

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE  
IN AND FOR KENT COUNTY

ROBERT K. DUNNING,                    )  
  ) C.A. No. 04C-09-027 (JTV)  
                          Plaintiff,         )  
  )  
                  v.                            )  
  )  
KEITH P. DOMINICK,                    )  
  )  
                          Defendant.        )

*Submitted: October 11, 2005*  
*Decided: January 31, 2006*

Jeffrey J. Clark, Esq., Schmittinger & Rodriguez, Dover, Delaware. Attorney for Plaintiff.

Jeffrey A. Young, Esq., Young & McNelis, Dover, Delaware. Attorney for Defendant.

*Upon Consideration of Plaintiff's  
Motion For a New Trial and  
Motion for Judgment as a Matter of Law*  
**DENIED**

**VAUGHN, President Judge**

***Dunning v. Dominick***  
C.A. No. 04C-09-027 (JTV)  
January 31, 2006

## **OPINION**

This is a personal injury, pedestrian-auto accident case in which a jury returned a verdict in favor of Keith P. Dominick ("defendant"). The jury found that the defendant was not negligent. Robert K. Dunning ("plaintiff") filed this Motion for a New Trial and Renewal of Motion for Judgment as a Matter of Law. The plaintiff had moved for Judgment as Matter of Law during trial. The Court reserved decision. I now consider that motion together with the plaintiff's motion for a new trial.

## **FACTS**

On November 5, 2002, the plaintiff, was struck by a vehicle driven by the defendant. At the time he was a pedestrian, crossing the street to vote at a polling location in Kenton, Delaware. The accident occurred during the twilight hour of the day. At trial there was conflicting testimony as to whether the plaintiff paused in the middle of the road to wait for on-coming traffic to clear or whether he had stepped into the far lane. There was also a factual disagreement as to whether the plaintiff stepped into the far lane of travel but stepped back into the lane in which the defendant was driving when he was struck. Additionally, there was a dispute as to whether the plaintiff was in an unmarked crosswalk at the time of the accident.

## **STANDARD OF REVIEW**

When a motion for judgment as a matter of law is made, it is the duty of the trial judge to determine whether, under any reasonable interpretation of the evidence, the jury could justifiably find in favor of the non-moving party and against the

***Dunning v. Dominick***  
C.A. No. 04C-09-027 (JTV)  
January 31, 2006

moving party.<sup>1</sup> The evidence must be viewed in the light most favorable to the non-moving party.<sup>2</sup> When reviewing a motion for new trial, the jury's verdict is entitled to "enormous deference."<sup>3</sup> Traditionally, "the court's power to grant a new trial has been exercised cautiously and with extreme deference to the findings of the jury."<sup>4</sup> In the absence of exceptional circumstances, the validity of damages determined by the jury should be presumed.<sup>5</sup> This Court will not upset the verdict unless the evidence preponderates so heavily against the jury verdict that a reasonable jury could not have reached the result.<sup>6</sup>

### **CONTENTIONS OF THE PARTIES**

The plaintiff claims that the defendant was negligent *per se* on two grounds: (1) the defendant failed to yield to the plaintiff in an unmarked crosswalk within an intersection in violation of 21 *Del. C.* § 4143(a); and (2) the defendant failed to give full time and attention to the operation of his vehicle by failing to maintain a proper lookout under 21 *Del. C.* § 4176(b). He also contends that because 21 *Del. C.* § 4144

---

<sup>1</sup> *Ebersole v. Lowengrub*, 208 A.2d 495 (Del. 1965).

<sup>2</sup> *Russell v. Kanaga*, 571 A.2d 724 (Del. 1990).

<sup>3</sup> *Young v. Frase*, 702 A.2d 1234, 1236 (Del. 1997) (*citing* the Delaware Constitution, Art. IV, § 11(1)(a)).

<sup>4</sup> *Maier v. Santucci*, 697 A.2d 747, 749 (Del. 1997).

<sup>5</sup> *Littrel v. Hanby*, 1998 Del. Super. LEXIS 10 at \*3-4, *citing* *Young*, 702 A.2d at 1236-37.

<sup>6</sup> *Storey v. Camper*, 401 A.2d 458, 465 (Del. 1979).

***Dunning v. Dominick***  
C.A. No. 04C-09-027 (JTV)  
January 31, 2006

states that every driver shall exercise due care to avoid colliding with any pedestrian upon any roadway, the plaintiff had an absolute right-of-way. Plaintiff claims that no reasonable jury could find that he crossed the road anywhere other than at an intersection or that the defendant maintained a proper lookout. At the very least, the plaintiff asserts, the jury should have found comparative negligence.

The defendant argues that 21 *Del. C.* § 4143(a) imposes responsibility on the pedestrian to avoid getting in the way of a motor vehicle which is established on the roadway and that the issues of due care or lack of due care on the part of the defendant and the adequacy or lack of adequacy of his lookout were all factual issues in dispute which were properly left to the jury to determine.

### **DISCUSSION**

As the defendant contends, many facts were in dispute, such as whether the plaintiff was in an unmarked crosswalk, the lighting at that time of day, whether the plaintiff had stepped into the far lane, and whether he stepped back into the path of the defendant's vehicle. Evidence and testimony were presented at trial supporting both the plaintiff's and the defendant's positions as to how the accident occurred.

I find that the evidence was sufficient to support a verdict in favor of the defendant. Evidence was presented that the defendant was traveling in his lane at approximately 10-15 mph, with another vehicle approximately five feet ahead of him, but toward the left-hand side of the same lane. There was evidence that the position of the vehicles would block the defendant's headlights from illuminating a pedestrian in the middle of the roadway. There was evidence, disputed, but nonetheless

***Dunning v. Dominick***  
C.A. No. 04C-09-027 (JTV)  
January 31, 2006

evidence, that it was fairly dark when the accident occurred, and that the area was not well lit. The defendant and a witness for the defense testified that the plaintiff had stepped into the far lane of travel and then stepped back into the path of the defendant's car. Given the absence of markings on the roadway and some testimony that the plaintiff did not cross the road at a 90 degree angle, some question of fact existed as to whether the accident occurred in a crossway. Under these facts and the attendant facts and circumstances, I am persuaded that negligence or lack of negligence on the part of the defendant was a jury issue and that a jury decision either way would, depending upon how the jury resolved the facts, be supported by the evidence.

Therefore, the plaintiff's motion for judgment as a matter of law and motion for a new trial is ***denied***.

**IT IS SO ORDERED.**

/s/ James T. Vaughn, Jr.

President Judge

oc: Prothonotary  
cc: Order Distribution  
File