

CELL PHONES & CIVIL LIABILITY

CELL PHONES AND THE EVOLUTION OF COMMUNICATION

By Dale K. Perdue

The first non-experimental use of a mobile phone in the United States is thought to have occurred in St. Louis in 1946. Impractical at best, early cell phones were bulky, expensive, and difficult to use. It was not until 1983 that the first commercial cellular network in the United States was launched in Chicago. By the mid to late 1980s, cellular phones were used increasingly in motor vehicles, but there were large voids in cellular service. Over the course of the next decade, cell phones became smaller, lighter and more affordable. Their popularity and use expanded exponentially, as did cellular service, and they evolved from an expensive business accessory to a virtual social necessity for adults and teens alike.

In the mid-90s, SMS (short message service) was introduced, allowing cell phone users to send short “text messages” between mobile devices. However, it was not until about 2000 that texting experienced dramatic growth among cell phone users. During the first few years, texting reached a tipping point and almost instantly created an entirely new (and pervasive) culture of communication among teens and young adults. In June 2009, there were over 276 million wireless subscribers in the United States. These users generated over 135 billion text messages per month and over 1.3 trillion text messages annually.¹ Today, texting is arguably the dominant means of interpersonal communication for teens, parents of teens, adults under 30 and anyone who wants to be connected to these groups.

The National Highway Transportation Safety Administration estimates that in 2005 approximately 10 percent of drivers in a typical daylight moment were using some type of cell phone.² According to the National Safety Council, there are approximately 636,000 motor vehicle crashes a year attributable to cell phone use, accounting for nearly 25 percent of all motor vehicle crashes annually!³ This and other factors led to NHTSA's conclusion that “cell phones are the contemporary icon of driver distraction.”⁴

Research Studies

Common sense suggests that talking on a cell phone while operating a motor vehicle is distracting. But the pertinent enquiry in terms of safety and legal liability is how distracting. Numerous credible studies over the past 15 years have provided reliable data on the distractibility of cell phone use.

The first scientific study that sought to quantify distractibility and establish a relationship between cell phone use and motor vehicle collisions was published in *The New England Journal of Medicine* in 1997.⁵ This study concluded that “[t]he risk of a collision when using a cellular telephone was four times higher than the risk when a cellular phone was not being used.”⁶ Moreover, the use of a hands free device did not present a safety advantage, suggesting that the risk was a function of impaired attention and not dexterity.⁷ Furthermore, the researchers found that “the relative risk is similar to the hazard associated with a blood alcohol level at the legal limit.”⁸

In 2000, researchers in the UK conducted a study to benchmark the risk of driving while talking on a cell phone against the known risks of driving while impaired by alcohol.⁹ They used a driving simulator under controlled conditions and protocols. The subjects drove a simulated course (1) with no phones and no alcohol consumption, (2) talking on hand-held cell phones, (3) talking on hands-free cell phones, and (4) while impaired by alcohol at the legal limit (80mg/100ml in the UK). Here is what the researchers found:

Results from this study showed a clear trend for significantly poorer driving performance (speed control, warning detection and response) when using a hand-held phone in comparison to other conditions. The best performance was for normal driving without phone conversations. Hands-free was better than hand-held. Driving performance under the influence of alcohol was significantly worse than normal driving, yet tended to be better than driving while using a phone. Drivers also reported [subjectively] that it was easier to drive drunk than to drive while using a phone.¹⁰

That cell phone use and alcohol consumption create similar driving impairments under controlled driving conditions is startling. The implications for real-world driving, however, are even more alarming when you consider that there are substantially more cell phone drivers than drunk drivers – and that drunk drivers are more common at night, when there is less traffic,



while cell phone drivers are pervasive during high traffic periods and around schools and playgrounds, where there are likely to be high concentrations of people.

David Strayer is a psychology professor at the University of Utah. His discipline is human factors and ergonomics, and he has done extensive research on distractibility. In 2006, he conducted his third scientific study of the effect of cell phone use on motor vehicle operators. Having concluded in prior studies that cell phone use clearly degrades driver performance, Strayer set out to quantify the degradation by comparing cell phone use with alcohol impairment, a known risk prohibited by law in the United States. As did the UK researchers, Strayer used a high-fidelity driving simulator to compare the driving performance of cell phone users with those impaired by alcohol at the legal limit (0.08% weight/volume). Consistent with the UK study, Strayer concluded that “[w]hen driving conditions and time on tasks were controlled, the impairments associated with using a cell phone while driving can be as profound as those associated with driving while drunk.”¹¹

Strayer acknowledges that drivers have always been subjected to distractions – eating, applying makeup, listening to the radio – but concludes that they are more cognitively engaged in cell phone conversations, and over a longer period of time.¹² Furthermore, his research shows that practice does not reduce the distractibility associated with cell phone use.¹³

In 2009, Strayer conducted another study, which confirmed the common sense notion that sending and reading text messages is more distracting than talking on a cell phone. Again, a driving simulator was used under highly controlled conditions. The resulting data showed that “the crash risk attributable to text messaging while driving is quite substantial,” and “text-messaging drivers display a pronounced impairment in control.”¹⁴

Strayer found significant and specific differences between cell phone use and texting while driving. Cell phone use employs a “sharing model” of attention, where the driver’s attention is concurrently devoted to both driving and talking on the cell phone. By contrast, texting employs a “switching model” of attention, “in which attention is allocated in large part either to driving or to text messaging.”¹⁵ Drivers pay a substantial price in attention for the switching model. Strayer explains:

When drivers have switched their attention to the text messaging task, that is, composing or reading or receiving a message, their reaction times to braking events are substantially higher, reflecting a substantial cost for task switching.

In the final analysis, Strayer concludes that not only does text messaging have a negative impact on driving performance, but the impact “appears to exceed the impact of conversing on a cell phone while driving.”¹⁷

In September 2009 the Federal Motor Carrier Safety Association issued the results of its study entitled “Driver Distraction in Commercial Vehicle Operations.”¹⁸ Among the findings of this study was that texting by the operators of commercial vehicles increased the risk of a safety-critical event by staggering 23.2 times!¹⁹ Texting drivers took their eyes off the forward roadway for an average of 4.6 seconds during the six second interval immediately preceding a safety critical event.²⁰ These findings prompted President Obama to issue an executive order forbidding federal employees from texting while driving government-owned vehicles; using cell phones provided by the government while driving; or using a cell phone while driving a privately owned vehicle on government business.²¹ Furthermore, on January 27, 2010 the FMCSA enacted a regulation prohibiting the use of electronic devices for texting by commercial motor vehicle operators while driving on public roads.²²

Civil Liability

The explosive penetration of cell phone technology into the fabric of our society, its pervasive use by motor vehicle drivers, and the well-documented distractibility effects of talking and texting on cell phones – all create tort law issues that simply did not exist two decades ago. Consider three of those issues:

Is cell phone use while operating a motor vehicle a tort or merely the cause (or evidence) of a tort?

Is cell phone use while operating a motor vehicle willful and wanton conduct – analogous to alcohol impairment – sufficient to sustain a claim for punitive damages?

When and under what circumstances does mobile talking or texting change the rules of vicarious liability and respondeat superior so as to make an employer liable for the acts of its employee?

Cell Phones and the Law of Negligence

Negligence is the failure to use ordinary care, which is the care that a reasonably prudent person would use under the same or similar circumstances.²³ Ordinary care includes a duty to keep a lookout and pay attention to one’s surroundings. Significantly, for purpose of this analysis, a person is negligent if he looks but does not see that which a reasonably cautious person would have seen under the same or similar circumstances.²⁴

Thus, the operator of a motor vehicle has a duty to keep a reasonably careful lookout for traffic, commensurate with the circumstances.²⁵ This includes anything and everything that comes within the driver’s field of vision, both direct and peripheral.²⁶ When a driver is inattentive or distracted behind the wheel, he has breached his duty to keep a careful lookout.²⁷

While using a cell phone behind the wheel of a motor vehicle is dangerous, using the cell phone is not itself the tort; rather, the tort is failing to pay attention, and cell phone use may be a cause (or the cause) of the driver’s inattention and consequent tortious act. In most cases cell phone use will be evidence of a driver’s negligence.²⁸

Evidence of negligence is important when the negligence is not self-evident. For example, simple rear end collisions are uncontroversial: a driver fails to maintain an assured clear distance, and the cause for failing to do so is largely immaterial. The same is true with failure to yield cases. If a driver runs a stop sign and causes a crash, negligence is normally established. The fact that the driver failed to heed the stop sign because of cell phone use is arguably immaterial in terms of negligence and proximate cause.



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Consider, however, more nuanced scenarios. Assume the defendant in the rear end collision claims the other driver “cut-off” his assured clear distance by suddenly pulling in front of him. Or suppose he claims a sudden medical emergency. Establishing that the defendant was using a cell phone at the time of the collision would be evidence that the cause of the collision was actually the defendant’s inattention. Similarly, assume that there is a head-on collision with no witnesses. Each driver asserts the other went left of center first. Correspondingly, each driver claims he made a reflexive maneuver in response to the first driver. Neither driver can meet his burden of proof. However, establishing that one driver was using a cell phone at the time of the collision is evidence of negligence – and in a case where other evidence is inconclusive, that could tip the scales for one of the parties.

Many jurisdictions around the country have enacted statutory bans on cell phone use while operating a motor vehicle. There are three types of bans: (1) a ban on texting, (2) a ban on hand held cell phone use (which would also include a ban on texting) and (3) a ban on all cell phone use. In many jurisdictions, when a statute regulates the operation of a motor vehicle with an aim toward promoting public safety, a violation of that statute constitutes negligence per se.²⁹ So, in those jurisdictions banning some form of cell phone use while driving, using a cell phone in the prohibited manner may itself be the negligent act, not just evidence of negligence. Nevertheless, it will still be necessary to prove that the cell phone use was a proximate cause of the harmful occurrence.

A very recent decision out of an Indiana appellate court puts the most interesting spin yet on cell phone use constituting direct negligence. In that case, a mother called her daughter on the daughter’s cell phone. The daughter answered, and it became known to the mother that the daughter was driving a motor vehicle while talking to the mother on her cell phone. During the conversation, the daughter caused a motor vehicle collision. Creating a new cause of action, in what appears to be a case of first impression, the court held the mother directly liable in negligence for knowingly “distracting” her daughter by talking to the daughter on the daughter’s cell phone while she knew the daughter to be driving.³⁰

Establishing a Claim for Punitive Damages

In Ohio, a plaintiff may seek an award of punitive damages if the tortfeasor acted with malice. Malice may be established by proving, by clear and convincing evidence, that the defendant acted with a conscious disregard for the rights and safety of another person in such a manner that there was a great probability of causing substantial harm.³¹

This is a high burden of proof. Nonetheless, two arguments may be advanced in cell phone cases to establish malice sufficient to have the issue of punitive damages submitted to a jury. Both arguments are premised on the scientific research showing a very high level of distractibility and cognitive impairment resulting from cell phone use while operating a motor vehicle.

The first argument is more likely to be successful where the specific use of the cell phone was texting rather than talking. As noted previously, it has been shown that texting while driving results in a higher level of cognitive impairment than talking. Furthermore, there is a fairly compelling argument that any motor vehicle driver should know (it is common sense at its most fundamental level) that texting is highly distracting. Correspondingly, any behavior that is highly distracting carries a high risk of causing a collision. Thus, it may be argued that

texting behind the wheel involves a conscious decision to engage in conduct that has a high probability of causing substantial harm to others. And that, of course, is the definition of malice.

The second argument is premised specifically on the scientific research showing that using a cell phone while driving results in a level of cognitive impairment equal to that caused by alcohol intoxication at the legal level. Again, the issue is malice, which is necessary to make a claim for punitive damages. In 1994, the Ohio Supreme Court decided *Cabe v. Lunich*, holding that where a negligent driver was under the influence of alcohol at the legal limit, and the alcohol impairment was a proximate cause of the collision, a jury question was established as to the existence of malice, and the question of punitive damages could be submitted to the jury.³² Accordingly, the argument is that if cell phone use while operating a motor vehicle is tantamount to alcohol impairment at the statutory limit, *Cabe v. Lunich* requires a finding of malice and submission to the jury on the issue of punitive damages.

Finally, in a recent development, a Texas jury returned a \$21 million verdict after finding the defendant “grossly negligent” for texting while driving and causing a fatal crash. The evidence showed that the defendant made 7 phone calls and sent 15 text messages during the 45 minutes he was on the road prior to the accident! Of the \$21 million verdict, \$20 million was for punitive damages, based on a willful and wanton standard similar to that in Ohio.³³

Vicarious Liability

Not only have cell phones changed the way people communicate and interact with each other, they have changed the way we do business. Where laptop computers have enabled workers to establish virtual offices in their homes, hotels, and coffee shops all over the world, cell phones have enabled workers to establish virtual offices in their cars, trucks and SUVs. This necessarily changes the underpinnings of rules that have governed vicarious liability and respondeat superior for more than a century.

In order for an employer to be liable for the negligence of an employee, the employee must be in the course and scope of his employment at the time of the tortious act. Much has been written about what activities are deemed to be in the course and scope of one’s employment. However, suffice it to say that the activity must be of the type that advances the interests of the employer, generally with the knowledge and consent of the employer.

Travel to and from a fixed place of employment – subject to limited exceptions – has always been held to be outside the scope of one’s employment. This is known as “the coming and going rule,” and it means that the average worker’s commute between home and office is personal travel, not business travel. However, the pervasive use of cell phones by commuting workers to conduct business while travelling to and from work “changes the game” with respect to the coming and going rule.

The wheels of justice grind slowly, and so it is with the judicial consideration of new legal issues created by cell phones. Not surprisingly, there is a paucity of legal authority addressing a phenomenon that is barely two decades old. Nonetheless, we can find guidance in the case law that is slowly emerging on the subject.

Some courts have held that an employer may be vicariously liable for damages caused by an employee while using a cell phone for business purposes on the commute to or from work.³⁴ For example, a Georgia appellate court in *Hunter v. Modern Continental Const. Co* held that in light of evidence that an



employee was on a work-related cell phone call while commuting to work, a jury question existed as to the employer's vicarious liability.³⁵ The Georgia court acknowledged the "coming and going rule" but explained that "special circumstances" may exist while an employee is traveling to or from work that can nevertheless expose the employer to liability. The court held that the evidence of the tortfeasor's cell phone call to a co-worker at the time of the accident altered the coming and going analysis. The fact that the employee was commuting to work did not absolutely preclude the imposition of vicarious liability under the theory of respondeat superior.

Similarly, another Georgia appellate court held, in *Clo White Co. v. Lattimore*, that an employer could be vicariously liable for its employee's work related cell phone use.³⁶ In *Clo White*, an employee was making phone calls to his office while commuting to work and caused a motor vehicle collision.

The Georgia court held that evidence of a work-related cell phone call at the time of an accident, while an employee was traveling to work, created a jury question regarding the employer's liability for the employee's negligence. Evidence that the employee-tortfeasor's phone calls were work-related, the court said, supported a rational conclusion that the employee was engaged in his employer's business, regardless of the fact that he was within the parameters of the coming and going rule. The court explained that "[t]his was a special circumstance whereby the employee may have actually been conducting some manner of company business at the same time that he was on his way to work when the accident occurred."³⁷ Under the rationale of *Clo White* and *Hunter*, the coming and going rule will not automatically relieve an employer of vicarious liability if there is evidence that the cell phone use at issue was in furtherance of the employer's business.

Some courts have referred to such "special circumstances" as the "dual purpose" exception to the coming and going rule, placing a commuting employee within the scope of employment. Under the dual purpose exception, even if an employee is traveling to or from work when he causes an accident, the employer may be held vicariously liable if the employee-tortfeasor is furthering a business interest of the employer. Thus, the commuter has two purposes: driving to or from work and conducting work-related tasks. In *O'Toole v. Carr*, a New Jersey Superior Court held that "[w]here, at the time of the negligent conduct, the employee is serving an interest of the employer as well as his or her private interest, a 'dual purpose' is established and the employer is vicariously liable."³⁸ Likewise, in *McClelland v. Simon-Williamson Clinic*, an Alabama appellate court recognized a "dual purpose" exception to the coming and going rule.³⁹

Based upon the rationale of the limited case law to date, it can be expected that most jurisdictions will follow the trend to apply the "special circumstances" ("dual purpose") exception to the coming and going rule with regard to cell phone use. Checking voicemails, on the other hand, may be construed as a personal activity. Nonetheless, depending on the degree to which the activity furthers an employer's business, checking voicemails could conceivably be interpreted as a "special circumstance" that places a commuting employee-tortfeasor within the scope of her employment. This argument would be more compelling if, for example, the employee was expecting a time sensitive message with an urgent business purpose, and was checking voicemails for that specific purpose.

Not surprisingly, courts have held that the mere use of a company owned cell phone, even while operating a company vehicle, is not itself sufficient to impose vicarious liability upon an employer. Rather, the call must have a tangible business purpose that conveys benefit upon the employer, and if this is the case, it is largely irrelevant who owned the cell phone or the vehicle.⁴⁰

Finally, it is worth noting that a policy argument may be advanced for imposing vicarious liability upon an employer arising from an employee's cell phone use. In the case of *Osborne v. Lyles*,⁴¹ the Ohio Supreme Court considered favorably a policy objective analysis previously enunciated by the California Supreme Court.⁴² The issue in both cases was whether a police officer was in the course and scope of his employment when he engaged in tortious activity. In this context, the Ohio Supreme Court acknowledged (without adopting) the following policy objectives for holding an employer vicariously liable for its employees' negligent conduct: "(1) to prevent recurrence of the tortious conduct; (2) to give greater assurance of compensation for the victim; and (3) to ensure that the victim's losses will be equitably borne by those who benefit from the enterprise that gave rise to the injury."⁴³

While the Ohio court recognized these three policy considerations with favor, the court did not specifically adopt them. Nonetheless, they could serve as the starting point for a policy objective rationale to hold an employer vicariously liable in a cell phone case. The argument, based on the first prong of the policy analysis, would be that, given the dangers posed by cell phone use by motor vehicle operations, and the foreseeability that such use can cause substantial harm, there is a legitimate policy objective in imposing vicarious liability on employers. The policy objective would be to educate employees on the dangers of cell phone use and establish policies prohibiting the use of cell phones (company owned or otherwise) for business or personal use in a company or personal vehicle.

Direct Liability of Employer for Employee's Cell Phone Use

Vicarious liability occurs when the negligence of the employee is imputed to the employer. The employer itself is not negligent but rather is held accountable for the negligence of its employee. This is the doctrine of respondeat superior, or "let the master answer for the servant."

At least one court has suggested, however, that liability may be imposed directly on the employer for damages caused by an employee while using a cell phone owned and provided by the employer.⁴⁴ The argument is that an employer is negligent in providing a cell phone to an employee for the purpose of making business calls while operating a motor vehicle when it is foreseeable to the employer that this poses a high risk of harm to others. An alternative theory of direct liability is that the employer provided a cell phone to the employee without establishing a clear policy that a company cell phone should never be used while operating a motor vehicle. In such a case of direct liability, the employee need not be in the course and scope of her employment for liability to attach to the employer.

Research demonstrates that cell phone use is distracting, and that texting is more distracting than talking. The more distracted a driver becomes, the higher the risk of an accident. At least two studies equate the level of distractibility of cell phone use with operating a motor vehicle while impaired by alcohol at the legal limit. This raises the question of whether using a cell phone while driving may constitute malice, for the purpose of imposing punitive damages.

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Negligence

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Furthermore, cell phones have enabled workers in almost every line of work to conduct the business of their employers in motor vehicles. This undermines the basic premise of the “coming and going rule” and exposes employers to vastly enlarged vicarious liability for the negligence of their employees outside of the “traditional” course and scope of employment.

These are issues that should be considered by plaintiff’s lawyers in every vehicular collision case. Likewise, employers and their counsel should consider their duties (and resulting exposures) and implement clear policies with respect to employee cell phone use while operating motor vehicles. In the coming years, more and more courts will be addressing these issues, and the judicial inclination is likely to disfavor the cell phone user and the employer that ignores its duties to establish clear policies for cell phone use.

1. CTIA—The Wireless Association, *Wireless Quick Facts*, <http://www.ctia.org> (last visited February 8, 2010).
2. U.S. Dep’t of Trans., Nat’l Highway Traffic Safety Admin., *Driver Distraction: A Review of the Current State-of-Knowledge* 13 (April 2008).
3. National Safety Council, *Cell Phone Fact Sheet*, Dec. 2009, <http://www.nsc.org>.
4. *Driver Distraction*, supra note 2, at 13.
5. Donald A. Redelmeier, M.D. & Robert J. Tibshirani, Ph.D., *Association Between Cellular Telephone Calls and Motor Vehicle Collision*, 336 *New Eng. J. Med.* 453 (Feb 13, 1997).
6. *Id.* at 453.
7. Subsequent research suggests that hands free cell use, especially with voice activation, does reduce distractibility.
8. Redelmeier & Tibshirani, supra note 5, at 456.
9. Andrew Parkes et al., *How Dangerous is Driving With a Mobile Phone? Benchmarking the Impairment to Alcohol*, TRL Report 547 (2002).
10. *Id.* at 14.
11. David L. Strayer et al., *A Comparison of the Cell Phone Driver and the Drunk Driver*, 48 *Hum. Factors* 381 (Summer 2006).
12. *Id.* at 381.
13. *Id.* at 388.
14. David L. Strayer et al., *Text Messaging During Simulated Driving*, 51 *Hum. Factors* 762, 770 (October 2009).

15. *Id.*
16. *Id.*
17. *Id.* at 762.
18. U.S. Dep’t of Trans., Fed. Motor Carrier Safety Admin., *Driver Distraction in Commercial Vehicle Operations* (September 2009).
19. *Id.* at 43.
20. *Id.* at 143.
21. Press Release, United States Department of Transportation, Office of Public Affairs, DOT 156-09 (October 1, 2009), available at <http://www.dot.gov/affairs/2009/dot15609.htm>.
22. Regulatory Guidance Concerning the Applicability of the Federal Motor Carrier Safety Regulations to Texting by Commercial Motor Vehicle Drivers, 75 *Fed. Reg.* 4,305-07 (Jan. 27, 2010) (to be codified at 49 C.F.R. ch. III).
23. 1 CV Ohio Jury Instructions 401.01.
24. 1 CV Ohio Jury Instructions 401.05.
25. See *State v. Ward* (1957), 105 Ohio App. 1, 10, 150 N.E.2d 465 (describing a driver’s duty when operating a motor vehicle as “maintaining a lookout in the same manner as would a reasonably prudent person under the same circumstances”).
26. See, e.g., *Bell v. Giamarco* (1988), 50 Ohio App.3d 61, 64, 553 N.E.2d 694 (asserting that the defendant “was charged with the duty to keep a lookout, not only in front of his vehicle, but to the sides and the rear as the circumstances warranted”).
27. See *Shortridge v. Dept. of Public Safety* (Ohio Ct. Cl. 1997), 90 Ohio Misc.2d 50, 54, 696 N.E.2d 679 (recognizing that Ohio common law imposes a duty upon motorists “to observe the environment in which one is driving,” and holding that because the defendant drove through an intersection without paying attention to traffic conditions, she was negligent).
28. See *Cleveland v. English*, Cuyahoga App. No. 92591, 2009 WL 3043572, 2009-Ohio-5011, at ¶18 (holding that because a witness observed the defendant talking on his cell phone at the time of the accident, sufficient evidence was presented that the defendant’s full time and attention was not on his driving).
29. See, e.g., *Roszman v. Sammett* (1971), 26 Ohio St.2d 94, 96, 269 N.E.2d 420 (recognizing that the violation of R.C. § 4513.03—mandating that “every vehicle upon a street or highway during the time from one-half hour to sunset to one-half hour before sunrise shall display lighted lights”—constitutes

- negligence per se).
30. *Buchanan ex rel. Buchanan v. Vowell*, No. 49A02-0909-CV-873, 2010 WL 1904572 (*Ind. Ct. App.* May 12, 2010).
31. See *Calmes v. Goodyear Tire and Rubber Co.* (1991), 61 Ohio St.3d 470, 473, 575 N.E.2d 416; *Preston v. Murty* (1987) 32 Ohio St.3d 334, 335, 512 N.E.2d 1174; *Roberts v. Mason* (1859), 10 Ohio St. 277, 279-80.
32. *Cabe et al. v. Lunich* (1994), 70 Ohio St.3d. 598, 640 N.E.2d 159.
33. *Small v. Vestal*, No. 08-01-18000-CV (*Tex., Robertson Co. Dist. Ct. Mar. 17, 2010*).
34. Further, it has been suggested in commentary that “[w]ith the advent and proliferation of cellular phones, employer liability for commuting collisions is now, not only possible, but likely.” H.J.A. Alexander, *Who Maimed Rhonda? Employer Liability—Cellular Phone Respondeat Superior*, 1 *Ann.2005 ATLA CLE* 771, 771 (July 2005).
35. *Hunter v. Modern Continental Const. Co., Inc.*, 652 S.E.2d 583, 593 (Ga. App. 2007).
36. *Clo White Co. v. Lattimore*, 590 S.E.2d 381 (Ga. App. 2003).
37. *Zehe v. Falkner* (1971), 26 Ohio St.2d 258, 261, 271 N.E.2d 276.
38. See *O’Toole v. Carr*, 786 A.2d 121, 126 (N.J. Super. 2001), citing *Gilborges v. Wallace*, 396 A.2d 338 (N.J. 1978).
39. *McClelland v. Simon-Williamson Clinic, P.C.*, 933 So.2d 367, 370 (Ala.Civ.App. 2005).
40. See *Easterling v. Man-O-War Automotive, Inc.*, 223 S.W.3d 852 (Ky. Ct. App. 2007); *Steele v. Cingular Wireless*, No. A112870, 2007 WL 2456104, at *3-4 (Cal. App. 1 Dist. Aug. 30, 2007); *Hoskins v. King*, ___ F. Supp. 2d ___, 2009 WL 3878244 (D.S.C. 2009); *Miller v. American Greetings Corp.*, 161 Cal.App.4th 1055, 1064-65, 74 Cal.Rptr.3d 776, 784 (2008).
41. *Osborne v. Lyles* (1992), 63 Ohio St.3d 326, 587 N.E.2d 825.
42. *Mary M. v. Los Angeles*, 814 P.2d 1341, 1343, 285 Cal.Rptr. 99, 101 (1991).
43. *Osborne*, 63 Ohio St.3d at 332, citing *Mary M.*, 814P.2d at 1343.
44. See *Hoskins*, 2009 WL 3878244.

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