



CASE STUDY: GUIDING STUDENTS AND EMPLOYEES TO RECOGNIZE THE EMPLOYER RISKS OF EMPLOYEE VIDEO ZOOM WHILE DRIVING

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Imagine that you have logged onto a video Zoom meeting, and you notice that one of the participants is driving. He fumbles with the phone, trying to align the camera with his face, looking from the phone to the road ahead. Other participants on the call either say nothing or thank him for being willing to participate from his car. That is distracted driving, and if he collides with a car or pedestrian due to that distraction, each of those meeting participants could be held liable for distracting the driver. In addition, they would be witnesses to his distracted driving in the lawsuit that would likely result in his employer being held liable. This article summarizes the risks of employer liability arising from distracted driving, proposes policies to reduce the risk of that liability, and offers a case study for teaching these concepts to students and employees.

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I. INTRODUCTION

“Police caught an idiot driver in the middle of a Zoom video call while behind the wheel as he made his way to work yesterday.”¹ That is an inflammatory statement, but many might feel the same way. “It beggars belief that a driver could think it’s safe to have a Zoom call while being in control of a car,” commented RAC road safety spokesman Simon Williams.² Police officers spotted the car and pulled it over, finding that the driver had only a provisional license and no insurance.³ While this story led only to head-shaking, it could have been so much worse.⁴ The leading cause of injury and death in the workplace, according to the

¹ Luke May, *Virtual Insanity! Police Catch Idiot Driver Holding a ZOOM Video Call at the Wheel on his Way to Work*, DAILY MAIL (Feb. 10, 2021), <https://www.dailymail.co.uk/news/article-9244903/Driver-holds-ZOOM-video-call-driving-work.html>.

² *Id.* RAC is the UK motoring organization, similar to the AAA in the United States.

³ *Id.*

⁴ *Id.*

National Safety Council, is motor vehicle collisions.⁵ Employers need to have policies in place prohibiting employee participation in video Zoom⁶ calls while driving or employers could end up liable for the resulting crash.⁷

II. THE CASE STUDY

Founded in 2015, Amanda's Apartment Accessories ("A³") operates as a successful retail organization, both storefront and online, within the home decorating business, focusing on apartment dwellers. It offers products ranging from décor items, such as artwork and frames, to linens, including sheets and towels. Due in large part to its aggressive social media marketing campaigns, it has attracted a young demographic, many who are furnishing their first apartments. As a format of operation, it employs nothing short of the latest innovations that technology has to offer. Although other major retailers in the segment have struggled, including Linens 'N Things and Bed, Bath, & Beyond,⁸ A³ has flourished. CEO Amanda Renarr, an interior design expert with an obsession for timeliness and attention to detail, recently hired new marketing director Karie Ann Floxon, who has experience managing a large staff. Karie Ann prefers to closely monitor the activities of the staff, insisting upon attendance at many meetings throughout the week, which some staff were finding increasingly burdensome. However, failure to attend a meeting could result in a reprimand, so employees started to search for ways to multitask.

One such employee, Deshaude Pierre, had arranged to maintain his remote worker status after the pandemic and did not have an office at the corporate

⁵ Frankenmuth Ins., *Commercial Fleet and Delivery Drivers: 5 Tips to Prevent Distracted Driving*, FMN, (July 9, 2020), <https://www.dailymail.co.uk/news/article-9244903/Driver-holds-ZOOM-video-call-driving-work.html>.

⁶ While this article focuses on Zoom, the same applies to FaceTime, Skype, WebEx, Teams, or any similar platform. For example, on June 7, 2021, Apple announced new features for its FaceTime app to allow enhanced video calls, appearing to make it more competitive with Zoom. Press Release, Apple Inc., *iOs15 brings new ways to stay connected and powerful features that help users focus, explore, and do more with on-device intelligence* (June 7, 2021), available at <https://www.apple.com/newsroom/2021/06/ios-15-brings-powerful-new-features-to-stay-connected-focus-explore-and-more/> No such new features should be used while driving.

⁷ See Lisa Nagele-Piazza, *Employers Can Be Liable For Distracted Driving*, SHRM, (Oct. 29, 2018), <https://www.shrm.org/resourcesandtools/legal-and-compliance/state-and-local-updates/pages/employers-can-be-liable-for-distracted-driving.aspx>.

⁸ Nathaniel Meyersohn, *Bed Bath & Beyond is closing hundreds of stores. But they won't be empty for long*, CNN, (Apr. 24, 2023), <https://www.cnn.com/2023/04/24/business/bed-bath-beyond-stores-bankruptcy-real-estate/index.html> (noting that the chain filed for bankruptcy on March 19, 2023, and would close all stores) (noting that the chain filed for bankruptcy on March 19, 2023 and would close all stores).

headquarters nor did he ever visit it. He became skilled at making it appear that he was a dedicated worker, often discussing how frantic his day was,⁹ while in reality, he spent most of his day playing with his three cats and working on home improvement. For example, one time he was on a ladder maintaining his house's gutter system but still attended a call with Karie Ann by wearing his ear buds and explaining that his camera was not working that day. Deshaude and coworker Julian often discussed what they perceived to be the wasted time spent in meetings, and started sharing techniques for multitasking, combining work and personal activities. Julian shared that his supervisor, Chris, encouraged his multitasking, as long as his required work was still completed.

During the pandemic, video conferencing through mediums like Zoom became useful not only for working remotely but also for still trying to achieve face-to-face interactions as opposed to mere phone calls. In comparison to phone calls, this new type of communication provides a much more exhaustive number of features and actions from which a participant can enhance their video call and/or experience. Abilities such as screen sharing, annotating, and reacting with emojis, among other features became possible in such calls.

Deshaude knew that an important meeting was coming up to discuss end-of-year figures as well as the marketing strategies A³ would take for the new year. He planned to sit in his home office and focus on the meeting, however, that morning, one of his cats appeared ill and he wanted to try to fit in a visit to the vet before the meeting. As often happens, though, the vet appointment took longer than usual and Deshaude was just pulling out of the vet's parking lot at the time the meeting was to begin, so Deshaude decided join via Zoom from his car. When he joined the meeting, some early attendees complimented Deshaude for his dedication to the company and ability to drive and Zoom at the same time. Karie Ann said that she appreciated his effort, but it would have been better if he had sat in the parking lot to attend the meeting. He assured her that he was fine and could safely multitask.

Julian joined the meeting, and sent a private chat message to Deshaude, letting him know that it was difficult to hear him. At this point, Deshaude was trying to pay attention to the meeting, and read Julian's text message, all while driving. He was driving with one hand while trying to adjust the settings on his phone, as

⁹ There is a trend called busyness, where people let everyone know how busy they are in order to signal how well they're doing. It has become a sort of currency. However, it is not the same as being productive, and it is often fake. Remy Blumenfeld, *The New Currency of Busyness – Three Ways to Spot a Fake*, FORBES (Feb. 23, 2019), <https://www.forbes.com/sites/remyblumenfeld/2019/02/23/the-new-currency-of-busyness-three-ways-to-spot-a-fake/?sh=3d845ed057b1>.

Amanda joined the meeting. She immediately told Deshaude to hang up, drive to a safe location where he could park and then rejoin the call. In a split second, sounds of tires squealing came from Deshaude's feed, followed by loud and simultaneous noises of glass shattering, metal crashing, and screams from both Deshaude and his cat, after which Deshaude was disconnected from the call.

While Deshaude was distracted by Zoom, a car driven by Ramone, had stopped suddenly in front of him, that he did not see, so he rear-ended that car, and he was rear-ended by another car, driven by Uly, a sixteen-year-old who had only been driving for a month. While no one was killed, Ramone suffered two broken knees requiring months of rehab and resulting in weeks of missed work. Uly suffered only bumps and bruises physically, but psychologically, he was traumatized and unable to drive again. Deshaude had minimal insurance, so both Ramone and Uly sued A³ to recover damages.

III. DISCUSSION QUESTIONS

1. *What are the primary types of distraction? In how many of those ways was Deshaude distracted?*
2. *What is a leading source of distraction while driving? What are available tools to combat that distraction?*
3. *What laws discourage distracted driving? How does law enforcement enforce such laws?*
4. *Can A³ be held liable to the plaintiffs for Deshaude's distracted driving? If so, under what theories?*
5. *Karie Ann tried to stop Deshaude's distracted driving, as did Amanda. How could they have been more successful?*
6. *What should an employer policy state regarding engaging in meetings while driving?*

IV. OVERVIEW OF DISTRACTED DRIVING

Distracted driving became an even larger concern during the pandemic, in part due to all of the virtual meetings engaged in by people working out of the office.¹⁰ Phone usage while driving was up by thirty-eight percent during the pandemic.¹¹ According to the American Automobile Association ("AAA"), when drivers take

¹⁰ *Don't Drive Distracted*, AAA, <https://www.aaa.com/dontdrivedistracted/> (defining distracted driving as "any activity (including texting) that diverts attention from the task of safe driving").

¹¹ Kea Wilson, *Speeding Isn't the Only Dangerous Driving Behavior on the Rise During COVID-19*, STREETS BLOG USA (May 7, 2020), <https://usa.streetsblog.org/2020/05/07/speeding-isnt-the-only-dangerous-driving-behavior-on-the-rise-during-covid-19>.

their eyes off the road for just two seconds, it doubles the risk of being involved in a crash.¹² The National Highway Traffic Safety Administration’s Driver Distraction Program defines three types of distractions:

- Visual distraction: Tasks that require the driver to look away from the roadway to visually obtain information;
- Manual distraction: Tasks that require the driver to take a hand off the steering wheel and manipulate a device; and
- Cognitive distraction: Tasks that are defined as the mental workload associated with a task that involves thinking about something other than the driving task.¹³

Some suggest that a fourth type of distraction is auditory, when the driver is hearing something unrelated to driving, such as passenger noise, an overhead helicopter, or another car backfiring.¹⁴ Video Zooming while driving involves all four types of distraction.¹⁵ It is visual because the driver will glance from the road to the device; manual because the driver will need to log onto the meeting and adjust the controls; cognitive since the meeting subject matter will distract the driver from focusing on the driving task; and auditory since the driver will be hearing various people in the meeting.¹⁶

The sources of distraction can be:

1. Associated with the vehicle—controls, displays, navigation systems
2. Brought into the vehicle—cell phones, computers, food, animals, grooming aids

¹² The *Risks of Distracted Driving*, AAA, <https://exchange.aaa.com/safety/distracted-driving/the-risks-of-distracted-driving>.

¹³ NAT’L HIGHWAY TRAFFIC SAFETY ADMIN., OVERVIEW OF THE NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION’S DRIVER DISTRACTION PROGRAM (2010), <https://www.nhtsa.gov/sites/nhtsa.dot.gov/files/811299.pdf> [hereinafter OVERVIEW OF DRIVER DISTRACTION PROGRAM]. The NHTSA’s mission is to “save lives, prevent injuries, and reduce economic costs due to road traffic crashes.” *Id.* Cognitive distraction can also be in the form of daydreaming. Don Kidd, *There are Four Types of Driver Distraction*, PERDUEANDKIDD (Oct. 30, 2017), <https://www.perdueandkidd.com/blog/distracted-driving>.

¹⁴ Kidd, *supra* note 13; Julie Ferguson, *Distracted Driving & Employer Policies*, ESI GROUP (Nov. 1, 2009), <https://www.theeap.com/best-practices/distracted-driving-employer-policies> (citing a “Carnegie Mellon study [showing] that just listening to cell phones can impair drivers by reducing the amount of brain activity associated with driving by as much as thirty-seven percent. ‘Subjects who were listening committed more lane maintenance errors, such as hitting a simulated guardrail, and deviating from the middle of the lane.’”); Byron Spice, *Carnegie Mellon Study Shows Just Listening to Cell Phones Significantly Impairs Drivers*, EUREKALERT (Mar. 5, 2008), <https://www.eurekalert.org/news-releases/786827>.

¹⁵ OVERVIEW OF DRIVER DISTRACTION PROGRAM, *supra* note 13.

¹⁶ *Id.*

3. External to the vehicle—signs and displays, scenery, roadside features¹⁷
4. Internal to the driver’s mind—daydreaming, “lost in thought”¹⁸

Sometimes, trying to solve one distraction can lead to another.¹⁹ For example, traffic congestion and long commutes can lead to stress and discomfort, which can be improved by a car seat massager as it relieves pain and triggers endorphins that improve mood.²⁰ Some argue that a car seat massager is a valuable feature not only in luxury vehicles, but in any car as the seat massager can improve circulation, prevent muscle fatigue, and improve mood, all of which can make for a safer driver.²¹ However, such seat massagers could also lead to cognitive distraction.²² While stressed drivers are not desirable, neither are those who are not alert having been lulled to sleep by a massage.²³ In addition, seat massagers could be a manual distraction from the numbness or pins and needles resulting from the massage, even hampering reflexes to respond quickly to a dangerous condition on the road.²⁴

Frankenmuth Insurance has created a list of safety tips in an effort to help delivery drivers to avoid distracted driving that includes “keep your eyes on the road, keep your hands on the wheel, and store gear properly.”²⁵ All three of those would apply to driving while in a video Zoom meeting since the driver’s eyes would be on the video screen rather than the road, her hands would be off the wheel while

¹⁷ Skywriting is another form of visual distraction while driving. Suzanne Raga, *14 Ethereal Secrets of Skywriters*, MENTAL FLOSS (Nov. 10, 2016), <https://www.mentalfloss.com/article/88552/14-ethereal-secrets-skywriters>. Because the letters appear one at a time, drivers continue to look up to see the rest of the message. *Id.* “When people see [skywriting], they literally slam on their brakes in green lights and stick their heads out the window,” according to skywriter Suzanne Asbury-Oliver. *Id.* Anecdotally, the author’s daughter, Amanda Carr, affirmed this kind of distraction on March 20, 2021, when she observed a skywriter while she was driving to work on the freeway. Conversation with Amanda Carr in Porter Ranch, CA (Mar. 20, 2020). She reported that traffic on the freeway slowed to a crawl as drivers struggled to read it. *Id.* Amanda admitted that she, too, was distracted, hoping that she would get in a better position to see the entire message, which she only recalled was something like “you’re nothing without your bones.” *Id.*

¹⁸ Kidd, *supra* note 13.

¹⁹ See Piyush Jain, *Are Car Massagers Safe? We Explore The Pros and Cons*, HOTCARS (Aug. 20, 2019), <https://www.hotcars.com/are-car-massagers-safe-we-explore-the-pros-and-cons>.

²⁰ Tony Havelka, *Best Car Seat Massager*, LIQUID IMAGE (Sept. 12, 2019), <https://www.liquidimageco.com/best-car-seat-massager>.

²¹ Joe Santos, *Why Aren’t Massage Seats a More Common Feature?*, MOTORBISCUIT (Aug. 20, 2020), <https://www.motorbiscuit.com/why-arent-massage-seats-a-more-common-feature>.

²² See Jain, *supra* note 19.

²³ *Id.*

²⁴ *Id.*

²⁵ Frankenmuth Ins., *supra* note 5. The other two tips are “eat before the trip” and “avoid drowsy driving.” *Id.*

joining the meeting, and the device used for the meeting would not be properly stowed.²⁶

Everyone is busy and often thinks that multitasking is the answer, including working while driving.²⁷ However, Neuroscientist Marcel Just, director of the Center for Cognitive Brain Imaging, conducted a study funded by the Office of Naval Research regarding brain activity associated with driving, and found that “[d]rivers need to keep not only their hands on the wheel; they also have to keep their brains on the road.”²⁸ He concluded that “the clear implication is that engaging in a demanding conversation could jeopardize judgment and reaction time if an atypical or unusual driving situation arose. Heavy traffic is no place for an involved personal or business discussion.”²⁹ The driver begins with attention focused on driving, but each additional input, whether seeing a helicopter or hearing construction noise, consumes some brain capacity, and reduces resources for monitoring the vehicle’s surroundings.³⁰ Just asserted that his “study demonstrates that there is only so much that the brain can do at one time, no matter how different the two tasks are.”³¹

A. Cell Phone Use

One of the leading sources of distraction is cellphone use.³² An astonishing 97% of Americans own a cellphone, including 85% who own smartphones.³³ The Centers for Disease Control and Prevention (“CDC”) estimates that crashes involving a distracted driver kill eight people a day in the U.S.³⁴ One survey

²⁶ *See id.*

²⁷ *See* Jon Hamilton, *Multitasking in the Car: Just Like Drunken Driving*, NPR (Oct. 6, 2018, 1:23 AM) <https://www.npr.org/templates/story/story.php?storyId=95702512>.

²⁸ Spice, *supra* note 14. Neuroergonomics, combining brain science with human-computer interaction studies, measures technology against human capabilities and has been applied to humans operating aircraft, ships, and cars, where the operator’s attention is distracted by technology including navigation systems and other tech devices. *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² OVERVIEW OF DRIVER DISTRACTION PROGRAM, *supra* note 13.

³³ *See Mobile Fact Sheet*, PEW RES. CTR. (Apr. 7, 2021), <http://www.pewinternet.org/fact-sheets/mobile-technology-fact-sheet>.

³⁴ *Distracted Driving*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/transportationsafety/distracted_driving/index.html.

reported that “48% of drivers admitted to reading a text, while one in four said they update social media, take pictures or videos while driving.”³⁵

Cell phone makers have made an effort to reduce cell phone distraction while driving.³⁶ One such example is Apple’s “Do Not Disturb While Driving” feature on its iPhones that mutes notifications to the driver and sends a message to texters or callers to let them know that the intended recipient is driving and cannot respond.³⁷ AT&T also has a “DriveMode” app to mute notifications.³⁸

B. Texting

The Supreme Court of the United States recognized that “[c]ell phone and text message communications are so pervasive that some persons may consider them to be essential means or necessary instruments for self-expression, even self-identification.”³⁹ However, texting while driving is dangerous and not advisable.⁴⁰ “All but two U.S. states have banned texting and driving, including Washington D.C., but only 21 states and D.C. prohibit drivers from holding their cellphones.”⁴¹ Executive Order 13513, issued on October 1, 2009, banned text messaging while driving by federal employees and requires federal agencies to encourage federal contractors to follow suit.⁴² “The Federal Motor Carrier Safety Administration

³⁵ “Senseless”: Parents Speak Out After Son Killed by Driver Apparently Distracted by Porn, CBS NEWS (Feb. 13, 2020, 7:48 AM), <https://www.cbsnews.com/news/texas-family-files-lawsuit-after-teen-killed-by-distracted-driver-watching-porn-mother-says>.

³⁶ See Mike Snider, *Here’s Where You Can’t Stream Video and Drive Anymore*, USA TODAY (June 28, 2018), <https://www.usatoday.com/story/tech/news/2018/06/28/you-cant-stream-video-while-driving-more-states-like-georgia-decide/732314002>.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *City of Ont. v. Quon*, 560 U.S. 746, 760 (2010).

⁴⁰ See “Senseless”: Parents Speak Out After Son Killed by Driver Apparently Distracted by Porn, *supra* note 35.

⁴¹ See *id.*; *Distracted Driving*, INS. INST. FOR HIGHWAY SAFETY, <https://www.iihs.org/iihs/topics/laws/cellphonelaws/maphandheldcellbans> (June 2023). Illinois law prohibits the use of electronic devices while driving. 625 ILL. COMP. STAT. ANN. 5/12-610.2(b) (West 2021). In Illinois, “[a] person convicted of violating subsection (b-5) commits a Class 4 felony if the violation resulted in the death of another person.” *Id.* 5/12-610.2(e).

⁴² Exec. Order No. 13,513, 74 Fed. Reg. 51,225 (Oct. 1, 2009). “Federal employees shall not engage in text messaging (a) when driving GOV, or when driving POV while on official Government business, or (b) when using electronic equipment supplied by the Government while driving.” *Id.* §2. “Each Federal agency, in procurement contracts, grants, and cooperative agreements, and other grants to the extent authorized by applicable statutory authority, entered into after the date of this order, shall encourage contractors, subcontractors, and recipients and subrecipients to adopt and enforce policies that ban text messaging while driving...”. *Id.* §4.

prohibits texting by commercial motor vehicle drivers while operating in interstate commerce.”⁴³

Some people may think that glancing at a phone for a few seconds is not a long enough period of time to be a problem.⁴⁴ However, “the average driver takes his eyes off the road for 5 seconds at a time while texting. At 55 miles per hour, that is like driving the length of a football field with your eyes closed. At 70 miles per hour, that [is like] driving blind for almost 2 football fields!”⁴⁵ Even the State Bar of Michigan notes in its policy that texting should be prohibited.⁴⁶

Law enforcement struggles to enforce no texting while driving laws, and looks to technology for assistance.⁴⁷ Textalyzer was created with technology from mobile forensics company Cellebrite, who assists law enforcement with unlocking mobile devices when needed to solve a crime.⁴⁸ The Textalyzer, named similarly to the Breathalyzer, could allow a law enforcement officer to connect a driver’s phone to the officer’s laptop solely to detect the operating system logs.⁴⁹ This would tell the officer if the driver was using the touchscreen at the time of a crash, but would not disclose the content of any such texts.⁵⁰ Evan’s Law, named in honor of college freshman Evan Lieberman who was killed when the driver of the car in which he was a passenger was distracted while texting, was introduced in the New York legislature in 2016, to permit use of the Textalyzer.⁵¹ While it failed in 2016, New York continues to consider legalizing the use of the Textalyzer, and Nevada is considering it as well.⁵²

⁴³ Limiting the Use of Wireless Communication Devices, 75 Fed. Reg. 59,118 (Sept. 27, 2010) (codified at 49 C.F.R. 383–84, 390–92).

⁴⁴ See *New Study Says Drivers Do Not Think Texting While Driving is Dangerous*, ROTHENBERG L. FIRM (Dec. 12, 2018), <https://injurylawyer.com/blog/new-study-says-drivers-do-not-think-texting-while-driving-is-hazardous>.

⁴⁵ Kidd, *supra* note 13.

⁴⁶ See Steven M. Gursten, *How Can You Avoid Remote Texter Liability?*, Mich. Auto L. (Apr. 13, 2017), <https://www.michiganautolaw.com/blog/2017/11/27/remote-texter-liability> (noting that Michigan Auto Law’s “Attorney Handbook” provides, “[c]ell phones should not be used while driving. Text-messaging while driving is prohibited at all times (as provided by Michigan law)”).

⁴⁷ See Kelly Wallace, *Driving While Distracted: Is the Textalyzer the New Breathalyzer?*, CNN (Sept. 2, 2016, 2:03 PM), <https://www.cnn.com/2016/09/02/health/distracted-driving-textalyzer/index.html>.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² Tanner Jubenville, *Controversial ‘Textalyzer’ Device Could Be up for Consideration Again in New York*, 13WHAM (Mar. 18, 2019, 11:04 PM), <https://13wham.com/news/local/controversial-textalyzer-device-could-be-up-for-consideration-again-in-new-york> (noting that objections to the device include Fourth Amendment issues, cost, and effectiveness).

ComSonics is developing a radar gun for use by law enforcement that will detect cell phone radio frequencies to identify drivers who are texting while driving.⁵³ In addition, some state law enforcement agencies use unmarked SUVs known as Concealed Identity Traffic Enforcement (CITE) vehicles, that allow officers to be able to look down into passenger vehicles to determine whether drivers are using distracting devices.⁵⁴

Texting is not just manually distracting, but also cognitively distracting.⁵⁵ Some might argue that hands-free texting permitted by some devices reduces the distraction.⁵⁶ For example, there was an attempt by Google with its Google Glass to keep drivers focused on the road by merely looking through their eyeglasses for services that would typically be managed on a phone.⁵⁷ In addition, a San Francisco startup, Navdy, “claims its Heads Up Display (HUD) would permit drivers to text and tweet safely while driving because the product projects images in the forward visual field of the driver so the driver does not need to look away from the road at his or her smartphone.”⁵⁸ However, just keeping one’s hands on the wheel is not enough.⁵⁹

⁵³ John Nassivera, *Texting and Driving: ComSonics’ Police Radar Gun Helps Cops Find Motorists on Their Phones*, HEADLINES & GLOB.. NEWS (Sept. 17, 2014, 4:54 PM), <http://www.hngn.com/articles/42727/20140917/texting-and-driving-comsonics-police-radar-gun-helps-cops-find-motorists-on-their-phones.htm> (ComSonics is a Virginia-based company that provides calibration services for speed enforcement equipment).

⁵⁴ Kevin Short, *New York State Troopers Battle Texting While Driving, Cell Phone Use on the Roads*, HuffPost (Dec. 6, 2017), http://www.huffingtonpost.com/2013/07/23/new-york-texting-driving_n_3634973.html (“In 1996, then-New York Gov. Pataki signed an executive order that banned unmarked police cars to combat a recent wave of police impersonations. Gov. Cuomo repealed the order in 2012 as part of the crackdown on distracted driving.”).

⁵⁵ *U Drive. U Text. U Pay.*, NAT’L HIGHWAY TRAFFIC SAFETY ADMIN., <https://www.nhtsa.gov/campaign/distracted-driving>.

⁵⁶ Joel Feldman, *Claiming it Can Make Texting and Tweeting Safe for Drivers with its “Heads Up Display”*, *Navdy Ignores the Science of Cognitive Distraction*, END DISTRACTED DRIVING, <https://www.enddd.org/end-distracted-driving/distracted-driving-updates/claiming-it-can-make-texting-and-tweeting-safe-for-drivers-with-its-heads-up-display-navdy-ignores-the-science-of-cognitive-distraction/>.

⁵⁷ Camille Riesbeck, *Driving with Google Glasses: Good or Bad Idea?*, TRANSPOCO TELEMATICS (June 11, 2014, 11:40 BST), <https://www.transpoco.com/blog/2014/06/11/driving-with-google-glasses/> (“For the purposes of driving whilst using Google Glass, it means that the wearer could be viewing information on the optical display at the same time they are concentrating on the road and this is concerning both the police and safety organizations.”).

⁵⁸ Feldman, *supra* note 56 (“The argument that using devices which do not require one’s vision to be taken away from the road is safer may be superficially appealing but is not backed by sound science.”).

⁵⁹ *See Distracted Driving*, CTRS. FOR DISEASE CONTROL AND PREVENTION: TRANSP. SAFETY (Apr. 26, 2022), https://www.cdc.gov/transportationsafety/distracted_driving/index.html.

C. Video Screens

It should seem obvious that one should not watch a video while driving, but apparently that is not the case. For example, a truck driver was watching an NFL game on his phone while driving and struck and killed a motorcycle driver.⁶⁰ In Pelham, New Hampshire, a 20-year-old woman forced a Jeep Wrangler into a rock wall when she was engaged in a FaceTime call while driving.⁶¹

In most states, having a video display within the driver's view while the vehicle is in motion is illegal.⁶² While parents may enjoy the distraction videos provide to their children in the backseat, those videos cannot be in the driver's view.⁶³ Laws do permit GPS-based navigation systems, provided they do not interfere with the driver's line of sight. Additionally, auto manufacturers typically prevent the use of navigation systems while driving by disabling them when the car is moving.⁶⁴

⁶⁰ Snider, *supra* note 36 (noting that the driver was texting while driving, killing the motorcyclist and injuring his passenger sister in the October 2017 incident in Pennsylvania).

⁶¹ *See id.*

⁶² Adam M. Gerschowitz, *Google Glass While Driving*, 47 ARIZ. STATE L.J. 755, 771, 773 (2015). In September 2019, Tesla introduced a new software feature called Tesla Theater, allowing the dashboard screen to show Netflix, YouTube, and Hulu videos, 1sixty8 Media, *Can I Watch Movies in My Car While Driving?*, BESTCARAUDIO.COM (Feb. 7, 2020), <https://www.bestcaraudio.com/can-i-watch-movies-in-my-car-while-driving/>. However, they are only available while the car is parked. *Id.*; *see, e.g.*, CAL. VEH. CODE § 27602(a) (West 2011) (“A person shall not drive a motor vehicle if a television receiver, a video monitor, or a television or video screen, or any other similar means of visually displaying a television broadcast or video signal that produces entertainment or business applications, is operating and is located in the motor vehicle at a point forward of the back of the driver's seat, or is operating and the monitor, screen, or display is visible to the driver while driving the motor vehicle.”); *see also id.* § 27602(b) (West 2011) (providing exceptions for “(1) A vehicle information display, (2) A global positioning display, (3) A mapping display, (4) A visual display used to enhance or supplement the driver's view forward, behind, or to the sides of a motor vehicle for the purpose of maneuvering the vehicle”).

⁶³ Gerschowitz, *supra* note 62 at 771, 773. Jonathan Weaver, age 18, and two others were killed in a head-on collision in Texas by a driver, with a cell phone in his hand, which was playing an X-rated movie on his cell phone at the time of the crash. “Senseless”: Parents Speak Out After Son Killed by Driver Apparently Distracted by Porn, *supra* note . Driver James Darling's employer stated “[o]ur hearts go out to all those impacted by this tragic accident, however, accident reconstruction analysis suggest[s] that our employee was not at fault. Beyond that, we decline to further discuss specific personnel or pending litigation.” *Id.*; *see* Plaintiffs' Original Petition & Jury Demand at 1–2, *Weaver v. Energy Transfer Partners*, Case No. DC-20-02383 (Tex. 44th Dist. Feb. 12, 2020), https://courtsportal.dallascounty.org/DALLASPROD/DocumentViewer/Embedded/j5YoGgmr2Cb3wjamaNvTJsaSqdkI3MFzdVaPcRzvc_4lMdyCd7jTf7Ks7xwkc2GmSvlfwe7ljWJyb6Laewi4XA2?p=0 (awaiting jury trial).

⁶⁴ 1sixty8, *supra* note 62; *Why Front Passengers Can't Enter GPS Navigation During the Drive*, NEWS WHEEL (Dec. 28, 2018), <https://thenewswheel.com/why-front-passengers-cant-enter-gps-navigation-during-the-drive..>

Video dashcam recorders are also permitted since there is no video screen to be viewed by the driver while driving.⁶⁵

The state of Georgia acted on July 1, 2018 to prohibit drivers from streaming video on their phones while driving, and crashes fell eleven percent in the first six months thereafter.⁶⁶ Washington enacted the Driving Under the Influence of Electronics Act, in January 2018, the first state to do so, which called out video on phones.⁶⁷ Jennifer Ryna, director of state relations for AAA’s national office commented, “We are seeing a trend of states amending distracted driving laws to address functionalities of smartphones.”⁶⁸

D. Zoom

The pandemic brought about a new form of distracted driving—Zoom.⁶⁹ With more people working from home, the number of people using Zoom skyrocketed.⁷⁰ People who had never heard of Zoom were suddenly spending hours each day on Zoom meetings.⁷¹ Unfortunately, just as people conduct business by cell phone

⁶⁵ Isixty8, *supra* note 62.

⁶⁶ Snider, *supra* note 36; GA. CODE ANN. § 40-6-241(c)(3) (2022); Robin Frazer Clark, *Were Georgia Roads Any Safer in 2018?*, ATLANTA INJ. LAW. BLOG (Jan. 2, 2019), <https://www.atlantainjurylawyerblog.com/were-georgia-roads-any-safer-in-2018/>.

⁶⁷ Snider, *supra* note 36.

⁶⁸ *Id.* (quoting Jennifer Ryna, director of state relations for AAA’s national office).

⁶⁹ Jeremy Baker, *Zoom is Adding to Distracted Driving During the Pandemic*, *Safe2Save Says*, KENS5 (Aug. 25, 2020), <https://www.kens5.com/article/news/local/safe2save-says-zoom-is-adding-to-distracted-driving-during-the-pandemic/273-93bfea50-8aa6-4258-86e0-5f2b1aa41337>. Self-described as a “marketplace for immersive experiences,” Zoom was named “the Preferred Video App for the 2nd Straight Year.” Aleks Swerdlow, *Introducing OnZoom: A Marketplace for Immersive Experiences*, ZOOM BLOG (Oct. 14, 2020), <https://blog.zoom.us/introducing-onzoom-a-marketplace-for-immersive-experiences>; *Zoom the Preferred Video App for the 2nd Straight Year* (2021), ZOOM, <https://explore.zoom.us/docs/lp/most-popular-apps-2021.html>. “2020 will be remembered as the ‘year Zoom became a household name.’ For the first time, the app became part of many people’s daily lives.” OKTA, OKTA’S BUSINESSES AT WORK 2021 (2021), <https://www.okta.com/sites/default/files/2021-02/Businesses-at-Work-2521.pdf>. Zoom was developed by Chinese software engineer Eric Yuan in 2011. Natalie Sherman, *Zoom Sees Sales Boom Amid Pandemic*, BBC (June 2, 2020), <https://www.bbc.com/news/business-52884782>.

⁷⁰ Sherman, *supra* note 69 (“Use of the firm’s software jumped 30-fold in April [2020], as the coronavirus pandemic forced millions to work, learn and socialize remotely.”).

⁷¹ See Jason Aten, *Zoom Is Now Worth \$130 Billion. The Reason Why is Simple*, INC (Sept. 2, 2020), <https://www.inc.com/jason-aten/zoom-is-now-worth-130-billion-reason-why-is-simple.html>; Sherman, *supra* note 69 (“Sales jumped 169% year-on-year in the three months to 30 April to \$328.2m, as it added more than 180,000 customers with more than 10 employees since January—far more than it had expected. It also turned a profit of \$27m in the quarter—more than it made in all of the prior financial year.”).

calls while driving, some of them decided to Zoom while driving.⁷² University Hospital’s Trauma Medical Director Dr. Mark Muir said, “[w]e’ve seen a few folks here [and] there who have been injured while trying to participate in some sort of remote meeting.”⁷³ He went on to admit that “I’ve even had unfortunately some of the meetings I’ve been on where I’m pretty sure some of the participants were driving and trying to navigate the roads while Zooming or WebEx chatting those types of things.”⁷⁴

Kyle Close, a student at the University of Mary Washington (UMW) shared that “[o]ver the past month I have noticed two different students driving while in class and on Zoom.”⁷⁵ He asserts that “UMW not only has a moral and ethical responsibility to keep students off the road while in class, but potentially a legal obligation as well,” referring to pending Virginia House Bill 874 that will further restrict cell phone usage while driving in Virginia.⁷⁶

Irish politician, James O’Connor, shocked his colleagues and community by joining a thirty-person group Zoom call while driving.⁷⁷ Another participant on the call said “I couldn’t believe it when I saw him. At first I thought someone had put in a video of James Corden in his Carpool Karaoke sketches.”⁷⁸

One of the problems is that no one says anything to stop such dangerous behavior.⁷⁹ Realtor Pat Kapowich admitted to seeing four leaders in the real estate industry participating in Zoom calls while driving.⁸⁰ The moment a meeting

⁷² May, *supra* note 1; Baker, *supra* note 69.

⁷³ Baker, *supra* note 69.

⁷⁴ Baker, *supra* note 69.

⁷⁵ Kyle Close, *Don’t Zoom and Drive*, BLUE & GRAY PRESS (Oct. 1, 2020), <https://blueandgraypress.com/2020/10/01/dont-zoom-and-drive>.

⁷⁶ *Id.* (expressing concern that students have been through a lot in 2020 and 2021 due to the pandemic, and “the last thing anyone needs is seeing a classmate get into a car accident live during a lecture”).

⁷⁷ Harriet Johnston, *Irish Politician, 23, Joins Group Zoom Call While Driving*, DAILY MAIL, (Oct. 12, 2020), <https://www.dailymail.co.uk/femail/article-8831309/Irish-politician-23-joins-group-Zoom-call-partys-weekly-driving.html>.

⁷⁸ *Id.*

⁷⁹ In fact, in three separate articles appearing in law journals, attorneys did not even mention that Zoom should not be used while driving. Sharon D. Nelson & John W. Simek, *Clip & Save: How to Use Zoom Securely*, 93 WIS. LAW., May 2020, at 49, 50, 52–53; Susan Berson, *Top Ten Tips for Lawyers “Zoom”ing into Remote Work During the Pandemic*, 89 J. KAN. B.A. 10, April 2020 at 10–12; Blake A. Klinkner, *Tips for Professional and Secure Zoom Meetings*, 43 WYO. LAW., June 2020, at 54–55.

⁸⁰ Pat Kapowich, *Buyers Working with a Recommended Agent want to Replace Him After He Schedules Zoom Call While Driving*, MERCURY NEWS (Feb. 15, 2021, 3:42 PM),

participant sees another participant engaging while driving, they should immediately end the call or instruct the driving participant to exit the meeting until the car is parked. Yet it may seem so obvious not to drive while on Zoom, that people feel it does not need to be said.⁸¹ In an article about things to avoid doing on Zoom, things like “don’t be wiggly” and “don’t avoid the camera” were included, but “don’t drive” was not included in the list of thirteen things to avoid.⁸² Consequently, employers must instruct employees to not participate in video Zoom meetings while driving in order to avoid liability.⁸³ It is inattention that causes accidents, and if the employer causes the inattention, the employer should be liable.⁸⁴

Most agree with the dangers of drunk driving, but many often try to argue that using cell phones is not as dangerous.⁸⁵ However, that is not the case.⁸⁶ According to the National Highway Traffic Safety Administration, distracted driving, whether from intoxication or cell phone use, can be deadly since it interferes with the driver’s ability to focus on safe driving.⁸⁷

Case law is clear that a passenger can be held liable for interfering with a driver’s operation of a vehicle.⁸⁸ In addition, a passenger has a duty not to distract

<https://www.mercurynews.com/2021/02/14/sponsored-buyers-working-with-a-recommended-agent-want-to-replace-him-after-he-schedules-zoom-call-while-driving>.

⁸¹ See Samantha Pyle, *What Not to Do During a Zoom Meeting*, GREENAPPLE STRATEGY (Aug. 12, 2020), <https://greenapplestrategy.com/what-not-to-do-during-a-zoom-meeting>.

⁸² N.F. Mendoza, *13 Things to Avoid Doing on Zoom*, TECHREPUBLIC (Apr. 3, 2020, 11:49 AM), <https://www.techrepublic.com/article/13-things-to-avoid-doing-on-zoom>.

⁸³ See Leland Garvin, *Employer Liability for Florida Distracted Driving Accidents*, GARVIN INJ. LAW (June 2, 2020) <https://www.garvinlegal.com/blog/employer-liability-for-florida-distracted-driving-accidents>.

⁸⁴ See Tracy Armstrong, *Cell Phones: Friend or Foe? Part One in a Three Part Series: Distracted Driving—A Potential Liability for Employers*, WILENTZ (July 7, 2021), <https://www.wilentz.com/perspectives/employment/2021-07-06-cell-phones-friend-or-foe-part-one>.

⁸⁵ See Stewart Law Offices, *Is Texting While Driving As Dangerous As Drunk Driving?*, STEWART L. OFFS.: BLOG (Jul. 16, 2020), <https://www.stewartlawoffices.net/is-texting-while-driving-as-dangerous-as-drunk-driving>. Compare *5 Facts You May Not Know About Drunk Driving*, BELSKY, WEINBERG & HOROWITZ (Feb. 26, 2019, 6:57 PM), <https://www.belsky-weinberg-horowitz.com/5-facts-you-may-not-know-about-drunk-driving/>, with Aline Holzwarth, *The Real Reason You Shouldn't Text While Driving*, BEHAV. SCIENTIST (Apr. 3, 2018), <https://behavioralscientist.org/the-real-reason-you-shouldnt-text-while-driving/>.

⁸⁶ See Holzwarth, *supra* note 85.

⁸⁷ *Distracted Driving*, NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., <https://www.nhtsa.gov/risky-driving/distracted-driving>.

⁸⁸ See, e.g., *Olson v. Ische*, 343 N.W.2d 284, 288 (Minn. 1984) (“A passenger who interferes with his driver’s operation of the motor vehicle, for instance by grabbing the steering wheel, may

a driver, and if a breach of that duty causes an accident, that passenger may also be liable for resulting damages.⁸⁹

While liability for distracted driving was initially placed on the driver, it has been expanded to include others (passengers or remote communicators) who distract the driver.⁹⁰ Today's technology provides opportunities for someone to distract a driver even when they are not physically present in the car.⁹¹ In addition, employers of employees engaging in distracted driving during their employment can be held liable.⁹²

be liable to others.”); *Liability of Motor Vehicle Passenger for Accident*, 50 AM. JURIS. PROOF OF FACTS 2d 677, 685–86 § 2 nn.16–20 (Christian C. Bjorklund et al. eds., 1988).

⁸⁹ See *Collins v. McGinley*, 558 N.Y.S.2d 979, 980 (N.Y. App. Div. 1990) (noting that jury's allocation of liability was 90% to the driver and 10% to the passenger who distracted the driver); *Kubert v. Best*, 75 A.3d 1214, 1226 (N.J. Super. Ct. App. Div. 2013) (“We have recognized that a passenger who distracts a driver can be held liable for the passenger's own negligence in causing an accident.”).

⁹⁰ See *Kubert*, 75 A.3d at 1229 (“[W]hen a texter knows or has special reason to know that the intended recipient is driving and is likely to read the text message while driving, the texter has a duty to users of the public roads to refrain from sending the driver a text at that time.”); *Gallatin v. Gargiulo*, No. 10401 of 2015, C.A., 2016 WL 8715650, at *14 (Pa. Ct. Com. Pl. Mar. 10, 2016) (“Plaintiff has pled facts which provide that Defendant, Laura E. Gargiulo, while driving, was distracted by a text message from either Defendant Joseph M. Gargiulo or Defendant Fend, who knew or should have known, that Defendant Laura E. Gargiulo was driving and would be distracted by such a text message; and this distraction immediately led to the death of the Decedent.”).

⁹¹ *Kubert*, 75 A.3d at 1229; see also Shekida A. Smith, *Texting While Driving Liability Now Extends To Remote Texters, According To New Jersey Appellate Court*, U. MIAMI L. REV. (Sept. 28, 2013), <https://lawreview.law.miami.edu/texting-driving/>. (“In theory the [*Kubert*] opinion demonstrates that legal ramifications for being a knowing and active nuisance to a driver who might possibly end up in a serious or fatal crash are not obsolete when the nuisance is ‘electronically present,’ rather than physically present, in the driver’s car.”).

⁹² See RESTATEMENT (SECOND) OF AGENCY §§ 219(1), 229(1) (AM. L. INST. 1957) (“A master is subject to liability for the torts of his servants committed while acting in the scope of their employment Conduct must be of the same general nature as the conduct authorized.”). Employers may be held liable under either vicarious liability or direct liability. See *Ellender v. Neff Rental, Inc.*, 965 So. 2d 898, 901–02 (La. Ct. App. 2007); see also Joanne Tucker, *6 Keys to An Effective Cell Phone Policy*, AUTO. FLEET (Sept. 4, 2012), <https://www.automotive-fleet.com/148220/6-keys-to-an-effective-cell-phone-policy> (employer settled for \$5.2 million with an Atlanta woman who lost her arm after being rear-ended by one of the company's employees who was driving 77 mph and using her company-issued cell phone at the time of the accident); *Driving While Calling*, LAWSUITS NEWS & LEGAL INFO. (Mar. 24, 2008), <https://www.lawyersandsettlements.com/settlements/11312/international-paper-cell-phone-crash.html>; Martha Buyer, *It's Time to Hang Up When Driving*, NO JITTER (Oct. 17, 2013), <https://www.nojitter.com/its-time-hang-when-driving>; Employer Smith Barney settled a lawsuit when its investment broker was using his cell phone to make cold calls when he drove through a red light, striking and killing a young man on a motorcycle. *Roberts v. Smith Barney, Inc.*, No. CIV. A. 97-2727, 1998 WL 1753646, at *1 (E.D. Pa. Feb. 11, 1998); *Roberts v. Smith Barney, Inc.*, 1999 WL 33236939, at *1 (E.D. Pa. 1999) (Employer Smith Barney settled a lawsuit when its investment

V. THIRD PARTY LIABILITY

A. *Individuals*

In 2013, the court in *Kubert v. Best* held, for the first time, that the sender of a text to a driver distracted by receiving that text, can be held liable to a third party injured in an automobile accident caused by the distracted driver.⁹³ Kyle Best was driving a pickup truck and texting with his friend, Shannon Colonna.⁹⁴ While looking at Colonna's text, Best hit Kubert's motorcycle.⁹⁵ The court held that Colonna could be held liable for negligence if she "knew or had special reason to know that the driver would read the message while driving and would thus be distracted from attending to the road and the operation of the vehicle."⁹⁶ Consider *Buchanan v. Vowell*, which occurred prior to *Kubert*, where a court found liability for a remote caller.⁹⁷ Candice Vowell was drinking in a bar with her mother, Shannon, who agreed to follow Candice home to make sure she arrived safely.⁹⁸ On the way, Shannon talked to Candice on the cell phone, allegedly to keep her alert, however, apparently it distracted her and she struck and permanently injured Jerry Buchanan.⁹⁹ He sued Candice, the bar where she drank, and Shannon, alleging that Shannon negligently distracted Candice.¹⁰⁰ The court held,

that Shannon owed a duty of reasonable care to those that shared the road with her, both motorists and pedestrians. Shannon, as an individual, may have breached this duty by calling and distracting a person she knew was operating a vehicle while under the influence of alcohol. Thus, Shannon may be found liable for Jerry's injuries even if she did not gratuitously assume a duty or act in concert with Candice.¹⁰¹

In *Kubert*, Colonna did not know that Best was driving, so she was not held liable, but the case sends a strong signal to other texters as well as their employers.¹⁰² Since the *Kubert* court expanded negligence to include the remote texter, finding that along with the text recipient, the remote texter has a duty to

broker was using his cell phone to make cold calls when he drove through a red light, striking and killing a young man on a motorcycle).

⁹³ *Kubert*, 75 A.3d at 1229.

⁹⁴ *Id.* at 1219–20.

⁹⁵ *Id.* at 1220–21.

⁹⁶ *Id.* at 1226.

⁹⁷ *Buchanan v. Vowell*, 926 N.E.2d 515, 521–22 (Ind. Ct. App. 2010).

⁹⁸ *Id.*

⁹⁹ *Id.* at 517–18.

¹⁰⁰ *Id.* at 518.

¹⁰¹ *Id.* at 522.

¹⁰² *Kubert v. Best*, 75 A.3d at 1214, 1229 (N.J. Super. Ct. App. Div. 2013).

others on the road, that would mean that under respondeat superior, an employee texting someone who they know is driving could be found to be committing a tort, and therefore, their employer would be liable under respondeat superior.¹⁰³ The *Kubert* court used the Supreme Court’s full duty analysis, which holds that in certain circumstances, a remote texter could be held liable should that individual be in a position to exercise considerable control or authority over the recipient and their actions.¹⁰⁴ According to one Ohio law firm, “[w]hile this is a New Jersey case, it provides potent precedence of concern for the devastating consequences of distracted driving in Ohio and elsewhere in the U.S.”¹⁰⁵

Kubert v. Best arose from a 2009 crash when eighteen-year-old Best crossed the center line of the road when distracted by his texting.¹⁰⁶ Linda and David Kubert, who were riding a motorcycle when Kyle Best’s truck hit them head-on and were severely injured, both lost their left legs.¹⁰⁷ They settled with Best for \$500,000, the maximum recovery under his insurance policy.¹⁰⁸ The Kuberts also sued Best’s seventeen-year-old friend, Shannon Colonna, who sent Best a text message

¹⁰³ *Id.*; see also Nagele-Piazza, *supra* note 7 (Employers can generally be held responsible for damages when a distracted driver is acting in the course and scope of employment. Since technology is expanding and the remote workforce is growing, workers are conducting more business away from the worksite and on the road, which increases the chances for employer liability.); Ellender v. Neff Rental, Inc., 965 So. 2d 898, 901–02 (La. Ct. App. 2007) (holding the employer liable for damages from an accident occurring when an employee was conducting business on an employer provider cell phone while driving when the accident occurred); Hunter v. Mod. Cont’l Constr. Co., 652 S.E.2d 583, 584 (Ga. Ct. App. 2007); David Needle, *Could Texting in Car Be an Employer Liability?*, ENTERMOBILETODAY (Jan. 26, 2010), <http://www.enterprisemobiletoday.com/article.php/3860556/Could-Texting-in-Car-Be-an-Employer-Liability.htm> (quoting Zurich insurance company, “companies would be well advised to issue guidelines that spell out that employee use of cellular devices while driving is neither encouraged nor condoned.”).

¹⁰⁴ *Kubert*, 75 A.3d at 1228–29 (In addition to the master-servant relationship between an employer and employee that is sufficient to give a passenger control over the driver’s conduct and establish a duty of care, other such relationships include parent-child, landlord-tenant, and guardian-ward.); see also *Champion ex rel. Ezzo v. Dunfee*, 939 A.2d 825, 830 (N.J. Super. Ct. App. Div. 2008).

¹⁰⁵ *New Jersey Court Finds Texter Can Have Responsibility for Remote Accident*, CLEMENTS, TAYLOR, BUTKOVICH & COHEN, LPA Co. (Fed. 6, 2014), <https://ctbclawyers.com/2014/02/06/new-jersey-court-finds-texter-can-have-responsibility-for-remote-accident/>; see also *Texting Liability for Remote Senders: Will This Be a Trend?*, COLLINS & COLLINS, P.C., <https://www.collinsattorneys.com/injuryblawg/auto-accidents/texting-liability-for-remote-s/> (“Texting and driving has catastrophic consequences. Distracted driving in fact leads to over 1000 deaths each year according to the CDC’s Distracted Driving Fact Sheet.”).

¹⁰⁶ *Kubert*, 75 A.3d at 1221–22.

¹⁰⁷ *Id.* at 1219.

¹⁰⁸ Smith, *supra* note 91. 91

immediately before the crash.¹⁰⁹ The court found that in this case, there was insufficient proof to overcome the motion for summary judgment in favor of Colonna because there was no proof that Colonna knew Best was driving or urged him to respond while driving, however, the case still had a powerful impact.¹¹⁰ In New Jersey, drivers are prohibited from using a cell phone while driving that is not “hands-free” unless there is an emergency situation.¹¹¹ The New Jersey legislature, finding a \$100 fine for violation of such prohibition insufficient, enacted the ‘Kulesh, Kubert and Bolis Law’ to provide criminal penalties for those who are distracted by use of a cell phone while driving and injure others. The new law explicitly permits a jury to infer that a driver who was using a hand-held cell phone and caused injury in an accident may be guilty of assault by auto, a fourth-degree crime if someone was injured seriously, thus exposing the driver to a potential sentence in state prison.¹¹²

B. Employer Liability

i. Vicarious Liability

Numerous courts have held that an employer is vicariously liable in cases where an employee has an accident while driving and using their cell phone for their employer’s business.¹¹³ For purposes of analyzing the scope of employment,

¹⁰⁹ Kubert v. Best, 75 A.3d 1214, 1221–22 (N.J. Super. Ct. App. Div. 2013).

¹¹⁰ The texter must have not only known the driver was driving, but also urged him or her to respond while driving. *Id.* at 1227.

¹¹¹ N.J. STAT. ANN. §§ 39:4–97.3 (2013) (“1. a. The use of a wireless telephone or electronic communication device by an operator of a moving motor vehicle on a public road or highway shall be unlawful except when the telephone is a hands-free wireless telephone or the electronic communication device is used hands-free . . .”).

¹¹² N.J. REV. STAT. § 2C:12-1(c)(1) (2009) (“A person is guilty of assault by auto or vessel when the person drives a vehicle or vessel recklessly and causes either serious bodily injury or bodily injury to another. Assault by auto or vessel is a crime of the fourth degree if serious bodily injury results and is a disorderly persons offense if bodily injury results. Proof that the defendant was operating a hand-held wireless telephone while driving a motor vehicle in violation of section 1 of P.L. 2003, c. 310 (C. 39:4-97.3) may give rise to an inference that the defendant was driving recklessly.”).

¹¹³ Jordan Michael, *Liability for Accidents from Use and Abuse of Cell Phones: When Are Employers and Cell Phone Manufacturers Liable?*, 79 N.D. L. REV. 299, 304–05 (2003) (“Although an employer is not generally liable for accidents occurring before or after business hours, if the employee is conducting business a cell phone at the time of the accident, the employer might still be indirectly liable. The employer might still be liable because conducting business via a cell phone provides a benefit to the employer.”); RESTATEMENT (THIRD) OF AGENCY § 7.07 (AM. L. INST. 2006) (defining the scope of employment as “when performing work assigned by the employer or engaging in a course of conduct subject to the employer’s control.” Therefore, with technology allowing one to “perform work assigned by the employer” from virtually anywhere and anytime, the scope of

location may extend beyond the office to the car,¹¹⁴ and time may extend beyond typical business hours.¹¹⁵ The key focus instead may be whether the employee was serving the purpose of the employer at the time of the tort.¹¹⁶

A parallel can be drawn to social host liability laws, which impose liability on the host of a gathering when a guest becomes intoxicated and causes injury to a third party.¹¹⁷ This is similar to dram shop laws which impose liability on sellers of alcoholic beverages, such as bars, liquor stores, and restaurants.¹¹⁸ Most dram shop laws will use a “visibly intoxicated” test; in other words, if a server knew or should have known that a customer was intoxicated and could cause danger to others, that customer should not be served, and the bar could be held liable for any injury caused by the intoxicated customer.¹¹⁹ While defendant hosts might try to argue about what

employment is not limited to the workplace of the employer, but to anywhere the employee is engaging in work related to his or her job.”). For example, Dyke Industries, an Arkansas lumber wholesaler, paid \$16.2 million to 78-year-old Alicia Bustos following a car accident involving one of Dyke’s salesmen who was allegedly talking on a cell phone seconds before the accident occurred. Jack Garson, *Driven to Distraction*, GARSON LAW (Feb. 2010), <https://garsonlaw.com/driven-to-distraction-from-the-legal-edge/> [<https://perma.cc/2WAT-4M7K>].

¹¹⁴ See Michael, *supra* note 113, at 305.

¹¹⁵ See *id.* at 304–05.

¹¹⁶ Jane Wagner, an attorney, struck and killed a 15-year-old girl with her Mercedes while talking on a cell phone late at night. Jennifer Myers, *Wrongful Death Suit Puts Cooley Godward on the Line*, LAW.COM (June 22, 2001, 12:00 AM) <https://www.law.com/almID/>. The girl’s parents brought suit against Wagner and won a \$2 million judgment against Wagner and her former employer, Cooley Godward, claiming Wagner was on a business call at the time of the accident. Karin Brulliard, *Family Wins \$2 Million in Hit-Run*, WASH. POST (Oct. 8, 2004), <https://www.washingtonpost.com/archive/local/2004/10/08/family-wins-2-million-in-hit-run/bb4b2eb4-ae4-4917-b595-6f74975feaa2>. While it was technically “after hours,” the call would be billed by the law firm to the client, and the law firm would receive a benefit, therefore the employee was serving the purpose of the employer at the time of the call. Myers, *supra* note 116; *Tiburzi v. Holmes Transport, Inc.*, No. 4:08 CV 1151 DDN, 2009 WL 2592732, at *5 (E.D. Mo. Aug. 20, 2009) (holding employer liable for \$18 million for its driver’s use of cell phone while driving for the employer and causing an accident that injured).

¹¹⁷ David Goguen, *Social Host Liability Laws and Lawsuits Over Alcohol-Related Accidents*, NOLO, <https://www.nolo.com/legal-encyclopedia/social-host-liability-laws-and-lawsuits-over-alcohol-related-accidents.html>.

¹¹⁸ *Id.*; see, e.g., see, e.g., *Jardine v. Upper Darby Lodge No. 1973, Inc.*, 198 A.2d 550, 553 (Pa. 1964) (“The first prime requisite to de-intoxicate one who has, because of alcohol, lost control over his reflexes, judgment and sense of responsibility to others, is to stop pouring alcohol into him.”). Expanding dram shop liability in Pennsylvania, the court continued, stating “[t]his is a duty which everyone owes to society and to law entirely apart from any statute.” *Id.*

¹¹⁹ *Dram Shop Law States Bars Can Be Held Liable for Drunk Driving Accidents*, ENJURIS, <https://www.enjuris.com/car-accident/dram-shop-law.html> (“Liability is usually limited to cases in which the individual being served was a minor or who was visibly drunk but still received service.”); *Legal Risks Bartenders Face for Overserving Alcohol*, ALCOHOL.ORG (Nov. 8, 2018), <https://www.alcohol.org/laws/over-serving> (“Bartenders who serve intoxicated patrons may be at

“should have known” means, there is no such argument in a video Zoom meeting.¹²⁰ If a meeting host can see that a meeting participant is on video Zoom while driving, that meeting participant is distracted and that meeting host should be held liable.¹²¹

An employer has “special reason to know”¹²² that the driver will be distracted because it is the employer distracting the employee.¹²³ Proof of the distraction would also not be a challenge since the employer can see that a device is being used to participate in the video Zoom meeting and can see that the driver is driving.¹²⁴

ii. Direct Liability

While employers may be vicariously liable for their employees’ torts, in the case of video Zoom meetings, employers could be held directly liable under a theory of negligence.¹²⁵ Negligence is the breach of a duty owed to a plaintiff to protect them from a foreseeable risk of harm.¹²⁶ The negligence analysis requires “an examination of the reasonableness of the risk created by the defendant’s conduct. This in turn depends upon a panorama of considerations such as the magnitude of the harm, the likelihood and foreseeability of its occurrence, weighed against the

risk for legal and civil charges as a result of these actions ... many states have enacted legislation to allow for prosecution and civil suits of commercial establishments that serve alcohol to visibly intoxicated individuals.”).

¹²⁰ See *supra* note 121 and accompanying text.

¹²¹ Courts dismissing cases filed against parties other than the distracted driver have focused on the lack of foreseeability of drivers using cell phones and causing crashes. *Doyle v. Sprint/Nextel Corp.*, 248 P.3d 947, 949 (Okla. Civ. App. 2010) (dismissing case against cell phone service provider for defendant driver who, while using the cell phone, ran a red light and caused the crash). But that would not be the case with video Zoom because the employer is watching them be distracted. See Kim Lyons, *PSA: Don’t drive while you are on a Zoom meeting*, THE VERGE, (MAY, 6, 2021, 8:51 PM), <https://www.theverge.com/2021/5/6/22423723/psa-dont-drive-zoom-meeting-ohio-distracted-driving-bill> [hereinafter Lyons].

¹²² *Kubert v. Best*, 75 A.3d 1214, 1219 (N.J. Super. Ct. App. Div. 2013).

¹²³ *Id.*

¹²⁴ “In fact, one could say that nothing short of watching the driver receive and read the message as he drives would ensure with certainty that the message will reach the driver while he is driving.” Emily K. Strider, *Don’t Text a Driver: Civil Liability of Remote Third-Party Texters after Kubert v. Best*, WM. & MARY L. REV. 56 1003, 1019 (2015). Strider argues that proof in the case of remote-texter liability would be difficult to prove since there is no guarantee that the text message would be received, nor would the sender have “direct knowledge of the recipient’s behavior.” *Id.*

¹²⁵ *McClane v. Rich Transport, Inc.*, No. 2:11-cv-00101 KGB, 2012 WL 3257658, at *7 (E.D. Ark. 2012) (finding the defendant driver’s employer could be liable for an independent claim of negligence and for punitive damages for failing to educate and supervise its drivers regarding the dangers of texting while driving).

¹²⁶ *Hetterle v. Chido*, 400 N.W. 2d 324, 326–27 (Mich. Ct. App. 1986).

utility of the defendant’s conduct.”¹²⁷ If the defendant employer permits or encourages video Zoom meetings while driving, then the employer can be held liable for negligence.¹²⁸ “An act is negligent if the actor intends it to affect, or realizes or should realize that it is likely to affect, the conduct of another, a third person, or an animal in such a manner as to create an unreasonable risk of harm to the other.”¹²⁹

Applying that standard to participating in a video Zoom meeting while driving, the magnitude of the harm is high as it could result in a deadly crash, the likelihood and foreseeability is high given that watching a video while driving is very distracting, and the utility of the driver’s participation in the video Zoom meeting is low.¹³⁰ There is no meeting that is important enough to risk someone’s life, whether that of the driver or passengers in another car or a pedestrian on the road. And, the risk is so easily mitigated by simply pulling off the road, to a safe location, and participating in the meeting while safely parked.¹³¹

VI. POLICIES, TRAINING, AND TOOLS

A. *Policies*

Employers are generally aware that their employee’s actions can expose the employer to liability.¹³² To reduce that risk of liability, employers have a variety of policies, ranging from nondiscrimination to confidentiality.¹³³ Often those policies specifically cover the employer’s premises, like policies to comply with OSHA, but sometimes policies need to extend beyond the workplace, such as what is permissible to post on social media.¹³⁴ To reduce the risk of being liable for an employee’s distracted driving, employers should have clear policies prohibiting employees from participating in company video Zoom meetings while driving.

Employers need to state their expectations in policies, or they will not be able to rely on them in court.¹³⁵ For example, the *Ellender* court noted that while the

¹²⁷ *Id.*

¹²⁸ *See id.*

¹²⁹ RESTATEMENT (SECOND) OF TORTS § 303 (AM. L. INST. 1965).

¹³⁰ *See id.*; *see also* Lyons, *supra* note 121.

¹³¹ *See* Lyons, *supra* note 121.

¹³² *See* Leslie Wolfe, *When are Employers Liable for Employee Behavior?*, CRAIN’S CLEV. BUS. (Nov. 11, 2013, 1:30 AM), <http://www.crainscleveland.com/article/20131111/BLOGS05/311119998/when-are-employers-liable-for-employee-behavior>.

¹³³ *See id.*

¹³⁴ *See id.*

¹³⁵ *See id.*

employer may not have expected or intended for its employees to talk on their cell phones while driving, it provided no factual information that such expectations or intentions were conveyed to its employees or enforced.¹³⁶ The National Safety Council emphasizes the importance of employee support of the policy, noting that commitment from the employer's leadership is key.¹³⁷

According to David Teater, a nationally recognized leader on the issue of distracted driving, once companies hear the research about the dangers of distracted driving, they typically move forward to ban distracted driving on the part of their employees.¹³⁸ "A new survey of more than 2,000 employers conducted by the National Safety Council found that 58 [%] had some type of cell phone usage policy in place, and roughly one-quarter of those surveyed prohibit both hand-held and hands-free devices while driving for some or all employees."¹³⁹ However, Jim Noble of Zurich Insurance, makes that point that "If you have a policy but your internal practice encourages cell phone use while driving, the policy is essentially without merit. That's probably wors[e] than not having a policy."¹⁴⁰ For example, Noble recommends not scheduling conference calls (which could be audio or video) at a time when it is likely that employees would be in their cars (e.g., during the morning or evening commute).¹⁴¹ Pund-IT analyst Charles King opined that "it

¹³⁶ *Ellender v. Neff Rental, Inc.*, 965 So.2d 898, 902 (La. Ct. App. 2007) ("Thus, although [the employer] may not have expressly authorized conducting business on a cell phone while driving, it certainly did not prohibit it."); see also Isaac A. Hof, *Wake-Up Call: Eliminating the Major Roadblock That Cell Phone Driving Creates for Employer Liability*, 84 TEMP. L. REV. 701, 719 (2012).

¹³⁷ National Safety Council, *Building Employee Buy-In*, National Safety Council, NSC.ORG, <https://www.nsc.org/getmedia/4b611a8f-0642-47a4-8318-65c85fa98786/building-employee-buy-in.pdf.aspx>. Another resource is the Network of Employers for Traffic Safety (NETS), an employer-led organization and a collaboration between the US government and the private sector focused on reducing road-related crashes, injuries, and deaths. NETS, TRAFFICSAFETY.ORG, <https://trafficsafety.org>.

¹³⁸ Kelly Wallace, *Distracted Driving: Urging Companies to Crack Down*, CNN.COM (Apr. 4, 2017, 9:26 AM), <https://www.cnn.com/2017/04/04/health/distracted-driving-company-cell-phone-bans-impact/index.html>. David Teater lost his 12-year-old son, Joe, in 2004 to a distracted driver who was on a phone call and ran a red light at 48 mph, slamming into the car in which Joe was a passenger. *Id.* He said it was a "perfect example of inattention blindness, looking, not seeing ... what happens when our minds are not fully engaged in the task of driving." *Id.* The loss of Joe led him to become an advocate against distracted driving, becoming the leader of the National Safety Council's distracted driving initiative from 2009 to 2015. *Id.*

¹³⁹ Julie Ferguson, *Distracted Driving & Employer Policies*, ESI GRP. (Nov. 1, 2009), <https://www.theeap.com/best-practices/distracted-driving-employer-policies>.

¹⁴⁰ David Needle, *Could Texting in Car Be an Employer Liability?*, ENTERMOBILETODAY (Jan. 26, 2010), <http://www.enterprisemobiletoday.com/article.php/3860556/Could-Texting-in-Car-Be-an-Employer-Liability.htm>.

¹⁴¹ *Id.*

makes sense for companies to have a policy in place that establishes a layer of discretion between themselves and employees that may break the law,” by driving distracted.¹⁴²

While there are plenty of tips on video conferencing etiquette, most of them mention avoiding driving while doing so.¹⁴³ Tips include testing hardware and internet connection, changing backgrounds, not playing with filters, having a quiet space, and of course, dressing beforehand.¹⁴⁴ Since video presence has a magnifying effect, experts recommend avoiding “fidgeting, moving around, or gazing elsewhere while someone else is talking.”¹⁴⁵ Participants have even been advised not to eat or drink while on camera.¹⁴⁶

¹⁴² *Id.*

¹⁴³ *See, e.g.,* Anita George, *The Do's and Don'ts of Video Conferencing Etiquette*, DIGIT. TRENDS (Mar. 26, 2020), <https://www.digitaltrends.com/computing/dos-and-donts-of-video-conferencing-etiquette/>. *But see* U.S. v. Morales, No. 20-mj-04939-AHG, 2020 WL 7770912, at *6 (S.D. Ca. 2020) (“All participants shall display the same level of professionalism during the Status Hearing and be prepared to devote their full attention to the Status Hearing as if they were attending in person, i.e., cannot be driving while speaking to the Court.”).

¹⁴⁴ *Id.*; Jami Ganz, *ABC Reporter Goes Pantsless during Zoom Appearance on ‘Good Morning America’*, NYDAILYNEWS.COM (Apr. 28, 2020), <https://www.nydailynews.com/snyde/ny-gma-contributor-goes-pantsless-zoom-20200428-okqn7le72jc5vctzbdbrkqjlwq-story.html> (recounting the story of the 27-year-old journalist who appeared to not be wearing pants with his professional jacket and shirt while reporting by Zoom on Good Morning America); Esther Shein, *How Your Actions on Zoom Could Get You Fired*, TECHREPUBLIC (May 8, 2020), <https://www.techrepublic.com/article/how-your-actions-on-zoom-could-get-you-fired/> (“It’s good common sense if you’re going to get on a call with the executive team you would get dressed.”); N.F. Mendoza, *13 Things to Avoid Doing on Zoom*, TECHREPUBLIC (Apr. 3, 2020), <https://www.techrepublic.com/google-amp/article/13-things-to-avoid-doing-on-zoom/> (“[M]emes of people with their video turned into a potato or a kitten ... [are] not good for credibility.”). A Texas attorney signed into a court hearing on his assistant’s computer with a filter that made him appear as a cat. He said he did not know how to fix it but assured the court “I am not a cat.” Ken Meyer, ‘I Am Not a Cat’: Texas Virtual Court Case Goes Hilariously Off the Rails After Lawyer Accidentally Activates Zoom Filter, MSN.COM (Feb. 9, 2021) <https://www.msn.com/en-us/tv/news/i-am-not-a-cat-texas-virtual-court-case-goes-hilariously-off-the-rails-after-lawyer-accidentally-activates-zoom-filter/ar-BB1dxE9T>. William Amos, representing the Quebec District of Pontiac, appeared naked at a Zoom video meeting of the House of Commons. *Canadian Lawmaker Caught Naked During Video Conference*, AP (Apr. 15, 2021), <https://apnews.com/article/oddities-general-news-3877863d6745d32b81bd008272dd38b0>.

¹⁴⁵ George, *supra* note 143.

¹⁴⁶ In advance of a meeting with an accreditation team, one university advised its employees “No Food Allowed!!! Treat yourself to a snack AFTER the meeting. If you must take a drink, adjust your sitting position, or leave for a moment, please turn off your camera first.” E-mail from AJ Grube, Dean, Coll. Bus., W. Carolina Univ. (Mar. 12, 2021).

There have also been warnings of Zoom behaviors that could result in termination.¹⁴⁷ “Sharing derogatory images, disclosing confidential information, or using discriminatory language toward a colleague will still have the same repercussions as they would in a physical office setting,” warned Betty Rodriguez, senior workplace analyst at Fit Small Business, about Zoom behaviors that should be avoided.¹⁴⁸ Attorney Jacob J. Sapochnick noted that company confidential information should not be shared since Zoom meetings might be recorded and those recordings could later be accessed by a computer hacker.¹⁴⁹ Meeting participants should also refrain from criticizing their boss in the “private” chat of a Zoom meeting since when the host downloads the meeting transcripts, all such private comments are visible.¹⁵⁰ Participants should avoid using the screen sharing tool to share inappropriate content.¹⁵¹

There have been many examples of egregious behavior on Zoom that a reasonable person might not have thought required advanced warnings.¹⁵² For example, Sean Nguyen, director of Internet Advisor, had to terminate an employee after repeated Zoom calls during which the employee would loudly fight with her live-in boyfriend.¹⁵³ A northern California planning commissioner resigned after

¹⁴⁷ See Shein, *supra* note 144.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* (“Everything we do online can be breached or accessed publicly,” said Scot J. Chrisman, founder and CEO of The Media House, a digital marketing firm; Zoom is not approved as a collaboration tool at NASA.); NASA WATCH (Apr. 9, 2020, 9:38 AM), <http://nasawatch.com/archives/2020/04/nasa-bans-use-o.html> (“Zoom is not licensed nor authorized for use by NASA employees and contractors, and is not allowed on NASA IT devices.”; Elon Musk’s SpaceX banned employees from using Zoom over “significant privacy and security concerns.”) Liam Tung, *We’re Freezing All New Features to Sort Out Security and Privacy*, (Apr. 2, 2020), <https://www.zdnet.com/article/zoom-were-freezing-all-new-features-to-sort-out-security-and-privacy/>; *Id.* (The FBI warned school about privacy issues, advising them to use meeting passwords and not to publicly share virtual classroom links;)

Thousands of personal Zoom videos have been left viewable on the open Web, highlighting the privacy risks to millions of Americans as they shift many of their personal interactions to video calls in an age of social distancing. Videos viewed by The Washington Post included one-on-one therapy sessions; a training orientation for workers doing telehealth calls that included people’s names and phone numbers; small-business meetings that included private company financial statements; and elementary school classes, in which children’s faces, voices and personal details were exposed. Many of the videos include personally identifiable information and deeply intimate conversations, recorded in people’s homes.);

Keith Cowing, *Beware of Using Zoom*, NASA WATCH (Apr. 4, 2020), <http://nasawatch.com/archives/2020/04/beware-of-using.html>.

¹⁵⁰ See Shein, *supra* note 144.

¹⁵¹ *Id.*

¹⁵² See, e.g., *id.*

¹⁵³ *Id.*

throwing his cat during a city meeting, explaining, “[w]e are all living in uncertain times and I certainly, like many of you, am adjusting to a new normalcy,” and apologizing for his behavior.¹⁵⁴ But Scott Green, a plastic surgeon acted in a manner that was not only inappropriate, but put a patient’s life at risk when he participated in a Zoom traffic court hearing from the operating room during a surgery.¹⁵⁵ The judge refused to proceed, protecting the welfare of the patient, who could be seen on the operating table in video Zoom meeting.¹⁵⁶ The Medical Board of California stated that it is “aware of this incident and will be looking into it.”¹⁵⁷ What will the result of that investigation be? Will the Board conclude that it needs a new policy statement that physicians should not attend traffic court while operating? That seems absurd, and should not be necessary, just as advising drivers not to video Zoom while driving should be obvious.

In an irony that would not be believable in a low-grade movie, vice chair of the Senate Transportation Committee, State Senator Rebecca Saldaña, participated in a legislative video meeting while driving.¹⁵⁸ She was clearly behind the wheel, although she used a virtual background to block the rest of the car and the passing scenery.¹⁵⁹ This was a direct violation of Washington law.¹⁶⁰ Sen. Saldaña acknowledged that she has “supported legislation about penalties for distracted driving, and like all drivers in Washington state, I must be subject and accountable to that law and all traffic laws.”¹⁶¹

Ohio State Senator Andrew Brenner apparently did not learn from his political colleague, Saldaña.¹⁶² Like Saldaña, Sen. Brenner attended a government video

¹⁵⁴ Stella Chan, *California City Official Who Threw Cat and Drank During Video Meeting Resigns*, CNN.COM (Apr. 28, 2020, 10:18 P.M.), <https://www.cnn.com/2020/04/28/politics/california-official-resigns-after-throwing-cat-trnd/index.html>.

¹⁵⁵ Katie Shepherd, *California Doctor Attends Zoom Court Hearing During Surgery: “I’m in an operating room right now,”* WASH. POST (Mar. 1, 2021, 5:09 A.M.), <https://www.washingtonpost.com/nation/2021/03/01/california-doctor-zoom-court-surgery/>.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ Mike Lindblom, *Seattle State Senator Apologizes for Joining a Zoom Hearing While Driving*, SEATTLE TIMES (Apr. 6, 2021, 6:02 PM), <https://www.seattletimes.com/seattle-news/transportation/seattle-state-senator-apologizes-for-joining-a-hearing-via-video-while-driving/>.

¹⁵⁹ *Id.*

¹⁶⁰ WASH. REV. CODE § 46.61.672(5)(c)(iii) (2017) (“Watching video on a personal electronic device”).

¹⁶¹ Lindblom, *supra* note 158.

¹⁶² See Wilson Wong, *Ohio State Senator Caught Driving During Zoom Call as House Considered Distracted-Driving Bill*, NBC NEWS (May 7, 2021, 2:28 PM), <https://www.nbcnews.com/news/us-news/ohio-state-senator-caught-driving-during-zoom-call-house-considered-n1266678>.

Zoom meeting while driving; however, it was not just the meeting attendees who knew of his distracted driving.¹⁶³ It was livestreamed to the public, who could not only see his seatbelt and watch him glance from side to side as if readying to cross a street, but could also see a background that made it appear that he was in the office, functionally an admission that he knew he was wrong and was trying to deceive everyone into believing that he was not exercising poor judgment by driving while on video Zoom.¹⁶⁴ Even more troubling is that, unlike Sen. Saldaña who admitted that she was wrong, Sen. Brenner denied that he was distracted, stating that “I was paying attention to the driving and listening to [the meeting]. And I’ve actually been on other calls, numerous calls, while driving. [O]n video calls, I’m not paying attention to the video. To me, it’s like a phone call.”¹⁶⁵ Three months prior to the incident, Ohio Governor Mike DeWine said, “Ohio’s current laws don’t go far enough to change the culture around distracted driving, and people are dying because of it.”¹⁶⁶ Apparently, Senator Brenner did not agree with Gov. DeWine’s comments, which also included “Distracted driving is a choice that must be as culturally unacceptable as drunk driving is today, and strengthening our current laws will lead to more responsible driving.”¹⁶⁷ Ohio legislators were following the governor’s lead, and they introduced a bill to strengthen laws focused on decreasing dangerous driving, including imposing penalties for texting and livestreaming while driving.¹⁶⁸ Irony seems to follow politicians who video Zoom while driving, as this distracted driving bill was introduced on the same day as Sen. Brenner’s lack of judgment.¹⁶⁹

Apparently, employers cannot rely on their employees to refrain from engaging in video Zoom meetings while driving, and therefore, an employer policy is required to both protect the safety of other drivers and pedestrians on the road and to protect employers from liability for their employees’ Zoom engagement while driving.¹⁷⁰ Harvard College recognized this need when stating its policies for *The Business of China*, a general education course taught synchronously online to

¹⁶³ *See Id.*

¹⁶⁴ *Id.* (“The [Zoom background] filter features brown wooden cabinets, hanging art pieces and a houseplant. However, a seat belt is strapped across his chest”).

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ Lucy Campbell, *Footage reveals Ohio state senator driving during Zoom call*, GUARDIAN (May 7, 2021), <https://www.theguardian.com/us-news/2021/may/07/footage-reveals-ohio-state-senator-driving-during-zoom-call>.

¹⁶⁹ *Id.*

¹⁷⁰ *See Wallace, supra* note 138.

students all over the world, including “Don’t Zoom while driving.”¹⁷¹ While that policy is short and sweet, employers may prefer just a bit more detail offered in the following sample policy:

No Zoom Video Meetings While Driving. While we appreciate our employees’ commitment to work, please focus on safety first, and only use electronic devices when it is safe to do so. To protect our employees and the community:

1. Employees are prohibited from using Zoom video while driving by using a mobile phone, tablet, laptop computer, or any other device.
2. Employees are encouraged to always focus on their driving for the safety of passengers, other drivers, and pedestrians. Please wait to engage in meetings until you are safely parked.
3. All supervisors are advised to immediately remove any Zoom meeting participant who is participating on video while driving.¹⁷²

B. Training

Once such a policy is created, employees need to be advised of the policy and trained on how it is to be used.¹⁷³ One of the keys to successful training is overcoming objections.¹⁷⁴ Productivity concerns are often cited as one of the top obstacles in reducing employee cell phone usage, as not talking to potential customers while driving between appointments could negatively impact business.¹⁷⁵ Participants using Zoom video while driving will likely raise the same

¹⁷¹ John S. Rosenberg, Harvard College class remote learning, On taking a Harvard Gen Ed class remotely with William C. Kirby, Harv. Mag. (Mar. 24, 2020), <https://www.harvardmagazine.com/2020/03/harvard-college-class-remote-learning> (quoting a rule of Zoom pedagogy stated by Kirby, “Don’t Zoom while driving”).

¹⁷² While the focus of this Article is on Zoom video meetings while driving, some employers may want to go further to deter all device-related distracted driving. For example, railroad operating employees are prohibited “from using electronic devices in any way that would detract from railroad safety.” Restrictions on Railroad Operating Employees’ Use of Cellular Telephones and Other Electronic Devices, 75 Fed. Reg. 59,850, 59,593 (proposed Sept. 27, 2010) (codified at 49 C.F.R. pt. 220). It goes on to state “[t]his paragraph is also meant to encompass other potential uses of electronic devices that may arise outside of those detailed or contemplated by this rule or by railroad operating rules.” *Id.* This is very valuable since in 2011 when the Final Rule amended and codified FRA Emergency Order No. 26, it was not contemplated at that time that video meetings would become as popular as they are in 2021, and likely will be in the future. Lindblom, *supra* note 158. Such language is similar to that used in the entertainment industry with respect to the grant of rights which is often crafted as “made by any method now known, or hereafter to become known.” *Chambers v. Time Warner, Inc.*, 123 F. Supp. 2d 198, 200 (S.D.N.Y. 2000).

¹⁷³ See Wallace, *supra* note 138.

¹⁷⁴ See *id.*

¹⁷⁵ See *id.*

concerns.¹⁷⁶ When announcing the policy, employers will want to share some of the dangers of distracted driving so that employees understand why the policy is being implemented.¹⁷⁷ Employers may want to consider implementing or participating in a campaign to stop distracted driving, in addition to initiating a policy.¹⁷⁸

Companies should support policies with training and safety programs to help “break distracted driving behaviors that are prohibited by the [company’s] policy.”¹⁷⁹ Truce, a software company dedicated to “eliminat[ing] workplace distractions by making mobile smarter,” notes that “[m]otor vehicle crashes are the leading cause of workplace fatalities, accounting for 24% of all fatal occupational injuries.”¹⁸⁰

The training should begin with statistics reminding employees of the impact distracted driving has on the company, its employees, and the general public.¹⁸¹ It might also be helpful to do some myth busting in order to get employees to embrace the concept of how dangerous distracted driving can be.¹⁸² For example, those confident that they can successfully multitask while driving can be reminded that “multitasking while driving increases the likelihood of crashes due to delayed breaking times and not seeing traffic signals.”¹⁸³ Some employees may think that

¹⁷⁶ See *'Zooming' and Driving: A New Concern During the COVID-19 Pandemic*, KTRK-TV (Oct. 8, 2020), <https://abc30.com/distracted-driving-deaths-zoom-while-take-a-work-meeting-research/6868604>.

¹⁷⁷ See Wallace, *supra* note 138.

¹⁷⁸ One such campaign is supported by StopDistractions.org, which states its mission as an “organization dedicated to eliminating the lifelong devastation that results when a loved one is killed or injured in a distracted driving crash.” *Our Mission*, STOPDISTRACTIONS.ORG, <http://stopdistractions.org>. Another is End Distracted Driving, which started after 21-year-old Casey Feldman was killed by a distracted driver. *About EndDD*, ENDDD.ORG, <https://www.enddd.org/about-enddd>.

¹⁷⁹ *Distracted Driving Training: How to Tackle Fleet Distracted Driving*, TRUCE (June 17, 2019), <https://trucesoftware.com/blog/distracted-driving-training-how-to-tackle-fleet-distracted-driving/>.

¹⁸⁰ *Id.*

¹⁸¹ For example, Truce noted that:

[i]n 2007, a tech company had to pay \$21.6 million when one of its drivers, while using a cell phone, was involved in a fatal crash. In 2008, a commercial fleet transportation company had to pay \$24.7 million when one of its truck drivers, while texting and driving, caused a fatal crash. In 2005, a paper company had to pay \$5.2 million when one of its employees caused a serious accident after they were distracted due to cell phone usage. *Id.*

¹⁸² See *id.*

¹⁸³ *Id.* Multitasking often results in not doing any of the tasks well. Studies show that only about 2.5 percent of people are good multitaskers; See, e.g., Jason M. Watson & David L. Strayer,

distracted driving is only a problem among cellphone-obsessed teenagers, but the reality is that distracted driving affects drivers of all ages.¹⁸⁴ What may be most surprising is that driving under the influence of drugs or alcohol is not more dangerous than distractions from other sources.¹⁸⁵

Once employees are trained on the realities of distracted driving, a good next step is to review the law of the employer's state, as all employees may not be clear on what activities are permitted while driving.¹⁸⁶ Next, the company's policy should be explained, including the consequences for violating it.¹⁸⁷ Employees should acknowledge that they have read it.¹⁸⁸

In the case of Zoom specifically, employees should be encouraged to not only avoid video Zoom while driving, but also to help enforce the policy by advising any employee who joins a meeting while driving that they should not participate until they are safely parked.¹⁸⁹ In addition, supervisors should be trained to remove employees from the meeting who are using video Zoom while driving.¹⁹⁰ In the case of fleet management, employers may want to include on-the-road training and possibly install monitoring software in the fleet vehicles, which of course, would require additional employee training.¹⁹¹

In 2017, Minnesota-based Cargill was the largest (150,000 employees) privately held corporation to implement a total ban on using mobile phones in company vehicles.¹⁹² "Overall, it's making sure employees know of the dangers of driving

Supertaskers: Profiles in Extraordinary Multitasking Ability, 17 PSYCHONOMIC BULL. & REV. 479, 482 (2010).

¹⁸⁴ TRUCE, *supra* note 179; *But see* Distracted Driving, Ctrs. for Disease Control and Prevention, https://www.cdc.gov/transportationsafety/distracted_driving/index.html ("Twenty-five percent of the distracted drivers involved in fatal crashes were young adults aged 20–29.").

¹⁸⁵ TRUCE, *supra* note 179.

¹⁸⁶ *See, e.g.*, Digest of Motor Laws, AAA, <https://drivinglaws.aaa.com>.

¹⁸⁷ TRUCE, *supra* note 179.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ A participant can be removed from a meeting by the host. In-Meeting Security Options, Zoom (June 29, 2023), <https://support.zoom.us/hc/en-us/articles/360041848151-In-meeting-security-options>.

¹⁹¹ TRUCE, *supra* note 179. Companies with fleets may even consider having drivers sign a safe driving agreement in which they promise to follow safety guidelines. Commercial Driving: How to Protect Your Company, Your Crew and Your Cars, Frankenmuth Ins. (Apr. 4, 2018), <https://www.fmins.com/blog/commercial-driving-protect-company-crew-cars>.

¹⁹² Fredrick Kunkle, *Cargill Goes Cold Turkey on Using Mobile Phones While Driving*, WASH. POST (Jan. 10, 2017, 3:17 PM), <https://www.washingtonpost.com/news/tripping/wp/2017/01/10/cargill-goes-cold-turkey-on-using-mobile-phones-while-driving>.

while distracted and how important that Cargill feels that safety is first,” said April Nelson, a company spokesperson.¹⁹³

C. Tools

To supplement employers’ use of policies to reduce distracted driving, ironically, technology can help, too.¹⁹⁴ For example, FleetGuardian produces a safety box for drivers to use to store their phones while driving.¹⁹⁵ It still permits Bluetooth connectivity to allow for hands free calls or listening to music, but it prevents fiddling with the phone while driving, and the use of the box can be tracked by the employer.¹⁹⁶ In development is the ZenduCAM Driver Distraction Camera that can detect fatigue and distraction with the use of facial recognition technology and warn the driver with audio alerts.¹⁹⁷

Zoom has a feature known as Safe Driving Mode, intended to lower the distraction while drivers are logged into Zoom.¹⁹⁸ It allows the meeting participant to swipe right on the phone screen to enter “Safe Driving Mode,” during which the microphone is muted and the video is stopped, allowing the driver to listen, like they might to the radio, but not participate.¹⁹⁹ However, the driver is still manually distracted when touching the phone to enter Safe Driving Mode and may still be cognitively distracted by focusing on the business of the meeting.²⁰⁰

Finally, FaceTime, a popular video call feature on Apple iPhones that can be connected in a car through Apple CarPlay, has a new feature causing the FaceTime camera to be disabled by Apple while an iPhone user is driving.²⁰¹ The fact that

¹⁹³ *Id.*

¹⁹⁴ *Distracted Driving Training: How to Tackle Fleet Distracted Driving*, *supra* note 179.

¹⁹⁵ Wisam Abou-diab, *Technology to Prevent & Stop Distracted Driving*, GOFLEET.COM (Feb. 27, 2019), <https://www.gofleet.com/technology-for-distracted-driving> (“It connects to a G07 tracking device through the IOX port and can track if the drivers haven’t placed the phone inside the box when the car is moving”).

¹⁹⁶ *Id.*

¹⁹⁷ *Id.* Another manufacturer, Samsara, provides dash cams and a fleet management platform to prevent unsafe and distracted driving. *AI Dash Cams*, SAMSARA, <https://www.samsara.com/products/safety/dash-cam/> (last visited Sep. 29, 2023).

¹⁹⁸ Close, *supra* note 75 (While reducing distraction may be a goal, using the feature requires the driver to touch the phone, resulting in both visual and manual distraction).

¹⁹⁹ *What is Safe Driving Mode?*, ZOOM HELP CTR. (Dec. 15, 2021), <https://support.zoom.us/hc/en-us/articles/201362973-What-is-safe-driving-mode>.

²⁰⁰ *See Overview of Driver Distraction Program*, *supra* note 13.

²⁰¹ Gatorslakerspats, *FaceTime Camera Disabled While Using Apple CarPlay*, DISCUSSIONS.APPLE.COM (Dec. 17, 2019, 5:34 AM), <https://discussions.apple.com/thread/250953391>. Some drivers may not be convinced of the dangers

both Zoom and Apple have such features acknowledges the dangers of participating in video calls while driving.²⁰²

VII. TEACHING NOTES

A. *Teaching Objectives*

This case study is intended to direct students in learning about the potential corporate liability of employers for distracted driving, specifically participation by employees in video Zoom meetings while driving. The main objectives for teaching the case are to challenge students to:

1. Appreciate the potential corporate liability associated with employee distracted driving;
2. Recognize the importance of assessing legal risk;
3. Acquire an understanding of the types of distraction, how they can be avoided, and what can happen if they are not avoided;
4. Apply the relevant legal principles to a fact pattern in order to predict the legal outcome;
5. Explain their analysis in a clear and concise manner.

B. *Potential Uses of the Case*

This case study can be used as a pedagogical tool in a wide variety of courses including business law, management, entrepreneurship, and human resources. Use of the case study will promote awareness of the risk of corporate liability related to the conduct of virtual meetings and enhance the development of students' critical thinking and legal analysis skills. In addition to an academic audience for this case, corporate training programs could benefit from the use of the case study.

C. *Discussion*

This section provides an analysis of the discussion questions posed in Part III.

1. *What are the primary types of distraction? In how many of those ways was Deshaude distracted?*

The three primary types of distraction are visual, manual, and cognitive.²⁰³ Deshaude was visually distracted in two ways because he was glancing from the

of distracted driving. "Why did Apple disable the FaceTime camera (while driving) using Apple CarPlay? I am bothered that the option was taken away from me." *Id.*

²⁰² *See id.*

²⁰³ NHTSA, *supra* note 13.

road to the phone: (1) to see his colleagues on the phone screen in the Zoom meeting, and (2) to adjust the phone settings to fix the sound. He was manually distracted when he touched the phone, first to log onto the meeting and then to adjust the controls. The conversation with his colleagues was cognitively distracting as he was paying attention to the colleagues rather than the road. A fourth type of distraction is auditory, which was present here as well since Deshaude was distracted by the sound of his colleagues talking during the meeting.²⁰⁴

2. *What is a leading source of distraction while driving? What are available tools to combat that distraction?*

Cellphones, owned by 97% of Americans, are a leading source of distracted driving, whether from calls, texting, or now, video Zoom.²⁰⁵ Therefore, cell phone makers have implemented tools to reduce distracted driving, including Apple's "Do Not Disturb While Driving" feature, notifying callers or texters that the intended recipient is driving and cannot respond, and AT&T's "Drive Mode" app.²⁰⁶ Zoom has a tool allowing the meeting host to immediately remove a participant, which could be used if someone joined a meeting while driving,²⁰⁷ as well as Safe Driving Mode, intended to lower the distraction while drivers are logged into Zoom.²⁰⁸ In this mode, microphone is muted and the video is stopped, allowing the driver to listen, as they might to the radio.²⁰⁹ Students may note that while visual and manual distractions may be alleviated by this tool, cognitive and auditory distractions are still present. This could stimulate an interesting discussion of whether traditional radio, or newer podcasts and books on tape, should be banned from vehicles. Or, if not banned by law, perhaps students will suggest that they be banned by employers seeking to reduce corporate liability. Companies operating fleets of drivers, such as trucking companies and delivery services, can install a safety box in the vehicle for drivers to use to store their phones while driving.²¹⁰ Students may quickly suggest, though, that drivers could put one phone in the box to feign compliance, but keep a second phone out of the box for use while driving.

²⁰⁴ Kidd, *supra* note 14.

²⁰⁵ See Hamilton, *supra* note 27.

²⁰⁶ See *Distracted Driving*, *supra* note 36. Apple has an additional feature causing the FaceTime camera to be disabled by Apple while an iPhone user is driving. Gatorslakerspats, *supra* note 201.

²⁰⁷ *In-Meeting Security Options*, SUPPORT.ZOOM.US, <https://support.zoom.us/hc/en-us/articles/360041848151-In-meeting-security-options>.

²⁰⁸ See *What is Safe Driving Mode?*, *supra* note 199.

²⁰⁹ *Id.*

²¹⁰ See TRUCE, *supra* note 179.

One of the most valuable tools for preventing distracted driving is education. Advising employees of the risks of distracted driving, and the corresponding liability to the employer, may have a deterrent effect. Also, training supervisors to lead by example and to immediately remove employees from Zoom meetings if they are driving distracted can reduce risk.

3. *What laws discourage distracted driving? How does law enforcement enforce such laws?*

All states other than Missouri and Montana have banned texting and driving and 21 states prohibit drivers from holding their cellphones while driving.²¹¹ Federal employees are banned from text messaging while driving and commercial motor vehicle drivers are prohibited by federal law from texting while operating motor vehicles in interstate commerce.²¹² Most states ban the use of a video display within the driver's view while the vehicle is in motion, excluding navigation devices.²¹³ Law enforcement struggles to enforce no texting while driving laws and has experimented with devices such as Textalyzer, similar to a Breathalyzer, that could allow a law enforcement officer to connect a driver's phone to the officer's laptop solely to detect the operating system logs to tell the officer if the driver was using the touchscreen at the time of a crash.²¹⁴ There is also a radar gun in development that would allow law enforcement to detect cell phone radio frequencies to identify drivers who are texting while driving, and some agencies are using special vehicles to allow officers to look down into passenger vehicles to determine whether drivers are using distracting devices.²¹⁵

4. *Can A³ be held liable to the plaintiffs for Deshaude's distracted driving? If so, under what theories?*

Numerous courts have held that an employer is vicariously liable in cases where an employee has an accident while driving and using their cell phone for their employer's business.²¹⁶ There is no question here that the cell phone use was within the scope of employment and serving the purpose of the employer since it was for a meeting with Deshaude's supervisor. This case goes a step further as unlike dram shop laws, where a seller of alcoholic beverages should not serve a customer how

²¹¹ See "Senseless": Parents Speak Out After Son Killed by Driver Apparently Distracted by Porn, *supra* note 35.

²¹² See *supra* notes 41 and 42.

²¹³ See CBS News, *supra* note 35.

²¹⁴ See Snider, *supra* note 46.

²¹⁵ See Gursten, *supra* note 36.

²¹⁶ See Nassivera, *supra* note 53.

is visibly intoxicated because it could result in distracted driving, there is no foresight needed here. Karie Ann and Amanda could see that Deshaude was distracted and did not take adequate action to both prevent the distraction in advance or stop it in the moment. One who intentionally distracts a driver can be held directly liable under a theory of negligence. Since the company, through both Karie Ann and Amanda, knew that the driver was distracted, the company can be held liable for that. Under respondent superior, there could be a finding that A³ was vicariously liable for the acts of its employee, Deshaude. However, the actions here go a step farther because it was A³ who was the cause of the distraction. *Kubert* held that a remote texter could be held liable for negligence if she knew or had reason to know that the driver would be distracted from attending to the road and the operation of the vehicle.²¹⁷ Applying that concept here, both Karie Ann and Amanda knew that Deshaude was driving and trying to manage the video Zoom meeting at the same time. There is no question of “should have known” since they could see Deshaude on camera. The consequence of the multiple car accident was foreseeable, and therefore, A³ would be liable.

Negligence is the breach of a duty owed to a plaintiff to protect them from a foreseeable risk of harm.²¹⁸ The negligence analysis requires consideration of the magnitude of the harm that could be caused by defendant’s conduct, as well as the likelihood and foreseeability of its occurrence, weighed against the utility of the defendant’s conduct.²¹⁹

Applying that standard to participating in a video Zoom meeting while driving, the magnitude of the harm is high as it could result in a deadly crash, the likelihood and foreseeability is high given that watching a video while driving is very distracting, and the utility of the driver’s participation in the video Zoom meeting is low.²²⁰ There is no meeting that is important enough to risk someone’s life, whether that of the driver or passengers in another car or a pedestrian on the road. And, the risk is so easily mitigated by simply pulling off the road, to a safe location, and participating in the meeting while safely parked.²²¹

5. *Karie Ann tried to stop Deshaude’s distracted driving, as did Amanda. How could they have been more successful?*

²¹⁷ *Kubert v. Best*, 75 A.3d 1214, 1226 (N.J. Sup. Ct. App. Div. 2013).

²¹⁸ *Hetterle v. Chido*, 400 N.W. 2d 324, 326–27 (Mich. Ct. App. 1986).

²¹⁹ *Id.*

²²⁰ *See id.*; *see also* Lyons, *supra* note 121.

²²¹ *See* Lyons, *supra* note 121.

A³ needs to adopt policies regarding distracted driving, including a clear policy prohibiting employees from participating in company video Zoom meetings while driving. Also, Karie Ann should have immediately removed Deshaude from the meeting, and when Amanda noticed that Karie Ann had not done so, Amanda should have removed him. Zoom, as well as other video conference platforms, have a tool allowing the meeting host to remove a participant at any time. A³ should also have provided training sessions including education about the risks of distracted driving, the relevant laws of the employer’s state, A³’s policy, and the consequences for employees who fail to comply with the policy.

6. *What should an employer policy state regarding engaging in meetings while driving?*

Such policies could include not scheduling Zoom meetings during common commuting times. Also, the policy should state that any supervisor, upon noting that an employee is driving while participating on Zoom, should immediately remove that employee without discussion. The time spent suggesting that the employee park, and the employee suggesting that they’re fine, is just more distracted driving time and more opportunity for accidents. While instructing employees not to drive while engaging in a video Zoom meeting may be obvious, it is not always, so clearly stating it in the corporate policy is necessary. As part of the class discussion, students could be asked about their familiarity with distracted driving policies at their workplace. The instructor might also break the students into groups and encourage them to write sample policies as a class activity.

VII. CONCLUSION

The only way to prevent distracted driving accidents caused by cell phones, whether from texting, voice, or video calls, is to not use the phone while driving.²²² Individuals need to exercise self-discipline to protect their lives and the lives of others, but when they need a nudge in the right direction, then employers should be there to provide that nudge. Not only will drivers and pedestrians be safer, but it will also decrease employer liability for distracted driving damages.²²³ Rather than waiting until costs, both financial and physical, drive restraint, employers can learn

²²² Maureen May, *Can Remote Texters Be Held Liable for Accidents?*, LEGAL EXAM’R (Oct. 8, 2015),

<https://web.archive.org/web/20170908132804/http://baltimore.legalexaminer.com/automobile-accidents/can-remote-texters-be-held-liable-for-accidents> (“The only sure way to prevent distracted driving accidents caused by cell phones: put the phone away when you get behind the wheel.”).

²²³ *See id.*

from the history of drunk driving liability and apply it to other forms of distracted driving.

Just as the public has learned the dangers of drinking and driving through a sustained campaign and enhanced criminal penalties and civil liability, the hazards of texting when on the road, or to someone who is on the road, may become part of the public consciousness when the liability of those involved matches the seriousness of the harm.²²⁴

Employers can initiate and support a campaign to prevent all forms of distracted driving.²²⁵

²²⁴ Kubert v. Best, 75 A.3d 1214, 1229 (N.J. Sup. Ct. App. Div. 2013).

²²⁵ See Kunkle, *supra* note 192.