

DON'T TEXT A DRIVER: CIVIL LIABILITY OF REMOTE
THIRD-PARTY TEXTERS AFTER *KUBERT V. BEST*

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INTRODUCTION

In August 2013, the Superior Court of New Jersey made a bold move in an attempt to combat the harms presented by texting while driving.¹ *Kubert v. Best* articulated a duty to refrain from sending messages to someone who is driving if the texter knows, or has “special reason to know,” that the recipient will view the text message while driving.²

In an age of constant communication and instant gratification, drivers increasingly choose to send and read text messages while driving instead of waiting until a safer time.³ Texting while driving is undoubtedly a dangerous combination of activities,⁴ and is now a serious problem in the United States.⁵ In addition to public outcry, state legislatures have responded strongly to the problem—a response reminiscent of the drunk driving epidemic in the 1980s.⁶

The court’s decision in *Kubert v. Best* is, therefore, in keeping with the trend of increasing penalties for texting while driving.⁷ However, the new duty of care articulated in *Kubert* expands liability for third parties.

Although texting while driving is an increasingly important topic in the discussion of our nation’s safety on the roads and has evoked a visible legislative response,⁸ little has been done to examine civil liability in the context of text messaging and driving. Various scholarly articles have addressed the texting while driving epidemic and the legislative response.⁹ However, few, if any, scholarly works

1. See *Kubert v. Best*, 75 A.3d 1214 (N.J. Super. Ct. App. Div. 2013).

2. *Id.* at 1228.

3. In a national survey, researchers found that 18 percent of all drivers and 49 percent of drivers ages 21 to 24 reported texting while driving. JULIE TISON ET AL., NAT’L HIGHWAY TRAFFIC SAFETY ADMIN., NATIONAL PHONE SURVEY ON DISTRACTED DRIVING ATTITUDES AND BEHAVIORS 21 (2011), available at <http://perma.cc/L4A2-6CCV>.

4. See *infra* Part I.B.

5. See *infra* Part I.B-C.

6. See *infra* Part IV.A.1.

7. See *infra* Part I.C.

8. See *infra* Part I.C.

9. See, e.g., A. Starkey De Soto, Note, *Intoxication: Texting While Driving: Does the Punishment Fit the Crime?*, 32 U. HAW. L. REV. 359 (2010) (discussing the legislative response to texting while driving and proposing different, and possibly more effective, solutions); Cody J. Harding, Note, *The Failure of State Texting-While-Driving Laws*, U. PITT. J. TECH. L. &

address the civil liability of remote third-party texters. This is in part because few cases involving texting while driving have reached appellate courts. This Note fills that gap by analyzing remote third-party texter liability.

This Note will examine the potential civil liability of third-party texters against the backdrop of existing tort liability and through the lens of history and policy. This Note argues that liability should not be placed on the remote third-party texter. Doing so would extend third-party liability well beyond any articulated and established duty, and would depart from our current understanding of third-party liability. Ultimately, this Note concludes that because this duty expands liability and because it is difficult to prove, other states should not follow New Jersey's lead in creating this basis for civil liability.

Part I discusses the background in which this situation arises by analyzing the United States' texting while driving problem and the legislative response to it. Part II analyzes traditional civil liability imposed on third parties and explains how the new duty would play out in analogous situations. Part III considers the difficulties of proving this new duty. Part IV addresses counterarguments in favor of assigning liability to remote third-party texters.

I. SETTING THE SCENE

A. Kubert v. Best

In 2009, husband and wife David and Linda Kubert were “grievously injured” when a pick-up truck driven by eighteen-year-old Kyle Best hit the motorcycle they were riding.¹⁰ Best's vehicle crossed the center line into the Kuberts' lane, and the front of his vehicle struck the Kuberts and their motorcycle.¹¹ The Kuberts were seriously injured—both lost their left legs as a result of the

POL'Y 1 (2013) (analyzing the success of criminal texting while driving statutes); Thomas E. Sherzan, Note, “Talk 2 U L8R”—*Why Cell Phones and Driving Have “G2G”: An Analysis of the Dangers of Cell Phone Use While Driving*, 59 DRAKE L. REV. 217 (2010) (discussing the harms of cell phone use while driving and potential solutions to these problems).

10. Kubert v. Best, 75 A.3d 1214, 1219 (N.J. Super. Ct. App. Div. 2013).

11. *Id.*

accident.¹² Telephone records revealed that right before the accident, Best and his friend, Shannon Colonna, exchanged text messages while Best was driving his vehicle home from work.¹³ When the accident occurred, New Jersey had already passed a law prohibiting texting while driving except in specific emergency situations.¹⁴

In addition to suing Best for his negligence,¹⁵ the Kuberts also sued Colonna, claiming that she had an “independent duty to avoid texting to a person who was driving a motor vehicle” because her “electronic[] presen[ce]” in the vehicle as a result of her text message conversation with Best constituted “aiding and abetting” Best’s illegal cell phone use while driving.¹⁶ The court articulated the new duty of care in the appeal of entry of summary judgment for Colonna.¹⁷ It decreed that “a person sending text messages has a duty not to text someone who is driving if the texter knows, or has special reason to know, the recipient will view the text while driving.”¹⁸ However, the court went on to say that in this particular case, the “plaintiffs have not presented sufficient evidence to prove that Colonna had such knowledge when she texted Best immediately before the accident.”¹⁹ Accordingly, the court affirmed the grant of summary judgment in Colonna’s favor.²⁰

The majority did not hold Colonna liable because “the evidence ... [was] not sufficient to conclude that Colonna took affirmative steps and gave substantial assistance to Best in violating the law.”²¹ However, although the court acknowledged that “[i]t is the primary responsibility of the driver to obey the law and to avoid distractions,” they nonetheless imposed a duty on the sender of a text message to refrain from texting someone who is driving in certain circumstances.²²

12. *Id.*

13. *Id.* at 1220-21.

14. *Id.* at 1218.

15. The Kuberts eventually settled their claims against Best. *Id.* at 1218.

16. *Id.* at 1221, 1224-25.

17. *Id.* at 1219.

18. *Id.* at 1221.

19. *Id.*

20. *Id.* at 1229.

21. *Id.* at 1225.

22. *Id.* at 1227.

B. The Texting While Driving Epidemic in the United States

Text messaging has quickly become a very common method of communication in the United States. As of June 2010, over 173 billion text messages were sent per month compared to only 12.2 million per month in June 2000.²³ Although texting is certainly a useful form of communication, research shows that sending a text message while driving requires the driver to take her eyes off the road for approximately 4.6 seconds.²⁴ This equates to driving at fifty-five miles per hour for the length of a football field without looking at the road.²⁵

A form of “distracted driving,” texting while driving and its dangers have been studied extensively, both through research simulations and analyses of historical data. Researchers have found that drivers who text are twenty-three times more likely to be involved in a safety-critical event than if they refrained from texting.²⁶ Furthermore, based on their analysis of historical data on road fatalities, cell phone subscriber rates, and estimated text message volumes, researchers Fernando Wilson and Jim Stimson concluded that “recent and rapid increases in texting volumes have resulted in thousands of additional road fatalities yearly in the United States.”²⁷

C. Legislative Response

Legislatures have recognized the dangers of texting and driving and have taken steps to discourage the practice. Forty-four states,

23. CTIA-THE WIRELESS ASS'N, WIRELESS IN AMERICA 4 (2011), http://files.ctia.org/pdf/WirelessInAmerica_Jan2011.pdf [<http://perma.cc/AH6A-DQ46>] (providing a history of wireless use in the United States and information about how wireless service works).

24. REBECCA L. OLSON ET AL., FED. MOTOR CARRIER SAFETY ADMIN., U.S. DEPT OF TRANSP., DRIVER DISTRACTION IN COMMERCIAL VEHICLE OPERATIONS 143 (2009), *available at* <http://perma.cc/35XJ-3ULH> (investigating the impact of driver distraction in commercial motor vehicle operations).

25. *Id.*

26. *See id.* at 146.

27. Fernando A. Wilson & Jim P. Stimson, *Trends in Fatalities From Distracted Driving in the United States, 1999 to 2008*, 100 AM. J. PUB. HEALTH 2213, 2218 (2010) (analyzing historical data to identify trends in highway fatalities and the connection to increased cell phone use by drivers).

the District of Columbia, Puerto Rico, Guam, and the U.S. Virgin Islands currently prohibit all drivers from text messaging.²⁸ Other states have enacted less comprehensive bans. For example, some states prohibit texting while driving for novice drivers or public transit drivers.²⁹

The New Jersey law is a typical example of banning texting and driving. It states that “the use of a wireless telephone or electronic communication device by an operator of a moving motor vehicle on a public road or highway shall be unlawful except when the telephone is a hands-free wireless telephone or the electronic communication device is used hands-free.”³⁰ Violation of this statute is a primary offense in New Jersey and carries a fine of \$100.³¹

Following the Kuberts’ accident and other traffic accidents involving texting while driving, New Jersey enacted additional legislation to address the dangers presented by texting while driving. The new law, named “Kulesh’s, Kuberts’ & Bolis’ Law,” amends the vehicular homicide statute to allow an inference of reckless driving if the defendant was using a cell phone in violation of the ban on texting while driving.³² This law also provides criminal penalties for drivers who injure others while texting and driving.³³ In addition to its inclusion in the vehicular homicide statute, this inference was also added to New Jersey’s “assault by auto” statute, which addresses situations in which a person drives a vehicle recklessly and causes bodily injury to another.³⁴

The key element in both the vehicular homicide and assault by auto statutes is the *reckless* driving of a vehicle.³⁵ With this amendment, the prosecution in a case of death by vehicular homicide or assault by auto can rely on the impermissible cell phone use to infer that the defendant was driving recklessly.³⁶ Although such an inference is not binding on the jury, the jury may rely on the inference

28. U.S. DEP’T OF TRANSP., NAT’L HIGHWAY TRAFFIC SAFETY ADMIN., DIGEST OF DISTRACTED DRIVING LAWS, at v-ix (2013), *available at* <http://perma.cc/8PA8-4SXN>.

29. *Id.*

30. N.J. STAT. ANN. § 39:4-97.3 (West 2010).

31. *Id.*

32. N.J. STAT. ANN. § 2C:11-5(a) (West 2012).

33. *Id.*

34. N.J. STAT. ANN. § 2C:12-1(c)(1) (West 2012).

35. *Id.*; § 2C:11-5(a).

36. §§ 2C:11-5(a); 2C:12-1(c)(1).

alone to find that the defendant was driving recklessly.³⁷ Thus, these amendments make it easier for the state to obtain convictions in cases of vehicular homicide and assault by auto where the defendant was texting while driving in violation of the statutory ban.

Although the legislative response has surely helped deter texting while driving, the legislature's decisions are not without criticism.³⁸ One principal problem with bans on texting while driving lies in their enforcement.³⁹ Enforcing laws that prohibit texting while driving by a class of drivers, such as novice drivers, is often unworkable for police officers as it is difficult to determine the age of a driver from a distance.⁴⁰ Additionally, statutes that allow for only secondary enforcement further hinder effective execution of texting bans.⁴¹ Beyond enforcement, the divide between driver perceptions of the dangers of texting while driving and their actions presents additional difficulties.⁴²

These issues have resulted in lax enforcement of texting and driving laws. For example, from 2010 through 2012, only 1,281 drivers were convicted of violating Georgia's ban on texting and driving.⁴³ Compared to the 22,500 convictions for driving under the influence of alcohol or drugs during the same time frame,⁴⁴ this number seems miniscule.

Given the high rates of texting while driving and the potential harms to the safety of those on America's roadways, it should come as no surprise that texting while driving is considered a deadly

37. CRIMINAL MODEL CHARGES—VEHICULAR HOMICIDE, NEW JERSEY COURTS (2004), available at <http://perma.cc/NP73-ACJQ> (instructing the jury that "it is within your power to find that proof of recklessness has been furnished beyond a reasonable doubt by inferences that may arise from the nature of the acts and circumstances surrounding the conduct in question").

38. See *infra* notes 117-22 and accompanying text.

39. See Sherzan, *supra* note 9, at 253-55.

40. *Id.* at 253.

41. See Harding, *supra* note 9, at 9.

42. In a recent survey conducted by AT&T, 97 percent of teens surveyed said that they believed texting while driving was dangerous, but 43 percent of the teens surveyed still admitted to doing it. *AT&T Teen Driver Survey Executive Summary*, AT&T, (May 2012), http://www.att.com/Common/about_us/txtng_driving/att_teen_survey_executive.pdf [<http://perma.cc/XX8N-AM9P>].

43. See Harding, *supra* note 9, at 13.

44. See *id.*

national epidemic.⁴⁵ In fact, during a Senate hearing in 2009, Julius Genachowski, the Chairman of the Federal Communication Commission, called texting and driving “the most pressing vital [safety] issue” on our highways.⁴⁶

II. THE CIVIL LIABILITY OF THIRD PARTIES

Imposing civil liability for remote third-party texters, as the court did in *Kubert*, involves a unique confluence of factors that have not been combined previously. First, the third-party texter is not in the vehicle with the driver; rather, he or she texts from another location. Second, reading a text message is a voluntary activity, and the connection between sending and reading a text message is attenuated, as the third-party texter may not foresee the recipient reading the text message while driving. Taken together, these factors create a duty to the public that exceeds previous duties of third parties. Of course, it is important to remember that a duty alone does not impose civil liability for negligence.⁴⁷ One must show not only that a duty existed, but also that it was breached, and that the breach caused the damages.⁴⁸

A. Common Tort Duties

Civil liability for a remote third-party sender of a text message had not been explored before *Kubert*. More commonly explored bases for civil liability arising from cell phone use involve the liability of the driver, the telephone company supplying the wireless service, and the employer of an individual who uses his cell phone while driving in his capacity as employee.⁴⁹ Courts have clearly established the direct civil liability of the driver using a cell phone while

45. See *Driven to Distraction: Technological Devices and Vehicle Safety: J. Hearing Before the Subcomm. on Commerce, Trade, & Consumer Prot. & the Subcomm. on Commc'ns, Tech. & the Internet of the H. Comm. on Energy and Commerce*, 111th Cong. 45 (2009).

46. *Id.*

47. RESTATEMENT (SECOND) OF TORTS § 328A (1965).

48. *Id.*

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

driving.⁵⁰ At the other end of the spectrum, actions against cell phone service providers based on providing cell phones to drivers who may choose to use them while driving have failed because no relationship exists between the provider and the driver that would create a duty of care.⁵¹ A remote third party, like Shannon Colonna in the *Kubert* case, clearly falls in between these two extremes—she has more of a relationship with the driver than a cell phone service provider, but she is not the driver herself.

Section 876 of the *Restatement (Second) of Torts* provides a traditional understanding of harm resulting to a third person from the tortious conduct of another. The applicable section to this argument is section 876(b), which states that “[f]or harm resulting to a third person from the tortious conduct of another, one is subject to liability if he ... knows that the other’s conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself.”⁵²

The court cited this provision as the basis for creating a duty of care between remote third-party texters and the public in *Kubert*.⁵³ In that case, the court framed Colonna’s conduct as aiding and abetting Best’s negligent driving by using a cell phone.⁵⁴ Although the court did not find Colonna liable under this section, it did not preclude liability for other third-party texters if they had the requisite knowledge, took affirmative steps, and gave substantial assistance to the negligent actor.⁵⁵ Such affirmative steps might include actively encouraging the driver to read and respond to the text message while driving.⁵⁶ The *Kubert* court left open the possibility that third-party texters could be liable under this section

50. *See, e.g.*, *McCormick v. Allstate Ins. Co.*, 870 So. 2d 547 (La. Ct. App. 2004) (finding the defendant solely at fault for a parking lot accident because she was talking on her cell phone and not looking at the road at the time of the accident).

51. *See, e.g.*, *Williams v. Cingular Wireless*, 809 N.E.2d 473, 478 (Ind. Ct. App. 2004). The court in *Williams* held that the cell phone service provider owes no duty of care to third party injured by driver using a phone because there is no relationship between the carrier and the driver and because “[a] cellular phone does not cause a driver to wreck a car. Rather, it is the driver’s inattention while using the phone that may cause an accident.” *Id.*

52. RESTATEMENT (SECOND) OF TORTS § 876(b) (1979).

53. *Kubert v. Best*, 75 A.3d 1214, 1223-24 (N.J. Super. Ct. App. Div. 2013).

54. *Id.* at 1224-25.

55. *Id.* at 1225.

56. *Id.*

if the plaintiffs could prove that the remote texter was aiding and abetting the driver by providing active encouragement or substantial assistance.⁵⁷

B. Analogies to Similar Situations

Although the situation in *Kubert* itself is unique, it shares similarities to other tort cases in which courts have traditionally imposed civil liability. For example, there are a number of parallels between the situations of a remote third-party texter and a passenger in the vehicle who is distracting the driver.

1. The Passenger's Duty Not to Distract the Driver

A passenger in a vehicle has a duty not to interfere with the driver's operation of the vehicle.⁵⁸ A passenger who breaches this duty and causes such interference may be civilly liable.⁵⁹ The scope of this duty must be reasonable and is considered under a "totality of the circumstances" approach.⁶⁰ A passenger might be liable under this theory if he shouts or yells at the driver or if he "obstruct[s] the driver's view of the road, for example, by suddenly holding a piece of paper in front of the driver's face and urging the driver to look at what is written or depicted on the paper."⁶¹ This duty of the passenger, however, is not all encompassing. For instance, it does not require the passenger to warn the driver about impending danger, supervise the driver's driving, or keep a lookout for danger.⁶²

The court in *Sanke v. Bechina* invoked this duty of a passenger not to interfere with the driver.⁶³ In this Illinois case, the court

57. *Id.*

58. See *Lombardo v. Hoag*, 634 A.2d 550, 559 (N.J. Super. Ct. App. Div. 1993).

59. See, e.g., *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, and a passenger who is the owner of the car may be liable, at common law, for negligent entrustment to an incompetent driver.").

60. See *Champion ex rel. Ezzo v. Dunfee*, 939 A.2d 825, 828 (N.J. Super. Ct. App. Div. 2008).

61. *Kubert*, 75 A.3d at 1227.

62. See *Dunfee*, 939 A.2d at 828 (citing *Tabor v. O'Grady*, 157 A.2d 701, 705 (N.J. Super. Ct. App. Div. 1960)).

63. 576 N.E.2d 1212, 1213 (Ill. App. Ct. 1991).

found that the passenger breached his duty by encouraging the driver to exceed the speed limit and ignore a stop sign.⁶⁴ The parties in this case were allegedly involved in a vehicular competition at the time of the crash.⁶⁵ The court held that this conduct fell squarely within the parameters of section 876 of the *Restatement (Second) of Torts*.⁶⁶

These situations differ from the facts in *Kubert* because the remote third-party texter is not present in the vehicle at the time of the accident. Furthermore, the connection between reckless driving and the choice to open and read a text message, and possibly to respond, is much more attenuated than the connection between a passenger distracting the driver by yelling or obscuring the line of vision.

A person's decision to open and read a text message is distinct from their physiological reaction to a stimulus presented to them. A driver has no choice but to hear the words yelled at him by a passenger or to see the object put in his line of vision by a passenger. His reaction to that stimulus represents more of an unavoidable physiological response than a voluntary undertaking.

On the other hand, opening and reading a text message is voluntary. The driver must choose to open the text message and read it. He is in no way forced to react to the receipt of the message. In fact, he has the option to simply ignore the message until a safer time presents itself. With the "silent" feature on most cell phones, the driver may not even know he has a text message until he takes the initiative to check his phone, which is also a voluntary choice.

The additional voluntary steps inherent in the reading of a text message set the remote third-party texter scenario apart from the more traditional driver-distraction causes. The driver has to *choose* to be distracted by a text message, whereas other distractions are not within the control of the driver.

64. *Id.* at 1213, 1218-19.

65. *Id.* at 1215.

66. *Id.* at 1218-19 (noting, however, that "[a]s the Restatement points out, the participation or assistance may be so slight that liability will not be imposed," thus the case was remanded for determination of whether the conduct constituted substantial assistance).

2. *Social Host Liability*

The situation in *Kubert* also bears some similarities to social host liability because neither the social host nor the third-party texter is present at the time of the incident. Social host liability imposes a duty on hosts serving alcohol to avoid creating a foreseeable risk of harm to their guests or others due to drunken behavior.⁶⁷ Should they breach this duty, the social host can be found civilly liable for harm caused by guests to third parties—so long as the furnishing of alcohol is the proximate cause of injury.⁶⁸ Similar to the liability of a remote third-party texter, social host liability implicates a person not present at the place and time of the event giving rise to the cause of action.

Another case from New Jersey, *Kelly v. Gwinnell*, was the seminal case in extending social host liability to cover third parties based on common law negligence principles.⁶⁹ In that case, the party injured in a drunk driving accident brought a civil action against the social host who provided the alcohol to the driver.⁷⁰ The court held:

[W]here a host provides liquor directly to a social guest and continues to do so even beyond the point at which the host knows the guest is intoxicated, and does this knowing that the guest will shortly thereafter be operating a motor vehicle, that host is liable for the foreseeable consequences to third parties that result from the guest's drunken driving.⁷¹

67. Denise Jones Lord, Comment, *Beyond Social Host Liability: Accomplice Liability*, 19 CUMB. L. REV. 553, 564-65 (1989) (discussing common law negligence actions based on social host liability, as well as theories of social host liability based on Dram Shop statutes and negligence per se).

68. See *Kelly v. Gwinnell*, 476 A.2d 1214, 1230 (N.J. 1984).

69. See *id.*; see also Jacob R. Pritcher, Jr., Note, *Is it Time to Turn Out the Lights? Social Host Liability Extended to Third Persons Injured by Intoxicated Adult Guests: Beard v. Graff*, 801 S.W.2d 158 (Tex. App.—San Antonio 1990, writ granted) (*en banc*), 22 TEX. TECH L. REV. 903, 905-06, 918 (1991) (“[A] social host may incur civil liability if the plaintiff proves that the host had exclusive control over the alcohol supply, the host served the guest an alcoholic beverage knowing that the guest was intoxicated, and that the host knew when the drink was served that the guest would be driving while intoxicated.”).

70. *Kelly*, 476 A.2d at 1230.

71. *Id.*

Social host liability for third parties is similar to liability for remote third-party texters because both the social host and the texter are not present at the time and place of the scene of the accident—both are remote. However, there is a significant difference between these two situations as well. This difference hinges on foreseeability.

The consumption of alcohol creates a physiological, scientifically quantifiable response. Alcohol depresses the body's central nervous system and affects the mood, mental ability, and physical ability of the consumer.⁷² The consumption of alcohol can slow and impair both judgment and motor coordination.⁷³ These effects often impair the consumer's ability to safely drive a motor vehicle.

In contrast, receipt of a text message causes no such physiological, bodily responses. The driver may become aware that he has received a message, but that does not in and of itself affect his ability to safely operate a motor vehicle. Rather, as discussed above, the driver must affirmatively choose to take his attention off the road when opening and reading the message while he is driving.⁷⁴

Therefore, it is foreseeable that a driver who has been drinking will have an impaired ability to operate his vehicle safely. However, it is not as foreseeable that a person who receives a text message while driving will open it. In fact, it is possible that the intended recipient will not receive the text message due to faulty wireless servers or the recipient having his cell phone turned off, among other reasons.⁷⁵ The cause of the accident by a driver who is reading a text message is his inattention, not the text message itself,⁷⁶ and the connection between the inattention and the text message is attenuated. This is in stark contrast to the social host situation, in which the cause of the accident is a reaction to the consumption of

72. *What Is Intoxication?*, UNIV. NOTRE DAME MCDONALD CTR. FOR STUDENT WELL-BEING, <http://oade.nd.edu/educate-yourself-alcohol/what-is-intoxication/> [<http://perma.cc/VWP9-KN2E>] (last visited Feb. 19, 2015).

73. *Acute Intoxication*, WORLD HEALTH ORG., http://www.who.int/substance_abuse/terminology/acute_intox/en/ [<http://perma.cc/H64J-MGNU>] (last visited Feb. 22, 2015) (“Alcohol intoxication is manifested by such signs as facial flushing, slurred speech, unsteady gait, euphoria, increased activity, volubility, disorderly conduct, slowed reactions, impaired judgment and motor incoordination, insensibility, or stupefaction.”).

74. See *supra* Part II.B.1.

75. See discussion *infra* Part III.A.

76. See *Williams v. Cingular Wireless*, 809 N.E.2d 473, 478 (Ind. Ct. App. 2004).

alcohol provided by the social host, and the connection between the intoxication and the accident is clear and undeniable.

3. *Products Liability and Distracted Driving*

Perhaps the most factually analogous situation to *Kubert* is that of the liability of third-party companies, such as cell phone manufacturers and service providers, for harm caused by the use of their products. Although these cases have been argued under theories of products liability, they are factually similar to the situation of the third-party texter.

In an Indiana case, *Williams v. Cingular Wireless*, a motorist, using a cell phone furnished by Cingular, struck Williams's vehicle.⁷⁷ Williams alleged that Cingular was negligent in furnishing a cell phone to the motorist because the Company knew or should have known that the motorist would use the cell phone while driving.⁷⁸ The court found that there was no relationship between Cingular and Williams that would give rise to a duty of care.⁷⁹ In denying liability, the court held that it was not foreseeable that the sale of a phone would result in an accident; "[r]ather, it is the driver's inattention while using the phone that may cause an accident."⁸⁰

Durkee v. Geologic Solutions, Inc. is the only case decided to date that deals with manufacturer liability for distracted driving specifically because of text messaging.⁸¹ In *Durkee*, a North Carolina case, a truck driver drove into vehicles that were stopped in front of him on the highway, causing injuries and a death, while he was using an in-truck text messaging system.⁸² Appellants sued the company that manufactured the texting system located in his truck, and alleged that the company owed them a duty of care because "injuries to the traveling public were reasonably foreseeable based on the texting system's design and (1) required the driver to divert

77. *Id.* at 475.

78. *Id.*

79. *Id.* at 477.

80. *Id.* at 478.

81. 502 Fed. Appx. 326 (4th Cir. 2013), *aff'g* *Durkee v. C.H. Robinson Worldwide, Inc.*, 765 F. Supp. 2d 742 (W.D.N.C. 2011).

82. *Id.* at 327.

his eyes from the road to view an incoming text from the dispatcher, and (2) permitted the receipt of texts while the vehicle was moving.”⁸³ The court affirmed the motion to dismiss. The court held that “the accident was caused by the driver’s inattention, not the texting device itself, and that the manufacturers are not required to design a product incapable of distracting a driver.”⁸⁴

The reasoning cited by the courts in *Williams* and *Durkee* can easily and logically be extended to *Kubert*: it was the driver’s inattention that caused the accident, not the cell phone or the text message. If a driver’s inattention was the cause of an accident, and not the product of the accident, as in *Williams* and *Durkee*, then it should follow that the receipt of a text message was also not the cause. The driver’s inattention trumps the other factors in these situations. Of course, these cases are also distinguishable from *Kubert*. The cases involved product manufacturers, and there is more of an individual relationship between the remote third-party texter and the driver than between the manufacturer and the driver. Nonetheless, that does not change causation of accident: driver inattention.

III. THE DIFFICULTY OF PROVING THE DUTY IN *KUBERT*

The effective application of the duty of care articulated in *Kubert* creates negative practical consequences. First, this duty is difficult to prove. The court in *Kubert* stated that “[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.”⁸⁵ This duty creates two potential scenarios in which it may be applied: (1) actual knowledge by the sender that the recipient will view the message while driving and (2) special reason to know that the recipient will view the message while driving.⁸⁶

83. *Id.*

84. *Id.* at 327-28.

85. *Kubert v. Best*, 75 A.3d 1214, 1228 (N.J. Super. Ct. App. Div. 2013).

86. *See id.*

A. *Sender “Knows” that Recipient Will View the Message While Driving*

The first scenario, “when the sender knows that the text will reach the driver while operating a vehicle,”⁸⁷ seems very difficult to prove with certainty. Knowledge, as the term is used here, means a conscious “belief in a truth,” and requires actual “awareness of a fact or condition.”⁸⁸

Whether the message will “reach the driver” depends on successful transmission and delivery of the message. Text messaging service is not 100 percent reliable.⁸⁹ In fact, “baseline reliability of SMS service is no better (and in some cases worse) than that of other communication media such as email, traditional telephone and VoIP.”⁹⁰ One survey indicates that “82 percent of respondents ... who had sent an SMS or MMS⁹¹ message in the past year said that [at least one of] their message[s] did not reach an intended recipient.”⁹² Given that there is often no way to definitely know whether a text message was successfully transmitted to the recipient, it therefore seems very difficult to prove that the sender knew that the recipient of the message would read it.

In the first scenario, the court also requires that the sender know that the recipient will read the message while he is driving. It is difficult to predict with absolute certainty what a person will be doing at some point in the future. Although the sender might anticipate that the recipient will be driving when he receives the

87. *Id.*

88. RESTATEMENT (SECOND) OF AGENCY § 9 cmt. c (1958).

89. See Xiaoqiao Meng et al., *Analysis of the Reliability of a Nationwide Short Message Service*, INST. ELECTRICAL & ELECTRONICS ENG'G CONFERENCE ON COMPUTER COMM'NS 1811 (2007), available at <http://perma.cc/XSU2-5GAN> (analyzing SMS message data records and finding that during normal conditions 5.1 percent of SMS messages fail to reach their intended destination).

90. *Id.*

91. SMS (short message service) and MMS (multimedia message services) are both types of text messages. MMS messages can contain more characters and forms of media other than text. For a detailed discussion of the similarities and differences between the types of messages, see Richard Ling et al., *Nascent Communication Genres within SMS and MMS*, in *THE INSIDE TEXT: SOCIAL, CULTURAL AND DESIGN PERSPECTIVES ON SMS* 75, 76 (Richard Harper et al. eds., 2005).

92. Maisie Ramsay, *Is SMS Reliability a Problem?*, WIRELESS WEEK (Apr. 2, 2010, 9:25 AM), <http://www.wirelessweek.com/articles/2010/04/sms-reliability-problem> [<http://perma.cc/QR9L-HX5C>].

message, the inherent unpredictability of the future makes absolute certainty difficult. For example, the driver might make an unexpected stop for a variety of reasons—a health emergency, a vehicle emergency, such as a lack of gasoline or a flat tire, or simply the desire to stop and get a cold drink—and therefore, might not read the message while driving. In fact, one could say that nothing short of watching the driver receive and read the message as he drives would ensure with certainty that the message will reach the driver while he is driving.

B. Sender “Has Special Reason” to Know that the Recipient Will Read the Message While Driving

The second scenario the court lays involves a remote third-party texter who has “[s]pecial reason to know[] from prior texting experience or otherwise” that the recipient will read the message while driving.⁹³ Prior experience could be shown, for example, by demonstrating that the sender of the text messages frequently observed the recipient read text messages while driving. This is still a high standard. Past conduct is not necessarily indicative of future behavior, and a pattern of behavior would be difficult to prove with certainty. For example, although the sender might recall that the driver frequently looks at his phone while driving, that fact does not appear to satisfy this standard. A plaintiff would need prove that the sender knew that the driver was using his phone to read and respond to text messages, as opposed to using it for other activities. Furthermore, the sender would need direct knowledge of the recipient’s behavior, and without other face-to-face interactions, texting would not provide this knowledge.

C. Special Relationship Between the Parties

Lastly, the court in *Kubert* considered the relationship between the sender of the text message and the recipient as a factor in imposing the duty.⁹⁴ The court referred to *Champion ex rel Ezzo v. Dunfee*, which evaluated a third party’s potential duty to control the

93. *Kubert v. Best*, 75 A.3d 1214, 1228 (N.J. Super. Ct. App. Div. 2013).

94. *Id.* at 1224.

behavior of the driver. The *Dunfee* court considered whether “[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.”⁹⁵ Examples of such relationships that give the passenger control over the driver’s conduct include parent-child, master-servant, landlord-tenant, and guardian-ward.⁹⁶ In *Kubert*, the court found that the friendship between Best, the driver, and Colonna, the remote third-party sender of the text message, was not, by itself, sufficient to establish a duty of care.⁹⁷

Given the strict requirements for establishing liability of a remote third-party texter, it is clear that proving that the sender violated this duty would be difficult. There are few situations where one seeking to prove liability would be able to definitively show the sender actually knew the recipient was driving at the time. Proving that the sender had special reason to know that the recipient would read the message while driving also would be difficult.

IV. COUNTERARGUMENTS

A. *Desperate Times Call for Desperate Measures*

Although imposing civil liability on a remote third-party texter may seem extreme, some would argue that it is a necessary measure to combat a serious problem in our nation—distracted driving. Distracted driving, which includes texting and using a navigation system, among other things, was the cause of approximately one in six fatal vehicle collisions in 2008.⁹⁸ As discussed above, distracted driving presents a serious problem to the safety of the traveling public in our nation.⁹⁹

95. *Champion ex rel. Ezzo v. Dunfee*, 939 A.2d 825, 830 (N.J. Super. Ct. App. Div. 2008).

96. *Id.*

97. *Kubert*, 75 A.3d at 1224.

98. *Wilson & Stimpson*, *supra* note 27, at 2213.

99. *See supra* notes 23-27 and accompanying text.

1. Comparison to Drunk Driving Epidemic

Although texting while driving and other forms of distracted driving are currently the prevailing driver safety issue on the roads, it is not the first such significant issue.¹⁰⁰ Drunk driving was considered a national epidemic, and was the subject of a flurry of legislation in the early 1980s.¹⁰¹

Scholars have likened the current texting while driving “epidemic” to the former drunk driving epidemic in the 1980s.¹⁰² Just as with texting while driving today, the public recognized the danger of drunk driving. They “[c]lamored for legislative responses to strengthen drunk driving laws” after the number of serious or fatal car crashes caused by drunk driving peaked in 1982.¹⁰³ Legislation strengthened the penalties for drunk driving, imposing harsher fines and sentences.¹⁰⁴

Drunk driving became a national priority in the 1980s in large part due to social activism.¹⁰⁵ Mothers Against Drunk Driving (MADD) was formed in 1980 by the mother of a teenager who was killed by a repeat offender drunk driver (other local groups were formed as well).¹⁰⁶ These groups and their grassroots campaign against drunk driving brought the issue into the spotlight, resulting in media attention, public awareness, and increased focus from the government.¹⁰⁷ In 1982, President Reagan appointed a Presidential Commission on Drunk Driving, which created a plan of action for addressing the drunk driving problem.¹⁰⁸ Citizen groups such as MADD focused on deterring drinking and driving, in part by attaching a new negative stigma to it through media campaigns.¹⁰⁹

100. De Soto, *supra* note 9, at 390.

101. *See id.* at 362-63.

102. *See id.* (discussing the legislative response to texting while driving and proposing different, and possibly more effective, solutions).

103. *Id.* at 363.

104. *Id.* at 364.

105. Allan F. Williams, *Alcohol-Impaired Driving and Its Consequences in the United States: The Past 25 Years*, 37 J. SAFETY RES. 123, 124 (2006).

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.* at 128.

In addition to raising awareness, citizen groups, such as MADD, also lobbied for new legislation addressing drunk driving.¹¹⁰ The federal government and individual states passed legislation, and the new laws took many different approaches to addressing the problem.¹¹¹ New policies included laws increasing penalties for drunk driving, lowering the legal BAC limit, and raising the minimum drinking age.¹¹² From 1981 to 1986, 729 state legislators passed laws related to drunk driving.¹¹³

Social host liability, as previously discussed, was a measure enacted by states in response to the drunk driving problem.¹¹⁴ At the time of its inception, legislators and scholars thought that social host liability was a hasty and ill-thought-out form of liability.¹¹⁵ The thought was that “[r]hetoric about the evils of driving while intoxicated, without more, does not justify a departure from the common law rule that only the drunk driver, and not the host who served him, is liable for injuries stemming from alcohol-related accidents.”¹¹⁶ Concerns cited by the critics of these reforms included moral blameworthiness, unfairness, and lack of a remedy for the plaintiffs.¹¹⁷ These concerns mirror those articulated by opponents to civil liability for remote third-party texters.¹¹⁸ For example, New Jersey Assemblywoman Celeste Riley raised concerns about the

110. *Id.*

111. William N. Evans et al., *General Deterrence of Drunk Driving: Evaluation of Recent American Policies*, 11 RISK ANALYSIS 279, 280 (1991).

112. *Id.*

113. *Id.*

114. *See supra* Part II.B.2.

115. *See* Derry D. Sparlin, Jr., Note, *Social Host Liability for Guests Who Drink and Drive: A Closer Look at the Benefits and Burdens*, 27 WM. & MARY L. REV 583, 631 (1986) (critiquing the institution of social host liability).

116. *Id.*

117. *Id.* at 623-26.

118. *See, e.g.*, James Beattie, “Don’t Blame the Texter” Bill Submitted in NJ General Assembly, CNSNEWS (Sept. 25, 2013, 9:19 AM), <http://cnsnews.com/news/article/james-beattie/don-t-blame-texter-bill-submitted-nj-general-assembly> [<http://perma.cc/VL4-ZAYT>] (discussing New Jersey Assemblywoman Caroline Casagrande’s bill, which proposes to statutorily eliminate potential liability of remote third-party texters); Ben Brumfield & Chris Boyette, *Text a Driver in New Jersey, and You Could See Your Day in Court*, CNN (Aug. 29, 2013, 2:40 PM) <http://www.cnn.com/2013/08/29/us/new-jersey-texting-crash-sender-liable> [<http://perma.cc/7FYX-PGVU>] (discussing how responsibility for texting and driving should belong to the driver, and quoting a radio interview with New Jersey Governor Chris Christie, “You have the obligation to keep your eyes on the road, your hands on the wheel and pay attention to what you’re doing”).

moral blameworthiness element at play in the new duty created in *Kubert*. “At some point we have to be responsible and accountable for our own behavior. We cannot blame it on who’s texting you.... This is about taking personal responsibility for your behavior, being personally accountable for your behavior, for your distracted driving; Turn the phone off!”¹¹⁹

Although social host liability was controversial at its inception¹²⁰ it has become an accepted part of our law and culture like remote third-party duty of care is proving to be today. Supporters of the remote third-party texter duty of care point to the fact that most states now have some form of social host liability; if not for all persons, it at least exists for minors.¹²¹ For example, New York’s Alcoholic Beverage Control Law states that “[n]o person shall sell, deliver or give away or cause or permit or procure to be sold, delivered or given away any alcoholic beverages to (1) any person ... under the age of twenty one years [or] (2) any visibly intoxicated person.”¹²² Today, social hosts can face both criminal and civil penalties for their actions.¹²³

However, critics of the third-party texter duty would argue that many of the strict measures implemented to combat drunk driving were not effective. First, many states have backed away from imposing such harsh social host liability, such as the liability established in *Kelly v. Gwinnell*.¹²⁴ In fact, most states restrict social host liability to minors.¹²⁵ In other words, parties are liable only for the injuries of their intoxicated social guests if the guests are minors.¹²⁶

119. Beattie, *supra* note 118.

120. See *supra* note 115 and accompanying text.

121. *State Law*, SOCIALHOSTLIABILITY.ORG, <http://socialhostliability.org/law/> [<http://perma.cc/WA8X-G6T9>] (last visited Feb. 22, 2015). For a state-by-state summary of social host liability laws, see *Dram Shop and Social Host Liability*, MOTHERS AGAINST DRUNK DRIVING, http://www.madd.org/laws/law-overview/Dram_Shop_Overview.pdf [<http://perma.cc/675C-W8D8>] (last updated June 2012).

122. See N.Y. ALCO. BEV. CONT. LAW § 65 (McKinney 2010).

123. See generally Jared Wachtler, *Are New York’s Social Host Liability Laws Too Strict, Too Lenient, or Just Right?*, 27 TOURO L. REV. 309 (2011) (discussing New York’s criminal and civil sanctions for social hosts in the context of history and in comparison to the laws in the nation).

124. See *supra* note 68 and accompanying text.

125. See *Dram Shop and Social Host Liability*, *supra* note 121, at 2-3.

126. *Id.*

In an effort to decrease drunk driving, many states increased fines and jail time for the crime, especially for repeat offenders.¹²⁷ The effectiveness of both of these measures has been subsequently critiqued.¹²⁸ A scholarly review of thirty-nine studies about the effects of increased fines and jail sentences on drunk driving rates did not find any consistent decreases in drunk driving as a result of these measures.¹²⁹ It found that mandatory fines and jail penalties did “not have clearly demonstrable general deterrent or preventative effects.”¹³⁰

During the period when public concern about drinking and driving was at its peak, states rushed to pass broad and comprehensive social host liability laws, as well as laws increasing the penalties for drunk driving.¹³¹ History has shown that such across-the-board measures were largely ineffective.¹³² Therefore, courts should carefully analyze the potential effects of imposing new duties and laws for texting while driving, so as not to overreach, as the courts did in response to the drunk driving epidemic.

B. Part of Larger Effort to Deter Texting While Driving

Supporters of the duty articulated in *Kubert* would argue that, more than practical implications, the duty might have an important deterrence effect. Civil liability for remote texters is just one piece in the puzzle of deterring texting while driving. Undoubtedly, it is necessary to address the problem from multiple angles. One could argue that the court in *Kubert* wanted to send a message to texters and was less focused on creating a practical duty. It is possible that the court realized how difficult its new duty would be to prove,¹³³

127. See Alexander C. Wagenaar et al., *General Deterrence Effects of U.S. Statutory DUI Fine & Jail Penalties: Long Term Follow-up in 32 States*, 35 ACCIDENT ANALYSIS & PREVENTION 982 (2007) (observing that between 1976 and 2002, twenty-six states statutorily imposed mandatory minimum fines for DUI and eighteen implemented mandatory jail penalties for first time offenders).

128. See *id.*

129. *Id.* at 992.

130. *Id.*

131. See *supra* notes 102-13 and accompanying text.

132. See *supra* notes 124-30 and accompanying text.

133. See *supra* Part III.

and perhaps intended this. As a deterrence measure, however, the duty of care articulated by the court in *Kubert* is overbroad.

The threat of civil liability for remote third-party texters could have the desired result and scare the public into stopping their texting and driving behaviors. However, the decision might scare the public into not texting at all. This is because the duty articulated in *Kubert* focuses on the sender of the text, not the recipient driver. And, it is recipient driver who has the primary responsibility to follow the law and avoid distractions while driving, not the sender of the message. Focusing on the sender of the text message, who most likely does not know if the recipient of his message is driving, could deter text messaging in an overly broad way that is not beneficial to the public.

The U.S. Supreme Court has acknowledged that “[c]ell phone and text message communications are so pervasive that some persons may consider them to be essential means or necessary instruments for self-expression, even self-identification.”¹³⁴ Furthermore, text messaging, if not done while driving, has many benefits. Texting is a quick, easy, and discrete way to communicate with others. Text messaging can also provide helpful information to the public, ranging from notifications of electricity outages¹³⁵ to information about prenatal health sent to expecting mothers.¹³⁶ The deterrence effect of *Kubert*’s duty is overbroad and discourages all texting, not just texting while driving, which is the problem the court in *Kubert* was trying to address.

If the court’s ultimate goal was simply to raise awareness about the dangers of texting while driving, however, it was very likely successful. Indeed, the court’s decision in *Kubert* gained national attention from both popular news outlets and legal news sources.¹³⁷

134. *City of Ontario v. Quon*, 130 S. Ct. 2619, 2630 (2010).

135. See ENERGENCY, <https://www.energysent.com/> [<http://perma.cc/Z97D-22HA>] (last visited Feb. 22, 2015) (offering text alerts about power outages to customers).

136. See *New Study Finds Text Messaging Program Benefits Pregnant Women*, GEO. WASH. PUB. HEALTH (June 9, 2014), <http://publichealth.gwu.edu/content/new-study-finds-text-messaging-program-benefits-pregnant-women> [<http://perma.cc/529V-QQK7>].

137. See, e.g., Brumfield & Boyette, *supra* note 118; Martha Neil, *Remote Texter Can Be Held Liable for Distracted Driver’s Crash, Appeals Court Rules*, ABA JOURNAL (Aug. 27, 2013, 6:02 PM), http://www.abajournal.com/news/article/remote_texter_can_be_held_liable_for_distracted_drivers_crash [<http://perma.cc/DQ37-7WGM>]; Peggy Wright, *Text Sender Could Be Civilly Liable for N.J. Wreck*, USA TODAY (Aug. 29, 2013 1:31 PM), <http://www.usatoday.com/story/news/nation/2013/08/29/texting-driving-crash-ruling-nj/2727549/> [<http://perma.cc/>]

Although not a decision from New Jersey's highest court, *Kubert v. Best* elicited comments from the Governor of New Jersey¹³⁸ and spawned additional legislation throughout the state.¹³⁹ It is possible that the court in *Kubert* was taking a different strategy to address the texting and driving problem in light of recent studies which reveal that banning handheld cell phone use while driving might not actually reduce crash rates.¹⁴⁰

As a scare tactic, the court's decision in *Kubert* to create a new duty might represent a policy-driven decision. However, as discussed above, the deterrence effect of the court's decision is overbroad. Furthermore, publicity and this method of deterrence alone are not nearly enough to solve the problems caused by texting and driving in the United States. A coordinated response from federal and state governments, cell phone manufacturers and service carriers, and the public at large is necessary to curb texting and driving in the United States.¹⁴¹ Perhaps the federal government should coordinate the collaboration between various federal agencies, the states, cell phone companies, and consumers.¹⁴² Regardless, the new duty of care articulated in *Kubert* represents, at best, an overbroad scare tactic intended to frighten drivers into ceasing to text while driving, and, at worst, a practically unenforceable and unwarranted expansion of third party liability.

IV. CONCLUSION

The duty articulated in *Kubert* represents a departure from the current legal understanding of a duty to the public because the

ET5K-LT9V] (summarizing the facts and decision in *Kubert v. Best*).

138. See Brumfield & Boyette, *supra* note 118.

139. See Beattie, *supra* note 118.

140. See Highway Loss Data Institute, *Hand-Held Cellphone Laws & Collision Claim Frequencies*, 26 HIGHWAY LOSS DATA INST. BULLETIN 17 (2009) (finding that, based on insurance collision loss data, handheld cell phone use by drivers and bans on such use has not affected trends in collision claims); *Study: Cell Phone Bans Don't Reduce Accidents*, CNN (Jan. 29, 2010, 5:57 AM), <http://www.cnn.com/2010/US/01/29/cellphone.study/> [<http://perma.cc/79JS-9M75>] (discussing the Highway Loss Data Institute Study and its implications).

141. See Alexa M. Farris, Note, *LOL? Texting and Driving Is No Laughing Matter: Proposing a Coordinated Response to Curb This Dangerous Activity*, 36 WASH. U. J.L. & POL'Y 233, 251 (2011) (discussing the various players in issue and how they could work together to alleviate the problem of texting and driving).

142. *Id.* at 251-59.

texter is in a remote location, his action is legal and not necessarily intended to spark tortious activity on the part of the driver, and the driver's tortious activity is a completely voluntary undertaking that is not automatic or unavoidable given the circumstances.¹⁴³ Although these factors individually might not represent a departure from our current understanding of a duty to the public, when taken together, they go beyond any duties to the public that have been articulated previously.

Because of the level of attenuation and the disconnect between the activity of sending a message and the negligent driving of another person, other states should not follow New Jersey's lead in allowing civil liability for remote third party texters. Although only New Jersey has addressed the issue, if other states followed New Jersey's lead, this new duty could become the norm.

This has important ramifications for drivers and texters everywhere. Mainly, this new duty would create uncertainty for texters. Millions of people send text messages every day, and it is safe to assume that many of them are not aware of whether the recipient of the message is driving at that exact time. Although sending a text message while not driving is usually perfectly legal and harmless, this new duty could impose civil liability on certain senders, even ones who do not know for a fact that the recipient is driving. Other states seeking to deter texting while driving should adopt different, more certain measures for deterrence.

Perhaps, however, the motivation behind the court's decision in *Kubert* was not to create a duty that would be implemented frequently, but rather to deter texting while driving. If that is the case, it makes sense that the duty is practically impossible to prove with certainty.¹⁴⁴ However, choosing to impose civil liability on remote third-party texters was an overbroad means to that end. Although news of the court's decision in *Kubert* might deter drivers from texting and driving, it might cause some texters to cease text messaging altogether, which is not necessarily in the public's best interest.

Despite potentially honorable intentions, it is undeniable that the court in *Kubert* created an entirely new duty of care, one that goes

143. See discussion *supra* Part II.A.

144. See discussion *supra* Part III.

beyond the duties which third parties currently owe to the public on behalf of others. This new duty of care creates uncertainty for texters and goes too far. Other states should not follow New Jersey's lead in this regard.

*Emily K. Strider**

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