NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37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

MEMORANDUM BY OTT, J.: **FILED APRIL 30, 2014**

Victoria Fullam[1] appeals the judgment entered on December 4, 2012 in the Philadelphia County Court of Common Pleas, in favor of Miller Brothers, a division of Miller Bros., Inc. ("Miller Brothers") after a jury found her 85% liable and Miller Brothers 15% in this premises liability negligence action. On appeal, Fullam argues the trial court abused its discretion in failing to grant her a new trial based upon Miller Brothers's violation of a motion in

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* Retired Senior Judge assigned to the Superior Court.

[1] Originally, Fullam's husband, Janusz Kaczmarksi, brought a separate claim for loss of consortium. Prior to the start of trial, however, defense counsel informed the trial court that he was withdrawing that claim. N.T., 10/1/2012, at 22.

limine ruling, the court's admission of improper and prejudicial testimony, and the court's inclusion of a jury charge on the "choice of ways" doctrine. For the reasons set forth below, we affirm.

The facts underlying Fullam's negligence claim are aptly summarized by the trial court as follows:

> On February 19, 2008, [Fullam] sustained injuries when she fell into a hole that was partially covered by a metal plate at the intersection of 34th and Market Streets. [Fullam] testified that she did not see the hole, and that it was located in the cross-walk where she was directed to walk. [Miller Brothers's] witnesses testified that [Fullam] walked right into the clearly cordoned off construction zone despite signs that explicitly directed pedestrians where to walk. The construction project was "enormous." [Fullam] drove past the construction site every morning before work. [Fullam] saw the barrels, cones, and tape that were blocking pedestrians from crossing on Market Street and she saw the "sidewalk closed" sign directing pedestrians to a clear pathway. The only way to get into that area was to go over or under the caution tape. Although she was aware of and saw all the construction activity, she chose not to take an alternative route despite the fact that there were available alternative ways. [Miller Brothers's] witnesses testified that they followed all applicable safety standards to ensure the safety of the site. Hundreds or thousands of pedestrians had walked that intersection from 7:00 a.m. until noon when [Fullam] fell on the date of the incident.
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> Mr. Puglizse, a foreman for Miller Brothers, witnessed [Fullam] walk around the backhoe that was within the construction zone, climb over a pile of dirt and fall.[2] When [Fullam] fell, Mike Miller, Vice-President of Miller Brothers, and Mr. Puglizse came to her side to offer assistance. [Fullam]

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[2] Puglizse testified that he did not actually see Fullam walk under caution tape into the construction area. N.T., 10/2/2013, at 111. His testimony described what she would have passed once she entered that area before she fell. ***Id.*** at 115.

> refused medical help and did not want an ambulance because she had a dentist appointment she did not want to miss. Miller and Puglizse testified that [Fullam] was disoriented, and that [she] told them she was on painkillers for her tooth. [Fullam] testified that she had only taken ibuprofen prior to the fall.
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> [Fullam's] husband picked her up from her dentist's office and took her to the emergency room at Chestnut Hill Hospital. [Fullam] injured her right foot (a fifth metatarsal base fracture). She had one visit to a podiatrist at Chestnut Hill Hospital for the injury to her foot, but discontinued care with him because he was not on her health insurance plan. Subsequently she saw Dr. Shannon at Penn-Presbyterian until August of 2008 when she reached maximum improvement. Although she felt initial improvement, after about a year her foot started to feel worse and she experienced difficulty walking distances and exerting pressure on it. Her attorney gave her a list of physician names, and she selected Dr. [Harold] Schoenhaus. Dr. Schoenhaus treated [Fullam] and recommended future surgery. She had health insurance, which had paid her past medical bills with the exception of some out of pocket expenses such as co-pays.

Trial Court Opinion, 7/22/2013, at 2-4 (footnotes omitted).

On February 8, 2010, Fullam filed a premises liability negligence action against Miller Brothers. Less than a week before trial, Fullam filed a motion in *limine* seeking to preclude any reference to the fact that she had taken Vicodin or other narcotics medication on the morning of her fall. During pretrial arguments, Fullam asserted that to permit such testimony or otherwise insinuate that she was "intoxicated," would be "substantially prejudicial" because no witness saw her impaired prior to her fall. N.T., 10/1/2012, 11. The trial court granted the motion. Fullam also made an oral motion to preclude Miller Brothers from eliciting testimony that her medical expert and treating physician, Dr. Schoenhaus, was recommended

to her by her attorney. The trial court denied the motion stating that "it's a fact of the case." ***Id.*** at 16.

On October 3, 2012, a jury returned a verdict finding both Fullam and Miller Brothers negligent, and finding their negligence was a substantial factor in causing Fullam's fall. The jury apportioned Fullam's negligence at 85%, and Miller Brothers's negligence at 15%. Fullam filed a timely post-trial motion seeking a new trial, which was denied by the trial court on November 29, 2012. Thereafter, on December 4, 2012, Miller Brothers praeciped to have judgment entered in their favor on the verdict. This timely appeal follows.[3]

The relief Fullam seeks is a new trial. Our review of a trial court's order denying a motion for a new trial is well-established. We must determine "whether the trial court committed an error of law, which controlled the outcome of the case, or committed an abuse of discretion." ***Polett v. Public Communications, Inc.***, 83 A.3d 205, 214 (Pa. Super. 2013) (*en banc*) (citation omitted).

> A trial court commits an abuse of discretion when it rendered a judgment that is manifestly unreasonable, arbitrary, or capricious, has failed to apply the law, or was motivated by partiality, prejudice, bias, or ill will.

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[3] On January 30, 2013, the trial court ordered Fullam to file a concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b). Fullam complied with the court's directive, and filed a concise statement on February 20, 2013.

Id. (citation omitted).

In her first issue, Fullam contends the trial court erred in failing to grant her a new trial after Miller Brothers violated a pretrial order precluding any reference to Fullam's alleged use of Vicodin or other narcotics, or her intoxication on the day of the accident. Fullam contends Miller Brothers "blatantly ignored" the trial court's ruling during closing arguments when it "repeatedly argu[ed] to the jury that [Fullam] was disoriented as a result of pain killers before her fall and waddled her way into an active construction site." Fullam's Brief at 15. Fullam further argues that Miller Brothers's comments were so prejudicial as to warrant a new trial.

When considering a challenge to the admissibility of evidence, we must bear in mind that such rulings are within the sound discretion of the trial court, and will not be disturbed by this Court absent an abuse of discretion or misapplication of the law. ***Schuenemann v. Dreemz, LLC***, 34 A.3d 94, 100 (Pa. Super. 2011) (citation omitted). "In addition, for a ruling on evidence to constitute reversible error, it must have been harmful or prejudicial to the complaining party." ***Phillips v. Lock***, 2014 PA Super 38 [1634 EDA 2013], *9 (February 28, 2014) (citation omitted).

By way of background, Fullam filed a motion in *limine* seeking to preclude Miller Brothers from "making any reference to or offering any evidence of Vicodin or other narcotics consumption or intoxication at the

time of trial."[4] During pretrial arguments, Miller Brothers opposed the motion because its witnesses were prepared to testify that, after the fall, Fullam told them she had taken Vicodin that morning for her tooth pain, an allegation that Fullman denies. N.T., 10/1/2012, at 10, 12. Fullam argued that in order to present evidence of narcotics consumption or intoxication, Miller Brothers was required to demonstrate that Fullam was actually impaired **before** the fall. Because the defense witnesses testified in their depositions that they did not see Fullam until a "split second before her fall," Fullam asserts that Miller Brothers would be unable to do so. N.T., 10/1/2012, at 11. Following argument, the trial court granted Fullam's motion in *limine*.

During her direct examination, Fullam denied that she had any tooth pain before the fall, but admitted that she "probably took two" ibuprofen that morning in advance of her dentist appointment. ***Id.*** at 93. However, defense witnesses, Michael Miller and John Puglizse, both testified that, after her fall, Fullam told them she was "on painkillers" for a toothache, and had to get to the dentist. ***See*** N.T., 10/2/2012, at 87, 95, 111. Further, Miller described Fullam as "disoriented." ***Id.*** at 87. Fullam did not object to this testimony.

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[4] Plaintiff's Motion in Limine to Preclude Any Reference to or Evidence of Vicodin/Narcotic Medication Consumption, 9/27/2012, at 4.

Prior to closing arguments, Fullam reiterated her objection to any reference to her being "whacked out on painkillers and things of that nature." ***Id.*** at 224. She argued that any mention of her being intoxicated would be a violation of the motion in *limine*. The trial court responded by stating that Miller Brothers "knows the rulings on that and … will stay away from it," but that Fullam would have the last word in her closing rebuttal. ***Id.*** at 226.

During closing arguments, Miller Brothers made the following comments, which Fullam contends were objectionable:

> The reason this accident occurred is because [Fullam] was disoriented on the morning of this accident. That's exactly what happened hire. (sic) She had broken her tooth two days earlier. She was in a great deal of pain. So much pain her dentist had canceled his lunch visit to see her that day. Can you imagine what kind of pain you would have to express to a dental receptionist and then to a dentist to get a dentist to break a lunch appointment to see you? Do you know what kind of pain is like, the riveting pain of a tooth ache?
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> She testified she was on painkillers. That was her testimony. It's not something I said, it's not something Mr. Miller said. It's not something Mr. [Pugliezse] said. That's the words out of her mouth, painkillers. Now counsel for plaintiff is suggesting to you it was just Ibuprofen. You can imagine what kind of painkiller she was on that day. …
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> * * *
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> She doesn't know where she fell because she was in so much pain that afternoon, that noon, she was enraptured by pain, she doesn't know where she fell. … And she doesn't know where she fell because she was disoriented, she's on painkillers and she's raptured in pain. She doesn't know where she fell.
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> * * *

> The fact of the matter is these men have an independent recollection of picking this woman up when she was in a work zone where she had no business to be. They were clear as a bell when they told you she was disoriented. She was on painkillers. That's her own words, and she was disoriented and didn't know where she was going.

N.T., 10/3/2012, at 43, 45-46, 68.

Fullam argues Miller Brothers's objectionable statements during its closing remarks blatantly violated the court's pretrial preclusion order. Moreover, she contends the comments had an "inevitable impact on the trial" and were "so egregious that no curative instruction [could] adequately obliterate the taint." Fullam's Brief at 15, 19-20 (citation omitted). Therefore, Fullam argues, the only appropriate remedy is a new trial.

The trial court, however, concluded Fullam's challenge was waived because she failed to lodge an objection either during Miller Brothers's closing, or immediately thereafter. Indeed, Fullam objected for the first time in her post-trial motions. Thus, despite the trial court's acknowledgment that "counsel's comments blatantly attempted to skirt the [pretrial] ruling," and that it "would have likely granted relief at the time these comments were made in closing arguments had [Fullam] made the request," the court concluded it was unable to grant post-trial relief. Trial Court Opinion, 7/22/2013, at 7 n.54.

However, Fullam argues that she made a preemptive objection before Miller Brothers's closing argument, but "the trial court made clear that it was not going to act to stop [Miller Brothers] from arguing regarding painkillers

and that it was for [Fullam] to respond in rebuttal." Fullam's Brief at 18. Accordingly, she contends she did not waive this issue on appeal when she failed to lodge an objection during Miller Brothers's closing argument.

It is well-established that, "in order to preserve an issue for review, litigants must make **timely and specific objections** during trial and raise the issue in post-trial motions." ***Harman ex rel. Harman v. Borah***, 756 A.2d 1116, 1124 (Pa. 2000) (emphasis supplied). However, Pennsylvania Rule of Evidence 103 provides that once the trial court enters a **definitive ruling** on the record, either before or during trial, "a party need not renew an objection or offer of proof to preserve a claim of error for appeal." Pa.R.E. 103(b). "Consistent with … Pa.R.E. 103(a), a motion in *limine* may preserve an objection for appeal without any need to renew the objection at trial, but only if the trial court clearly and definitively rules on the motion." ***Blumer v. Ford Motor Co.***, 20 A.3d 1222, 1232 (Pa. Super. 2011) (citations omitted), *appeal denied*, 49 A.3d 441 (Pa. 2012).

We find that had Miller Brothers argued Fullam took Vicodin, or was intoxicated, we would agree with Fullam that the trial court's prior ruling preserved her issue for appeal. However, Miller Brothers's comments during the closing argument were not a clear violation of Fullam's motion in *limine*. Rather, Miller Brothers argued that Fullam had taken painkillers and was disoriented, an argument that was supported by the testimony of both Miller and Pugliezse to which Fullam did not object. ***See*** N.T., 10/1/2012, at 87, 95, 111. Therefore, we conclude Miller Brothers's closing argument was a

fair comment on the evidence presented at trial. ***Hyrcza v. West Penn Allegheny Health System, Inc.***, 978 A.2d 961 (Pa. Super. 2009), ("[S]o long as no liberties are taken with the evidence, a lawyer is free to draw such inferences as he wishes from the testimony and to present his case in the light most suited to advance his cause and win a verdict in the jury box.") (citation omitted), *appeal denied*, 987 A.2d 161 (Pa. 2009).

Accordingly, because the comments did not clearly violate the motion in *limine*, and were, in fact, based upon evidence presented at trial to which Fullam did not object, Fullam should have lodged an objection either during the closing, or immediately thereafter, if she believed Miller Brothers's closing argument pushed the boundaries of fair comment. Therefore, we find her present objection waived for our review.[5]

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[5] We note that even in the cases which Fullam cites for support, the aggrieved party lodged an immediate objection at the time the improper comments were made. ***See Poust v. Hylton***, 940 A.2d 380 (Pa. Super. 2007) (trial court erred in failing to grant a new trial when defense counsel violated pretrial order precluding mention of the word "cocaine;" opposing counsel lodged immediate objection), *appeal denied*, 959 A.2d 320 (Pa. 2008); ***Siegal v. Stefanyszyn***, 718 A.2d 1274, 1277 (Pa. Super. 1998) (trial court erred in failing to grant new trial when counsel made improper argument during closing which "conveyed to the jury something that counsel knew to be untrue;" opposing counsel lodge immediate objection), *appeal denied*, 739 A.2d 1059 (Pa. 1999).

Furthermore, we note that although the trial court indicated in its opinion it would have granted relief had an objection been made, the court did not specify that it would have granted a mistrial. Rather, a curative instruction, that the jury must rely on its own recollection of the testimony presented at trial, may have sufficed to cure any potential prejudice. In
(Footnote Continued Next Page)

Next, Fullam argues the trial court erred in failing to grant her a new trial based upon three erroneous evidentiary rulings. Specifically, Fullam contends the trial court abused its discretion (1) in denying her motion in *limine* to preclude Miller Brothers from presenting evidence of how she obtained the names of her treating physicians; (2) in permitting Miller Brothers to present evidence that there were no other falls at the construction site; and (3) in permitting Miller Brothers to present the testimony of a process server to demonstrate that a witness failed to appear despite being served with a subpoena. Again, we conclude Fullam is entitled to no relief.

First, Fullam argues that the trial court erred in permitting testimony concerning how she received the names of her treating physicians, Dr. Schoenhaus and Dr. Song Lee, because Miller Brothers failed to present any medical expert testimony, and, therefore, there was no actual dispute concerning the extent of her injuries or their causal relationship to her fall. Accordingly, she contends that "how she obtained the names of her treating physcians was irrelevant" and Miller Brothers's suggestion that her physicans

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fact, the trial court did instruct the jury that "the attorneys are not witnesses and what they say is not evidence in this case." N.T., 10/3/2012, at 101.

were simply "hired guns" was "improper and beyond prejudicial." Fullam's Brief 23-24. We disagree.

During pretrial arguments, Fullam made an untimely oral motion in *limine* to preclude Miller Brothers from eliciting testimony that Fullam received the name of her treating physician, and only medical expert witness, Dr. Schoenhaus, from her attorney. ***See*** N.T., 10/1/2012, at 16. The trial court asked Fullam's counsel if he did, indeed, recommend Dr. Schoenhaus to Fullam, to which counsel replied, "Yes." ***Id.*** Thereafter, the trial court stated, "Then it's a fact of the case." ***Id.*** Although Fullam argued that the fact was not relevant, Miller Brothers asserted that it was a fact for the jury to consider. The trial court agreed, and denied the motion in *limine*. ***Id.*** at 17. During her direct examination, Fullam testified that she was treated by Dr. Lee for the injury to her wrist, and by Dr. Schoenhasue for the injury to her foot. ***Id.*** at 114, 117. She acknowledged that she was referred to Dr. Lee by her cousin, Nancy Fullam, who happens to be an attorney, and she was referred to Dr. Shoenhaus by her trial attorney. ***Id.*** at 115-117, 151.

Pennsylvania Rule of Evidence 607(b) provides that "[t]he credibility of a witness may be impeached by any evidence relevant to that issue[.]" Pa.R.E. 607(b). Moreover, it is well-established that:

> Impeachment of an expert witness by demonstrating partiality is permissible. It is proper to ask an expert witness his fee for testifying, as well as whether he has a personal friendship with the party or counsel calling him.

J.S. v. Whetzel, 860 A.2d 1112, 1120 (Pa. Super. 2004) (citations omitted).

Here, the trial court concluded Miller Brothers's inquiry regarding how Fullam got the names of her treating physicians was relevant to demonstrate the physicians' potential biases. We agree. Even without opposing medical expert testimony, the jury was still required to weigh the credibility of Fullam's expert, Dr. Schoenhaus. Any relationship he may have had with Fullam's attorney was a relevant credibility consideration. ***J.S.***, ***supra***.

With regard to the testimony concerning Fullam's wrist doctor, Dr. Lee, we note that Fullam's pretrial objection referred only to Dr. Schoenhaus. ***See*** N.T., 10/1/2012, at 15-16. Hence, because Fullam never objected to the inquiry regarding how she obtained the name of Dr. Lee, we could consider her challenge now waived. ***Harman ex rel. Harman***, ***supra***. Nevertheless, assuming *arguendo* the issue is preserved, we conclude that the inquiry was relevant to demonstrate the physician's potential bias.[6] Moreover, any evidence regarding the diagnosis and treatment of her injuries was relevant to the issue of damages, an issue that was, ultimately, not reached by the jury. Therefore, Fullam cannot demonstrate she was

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[6] Specifically, with regard to Dr. Lee, Fullam testified that her cousin, Nancy, an attorney, gave her the name of Dr. Lee and stated, "[T]his is a top hand person I would like you to see him." N.T., 10/1/2012, at 116.

prejudiced by this testimony, and, accordingly, no relief is warranted. ***See Phillips***, ***supra***.

Next, Fullam contends the trial court abused its discretion when it permitted Miller Brothers to elicit testimony that there were no other falls at the construction site on the day of the accident, and failed to instruct the jury that "evidence of lack of prior falls is not proof that [Miller Brothers] was free from negligence or that [Fullam] was negligent in causing her own fall." Fullam's Brief at 25. Further, Fullam contends the testimony was prejudicial because it allowed the jury "to reach its verdict based upon the improper assumption that a lack of prior falls at the same location was evidence that [Miller Brothers] had acted properly, and, more importantly, that [Fullam] caused her own fall." ***Id.*** at 26.

During opening arguments, Miller Brothers stated several times that no one else fell at the construction site. N.T., 10/1/2012, at 73, 78, 80. Following arguments, Fullam lodged an objection arguing the fact that no one else had fallen was "not proper evidence to put before a jury as a basis to determine whether [Miller Brothers was] negligent in this case." ***Id.*** at 86. While the trial court denied the objection, it took under advisement Fullam's request for a corrective instruction that "simply because no one else fell does not mean there was no negligence." ***Id.*** at 84.

Pennsylvania courts have permitted, in different contexts, similar evidence regarding the lack of prior claims. In ***Spino v. John S. Tilley Ladder Co.***, 696 A.2d 1169 (Pa. 1997), a products liability case, the

Pennsylvania Supreme Court held that "evidence of the non-existence of prior claims" may be admissible if the offering party can establish that "the accident occurred while others were using a product similar to that which caused plaintiff's injury." ***Id.*** at 1173. More relevant to the facts at issue, in ***Orlando v. Herco, Inc.***, 505 A.2d 308 (Pa. Super. 1984), a case based on food poisoning, this Court permitted evidence that "on the same evening on which [the plaintiff] became ill, twenty other guests had ordered shrimp creole and had not complained of illness." ***Id.*** at 310. Although the plaintiff argued that the issue was whether the food served to him was unmerchantable, this Court concluded that "the fact that all other shrimp creole sold that evening, prepared at the same time and using common ingredients, was found to be fit for human consumption was a relevant fact for the jury to consider." ***Id.***

Here, the trial court concluded the testimony concerning the lack of other falls was especially relevant in light of the parties' dispute as to how the accident occurred. The court opined:

> The evidence and arguments were properly presented to show that other pedestrians followed [Miller Brothers's] warnings and signage and that there was no dangerous condition within the cross-walk area where [Miller Brothers] had directed pedestrian traffic. [Fullum] testified that she fell in the cross-walk where [Miller Brothers] directed people to walk. [Miller Brothers's] witnesses contradicted [Fullam's] assertion by testifying that [she] crossed the barricade and entered an area where she was not permitted to be. This evidence was properly allowed to show that at that same time and place many other people properly followed the signs and warnings to take the proper path without any incident or accident of a similar nature occurring.

Trial Court Opinion, 7/22/2013, at 12-13. We detect no abuse of discretion on the part of the trial court in permitting this testimony.[7] Accordingly, this issue fails.

Fullam also asserts the trial court erred in permitting Miller Brothers to present the testimony of a process server to explain that he served a subpoena on defense witness, Shirley Mackin, whom Miller Brothers referred to in its opening argument, but who failed to appear for trial. Fullam contends that the testimony of the process server was irrelevant, and "because [Miller Brothers] was permitted to present evidence that they desperately attempted to obtain her presence, the jury was left … [with] the improper assumption that Ms. Mackin would have testified that … [Fullam] caused her own fall." Fullam's Brief at 27-28.

Our review of the certified record reveals that Fullam failed to raise this claim either in her post-trial motions, or in her Rule 1925(b) concise statement. Either omission is fatal to her claim. ***See Sovereign Bank v.***

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[7] Moreover, to the extent Fullam challenges the trial court's failure to provide a cautionary instruction that evidence of a lack of similar falls does not definitively establish that Miller Brothers was not negligent, we find such challenge waived. When Fullam requested the instruction following opening arguments, the court informed her that he would take it under advisement. Fullam does not indicate that she renewed her request either before or after the court's jury charge. Accordingly, it is now waived. ***See Blumer***, ***supra***, 20 A.3d at 1232 ("[I]f the trial court defers ruling on a motion in *limine* until trial, the party that brought the motion must renew the objection at trial or the issue will be deemed waived on appeal.").

Valentino, 914 A.2d 415, 426 (Pa. Super. 2006) ("Even when a litigant files post-trial motions but fails to raise a certain issue, that issue is deemed waived for purposes of appellate review."); Pa.R.A.P. 1925(b)(4)(vii) ("Issues not included in the Statement and/or not raised in accordance with the provisions of this paragraph (b)(4) are waived."). Therefore, this claim is waived for our review.

Lastly, Fullam contends she is entitled to a new trial based upon an erroneous jury charge. Specifically, Fullam argues the trial court's charge on the "choice of ways" doctrine was "misleading to the jury, affecting the jury's calculus when determining liability." Fullam's Brief at 30.

Our review of a challenge to a jury charge is well-settled:

> We will grant a new trial based on an error in the jury charge if "the jury was probably misled by what the trial judge charged." ***Price v. Guy***, 558 Pa. 42, 45, 735 A.2d 668, 670–71 (1999) (citation omitted). A jury instruction is faulty if the evidence presented at trial does not support it. ***See Marlowe v. Travelers' Ins. Co.***, 313 Pa. 430, 432–33, 169 A. 100, 101 (1933). When the record is void of evidence satisfying the elements of a particular legal doctrine, the trial court commits a reversible error by discussing that doctrine in its charge. ***See Angelo v. Diamontoni***, 871 A.2d 1276, 1279 (Pa.Super.2005).

Mirabel v. Morales, 57 A.3d 144, 153 (Pa. Super. 2012).

The "choice of ways" doctrine imputes contributory negligence when a person who has a choice of two ways to travel, one being perfectly safe and the other subject to risk and danger, voluntarily choses the risky path and is injured. ***Id.*** at 153-154. In ***Mirabel***, ***supra***, this Court explained:

> In order for there to be sufficient evidence to warrant a jury instruction for the doctrine, there must be evidence of (1) a safe course, (2) a dangerous course, and (3) facts which would put a reasonable person on notice of the danger or actual knowledge of the danger. The "choice of ways" doctrine has a narrow application and it should only be applied in the clearest case. In cases in which the doctrine has been applied to find that the plaintiff was contributorily negligent, the danger the plaintiff chose to confront was indisputably obvious.

Id. at 154 (internal citations and quotation marks omitted).

Fullam argues the court's jury charge on the "choice of ways" doctrine was improper because "the route chosen by [her] was purportedly safe" and "there was no danger to appreciate and no other route that could have been taken." Fullam's Brief at 29-30. While this argument conforms with Fullam's testimony concerning the circumstances of her fall, two of Miller Brothers's witnesses testified that Fullam fell in an area that was cordoned off to pedestrians. N.T., 10/2/2012, at 44, 47, 87, 110-111, 115. The trial court, in its opinion, summarized the facts supporting the "choice of ways" charge as follows:

> Here, there was evidence of several safe courses, evidence of a dangerous course, and facts that would have put a reasonable person on notice of the danger or actual knowledge of the danger. First, there was testimony that [Fullam] could have followed the signs instructing her where to walk to avoid the cordoned off area of construction she walked through. There was also testimony that both 33rd Street or northbound 36th Street were both safe available alternative routes. [Fullam] testified that she did not choose to take another route because she was "planning to simply go the route that [she] had always gone which was up 34th Street and to follow whatever [she] needed to do there." Second, there was testimony that the route that [Fullam] chose to take was dangerous. There was testimony and evidence that [Fullam] walked into a cordoned off area of construction where pedestrians were not permitted to be.

> There was active construction activity going on in the area where [Fullam] fell. It was cordoned off because it was not a safe area for pedestrians to walk through. Third, there was evidence that a reasonable person would have been on actual or constructive notice of the danger of the course she took. [Fullam] was fully aware of the fact that construction activity was taking place at 34th and Market Streets because she worked nearby and drove past the site every morning on her way to work. The construction site was enormous. [Fullam] saw the barrels, cones, and tape that were blocking pedestrians from crossing straight on Market Street and she saw the "sidewalk closed" sign directing pedestrians to a clear pathway.
>
> Although [Fullam] testified that she fell within the cross-walk [Miller Brothers] directed her to follow, there was significant testimony and evidence that in fact she crossed over the barriers and walked into the cordoned off area of construction where she was not permitted to be. Thus, there was sufficient evidence that a safer route existed, and that [Fullam] chose to take a route that was clearly dangerous. Therefore, it was proper for the Court to instruct the jury as to [Fullam's] choice of ways.

Trial Court Opinion, 7/22/2013, at 13-14.

We agree with the finding of the trial court that the testimony presented by Miller Brothers, as summarized above, supported a jury charge on the "choice of ways" doctrine.[8] Therefore, Fullam's final claim is meritless.

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[8] The actual charge given by the trial court on the "choice of ways" doctrine was brief. In instructing the jury on the concept of Fullam's contributory negligence, the court stated:

> [Miller Brothers] has specific grounds of contributory negligence of [Fullam] that are alleged in this case. One [it] alleges that [Fullam] was negligent … that she failed to keep a reasonable lookout, … and two, that in failing to comply with the barriers – and that she failed to comply with the barriers, road signs and

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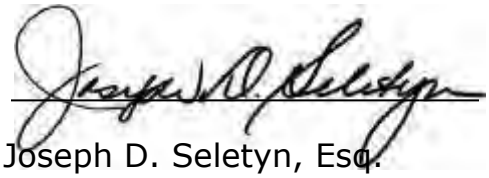
Accordingly, because we conclude Fullam has failed to establish that the trial court abused its discretion in denying her request for a new trial, we affirm the judgment entered in favor of Miller Brothers.

Judgment affirmed.

Strassburger, J., files a dissenting memorandum.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 4/30/2014

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> caution tape; and three, … that in failing to choose the choice of way which was perfectly safe, and that in crossing Market Street at either 33rd or 36th Street rather than crossing at 34th Street which she knew was under construction. These are actions [that] lean towards her negligence.
>
> So, those are the things you will consider when deciding question Number three ["Was the plaintiff Victoria Fullam negligent?"].

N.T., 10/3/2012, at 118-119.