IN THE COURT OF COMMON PLEAS OF
LEBANON COUNTY, PENNSYLVANIA

CIVIL ACTION – LAW

GUY EHLER and CAROL EHLER, Husband and Wife, Plaintiffs	:	No. 2018-00307
v.	:	
OLD DOMINION FREIGHT LINE, DONNY WILLIAMS, ESTATE OF ALFRED D. KINNICK, DE'D, PENSKE TRUCK LEASING CO., L.P., PENSKE TRUCK LEASING CORP., NEW PRIME, INC., KRISTYN MITCHELL, MICHELE A. ERLE and MARK A. ERLE, Related and/or Husband and Wife, OMAR PLACENCIA-CORREA, JOSE L. PEREZ, TRANSCOM LEASING CORP., JP SONS TRUCKING CORPORATION, TOTAL TRANSPORTATION OF MISSISSIPPI, LLC, CLARENCE HERMAN, U.S. XPRESS, INC., DAIMLER TRUST, Defendants	:	

ORDER OF COURT

AND NOW, this 30th day of August 2018, upon consideration of the Preliminary Objections filed by the Estate of Alfred D. Kinnick, Penske Truck Leasing Company and Penske Truck Leasing Corp., said Preliminary Objections are denied. The DEFENDANTS are to file an

answer to the Complaint within thirty (30) days from the date of this Order.

BY THE COURT:

_______________________________ J.
BRADFORD H. CHARLES

BHC/pmd

cc: Court Administration
All counsel by email – Certificate of Service Attached
Judge Arnold New - by email
Judge Shelley Robins-New - by email

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APPEARANCES:

Rebecca Lyttle, Esquire	FOR PLAINTIFFS
James DeCinti, Esquire	FOR Total Transportation of Mississippi, US Xpress, Daimler Trust & Clarence Herman
June J. Essis, Esquire	FOR Old Dominion Freight Lines & Donny Williams

Thomas P. Bracaglia, Esquire	**FOR Estate of Alfred Kinnick, Dec'd., Penske Truck Leasing Corp., Penske Truck Leasing Co.**
Joseph B. Mayers, Esquire	**FOR Joseph Jakubik**
Corey J. Adamson, Esquire	**FOR Michele & Mark Erle**
Susan Engle, Esquire	**FOR Jose Perez, Omar Placencio-Correa, Transcom Leasing Corp., JP Sons Trucking Corporation**
Mitchell Berger, Esquire	**FOR New Prime Inc., Krystin Mitchell**
Robert Dapper, Jr., Esquire	**FOR Fed-Ex Ground Package Systems, Inc., Fed-Ex Corp. & Shota Manvelidze**

OPINION BY CHARLES, J., August 30, 2018

Before us is a question that is both simple and unsettled: Should a driver be guilty of recklessness for driving while utilizing a cellular telephone? A review of the sparse case law that exists on this issue requires us to answer the question by stating: "It depends." Because "it depends" is not enough to dismiss a case via Preliminary Objections, we will send PLAINTIFFS' claim of recklessness against the Estate of Alfred D. Kinnick (hereafter KINNICK) forward to the discovery phase of litigation.

I. FACTS

This case arises out of the sixty-four vehicle motor vehicle accident on Interstate 78 that occurred on February 13, 2016. While most issues pertaining to the mass vehicle accident are being addressed in a consolidated docket designated" "In re: 64 Vehicle Accident on I-78 on February 13, 2016", a case-specific issue has arisen in the above-captioned docket that has prompted us to author this separate opinion.

In her amended complaint, PLAINTIFFS allege that KINNICK and his employer, Penske Truck Leasing Company, should be deemed to have acted recklessly because Kinnick allegedly "diverted his vison from the roadway" because he was utilizing a cellular device. Because of this recklessness, PLAINTIFFS seek punitive damages.

The Estate of Alfred Kinnick[1] and Penske have filed Preliminary Objections. They assert that a plaintiff cannot sustain a claim of recklessness where a defendant was merely talking on a cellular telephone. Both parties have filed briefs to address this question. We author this opinion to explain our reasoning on this surprisingly novel issue.

II. DISCUSSION

We will begin our analysis with a discussion of general precepts that provide a foundation for the specific issue before this Court:

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[1] Tragically, Mr. Kinnick died as a result of this accident.

(1) Standard for Preliminary Objections

The DEFENDANTS have proffered a demurrer. The bar that must be hurdled to obtain a demurrer is set at a high level:

> "Preliminary objections in the nature of a demurrer test the legal sufficiency of the complaint. When considering preliminary objections, all material facts set forth in the challenged pleadings are admitted as true, as well as all inferences reasonable deducible therefrom. Preliminary objections which seek the dismissal of a cause of action should be sustained only in cases in which it is clear and free from doubt that the pleader will be unable to prove facts legally sufficient to establish the right to relief. If any doubt exists as to whether a demurrer should be sustained, it should be resolved in favor of overruling the preliminary objections. ***Schemberg v. Smicherko***, 85 A.3d 1071, 1073 (Pa. Super. 2014), quoting in part ***Joyce v. Erie Insurance Exchange***, 74 A.3d 157, 152 (Pa. Super. 2013).

(2) Punitive Damages

Punitive damages are generally recognized to be an "extreme remedy" that are available only when a plaintiff has established that the defendant has acted in an "outrageous fashion". ***Phillips v. Cricket Lighters***, 883 A.2d 439, 445-46 (Pa. 2005). Stated differently, punitive damages presuppose that the defendant's conduct was "malicious, wanton, reckless, willful or oppressive." ***Jahanshashi v. Centura Development Company***, 816 A.2d 1179, 1188 (Pa. Super. 2003). To state a claim for punitive damages, a plaintiff must plead specific facts demonstrating outrageous and/or willful misconduct.

Smith v. Brown, 423 A.2d 743 (Pa. Super. 1980). No court may award punitive damages "merely because a tort has been committed." ***Xander v. Kiss***, 2012 WL 168326 (Pa. Com. PL. 2012). In order to award punitive damages, the state of mind of the defendant is critical; the defendant's conduct must be the result of either an evil motive or a reckless indifference to the rights of others. ***Scampone v. Grain Healthcare Company***, 11 A.3d 967 (Pa. Super. 2010).

(3) Recklessness

Black's Law Dictionary defines recklessness as

> "Conduct whereby the actor does not desire harmful consequence but nonetheless foresees the possibility and consciously takes the risk. Recklessness involves a greater degree of fault than negligence but a lesser degree of fault than intentional wrongdoing....[It requires] the state of mind in which a person does not care about the consequences of his or her actions." Black's Law Dictionary, 9th Ed. (2009) at page 1385.

Pennsylvania's highest Court has defined reckless indifference to the rights of others as an intentional act "of an unreasonable character in disregard of a risk known to [the actor] or so obvious that he must be taken to have been aware of it, and so great as to make it highly probable that harm will follow." ***Evans v. Philadelphia Transportation Company***, 212 A.2d 440 (Pa. 1965). One noted commentator has described the *mens rea* required for recklessness as follows:

> "For purposes of assessing punitive damages, an actor's conduct is in reckless disregard of the safety of another if he or she does an act or intentionally fails to do an act that it is his or her duty to the other to do, knowing or having reason to know of facts that would lead a reasonable man to realize not only that his or her conduct creates an unreasonable risk of physical harm to another but also that such risk is substantially greater than that which is necessary to make his or her conduct negligent.
>
> The state of mind of the actor to constitute reckless indifference justifying punitive damages requires a higher degree of culpability than...reckless disregard of safety, necessitating only that while the actor is or should be aware of the facts, the actor does not realize or appreciate the high degree of risk involved, even though a reasonable person in his or her position would do so. There is also authority holding that punitive damages are not recoverable based upon any theory of "implied malice" either in the sense of gross negligence or in the sense of inferring malice from an element of the underlying tort." 1 Summary Pennsylvania Jurisprudence 2d, Torts § 9:95 (2018 edition).

(4) Distracted Driving Law

In 2004, Pennsylvania's General Assembly passed a Distracted Driving Law. Significantly, the law applies primarily to operators of "commercial motor vehicles". The law precludes the activity of texting while driving. See, 75 Pa. C.S.A. § 1621(a). As it relates to use of a handheld mobile telephone, the law prohibits an operator of a commercial vehicle from using a handheld mobile telephone while driving except in an emergency situation. See, 75 Pa. C.S.A. § 1622(a) and (c). A commercial vehicle operator who violates

the handheld mobile telephone prohibition is deemed to commit a summary offense that has a mandatory fine of one-hundred dollars ($100). 75 Pa. C.S.A. § 162(d).

With the above general legal principles in mind, we will turn to the specific issue before this Court, i.e., whether use of a cellular telephone while driving constitutes recklessness.

Much to the surprise of this Court, no Pennsylvania Appellate case has yet to decide the issue now before this Court. However, numerous trial courts have weighed in on the issue, albeit with different results.

- ***Xander v. Kiss***, 2012 WL 168326 (Pa. C.P. 2012)

  Xander was the first Common Pleas decision to address the question of whether use of a cell phone while driving can constitute recklessness. In ***Xander***, the Defendant was talking on his cellular telephone when he left his lane of travel and collided with another vehicle. The Plaintiff included a claim for punitive damages in the complaint. The Defendant demurred. The Court in ***Xander*** agreed with the defense position and stated:

  "While such allegations indubitably establish a *prima facie* claim for negligence, they fall short of establishing the Defendant's evil motive or reckless indifference to her rights. We note that in each of the cases cited by the Plaintiffs in support of the sufficiency of Count 3,

evidence that the driver was on a cell phone at the time of the accident was accompanied by additional indicators of gross negligence or reckless disregard for the rights of others...."

- ***Rockwell v. Knott***, 2013, WL 10215759 (Pa. C.P. 2013)

  Rockwell involved a Motion for Summary Judgment. In ***Rockwell***, the Defendant looked down at the GPS app on his cell phone while driving a van. After examining the evidence, the Trial Court concluded that "a motorist may arguably engage in reckless indifferent conduct, and thereby be potentially liable for punitive damages, if he completely directs his or her attention to observe a low-positioned GPS device..." However, the Court also concluded that the record in ***Rockwell*** did not support the conclusion that the Defendant was guilty of distracted driving.

- ***Kodash v. Latimer***, No. 09-CV-8622(Lackawanna Co. 2012)

  Kodash involved preliminary objections to a claim of punitive damages stemming from a motorist's use of a handheld electronic device. In denying the Motion to Strike, the Court relied upon the existence of numerous municipal ordinances that preclude drivers from using cellular devices that "shift part of one's complete attention and gaze away from driving". Because discovery had not yet fleshed out all facts pertinent to the issue, the Court concluded that "It is possible that a jury

may be called on to consider whether communicating on a PDA while driving is a wanton and reckless act...".

- ***Pietrulewicz v. Gil***, 2014 WL 1226404 (Pa. C.P. 2014)

  In ***Pietrulewicz***, the Defendant made an allegedly improper left turn into a motorcycle being operated by Plaintiff. The Plaintiff alleged that the Defendant was using a cellular telephone at the time. Citing ***Xander*** and a Federal case from the Southern District of Mississippi, the Court concluded that "driving while talking on a cell phone, absent additional facts, does not give rise to an allegation of recklessness." The Court reasoned: "while it is undisputed that the distraction of the cell phone caused Defendant's failure to yield when she was required to do so, the Court finds that this does not give rise to an evil motive or a conscious indifference to Plaintiff's rights. To the contrary, the facts support only a claim that Defendant was negligent."

- ***Piester v. Hickey***, 2012 WL 935789 (E.D. Pa. 2012)

  In ***Piester***, a Magistrate Judge from Pennsylvania's Eastern District Federal Court dismissed an allegation of recklessness in the complaint based upon a claim that the Defendant "looked at" his cellular telephone when driving. The Court reasoned:

> "Bald allegations that the Defendant "looked at" or "used" a cellular telephone while driving are insufficient to support a claim of "reckless indifference." The ***Xander*** Court concluded that a properly-plead punitive damages claim requires additional facts, such as well-plead allegations that Defendant exceeded the posted speed limit, or disregarded traffic signals or otherwise drover erratically...Here, as in ***Xander*,** Plaintiffs have failed to plead facts supporting a claim of outrageous behavior sufficient to establish Defendants' "evil motive" or "reckless indifference" to Plaintiffs' rights."

Having concluded that there is not unanimity among Trial Judges who have addressed this issue, we have expanded our research to include cases from other jurisdictions. Unfortunately, these cases similarly do not provide consensus. For example, in ***Thompson v. Cooper***, 290 P.3d 393 (Alaska 2012), the Court concluded: "We have never ruled that using a cell phone while driving, alone, amounts to reckless indifference, and we decline to do so here." **Id** at page 402. Other Courts have ruled that when use of a cell phone causes a driver to violate the rules of the road, there is a triable issue of fact regarding recklessness. See, ***Gaddis v. Hegler***, 2011 WL 2111801 (S.D. Miss 2011). Still other Courts have sought a middle-ground that focuses upon *how* a motorist is using the handheld device. For example, in ***Lindsey v. Clinch County Glass Inc.***, 718 S.E. 2d 806 (GA. Ct. App. 2011), the Court concluded that because it was illegal under Georgia Law to text while driving, such conduct could give rise to a claim for punitive damages. However, because Georgia's

legislature did not prohibit talking on a cell phone while driving, such a claim would not support an award of punitive damages.

Where does the above leave us? The answer is..."Without clear guidance." With that being acknowledged, we have to emphasize several points:

(1) Distracted driving is dangerous. The National Highway Transportation Safety Administration has reported that 391,000 people were injured and 3,450 lives were lost in 2016 as a result of distracted driving. See, NHTSA.gov, Distracted Driving Study. The American Automobile Association Foundation for Traffic Safety has estimated that use of a cellular phone quadruples the risk of creating a motor vehicle accident. See, 2012 study found at www.AAAFoundation.org. While we doubt that most drivers would know the specifics of these studies, the dangers of distracted driving are well known. Using a cell phone while driving is activity fraught with peril.

(2) Mr. Kinnick was operating a tractor-trailer truck. The average passenger car sold in America today weighs roughly 4,000 pounds. A fully-loaded tractor-trailer can weigh up to 80,000 pounds. See, Hakim, D. "Average US car is tipping scales at 4,000 pounds", New York Times (May 5, 2004); 75 Pa. C.S.A. § 4941. We accept as an axiom that a motor vehicle accident involving a tractor-trailer truck is more dangerous to the health of

the people involved than a motor vehicle accident involving just pasenger cars. As a professional driver, Kinnick knew or should have known this.

(3) Using a cellular telephone device while operating a commercial truck is a violation of Pennsylvania Law. See, 75 Pa. C.S.A. § 1622. This prohibition against use of cellular telephones is included within Chapter 16 of Pennsylvania's Motor Vehicle Code. The preamble to that chapter indicates that rules contained therein are designed "to reduce or prevent commercial motor vehicle accidents, fatalities and injuries..." The preamble also states "This chapter is a remedial law and shall be liberally construed to promote the public health, safety and welfare." See, 75 Pa. C.S.A. § 1602. Clearly, Pennsylvania's General Assembly has perceived a necessity to treat tractor-trailer drivers different that the general motoring public. As it relates to the issue now before us, the General Assembly's choice is instructive.

(4) The weather was poor. The 64 vehicle pile-up accident occurred during a snow squall that reportedly produced "white-out" conditions. Under such circumstances, it was even more important than normal for a truck driver to keep his eyes on the road.

This case is now at the preliminary objection phase of the proceedings. At this point, no one has been deposed and details of the accident involving Mr. Kinnick's tractor-trailer are as of yet unknown. For example, we do not know whether or how Mr. Kinnick was using a cellular device. If he was, we do not know whether he was reporting an emergency as authorized by 75 Pa. C.S.A. § 1622(c). Likewise, we do not know if there is any causal connection between the use of a cellular device and the collision that caused PLAINTIFFS' harm. Because there are so many possible factual permutations in this case, because Mr. Kinnick was operating a commercial tractor-trailer vehicle, because distracted driving is an obvious dangerous activity, and because Pennsylvania has chosen to outlaw cellular phone use by commercial drivers, we cannot today declare an award of punitive damages to be impossible. Instead, we will err on the side of caution by preserving the viability of PLAINTIFFS' allegations. Of course, we stand willing to re-evaluate this issue following discovery via a Motion for Summary Judgment. For today, we will simply deny the Preliminary Objections now before us.