

**EMPLOYEES ON
THE ROAD:
DRIVER SAFETY
AND
EMPLOYER LIABILITY**

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**I. RESPONDEAT SUPERIOR: LIABILITY OF AN EMPLOYER FOR THE
NEGLIGENT OR TORTIOUS ACTS OF AN EMPLOYEE**

1. Respondeat superior is a legal doctrine embraced by all fifty states, and which has been part of the law of Ohio since before the twentieth century.
 - A. The doctrine holds that an employer is liable to injured third parties for the negligent or tortious acts of employees that occur within the scope of employment. *American Ins. Group v. McGowan* (1966), 7 Ohio App. 2d 62, 218 N.E. 2d 746; *Clark v. Southview Hospital and Family Health Center* (1994), 68 Ohio St. 2d 435, 628 N.E., 2d 46.
 - B. Respondeat superior is based upon the presumption that the employer holds a position of authority and control over the employee while the employment relationship is in effect. The law imposes an obligation upon employers to exercise that authority and control for the safety of third parties. *Councill v. Douglas* (1955), 163 Ohio St. 292, 126 N.E. 2d 597.
 1. Respondeat superior has no application unless an employer-employee relationship exists. It does not apply where the employee is actually an independent contractor.
 2. The distinction between employee and independent contractor is generally that of control. If the employer retains the ability to dictate and control the manner in which the work at issue is done, an employer-employee relationship likely exists. However, if the employer retains only the ability to control the outcome of the work, i.e., whether the job is performed correctly, meets specifications, etc., the employee is probably an independent contractor. *Rogers v. Allis-Chalmers Mfg. Co.* (1950), 153 Ohio St. 513, 92 N.E. 2d 677.
 3. A considerable amount of litigation has occurred over this issue, as the employer is typically the “deep pocket” from whom recovery is sought by an injured third party.
 4. Among the factors that courts examine to determine whether an independent contractor or employer-employee relationship exists are the following, *Kuhn v. Youlten* (1997), 118 Ohio App. 3d 168, 692 N.E. 2d 226:
 - a. Who controls the hours during which the work is performed.
 - b. Who provides the tools and materials necessary for completion of the work.

- c. The terms of the compensation paid to the worker.
 - d. The degree of control exerted by the hiring party over the manner in which the work is performed.
 - e. Whether the worker is free, at his/her discretion, to hire others to assist with the work.
 - f. The payment of income and employment taxes by the parties.
5. Example: Newspaper carriers.
- a. Often classified as independent contractors by the newspaper.
 - b. Newspapers often conduct marketing seminars, provide methods by which the money owed to the carrier is collected, provide marketing materials and supplies, and handle service errors.
 - c. Most courts in this area have held that whether newspaper carriers are employees or independent contractors is a fact issue for determination by the jury.
- C. The judicial justification for respondeat superior is derived from public policy considerations to (1) prevent reoccurrence of the tortious conduct (2) to provide greater assurance of compensation for the victim; (3) to ensure that the losses of the victim will be equitably borne by those who benefit from the enterprise that gave rise to the injury.
2. Respondeat superior only applies to hold the employer liable if the actions which caused the injury occurred within the scope of employment. *Greenberg v. Life Ins. Co. of Virginia* (6th Cir. 1999), 177 F. 3d 507.
- A. This issue has generated most of the litigation which has occurred in this area.
 - B. Scope of employment for purposes of civil liability is different than for workers compensation eligibility.
 - C. Stated as a general rule, an act by an employee or servant is deemed to be within the scope of employment if it is calculated to facilitate or promote the business for which the employee was hired.
 - 1. The issue is not as simple as determining whether an employee was “on the clock” when a negligent act occurred.

- Worker’s compensation principles are inapplicable to the analysis of whether an employee is within the scope of employment. *Faber v. Metalweld* (1992), 89 Ohio App. 3d 794, 627 N.E. 2d 642.
2. The courts have stated that “. . . the expression ‘scope of employment’ cannot be accurately defined, because it is a question of fact to be determined according to the peculiar facts of each case.” *Mumford v. Interplast, Inc.* (1992), 119 Ohio App. 3d 724, 696 N.E. 2d 259. Typically, the courts allow a jury to determine whether a particular act that causes injury is within the scope of employment. *Posin v. ABC Motor Court Hotel* (1976), 45 Ohio St. 2d 271, 344 N.E. 2d 334.
 3. It does not necessarily matter that the employer had not authorized the employee to perform the act which caused injury, or was aware of its occurrence. It is sufficient that the act is “fairly implied from the nature of the employment and duties incident thereto, considering the object, purpose, and end of the employment.” *Combs v. Kobacher Stores* (1953), 65 Ohio L. Abs. 326, 114 N.E 2d 326.
 - For example, respondeat superior was applied to hold a general contractor liable in *Brier v. Lathrop Co.* (1970), 22 Ohio St. 2d 166, 258 N.E. 2d 597. The case involved an injury which occurred when an employee of the defendant gratuitously undertook to assist with moving scaffolding at a construction site. Despite the fact that the scaffolding belonged to a subcontractor, the court held that respondeat superior applied since aiding subcontractors on a job site served to further the business of the general contractor.
 4. Intentional acts committed by an employee can result in liability being imposed on the employer. However, if the purpose of the act is for the employee to pursue his or her own malevolence or agenda against the victim, the employer-employee relationship will be held to be severed and respondeat superior has no applicability. *Vrabel v. Acri* (1952), 156 Ohio St. 467, 103 N.E. 2d 564.
- D. In determining whether an act occurs within the scope of employment, the courts will often examine the following factors:
1. Whether the act at issue is commonly done by employees working for the employer or similar employers.
 2. The time, place and purpose of the act.
 3. Whether the employer had, or should have had, reason to expect that the act will be perpetrated by the employee.

4. Whether the instrumentality by which the harm was inflicted was furnished by the employer to the employee.
 5. The extent to which the employee departed from the normal method of accomplishing an authorized result.
 6. Whether the act in question was seriously criminal.
- E. Essentially, the deviation by an employee from the normal performance of his/her tasks, in order to render the employer not liable for injurious acts, must be so significant that “its very character severs the relationship of employer and employee. *Osborne v. Lyles* (1992), 63 Ohio St. 2d 326, 587 N.E. 2d 825.
3. Examples of cases involving determination of “scope of employment.”
 - A. *Thomas v. Ohio Department of Rehabilitation and Correction* (1988), 48 Ohio App. 3d 86, 548 N.E. 2d 991: The unjustified use of force by a corrections officer against an inmate did not by itself remove the officer from the scope of employment.
 - B. *Osborne v. Lyles* (1992), 63 Ohio St. 3d 326, 587 N.E. 2d 825: An off-duty Cleveland police officer who was involved in an altercation following a traffic accident in his personal vehicle was held to be within the scope of employment. The court placed significant reliance on a Cleveland police manual which essentially stated that officers are deemed to always be on duty, despite their normal working hours.
 - C. *Byrd v. Faber* (1991), 57 Ohio St. 3d 56. Sexual misconduct by a clergyman was deemed to be outside the scope of employment. The court held that the actions of the clergyman could not be construed in any manner as facilitated or promoting the business of the denomination.
 - D. *Rogers v. Allis-Chalmers Mfg. Co.* (1949), 85 Ohio App. 421, 88 N.E. 2d 234: An employee who voluntarily participated in an after-hours golf tournament sponsored and paid for by the employer was held outside the scope of employment when he struck another player with an errant shot.
 - E. Physical assaults and criminal acts by employees are generally held to be outside the scope of employment. *Stephens v. A-Able Rents Co.* (1995), 101 Ohio App. 3d 20, 654 N.E. 2d 1315.
 4. Examples of cases involving automobiles and scope of employment:
 - A. Required operation by an employee of a company vehicle to and from a fixed employment site was insufficient, by itself, to hold the employer liable under respondeat superior to persons injured in an accident which occurred while the

employee was enroute to work. *Kimble v. Pepsi-Cola General Bottlers* (1995), 103 Ohio App. 3d 205, 658 N.E. 2d 1135.

- B. Respondeat superior did not apply to an accident caused by a postal worker, who, at the time of the incident, was on a lunch break and had driven fifteen or twenty minutes from the assigned route in order to attend to personal errands. The court also observed that the postal worker had no permission to attend to personal business during the work day. *Leach v. Walls* (N.D. Ohio 1997), 993 F. Supp. 1103.
- C. An employee who left his place of employment with a company vehicle for the purpose of obtaining lunch, and who consumed alcoholic beverages over the course of the next four hours, was held to be on a “frolic and detour.” However, the “frolic and detour” was determined by the court to have ended, and respondeat superior applicable, when the employee left the restaurant for the purpose of returning the company car to the employer’s parking lot. The court reasoned that since the employee was required to return the car to the employer following the lunch break, he was within the scope of employment at the time of a subsequent accident.
- D. In another case involving whether lunch breaks serve to preclude application of respondeat superior, the court considered a case in which a municipal employee was involved in an accident while driving a city truck to a lunch stop. The evidence indicated that city workers were required to drive to the closest location available for lunch, and, through use of a portable radio, remain on call for any emergency business. The court held that such was insufficient, as a matter of law, to hold that the employee was outside the scope of employment at the time of an accident that occurred while the worker was driving to lunch. *Lightning Rod Mut. Ins. Co. v. Chatman* (1990), 64 Ohio App. 3d 781, 582 N.E. 2d 1122.
- E. Where the unpaid relative of a business owner was requested to deliver documents to a business site, respondeat superior was held to apply despite the fact that the relative received no compensation for her efforts. *Thornton v. Parker* (1995), 100 Ohio App. 3d 743, 654 N.E. 2d 1282.
- F. A truck driver was held to be within the scope of employment while delivering merchandise inside a garage owned by a customer, notwithstanding instructions by the employer which prohibited driving beyond the street curb during deliveries. *Gulla v. Straus* (1950), 154 Ohio St. 193, 93 N.E. 2d 662.

II. NEGLIGENCE ENTRUSTMENT IMPOSES LIABILITY ON AN EMPLOYER FOR ITS OWN NEGLIGENCE IN ALLOWING AN INCOMPETENT EMPLOYEE TO DRIVE

1. Negligent Entrustment vs. *Respondeat Superior*:
 - A. *Respondeat Superior*: The owner of an automobile cannot be held liable under the doctrine of *respondeat superior* in an action for damages for injuries to a third person caused by the negligence of an employee of such owner in the operation of the automobile, unless it is proven that the employee, at the time, was engaged in his employer's business and acting within the scope of his employment. *Gulla v. Strauss* (1950), 154 Ohio St. 193.
 - B. Negligent Entrustment: The owner/lessor of a motor vehicle may be held liable if it is established that: (1) the motor vehicle was driven with permission of the owner, (2) the driver was in fact incompetent, and (3) the owner (defendant) knew such facts as to imply at the time of entrustment that the trustee was unlicensed or incompetent or unqualified. *Gulla v. Strauss* (1950), 154 Ohio St. 193.
 - C. The Difference?
 1. *Respondeat Superior* requires that the tortfeasor/employee act within the scope of his/her employment when he/she commits the tort in order for the employer to be held liable for the employee's tortious actions.
 2. Negligent entrustment requires the employer to have an ownership right, control of the vehicle is not enough, in the vehicle that was entrusted to the tortfeasor/employee. Thus for an employer to be held liable under a theory of negligent entrustment the employer must have an ownership right in the property entrusted. *Dunne v. Hanson*, 2002 Ohio App. Lexis 2306 (6th Dist).
2. Incompetence:
 - A. Apparent Incompetence: When it is apparent that a person is incompetent to drive a vehicle, liability is predicated upon the owner's negligence arising from the act of knowingly entrusting the vehicle to an incompetent driver. Such liability on the part of the owner is generally confined to cases where he entrusts his motor vehicle to one whose appearance or conduct is such as to indicate his incompetency or inability to operate the vehicle with due care. *Gulla v. Strauss* (1950), 154 Ohio St. 193.
 - Example: Where the owner of an automobile loaned it to another, whom he knew to be drinking intoxicating liquors, to attend a drinking party with knowledge that such other was in the habit of getting drunk, he was liable for negligent entrustment. *Gulla v. Strauss* (1950), 154 Ohio St. 3 citing *Mitchell v. Churches*, (1922) 119 Wash. 547, 206 P. 6.

B. Non-apparent Incompetence: To impose liability in other cases, where the incompetency of the trustee is not apparent to the entruster of the motor vehicle at the time of its entrustment, it must be affirmatively shown that the entruster had at that time knowledge of such facts and circumstances relating to the incompetency of the trustee to operate the motor vehicle as would charge the entruster with knowledge of such incompetency. *Gulla v. Strauss* (1950), 154 Ohio St. 193.

1. Example: A 17 year old was not incompetent, “as a matter of law,” even though he had a cited accident when he was only 15 and driving without a license, a speeding citation when he was 16, and a DWI with a license suspension four to five months before the accident involved in the case. *Cincinnati Ins. Co. v. Watson* (1989) No. 88AP-898.

2. Incompetence or recklessness of a motor vehicle operator may, of course, be shown by evidence of previous instances of negligent or reckless conduct in the operation of a motor vehicle. See *Clark v. Stewart*, (1933) 126 Ohio St. 263.

C. Degree of Knowledge: The requisite degree of knowledge is knowingly, either through actual knowledge or through knowledge implied from the attendant facts or circumstances. *Bell v. Sammons*, 1988 Ohio App. Lexis 1023 (9th Dist).

● Example: Smith and Paul were out partying when Smith loaned his car to Paul because Paul wanted to keep partying and Smith wanted to go home to bed. Court reasoned that an ordinarily prudent person, situated as Smith was at 3 o'clock on the morning in question, would have foreseen that the entrustment of Smith's car to Paul, under the circumstances then present (drink, late hour, wet roads) would in all likelihood result in an accident. Smith knew or ought to have known at the time of entrustment that the operation by Paul was likely to be reckless, incompetent and a unsafe danger to other persons. *Smith v. Hopton*, (1960) 169 N.E.2d 646.

3. Negligent Acts By Employers

A. Express Permission: To sustain an action for negligent entrustment of a vehicle, a plaintiff must show that the vehicle was driven with the owner's permission and authority[.] *St. Amand v. Spurling, et al.*, 2006 Ohio 4391 (2nd Dist).

B. Implied Permission: Despite a written policy against personal use, when an employer knows of but ignores an employee's disregard for a policy that does not allow the employee to use a company vehicle for personal use, the employer may be liable under the theory of implied permission. *St. Amand v. Spurling, et al.*, 2006 Ohio 4391 (2nd Dist).

- Example: Employee had used company vehicle for personal use on a previous occasion in 2000 and was charged with a DUI; however, the employer continuing to allow employee to make use of van for business purposes does not establish that employer impliedly permitted employee to make personal use of company van in March 2002. *St. Amand v. Spurling, et al.*, 2006 Ohio 4391 (2nd Dist).

4. Signs for Employers to Watch For

A Incompetence

1. Mental

- a. For example: depression, mental anguish
- b. The degree of incompetence sufficient to sustain a negligent entrustment claim is that a driver be wholly incompetent by reason of mental or physical disability to operate a vehicle. *Bowlander et al. v. Ballard et al.*, 2003 Ohio App. Lexis 2625 (6th Dist).

2. Physical deficiency

- Example: Defendant had a valid Ohio driver's license, restricted to his wearing glasses, had diabetes, had semi-paralysis of his right hand and qualified for a handicapped parking permit at the Ohio State University, where he was a student. The court held absent a handicap which by its very nature impacts an individual's competency to drive, the mere existence of handicaps does not raise a reasonable inference as to a person's competency to operate a motor vehicle sufficient to find owner of vehicle liable for negligent entrustment. *Lin v. Khan*, 1994 Ohio App. Lexis 1900 (10th Dist).

3. Intoxication and Medication

- If the employer knows the employee is drunk or heavily medicated and the employee entrusts the company vehicle to the employer then the company could be held liable for the employee/tortfeasor's actions.

4. Personal Use: If an employer allows the company vehicle to be used for personal use then the company can be held liable for negligent entrustment if the employee is involved in a car accident and the employer had knowledge of the employee's incompetence to drive the vehicle. *See Gulla v. Strauss*, (1950), 154 Ohio St. 193., *St. Amand v. Spurling, et al.*, 2006 Ohio 4391 (2nd Dist).

B. Actual Knowledge of Problem

1. Check all driving and criminal records. The insurance company should not be the only one that checks the employee's records, the employer needs to check records as well.
 - Example: Employee was involved in a car accident where he was found to be intoxicated, and without a valid Ohio drivers license while operating a company vehicle. When employee was hired he said he had a license to drive and no further inquiry was made to ascertain the truthfulness of the statement. The record shows that prior to employing him, the manager of the company made inquiry of two former employers, one of whom commended employee as a "very good driver and very good employee." Neither of his former employers, knowing the purpose of the inquiry, reported any incident of intoxication or other delinquency upon the part of the employee. Thus court held that there was no basis for a negligent entrustment claim against the employer. *Williamson v. Eclipse Motor Lines, Inc.*, (1945)145 Ohio St. 467.
2. When a problem becomes apparent (for example: a company driver gets cited for a DUI) take necessary action to shield the company from liability in any future negligent entrustment actions.

C. Implied Knowledge of Problem

1. Ignorance is bliss, but it must be true ignorance. Implied permission will be found when an employer chooses to ignore a problem that the employer knows about.
 - Example: Court held that an issue of fact existed as to whether the owner gave her implied permission to the ex-husband to drive the truck. The fact that the ex-husband had driven the owner's other car despite her instructions not to demonstrated that the owner was aware that the ex-husband drove her vehicles. *Keeley v. Hough*, 2005 Ohio App. Lexis 3451 (11th Dist).

III. EMPLOYER LIABILITY FROM A WORKERS' COMPENSATION STANDPOINT

1. Quick Overview of Workers' Compensation
 - A. Compensable Injury: one sustained in the course of, and arising out of, the employment. ORC 4123.01(C).
 - B. Exceptions:
 1. Fixed Situs Employees:
 - a. Coming and going rule: an employee with a fixed place of employment, who is injured while traveling to or from his place of employment is not entitled to WC. *MTD Products, Inc. v. Robatin* (1991), 61 Ohio St. 3d 66.
 1. Exception I: where the injury occurs within the "zone of employment."
 - A. Zone of Employment: place of employment and the area thereabout, including the means of ingress and egress under the control of the employer.
 - B. Examples:
 1. Exclusive parking lots/garages
 2. Grassy areas around the employer's buildings
 2. Exception II: Under the "Totality of the Circumstances" test, the employee's injury "arises" out of the employment. *Fisher v. Mayfield* (1990), 49 Ohio St. 3d 275.
 - A. Proximity of the accident to the place of employment.
 - B. Degree of control the employer had over the scene of the accident.
 - C. Benefit the employer received from the employee's presence at the scene of the accident.
 3. Exception III: Where the employee is on a "special mission" or "special errand" for the employer – the mission or errand

must be a major factor in the journey or movement, and not merely incidental thereto:

a. Examples:

1. *Smith v. Carnegie Auto Parts, Inc.* (2007), 2007 Ohio 992: employee injured in auto accident after dropping off work-related mail at the post office on her way to work not entitled to participate in workers' comp fund.
2. *Adams v. IC* (1939), 65 Ohio App. 7: employee of county treasurer's office entitled to recover where she was injured in an auto accident after leaving work and on her way to drop of tax blanks at the office of a taxpayer located on her route home.

2. Traveling Employees

a. Frolic and Detour—applies to workers comp—

- Were they so far out of their job duties that the employer gained no benefit from the employee's actions?

b. For non-fixed-situs employees (or traveling employees), some courts find that if an employee goes on a personal errand and leaves his or her travel route, the employee leaves the course and scope of their employment. However, when they complete their errand, and return to their original route, they return to the course and scope of their employment.

c. Example:

1. *Skapura v. Cleveland Electric Illuminating Co.* (1951), 89 Ohio App. 403.
2. *Sudman v. Wilson* (Nov. 29, 1990), 8th Dist. App. No. 57586.

C. Intoxication

1. ORC 4123.54: An employee is entitled to recover workers' comp if they are injured on the job so long as the injury was not "caused by the employee being intoxicated or under the influence of a controlled substance not

prescribed by a physician,...where the intoxication...was the proximate cause of the injury.” At least one of the following must be established:

- a. A chemical test is administered within 8 hours of the injury and shows an alcohol level above the legal limit.
 - b. A chemical test is administered within 32 hours of the injury shows that the employee has certain non-prescribed drugs over certain levels.
 - c. The employee refuses to submit to a requested chemical test.
2. Example: An employee who becomes so intoxicated that he cannot perform his job functions, and is injured, is not entitled to recover.

D. Miscellaneous:

1. A claimant injured while driving was entitled to recover because he was “on call” at the time of the auto accident, and was answering an electronic page. *Durbin v. Ohio BWC* (1996), 112 Ohio App.3d 62.
2. Out of Town Travel
 - a. *Elsass v. Commercial Carriers, Inc.* (1990), 69 Ohio App. 3d 342: Truck driver not entitled to recover where he was injured as a passenger in a taxicab while he was being driven to a topless bar – BUT, the fact that he had finished his job duties for the day was not dispositive of the issue. Rather, the issue was that the employer had no control over where the driver went that evening.
 - b. *Bower v. IC* (1939), 61 Ohio App. 469: School teacher injured in a motor vehicle accident while attending an out of town teachers’ institute was entitled to recover. At the time of the accident, she was in-between her departure from the meeting and en route to her hotel. **Had she been on her way to dinner that evening, perhaps the result would have been more like that in *Elsass*.

IV. CELL PHONE USE BY EMPLOYEES MAY SPELL FUTURE LIABILITY FOR EMPLOYERS

1. In The News
 - A. November 2006: Two-year-old Morgan Pena made national headlines when a driver talking on his cell phone sped through a stop sign, killing the child as she sat buckled in her car seat. The driver was fined \$50 and got two traffic tickets. His license was not suspended. (www.cartalk.com)
 - B. March 2005 - Toledo, OH: Five-year-old Dameatrius McCreary hopped off the school bus but never made it home. After crossing in front of the school bus, he began across the other side of the street, but was struck and killed by a car whose driver took her eyes off the road to search for her ringing cell phone. (Source: Dayton Daily News)
 - C. Six weeks later, 2-year-old Nhiem Jennings of Cincinnati, returning from an outing with his family, was hit by a car in Covington, Ky. The driver, an 18-year-old senior, was text-messaging friends on his cell phone when his car slammed into the boy. (Source: Dayton Daily News)
2. Statistics: Alarming, But Inconsistent
 - A. A January 2007 survey of 1,200 drivers found that 73 percent talk on cell phones while driving. Cell phone use was the highest among young drivers. Nineteen percent of motorists send and receive text messages while driving.
- Insurance Information Institute
 - B. The risk of collision is four times greater if you are on the phone while driving.
- *The New England Journal of Medicine* (1997)
 - C. If a driver is in an accident while using a wireless phone, the chances are nine times as great that it will be a fatal accident.
- *Accident Analysis and Prevention Journal* (1998)
 - D. A study on hands free devices involved approximately the same risk as hand-held mobile phones. Studies show the single, most risky behavior is the actual conversation itself.
- *The New England Journal of Medicine* (1997)
- *Transportation Human Factors* (1999)
 - E. A study from researchers at the University of Utah, published in the summer 2006 issue of *Human Factors*, concluded that talking on a cell phone while driving is as dangerous as driving drunk, even if the phone is a hands-free model. Another study

at the same university found that motorists who talked on hands free cell phones were 18 percent slower in braking and took 17 percent longer to regain the speed they lost when they braked.

- F. Many phone-related crashes occur while the driver is responding to a call, which includes being startled or distracted by the ringing, dropping the phone, or turning to pick up the phone.
- *Japanese National Police Agency* (studies conducted in 1997 and 1998)

G. On the Other Hand:

1. Although use of a cell phone increases the chance of collision, other studies have shown that cell phone use is far *less* likely to be the cause of a crash than other distractions. For example, while reaching for a moving object such as a falling cup increases the risk of a crash by 9 times, talking or listening on a hand-held cell phone only increased the risk by 1.3 times.
- Virginia Tech Transportation Institute and the National Highway Traffic Safety Administration.
2. Similarly, the August 2003 report from the AAA Foundation for Traffic Safety, confirmed that drivers are less distracted by cell phones than by other common activities such as reaching for items on the seat or glove compartment, or talking to passengers.
3. Study found that the driver's average risk of being killed while using a cell phone is 6.4 in a million per year. That is 80 percent less than the average risk of fatality to a driver with a blood alcohol level of .10%.

3. How Are Courts Handling Cell Phone Related Accidents?

- A. Louisiana: The defendant was driving west on a two-way street when she decided to make a left-hand turn into a parking lot. While she waited for cars to pass in order to turn, she dialed her sister's number on her cellular phone. While the phone was ringing; the oncoming traffic cleared; however, she did not immediately turn. The driver behind her sat approximately 8-10 seconds. When she did not move after oncoming traffic cleared, he tried to pass her. As he did so, the defendant turned and struck his vehicle, causing him to veer to the left and hit another car parked on the roadside.
- The Court considered the use of the cell phone as just one factor pointing to driver inattentiveness that was construed as general negligence. The driver behind the defendant was also found to be negligent. Fault was allocated equally between the two drivers. *Perkins v. Allstate Indemnity Ins. Co.*, 821 So.2d 647 (2002).

- B. Oklahoma: The defendant was making a left-hand turn across southbound traffic out of a parking lot, when he struck the plaintiff's car which was traveling southbound in a left-hand lane. The defendant argued in his defense that at the time of the accident, the plaintiff was talking on her cell phone and it took her a minute to realize what happened. The defendant accordingly asked the court to submit the issue of contributory negligence to the jury.
- The Court found that the plaintiff's alleged use of a cell phone during the accident, standing alone or in combination with other facts adduced at trial, was not sufficient to submit the issue of contributory negligence to the jury. *Morgenstern v. Knight* (2006), 2006 OK CIV APP 39 ("Defendant cites to authority, and we are unwilling to so pronounce, that the use of a cell phone while driving an automobile which is involved in an accident, without more, creates an issue of fact as to whether the cell phone user is guilty of contributory negligence.
- C. On the other hand: an Indiana court held it is conceivably foreseeable that misuse of a cell phone while driving might cause an accident. *Williams v. Cingular Wireless*, 809 N.E.2d 473, 478 (Ind. Ct. App. 2004).
- D. **Ohio:**
- *State v. Dipman*, 6th Dist. No. L-05-1327, 2007-Ohio-2143 – regarding Dameatrius McCreary (mentioned above).
 - a. Five-year-old Dameatrius was crossing the street after getting off of the school bus, when he was struck and killed by a car. The driver was bent over, reaching for a ringing cell phone when she felt an impact and looked up to see a small boy on the hood. The driver estimated she took her eyes off the road for a total of 5-10 seconds while driving within the 35 mph speed limit. At that speed, she was covering 51 ft per second and therefore traveled blindly for 255-510 feet. The accident reconstructionist, however, estimated her eyes were more likely off the road for close to 25 seconds, during which she would have blindly traveled a quarter of a mile.
 - b. The driver was found guilty of aggravated vehicular homicide, a third-degree felony, and sentenced to five years community control. In so doing, the court/jury considered her use of a cell phone in determining whether the driver violated ORC 2903.06, which states that no person, while operating a motor vehicle, shall cause the death of another by acting "recklessly."

- E. Consensus seems to be the cell phone use is considered one of many factors which can be used to determine whether an accident was caused by driver inattentiveness or recklessness.
- F. How Does This Affect Employers?
1. Doctrine of “Vicarious Liability” says that employers may be held legally accountable for the negligent acts of employees which are committed in the course of employment.
 2. Massachusetts decision: An off-duty policeman, with the police station’s permission, used a city vehicle to attend a golf tournament. While there, he consumed four beers and left in a state of intoxication. While driving back to the station to begin his shift, he received a page from a subordinate from the police station. In accordance with the station’s policy for responding to a page, he used the cell phone in the vehicle to respond. As he attempted to do so, he crossed the center line and struck an oncoming vehicle. The call was never completed and he never spoke to anyone at the station prior to the collision. *Clickner v. Lowell* (Mass. 1996), 422 Mass. 539.
 - Court found he was not acting within the scope of employment; therefore, no liability was imputed to the employer.
 3. Louisiana decision: Mr. Levingston was employed as a regional sales manager, and his position required him to travel a great deal. His employer paid him \$400 per month to compensate him for use of his personal vehicle and provided him with a company credit card to purchase all his fuel. The employer also provided him with a cell phone, on which he regularly conducted business on behalf of his employer while driving. The employer never prohibited him from talking on the cell phone while driving, nor did it have any policies or procedures forbidding such actions. *Ellender v. Neff Rental, Inc.* (2007), 2007 La. App. LEXIS 1287.
 - a. One day, Levingston was driving when a fellow employee seeking pricing information called him. When Levingston diverted his attention from the road to search for the documentation to answer the question, he rear-ended another vehicle.
 - b. The employer submitted an affidavit which stated it did not expect or intend for its employees to talk on cell phones while driving; but did not state that such expectations were ever conveyed to its employees or otherwise enforced.
 - c. Considering the factors involved, the Court found the employer was vicariously liable for the accident; stating that although the employer

may not have specifically authorized use of company cell phones while driving, it certainly did not prohibit it.

4. There have been several lawsuits involving multi-million dollar settlements from an employer sued by a person who was injured in accident caused by an employee talking “within the course of employment” on a cell phone while driving.

G. How Legislature Is Responding:

1. No state completely bans all types of cell phone use (handheld and hands-free) while driving.
2. Seventeen states and the District of Columbia have special cell phone driving laws for novice drivers.
3. School bus drivers in 14 states and the District of Columbia are prohibited from all cell phone use when passengers are present, except for in emergencies.
4. Connecticut, New York, New Jersey and the District of Columbia have enacted jurisdiction-wide cell phone laws prohibiting driving while talking on handheld cell phones. California and Washington have passed similar laws that will go into affect in July, 2008.
5. In May of 2007, Washington became the first state to ban driving while texting for all drivers.
6. Several states have begun information gathering to better determine the true risk involved in cell phone use while driving.
7. At least 25 other countries have passed laws restricting or prohibiting cell phone use while driving. In the United Kingdom and Germany, drivers can lose insurance coverage if they are involved in a crash while talking on the phone.
8. Where Does **Ohio** Stand?
 - a. Ohio permits individual localities to pass cell phone bans. Brooklyn, Ohio, currently has one in place, banning the use of hand-held cell phones while driving.
 - b. Pending legislation?

H. Cons of Passing Such Legislation

1. Difficult to Enforce – and even when done, fines are generally small \$50 per offense (for example).
2. If drivers aren't talking on the phone, they will find something else to do:
 - Some of the above studies show that other distractions (kids in back seat, passengers, eating, putting on make-up, looking for a CD, etc.) are more hazardous than talking on a phone.
3. Studies still unsure as to whether using hands-free devices lessens the risk.
4. With the common-place use of cellular phones, can we be sure that the use of cell phones are creating bad drivers, or is it that already bad drivers just happen to be using cell phones?
5. Lowers productivity.
6. Adds to traffic by additional trips, etc., that could have been avoided by communication over cell phone.