MARIE P. GARDNER,	:	IN THE COURT OF COMMON PLEAS OF
	:	LYCOMING COUNTY, PENNSYLVANIA
Plaintiff	:	
	:	
vs.	:	NO. 97-01,881
	:	
SAMPSON FIRE SALES, INC. and NICHOLAS SAMPSON,	:	MOTION FOR JUDGMENT NOTWITH-
	:	STANDING THE VERDICT OR IN THE
	:	ALTERNATIVE FOR A NEW TRIAL
Defendant	:	

OPINION and ORDER

The matter presently before the Court concerns a Motion for Judgment Notwithstanding the Verdict/New Trial filed by Plaintiff Marie P. Gardner (hereinafter "Plaintiff") September 28, 1999.[1] The case involves a motor vehicle accident, which occurred December 20, 1995. Plaintiff was a passenger in her own vehicle, which was stopped at a stop sign in the K-Mart parking lot on East Third Street in Loyalsock Township. The parking lot was covered with snow. A second vehicle driven by Defendant Nicholas Sampson (hereinafter "Defendant") slid into the rear of Plaintiff's vehicle. Plaintiff subsequently filed the instant lawsuit.

Trial was held September 20, 1999, at the conclusion of which the jury determined Defendant was not negligent. Plaintiff argues this verdict was improper, as Defendant's conduct constituted negligence *per se* for failing to operate his vehicle in a manner such that it could be stopped within the assured clear distance ahead. Such failure, Plaintiff claims, necessitates a finding that Defendant was negligent as a matter of law. Plaintiff further asserts her motion must be granted as this Court committed judicial error in denying Plaintiff's

[1] Argument was held December 23, 1999.

earlier motion for Summary Judgment (Opinion and Order filed August 24, 1999) and allowing the question of Defendant's negligence to be determined by a jury. In denying the Summary Judgment motion, it was the opinion of this Court that there were material issues of fact to be resolved by the jury. We found that reasonable jurors could differ as to whether Defendant was negligent, in view of deposition testimony presented that Defendant drove his vehicle at less than ten miles per hour prior to the time he applied his brakes on the snow-covered parking lot, but was unable to stop.

Judgment notwithstanding the verdict may be entered only if the movant is entitled to judgment as a matter of law and the evidence presented at trial was such that no two reasonable minds could disagree that the verdict would be in favor of the movant; only evidence which supports the verdict may be considered, giving the verdict winner the benefit of any doubt. ***Degenhardt v. Dillon Co.***, 669 A.2d 946 (Pa. 1996).

Having reviewed the instant case, including evidence presented at trial, we see no error in determining that the question of Defendant's negligence was for the jury. Moreover, reasonable minds could differ as to whether Defendant was negligent.

In the case of ***Wicks v. Com. of Pa., Dept. of Transportation, et al***., 590 A.2d 832 (Pa.Cmwlth. 1991), a motorcyclist was injured in an accident after losing control of his motorcycle. Previous accidents had occurred in the same area. The motorcyclist sued the Pennsylvania Department of Transportation, the township, and owners of mailboxes situated alongside the roadway. The jury returned a verdict finding plaintiff 57% negligent, PennDOT 28% negligent and the township 15% negligent. Plaintiff filed a motion for post-trial relief and a new trial, which was denied. Plaintiff then appealed, alleging in part that the trial court erred

in instructing the jury as to the assured clear distance ahead rule. The appellate court affirmed the trial court, stating that "[t]he applicability of the rule is generally a question of fact for the jury." ***Id***. at 838; *see also* ***Cannon v. Tabor***, 642 A.2d 1108, 1112 (Pa.Super. 1994).

In the instant case, during trial Defendant was called to testify as if on cross-examination as to the circumstances surrounding the accident. Defendant testified that prior to the accident, his speed definitely did not exceed ten miles per hour. He was aware of snow on the surface of the parking lot but did not think it was ice. Upon entering the parking lot, he stopped the vehicle and put it in four wheel drive. Leaving the parking lot, he noted Plaintiff's vehicle as he made a left turn towards the exit onto the street, where Plaintiff's vehicle was stopped. He traveled approximately 20 yards, then applied his brake. At that point the vehicle began sliding. Defendant testified he could not stop the slide, even though he applied his brake and tried to turn his wheel in an attempt to rub the curb with his tires. Accordingly to Defendant, his vehicle slid approximately 25 to 30 yards, as if on a "shuffleboard," with no velocity, until impacting with Plaintiff's vehicle.

The jury was instructed pursuant to Pennsylvania Suggested Standard Civil Jury Instruction 3.31 (Civ), entitled Evidence of Negligence – Violation of Statute (With Exculpatory Explanation). We stated that Defendant, offering an excuse or justification of his

alleged violation 75 Pa.C.S. §3361,[2] had the burden of proof that he did what might reasonably be expected of a person of ordinary prudence, acting under similar circumstances. *See* SSJI 3.31 (Civ), Subcommittee Note, citing ***Hayes v. Hagemeir***, 400 P.2d 945 (1963).

From Defendant's testimony, the jury could have concluded he did everything reasonably expected of a person of ordinary prudence acting under similar circumstances. In so finding, it would be reasonable for the jury to find Defendant was not negligent.

Nevertheless, Plaintiff argues that at trial, Defendant testified he noted the position of Plaintiff's vehicle as he turned a corner in the parking lot and he then traveled approximately 20 yards towards Plaintiff's vehicle before attempting to stop his own vehicle. Plaintiff then argues:

> [A]t this time the Defendant, in violation of 75 Pa.C.S.A. §3361, the assured clear distance rule, was driving his vehicle at a speed greater than would permit him to bring his vehicle to a stop within the assured clear distance ahead of his vehicle. *As a direct result of his violation of 75 Pa.C.S.A. §3361* the Defendant rear-end [sic] Plaintiff's vehicle causing the Plaintiff to suffer compensable damages.

---

[2] Section 3361 provides as follows:

Driving vehicle at safe speed.

> No person shall drive a vehicle at a speed greater than is reasonable and prudent under the conditions and having regard to the actual and potential hazards then existing, nor a speed greater than will permit the driver to bring his vehicle to a stop within the assured clear distance ahead. Consistent with the foregoing, every person shall drive at a safe and appropriate speed when approaching and crossing an intersection or railroad grade crossing, when approaching and going around a curve, when approaching a hill crest, when traveling upon any narrow or winding roadway and when special hazards exist with respect to pedestrians or other traffic or by reason of weather or highway conditions.

75 Pa.C.S. §3361.

Plaintiff's Brief p. 2 (emphasis supplied). Plaintiff concludes that because Defendant was in violation of 75 Pa.C.S. §3361, the assured clear distance rule, he was negligent as a matter of law, and the jury was compelled to make a finding of negligence against Defendant. ***Id***. at p. 8.

Plaintiff does not complain that the jury was not properly instructed as to the applicability of the doctrine of negligence *per se* should they have found that the Defendant violated §3361 of the Vehicle Code. In fact, the jury was properly instructed and was given a charge that included the language of §3361 and that a violation thereof would constitute negligence, as a matter of law, as requested in Plaintiff's Point for Charge No. 2.[3] The jury also was given the Plaintiff's requested Points for Charge Nos. 4 and 5, among others, which advised the jury the driver must consider the condition of the roadway in regulating his speed and controlling his vehicle and, in considering that condition, reduce his speed to a point where he could control his automobile.

Plaintiff would have the jury and this Court apply a standard that, if a rear-end accident occurs, absolute liability attaches to the person who strikes the rear of a vehicle in front of him, and further, that such a collision necessarily constitutes a violation of §3361. This is not the law of Pennsylvania. The jury was properly instructed and properly considered whether the statute was violated and if so, whether that violation was negligence under all the circumstances of this case. Obviously, the jury determined that the Defendant had acted prudently in operating his vehicle, taking into consideration all the conditions that existed. It is axiomatic that the happening of an accident may be unavoidable and can happen or occur without anyone being negligent. *See* ***Flagiello v. Crilly***, 187 A.2d 289 (Pa. 1963).

[3] Defendant's Point No. 2 was patterned after the Standard Civil Jury Instruction No. 3.30 (revised 1991).

Moreover, this Court is not convinced that §3361 of the Vehicle Code applies to the case at bar. The Vehicle Code provides for the applicability of its various provisions in 75 Pa.C.S. §3101(a), Application of part, which reads as follows:

> **(a) General rule.-**Except as provided in subsection (b),[4] the provisions of this part relating to the operation of vehicles refer exclusively to the operation of vehicles upon highways except where a different place is specifically referred to in a particular provision.

The term "highway" is defined under 75 Pa.C.S. §102 as follows:

> **"Highway."** The entire width between the boundary lines of every way publicly maintained when any part thereof is open to the use of the public for purposes of vehicular travel. The term includes a roadway open to the use of the public for vehicular traffic on grounds of a college or university or public or private school or public or historical park.

The Vehicle Code also provides for a definition of "trafficway" under §102 as follows:

> **"Trafficway"** The entire width between property lines or other boundary lines of every way or place of which any part is open to the public for purposes of vehicular travel as a matter or right of custom.

It is clear, therefore, that §3361 applies only to conduct that would occur on a highway and does not occur to conduct that occurs on a trafficway insofar as a violation of the Vehicle Code is concerned. The accident at issue here occurred in a privately owned parking lot, a trafficway, not a way publicly maintained. Accordingly, Defendant could not have violated the Vehicle Code under 75 Pa.C.S. §3361 and his actions concerning the accident cannot be negligence *per se*.

[4] Subsection (b) concerns provisions of Subchapter B of Chapter 37, entitled "Serious Traffic Offenses." The statute at issue here is in Chapter 33 and therefore governed by Subsection (a).

Accordingly, we enter the following Order:

ORDER

AND NOW, this 23rd day of February 2000, Plaintiff's Motion for Judgment Notwithstanding the Verdict, filed September 28, 1999, is HEREBY DENIED.

BY THE COURT:

William S. Kieser, Judge

cc: Court Administrator
Charles A. Dominick, Esquire
Jacobs & Saba; 340 Market Street; Kingston, PA 18704
Thomas Waffenschmidt, Esquire
Judges
Nancy M. Snyder, Esquire
Gary L. Weber, Esquire (Lycoming Reporter)