

## **GEORGIA'S BAN ON TEXTING WHILE DRIVING: WHAT IT MEANS FOR EMPLOYERS**

by

MARK G. BURNETTE

*Mr. Burnette is the attorney for the Association and specializes in dealing with the unique legal issues of insurance agencies and agents. He handles the "IIAG Free Legal Service" program, which provides each member agency a free 15 minute telephone consultation per quarter. Contact him at 1-800-IIAG-911 or 404-638-5891 or by e-mail to [mburnette@decatour-law.com](mailto:mburnette@decatour-law.com)*

In today's fast paced business world, it is not unusual for employees to be constantly connected to their jobs through the use of cell or smart phones, iPads, and other personal electronic devices. In some cases, they are expected to be available for contact by customers or the employer wherever they may be during the workday and even beyond. Thus, it is not at all unusual in Georgia to see a person driving down the highway talking on their cell or smart phone or until recently, even reading and sending text messages. As a result, the occurrence of accidents that can be attributed to the use of such phones or other personal electronic devices while driving has increased significantly.

Acting on the above situation, in 2010, the Georgia legislature enacted O.C.G.A. §40-6-241.21, which makes it illegal for an adult with a Class C driver's license (permits operation of regular motor vehicles) to "operate a motor vehicle on any public road or highway of this state while using a wireless telecommunications device to write, send, or read any text based communication, including but not limited to a text message, instant message, e-mail, or Internet data." A "wireless telecommunication device" is defined as "a cellular telephone, a text messaging device, a personal digital assistant, a stand alone computer, or any other substantially similar wireless device that is used to initiate or receive a wireless communication with another person." There are exceptions to the above prohibition, which are not relevant to the subject of this article.

Although the writer is unaware of any court decisions dealing with the effect of the above ban on the liability of a driver who is involved in an accident while violating its provisions, it is not hard to make the argument that such conduct constitutes not only negligence on the part of the driver, but also intentional misconduct, much like driving while intoxicated. If that argument is accepted by the Georgia courts, the victim in an accident that occurred because the driver was violating the ban on texting would be able to recover punitive, as well as compensatory, damages from that driver. If that driver happened to be in the course of performing their duties on behalf of an employer at the time of the accident, under Georgia's vicarious liability law, the employer could be held responsible for its employee's conduct to the same extent as the employee, especially if the employer was previously aware that the employee violated the ban on texting while performing his or her duties on behalf of the employer.

The employer's best defense to being held responsible for its employee's violation of the texting ban that results in an accident is to adopt and consistently enforce a policy specifically prohibiting such conduct by its employees during the course of

performing their duties on behalf of the employer. The mere adoption of such a policy will not be sufficient if it is routinely violated by employees with no consequences to them. It's better to act now than to become the test case for the finding of such liability on the part of the employer by the Georgia courts.

While considering the adoption of such a policy, the employer should also consider whether to include in that policy a ban on all use of cell or smart phones or other personal electronic devices by their employees while operating a motor vehicle. The Georgia Court of Appeals has held in at least two cases that an employer may be held liable for an accident that resulted while its employee was using a cell phone in a motor vehicle on the way to work. In 2010, the Georgia legislature instituted such a ban for drivers under 18 years old. Later that year, the United States Occupational Safety and Health Administration ("OSHA") issued a warning that employers who either condone or create incentives for the use of texting by their employees while operating a motor vehicle were creating an unsafe work environment for their employees for which the employer could be penalized under the OSHA law. It is not hard to imagine OSHA coming to the conclusion that allowing employees to even use their cell or smart phones while operating a motor vehicle would also constitute the creation of an unsafe work environment.

In late 2011, the National Transportation Safety Board ("NTSB") did come to that conclusion and called for a nationwide ban on the use of all personal electronic devices by drivers while operating a motor vehicle. In January of this year, the United States Department of Transportation ("DOT") acted on that conclusion and issued a regulation that bans all use of "hand held mobile telephones" by drivers of interstate commercial motor vehicles and intrastate commercial motor vehicles carrying a placarded amount of hazardous materials. One month later, the DOT issued non-binding guidelines calling for automakers to design installed cell phones, navigation devices, and devices allowing drivers access to the internet so that they could not be used while the motor vehicle is moving.

From the above, it is clear that the trend is moving toward the banning of the use of all hand held personal electronic devices by drivers while operating a motor vehicle. Employers who act now to do so with respect to their employees will be protecting themselves against possible federal liability for the creation of an unsafe work environment and the potential that a smart personal injury attorney can convince a judge and jury that the mere use of such a device by a driver constituted negligence for which the deep pocketed driver's employer should be liable.

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