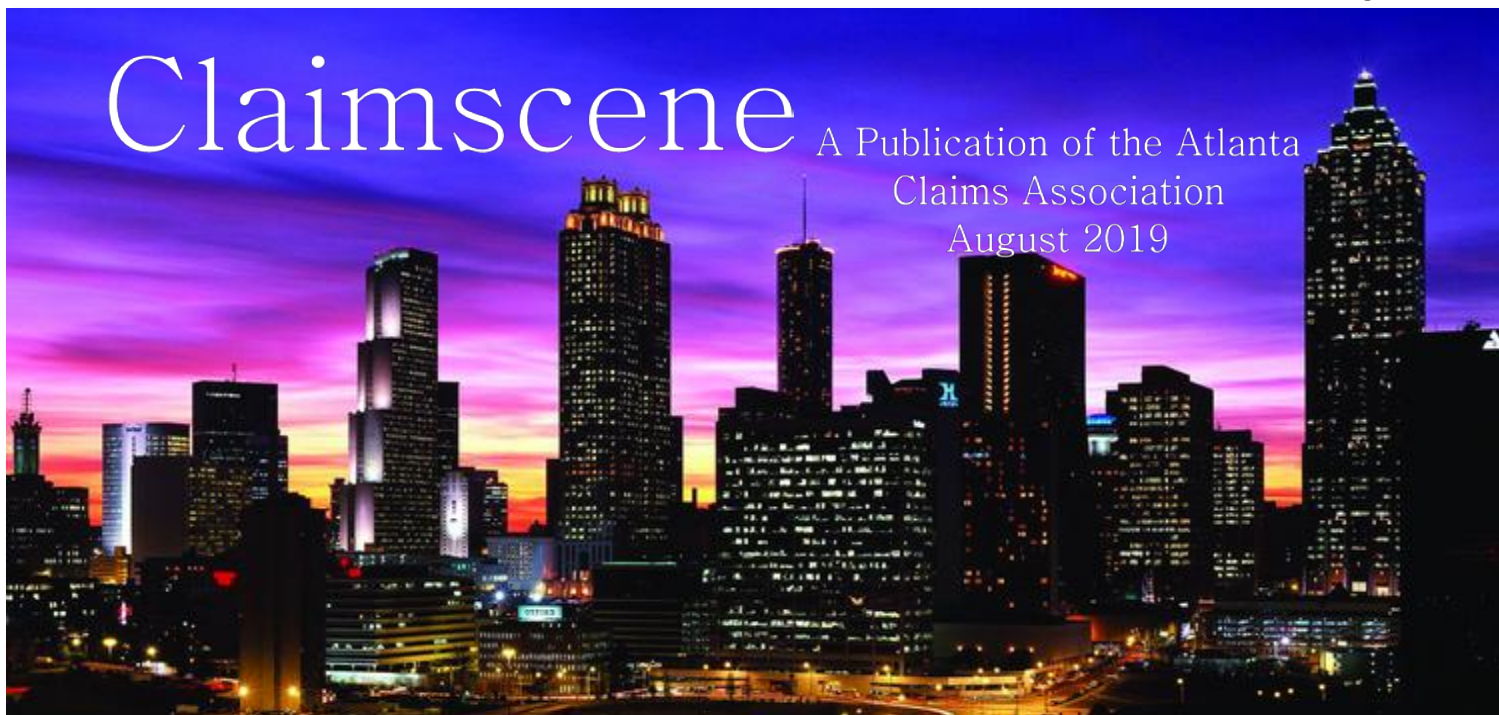


# Claimscene

A Publication of the Atlanta  
Claims Association  
August 2019



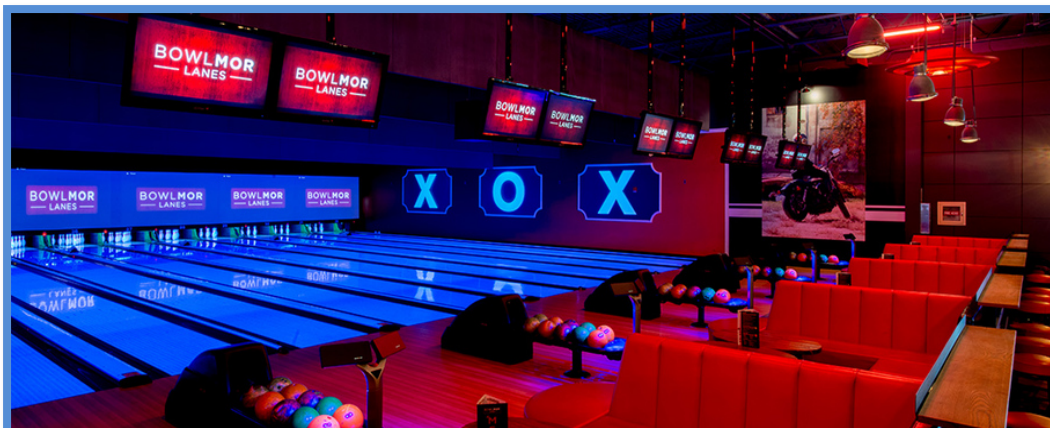
You are cordially invited to the  
**ACA Fall Bowling Outing**

**Oct 17, 6:00 PM – 8:00 PM**  
**Bowlmor Atlanta, 2175 Savoy Dr., Atlanta, GA 30341**

**Bowling ball, shoes, hors d'oeuvres  
and two free drinks are included!**

**Sponsorships are \$400 a lane.**  
**Please contact Jennifer Herring to Sponsor a Lane.**  
[jherring@myphysio.com](mailto:jherring@myphysio.com) | 470-201-9644

**REGISTER**



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# Letter from The President Adolphus Drain



**Brother vs. Brother**  
**The Battle of the Presidents**  
**Black Beauty vs. Hot Sauce**



Yes, the Fall Atlanta Claims Association Bowling Outing has been scheduled for Thursday, October 17, 2019 at Bowlmor Lanes on Savoy Road in the Perimeter Mall area.

We have nine lanes reserved and a featured “mano y mano” battle between yours truly and my bowling ball “Hot Sauce” versus Kowalski Brown and his bowling ball “Black Beauty”. It should be epic; one of us may break 100! We have a nice buffet planned with prizes and a raffle as usual.

Please sign up and register on the ACA website under the ‘Events’ tab. We also have room for a few more sponsors. Please contact Jennifer Herring (JHerring@myphysio.com) to sponsor a lane. Should be a great time!

ACA would like to extend a special thanks to Genex and Kim Morris for hosting our first webinar on Claim Ethics by Dr. Michael Coupland. We had a nice turnout.

**September’s webinar focuses on property and will be hosted by Swift, Currie, McGhee & Hiers. See the details and register on the next page.**

We are continuing our push to increase our membership by 100 people. We have 75 more to go. Please reach out to a colleague and encourage them to join you as an ACA member.

Stand by for our plans for the ACA Christmas Outing in December. Here’s a little hint, “Dab lightly”...

Finally, on behalf of ACA, we would like to extend our deepest condolences and prayers to our friend and colleague, Dr. Christopher Edwards.

See y’all in September at the webinar and at Bowlmor in October!

Yours truly,  
Adolphus Drain aka PACA

# FIRST-PARTY PROPERTY WEBINAR: **POWER IN THE POLICY**

This webinar highlights the key investigative tools available to insurance carriers in policies and how to use those tools to complete a thorough and accurate analysis and adjustment of a loss.

**[CLICK HERE TO REGISTER](#)**

TUESDAY, SEPTEMBER 24, 2019  
1-2 P.M. EASTERN

**PRESENTED BY**



**Alex Mikhalevsky**

Attorney

Swift, Currie, McGhee & Hiers



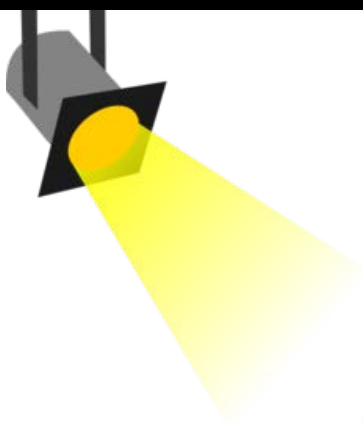
**Christy Maple**

Attorney

Swift, Currie, McGhee & Hiers

*swift / currie*





**CLAIMSCENE MEMBER SPOTLIGHT**  
**Rachel Tonic**



**Contact Information:**  
Company: Amerisure  
Email: rtoncic@amerisure.com  
Phone: 404.764.9026

**Membership:** November 2018

**ACA Involvement:** (ACA events that you have attended and/or assisted with planning/sponsorship.)  
I am newer to ACA and have not been involved in any events, but I look forward to participating and I would love to assist in planning of an event!

**Work History:**

Title/Occupation: Claims Manager  
Since: 1992  
State Licensed: GA  
Field of Expertise: Workers' Compensation/Leadership/Sales & Marketing  
Designations: CWCP

**Personal:**

Marital Status: Married  
Children: Collin 25 and Claire 21  
Hobbies: Cooking (not very good but love to try) Food/wine & Music festivals, Reading, and Peloton  
College: Old Dominion  
Degree: Theater arts/marketing

**What would you like to share with ACA Members?**

In the past I have been very active in several VA associations but look forward to being involved in the ACA. I spent ten years in sales and marketing after starting in claims and chose to come back to claims. I think claims is such an important part of the insurance industry and we truly make a difference, every day! I am inspired to continue my leadership journey and to assist others in doing the same.

**If you could have lunch with a famous person, past or present, who would it be and why?**

I would have lunch with Lauryn Hill. Her music is inspiring, and I appreciate that she is a strong woman who is unapologetic about being herself. I think it would be a fun and very long lunch.  
Past person – I would have lunch with Henry David Thoreau. I would love to discuss today's issues with him and get his thoughts. I think that both of these people are thought leaders, and both are inspiring to me.





## Georgia's Relatively New Hands-Free Law and the Implications on Liability Claims



**Michael Becker, Esq.**  
**Amanda L. Myers, Esq.**  
**Vernis & Bowling of Atlanta**

Five seconds. Taking your eyes away from the road for five seconds, while traveling at 55 miles per hour, is the equivalent of driving the length of an entire football field while blindfolded<sup>i</sup>.

Distracted driving, which includes the use of a cell phone, GPS, the radio, eating, drinking, and talking to people in your vehicle, increases your risk of crashing. According to National Safety Council estimates, cell phone-related crashes account for 27 percent of all crashes<sup>ii</sup>. According to the CDC, each day in the United States, approximately 9 people are killed and more than 1,000 injured in crashes that are reported to involve a distracted driver<sup>iii</sup>.

### BACKGROUND

Just over one year ago, Georgia Governor Nathan Deal signed House Bill 673, the Hands-Free Georgia Act, into law. The act amended O.C.G.A. § 40-6-241 (c) to prohibit drivers from touching their electronic devices, and the act further amended O.C.G.A. § 40-5-57 to provide a schedule of fines and points for first, second, and subsequent violations. Effective July 1, 2018, Georgia motorists were prohibited from:

- Holding or supporting, with any part of the body, a wireless telecommunications device or stand-alone electronic device;
- Writing, sending or reading any text-based communication, including a text message, instant message, e-mail or internet data;
- Watching, recording, or broadcasting a video or movie;
- Taking pictures or a video;
- Using a phone at a stoplight; or
- Picking a song on an iPod or smartphone.

There are special provisions in the Hands-Free Georgia Act for Commercial Vehicles. When driving a "commercial motor vehicle" the new law, in addition to the prohibitions applicable to all drivers, also makes unlawful at O.C.G.A. § 40-6-241(d):

- Using more than a single button on a wireless telecommunications device to initiate or terminate a voice communication; or
- Reaching for a wireless telecommunications device or stand-alone electronic device in such a manner that requires the driver to no longer be: (A) In a seated driving position; or (B) properly restrained by a safety belt.

For any person convicted of violating the Hands-Free Georgia Act, the first offense in a 24-month period carries a \$50 fine and 1 point on their driver's license. A second offense in a 24-month period carries a \$100 fine and 2-point penalty; and the third or more offenses in a 24-month period carry a \$150 fine and 3-point penalty. See O.C.G.A. § 40-6-241 (f) and O.C.G.A. § 40-5-57.

### IMPLICATIONS OF THE HANDS-FREE GEORGIA ACT ON LITIGATION STRATEGY

For the claim's handler, litigation adjuster, or attorney, the new law provides some new challenges and opportunities in both pre-suit claims evaluation and post-suit litigation evaluation and strategy.

Even prior to the enactment of HB673, plaintiffs often included claims for punitive damages where there was some evidence the at-fault driver was using a cell phone. Prior to the Hands-Free Georgia Act, the Georgia Court of Appeals in *Lindsey v. Clinch County Glass* affirmed summary judgment to a defendant on the plaintiff's punitive damages claim.<sup>iv</sup> In that case, a contractor who installed an office desk in his truck caused an accident because he admittedly took his eyes off the road to search his mobile phone for a telephone number.<sup>v</sup> Absent a history of distracted driving, however, the trial court granted summary judgment on plaintiff's punitive damages claim.<sup>vi</sup> The Court noted that merely violating a rule of the road would not support a claim for punitive damages unless the accident arises from a "pattern or policy of dangerous driving."<sup>vii</sup>

The *Lindsey* plaintiffs argued that such a pattern was evident in the defendant's frequent use of his phone while driving, which he knew to be dangerous because he instructed his employees not to do so, and conceded that numerous studies supported that conclusion.<sup>viii</sup> However, at that time in Georgia, the proper use of a mobile phone was not a violation of the duty to exercise due care while operating a motor vehicle under O.C.G.A. § 40-6-241 as noted by the Court.<sup>ix</sup> Although there was evidence of regular usage prior to the accident, because this usage was *legal*, there was no pattern.<sup>x</sup>

All of this changed on July 1, 2018: now, unless coupled with a hands-free system, such usage is illegal and could support such a pattern and/or policy of reckless driving, thereby making summary judgment on punitive damages claims less likely. Further, merely touching a cellphone is now illegal. More and more plaintiffs are including claims for punitive damages in general, which applies especially to violations, or perceived violations, of the Hands-Free Georgia Act. Therefore, violations of the Hands-Free Georgia Act may present new challenges to the overall formulation of strategy and impact on a case in light of the potential for punitive damages; or, on the other side of the "v", violations of the Hands-Free Georgia Act may present new litigation opportunities for your client.

### IMPLICATIONS OF THE HANDS-FREE GEORGIA ACT ON DISCOVERY TACTICS

Litigators have also revised their discovery tactics in response to the new law. Plaintiffs usually propound interrogatories to discover whether a defendant was using their cellphone before the accident at issue. In conjunction, they often request that a defendant produce their personal wireless bills showing the calls, text messages, data usage, and/or e-mails sent or received at least on the day of the collision. On some occasions, plaintiffs will seek those documents directly by serving a request for production of documents on the defendant's wireless carrier.

Opposition to such discovery may or may not be successful, which is the case in most discovery disputes. There are good arguments for allowing such discovery against a defendant, *particularly when a plaintiff seeks punitive damages*. In such a case, a plaintiff is likely to argue that they are entitled to prove up their punitive damages claim through discovery of habitual violations of the Hands-Free Georgia Act. Even in the absence of such a claim, some trial judges may find that plaintiffs are entitled to seek evidence of distracted driving, especially in cases where distraction may have played a part, such as a rear-end accident. However, attorneys should still file well-developed objections to a plaintiff's attempts to seek this discovery on the basis of relevance, harassment, and invasion of privacy, and scope depend and on the particular circumstances.

Discovery in this area sometimes unfortunately requires an adjuster and their trial counsel to alter the valuation of a case. Often, defendants emphatically deny cellphone usage in their interrogatory responses and in depositions. Should a plaintiff uncover definitive evidence to the contrary, however, a jury becomes much more likely to believe a plaintiff than a defendant, which often extends not only to their version of the accident but also their perceived veracity about their injuries.

This discovery tactic is not only being used by plaintiffs but is also used by defendants. Besides the credibility issues that apply to any party that is untruthful, a clear liability accident could become murky if the plaintiff was using their cell phone at the time of the collision. As an example, texting or talking on the phone might explain a defendant's claim that a plaintiff suddenly stopped short without reason, causing a rear-end accident.<sup>xi</sup>

### IMPLICATIONS OF THE HANDS-FREE GEORGIA ACT ON NEGLIGENCE PER SE CLAIMS

Plaintiffs are also bringing negligence *per se* claims based on cellphone usage. Under Georgia law, a statute may establish a legal duty in tort and breach of that statute may constitute negligence *per se*.<sup>xii</sup> There are two parts to negligence *per se*: (1) whether the injured person is the type the law was intended to protect; and (2) whether the harm was the type the law intended to protect against.<sup>xiii</sup> Although a plaintiff must still prove an accident proximately caused their damages, and must prove their actual damages, violation of the new Hands-Free Georgia Act could provide plaintiffs with the first two parts of negligence: duty, and breach of duty. The text of the bill as enacted states that its purpose included “to prohibit actions which distract a driver while operating a motor vehicle.” In the case of a plaintiff injured in an accident caused by a defendant’s mobile phone usage, the plain text of the bill and the statute likely provide enough to support the two prongs of negligence *per se*.

Moreover, pleading guilty to the traffic violation at issue in the accident can establish negligence *per se*.<sup>xiv</sup> First offenders may have an out under the new law, however: O.C.G.A. § 40-6-241(f)(2) provides that on the first charge for violation of the statute, a defendant may provide proof of purchase for a hands-free device and will therefore be found not guilty. A not-guilty adjudication forecloses any use of an admission of guilt and/or negligence in a subsequent civil suit under Georgia’s evidence code, and there can even be good arguments for summary judgment on a plaintiff’s negligence *per se* claim as no violation is established.<sup>xv</sup>

### CONCLUSION

The jury is still out on exactly how the Courts will interpret the relatively new Hands-Free Georgia Act when determining the outcome of civil cases; however, we are starting to see the implications in the pleading and discovery processes already. The good news is that it appears the new law has made a positive impact on Georgia’s roads. Robert Hartwig, director of the Center for Risk and Uncertainty Management at the University of South Carolina, presented an update to the Georgia House Insurance Committee in February 2019 that traffic fatalities fell 3.4% in 2018 compared with 2017 according to the Georgia Department of Transportation<sup>xvi</sup>. Hartwig reported that these statistics were due in part to the Hands-Free Georgia Act.

If you need assistance in defending an auto case, please contact the Vernis & Bowling of Atlanta team at (404) 846-2001.

---

<sup>i</sup> <<https://www.nhtsa.gov/risky-driving/distracted-driving>>.

<sup>ii</sup> <<https://www.nsc.org/in-the-newsroom/cell-phones-are-involved-in-an-estimated-27-percent-of-all-car-crashes-says-national-safety-council>>.

<sup>iii</sup> <[https://www.cdc.gov/motorvehiclesafety/distracted\\_driving/index.html](https://www.cdc.gov/motorvehiclesafety/distracted_driving/index.html)>.

<sup>iv</sup> 312 Ga. App. 534, 718 S.E.2d 806 (2011).

<sup>v</sup> *Id.*

<sup>vi</sup> *Id.*

<sup>vii</sup> *Id.* at 535.

<sup>viii</sup> *Id.*

<sup>ix</sup> *Id.*

<sup>x</sup> *Id.*

<sup>xi</sup> A leading motorist is not entitled to a superior legal position simply because he proceeds other motorists; rather, the leading motorist is bound “not to stop, slow up, nor swerve from his course without adequate warning to following vehicles of his intention so to do.” *Lynch v. Broom*, 158 Ga. App. 52, 53, 279 S.E.2d 302, 303 (1981) (overruled on other grounds).

<sup>xii</sup> *Nash v. Reed*, 349 Ga. App. 381, 385, 825 S.E.2d 853, 857 (2019)

<sup>xiii</sup> *Id.*

<sup>xiv</sup> *Gurin v. Harris*, 129 Ga. App. 561, 200 S.E.2d 368 (1973)

<sup>xv</sup> Where a defendant pleads not guilty or *nolo contendere*, even if they subsequently pay a fine, there is no admissible admission of guilt in a subsequent civil suit to support a negligence *per se* claim. *Agic v. MARTA*, 334 Ga. App. 679, 780 S.E.2d 79 (2015).

<sup>xvi</sup> <<https://www.ajc.com/blog/commuting/expert-georgia-cell-phone-law-lowered-traffic-fatalities/XoYyFGvF488rG3ZeDAzB2O/>>.



## New Members for August 2019

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**Kim Morris**

Genex Services  
Area Sales Manager

**Marcus Thurmond**

Inamarc Mgmt, LLC.  
Property Manager

**Sara Alexandre**

Swift Currie McGhee Hiers  
Attorney

**Matthew Walker**

Drew Eckl & Farnham LLP  
Attorney

**John Adkisson**

Drew Eckl & Farnham LLP  
Attorney

**Jason Prine**

Drew Eckl & Farnham LLP  
Attorney

**Jonathan Gibson**

Drew Eckl & Farnham LLP  
Attorney

**Dana Schwartzenfeld**

Drew Eckl & Farnham LLP  
Attorney

**Chelsea Ivey**

Drew Eckl & Farnham LLP  
Attorney

**Camille Dizon**

Drew Eckl & Farnham LLP  
Attorney

**Bonnie Timms**

Drew Eckl & Farnham LLP  
Attorney

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For submissions to the Claims scene please contact Angela Patman at: [angela.patman@thehartford.com](mailto:angela.patman@thehartford.com)  
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