for the Millers continued (and concluded) the rebuttal argument as follows:

What I should have said and I apologize is this. The choices that Dr. Duncan made that day put all the risk on Rick, and Rick is going to have to live with the consequences of Dr. Duncan's choices that day. And I'd ask you to keep that in mind during your deliberation. Thank you.

(Tr. 789).

The Millers argue that the statements to which Dr. Duncan objected were proper. They cite *Henley v. State*, 881 N.E.2d 639, 649 (Ind. 2008), for the proposition that final argument is “an opportunity to advance one’s theory of the case,” and contend that counsel’s argument “tie[d] the legal theory to the evidence,. . . drawing attention to the gravity of the situation by reference to those in the courtroom, namely the life span of the jurors, and Dr. Duncan’s ability to go on with his life.” Millers’ Br. at 9. However, the issue for the jury was whether Dr. Duncan was negligent in his administration of the epidural anesthesia, *i.e.*, whether he failed to comply with the appropriate standard of medical care and such resulted in the Millers’ injuries and damages. *See, Spar v. Cha*, 907 N.E.2d 974, 979 (Ind. 2009). The attempted comparison of consequences suffered by the parties did not advance the Millers’ theory of negligence, and we find no abuse of discretion in the trial court’s sustaining the objection thereto.

The Millers also argue that the trial court abused its discretion in giving the admonishment to the jury.³ However, they failed to preserve this matter by so arguing to the trial court. *See Dudley Sports Co. v. Schmitt*, 151 Ind. App. 217, 279 N.E.2d 266, 280 (1972) (when no objection made to trial court’s comments during trial, “any alleged error has been waived and may not be urged as grounds for reversal”); *Carson v. Assoc’d Truck Lines, Inc.*, 143 Ind. App. 431, 241 N.E.2d 78, 80 (1968) (failure to object at trial to alleged misconduct of trial court “waives this issue on appeal”). Further, the

³ Dr. Duncan notes that they did not object to the admonishment. He cites *Hollinsworth v. State*, 920 N.E.2d 679 (Ind. Ct. App. 2010), in that regard, but *Hollinsworth* was transmitted on transfer on February 25, 2010.

admonishment of the jury is a matter “within the discretionary ambit of the trial court and is reviewable only for abuse of discretion.” *Ballard v. State*, 438 N.E.2d 707, 709 (Ind. 1982).

The Millers correctly remind us that a trial “before an impartial judge is an essential element of due process.” *Timberlake v. State*, 690 N.E.2d 243, 257 (Ind. 1997). They argue that the admonishment “usurped the merit and consideration the jurors may have given” their claim, “relayed” argument of Dr. Duncan’s counsel, and “weigh[ed] in on the merits” of their case by suggesting that it “victimized and/or burdened” him. Millers’ Br. at 10.

The trial court is “given latitude to run the courtroom and maintain discipline and control of the trial.” *Timberlake*, 690 N.E.2d at 247. To demonstrate the denial of a fair trial based upon allegations of improper comments by the trial court, the appellant must “show that the trial judge’s action and demeanor crossed the barrier of impartiality and prejudiced” the appellant’s case. *Id.*

Here, the Millers did not object to the trial court’s admonishment to the jury. Hence, the matter is arguably foreclosed for appeal. Moreover, given the Millers’ legal theory at trial and the substance of the court’s admonishment, we do not find that they have demonstrated that such “crossed the barrier of impartiality and prejudiced” their case. *Id.*

Affirmed.

BAKER, C.J., and CRONE, J., concur.