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## Raising Corporate Consciousness of Employer Liability for Video Zoom While Driving

Nanci K. Carr

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RAISING CORPORATE CONSCIOUSNESS  
OF EMPLOYER LIABILITY FOR VIDEO  
ZOOM WHILE DRIVING

NANCI K. CARR\*

ABSTRACT

*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 and proposes policies to reduce the risk of that liability.*

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## 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.”<sup>1</sup> 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.<sup>2</sup> Police officers spotted the car and pulled it over, finding that the driver had only a provisional license and no insurance.<sup>3</sup> While this story led only to head shaking, it could have been so much worse.<sup>4</sup> The leading cause of injury and death in the workplace, according to the National Safety Council, is motor vehicle collisions.<sup>5</sup> Employers need to have policies in place prohibiting employee participation in video Zoom<sup>6</sup> calls while driving or employers could end up liable for the resulting crash.<sup>7</sup>

## I. DISTRACTED DRIVING

Distracted driving has become an even larger concern during the pandemic, and part of the problem may be all of the virtual

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<sup>1</sup> 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, 8:37 AM), <https://www.dailymail.co.uk/news/article-9244903/Driver-holds-ZOOM-video-call-driving-work.html> [<https://perma.cc/9SZL-2KV9>].

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

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Commercial Fleet and Delivery Drivers: 5 Tips to Prevent Distracted Driving*, FRANKENMUTH INS. (July 9, 2020) [hereinafter *Commercial Fleet and Delivery Drivers*], <https://www.fmins.com/blog/commercial-fleet-delivery-drivers-prevent-distracted-driving/> [<https://perma.cc/PH2P-6836>].

<sup>6</sup> While this Article focuses on Zoom, the same applies to FaceTime, Skype, WebEx, Teams, or any similar platform. For example, on June 7, Apple announced new features for its FaceTime app to allow enhanced video calls, appearing to make it more competitive with Zoom. *WWDC*, APPLE.COM (June 7, 2021), <https://www.apple.com/apple-events/june-2021/> [<https://perma.cc/RE43-URFA>]. No such new features should be used while driving.

<sup>7</sup> 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> [<https://perma.cc/DSQ5-HZRS>].

meetings engaged in by people working out of the office.<sup>8</sup> Phone usage while driving is up by thirty-eight percent during the pandemic.<sup>9</sup> According to the American Automobile Association (“AAA”), when drivers take their eyes off the road for just two seconds, it doubles the risk of being involved in a crash.<sup>10</sup> 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.<sup>11</sup>

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 back-firing.<sup>12</sup> Video Zooming while driving involves all four types of

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<sup>8</sup> *Don’t Drive Distracted*, AAA, <https://www.aaa.com/dontdrivedistracted/> [<https://perma.cc/AS23-LAJ7>] (defining distracted driving as “any activity (including texting) that diverts attention from the task of safe driving”).

<sup>9</sup> 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/> [<https://perma.cc/9KPG-N85K>].

<sup>10</sup> *The Risks of Distracted Driving*, AAA, <https://exchange.aaa.com/safety/distracted-driving/the-risks-of-distracted-driving/> [<https://perma.cc/W7PX-3BSS>].

<sup>11</sup> NAT’L HIGHWAY TRAFFIC SAFETY ADMIN., OVERVIEW OF THE NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION’S DRIVER DISTRACTION PROGRAM 3–4 (2010) [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*, PERDUE AND KIDD (Oct. 30, 2017), <https://www.perdueandkidd.com/blog/distracted-driving/> [<https://perma.cc/V5QD-ETKN>].

<sup>12</sup> Kidd, *supra* note 11; Julie Ferguson, *Distracted Driving & Employer Policies*, ESI GROUP (Nov. 1, 2009), <https://www.theeap.com/best-practices/distracted-driving-employer-policies> [<https://perma.cc/8DTP-GSCZ>] (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

distraction.<sup>13</sup> 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.<sup>14</sup>

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
- [3.] External to the vehicle—signs and displays, scenery, roadside features<sup>15</sup>
- [4.] Internal to the driver’s mind—daydreaming, “lost in thought”<sup>16</sup>

Sometimes, trying to solve one distraction can lead to another.<sup>17</sup> For example, traffic congestion and long commutes can

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middle of the lane.”); Byron Spice, *Carnegie Mellon Study Shows Just Listening to Cell Phones Significantly Impairs Drivers*, CARNEGIE MELLON UNIV., [https://www.cmu.edu/news/archive/2008/March/march5\\_drivingwhilelistening.shtml](https://www.cmu.edu/news/archive/2008/March/march5_drivingwhilelistening.shtml) [<https://perma.cc/7PBD-FJKR>].

<sup>13</sup> OVERVIEW OF DRIVER DISTRACTION PROGRAM, *supra* note 11, at 3–4.

<sup>14</sup> *Id.*

<sup>15</sup> 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> [<https://perma.cc/3DYZ-8QK8>]. 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.*

<sup>16</sup> Kidd, *supra* note 11.

<sup>17</sup> See Piyush Jain, *Are Car Massagers Safe?*, HOTCARS (Aug. 20, 2019), <https://www.hotcars.com/are-car-massagers-safe-we-explore-the-pros-and-cons/> [<https://perma.cc/F4B3-4GPD>].

lead to stress and discomfort, which can be improved by a car seat massager as it relieves pain and triggers endorphins that improve mood.<sup>18</sup> 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.<sup>19</sup> However, such seat massagers could also lead to cognitive distraction.<sup>20</sup> While stressed drivers are not desirable, neither are those who are not alert having been lulled to sleep by a massage.<sup>21</sup> 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.<sup>22</sup>

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.”<sup>23</sup> 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 joining the meeting, and the device used for the meeting would not be properly stowed.<sup>24</sup>

Everyone is busy and often thinks that multitasking is the answer, including working while driving.<sup>25</sup> 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

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<sup>18</sup> Tony Havelka, *Best Car Seat Massager*, LIQUID IMAGE (Sept. 12, 2019), <https://www.liquidimageco.com/best-car-seat-massager/> [https://perma.cc/E6UL-VPSS].

<sup>19</sup> Joe Santos, *Why Aren’t Massage Seats a More Common Feature?*, MOTOR-BISCUIT (Aug. 20, 2020), <https://www.motorbiscuit.com/why-arent-massage-seats-a-more-common-feature/> [https://perma.cc/YR2D-MSST].

<sup>20</sup> See Jain, *supra* note 17.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Commercial Fleet and Delivery Drivers*, *supra* note 5. The other two tips are “eat before the trip” and “avoid drowsy driving.” *Id.*

<sup>24</sup> See *id.*

<sup>25</sup> 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> [https://perma.cc/42G5-EVG4].

that “[d]rivers need to keep not only their hands on the wheel; they also have to keep their brains on the road.”<sup>26</sup> 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.”<sup>27</sup> 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.<sup>28</sup> 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.”<sup>29</sup>

#### A. Cell Phone Use

One of the leading sources of distraction is cellphone use.<sup>30</sup> An astonishing ninety-seven percent of Americans own a cellphone, including eighty-five percent who own smartphones.<sup>31</sup> The Centers for Disease Control and Prevention (“CDC”) estimates that crashes involving a distracted driver kill eight people a day in the U.S.<sup>32</sup> One survey 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.”<sup>33</sup>

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<sup>26</sup> Spice, *supra* note 12. 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.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> OVERVIEW OF DRIVER DISTRACTION PROGRAM, *supra* note 11, at 4.

<sup>31</sup> See *Mobile Fact Sheet*, PEW RES. CTR. (Apr. 7, 2021), <http://www.pewinternet.org/fact-sheets/mobile-technology-fact-sheet> [<https://perma.cc/28UB-JT7K>].

<sup>32</sup> *Distracted Driving*, CTRS. FOR DISEASE CONTROL AND PREVENTION, [https://www.cdc.gov/transportationsafety/distracted\\_driving/index.html](https://www.cdc.gov/transportationsafety/distracted_driving/index.html) [<https://perma.cc/JV67-B5EP>].

<sup>33</sup> “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/> [<https://perma.cc/ZH98-7VUC>].

Cell phone makers have made an effort to reduce cell phone distraction while driving.<sup>34</sup> 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.<sup>35</sup> AT&T also has a "DriveMode" app to mute notifications.<sup>36</sup>

### *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."<sup>37</sup> However, texting while driving is dangerous and not advisable.<sup>38</sup> "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."<sup>39</sup> 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.<sup>40</sup> "The Federal Motor Carrier Safety

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<sup>34</sup> See Mike Snider, *Here's Where You Can't Stream Video and Drive Anymore*, USA TODAY (June 28, 2018, 10:25 AM), <https://www.usatoday.com/story/tech/news/2018/06/28/you-cant-stream-video-while-driving-more-states-like-georgia-decide/732314002/> [<https://perma.cc/H9H3-7BJ8>].

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *City of Ont. v. Quon*, 560 U.S. 746, 760 (2010).

<sup>38</sup> See "*Senseless*": *Parents Speak Out After Son Killed by Driver Apparently Distracted by Porn*, *supra* note 33.

<sup>39</sup> See *id.*; *Cellphones and Texting*, INS. INST. FOR HIGHWAY SAFETY (Feb. 2020), <https://www.iihs.org/iihs/topics/laws/cellphonelaws/maphandheldcellbans> [<https://perma.cc/R5L5-GVWP>]. Missouri has a partial ban, but Montana has no ban at all. *Id.* Illinois law prohibits the use of electronic devices while driving. 625 ILL. COMP. STAT. ANN. 5/12-610.2 (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.*

<sup>40</sup> Exec. Order No. 13513, 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

Administration prohibits texting by commercial motor vehicle drivers while operating in interstate commerce.”<sup>41</sup>

Some people may think that glancing at a phone is not a long enough period of time to be a problem.<sup>42</sup> 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!”<sup>43</sup> Even the State Bar of Michigan notes in its policy that texting should be prohibited.<sup>44</sup>

Law enforcement struggles to enforce no texting while driving laws, and looks to technology for assistance.<sup>45</sup> Textalyzer was created with technology from mobile forensics company Cellebrite, who assists law enforcement with unlocking mobile devices when needed to solve a crime.<sup>46</sup> 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.<sup>47</sup> 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.<sup>48</sup> Evan’s Law, named in honor of college freshman Evan Lieberman who was killed when the driver

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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.

<sup>41</sup> Limiting the Use of Wireless Communication Devices, 75 Fed. Reg. 59,118 (Sept. 27, 2010) (codified at 49 C.F.R. pts. 383–84, 390–92).

<sup>42</sup> 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/> [<https://perma.cc/LVD3-27J4>].

<sup>43</sup> Kidd, *supra* note 11.

<sup>44</sup> See Steven M. Gursten, *How Can You Avoid Remote Texter Liability?*, MICH. AUTO L. (Nov. 27, 2017), <https://www.michiganautolaw.com/blog/2017/11/27/remote-texter-liability> [<https://perma.cc/2F2R-WRJJ>] (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).”).

<sup>45</sup> 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> [<https://perma.cc/98CM-A7AT>].

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

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.<sup>49</sup> While it failed in 2016, New York continues to consider legalizing the use of the Textalyzer, and Nevada is considering it as well.<sup>50</sup>

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.<sup>51</sup> In addition, some state law enforcement agencies use unmarked SUVs known as Concealed Identity Traffic Enforcement (“CITE”) vehicles, which allow officers to be able to look down into passenger vehicles to determine whether drivers are using distracting devices.<sup>52</sup>

Texting is not just manually distracting, but also cognitively distracting.<sup>53</sup> Some might argue that hands-free texting permitted by some devices reduces the distraction.<sup>54</sup> For example, there was an attempt by Google with its Google Glass to keep drivers

<sup>49</sup> *Id.*

<sup>50</sup> Tanner Jubenville, *Controversial ‘Textalyzer’ Device Could Be up for Consideration Again in New York*, 13 WHAM (Mar. 18, 2019), <https://13wham.com/news/local/controversial-textalyzer-device-could-be-up-for-consideration-again-in-new-york> [<https://perma.cc/7JV9-PKTD>] (noting that objections to the device include Fourth Amendment issues, cost, and effectiveness).

<sup>51</sup> John Nassivera, *Texting and Driving: ComSonics’ Police Radar Gun Helps Cops Find Motorists on Their Phones*, HEADLINES & GLOB. NEWS (Sept. 17, 2014), <http://www.hngn.com/articles/42727/20140917/texting-and-driving-com-sonics-police-radar-gun-helps-cops-find-motorists-on-their-phones.htm> [<https://perma.cc/3RDL-5XME>]. ComSonics is a Virginia-based company that provides calibration services for speed enforcement equipment. *Id.*

<sup>52</sup> Kevin Short, *New York State Troopers Battle Texting While Driving, Cell Phone Use on the Roads*, HUFFINGTON POST (Dec. 6, 2017), [http://www.huffingtonpost.com/2013/07/23/new-york-texting-driving\\_n\\_3634973.html](http://www.huffingtonpost.com/2013/07/23/new-york-texting-driving_n_3634973.html) [<https://perma.cc/BSV7-YSQ2>] (“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 crack-down on distracted driving.”).

<sup>53</sup> *U Drive. You Text. You Pay.*, NAT’L HIGHWAY TRAFFIC SAFETY ADMIN., <https://www.nhtsa.gov/campaign/distracted-driving> [<https://perma.cc/ZT8J-QDDA>].

<sup>54</sup> Joel Feldman, *Claiming It Can Make Texting and Tweeting Safe for Drivers with Its ‘Heads Up Display’*, *Navy Ignores the Science of Cognitive Distraction*, ENDDD, <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/> [<https://perma.cc/MK6Q-YA79>].

focused on the road by merely looking through their eyeglasses for services that would typically be managed on a phone.<sup>55</sup> 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.”<sup>56</sup> However, just keeping one’s hands on the wheel is not enough.<sup>57</sup>

### 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.<sup>58</sup> 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.<sup>59</sup>

In most states, having a video display within the driver’s view while the vehicle is in motion is illegal.<sup>60</sup> While parents may

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<sup>55</sup> Camille Riesbeck, *Driving with Google Glasses: Good or Bad Idea?*, TRANSPOCO TELEMATICS (June 11, 2014, 11:40 AM), <https://www.transpoco.com/blog/2014/06/11/driving-with-google-glasses/> [<https://perma.cc/7HJD-FSSA>] (“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 organisations.”).

<sup>56</sup> *Id.* “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.” *Id.*

<sup>57</sup> *See Distracted Driving, Transportation Safety*, CTRS. FOR DISEASE CONTROL AND PREVENTION (Mar. 2, 2021), [https://www.cdc.gov/transportationsafety/distracted\\_driving/index.html](https://www.cdc.gov/transportationsafety/distracted_driving/index.html) [<https://perma.cc/N9G9-R993>].

<sup>58</sup> Snider, *supra* note 34 (noting that the driver was texting while driving, killing the motorcyclist and injuring his passenger sister in the October 2017 incident in Pennsylvania).

<sup>59</sup> *See id.*

<sup>60</sup> Adam M. Gershowitz, *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, *Can I Watch Movies in My Car While Driving?*, BEST CAR AUDIO (Feb. 7, 2020), <https://www.bestcaraudio.com/can-i-watch-movies-in-my-car-while-driving/> [<https://perma.cc/2U2T-TYJ7>]. However, they are only available while the car is parked. *Id.*; *see, e.g.*, CAL. VEH. CODE § 27602(a) (West

enjoy the distraction videos provide to their children in the back seat, those videos cannot be in the driver's view.<sup>61</sup> 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.<sup>62</sup> Video dashcam recorders are also permitted since there is no video screen to be viewed by the driver while driving.<sup>63</sup>

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.<sup>64</sup> Washington

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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 CAL. VEH. CODE 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").

<sup>61</sup> Gershowitz, *supra* note 60, 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 33. 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 and Jury Demand at 1–2, Weaver v. Energy Transfer Partners, No. CD-20-02383 (Tex. 44th Dist. filed Feb. 12, 2020), [https://courtportal.dallascounty.org/DALLASPROD/DocumentViewer/Embedded/j5YoGmr2Cb3wjamaNvTJsaSqdKI3MFzdVaPcRzvc\\_4lMdyCd7jTf7Ks7xwkc2GmSvlfwe7ljWJyb6Laewi4XA2?p=0](https://courtportal.dallascounty.org/DALLASPROD/DocumentViewer/Embedded/j5YoGmr2Cb3wjamaNvTJsaSqdKI3MFzdVaPcRzvc_4lMdyCd7jTf7Ks7xwkc2GmSvlfwe7ljWJyb6Laewi4XA2?p=0) [<https://perma.cc/V775-VTYX>] (awaiting jury trial).

<sup>62</sup> 1sixty8, *supra* note 60; *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/> [<https://perma.cc/E9QR-ND3R>].

<sup>63</sup> 1sixty8, *supra* note 60.

<sup>64</sup> Snider, *supra* note 34; GA. CODE ANN. § 40-6-241(c)(3) (2018); 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/> [<https://perma.cc/H7VD-3UY8>].

enacted the Driving Under the Influence of Electronics Act, in January 2018, the first state to do so, which called out video on phones.<sup>65</sup> Jennifer Ryan, 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."<sup>66</sup>

#### D. Zoom

The pandemic brought about a new form of distracted driving—Zoom.<sup>67</sup> With more people working from home, the number of people using Zoom skyrocketed.<sup>68</sup> People who had never heard of Zoom were suddenly spending hours each day on Zoom meetings.<sup>69</sup> Unfortunately, just as people conduct business by cell

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<sup>65</sup> Snider, *supra* note 34.

<sup>66</sup> *Id.* (quoting Jennifer Ryan, director of state relations for AAA's national office); Cole Lauterbach, *Illinois bans streaming video while behind the wheel*, CTR. SQUARE (Sept. 5, 2019), [https://www.thecentersquare.com/illinois/Illinois-bans-streaming-video-while-behind-the-wheel/article\\_9b98137c-cff4-11e9-adff-c714d74cefe7.html](https://www.thecentersquare.com/illinois/Illinois-bans-streaming-video-while-behind-the-wheel/article_9b98137c-cff4-11e9-adff-c714d74cefe7.html) [<https://perma.cc/26ZD-BYZE>] ("Illinois' distracted driving laws have been modernized to ensure people can't stream videos while operating a car.").

<sup>67</sup> Jeremy Baker, *Zoom Is Adding to Distracted Driving During the Pandemic*, *Safe2Save Says*, KENS5 (Aug. 25, 2020 9:14 AM), <https://www.kens5.com/article/news/local/safe2save-says-zoom-is-adding-to-distracted-driving-during-the-pandemic/273-93bfea50-8aa6-4258-86e0-5f2b1aa41337> [<https://perma.cc/UF8P-CQQV>]. 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/> [<https://perma.cc/DRL6-MNKQ>]; *Zoom the Preferred Video App for the 2nd Straight Year*, ZOOM (2021), <https://explore.zoom.us/docs/lp/most-popular-apps-2021.html> [<https://perma.cc/V2UU-JV45>]. "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 INC., OKTA'S BUSINESSES AT WORK 2021, 28 (2021). 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> [<https://perma.cc/2T3W-FB7E>].

<sup>68</sup> Sherman, *supra* note 67 ("Use of the firm's software jumped 30-fold in April [2020], as the coronavirus pandemic forced millions to work, learn and socialize remotely.").

<sup>69</sup> 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> [<https://perma.cc/NB2V-JR3T>]; Sherman,

phone calls while driving, some of them decided to Zoom while driving.<sup>70</sup> 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."<sup>71</sup> 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."<sup>72</sup>

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."<sup>73</sup> 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.<sup>74</sup>

Irish politician, James O'Connor, shocked his colleagues and community by joining a thirty-person group Zoom call while driving.<sup>75</sup> 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."<sup>76</sup>

One of the problems is that no one says anything to stop such dangerous behavior.<sup>77</sup> Realtor Pat Kapowich admitted to seeing

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*supra* note 67 ("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.").

<sup>70</sup> May, *supra* note 1; Baker, *supra* note 67.

<sup>71</sup> Baker, *supra* note 67.

<sup>72</sup> *Id.*

<sup>73</sup> Kyle Close, *Don't Zoom and Drive*, BLUE & GRAY PRESS (Oct. 1, 2020), <https://blueandgraypress.com/2020/10/01/dont-zoom-and-drive/> [<https://perma.cc/GNW9-X6WH>].

<sup>74</sup> *Id.* Close expressed 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." *Id.*

<sup>75</sup> Harriet Johnston, *Irish Politician, 23, Joins Group Zoom Call While Driving*, DAILY MAIL (Dec. 10, 2020), <https://www.msn.com/en-gb/cars/news/irish-politician-23-joins-group-zoom-call-while-driving/ar-BB19Wp5g> [<https://perma.cc/L2PS-5YTY>].

<sup>76</sup> *Id.*

<sup>77</sup> 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.

four leaders in the real estate industry participating in Zoom calls while driving.<sup>78</sup> The moment a meeting 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. And it may seem so obvious not to do it, that people think it does not need to be said.<sup>79</sup> 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.<sup>80</sup> Consequently, employers must instruct employees to not participate in video Zoom meetings while driving in order to avoid liability.<sup>81</sup> It is inattention that causes accidents, and if the employer causes the inattention, the employer should be liable.<sup>82</sup>

Most agree with the dangers of drunk driving, but many often try to argue that using cell phones is not as dangerous.<sup>83</sup>

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Nelson & John W. Simek, *Clip & Save: How to Use Zoom Securely*, 93 WIS. LAW. 49, 50, 52–53 (May 2020); Susan Berson, *Top Ten Tips for Lawyers “Zoom”ing into Remote Work During the Pandemic*, 89 J. KAN. BAR ASS’N 10, 10–12 (2020); Blake A. Klinkner, *Tips for Professional and Secure Zoom Meetings*, 43 WYO. LAW. 54, 54–55 (2020).

<sup>78</sup> 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), <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/> [<https://perma.cc/A73N-5UMM>].

<sup>79</sup> See Adam York, *What Not to Do During a Zoom Meeting*, GREENAPPLE STRATEGY (Aug. 12, 2020), <https://greenapplestrategy.com/what-not-to-do-during-a-zoom-meeting/> [<https://perma.cc/W3SX-NCFY>].

<sup>80</sup> N.F. Mendoza, *13 Things to Avoid Doing on Zoom*, TECHREPUBLIC (Apr. 3, 2020), <https://www.techrepublic.com/article/13-things-to-avoid-doing-on-zoom/> [<https://perma.cc/H224-BQQH>].

<sup>81</sup> See Leland Garvin, *Employer Liability for Florida Distracted Driving Accidents*, GARVIN INJ. L. (June 2, 2020), <https://www.garvinlegal.com/blog/employer-liability-for-florida-distracted-driving-accidents/> [<https://perma.cc/M9T5-KCXN>].

<sup>82</sup> 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-in-a-three-part-series-distracted-driving-a-potential-liability-for-employers> [<https://perma.cc/PJ3C-8YZD>].

<sup>83</sup> See Stewart Law Offices, *Is Texting While Driving As Dangerous As Drunk Driving?*, STEWART L. OFFS.: BLOG (July 16, 2020), <https://www.stewartlawoffices.net/is-texting-while-driving-as-dangerous-as-drunk-driving> [<https://perma>

However, that is not the case.<sup>84</sup> 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.<sup>85</sup>

Case law is clear that a passenger can be held liable for interfering with a driver's operation of a vehicle.<sup>86</sup> In addition, a passenger has a duty not to distract a driver, and if a breach of that duty causes an accident, that passenger may also be liable for resulting damages.<sup>87</sup>

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.<sup>88</sup> Today's technology provides opportunities for someone to distract a driver

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.cc/38HU-KVRX]. *Compare 5 Facts You May Not Know About Drunk Driving*, BELSKY, WEINBERG & HOROWITZ (Feb. 26, 2019), <https://www.belsky-weinberg-horowitz.com/5-facts-you-may-not-know-about-drunk-driving/> [https://perma.cc/EFC7-SEYZ], 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/> [https://perma.cc/4CHU-R8FV].

<sup>84</sup> See Holzwarth, *supra* note 83.

<sup>85</sup> *Distracted Driving*, NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., <https://www.nhtsa.gov/risky-driving/distracted-driving> [https://perma.cc/RMW3-44W8].

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

<sup>87</sup> See *Collins v. McGinley*, 558 N.Y.S.2d 979, 980 (N.Y. App. Div. 1990) (noting that jury's allocation of liability was ninety percent to the driver and ten percent 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.").

<sup>88</sup> See *Kubert*, 75 A.3d at 1229 ("When 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 \*6 (Pa. 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.").

even when they are not physically present in the car.<sup>89</sup> In addition, employers of employees engaging in distracted driving during their employment can be held liable.<sup>90</sup>

## II. 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.<sup>91</sup> Kyle Best was driving a pickup truck and texting with his friend, Shannon Colonna.<sup>92</sup> While looking at Colonna's text, Best hit Kubert's motorcycle.<sup>93</sup>

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<sup>89</sup> *Kubert*, 75 A.3d at 1229; Shekida A. Smith, *Texting While Driving Liability Now Extends To Remote Texters, According To New Jersey Appellate Court*, U. MIA. L. REV. (Sept. 28, 2013), <https://lawreview.law.miami.edu/texting-driving/> [<https://perma.cc/B8WG-7FJR>] (“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.”).

<sup>90</sup> 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> [<https://perma.cc/FE6Y-UP7V>] (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> [<https://perma.cc/6DHP-WMRH>]; Martha Buyer, *It’s Time to Hang Up When Driving*, NO JITTER (Oct. 17, 2013), <https://www.nojitter.com/its-time-hang-when-driving> [<https://perma.cc/YJ4W-QLXD>]. 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.*, No. CIV. A. 97-2727, 1999 WL 33236939, at \*1 (E.D. Pa. Jan. 29, 1999).

<sup>91</sup> *Kubert*, 75 A. 3d at 1229.

<sup>92</sup> *Id.* at 1219–20.

<sup>93</sup> *Id.* at 1220–21.

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.”<sup>94</sup> Consider the *Buchanan* case that occurred prior to *Kubert*, where a court found liability for a remote caller.<sup>95</sup> Candice Vowell was drinking in a bar with her mother, Shannon, who agreed to follow Candice home to make sure she arrived safely.<sup>96</sup> 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.<sup>97</sup> He sued Candice, the bar where she drank, and Shannon, alleging that Shannon negligently distracted Candice.<sup>98</sup> 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.<sup>99</sup>

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.<sup>100</sup> 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 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.<sup>101</sup> The *Kubert* court used the

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<sup>94</sup> *Id.* at 1226.

<sup>95</sup> *Buchanan ex rel. Buchanan v. Vowell*, 926 N.E.2d 515, 521–22 (Ind. Ct. App. 2010).

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* at 517–18.

<sup>98</sup> *Id.* at 518.

<sup>99</sup> *Id.* at 522.

<sup>100</sup> *Kubert v. Best*, 75 A.3d 1214, 1229 (N.J. Sup. Ct. App. Div. 2013).

<sup>101</sup> *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

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.<sup>102</sup> 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."<sup>103</sup>

*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.<sup>104</sup> 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.<sup>105</sup> They settled with Best for \$500,000, the maximum recovery under his insurance policy.<sup>106</sup> The Kuberts also sued Best's seventeen-year-old friend, Shannon Colonna, who sent Best a text message immediately before the

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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 provided 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?*, ENTER. MOBILE TODAY (Jan. 26, 2010), <http://www.enterprisemobiletoday.com/article.php/3860556/Could-Texting-in-Car-Be-an-Employer-Liability.htm> [https://perma.cc/X7SM-QASP] (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.").

<sup>102</sup> *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. *Champion ex rel. Ezzo v. Dunfee*, 939 A.2d 825, 830 (N.J. Super. Ct. App. Div. 2008).

<sup>103</sup> *New Jersey Court Finds Texter Can Have Responsibility for Remote Accident*, CLEMENTS, TAYLOR, BUTKOVICH & COHEN, CO. (Feb. 6, 2014), <https://ctbclawyers.com/2014/02/06/new-jersey-court-finds-texter-can-have-responsibility-for-remote-accident/> [https://perma.cc/DF34-SHCA]; see also *Texting Liability for Remote Senders: Will This Be a Trend?*, COLLINS & COLLINS, P.C. (Sept. 27, 2013), <https://www.collinsattorneys.com/injuryblawg/auto-accidents/texting-liability-for-remote-s/> [https://perma.cc/9F6Z-F75W] ("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.").

<sup>104</sup> *Kubert*, 75 A.3d at 1221–22.

<sup>105</sup> *Id.* at 1222.

<sup>106</sup> Smith, *supra* note 89.

crash.<sup>107</sup> 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.<sup>108</sup> In New Jersey, drivers are prohibited from using a cell phone while driving that is not “hands-free” unless there is an emergency situation.<sup>109</sup> 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.<sup>110</sup>

## *B. Employer Liability*

### *1. 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.<sup>111</sup>

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<sup>107</sup> *Kubert*, 75 A.3d at 1221–22.

<sup>108</sup> *Id.* at 1227. The texter must have not only known the driver was driving, but also urged him or her to respond while driving. *Id.*

<sup>109</sup> N.J. STAT. ANN. §§ 39:4–97.3 (“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”).

<sup>110</sup> § 2C:12-1(c)(1) (“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.”).

<sup>111</sup> 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

For purposes of analyzing the scope of employment, location may extend beyond the office to the car,<sup>112</sup> and time may extend beyond typical business hours.<sup>113</sup> The key focus instead may be whether the employee was serving the purpose of the employer at the time of the tort.<sup>114</sup>

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.<sup>115</sup> This is similar

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via 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 any-time, the scope of 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 L. (Feb. 2010), <https://garsonlaw.com/driven-to-distraction-from-the-legal-edge/> [<https://perma.cc/2WAT-4M7K>].

<sup>112</sup> See Michael, *supra* note 111, at 305.

<sup>113</sup> See, e.g., *id.* at 304–05.

<sup>114</sup> 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/900005526272/> [<https://perma.cc/DQG6-YT7X>]. 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/> [<https://perma.cc/N8PB-V9JR>]. 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*; *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 fifteen people and killed three).

<sup>115</sup> *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> [<https://perma.cc/EL5W-J9LY>].

to dram shop laws which impose liability on sellers of alcoholic beverages, such as bars, liquor stores, and restaurants.<sup>116</sup> 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.<sup>117</sup> While defendant hosts might try to argue about what “should have known” means, there is no such argument in a video Zoom meeting.<sup>118</sup> 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.<sup>119</sup>

An employer has “special reason to know”<sup>120</sup> that the driver will be distracted because it is the employer distracting the employee.<sup>121</sup> Proof of the distraction would also not be a challenge

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<sup>116</sup> *Id.*; 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.” *Jardine*, 198 A.2d at 553.

<sup>117</sup> *Dram Shop Law States Bars Can Be Held Liable for Drunk Driving Accidents*, ENJURIS, <https://www.enjuris.com/car-accident/dram-shop-law.html> [<https://perma.cc/J3PP-GFSJ>] (“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> [<https://perma.cc/5LU5-2A34>] (“Bartenders who serve intoxicated patrons may be at 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.”).

<sup>118</sup> See *infra* note 119 and accompanying text.

<sup>119</sup> 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*, VERGE, <https://www.theverge.com/2021/5/6/22423723/psa-dont-drive-zoom-meeting-ohio-distracted-driving-bill> [<https://perma.cc/3D7C-A5T4>].

<sup>120</sup> *Kubert v. Best*, 75 A.3d 1214, 1219 (N.J. Super. Ct. App. Div. 2013).

<sup>121</sup> *Id.*

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.<sup>122</sup>

## 2. 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.<sup>123</sup> Negligence is the breach of a duty owed to a plaintiff to protect them from a foreseeable risk of harm.<sup>124</sup> 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 utility of the defendant's conduct."<sup>125</sup> If the defendant employer permits or encourages video Zoom meetings while driving, then the employer can be held liable for negligence.<sup>126</sup> "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."<sup>127</sup>

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.<sup>128</sup> There is no meeting that is important enough

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<sup>122</sup> "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*, 56 WM. & MARY L. REV. 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.*

<sup>123</sup> *McClane v. Rich Transport, Inc.*, No. 2:11-cv-00101 KGB, 2012 WL 3257658, at \*7 (E.D. Ark. Aug. 9, 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).

<sup>124</sup> *Hetterle v. Chido*, 400 N.W. 2d 324, 326–27 (Mich. Ct. App. 1986).

<sup>125</sup> *Id.*

<sup>126</sup> *See id.*

<sup>127</sup> RESTATEMENT (SECOND) OF TORTS § 303 (AM. L. INST. 1965).

<sup>128</sup> *See id.*; *see also* Lyons, *supra* note 119.

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.<sup>129</sup>

### III. POLICIES, TRAINING, AND TOOLS

#### A. Policies

Employers are generally aware that their employee's actions can expose the employer to liability.<sup>130</sup> To reduce that risk of liability, employers have a variety of policies, ranging from non-discrimination to confidentiality.<sup>131</sup> 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.<sup>132</sup> 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.<sup>133</sup> For example, the *Ellender* court noted that while the 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.<sup>134</sup> The National Safety Council emphasizes the importance of employee support of the policy, noting that commitment from the employer's leadership is key.<sup>135</sup>

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<sup>129</sup> See Lyons, *supra* note 119.

<sup>130</sup> See Leslie Wolfe, *When are Employers Liable for Employee Behavior?*, CRAIN'S CLEV. BUS. (Nov. 11, 2013), <http://www.crainscleveland.com/article/20131111/BLOGS05/311119998/when-are-employers-liable-for-employee-behavior> [<https://perma.cc/W3SJ-5M6H>].

<sup>131</sup> See *id.*

<sup>132</sup> See *id.*

<sup>133</sup> See *id.*

<sup>134</sup> *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).

<sup>135</sup> NAT'L SAFETY COUNCIL, BUILDING EMPLOYEE BUY-IN 1 (2017). Another resource is the Network of Employers for Traffic Safety (NETS), an employer-led

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.<sup>136</sup> “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.”<sup>137</sup> 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.”<sup>138</sup> 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).<sup>139</sup> Pund-IT analyst Charles King opined that “it 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.<sup>140</sup>

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organization and a collaboration between the U.S. government and the private sector focused on reducing road-related crashes, injuries, and deaths. *Advancing Safety. Reducing Risk. Saving Lives.*, NETWORK OF EMPS. FOR TRAFFIC SAFETY, <https://trafficsafety.org> [<https://perma.cc/6UUF-QJEZ>].

<sup>136</sup> Kelly Wallace, *Distracted Driving: Urging Companies to Crack Down*, CNN (Apr. 4, 2017, 9:26 AM), <https://www.cnn.com/2017/04/04/health/distracted-driving-company-cell-phone-bans-impact/index.html> [<https://perma.cc/6K6J-QMQE>]. 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.*

<sup>137</sup> Julie Ferguson, *Distracted Driving & Employer Policies*, ESI GRP. (Nov. 1, 2009), <https://www.theeap.com/best-practices/distracted-driving-employer-policies> [<https://perma.cc/YMS9-2VL7>].

<sup>138</sup> David Needle, *Could Texting in Car Be an Employer Liability?*, ENTERPRISEMOBILETODAY (Jan. 26, 2010), <http://www.enterprisemobiletoday.com/article.php/3860556/Could-Texting-in-Car-Be-an-Employer-Liability.htm> [<https://perma.cc/Q2PX-9NWJ>].

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

While there are plenty of tips on video conferencing etiquette, most of them mention avoiding driving while doing so.<sup>141</sup> Tips include testing hardware and internet connection, changing backgrounds, not playing with filters, having a quiet space, and of course, dressing beforehand.<sup>142</sup> Since video presence has a magnifying effect, experts recommend avoiding “fidgeting, moving around, or gazing elsewhere while someone else is talking.”<sup>143</sup> Participants have even been advised not to eat or drink while on camera.<sup>144</sup>

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<sup>141</sup> 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/> [https://perma.cc/MDT7-ZAR4]. But see U.S. v. Morales, No. 20-mj-04939-AHG, 2020 WL 7770912, at \*6 (S.D. Ca. Dec. 30, 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.”).

<sup>142</sup> George, *supra* note 141; Jami Ganz, *ABC Reporter Goes Pantsless during Zoom Appearance on ‘Good Morning America’*, N.Y. DAILY NEWS (Apr. 28, 2020), <https://www.nydailynews.com/snyde/ny-gma-contributor-goes-pantsless-zoom-20200428-okqn7le72jc5vctzbdbrkqjlwq-story.html> [https://perma.cc/VQM5-BUXZ] (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/> [https://perma.cc/RB4P-ZTGZ] (“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/> [https://perma.cc/C2SK-JN65] (“[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 (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> [https://perma.cc/PU2Y-WS95]. 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> [https://perma.cc/GF7K-D33M].

<sup>143</sup> George, *supra* note 141.

<sup>144</sup> 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

There have also been warnings of Zoom behaviors that could result in termination.<sup>145</sup> “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.<sup>146</sup> 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.<sup>147</sup> 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,

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moment, please turn off your camera first.” E-mail from AJ Grube, Dean, Coll. Bus., W. Carolina Univ. (Mar. 12, 2021) (on file with author).

<sup>145</sup> See Shein, *supra* note 142.

<sup>146</sup> *Id.*

<sup>147</sup> *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. Keith Cowing, *Nasa Bans Use of Zoom*, NASA WATCH (Apr. 9, 2020, 9:38 AM), <http://nasa-watch.com/archives/2020/04/nasa-bans-use-o.html> [https://perma.cc/Q6UT-4E32] (“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, *Zoom: We’re Freezing All New Features to Sort Out Security and Privacy*, ZDNET (Apr. 2, 2020), <https://www.zdnet.com/article/zoom-were-freezing-all-new-features-to-sort-out-security-and-privacy/> [https://perma.cc/6E58-QJS3]. The FBI warned school about privacy issues, advising them to use meeting passwords and not to publicly share virtual classroom links. *Id.*

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://nasa-watch.com/archives/2020/04/beware-of-using.html> [https://perma.cc/T9PD-F2YH].

all such private comments are visible.<sup>148</sup> Participants should avoid using the screen sharing tool to share inappropriate content.<sup>149</sup>

There have been many examples of egregious behavior on Zoom that a reasonable person might not have thought required advanced warnings.<sup>150</sup> 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.<sup>151</sup> A northern California planning commissioner resigned after 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.<sup>152</sup> 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.<sup>153</sup> The judge refused to proceed, protecting the welfare of the patient, who could be seen on the operating table in video Zoom meeting.<sup>154</sup> The Medical Board of California stated that it is “aware of this incident and will be looking into it.”<sup>155</sup> 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

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<sup>148</sup> Shein, *supra* note 142.

<sup>149</sup> *See id.*

<sup>150</sup> *See, e.g., id.*

<sup>151</sup> *Id.*

<sup>152</sup> Stella Chan, *California City Official Who Threw Cat and Drank During Video Meeting Resigns*, CNN (Apr. 28, 2020), <https://www.cnn.com/2020/04/28/politics/california-official-resigns-after-throwing-cat-trnd/index.html> [<https://perma.cc/PB3N-9SUV>] (“I did not conduct myself in the Zoom meeting in a manner befitting of a planning commissioner and apologize for any harm I may have inflicted.”).

<sup>153</sup> Katie Shepherd, *California Doctor Attends Zoom Court Hearing During Surgery: ‘I’m in an Operating Room Right Now’*, WASH. POST (Mar. 1, 2021), <https://www.washingtonpost.com/nation/2021/03/01/california-doctor-zoom-court-surgery/> [<https://perma.cc/D7ST-BJYF>].

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

Senator Rebecca Saldaña, participated in a legislative video meeting while driving.<sup>156</sup> She was clearly behind the wheel, although she used a virtual background to block the rest of the car and the passing scenery.<sup>157</sup> This was a direct violation of Washington law.<sup>158</sup> 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.”<sup>159</sup>

Ohio State Senator Andrew Brenner apparently did not learn from his political colleague, Saldaña.<sup>160</sup> Like Saldaña, Sen. Brenner attended a government video Zoom meeting while driving; however, it was not just the meeting attendees who knew of his distracted driving.<sup>161</sup> It was livestreamed to the public, who could not only see his seat belt 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.<sup>162</sup> 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.

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<sup>156</sup> Mike Lindblom, *Seattle State Senator Apologizes for Joining a Zoom Hearing While Driving*, SEATTLE TIMES (Apr. 6, 2021), <https://www.seattletimes.com/seattle-news/transportation/seattle-state-senator-apologizes-for-joining-a-hearing-via-video-while-driving/> [<https://perma.cc/KQ9D-2TTH>].

<sup>157</sup> *Id.*

<sup>158</sup> WASH. REV. CODE § 46.61.672(5)(c)(iii) (2017) (“Watching video on a personal electronic device”).

<sup>159</sup> Lindblom, *supra* note 156.

<sup>160</sup> See Wilson Wong, *Ohio State Senator Caught Driving During Zoom Call as House Considered Distracted-Driving Bill*, NBC NEWS (May 7, 2021), <https://www.nbcnews.com/news/us-news/ohio-state-senator-caught-driving-during-zoom-call-house-considered-n1266678> [<https://perma.cc/P4BG-FSUL>].

<sup>161</sup> *See id.*

<sup>162</sup> *Id.* (“The [Zoom background] filter features brown wooden cabinets, hanging art pieces and a houseplant. However, a seat belt is strapped across his chest.”).

To me, it's like a phone call.”<sup>163</sup> 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.”<sup>164</sup> 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.”<sup>165</sup> 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.<sup>166</sup> 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.<sup>167</sup>

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.<sup>168</sup> Harvard College recognized this need when stating its policies for *The Business of China*, a general education course taught synchronously online to students all over the world, including “Don’t Zoom while driving.”<sup>169</sup> 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

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<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> 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> [<https://perma.cc/DW2T-99VH>].

<sup>167</sup> *Id.*

<sup>168</sup> See Wallace, *supra* note 136.

<sup>169</sup> John S. Rosenberg, *Don’t Zoom While Driving*, HARV. MAG. (Mar. 24, 2020), <https://www.harvardmagazine.com/2020/03/harvard-college-class-remote-learning> [<https://perma.cc/8GT5-UTUP>].

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.<sup>170</sup>

### *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.<sup>171</sup> One of the keys to successful training is overcoming objections.<sup>172</sup> 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.<sup>173</sup> Participants using Zoom video while driving will likely raise the same concerns.<sup>174</sup> When announcing the policy,

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<sup>170</sup> 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 (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 156. 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).

<sup>171</sup> See Wallace, *supra* note 136.

<sup>172</sup> See *id.*

<sup>173</sup> See *id.*

<sup>174</sup> See ‘Zooming’ and Driving: A New Concern During the COVID-19 Pandemic, ABC30 (Oct. 8, 2020), <https://abc30.com/distracted-driving-deaths-zoom-while-take-a-work-meeting-research/6868604/> [<https://perma.cc/86KQ-PAHC>].

employers will want to share some of the dangers of distracted driving so that employees understand why the policy is being implemented.<sup>175</sup> Employers may want to consider implementing or participating in a campaign to stop distracted driving, in addition to initiating a policy.<sup>176</sup>

Companies should support policies with training and safety programs to help “break distracted driving behaviors that are prohibited by the [company’s] policy.”<sup>177</sup> 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.”<sup>178</sup>

The training should begin with statistics reminding employees of the impact distracted driving has on the company, its employees, and the general public.<sup>179</sup> 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.<sup>180</sup> For example, those confident that they can successfully multitask while driving can be reminded that “multitasking while driving increases

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<sup>175</sup> See Wallace, *supra* note 136.

<sup>176</sup> 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> [<https://perma.cc/CV4J-MP3P>]. Another is End Distracted Driving, which started after 21-year-old Casey Feldman was killed by a distracted driver. *About EndDDD*, ENDDDD.ORG, <https://www.endddd.org/about-endddd/> [<https://perma.cc/P3VB-D9TQ>].

<sup>177</sup> *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/> [<https://perma.cc/5F6M-2NDV>].

<sup>178</sup> *Id.*

<sup>179</sup> 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.*

<sup>180</sup> See *id.*

the likelihood of crashes due to delayed breaking times and not seeing traffic signals.”<sup>181</sup> Some employees may think that distracted driving is only a problem among cellphone obsessed teenagers, but the reality is that distracted driving affects drivers of all ages.<sup>182</sup> What may be most surprising is that driving under the influence of drugs or alcohol is not more dangerous than distractions from other sources.<sup>183</sup>

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.<sup>184</sup> Next, the company’s policy should be explained, including the consequences for violating it.<sup>185</sup> Employees should acknowledge that they have read it.<sup>186</sup>

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.<sup>187</sup> In addition, supervisors should be trained to remove employees from the meeting who are using video Zoom while driving.<sup>188</sup> In the case of fleet management, employers may want to include on-the-road training and possibly install monitoring

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<sup>181</sup> *Id.* Multitasking often results in not doing any of the tasks well. Studies show that only about 2.5% of people are good multitaskers. *See, e.g.*, Jason M. Watson & David L. Strayer, *Supertaskers: Profiles in Extraordinary Multitasking Ability*, 17 PSYCHONOMIC BULL. & REV. 479, 482 (2010).

<sup>182</sup> *Distracted Driving Training: How to Tackle Fleet Distracted Driving*, *supra* note 177. *But see Distracted Driving*, CTRS. FOR DISEASE CONTROL AND PREVENTION, [https://www.cdc.gov/transportationsafety/distracted\\_driving/index.html](https://www.cdc.gov/transportationsafety/distracted_driving/index.html) [<https://perma.cc/8B82-W7KF>] (“Twenty-five percent of the distracted drivers involved in fatal crashes were young adults aged 20–29.”).

<sup>183</sup> *Distracted Driving Training: How to Tackle Fleet Distracted Driving*, *supra* note 177.

<sup>184</sup> *See, e.g.*, Digest of Motor Laws, AAA, <https://drivinglaws.aaa.com> [<https://perma.cc/LR9F-ZTW3>].

<sup>185</sup> *Distracted Driving Training: How to Tackle Fleet Distracted Driving*, *supra* note 177.

<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

<sup>188</sup> A participant can be removed from a meeting by the host. *In-Meeting Security Options*, ZOOM (Sept. 22, 2021), <https://support.zoom.us/hc/en-us/articles/360041848151-In-meeting-security-options> [<https://perma.cc/3684-GJHH>].

software in the fleet vehicles, which of course, would require additional employee training.<sup>189</sup>

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.<sup>190</sup> “Overall, it’s making sure employees know of the dangers of driving while distracted and how important that Cargill feels that safety is first,” said April Nelson, a company spokesperson.<sup>191</sup>

### C. Tools

To supplement employers’ use of policies to reduce distracted driving, ironically, technology can help, too.<sup>192</sup> For example, Fleet-Guardian produces a safety box for drivers to use to store their phones while driving.<sup>193</sup> 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.<sup>194</sup> 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.<sup>195</sup>

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<sup>189</sup> *Distracted Driving Training: How to Tackle Fleet Distracted Driving*, *supra* note 177. 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/> [<https://perma.cc/QL9W-USLH>].

<sup>190</sup> Fredrick Kunkle, *Cargill Goes Cold Turkey on Using Mobile Phones While Driving*, WASH. POST (Jan. 10, 2017), <https://www.washingtonpost.com/news/tripping/wp/2017/01/10/cargill-goes-cold-turkey-on-using-mobile-phones-while-driving/> [<https://perma.cc/8GLK-6EQF>].

<sup>191</sup> *Id.*

<sup>192</sup> *Distracted Driving Training: How to Tackle Fleet Distracted Driving*, *supra* note 177.

<sup>193</sup> Wisam Abou-diab, *Technology to Prevent & Stop Distracted Driving*, GOFLEET.COM (Feb. 27, 2019), <https://www.gofleet.com/technology-for-distracted-driving> [<https://perma.cc/U6HN-728E>] (“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.”).

<sup>194</sup> *Id.*

<sup>195</sup> *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/> [<https://perma.cc/2PLE-VNF8>].

Zoom has a feature known as Safe Driving Mode, intended to lower the distraction while drivers are logged into Zoom.<sup>196</sup> 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.<sup>197</sup> 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.<sup>198</sup>

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.<sup>199</sup> The fact that both Zoom and Apple have such features acknowledges the dangers of participating in video calls while driving.<sup>200</sup>

#### 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.<sup>201</sup> Individuals need to exercise self-discipline to protect their lives and the lives of others, but

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<sup>196</sup> Close, *supra* note 73. While reducing distraction may be a goal, using the feature requires the driver to touch the phone, resulting in both visual and manual distraction. *Id.*

<sup>197</sup> *What Is Safe Driving Mode?*, ZOOM (Jan. 11, 2021), <https://support.zoom.us/hc/en-us/articles/201362973-What-is-safe-driving-mode-> [<https://perma.cc/5AE4-2JHJ>].

<sup>198</sup> See OVERVIEW OF DRIVER DISTRACTION PROGRAM, *supra* note 11.

<sup>199</sup> Gatorslakerspats, *FaceTime Camera Disabled While Using Apple CarPlay*, APPLE (Dec. 17, 2019, 5:34 AM), <https://discussions.apple.com/thread/250953391> [<https://perma.cc/H64D-BX6E>]. Some drivers may not be convinced of the dangers 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.*

<sup>200</sup> See *id.*

<sup>201</sup> Maureen May, *Can Remote Texters Be Held Liable for Accidents?*, LEGAL EXAM’R (Oct. 8, 2015), <https://web.archive.org/web/20170908132804/http://balimore.legalexaminer.com/automobile-accidents/can-remote-texters-be-held-liable-for-accidents/> [<https://perma.cc/KF45-LD8T>] (“The only sure way to prevent distracted driving accidents caused by cell phones: put the phone away when you get behind the wheel.”).

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.<sup>202</sup> Rather than waiting until costs, both financial and physical, drive restraint, employers can learn 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.<sup>203</sup>

Employers can initiate and support a campaign to prevent all forms of distracted driving.<sup>204</sup>

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<sup>202</sup> *See id.*

<sup>203</sup> *Kubert v. Best*, 75 A.3d 1214, 1229 (N.J. Sup. Ct. App. Div. 2013).

<sup>204</sup> *See Kunkle, supra* note 190.