

NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P 65.37

VICTORIA FULLAM AND JANUSZ
KACZMARKSI, W/H

Appellant

v.

MILLER BROTHERS, A DIVISION OF
MILLER BROS., INC.

Appellee

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 106 EDA 2013

Appeal from the Judgment Entered December 4, 2012
In the Court of Common Pleas of Philadelphia County
Civil Division at No(s): 987 February Term, 2010

BEFORE: BENDER, P.J., OTT, J., and STRASSBURGER, J.*

DISSENTING MEMORANDUM BY STRASSBURGER, J. **FILED APRIL 30, 2014**

Because I believe Fullam should have been granted a new trial after counsel for Miller Brothers blatantly violated the court's ruling on Fullam's motion *in limine*, I respectfully dissent.

Prior to trial, the trial court granted Fullam's request to preclude Miller Brothers from making any reference to Fullam's narcotics consumption prior to her fall. At trial, Fullam indicated she had taken ibuprofen prior to the accident, while two defense witnesses testified that Fullam informed them she was "on painkillers." However, consistent with the court's ruling, neither party elicited testimony regarding Fullam's consumption of narcotics prior to

* Retired Senior Judge assigned to the Superior Court.

the incident. Nevertheless, during closing arguments, counsel for Miller Brothers expanded upon the testimony offered at trial, in clear violation of the trial court's prior order, asking the jury to consider the "riveting pain" Fullam experienced that day and explaining that Fullam "is suggesting to you it was just Ibuprofen. You can imagine what kind of painkiller she was on that day." N.T., 10/3/2012, at 43, 45-46.

As a panel of this Court has held, "[t]he grant of a motion in limine is a court order that must be observed. To allow Appellee's counsel to violate such a court order, without the declaration of a mistrial ... would defeat the intended purpose of such orders." **Poust v. Hylton**, 940 A.2d 380, 385 (Pa. Super. Ct. 2007); **see also Siegal v. Stefanyszyn**, 718 A.2d 1274 (Pa. Super. 1998) (holding that "[d]efense counsel's reference to the absence of opinion testimony of [Mrs. Siegal's] witness [in violation of the granted motion *in limine*] was improper and outrageous, and so polluted the jury that the effect could not be cured by the curative instruction that was given.")

In my view, there is no question that counsel's closing remarks are improper and far exceeded permissible "fair comment" on the evidence.¹

¹In fact, the trial court acknowledged that "counsel's comments blatantly attempted to skirt the [pretrial] ruling." Trial Court Opinion, 7/22/2013, at 7 n. 54.

Thus, the trial court was required to do everything in its power to cure the situation.

Whether remarks by counsel warranted a new trial requires a determination based upon an assessment of the circumstances under which the statements were made and the precaution taken by the court and counsel to prevent such remarks from having a prejudicial effect. It is the duty of the trial judge to take affirmative steps to attempt to cure harm. **However, there are certain instances where the comments of counsel are so offensive or egregious that no curative instruction can adequately obliterate the taint.**

Poust, supra, at 386 (emphasis in original).

Additionally, I disagree with the Majority that Fullam should have objected during Miller Brothers' closing argument, and her failure to do so is fatal to her claim. **See** Pa.R.E. 103(b) Comment ("A ruling on a motion in *limine* on record is sufficient to preserve the issue for appeal, without renewal of the objection or offer at trial."); **see also *Blumer v. Ford Motor Co.***, 20 A.3d 1222, 1232 (Pa. Super. 2011).

Thus, in light of Fullam's preemptive objection, the trial court erred in failing to declare a mistrial. Accordingly, I would vacate the judgment in this matter and remand for a new trial.