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**Question Number 3  
on SofTest**

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Supreme Court of Pennsylvania  
Pennsylvania Board of Law Examiners

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Pennsylvania Bar Examination  
February 24 and 25, 2015

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**PERFORMANCE TEST**  
February 24, 2015

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## Table of Contents

### **FILE**

1. Assignment Memorandum.....	1
2. Formatting Memorandum .....	2
3. Town Police Department Incident Report .....	3

### **LIBRARY**

1. 75 Pa.C.S. § 3316 – Prohibiting text-based communications.....	5
2. 75 Pa.C.S. §102 – Definitions.....	5
3. <i>Rockwell v. Knott &amp; New Prime</i> , 32 Pa. D. & C 5th 157 (Pa. Com. Pl. 2013).....	6
4. <i>Schemberg v. Smicherko</i> , 85 A.3d 1071 (Pa. Super. 2014) .....	12

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**FILE**

## Memorandum

**TO:** Applicant  
**FROM:** Ethan Anderson  
**DATE:** February 21, 2017  
**CLIENT:** Patty Pasternak, client # 05152008  
**SUBJECT:** Assignment to Draft Memorandum

We represent Patty Pasternak with regard to the serious injuries she suffered as a result of a motor vehicle accident in which her vehicle was struck on the driver side by a motorcycle being operated by Daniel Dench. We will bring an action against Mr. Dench alleging, among other claims, negligence *per se* for violating the Pennsylvania statute prohibiting text-based communications. We will also request punitive damages for Mr. Dench's outrageous conduct, as detailed in the police report.

After speaking to Mr. Dench's counsel, I anticipate that he will raise three legal issues with respect to our anticipated complaint:

1. He will object to our inclusion of punitive damages;
2. He will claim that Dench's playing a video game while driving does not violate 75 Pa.C.S. § 3316; and
3. He will claim that, even if Dench's conduct is found to be a violation of 75 Pa.C.S. § 3316, it cannot be a basis for a negligence *per se* claim.

While I believe we do, I want to be certain that we have a proper basis for our claim of negligence *per se* based on a violation of 75 Pa.C.S. § 3316, as well as for our claim for punitive damages, before we draft and file the complaint. Your assignment is to draft a legal memorandum to me setting forth the law concerning each of the three issues listed above, along with an argument in support of our position on each issue. Please set forth in the memorandum the factual and legal basis for your arguments.

Attached is a memorandum setting forth the guidelines and formatting to use when drafting your memorandum and a copy of the incident report from the Town Police Department for your review. I have also included for your use a Library that contains relevant legal authority. Please limit your argument to the facts contained in the File, and the law contained in the Library. Do not base your arguments on law or facts that are not included in the File or Library. Do not include your name on the memorandum; instead, simply put "Applicant" in the "From" field. Although Bluebook citations are not necessary, please cite to each case, statute, or document such that I will know to what document you are referring.

**Law Offices of Ethan Anderson & Associates**  
**Attorneys at Law**

DATE: January 2, 2017  
TO: All Attorneys and Law Clerks  
FROM: Ethan Anderson  
RE: Guidelines and Format for Preparation of Internal Legal Memoranda

Use the following guidelines and format in the order listed for preparing all internal legal memoranda:

1. The document should be entitled “Memorandum of Law.”
2. The upper left corner of the memorandum should include a heading similar to the heading above (e.g. – Date, To, From, and Re).
3. Include a brief introductory paragraph laying out the purpose of the memorandum.
4. The memorandum should be divided into sections, one for each issue discussed. Each issue should begin with a short heading that reflects the issue being addressed.
5. Each section should include a statement setting forth the issue being addressed and a reasoned analysis supporting your conclusion. Identify the relevant and controlling legal principles and apply these legal principles to the facts to demonstrate the reasoning that supports your conclusion on the issue presented. If there are facts and legal principles relevant to any point or element in your analysis that could be argued to support a different conclusion, identify and discuss those principles or facts.
6. Include all relevant facts needed to resolve the issues presented as well as any background facts helpful to understanding the issues.
7. State your conclusion(s) as a positive statement that responds to the question(s) raised by the issue presented.

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**TOWN POLICE DEPARTMENT INCIDENT REPORT**

1. TYPE     a. ORIGINAL     b. CONTINUATION     c. SUPPLEMENT

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2. TYPE OF OFFENSE OR INCIDENT:                      Motor Vehicle Accident

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3. ADDRESS OF OFFENSE OR INCIDENT:              Intersection of First and Main Streets, Town, PA

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4. NAME OF AGENCY:                                      Town P.D.

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5. DATE AND TIME OF OFFENSE/INCIDENT: 08/18/2016 at 1:00 P.M.

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6. PERSONS INVOLVED:

	NAME AND ADDRESS	AGE	SEX	INJURED	TELEPHONE #
Driver 1	Patty Pasternak 1 Prickle Place Town, PA 99999	45	F	Yes	555-555-5555
Driver 2	Daniel Dench 2 Dunbar Drive Town, PA 99999	16	M	Yes	444-444-4444

7. VEHICLES INVOLVED:

	MAKE AND MODEL	YEAR	COLOR	CHARACTERISTICS	VIN #	Tag No.
Vehicle 1	Chevrolet Traverse	2016	Black	4 door, SUV	06241995PA11052010	Pable 1
Vehicle 2	Harley Davidson Fat Boy	2015	Red	Two wheel; street motorcycle	08191968FL10171962	GPB 001

8. WEATHER CONDITIONS: It was a dry, summer day with no adverse weather conditions.

9. NARRATIVE *(If additional space is needed, use blank sheet and attach.)*

**Driver 1**, Patty Pasternak, stated that she was driving north on First Street approaching the intersection with Main Street when she lawfully stopped for a red light. Driver 1 saw Driver 2, Daniel Dench, driving erratically down Main Street on his motorcycle and traveling at a high rate of speed. As Driver 2 approached the intersection where Driver 1 was stopped, Driver 1 could see that Driver 2 was looking down at his leg, and Driver 2 never looked up from his leg. Driver 2 suddenly reached down to his leg and picked up his telephone with his right hand and, while tapping the screen with his left hand, he immediately veered to the right, hitting the curb and becoming airborne. Driver 2's motorcycle then collided with the driver's side of Driver 1's vehicle. Driver 1 was transported to Town Hospital via ambulance. Driver 1 sustained a concussion, back and neck injuries, and her vehicle was totaled.

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(Narrative continued) (Page 2 of 2)

**Driver 2**, Daniel Dench, stated that, while driving east on Main Street approaching the intersection with First Street, he was playing a video game on his smart phone in which players compete to collect the highest number of virtual gold coins in the shortest amount of time. Players normally walk around town, periodically looking at their mobile device/PDA which shows them where coins are, and when players get close enough on a map, the virtual coins appear on the screen of the player's mobile device. Upon seeing the virtual gold coins on their mobile device, a player must tap the screen of their mobile device to collect the virtual coins; at the same time, the player receives a text message stating, "Congratulations, you got the coin!" The player then taps the screen again, which automatically sends to other players a text message saying, "I got it!" Driver 2 stated he thought he could collect coins faster by driving his motorcycle instead of walking. Driver 2 admitted to: traveling in excess of the speed limit; driving very close to the curb to gather the virtual coins; taking his eyes off the road for at least five seconds to look for the next virtual gold coin on his mobile device that was sitting on his leg; and then, immediately before hitting the curb, picking up the mobile device and tapping the screen when he found the coin, reading the resulting text message saying he got the coin, and tapping his mobile device screen again to send a message to other players that he got the coin. He also stated "I knew it was risky to speed and drive so close to the curb while playing, but it was definitely worth it so I could win the game and maintain the title of top coin collector." Driver 2 was transported to Town Hospital via ambulance. Despite suffering a fractured skull and two broken legs, he said he will return to playing the game to retain his title.

Driver 2 was cited for speeding, operating a motor vehicle in an unsafe manner, failing to abide by traffic signal devices, and texting while driving (75 Pa. C.S. §3316).

End of Report.

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**LIBRARY**

## **75 Pa. C.S. § 3316 Prohibiting text-based communications**

**(a) Prohibition.** -- No driver shall operate a motor vehicle on a highway . . . in this Commonwealth while using an interactive wireless communications device to send, read or write a text-based communication while the vehicle is in motion. A person does not send, read or write a text-based communication when the person reads, selects or enters a telephone number or name in an interactive wireless communications device for the purpose of activating or deactivating a voice communication or a telephone call.

\* \* \*

**(d) Penalty.** -- A person who violates subsection (a) commits a summary offense and shall, upon conviction, be sentenced to pay a fine of \$50.

**(f) Definition.** -- As used in this section, the term "text-based communication" means a text message, instant message, electronic mail or other written communication composed or received on an interactive wireless communications device.

## **75 Pa. C.S. § 102 – Definitions**

**“Interactive wireless communications device.”** A wireless telephone, personal digital assistant, smart phone, portable or mobile computer or similar device which can be used for voice communication, texting, e-mailing, browsing the Internet or instant messaging.

\* \* \*

**“Highway.”** The entire width between the boundary lines of every way publicly maintained when any part thereof is open to the use of the public for purposes of vehicular travel.

\* \* \*

**“Motor vehicle.”** A vehicle which is self-propelled[, which includes a motorcycle,] except an electric personal assistive mobility device or a vehicle which is propelled solely by human power.

**STEVEN ROCKWELL, Plaintiff**

v.

**GLENN KNOTT and NEW PRIME, INC., Defendants**

**Common Pleas Court of Lackawanna County, Pennsylvania**

\* \* \*

Defendants' motion for partial summary judgment in this motor vehicle litigation raises a novel issue of apparent first impression in this Commonwealth: whether a motorist, who is involved in an accident while looking downward at the display screen of a global positioning system (“GPS”) application [footnote omitted] on a cell phone, rather than at the roadway, may be liable for punitive damages? A motorist arguably may engage in recklessly indifferent conduct, and thereby be potentially liable for punitive damages, if [s]he completely diverts his or her attention from the roadway to observe a low positioned GPS device and nevertheless continues to travel on the roadway until [s]he collides with another vehicle.

**I. FACTUAL BACKGROUND**

This personal injury suit arises out of an automobile accident which occurred on August 24, 2011, at the intersection of East Union Street and North Washington Street in Wilkes-Barre, Luzerne County. At that time, Plaintiff, Steven Rockwell (“Rockwell”), was travelling eastbound on East Union Street, while Defendant, Glenn Knott (“Knott”), was proceeding in a westerly direction on East Union Street. (citation omitted). Knott was operating a Ford Van that was owned by his employer, Defendant, New Prime, Inc. (“New Prime”), and was acting within the course and scope of his employment with New Prime at that time. (citation omitted).

Knott brought his vehicle to a stop in the westbound, left-hand travelling lane of East Union Street, “intending to turn left onto the southbound lane of North Washington Street.” (citation omitted). Rockwell has alleged in his amended complaint that as a [sic] Knott was stopped at the intersection, he “began fidgeting with his GPS unit, taking his eyes off of the road,” and diverted his attention “from oncoming traffic for a substantial and significant amount of time.” (citation omitted). Knott and New Prime have specifically denied those allegations in their responsive pleading. (citation omitted). Rockwell further avers that “[a]s [he] attempted to drive through the foregoing intersection in the eastbound lane of East Union Street, Mr. Knott abruptly turned left into Mr. Rockwell's lane.” (citation omitted). Knott and New Prime have also denied that assertion, and contend to the contrary that “Rockwell's motorcycle struck Glenn Knott's vehicle.” (citation omitted).

Rockwell commenced this action on February 17, 2012, and asserted a negligence claim against Knott, a vicarious liability claim against New Prime, and a direct claim against New Prime for negligent hiring and training of Knott. (citation omitted). In Count IV of the amended complaint, Rockwell seeks to recover punitive damages from Knott and New Prime. Rockwell alleges that “Knott knew that it was dangerous to operate his GPS at the same time that he was operating a vehicle,” and “knowingly and intentionally

chose to be distracted by his GPS system while he was operating a motor vehicle.” (citation omitted). Rockwell further maintains that “New Prime knowingly and intentionally failed to train, inform, educate, and prohibit its employees from acting as distracted drivers and from operating a GPS system while driving.” (citation omitted). As a result of that alleged “willful, wanton or reckless behavior” by Knott and New Prime, Rockwell advances a claim for punitive damages. (citation omitted).

During Knott's discovery deposition, he testified that on August 24, 2011, New Prime instructed him to drive a fellow employee from its Pittston business to a bus station in Wilkes-Barre. . . . Knott . . . obtained the . . . address for the bus station, and programmed that . . . address into the GPS application on his wireless communications cell phone. (citation omitted). Knott then placed his cell phone in the lower center console and angled its screen towards him so that he “could see it” as he drove to the bus station. (citation omitted).

According to Knott, once he arrived at the intersection of East Union Street and North Washington Street, he “stopped” the van, “took a glance down at [his] GPS . . . just to make sure [he] was on the right street,” and then “glanced back up” at “the Washington Street sign” before taking his foot off the brake. (citation omitted). When questioned further regarding the use of his GPS and the circumstances surrounding the accident, Knott testified:

Q. Now, let me make sure your testimony is accurate. When that last vehicle goes through the intersection, the last car you see, you look down at your GPS?

A. Yes, as it was coming through the intersection, I took a glance down to the GPS to make sure it was Washington, like the road I was going on was the correct road, yes.

\* \* \*

Q. And when you looked down at the GPS, the car coming in the opposite direction was already in the intersection, the last car.

A. Yes.

Q. Then what did you do then?

A. I looked forward to see my lane was clear and I – that's why I perceived the lane was clear. I didn't see anyone in the straight lane.

\* \* \*

Q. And then you started to move, turn, make your left-turn?

A. I took my foot off the brake and it moved forward.

Q. Help me understand that just so we're clear. I don't want to misunderstand what you're saying. So you looked up at the street sign. You see it says Washington Street, and then you take your foot off the brake.

A. Yes.

Q. And at the time you take your foot off the brake, where are you looking?

A. Well, I was moving my eyes down towards the street in front of me.

Q. So when you took your foot off the brake, you were moving your eyes from the Washington Street sign down to the –

A. To the street in front of me, yes.

Q. And when you took your foot off the brake, the vehicle started to move forward?

A. Yes.

Q. And did you have the wheel turned one way?

A. Yes.

Q. What way did you have it turned?

A. Turn left to make the turn.

Q. Did you put your foot on the gas at all?

A. No.

\* \* \*

Q. And your vehicle was already moving at the first – when you first saw the motorcycle?

A. This, when I first saw it, yes, and then I hit the brake.

Q. And then you hit the brake. When you hit the brake, did your vehicle stop immediately?

A. I believe it stopped like right prior to impact, yes.

(citation omitted).

After the close of discovery and following the filing of a Certificate of Readiness for trial, Knott and New Prime filed a motion for partial summary judgment with respect to Rockwell's punitive damages claim. Knott submits that there is no evidence in the record to support the allegations in Rockwell's pleading that Knott “was looking at his GPS when he began to make the left hand turn, i.e., that he violated a traffic law and was distracted.” (citation omitted). In the alternative, Knott posits that even “assuming *arguendo* that Mr. Knott was looking at his GPS when he began to turn left, such an act does not constitute evidence to satisfy the heightened legal standard necessary to prove a claim for punitive damages.” (citation omitted).

...

In opposition to defendants' motion for partial summary judgment, Rockwell cites the deposition testimony of Knott's supervisor, Richard Yarborough, who stated that all New Prime drivers are advised “not [to] use GPS” because [t]hey're dangerous” and “take your attention from the road.” (citation omitted). Rockwell asserts that Knott “ignored this directive” and “proceeded to drive ‘blindfolded’

despite being specifically instructed not to do so by Mr. Yarborough.” (citation omitted). Rockwell further argues that Knott has “not cited any case law that specifically addresses whether or not the use of a GPS while driving constitutes the type of recklessness that supports a punitive damages claim[.]” . . .

\* \* \*

## II. DISCUSSION

\* \* \*

### *(B) DISTRACTED DRIVING CLAIM*

Rockwell contends that Knott's use of his GPS while driving, when coupled with his supervisor's admonition to avoid use of a GPS while operating a vehicle, requires submission of the punitive damages claim to the jury based upon “the fact that [Knott] was practically operating a motor vehicle blindfolded after being told of the dangerous (*sic*) associated with the same and voluntarily ignoring those warnings.” (citation omitted). “Punitive damages are appropriate when an individual's actions are of such an outrageous nature as to demonstrate intentional, willful, wanton, or reckless conduct.” (citation omitted). Wanton misconduct or reckless indifference “means that ‘the actor has intentionally done an act of an unreasonable character, in disregard of a risk known to him or so obvious that he must be taken to have been aware of it, and so great as to make it highly probable that harm would follow.’” (citation omitted). “Thus, in Pennsylvania, a punitive damages claim must be supported by evidence sufficient to establish that (1) a defendant had a subjective appreciation of the risk of harm to which the plaintiff was exposed and that (2) he acted, or failed to act, as the case may be, in conscious disregard of that risk.” (citation omitted).

Punitive damages claims have been permitted against motorists in narrow sets of circumstances indicating unreasonable actions by defendants in conscious disregard of known or obvious risks which pose a high probability of harm to others. . . . [C]ourts have allowed punitive damages claims to proceed against . . . motorists who otherwise engage in wanton or reckless conduct. (citation omitted) (“Allowing a truck to go out on the road where the load could not properly be distributed because of a broken loading rack; not braking when travelling down hills so that the truck exceeded the speed limit; driving with limited visibility because the listing of the back of the truck obscured the view from the side mirror; and changing lanes under these circumstances without signaling is sufficient evidence to justify a jury's conclusion that the Defendants' conduct was outrageous”) . . .

Although no Pennsylvania appellate court has yet to address the viability of a punitive damages claim predicated upon a motorist's use of an interactive wireless communications device or GPS application at the time of an accident, several trial courts in Pennsylvania have considered the recoverability of punitive damages in accidents involving cell phone use or text-based communication on a wireless communications device. In *Kondash v. Latimer*, (citation omitted), visiting Senior Judge Harold A. Thomson, Jr., declined to grant a motion to strike [a claim for punitive damages] that was filed by a defendant who allegedly caused an accident while “talking on, texting or otherwise utilizing a wireless phone, personal digital assistant (“PDA”) or other handheld device.” (citation omitted). . . . (footnote omitted).

In contrast, the court in *Xander v. Kiss*, (citation omitted) concluded that a punitive damages claim against



a defendant who “was speaking on his cellular telephone at the time of the accident” could proceed forward only if there was some “additional indicia of recklessness” besides the mere use of a cell phone. (citation omitted). More recently, Monroe County Judge Arthur L. Zulick similarly concluded in *Platukis v. Pocono Segway Tours, LLC*, (citation omitted) that cell phone usage alone does not give rise to a claim for punitive damages. In sustaining a demurrer that was filed by a defendant who “was using a cellular phone at the time of the collision, and was operating the Segway at an excessive rate of speed,” Judge Zulick reasoned that “[w]hile using a cellular phone while operating a motor vehicle is undoubtedly risky, that alone still does not give rise to the state of mind necessary to find [defendant] acted recklessly.” (citation omitted); *see also* (citation omitted) (citing *Xander* with approval, dismissing punitive damages claim against defendant who was allegedly using his cell phone while driving, and concluding that “it appears that the proper inquiry here is whether the allegations in Plaintiffs’ complaint constitute the type of ‘additional indicators’ or aggravating factors that could elevate Defendant’s conduct from mere negligence to the type of willful, wanton or reckless conduct that would justify punitive damages.”).

\* \* \*

Other jurisdictions have also applied different approaches when analyzing punitive damages claims against motorists who have allegedly caused accidents while speaking on cell phones. Most of those courts agree that cell phone usage alone is insufficient to support an award of punitive damages. (citation omitted) (“We have never ruled that using a cell phone while driving, alone, amounts to reckless indifference, and we decline to do so here.”). Some jurisdictions have concluded that the use of a cell phone, in combination with a violation of a Vehicle Code provision or other recognized rule of the road, creates a triable issue of fact regarding the recovery of punitive damages. (citation omitted) (denying motion for partial summary judgment relative to punitive damages claim against tractor trailer driver who was talking on his cell phone and had driven more than seventy hours in the eight-day period before the accident, in violation of 49 C.F.R. 392.3); (citation omitted) (denying motion to dismiss punitive damages claim against driver who “ran a red light, and ignored other warnings signs immediately prior to the accident because she was talking on her cell phone.”); (citation omitted) . . . . Other courts have adopted a heightened test that requires proof of “other aggravating circumstances,” beyond violations of the rules of the road, in order to recover punitive damages from a motorist who is using a cell phone at the time of the accident. (citation omitted) (stating that “evidence of mobile phone use did not, without more, establish a policy or pattern of dangerous driving,” and affirming dismissal of punitive damages claim since “there is no evidence of a policy or pattern of dangerous driving or other aggravating circumstances.”).

Texting while driving significantly increases the degree of driver distraction since it requires the motorist to completely divert his or her attention from the roadway as [s]he focuses upon the mobile device. As such, texting poses a much greater risk to pedestrians and other motorists than speaking on a cell phone. (citation omitted) (dismissing punitive damages claim against tractor trailer driver who “was talking on his hands-free cell phone at the time of the collision,” and finding that “[w]hile such conduct may be negligent, it does not show wanton and willful disregard of Plaintiffs’ safety. . . .”). Indeed, Section 3316(a) of the Pennsylvania Vehicle Code, 75 Pa.C.S., only bans text messaging while driving and does not prohibit a motorist from engaging in cell phone conversations while driving. (citations omitted).

A motorist’s use of a GPS device may, or may not, cause distracted driving depending upon the type and

placement of the GPS device and the concomitant operation of the vehicle. . . . Knott apparently did not possess . . . a bracket or holder since his cell phone was located in the cup holder of the center console at the time of the accident.

The position of the GPS device, the extent of the driver's distraction, and the distance travelled by the vehicle during that period of diversion are important factors in determining whether the motorist is chargeable with outrageous conduct. (citation omitted) (semi-truck driver who "looked down at the open map on the seat next to him to verify driving directions" for a matter of seconds "was clearly negligent in the operation of his vehicle," but was not liable for punitive damages). If the GPS device is affixed to the dashboard or windshield of the vehicle, such that the operator maintains peripheral vision of the roadway, a motorist's split second glimpse at its screen is akin to a momentary glance at a speedometer or side or rearview mirror, and does not constitute reckless indifference or wanton misconduct. However, if a driver completely diverts his or her attention from the roadway to view a GPS device which is not located on the dashboard or windshield, and continues to travel in his or her vehicle without any view of the roadway or other traffic, [s]he may be deemed reckless.

In light of Richard Yarborough's testimony that New Prime's drivers are cautioned against using GPS navigation systems since such devices divert their attention from the roadway, a genuine issue of material fact exists as to whether Knott had a subjective appreciation of the risk of harm posed by use of a GPS. Although Rockwell alleged in his amended complaint that Knott's attention was diverted "for a substantial and significant amount of time" due to the GPS device, the summary judgment record is devoid of any such proof. Even when viewed in the light most favorable to Rockwell, the record reflects that as the final approaching vehicle entered the intersection from the opposite direction, Knott looked at the GPS to ensure that he was at the correct intersection. Knott then "glanced back up" at the street sign for Washington Street, looked forward in the direction of oncoming traffic, and proceeded to take his foot off the brake as he began his left turn. Reasonable minds could not differ that such conduct by Knott does not constitute reckless, distracted driving.

If the record contained some evidence suggesting that Knott was viewing the GPS device positioned in the lower center console as he proceeded to make a left turn without yielding the right of way to Rockwell, in violation of Section 3322 of the Vehicle Code, 75 Pa.C.S., an issue of fact would exist as to whether Knott's recklessly indifferent conduct warrants the submission of Rockwell's punitive damages claim to the jury. At the summary judgment stage, Rockwell can no longer rely upon his averment that Knott was so distracted "for a substantial and significant amount of time," and no such evidence is present in the record submitted for review. As a result, Rockwell's evidence in support of his punitive damages claim against Knott is insufficient as a matter of law, and Knott's motion for partial summary judgment will be granted.

1. The motion for partial summary judgment . . . is GRANTED; and
2. Count IV . . . setting forth claims for punitive damages against Defendants . . . is DISMISSED.

**KARL SCHEMBERG, Jr., Appellant v. JAMES SMICHERKO, Appellee**

**Superior Court of Pennsylvania. February 11, 2014**

Karl Schemberg, Jr. (Plaintiff) appeals from the November 8, 2012 order which sustained the preliminary objections of James Smicherko (Defendant) and dismissed Plaintiff's complaint with prejudice. We reverse and remand for further proceedings consistent with this opinion.

The trial court summarized the facts and procedural history of this case as follows:

Plaintiff . . . filed a complaint against [Defendant] for negligence *per se* and negligence. Plaintiff is a police officer for the Borough of Kutztown Police Department. Around midnight on February 17, 2012, while on duty, [P]laintiff observed [D]efendant urinating in public against the side of a private residence which [P]laintiff believed was not [D]efendant's private residence in violation of municipal ordinances and state laws. Defendant ran away to avoid [P]laintiff's investigation. [Plaintiff] pursued [D]efendant and eventually apprehended him not far from the area where he first saw [D]efendant urinating. The area of the pursuit was not well lit, and [P]laintiff fell from a height between twelve inches to fifteen inches while pursuing [D]efendant. Plaintiff sustained injuries to his right leg which required, inter alia, surgery. Defendant pled guilty to violating the Borough of Kutztown ordinance prohibiting urination in public. Plaintiff contends in his complaint that [D]efendant committed negligence *per se* because he violated the ordinance of Kutztown Borough and 18 Pa.C.S.A. § 5104 which reads as follows:

A person commits a misdemeanor of the second degree if, with the intent of preventing a public servant from effecting a lawful arrest or discharging any other duty, the person creates a substantial risk of bodily injury to the public servant or anyone else, or employs means justifying or requiring substantial force to overcome the resistance.

Defendant filed preliminary objections to the complaint contending that [P]laintiff was not able to prove claims of negligence *per se* and negligence. [The trial court] agreed with [D]efendant and sustained the preliminary objections.

(citation omitted).

Plaintiff filed a timely notice of appeal, and both Plaintiff and the trial court complied with Pa.R.A.P. 1925. Plaintiff presents the following questions for our review:

A. DID THE TRIAL JUDGE ERR IN CONCLUDING THAT [PLAINTIFF] COULD NOT ESTABLISH A CLAIM FOR NEGLIGENCE OR NEGLIGENCE *PER SE* BECAUSE THE STATUTE VIOLATED BY [DEFENDANT] WAS NOT INTENDED TO PROTECT A SPECIFIC GROUP OF INDIVIDUALS AS OPPOSED TO THE GENERAL PUBLIC?

B. DID THE TRIAL JUDGE ERR IN CONCLUDING THAT [PLAINTIFF] COULD NOT ESTABLISH A CLAIM FOR NEGLIGENCE *PER SE* OR NEGLIGENCE BECAUSE THE ACTIONS OF [DEFENDANT] WERE NOT THE PROXIMATE CAUSE OF THE INJURIES SUFFERED BY [PLAINTIFF]?

\* \* \*

The concept of negligence *per se* establishes the elements of duty and breach of duty where an individual violates an applicable statute, ordinance, or regulation designed to prevent a public harm. However, a plaintiff, having proven negligence *per se* cannot recover unless it can be proven that such negligence was the proximate cause of the injury suffered.

We have defined negligence *per se* in the following fashion:

[Negligence *per se* is] conduct, whether of action or omission, which may be declared and treated as negligence without any argument or proof as to the particular surrounding circumstances. Pennsylvania recognizes that a violation of a statute or ordinance may serve as the basis for negligence *per se*. However, a court will not use a statute or regulation as the basis of negligence *per se* where the purpose of the statute is to secure to individuals the enjoyment of rights or privileges to which they are entitled only as members of the public.

In order to prove a claim based on negligence *per se*, the following four requirements must be met:

- (1) The purpose of the statute must be, at least in part, to protect the interest of a group of individuals, as opposed to the public generally;
- (2) The statute or regulation must clearly apply to the conduct of the defendant;
- (3) The defendant must violate the statute or regulation;
- (4) The violation of the statute or regulation must be the proximate cause of the plaintiff's injuries.

(citations omitted).

The statute Plaintiff claims that Defendant violated provides as follows.

A person commits a misdemeanor of the second degree if, with the intent of preventing a public servant from effecting a lawful arrest or discharging any other duty, the person creates a substantial risk of bodily injury to the public servant or anyone else, or employs means justifying or requiring substantial force to overcome the resistance.

18 Pa.C.S. § 5104.

The trial court rejected Plaintiff's negligence *per se* claim based upon violation of this statute upon the following analysis: “[f]leeing the scene of a summary arrest, without more, does not create a substantial

risk of bodily harm to a police officer. Moreover, [Defendant] did not employ any resistance which forced [Plaintiff] to overcome the resistance with substantial force.” (citation omitted) We disagree.

Plaintiff's complaint does not allege merely flight to avoid arrest. Plaintiff alleged that Defendant attempted to prevent Plaintiff from performing his duty by fleeing, in the middle of the night, through a poorly-lit area of uneven terrain. (citation omitted). Accepting these averments as true, and giving Plaintiff the benefit of all reasonable inferences therefrom, the fact finder could reasonably conclude that Defendant's flight created a substantial risk of bodily injury. (citation omitted). Therefore, it is not clear and free from doubt that Plaintiff will be unable to prove that Defendant violated 18 Pa.C.S. § 5104.

Defendant argues his preliminary objections were nonetheless properly granted because the purpose of Section 5104 is not to protect officers specifically, but rather the public in general. Defendant's Brief at 4. Again, we disagree.

Clearly the purpose of the statute is to protect the group of individuals, specifically including public servants, who find themselves in the zone of danger created by the individual preventing the public servant from discharging his or her duty. That the protected group includes bystanders as well as public servants does not make it so general as to prevent the application of Section 5104 in a negligence *per se* claim.

For example, although the criminal code provision against underage drinking “represents an obvious legislative decision to protect both minors and the public at large from the perceived deleterious effects of serving alcohol to persons under twenty-one years of age[,]” our Supreme Court held that violation of that statute constituted negligence *per se*. (citations omitted). Similarly, the intention to protect from harm manifested in the statute at issue in this case is more specific than provisions of the motor vehicle code; yet violations of [some] traffic laws constitute negligence *per se*. (citation omitted) (holding that passing in a no-passing zone, in violation of the vehicle code was negligence *per se*) (citation omitted) (“The law of this Commonwealth is clear that failure to obey a stop sign is negligence *per se*.”).

In contrast, statutes which this Court has held were too general to support a negligence *per se* claim involve statutes that less clearly indicate an intention to protect specific groups from specific types of harm. (citation omitted) (holding that there was no negligence *per se* claim based upon violation of Philadelphia Air Management Code, because “the purpose of the Code was to protect the ‘atmosphere over the City’ of Philadelphia, with . . . concomitant benefits to its ‘inhabitants.’”).

Thus, we conclude that the purpose of 18 Pa.C.S. § 5104 is to protect the interests of a group of which Plaintiff is a member and applies to Defendant's alleged conduct, and that, accepting the facts alleged in Plaintiff's complaint as true, a fact-finder could reasonably conclude that Defendant violated the statute.

\* \* \*

Because Plaintiff's complaint alleges facts which satisfy the requirements for a claim of negligence *per se*, (citation omitted) the trial court erred as a matter of law in granting Defendant's preliminary objections in the nature of a demurrer.

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## *Instructions*

The performance test is designed to test an applicant's ability to perform the legal task that has been assigned using the factual information contained in the File and legal principles that are provided in the Library.

The File contains the only factual information that you should consider in performing the assigned task. The task to be completed is set forth in the first document in the File in the form of a memorandum to the applicant. The Library contains the only legal principles that you should consider to complete the assigned task. Although your general knowledge of the law may provide some background for analyzing the problem, the factual information contained in the File and the legal principles contained in the Library are the only materials that you should use in formulating your answer to the assigned task.

Your response should be written in the gray answer book or typed in answer screen number 3 of SofTest. Be sure to allow sufficient time for reading the materials, organizing your answer and completing the task assigned. Your answer should demonstrate an understanding of the relevant facts, recognition of the issues and the applicable principles of law and the reasoning that supports your answer. Your grade will be based on the content of your response and your ability to follow instructions in performing the assigned task.

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