

SUPERIOR COURT  
of the  
State of Delaware

William L. Witham, Jr.  
Resident Judge

Kent County Courthouse  
38 The Green  
Dover, Delaware 19901  
Telephone (302) 739-5332

November 19, 2009

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Re: *Nicole Colbert v. Marc Ostroff*  
09C-02-031 WLW  
*Letter Order Upon Plaintiff's Motion in Limine*

Dear Counsel:

Plaintiff Nicole Colbert (“Colbert”) filed this Motion in Limine on August 21, 2009. Colbert, pursuant to Delaware Rules of Evidence 401, 402 and 403, seeks to exclude from evidence any proof indicating that she was not walking in a marked crosswalk at the time of the accident in question. Based upon the reasons set forth below, Colbert’s motion must be denied.

**FACTS AND PROCEDURAL HISTORY**

On February 24, 2007, Colbert was struck by a motor vehicle while walking in the Dover Target parking lot with her daughter and her daughter’s friend. Colbert alleges that the side mirror of a vehicle driven by Defendant Marc Ostroff (“Ostroff”)

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made contact with her right arm. Ostroff indicated in his deposition that he believes Colbert extended her arm deliberately. The impact allegedly severely injured Colbert. Colbert, at the time of the accident, was not walking in an area designated for pedestrians.

On February 20, 2009, Colbert filed suit alleging that Ostroff was negligent. A pre-trial conference is currently scheduled for January 12, 2010. Trial is scheduled for February 8, 2010.

***Plaintiff Colbert's Arguments***

Colbert contends that any evidence indicating that she was outside the designated crosswalk at the time of the accident should be excluded as irrelevant, unfairly prejudicial and misleading or confusing to the jury. She avers that the accident would have occurred regardless of whether or not she was in a crosswalk at the time of the accident. Consequently, Colbert contends that telling the jury she was not in a crosswalk would cause the jury to automatically assume that she was at least partially at fault.

***Defendant Ostroff's Arguments***

Ostroff disputes Colbert's characterization of the case. Colbert avers that the "main issue" to be decided is whether the accident resulted from Ostroff's negligence or Colbert's intentional act. Ostroff, however, contends that an additional issue is whether Colbert's basic negligence was a proximate cause of the accident. That is, Ostroff contends that Colbert failed to be attentive and aware of her surroundings as she walked through a "driving area" of the parking lot. This includes Colbert's

failure to use an available crosswalk. Ostroff contends that the fact that the accident did not occur in a crosswalk is an essential element of his defense. Consequently, evidence supporting this defense should not be excluded.

### **DISCUSSION**

Delaware Rule of Evidence 402 provides that relevant evidence is generally admissible and irrelevant evidence is inadmissible.<sup>1</sup> Relevant evidence is that which has a tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence.<sup>2</sup> Relevant evidence, however, may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.<sup>3</sup>

The Court finds that evidence of Colbert's failure to cross in a clear and available crosswalk is indeed relevant. Even assuming that the central issue of this case is whether Ostroff's negligence or Colbert's intentional act caused Colbert's injury, it is not the only issue. An important underlying issue is whether Colbert's own negligence was a proximate cause of the accident. To this end, Ostroff may develop the facts surrounding Colbert's failure to cross in an area designated for pedestrians. It is up to the jury to determine, based upon the facts, which party's

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<sup>1</sup> D.R.E. 402.

<sup>2</sup> D.R.E. 401.

<sup>3</sup> D.R.E. 403.

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theory of liability prevails. Consequently, the evidence indicating that Colbert failed to cross in a crosswalk is relevant and not unfairly prejudicial, confusing or misleading.

**CONCLUSION**

For the foregoing reasons, Colbert's Motion in Limine is *denied*. IT IS SO ORDERED.

/s/ William L. Witham, Jr.  
Resident Judge

WLW/dmh

oc: Prothonotary

xc: Counsel