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The Next Best Defendant: Examining a Remote Text Sender's Liability Under Kubert v. Best

Christopher P. Edwards

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**THE NEXT BEST DEFENDANT: EXAMINING A REMOTE
TEXT SENDER’S LIABILITY UNDER *KUBERT V. BEST***

*Christopher P. Edwards**

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I. INTRODUCTION

With the rise in cell phone usage in the United States, texting while driving has grown to become a pervasive form of distracted driving, which has created a major public safety issue with much of the focus only on the conduct of the driver.¹ Texting, because of its inherently distracting and mobile nature,² poses a serious and potentially deadly risk of harm to others when coupled with the operation of a motor vehicle.³ To illustrate, in 2013, cell phone related accidents constituted 27 percent of all automobile accidents.⁴ Further, it is estimated that 341,000 of those accidents were related to texting and driving,⁵ where 411 of those crashes resulted in fatalities.⁶ These figures demonstrate how a driver substantially increases the likelihood of causing an accident when he uses a cell phone to view or send texts, which exposes the driver to liability while the text sender generally bears no responsibility.⁷

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1. Visual-Manual NHTSA Driver Distraction Guidelines for In-Vehicle Electronic Devices, 78 Fed. Reg. 24818, 24824-25 [hereinafter NHTSA] (proposed April 26, 2013) (not to be codified) (noting that the widespread popularity or use of text messaging began to rise after 2004).

2. *Id.* at 24820 (stating that the NHTSA believes that the task of text messaging inherently interferes with a driver's ability to safely control a vehicle).

3. See Joseph B. Bayer & Scott W. Campbell, *Texting while Driving on Automatic: Considering the Frequency-Independent Side of Habit*, 28 COMPUTERS HUM. BEHAV. 2083, 2083 (2012) (noting that texting while driving is absurd because "[i]n addition to operating the vehicle's interface, obeying travel laws, traversing traffic, and locating destinations, the texting individual is required to pinpoint and retrieve his or her mobile device, situate the current conversation, and devise an appropriately human message . . .").

4. *Annual Estimate of Cell Phone Crashes 2013*, NAT'L SAFETY COUNCIL (2015), <http://www.nsc.org/DistractedDrivingDocuments/Cell-Phone-Estimate-Summary-2013.pdf>.

5. *Id.*

6. NAT'L HIGHWAY SAFETY ADMIN., U.S. DEP'T OF TRANSP., REP. NO. DOT HS 812 132, *DISTRACTED DRIVING 2013* (2015) (reporting that 411 distraction-affected crashes resulting in fatalities involved the use of a cell phone).

7. *But see* Kubert v. Best, 432 N.J. Super. 495, 503 (App. Div. 2013) (addressing the issue

Because texting requires the participation of at least two individuals, the driver should not be held solely liable while the sender of the text shares no liability.⁸ While a driver owes a duty of reasonable care not to become distracted by an incoming text, if the sender of the text is aware that the driver is likely to become distracted by it, she should have a limited duty *not* to send that text.⁹ For example, in June of 2015, James Davenport, a school bus driver, “was driving while distracted due to sending and receiving text messages,” veered into oncoming traffic and collided with another school bus, killing two students and a teacher’s aide.¹⁰ If the text sender was aware that the bus driver, who may have owed a heightened duty of care to his passengers, was driving a school bus during the exchange of texts, the victims of such a needless tragedy should be able to seek redress from both parties who engaged in the texting activity.¹¹

Recently in *Kubert v. Best*, the Superior Court of New Jersey properly extended potential liability not merely to the driver who causes an accident due to texting and driving, but also to the sender of the text.¹² *Kubert’s* holding represents a departure from traditional notions of third-party tort liability and imposes a new duty on remote senders of text messages.¹³ While the Superior Court concluded that the evidence presented by the Kuberts was insufficient to hold the remote text sender liable, it held that “the sender of a text message can potentially be liable if an accident is caused by texting, but only if the sender knew or had special reason to know that the recipient would view the text while driving and thus become distracted.”¹⁴

This Article argues that states should extend liability to text senders

of whether a remote text sender may be held liable for an automobile accident caused by the recipient); see also Phillip N. Quisenberry, *Texting and Driving: Can it be Explained by the General Theory of Crime?*, 40 AM. J. CRIM. JUST. 303, 303 (2014) (“At least one study found that drivers who text are 23 times more likely to crash relative to non-distracted drivers.”).

8. See *Kubert*, 432 N.J. Super. at 503.

9. See *id.* (holding that a remote text sender has a duty not to send a driver a text in limited circumstances).

10. David Bailey, *Tennessee Bus Driver Was Texting before Deadly Crash*, REUTERS (June 5, 2015), <http://www.reuters.com/article/2015/06/05/us-usa-tennessee-crash-idUSKBN0OL2EI20150605>.

11. JOHN C. P. GOLDBERG ET AL., TORT LAW 158 (Vicki Been et al. eds., 3d ed. 2012) (noting that “commercial and governmental operators of . . . buses . . . have long been held to owe their passengers greater-than-ordinary care”).

12. See *Kubert*, 432 N.J. Super. at 503 (“[T]he sender of a text message can potentially be liable if an accident is caused by texting, but only if the sender knew or had special reason to know that the recipient would view the text while driving and thus be distracted.”).

13. *Id.*

14. *Id.* at 503.

to provide victims of accidents caused by texting and driving with an alternative mechanism of redress. Part II discusses empirical evidence that demonstrates the societal harm caused by texting and driving and provides the legislative background concerning the steps that states have already taken to reduce texting while driving. Part III discusses the holding, facts, and the “full duty analysis” that the New Jersey Superior Court employed in *Kubert v. Best* to impose a new duty on remote text senders.¹⁵ Part IV argues that state legislatures and courts should establish rules that impose a duty on remote persons to avoid sending text messages to drivers if they know that the driver will view the text and become distracted. Finally, Part IV also examines how a plaintiff might prove a remote text sender’s negligence under *Kubert*.

II. BACKGROUND

A. Texting and Driving Has Produced Negative Effects in Society

Empirical evidence of the negative consequences caused by distracted driving—and specifically texting and driving—should serve as incentive for society to address the issue and take steps to curtail the unsafe activity. In the United States, approximately 899,000 automobile accidents were related to distracted driving in 2010, and at least 47,000 police-reported crashes involved a driver who was distracted by an electronic device.¹⁶ Since then, various studies have concluded that the activity of texting while driving is one of the most risky forms of distracted driving.¹⁷ Furthermore, the economic costs imposed on society by accidents caused by distracted driving should further incentivize society to proactively reduce distracted driving. Specifically, a study by the National Highway Traffic Safety Administration reported that the economic cost of distracted driving equated to a total cost of at least \$40 billion.¹⁸ This figure includes “losses [of] productivity, medical

15. *Id.* at 517 (“Our conclusion that a limited duty should be imposed on the sender [of a text] is supported by the “full duty analysis” described by the [New Jersey] Supreme Court . . .”).

16. NHTSA, *supra* note 1, at 24819, 24823.

17. To illustrate the distracting nature of cell phone use while driving, research has revealed that there are three primary types of distractions that affect a driver’s ability to operate an automobile: visual, manual, and cognitive. A driver is visually distracted when he glances away from the road to “visually obtain information,” manually distracted when he removes his hand from the steering wheel to manipulate a device, and cognitively distracted when his mental attention is diverted from the task of driving. Some tasks, such as interacting with passengers or changing the radio station, only distract a driver in one or two ways, while texting and driving distracts a driver in all three ways. *Id.* at 24819.

18. LAWRENCE BLINCOE ET AL., THE ECONOMIC AND SOCIETAL IMPACT OF MOTOR VEHICLE

costs, legal and court costs, emergency service costs, insurance administration costs, congestion costs, property damage, and workplace losses.”¹⁹

The societal movement to decrease incidences of drinking and driving offers guidance on how society should approach the problem of texting and driving.²⁰ Analogously, drinking and driving has resulted in harmful societal consequences and has been fiercely combated.²¹ Particularly, over the last several decades, media campaigns, legal prohibitions, and heightened public awareness of the issue led to a decrease in accidents related to drinking and driving and, in turn, decreased the number of deaths caused by drinking and driving.²² To illustrate, alcohol related accidents that resulted in a fatality declined by 23 percent from 13,099 in 2004 to 10,076 in 2013.²³ Thus, by adopting similar techniques, particularly by increasing civil liability, incidences of accidents related to texting and driving can also be reduced.

B. Texting-and-Driving Laws Have Been Enacted by State Legislatures to Combat the Negative Effects of Texting and Driving

In response to the increase in accidents caused by texting and driving, a majority of states have enacted measures to curb the phenomenon in various forms.²⁴ Currently, forty-six states have enacted a texting-and-driving ban for all drivers.²⁵ For example, New Jersey has

CRASHES, at 4 (2015).

19. *Id.* at 5.

20. See *Kubert*, 432 N.J. Super. at 519 (noting that the public learned of the dangers of drinking and driving through a “sustained campaign and enhanced criminal penalties and civil liability”).

21. See Steven Grossman, *Hot Crimes: A Study in Excess*, 45 CREIGHTON L. REV. 33, 47, 54-55 (2011) (noting that advocacy groups such as Mothers Against Drunk Driving were successful in raising awareness of issues such as “the problem created by the drunk driver, the overly lenient sentences that many drunk drivers received at that time, and the need for new legislation”).

22. See Marykate E. Williams, *Learning from the Past to Improve the Future: Taking A Lesson from America’s Drunk Driving Dilemma to Cure the Current Texting While Driving Epidemic*, 41 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 253, 263 (2015) (reporting that after states increased the drinking age to 21, drunk driving accidents involving fatalities decreased by 53 percent from 1982 to 2011).

23. NAT’L HIGHWAY SAFETY ADMIN., U.S. DEP’T OF TRANSP., REP. NO. DOT HS 812 102, ALCOHOL-IMPAIRED DRIVING (2014).

24. Even President Obama has taken steps to reduce texting and driving. For instance, in 2009 he issued an executive order to “demonstrate Federal leadership in improving safety on our roads and highways” by imposing a “Federal Government-wide prohibition on the use of text messaging while driving on official business or while using Government-supplied equipment.” Federal Leadership on Reducing Text Messaging While Driving, 74 Fed. Reg. 51225, 51225 (Oct. 6, 2009).

25. *Distracted Driving Laws*, GOVERNORS HIGHWAY SAFETY ASS’N (Nov. 2015),

enacted several statutes to suppress texting while driving. Specifically, New Jersey's traffic regulation that bans texting while driving sets forth penalties, which, if violated, carry monetary sanctions that may be enhanced with each subsequent violation and may also lead to an operator's license forfeiture.²⁶ Further, partly in response to the facts giving rise to the litigation in *Kubert v. Best*, the New Jersey legislature enacted a provision within its criminal code known as the "Kulesh, Kubert, and Bolis Law."²⁷ The statute places severe criminal penalties on a defendant convicted of recklessly causing an accident resulting in bodily injury to another.²⁸ Finally, the statute permits a jury to infer that the defendant was driving recklessly if there is sufficient proof that the defendant violated New Jersey's texting-while-driving statute.²⁹

Conversely, some states have prohibited texting and driving for only certain classes of drivers. For example, Missouri places a restriction on texting and driving for drivers 21 years of age or younger, in lieu of an outright ban.³⁰ Texas has adopted a limited ban on specific classes of individuals, such as drivers under 18 years of age and school bus drivers who are driving underage children.³¹ The mechanism for enforcement also varies by state, where most states have adopted a primary enforcement scheme, while others enforce texting while driving as a secondary offense.³² However, several states have not yet enacted outright prohibitions on texting while driving for all drivers. Particularly, states such as Arizona and Montana have not yet adopted a state-wide ban on texting and driving.³³

http://www.ghsa.org/html/stateinfo/laws/cellphone_laws.html [hereinafter *Distracted Driving Laws*] ("Currently, 46 states, D.C., Puerto Rico, Guam and the U.S. Virgin Islands ban text messaging for all drivers.").

26. N.J. STAT. ANN. § 39:4-97.3(d) (West 2013) (setting forth a monetary penalty of \$200-\$300 for a first violation, \$400-\$600 for a second violation, \$600-\$800 for a third violation, and a discretionary operator's license forfeiture for a fourth offense).

27. See N.J. STAT. ANN. § 2C:11-5 editors' note (West 2012). New Jersey's assault-by-auto statute states: "Proof that the defendant was operating a hand-held wireless telephone while driving a motor vehicle in violation of [New Jersey's texting-while-driving statute] may give rise to an inference that the defendant was driving recklessly." N.J. STAT. ANN. § 2C:12-1(c)(1) (West 2015).

28. Assault by auto, when it involves a driver who was using a cell phone, is a fourth-degree crime if a person was seriously injured as a result of the accident. N.J. STAT. ANN. § 2C:12-1(c)(2) (West 2014).

29. See *supra* text accompanying note 27.

30. *Distracted Driving Laws*, *supra* note 25.

31. *Id.*

32. *Id.* (noting that all but five states that ban texting while driving have primary enforcement schemes).

33. *Id.*

C. Several Courts Have Extended Liability to Passengers of Motor Vehicles

Courts in New Jersey have recognized that passengers of automobiles may be held liable to third-party victims for accidents caused by the driver of an automobile.³⁴ Generally, while passengers cannot be held liable for injuries to third parties based on the negligent conduct of the driver, New Jersey courts have imposed a duty on passengers not to interfere with the driver's operation and control of a motor vehicle.³⁵

Courts in other jurisdictions have similarly held that a passenger may be held liable to an injured third party if she interferes with the driver's control of the automobile through her own affirmative negligence.³⁶ Specifically, conduct such as grabbing and turning the steering wheel, distracting the driver's attention from the road, obstructing the driver's view, and urging the driver to violate traffic laws, such as driving under the influence of drugs, may constitute conduct sufficient to demonstrate that the passenger interfered with the driver's operation of the motor vehicle.³⁷ For example, in *Adams v. Morris*, the court held that the passenger owed a duty of care to the third-party plaintiff after the passenger diverted the driver's attention from the road when the passenger asked the driver to clean a car seat.³⁸ Additionally, it was held in *Brainerd v. Stearns* that a passenger who attempts to take control of an automobile by grasping the wheel may be held liable for negligence when that automobile causes injury to a third party due to an attempted commandeering of the automobile.³⁹ Next, the court in *Reclusado v. Mangum* stated that an act that directly interferes

34. *E.g.*, *Lombardo v. Hoag*, 269 N.J. Super. 36, 54 (App. Div. 1993) (citing *Lind v. Slowinski*, 450 N.W.2d 353, 356-57 (Ct. App. 1990) (stating that a passenger may be held liable to a third party if he or she interferes with the driver's ability to operate the vehicle)).

35. *Id.* ("A passenger has a duty not to interfere with the operations of the driver.").

36. *See Olson v. Ische*, 343 N.W.2d 284, 288 (Minn. 1984) ("A passenger who interferes with his driver's operation of the motor vehicle, for instance by grabbing the steering wheel, may be liable to others . . .").

37. Gregory G. Sarno, *Liability of Motor Vehicle Passenger for Accident*, 50 AM. JURIS. PROOF FACTS 2d 677 § 2 (1988).

38. 584 S.W.2d 712, 716-17 (Tex. Civ. App. 1979) ("[The passenger] diverted the driver's attention from the road by requesting him to clean up the seat Under such a state of facts and circumstances, the trial court correctly concluded that appellant owed a duty to . . . the [third-party] plaintiffs.").

39. 155 Wash. 364, 366, 368-70 (Wash. 1930) ("The [passenger] knew, or to him is imputed the knowledge, that the probable consequence of [grasping the steering wheel] would be to cause an accident. Such disregard of consequences warranted the jury in finding the [passenger] guilty of gross negligence.").

with a driver's operation, such as "holding some object" in front of the driver's eyes, would be a breach of a statutorily defined duty not to interfere with the driver's control of an automobile.⁴⁰ Finally, *Price v. Halstead* established that passengers may be liable to third parties for injuries caused by an intoxicated driver if the passengers substantially encouraged the driver's impairment.⁴¹

These decisions in which courts have extended liability to passengers may serve as an important basis for courts to extend liability to remote text senders. Appropriately, the *Kubert* court extended passenger liability to include remote text senders who, under circumstances similar to passengers that divert the driver's attention from the road, interfere with the driver's operation of the motor vehicle.⁴²

III. A CLOSER LOOK AT *KUBERT V. BEST*

A. *Kubert's Holding Places a New Duty on Remote Text Senders*

Kubert's holding imposes a new duty on remote text senders in relation to the public who use the roadways.⁴³ This holding is articulated in several different ways throughout the court's opinion.⁴⁴ Essentially, the court held that "[t]he sender of a text message can potentially be liable if an accident is caused by texting, but only if the sender knew or had special reason to know that the recipient would view the text while driving and thus be distracted."⁴⁵ The court explained that a sender has "special reason to know" based on a "personal relationship or prior experience that put a defendant 'in a position' to 'discover the risk of harm.'"⁴⁶ Thus, a sender will have breached a duty to the public who use the roadways by distracting the driver if the sender either knew or had

40. 228 Cal.App.2d 8, 15-16 (Cal. Dist. Ct. App. 1964) ("[A]cts which the code section is designed to prevent . . . such as . . . blinding [the driver's] view of the road by holding some object in front of his eyes . . . would be [a] breach[] of the code section.").

41. 177 W.Va. 592, 600 (W. Va. 1987) ("[A] passenger may be found liable for injuries to a third party caused by the intoxication of the driver of the vehicle in which he is riding . . .").

42. *Kubert v. Best*, 432 N.J. Super. 495, 515 (App. Div. 2013) (stating that the court imposed liability on remote text senders by "examining the law in [the] analogous circumstance[]" of passenger liability).

43. *Id.*

44. *See id.* at 495, 503, 507, 514-15, 517, 519.

45. *Id.* at 503.

46. *Id.* at 517 (quoting *J.S. v. R.T.H.*, 155 N.J. 330, 338 (N.J. 1998)) ("In *J.S.*, the Court used the phrase 'special reason to know' in reference to a personal relationship or prior experience that put a defendant 'in a position' to 'discover the risk of harm.'").

“special reason to know” that the driver would view the message while driving.⁴⁷

B. Factual and Procedural Background of Kubert

In *Kubert*, the plaintiffs, Linda and David Kubert, were riding a motorcycle when Kyle Best, who was driving a pick-up truck, veered into the opposite lane and collided with the Kuberts.⁴⁸ Best stopped his vehicle and immediately dialed 911.⁴⁹ As a result of the collision, both Linda and David Kubert lost their left legs.⁵⁰

The Kuberts filed suit against Best in the Morris County Superior Court in New Jersey. In preparing for the lawsuit, the Kuberts’ attorney investigated Best’s actions on the day of the accident and discovered that Best had been in continuous communication with Shannon Colonna via text message and telephone throughout the day.⁵¹ While the cell-phone record revealed that Best and Colonna had texted each other sixty-two times on the day of the accident, the two defendants were not in a romantic relationship at the time, but were merely friends.⁵² Further, because the cell-phone record indicated that Best sent a text to Colonna immediately before the accident, the court reasoned that it could be inferred that Best replied to Colonna’s text received only thirty-five seconds earlier.⁵³ Seventeen seconds after responding to Colonna’s text, Best called 911.⁵⁴ Thus, the evidence suggested that Best must have collided with the Kuberts at some point during those seventeen seconds.⁵⁵

The Kuberts added Colonna as a defendant to the lawsuit and their attorney attempted to obtain the content of the text messages that were

47. *Id.* (“[W]hen the sender ‘has actual knowledge or special reason to know[]’ . . . from prior texting experience or otherwise, that the recipient will view the text while driving, the sender has breached a duty of care to the public by distracting the driver.”).

48. *Id.* at 503-04.

49. *Id.* at 504.

50. *Id.*

51. *Id.* (noting that the Kuberts’ attorney “developed evidence to prove Best’s activities on the day of the accident” and that “they texted each other many times each day . . .”).

52. *Id.*

53. The opinion appears to contain a scrivener’s error here. Specifically, it states that only twenty-five seconds elapsed between the time when Best received Colonna’s text at 5:48:23 and when Best responded with a text at 5:48:58. *Id.* at 506 (“It can be inferred that he sent [his] text in response to Colonna’s text to him that he received twenty-five seconds earlier.”). In fact, thirty-five seconds would have elapsed.

54. *Id.* at 505.

55. *Id.* at 505-06.

exchanged between Best and Colonna.⁵⁶ However, the Kuberts' attorney did not have access to that information and neither Best's nor Colonna's depositions contained what the contents of those text messages were.⁵⁷ Eventually, Best settled and Colonna moved for summary judgment.⁵⁸ The trial court concluded that remote persons do not have a legal duty to avoid sending text messages to drivers, even if the remote person knows that the recipient is driving.⁵⁹ The Kuberts appealed the trial court's dismissal of their claims against Colonna to the Appellate Division of the New Jersey Superior Court.⁶⁰

C. *The Rationale of the Kubert Decision*

To reach its conclusion that the sender of a text has a limited legal duty not to send a text in certain circumstances, the *Kubert* court engaged in the common law process of formulating a new duty under a "full duty analysis."⁶¹ First, the court noted that a "duty is an obligation imposed by law requiring one party to conform to a particular standard toward another," that defining a duty is an issue of law, and that "determinations of the scope of duty in negligence cases has traditionally been a function of the judiciary."⁶² Next, the court briefly stated that imposing a legal duty requires balancing several factors, such as "the relationship of the parties, the nature of the attendant risk, the opportunity and ability to exercise care, and the public interest in the proposed solution."⁶³ Importantly, the court noted that not only does the imposition of a duty upon a defendant need to reach a just outcome in the specific circumstance, but that it must be a "generally applicable rule that governs societal behaviors."⁶⁴

The court next considered the Kuberts' argument that Colonna should be held liable under a theory of aiding and abetting. The Kuberts

56. *Id.* at 506.

57. *Id.*

58. *Id.* at 501, 506 ("[The Kuberts'] claims for compensation from [Best] have been settled and are no longer part of this lawsuit.").

59. *Id.* at 506-07.

60. *Id.* at 501 ("Plaintiffs appeal the trial court's dismissal of their claims against the driver's seventeen-year-old friend who was texting the driver much of the day and sent a text message to him immediately before the accident.").

61. *Id.* at 509-10 ("The New Jersey Supreme Court recently analyzed the common law process by which a court decides whether a legal duty of care exists to prevent injury to another . . . [and] described [this process] as 'a full duty analysis.'").

62. *Id.* at 509, 519.

63. *Id.* at 510 (quoting *Desir ex. rel. Estiverne v. Vertus*, 214 N.J. 303 (2013)).

64. *Id.* (quoting *Desir ex. rel. Estiverne v. Vertus*, 214 N.J. 303 (2013)).

cited the Second Restatement of Torts § 876, and argued that under this Section “[A]n individual is liable if he or she knows that another person’s ‘conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other.’”⁶⁵ Under this theory, the Kuberts argued that Colonna was essentially “electronically present” when she aided and abetted Best’s use of a cell phone immediately before the accident.⁶⁶ The court acknowledged that the Superior Court of New Jersey had previously adopted the principle set forth in § 876 and discussed two previous cases in which the Superior Court applied the Section to passenger liability cases.⁶⁷ Specifically, in *Champion ex rel. Ezzo v. Dunfee*⁶⁸ and *Podias v. Mairs*,⁶⁹ the court examined whether passengers of a vehicle could be held liable if an injury resulted from the driver’s negligent conduct, and the court discussed each seriatim.

Champion set forth two exceptions to the general rule that a passenger does not owe a duty to other passengers and thus permits one passenger of a vehicle to recover against a defendant passenger under either of two conditions.⁷⁰ First, recovery is permitted if there is a “special relationship” that exists between the passenger and driver which allows the passenger to have control over the actions of the driver.⁷¹ Second, recovery is permitted if the passenger “substantially encourages or assists” the driver to engage in negligent behavior.⁷² However, the *Kubert* court found that the defendant neither had a special relationship with the driver nor actively encouraged the driver to text while driving and concluded that merely sending a text does not constitute “active encouragement” because it does not urge the driver to immediately view the text.⁷³

In *Podias v. Mairs*, the court considered “whether passengers in a

65. *Id.* at 510. (quoting RESTATEMENT (SECOND) OF TORTS § 876 (AM. LAW INST. 1979)).

66. *Id.* at 511 (“Although Colonna was at a remote location from the site of the accident, plaintiffs say she was ‘electronically present’ in Best’s pick-up truck immediately before the accident and she aided and abetted his unlawful use of his cell phone.”).

67. *Id.* at 510-13.

68. 398 N.J. Super. 112 (App. Div. 2008).

69. 394 N.J. Super. 338 (App. Div. 2007).

70. *Champion*, 398 N.J. Super. at 121-22.

71. *Id.* (“A special relationship exists where the occupant has some control over the driver, as where the driver is in the occupant’s employ or where they are engaged in a joint enterprise or venture.”).

72. *Id.* at 122 (“The other recognized exception to the rule of passenger non-liability is where the passenger substantially encourages or assists in the driver’s tortious conduct.”).

73. *Kubert*, 432 N.J. Super. at 512 (“Colonna did not have a special relationship with Best . . . [and] the act of sending [text] messages, by itself, is not active encouragement that the recipient read the text and respond immediately, that is, while driving and in violation of the law.”).

car may, in certain circumstances, owe a duty to a pedestrian struck by a driver who is either unwilling or unable to seek emergency aid or assistance himself.”⁷⁴ Adopting § 876 of the Second Restatement, the court concluded that third parties may be held liable on an aiding and abetting theory if the third party gives “substantial assistance” or encourages the driver to leave the scene of an accident and causes the driver to neglect fulfilling his duty to assist the injured party.⁷⁵ However, in *Kubert*, the court found that there was insufficient evidence to prove that Colonna “took affirmative steps and gave substantial assistance to [the driver] in violating the law.”⁷⁶ Thus, the court concluded that Colonna could not be held liable for aiding and abetting the driver’s negligent conduct.⁷⁷

While neither of these cases persuaded the court that a duty should be imposed on the remote sender of a text under an aiding and abetting theory, the court continued its analysis without reference to the party’s arguments under an alternative theory of liability that runs analogous to passenger liability.⁷⁸ The court began by citing the Second Restatement of Torts § 303, which states that “[a]n act is negligent if the actor intends it to affect, or realizes or should realize that it is likely to affect, the conduct of another, third person, or an animal in such a manner as to create an unreasonable risk of harm to the other.”⁷⁹ Further, the court offers an illustration of this concept, which states: “A is driving through heavy traffic. B, a passenger in the back seat, suddenly and unnecessarily calls out to A, diverting his attention, thus causing him to run into the car of C. B is negligent toward C.”⁸⁰ Based on this illustration, the court expanded the scope of passenger liability by imposing a duty to avoid unreasonably risky conduct that the passenger knows or has special reason to know will distract the driver, such as urging the driver to

74. *Podias*, 394 N.J. Super. at 343.

75. *Kubert*, 432 N.J. Super. at 513 (quoting RESTATEMENT (SECOND) OF TORTS § 876 (AM. LAW INST. 1979)) (“We [have] held that the passengers could be found liable for giving ‘substantial assistance’ to the driver in failing to fulfill his legal duty to remain at the scene of the accident and to notify the police.”).

76. *Id.*

77. *Id.* (“The evidence available to plaintiffs is not sufficient to prove Colonna’s liability to the Kuberts on the basis of aiding and abetting Best’s negligent driving while using a cell phone.”).

78. *Id.* at 515-18 (“When the sender knows that the text will reach the driver while operating a vehicle, the sender has a relationship to the public who use the roadways similar to that of a passenger physically present in the vehicle.”).

79. *Id.* at 515 (quoting RESTATEMENT (SECOND) OF TORTS § 303 (AM. LAW INST. 1965)).

80. *Id.* (quoting RESTATEMENT (SECOND) OF TORTS § 303 cmt. d, illus. 3 (AM. LAW INST. 1965)).

remove his gaze from the road to view a cell phone screen.⁸¹

Finally, the court states that foreseeability, a “foundational element” in determining whether a duty exists, is “based on the defendant’s knowledge of the risk of injury.”⁸² Next, the court reasoned that the sender of a text takes a foreseeable risk if the sender is aware that the recipient is driving and will view the text immediately.⁸³ Therefore, the court concluded that if a person sends a text to a recipient when the sender has either actual knowledge or special reason to know that the recipient is driving and will read the text, then the sender has, like a passenger, “knowingly engaged in distracting conduct” and has breached the duty of care owed to the public who use the roadways.⁸⁴

D. The Concurring Opinion’s Disagreement with the Majority’s Holding Should Be Afforded Minimal Weight

Judge Espinosa delivered a concurring opinion in which she concurred in the judgment but disagreed with the majority’s holding that established a new duty rule for remote text senders.⁸⁵ The concurrence began by emphasizing individual liability and argued that it should be the sole responsibility of the driver to avoid distractions.⁸⁶ Further, it stated that the majority improperly equates passengers with remote text senders because the remote sender “lacks firsthand knowledge of the circumstances attendant to the driver’s operation of the vehicle that a passenger possesses and has even less ability to control the actions of the driver.”⁸⁷ While Judge Espinosa concedes that the threshold of the new duty rule is so high that it will rarely be satisfied, essentially she opined that because traditional tort principles provide a sufficient analytical

81. *Id.* at 515-18 (“[A] passenger must avoid distracting the driver. The remote sender of a text who knows the recipient is then driving must do the same.”).

82. *Id.* at 516 (quoting *Podias v. Mairs*, 394 N.J. Super. 338, 350 (App. Div. 2007); *J.S. v. R.T.H.*, 155 N.J. 330, 337 (1998)) (“Foreseeability of the risk of harm is the foundational element in the determination of whether a duty exists Foreseeability, in turn, is based on the defendant’s knowledge of the risk of injury.”).

83. *Id.* at 517.

84. *Id.* (“[I]f the sender knows that the recipient is both driving and will read the text immediately . . . [t]he sender has knowingly engaged in distracting conduct, and it is not unfair also to hold the sender responsible for the distraction.”).

85. *Id.* at 520 (Espinosa, J., concurring) (“I do not agree that it is necessary for us to articulate a new duty specific to persons in remote locations who send text messages to drivers . . .”).

86. *Id.* at 520-21 (quoting *Podias v. Mairs*, 394 N.J. Super. 338, 346 (App. Div. 2007)) (“Traditional tort theory emphasizes individual liability, which is to say that each particular defendant who is to be charged with responsibility must be proceeding negligently.”).

87. *Id.* at 521.

framework for approaching the issue of remote text sender liability, it was unnecessary for the majority to articulate a new duty rule.⁸⁸

To demonstrate how basic tort principles should be the sole guide of a court's analysis when determining whether a remote text sender will be held liable, the concurrence applied the passenger liability analysis formulated under *Champion* to the case at bar.⁸⁹ In *Kubert*, because there existed no "special relationship" between the remote sender and the recipient-driver, this exception to passenger non-liability was not present, and so the concurrence proceeded with its analysis under an aiding and abetting theory based on the Second Restatement of Torts § 876.⁹⁰ In particular, the concurrence focused on the third element of aiding and abetting under the Second Restatement, which requires that the defendant "knowingly and substantially assist the principal violation."⁹¹ To determine whether substantial assistance was present in a particular case, the comment to the Second Restatement lists five factors, including whether the defendant was present or absent at the time of the commission of the tort.⁹² The concurrence argued that because a remote text sender will not be physically present in the automobile when the tort is committed, "at least" this one factor would weigh against holding the sender liable.⁹³ The concurrence reasoned that only a passenger, unlike a remote sender, can be aware of the circumstances regarding the driver's situation, and so only passengers can be aware of the risks created by the driver's conduct, whereas a remote person who is not physically present cannot.⁹⁴

However, there are several difficulties with the concurrence's

88. *Id.* at 520 ("In my view, traditional tort principles provide adequate guidance to determine whether liability should be imposed in such circumstances.").

89. *Id.* at 522.

90. *Id.* at 522-23 ("As the majority opinion notes, the type of 'special relationship,' such as parent-child, master-servant, landlord-tenant, and guardian-ward, required to impose liability for the conduct of another . . . was not present here.").

91. *Id.* (quoting *Tarr v. Ciasulli*, 181 N.J. 70, 84 (2004) (citing RESTATEMENT (SECOND) OF TORTS § 876(b) (AM. LAW INST. 1979))).

92. RESTATEMENT (SECOND) OF TORTS § 876 cmt. d (AM. LAW INST. 1979) (listing five considerations, including "the nature of the act encouraged, the amount of assistance given by the defendant, his presence or absence at the time of the tort, his relation to the other and his state of mind").

93. *Kubert*, 432 N.J. Super. at 523 (Espinosa, J., concurring) (citing RESTATEMENT (SECOND) OF TORTS § 876 cmt. d (AM. LAW INST. 1979)) ("When the tort is the driver's use of text messaging, it is evident that *at least one* of the factors—the remote texter's absence from the location of the tort—will weigh against liability.") (emphasis added).

94. *Id.* (citing *Champion ex rel. Ezzo v. Dunfee*, 398 N.J. Super. 112, 122-23 (App. Div. 2008)) ("[T]he passenger's presence in the automobile provide[s] an awareness of the circumstances that contribute[s] to the risk created by the driver's conduct.").

analysis of this particular factor under the theory of aiding and abetting. First, even if the remote sender is not physically present in the vehicle, the driver is most likely operating a vehicle to reach a destination, which will require the driver to operate a vehicle on a public road. Thus, if the remote sender is aware that the recipient is driving, this should give the remote sender sufficient “awareness of the circumstances” that there will likely be other drivers in the recipient’s immediate proximity, regardless of whether the sender has “first-hand knowledge” based on his physical presence.⁹⁵ Also, while the sender’s absence may weigh against liability according to the Second Restatement’s comment, this is only one of five factors that help determine whether the sender substantially assisted the driver’s negligent conduct.⁹⁶ Therefore, regardless of whether the text sender is physically present in the vehicle, if a potential plaintiff is able to prove that the sender had knowledge that the recipient was both driving and was likely to view the message and become distracted, the sender has sufficient awareness of the circumstances because negligent driving upon a public highway almost certainly carries an inherent risk of injury to others.⁹⁷

Moreover, the concurring opinion misconstrued the premise of the majority’s holding when it states that “knowledge a text message will ‘reach the driver while operating the vehicle,’ without more, places the remote text sender in a position equivalent to that of a passenger in the vehicle.”⁹⁸ This misstatement lacks the other essential component regarding the sender’s state of mind because the sender must not only know that the recipient is driving, but also that the recipient will view the text and thereby become distracted.⁹⁹ Consequently, when the concurrence proceeds to analyze whether Colonna would be held liable under an aiding and abetting theory, this important requirement is overlooked. Particularly, when evaluating whether Colonna was aware that she was assisting the driver’s tortious conduct, the concurrence’s

95. *Id.* at 521.

96. *See* RESTATEMENT (SECOND) OF TORTS § 876 cmt. d (AM. LAW INST. 1979) (noting that several factors should be considered in determining whether the “assistance of or participation by the defendant may be so slight that he is not liable for the act of [another]”).

97. To illustrate this inherent risk, in 2010 there were approximately 5,409,000 police-reported crashes in the United States. NHTSA, *supra* note 1, at 24818, 24823-25 tbl.1. *Visual-Manual NHTSA Driver Distraction Guidelines for In-Vehicle Electronic Devices*, 78 Fed. Reg. 24818, 24823-25 tbl.1 (proposed April 26, 2013) (not to be codified).

98. *Kubert*, 432 N.J. Super. at 521 (Espinosa, J., concurring).

99. *Id.* at 515-16 (majority opinion) (“[A]dditional proofs are necessary to establish the sender’s liability, namely, that the sender also knew or had special reason to know that the driver would read the message while driving and would thus be distracted from attending to the road and the operation of the vehicle.”).

analysis focused on whether she knew that she was “substantially assist[ing]” the conduct.¹⁰⁰ In contrast, *Kubert*’s holding permits courts to hold a remote sender liable when faced with evidence that the sender merely knew or had special reason to know that the driver was likely to view the text and become distracted.¹⁰¹ Thus, while the standard of evidence proving the requisite state of mind under *Kubert* might be lower than under an aiding and abetting theory, it is more realistic in terms of deterring a text sender’s detrimental behavior, and as the concurrence concedes, “will rarely be met.”¹⁰²

Lastly, the concurrence states that the legislature has recognized the risk of harm associated with texting and driving and has acted when it amended its assault by auto statute.¹⁰³ In the concurrence’s view, because the legislature’s action addressed only the conduct of the driver and failed to establish any civil or criminal liability for a remote sender, the legislature would disapprove of the majority’s extension of liability to remote text senders.¹⁰⁴ However, as the concurrence concedes, while there was no indication in the record that the legislature would have extended liability, indication that the legislature considered the precise issue is similarly absent.¹⁰⁵ This argument essentially relies on legislative inaction, which is generally a relatively weak indicator of legislative intent.¹⁰⁶

Absent legislative action, at common law it is generally the role of the court to impose a new duty in the face of “changing social relations and exigencies and man’s relation to his fellows.”¹⁰⁷ In light of text

100. *Id.* at 525 (Espinosa, J., concurring).

101. *Id.* at 503 (majority opinion).

102. *Id.* at 520 (Espinosa, J., concurring) (“[T]he bar set by the majority for the imposition of liability is high and will rarely be met since the duty created arises when the conduct of a person, not in an automobile, interferes with the driver’s operation of the vehicle.”).

103. *Id.* at 525-26; *see also supra* text accompanying note 32.

104. *Kubert*, 432 N.J. Super. at 525-26 (Espinosa, J., concurring) (“We have nothing before us that reflects whether the Legislature considered legislation that would have imposed either civil liability or criminal penalties for a remote texter who sends a distracting text message to a driver.”).

105. *See id.* at 525.

106. *See* *Bob Jones Univ. v. United States*, 461 U.S. 574, 600 (1983) (“Ordinarily, and quite appropriately, courts are slow to attribute significance to the failure of Congress to act on particular legislation.”); *see also* Michael E. Solimine & James L. Walker, *The Next Word: Congressional Response to Supreme Court Statutory Decisions*, 65 TEMP. L. REV. 425, 429 (1992) (“The United States Supreme Court generally gives little weight to legislative inaction, since a variety of reasons . . . may account for the inaction.”).

107. *See* *Stewart v. 104 Wallace St., Inc.*, 87 N.J. 146, 158 (1981) (noting that the legislature’s refusal to impose liability on a defendant is not dispositive because the “drawing of the parameters of tort liability has historically been a matter of common law”); *Essex v. N.J. Bell Tel. Co.*, 166 N.J. Super. 124, 127 (App. Div. 1979) (explaining how the existence of a duty at law must be flexible to adapt to changing social conditions).

messaging, an unprecedented method of communication that has changed the relationships between members of society in ways that no other form of communication could have prepared the law for, it is reasonable for courts to impose a duty on remote text senders in response to the foreseeable dangers that texting and driving may potentially produce.¹⁰⁸ Consequently, a lack of legislative action regarding a text sender's liability should not dissuade a court from imposing a duty on remote text senders because, even if a legislature's policy differs from that of the court, legislatures are empowered to overturn a court's decision if it be the will of the people.¹⁰⁹

IV. STATES SHOULD PERMIT VICTIMS OF ACCIDENTS CAUSED BY TEXTING AND DRIVING TO RECOVER AGAINST REMOTE TEXT SENDERS

A. States Should Adopt Rules That Impose a Duty on Remote Text Senders

State courts and legislatures should, in a manner similar to that of *Kubert*, hold that remote persons have a duty to avoid sending text messages to drivers if they know or have special reason to know that the driver will view the text and become distracted.¹¹⁰ For the purposes of predictability, state legislatures should enact legislation that defines the contours of the new duty, which will provide potential plaintiffs with a cause of action and will provide the public with the opportunity to avoid behaviors that will open themselves up to liability.

As Oliver Wendell Holmes stated, “[A]ny legal standard must, in theory, be capable of being known. When a man has to pay damages, he is supposed to have broken the law, and he is further supposed to have known what the law was.”¹¹¹ For a sender to have notice of the circumstances in which he might be held liable for texting a driver, he should be able to turn to an unambiguous statement of the law. As an illustration, New Jersey's statute banning texting while driving sets forth the contours of liability for drivers who violate the statute.¹¹² This allows

108. See *Kubert*, 432 N.J. Super. at 519 (“[T]he public interest requires fair measures to deter dangerous texting while driving.”).

109. For example, tort reform acts passed by the New Jersey Legislature alter tort principles traditionally formulated at common law. See, e.g., N.J. STAT. ANN. § 2A:15-5.3 (West 2015) (altering the recovery of damages under comparative negligence).

110. *Kubert*, 432 N.J. Super. at 519 (noting that the issue of texting and driving will “become part of the public consciousness when the liability of those involved matches the seriousness of the harm”).

111. OLIVER W. HOLMES JR., *THE COMMON LAW* 111 (1881).

112. N.J. STAT. ANN. § 37:4-97:3 (West 2013) (describing the prohibited conduct under New

drivers to conform their conduct in accordance with this statute to avoid liability.

B Remote Text Sender's Duty Aligns with the Parameters Set Forth in Palsgraf

The relational aspects of breach and duty set forth in *Kubert* properly align in a manner consistent with *Palsgraf* so that a remote text sender may indeed breach a duty of care to the public who use the roadways. In *Palsgraf*, Judge Cardozo introduced the notion that the elements of breach and duty must align for a plaintiff to recover even if the defendant's conduct actually causes the plaintiff's injury.¹¹³ The events in *Palsgraf* take place at a train station where the guard of a railroad car pushed a gentleman carrying a package.¹¹⁴ The contents of the package, unbeknownst to all because of its modest appearance, in fact contained fireworks, which exploded upon impact with the ground.¹¹⁵ The plaintiff, a young woman who stood "many feet away" at the other end of the platform, was injured from the explosion.¹¹⁶ The plaintiff sued the railroad company for the negligence of the guard, and the court held that, while the guard owed a duty to the gentleman carrying the package, it was not foreseeable that the apparently harmless package "had in it the potency of peril to persons thus removed."¹¹⁷ Therefore, even though the plaintiff indeed suffered an injury because of the guard's negligence, it was not foreseeable that his actions would cause harm to anyone other than the possessor of the package, and therefore he could not have breached a duty that he did not owe to the plaintiff.¹¹⁸

While a potential victim of an automobile accident would be far removed from the source of the careless conduct similar to the plaintiff in *Palsgraf*, it is "[t]he risk reasonably to be perceived [that] defines the duty to be obeyed."¹¹⁹ In *Palsgraf*, the guard did not owe a duty to the plaintiff because it was not foreseeable ex ante that he would, by

Jersey's texting-while-driving statute).

113. Ernest J. Weinrib, *The Passing of Palsgraf?*, 54 VAND. L. REV. 803, 808 (2001) ("Cardozo's achievement was to align the relational significance of risk, as a foreseeable effect on another, with the relational nature of tortious wrongdoing as the violation of the plaintiff's right.").

114. *Palsgraf v. Long Island R.R. Co.*, 248 N.Y. 339, 340-41 (N.Y. 1928).

115. *Id.* at 341.

116. *Id.*

117. *Id.*

118. *Id.* at 345 ("Negligence, like risk, is . . . a term of relation. Negligence in the abstract, apart from things related, is surely not a tort, if indeed it is understandable at all.").

119. *Id.* at 344.

showing the owner of the package, carelessly set in motion the series of events which caused a hidden but dangerous instrumentality to explode and injure the plaintiff.¹²⁰ However, unlike the guard in *Palsgraf*, the sender of a text will be held liable only if he is aware that the recipient is driving an automobile that, when operated carelessly, can foreseeably cause substantial harm to others in the immediate proximity.¹²¹ Further, even though the instrumentalities in both cases are potentially dangerous, in the case of texting a driver it is foreseeable that an automobile, because of its known and dangerous potentialities, will give notice to the actor ex ante of the “risk reasonably to be perceived.”¹²² Thus, because the sender of a text can perceive the risk to others when she sends a text knowing that the recipient is operating a dangerous instrumentality, it is not unfair to impose a duty upon the sender to refrain from engaging in an activity that has the potential to harm the public who use the roadways.¹²³

C. Proving Negligence of a Remote Text Sender Under *Kubert*¹²⁴

There are essentially two prongs that must be satisfied regarding a sender’s state of mind before the sending of a text may be considered a tortious action rendering the sender liable to a third party under *Kubert*.¹²⁵ First, the sender must have known or had special reason to know that the recipient was driving at the time he sent the text.¹²⁶ Second, the sender must have known or had special reason to know that the driver is likely to view the message while driving.¹²⁷ A plaintiff may

120. *Id.* at 342 (“To the eye of ordinary vigilance, the bundle is abandoned waste, which may be kicked or trod on with impunity.”).

121. *See id.* at 344 (“The risk reasonably to be perceived defines the duty to be obeyed, and risk imports relation; it is risk to another or to others within the range of apprehension.”).

122. Remote text senders should have notice that the recipient-driver is engaging in a potentially dangerous activity since many States require that all drivers obtain automobile insurance. *See, e.g., State v. McCourt*, 131 N.J. Super. 283, 286 (App. Div. 1974) (“[T]he State requires an owner of a dangerous instrumentality such as an automobile, as a condition precedent to use the State’s highway, to ensure compensation for damages to others that may be sustained as a result thereof.”).

123. *Kubert v. Best*, 432 N.J. Super. 495, 517 (App. Div. 2013) (explaining that it is not unfair to hold a sender responsible for distracting a driver when he or she knows that the recipient is driving and will read the text while driving).

124. Although the court in *Kubert* referenced Section 303 of the Second Restatement of Torts to reach its holding, the Third Restatement, as the most recent Restatement of Torts, will be used here as the model to demonstrate how *Kubert* could be applied in tort across jurisdictions, rather than limiting its application.

125. *Kubert*, 432 N.J. Super. at 519.

126. *Id.*

127. *Id.*

potentially satisfy these prongs in several ways. For example, a plaintiff will likely need to prove that the sender knew that the recipient was likely to view the text from circumstantial evidence or because he had special reason to know based on prior experience, a personal relationship between the sender and driver, or “otherwise.”¹²⁸ Because of the degree of interrelatedness between the prongs, it is likely that the evidence a plaintiff presents will be sufficient to satisfy both.

There are several approaches in which a plaintiff might be able to satisfy either or both prongs under *Kubert*. Testimony may reveal that the sender knew that the recipient was likely to view the text and/or that the recipient was driving.¹²⁹ Alternatively, the content of the exchange of texts between the sender and driver may be a reliable means of establishing that the sender both knew the recipient was driving and actually viewed the text based on a response to the sender’s text.¹³⁰ Also, the plaintiff might present evidence that the sender knew, from prior experience, about the recipient’s habit of viewing texts while driving or of the recipient’s commuting habits.¹³¹ Finally, evidence of certain personal relationships should permit a factfinder to infer that the sender had “special reason to know” under the doctrine of *res ipsa loquitur*.¹³²

1. A Plaintiff May Prove a Sender’s Negligence by Offering the Contents of the Relevant Exchange of Texts

Absent a “special reason to know” based on a personal relationship between sender and recipient, a plaintiff may, through discovery, offer evidence of a sender’s breach if the plaintiff obtains the content of the relevant exchange of texts between the sender and the recipient.¹³³

128. *See id.* at 517 (noting that “special reason to know” in the context of breach references a “personal relationship,” “prior texting experience,” or “otherwise”).

129. *See id.* at 520 (stating that while plaintiffs had presented testimony, it was insufficient to establish that the defendant was aware that the driver would view the defendant’s text while driving).

130. Julia Blackmon, Case Note, *Oops, I Sent it Again!*, 17 SMU SCI. & TECH. L. REV. 59, 67 (2014) (“Had the plaintiffs been able to obtain and examine the messages [between the sender and driver], seconds before the [driver’s] accident, the plaintiffs might have been able to prove that [the sender] knew or had reason to know that the [recipient] was driving when she texted him.”).

131. *See, e.g.,* L.T. v. F.M., 438 N.J. Super. 76, 89 (App. Div. 2014) (quoting N.J.R. EVID. 406) (“Evidence, whether corroborated or not, of habit or routine practice is admissible to prove that on a specific occasion a person . . . acted in conformity with the habit or practice.”).

132. *See Kubert*, 432 N.J. Super. at 517; RESTATEMENT (THIRD) TORTS: PHYS. & EMOT. HARM scope note to §§ 17-19 (AM. LAW INST. 2010) (explaining that *res ipsa loquitur* can be seen as a rule of evidence based on circumstantial evidence which permits a plaintiff to prove that the defendant breached his duty).

133. For example, under the Federal Rules of Civil Procedure, a party may generally “serve on

Alternatively, if a plaintiff is unable to obtain the texts from the sender or recipient, the plaintiff may, perhaps with some difficulty, subpoena the messages directly from the cellular service provider.¹³⁴ Indeed, in the federal district courts, case law concerning the discoverability of texts has yet to be developed.¹³⁵ Nevertheless, assuming that texts may be discovered and admitted into evidence, a court would be tasked with determining whether the plaintiff's evidence is sufficient to prove by a preponderance of the evidence that the sender knew the recipient was driving and would view the incoming text.¹³⁶

Because the *Kubert* court held that the evidence presented by the plaintiffs was insufficient to hold the defendant-sender liable, there is an absence of precedent regarding the type of evidence that would be sufficient to prove that the sender knew the recipient was driving and would view the text.¹³⁷ However, because the court does elaborate on the evidence *insufficient* to impose liability, the opinion may still offer guidance on the requisite evidence needed to prove breach.¹³⁸ Particularly, in *Kubert*, the plaintiffs presented evidence on the habits of the remote sender and recipient-driver regarding the frequent exchange of texts that occurred on the day of the incident.¹³⁹ In addition, the court

any other party a request . . . to produce and permit the requesting party to copy . . . electronically stored information . . . stored in any medium from which information can be obtained . . .” Fed. R. Civ. P. 34(a)(1)(A).

134. In order to obtain cell phone records from the telephone company, often not a party to the litigation, the requesting party may be required to show special circumstances which is not established merely upon a showing that the information sought is relevant; rather, it must be demonstrated that the information sought cannot be obtained through other sources such as the cell phone user.

Jay M. Zitter, Annotation, *Civil Liability Arising from Use of Cell Phone While Driving*, 36 A.L.R. 6TH 443(2008).

135. Erin M. Secord, Note, *Exploring Challenges With the Discovery of Text Messages in Federal Cases Through the Lens of the Federal Rules of Civil Procedure and the Stored Communications Act*, 18 U.S.C. §§ 2701-11, 15 SUFFOLK J. TRIAL & APP. ADVOC. 143, 163 (2010) (“Case law regarding text messages is largely undeveloped, leaving an expansive canvas upon which future courts may craft the jurisprudence in this area.”).

136. See Juan A. Albino, *Do Defendants Have a Privacy Interest in Their Cell Phone's Text Messages and E-mails?*, 44 REVISTA JURIDICA UNIVERSIDAD INTERAMERICANA DE P.R. 383, 395 (2009) (explaining that, under the federal rules of evidence, there are five hurdles that a party must overcome when offering texts as evidence: relevance, authenticity, hearsay, the “best evidence rule,” and probative value).

137. *Kubert v. Best*, 432 N.J. Super. 495, 520 (App. Div. 2013) (“[The Kuberts] failed to develop evidence tending to prove that [the sender] not only knew that [the recipient] was driving when she texted him . . . but that [the sender] knew [the driver] would violate the law and immediately view and respond to [the sender's] text.”).

138. See *id.* at 519-20.

139. *Id.* (“In this case, plaintiffs developed evidence pertaining to the habits of [the recipient] and [the sender] in texting each other repeatedly. They also established that the day of the accident

reiterated that the defendant only sent one text to the recipient while he was driving, that the content of that text were unknown, and that there was an absence of testimony supporting the conclusion that the defendant knew the recipient was driving and would view the text.¹⁴⁰ The court concluded that the plaintiff's evidence, which merely demonstrated a routine pattern of texting between the sender and recipient, was insufficient to prove that the sender knew the recipient was driving and would view the incoming text.¹⁴¹

As *Kubert* demonstrates, it will likely be difficult for a plaintiff to prove a sender's state of mind.¹⁴² State of mind is often proved by presenting circumstantial evidence, and in the case of proving that a remote sender knew whether the recipient would be driving and view a text, the most reliable evidence would likely be the content of the exchanged texts.¹⁴³ For example, a recipient-driver who responds "I'm driving" should give the sender sufficient knowledge that the recipient is both driving and has viewed the sender's text.¹⁴⁴ Moreover, even if a recipient's responsive text does not explicitly state that the recipient is driving, a plaintiff may nonetheless demonstrate that a sender should have at least had constructive knowledge based on the content of an earlier exchange of texts.¹⁴⁵ Specifically, if a plaintiff submits evidence

was not an unusual texting day for the two.").

140. *Id.* at 520 ("[Defendant] sent only one text while [the recipient] was driving. The contents of that text are unknown. No testimony established that she was aware [the recipient] would violate the law and read her text as he was driving, or that he would respond immediately.").

141. *Id.* ("The evidence of multiple texting at other times when [the recipient] was not driving did not prove that [the sender] breached the limited duty we have described.").

142. *Cf.* *State v. Johns*, 301 Or. 535, 551 (1986) ("[S]tate of mind is often the most difficult element of a crime to prove because many crimes are unwitnessed and even if a witness is present, the witness can only surmise the actor's state of mind."); *see also* David P. Leonard, *The Use of Uncharged Misconduct Evidence to Prove Knowledge*, 81 NEB. L. REV. 115, 122 (2002) ("[K]nowledge is an essential element or part of the mental element of some civil claims as well . . .").

143. *See* *Gray v. Press Commc'ns, LLC*, 342 N.J. Super 1, 12 (App. Div. 2001) (citing *Costello v. Ocean Cty. Observer*, 136 N.J. 594, 615 (1994)) ("Rarely will direct evidence be available to prove state of mind."); *see also* Leonard, *supra* note 142, at 120 ("Because states of mind almost always must be proven circumstantially, courts have long been lenient in permitting all forms of evidence . . . to prove the mental state.").

144. *See also* *Kubert*, 432 N.J. Super. at 506 (noting that because the recipient sent a text back to the sender less than a minute after the recipient received the sender's text, it can be inferred that the recipient sent that text in response to the sender's original text).

145. *See* *Feldman v. Lederle Laboratories*, 97 N.J. 429, 452 (1984) ("Constructive knowledge embraces knowledge that should have been known based on information that was reasonably available or obtainable and should have alerted a reasonably prudent person to act."). And, as *Kubert* teaches, merely offering evidence that demonstrates an earlier pattern of texting, without disclosing the content of those texts, cannot prove that a remote sender breached his or her duty. *Kubert*, 432 N.J. Super. at 506, 512, 519-20 (emphasizing that the content of the exchanged texts

of the content of an exchange of texts from an earlier date at a similar time of day where the recipient had previously responded by stating that he was driving, the factfinder should be permitted to infer that the sender should have known, based on prior knowledge, that the recipient was likely to be driving at that time and would view the text.¹⁴⁶ This inference should be more compelling if the content of the texts reveal that the recipient previously informed the sender of when the recipient was likely to be commuting.¹⁴⁷

On the other hand, a recipient who responds by texting “I can’t talk because I’m about to drive” may indicate that the sender did not know that the recipient was driving, even if she in fact was driving. Similarly, cell phone applications exist that will automatically respond to a text by informing the sender that the recipient is driving and cannot respond.¹⁴⁸ Thus, while such a response will give the sender notice that the recipient is driving, the use of this application may cause a factfinder to presume that the sender did not have knowledge that the recipient would view the incoming text.¹⁴⁹

2. A Factfinder Should Be Permitted to Infer a Remote Sender’s Negligence under Res Ipsa Loquitur

In *Kubert*, because the plaintiffs could not obtain the content of the relevant text messages that were exchanged between the defendants, and because the defendant’s deposition concerning the content of the messages was taken sixteen months after the accident, the plaintiffs failed to establish that the defendant knew or had special reason to know

was missing from the evidence).

146. Leonard explains that, under Federal Rule of Evidence 404(b), in some cases “other crimes, wrongs, or acts” will demonstrate that the actor had knowledge at the time of the earlier crime, wrong, or act. Leonard, *supra* note 142, at 116, 124 (quoting FED. R. EVID. 404(b)). He further explains that the “fact-finder is then asked to infer that the individual retained that knowledge up to the time of the charged event.” *Id.* at 124.

147. *See id.* (“In some cases, the inference of past knowledge, and in turn knowledge on the occasion in question, will be very strong.”).

148. For example, AT&T offers a smart-phone application that automatically responds to a text message when the vehicle moves faster than 25 m.p.h., which informs the sender that the recipient is driving and cannot respond. AT&T, *AT&T DriveMode Factsheet and Q&A*, AT&T (2013), https://www.att.com/Common/about_us/txtng_driving/att_drivemode_factsheet.pdf.

149. *See* Andrew Oliva, Case Comment, *Kubert v. Best et. al.: Massachusetts Ramifications of the Recent Remote Texting Liability Case in New Jersey*, 1 BEARING WITNESS: J. ON LAW AND SOC. RESP. 59, 60 (2013) (“[I]t is important to note that not only must the sender of the text message know that the recipient will read the message, but they must also know that the recipient will read it while driving.”).

that the recipient was both driving and would view the text message.¹⁵⁰ However, under *res ipsa loquitur*, even if the content of the texts cannot be obtained, a plaintiff should nonetheless be entitled to an inference that the sender breached his duty based on certain special relationships between the sender and the driver because it should have given the sender “special reason to know.”¹⁵¹ Moreover, application of *res ipsa loquitur* would not be unfair in this context because the content of the texts might be difficult to obtain; thus, it will encourage the defendant to disclose this crucial evidence, which might rebut the inference and bar the plaintiff’s *res ipsa loquitur* claim.¹⁵²

In a jurisdiction applying the Third Restatement’s formulation of *res ipsa loquitur*, “The factfinder may infer that the defendant has been negligent when the accident causing the plaintiff’s harm is a type of accident that ordinarily happens as a result of the negligence of a class of actors of which the defendant is the relevant member.”¹⁵³ In an action against a text sender, this suggests that the class of actors of which the defendant is a relevant member should constitute text senders who possess a personal or special relationship with the recipient driver.¹⁵⁴ Further, the Third Restatement explains that “[a]n actor in a special relationship with another owes a duty . . . to third parties with regard to risks posed by the other that arise within the scope of the

150. *Kubert*, 432 N.J. Super. at 506-7 (“[T]he necessary evidence to prove breach of the remote texter’s duty is absent on this record . . .”).

151. *See id.* at 517 (noting that when the sender has “special reason to know” that the driver will view the text based on a “personal relationship,” he has breached his duty of care by distracting the driver because he was in a position to discover the risk of harm).

152. *See, e.g.,* *United States v. Ridolfi*, 318 F.2d 467, 470 (2d Cir. 1963) (explaining that when *res ipsa loquitur* is applied, the burden shifts to the defendant to come forward with evidence to demonstrate that the accident was not due to his or her fault); *see also* *Jerista v. Murray*, 185 N.J. 175, 192 (2005) (citing *Brown v. Racquet Club of Bricktown*, 95 N.J. 280, 289 (1984)) (“[Res ipsa] places a strong incentive on the party with superior knowledge to explain the cause of an accident and to come forward with evidence in its defense.”); RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 17 (AM. LAW INST. 2010) (“In at least a few jurisdictions, *res ipsa loquitur* creates a rebuttable presumption, thereby requiring the defendant to come forward with some exculpatory evidence or suffer a judgment as a matter of law.”).

153. RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 17 (AM. LAW INST. 2010).

154. The Third Restatement states that “[i]n limited circumstances . . . [i]f two parties have an ongoing relationship pursuant to which they share responsibility for a dangerous activity, and if an accident happens establishing the negligence of one of the two, imposing *res ipsa loquitur* liability on both is proper.” RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 17 cmt. f (AM. LAW INST. 2010). While it may ordinarily be the case that only the recipient-driver engages in a dangerous activity by texting and driving, he cannot do so without the participation of the remote text sender. Thus, because a remote sender may also be potentially held liable for the dangerous activity of texting and driving under *Kubert*, if the sender and recipient have an “ongoing relationship,” imposing *res ipsa loquitur* liability on both would be proper. *See Kubert*, 432 N.J. Super. at 503.

relationship.”¹⁵⁵ Under *Kubert*, a personal relationship between the sender and recipient gives the sender “special reason to know,” which puts the sender “in a position to discover the risk of harm.”¹⁵⁶ Thus, if a sender has a special relationship with the recipient whom the sender knows is driving, the sender has special reason to know that sending a text might interfere with the driver’s operation of the vehicle and the sender must take reasonable steps to prevent the driver from causing an accident by not sending the text.¹⁵⁷

In addition to the evidence presented by a plaintiff, the jury should be permitted to supplement its understanding of whether the defendant was in a position to discover the risk of harm with its “general experience” and “common knowledge.”¹⁵⁸ Thus, juries should be entitled to apply their own experiences because both texting and driving are commonplace activities and most jurors are more than likely familiar with the associated risks when a person engages in both simultaneously.¹⁵⁹

Further, the Third Restatement supports the principle that a remote text sender owes an independent duty to third-party motorists when the remote text sender has a “special reason to know” based on a personal relationship with the driver by listing several relationships that are sufficient to impose this duty.¹⁶⁰ Specifically, relationships between

155. RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 41 (AM. LAW INST. 2012). Section 41 is entitled “Duty to Third Parties Based on Special Relationship with Person Posing Risks” and sets forth special relationships that will give rise to a duty to third parties, including “a parent with dependent children” and “an employer with employees.” *Id.*

156. *Kubert*, 432 N.J. Super. at 517; see RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 41 cmt. c (AM. LAW INST. 2012) (noting that the “duty imposed . . . subjects an actor to liability for the actor’s own tortious conduct”).

157. *Kubert*, 432 N.J. Super. at 518 (noting that text senders will be held liable “for their own negligence when they have knowingly disregarded a foreseeable risk of serious injury to others”); see RESTATEMENT (THIRD) TORTS: PHYS. & EMOT. HARM § 41 cmt. c (AM. LAW INST. 2012) (“If the other person poses a risk of harm to third parties, the actor must take reasonable steps, in light of the foreseeable probability and magnitude of any harm, to prevent it from occurring.”).

158. See, e.g., *Buckelew v. Grossbard*, 87 N.J. 512, 527 (1981) (reaffirming the proposition that a jury may be entitled to conclude from “common knowledge” that the plaintiff would not have been injured but for the defendant’s failure to adhere to its appropriate standard of conduct); see also RESTATEMENT (THIRD) TORTS: PHYS. & EMOT. HARM § 17 cmt. c (AM. LAW INST. 2010) (“In some cases, the jury can derive its understanding of the circumstances that cause a particular type of accident from . . . general experience [and] common knowledge.”).

159. See *Kahn v. Singh*, 200 N.J. 82, 92 (N.J. 2009) (noting that the original basis for *res ipsa loquitur* is found in cases that rest on common knowledge); see also RESTATEMENT (THIRD) TORTS: PHYS. & EMOT. HARM § 17 cmt. c (AM. LAW INST. 2010) (“Such experience and knowledge is especially available and helpful when the type of accident is one with which ordinary citizens are generally familiar.”).

160. Thus, “If the actor neither knows nor should know of a risk of harm, no action [or inaction] is required.” RESTATEMENT (THIRD) TORTS: PHYS. & EMOT. HARM § 41 cmt. c (AM. LAW

parent and minor child and between employer and employee should impose a duty on parents and employers not to send a text because they are more likely to be familiar with the recipient's schedule and their habits while driving, which should give them special reason to know that the minor child or employee would be driving and would view the sender's text while driving.¹⁶¹ Similarly, a relationship between spouses could fit into this category, because, like the aforementioned relationships, there is "some degree of control over the other person."¹⁶² Accordingly, if a sender has a special relationship with the recipient, the sender is within the "class of actors" for purposes of *res ipsa loquitur*, and the factfinder should be permitted to infer that the sender was negligent because he has special reason to know that the recipient was driving.¹⁶³

a. Employer and Employee Relationship

Under an employer-employee relationship, and particularly when the employee is acting within the scope of the employment, an employer is likely to know whether an employee is driving.¹⁶⁴ Further, it is not unlikely that an employer might expect the employee to promptly respond, especially while the employee is "on the clock" or acting within the scope of his employment.¹⁶⁵ Thus, employees under time constraints

INST. 2012).

161. See RESTATEMENT (THIRD) TORTS: PHYS. & EMOT. HARM § 41 cmt. d-e (AM. LAW INST. 2012) (noting that the basis for the employer's duty in relation to the employee is the employer's "hiring, training, supervision, and retention of employees"); see also *id.* ("The basis of the parents' duty with regard to dependent children is the parents' responsibility for child-rearing [and] their control over their children . . .").

162. Cf. *Wagner v. Schlue*, 255 N.J. Super. 391, 395 (Law Div. 1992) (holding a husband liable for third party's injuries caused by his wife after he permitted her to drive intoxicated); RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 41, cmt. c (AM. LAW INST. 2012) (noting that these special relationships impose a duty because the "actor has some degree of control over the other person").

163. RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 17 (AM. LAW INST. 2010).

164. See RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 41 (AM. LAW INST. 2012) (noting that this section is not limited to acts of the employee that are outside of the scope of employment).

165. However, an employer may be able to rebut the inference that the employer had "special reason to know" that the employee would view an incoming text if the employer has a specific policy against texting and driving. See Isaac A. Hof, Comment, *Wake-up Call: Eliminating the Major Roadblock that Cell Phone Driving Creates for Employer Liability*, 84 TEMP. L.R. 701, 735 (2012) (arguing that one factor that courts may look to in determining whether the employer may avoid being directly liable is whether an employer has an existing cell phone policy). For example, some employers, such as the Federal Motor Carrier Safety Administration, prohibit motor carriers from requiring or allowing drivers to text and drive while in interstate commerce and impose penalties for violations of the rule. Limiting the use of Wireless Communication Devices, 75 Fed.

may feel pressured or even obligated to immediately respond to their employer's text or email. Further, a plaintiff may enhance his argument that the employer had a higher expectation of a timely response if it can be shown that the employer provided an employee with a work-specific cell phone or condoned the use of a cell phone while driving.¹⁶⁶ This type of pressured communication fits squarely within the permissive scope of *Kubert*, which holds that the remote employer-sender can be liable not for actually obstructing a driver's view, but for merely urging that the driver view a cell phone because the employer-sender has special reason to know, based on the existence of an employer-employee relationship, that the driver will become distracted.¹⁶⁷

b. Parent and Minor Child Relationship

Similar to an employer-employee relationship, a parent is likely to know the whereabouts of the child, and particularly, whether the child is driving.¹⁶⁸ In the context of proving a parent-sender's negligence, parents should have "special reason to know" based on the parent-child relationship, which exists because the parent has some degree of control over the conduct of child, which serves as the basis for imposing liability.¹⁶⁹ Specifically, parents maintain control of the child because, especially at remote locations, parents often tend to expect an immediate response from their child. It follows that based on this expectation, the child might feel pressured to respond immediately. Thus, when a parent sends a text to his child whom he knows is driving, it can be said that the parent exerts control by "urging" the child to view and respond to the message, thereby distracting the child.¹⁷⁰ In effect, while a parent-child

Reg. 59118, 59118 (Oct. 27, 2010); *see also* Prohibition Against Texting, 49 C.F.R § 392.80 (2016).

166. *See* Hof, *supra* note 165 (arguing that courts should look to whether the employer "encouraged or required employees to use cell phones for work-related purposes while driving" in determining whether an employer has breached its duty to the public); *see also* RESTATEMENT (THIRD) TORTS: PHYS. & EMOT. HARM § 41 cmt. e (AM. LAW INST. 2012) (noting that the duty of employers also "extends to conduct by the employee . . . when the employment facilitates the employee causing harm to others").

167. *See* *Kubert v. Best*, 432 N.J. Super. 495, 516 (App. Div. 2013) ("[I]f the sender knows that the recipient is both driving and will read the text . . . the sender has knowingly engaged in distracting conduct.>").

168. *See* RESTATEMENT (SECOND) OF TORTS § 316 reporter's note (AM. LAW INST. 1965) (noting that, for the parent to be held liable, there must "be some specific propensity of the child, of which the parent has notice").

169. RESTATEMENT (THIRD) TORTS: PHYS. & EMOT. HARM § 41 cmt. d (AM. LAW INST. 2012) ("The basis of the parents' duty with regard to dependent children is the parents' responsibility for child-rearing [and] their control over their children . . .").

170. *See* *Kubert*, 432 N.J. Super. at 516, 518 (stating that text senders, who have a similar duty

relationship might not offer direct evidence of whether a parent knew that his child would view the message while driving, it should permit the factfinder to infer that the parent had a special reason to know that the child would view the text and become distracted.¹⁷¹

In sum, even if the plaintiff is unable to obtain the content of the relevant exchange of texts, the factfinder should nonetheless be permitted to infer a sender's negligence if the plaintiff can demonstrate that the sender, because of the sender's relationship with the recipient, had special reason to know that the recipient would view the text and thus become distracted.¹⁷²

D. Imposing a Duty on Remote Text Senders May Implicate Several Issues

Holding senders of text messages liable may implicate insurance-related issues. For example, if a sender is held liable, he might attempt to shield his personal assets by filing an insurance claim, but because no insurance provider offers a policy that specifically covers liabilities associated with texting, senders might attempt to file claims under existing policies.¹⁷³ Thus, unless the standard for holding a text sender liable is onerous, the insurance industry may experience a headache from the flood of unrelated insurance claims filed by defendant text senders.¹⁷⁴

Because some states may not be prepared to permit a plaintiff to recover against a text sender, thereby depriving the sender of his personal assets for sending a text, courts should be reluctant to lower the

to passengers, may be held liable by "urging" a driver to remove his or her gaze from the road if they have special reason to know that "the driver will in fact be distracted and drive negligently as a result . . .").

171. This inference merely serves as an alternative theory for imposing liability on the parent for the child's negligent driving. For example, Kentucky has adopted a statute that imputes a child's negligent driving on the "motor vehicle owner who causes or knowingly permits a minor under the age of eighteen . . . to drive," which in many cases is likely to be the parent. KY. REV. STAT. ANN. § 186.590 (West 2016) (imputing joint and several liability also on the person who "signed the application" of the minor's license allowing him or her to drive).

172. See RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 17 cmt. j (AM. LAW INST. 2010) (noting that a jury will receive a res ipsa loquitur instruction if "reasonable minds can infer that the accident is of the type that usually happens because of the negligence of the class of actors to which the defendant belongs").

173. On the other hand, imposing liability on a remote text sender may serve as an opportunity for insurers to offer policy riders to cover potential liability associated with texting. See Oliva, *supra* note 149 ("It is possible that insurance contracts insuring the operator of a motor vehicle could include provisions agreeing to represent remote parties that the operator is texting . . .").

174. *Id.* (noting that *Kubert's* holding will likely result in increased litigation).

threshold when holding a text sender liable.¹⁷⁵ Indeed, for a sender to have breached his duty to the public and specifically the potential victim, courts should consider raising the burden of proof from a preponderance standard to requiring that the victim prove by clear and convincing evidence that the sender knew or had special reason to know that the recipient was driving and would view the incoming text.¹⁷⁶ Otherwise, not only will the floodgate be opened to a substantial increase in litigation, whether meritorious or not, the deep pocket problem would hold ordinary persons' assets liable and likely overwhelm the insurance industry as a whole with its own flood of insurance claims.

Another potential issue with imposing liability on remote text senders is that furthering the prohibition on texting and driving may actually increase accidents caused by texting and driving because if the driver knows that the activity is banned, he might attempt to hide the activity by holding his phone below his line of sight, which may cause him to hold his gaze from the road for an even longer period of time.¹⁷⁷ This distraction may last long enough to significantly slow down a person's reaction time and increase the possibility of an accident.¹⁷⁸

V. CONCLUSION

Texting and driving is a dangerous activity that is responsible for many of the avoidable accidents that occur due to distracted driving.¹⁷⁹ While many state legislatures have responded by enacting formal prohibitions on texting and driving, the penalties are far less severe than other forms of distracted driving, namely driving while intoxicated.¹⁸⁰

175. *See id.*

176. The clear and convincing evidence standard is a higher standard of proof but a lower standard than proof beyond a reasonable doubt. *Liberty Mut. Ins. Co. v. Land*, 186 N.J. 163, 169 (2006) (citing *Aiello v. Knoll Golf Club*, 64 N.J. Super 156, 162 (App. Div. 1960)). Specifically, "The clear and convincing standard should produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established." *Id.* (citing *In re Purrazzella*, 134 N.J. 228, 240 (1993)).

177. *See* Highway Loss Data Institute, *Texting Laws and Collision Claim Frequencies* (2010) (explaining that this unexpected consequence to laws banning texting while driving may make texting and driving more dangerous if it causes drivers to take their eyes off the road more frequently than before the ban was enacted).

178. *See* Quisenberry, *supra* note 7 and accompanying text.

179. For example, in 2013, cell phone related accidents constituted 27 percent of all automobile accidents. *Annual Estimate of Cell Phone Crashes 2013*, *supra* note 4.

180. For example, in New Jersey the penalty for a first offense for texting and driving is a monetary fine between \$200 and \$400. N.J. STAT. ANN. § 39:4-97.3(d) (West 2015). In contrast, depending on the offender's blood alcohol concentration, a first offender convicted of driving while intoxicated is subject to a mandatory operator's license forfeiture, imposition of an ignition interlock, a fine between \$250 and \$500, and a mandatory period of detainment. N.J. STAT. ANN. §

Because the penalties for many states and localities usually consist of a small monetary fine, the deterrent effect on the conduct of drivers is minimal.¹⁸¹ Thus, this approach to reducing texting while driving only addresses one-half of the prohibited conduct.

While prohibiting texting and driving on the part of the recipient-driver is the more obvious approach to addressing the issue, the very nature of texting requires the participation of two individuals, which suggests that the text sender's conduct should also be addressed. The framework that *Kubert* has formulated appropriately addresses the issue of texting and driving by imposing a duty on the remote sender to refrain from texting in inappropriate circumstances.¹⁸² Because the threshold of proving that a remote text sender has breached his duty is higher than ordinary standards of conduct, *Kubert's* holding offers a realistic approach to reducing incidences of texting while driving.¹⁸³ It also forces society to re-examine how drivers should use electronic devices when operating an automobile. Accordingly, state courts and legislatures should impose a duty on remote text senders, consistent with the holding in *Kubert*, to not send a text to a recipient whom they know is driving and is likely to become distracted by the incoming text.¹⁸⁴

39:4-50(a) (West 2015).

181. See Highway Loss Data Institute, *supra* note 177 (“[M]ost importantly for policy makers, laws banning [cell phone conversations and texting] are not reducing crash risk in the United States.”).

182. *Kubert v. Best*, 432 N.J. Super. 495, 503 (App. Div. 2013).

183. *Id.* at 520 (Espinosa, J., concurring) (“[T]he bar set by the majority for the imposition of liability is high and will rarely be met.”).

184. See *id.* at 503 (majority opinion).