

# TEXTERS BEWARE: ANALYZING THE COURT'S DECISION IN *KUBERT V. BEST*, 75 A.3D 1214 (N.J. SUPER. CT. APP. DIV. 2013)

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## I. INTRODUCTION

On June 28, 2007, five teenage girls were killed when the car in which they were traveling crossed the center line of a two-lane highway and collided with an oncoming tractor-trailer.<sup>1</sup> The car exploded into flames and all five girls were killed on impact.<sup>2</sup> Upon review of the driver's phone records, police determined that the driver received a text message at 10:06:29 p.m. asking, "What are you doing?"<sup>3</sup> The crash was reported to authorities at 10:07 p.m.<sup>4</sup>

"Because text messaging requires visual, manual, and cognitive attention from the driver, it is one of the most alarming distractions."<sup>5</sup> Forty-one states and the District of Columbia ban text messaging for all drivers.<sup>6</sup> New Jersey goes even farther, not only prohibiting texting while driving,<sup>7</sup> but also enacting a law that provides criminal penalties to drivers who injures others while distracted by cell phones.<sup>8</sup> Senator Fred Madden, a sponsor of the bill establishing the statute, stated, "Sometimes those distractions can have tragic results. That is why it is important to send a message that such behavior must cease."<sup>9</sup>

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1. *Text Messages Sent on Phone of Driver Before Fatal Wreck*, N.Y. TIMES, July 14, 2007, at B3.
2. *Id.*
3. *Id.*
4. *Id.*
5. NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., DIGEST OF DISTRACTED DRIVING LAWS, at iv (1st ed. 2013).
6. *Id.*
7. N.J. STAT. ANN. §§ 39:4-97.3 (West 2014).
8. *Id.* at § 2C:11-5.
9. Michelle Caffrey, *Family of Toni Donato-Bolis Relieved to See 'Kulesh, Kubert and Bolis Bill' Against Distracted Driving Signed Into Law*, SOUTH JERSEY TIMES, July 19, 2012, [http://www.nj.com/washington-township-times/index.ssf/2012/07/family\\_of\\_toni\\_donato-bolis\\_re.html](http://www.nj.com/washington-township-times/index.ssf/2012/07/family_of_toni_donato-bolis_re.html).

Although public policy mandates a reduction in texting while driving,<sup>10</sup> arguably this is a duty that should fall on drivers. However, New Jersey does not stop there. In *Kubert v. Best*, the Superior Court of New Jersey, Appellate Division, imposed a new duty on remote texters.<sup>11</sup>

This Note will examine *Kubert* in regard to the new duty imposed upon remote texters. This Note will argue it was unnecessary for the court to formulate a new duty regarding a remote third party's obligation not to text the driver of a motor vehicle because the duty to avoid texting while driving should fall solely on the driver. Section II will provide an overview of the relevant case law regarding the creation of a new duty. Section III will specifically examine the opinion of the Superior Court of New Jersey in *Kubert*. Finally, Section IV will analyze why the majority in *Kubert* was incorrect to create a new duty for remote texters, how the court should have come to a different result, and why the new duty created will rarely be met.

## II. LEGAL BACKGROUND

“A duty is an obligation imposed by law requiring one party ‘to conform to a particular standard of conduct toward another.’”<sup>12</sup> In *Kubert*, the court created a new duty that remote texters refrain from texting someone whom they know is driving and who will read the text message.<sup>13</sup> As this was a case of first impression regarding the existence of a duty for remote texters,<sup>14</sup> the court analogized a remote texter to a passenger's relationship with a driver.<sup>15</sup> The court reasoned that when a texter sends a message to someone they know is driving who will read the message, the texter is distracting the driver in the same way a passenger could.<sup>16</sup> The court stated, “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.”<sup>17</sup> Thus, to understand the decision reached in *Kubert*, it is necessary to examine both the analysis New Jersey courts use in the creation of a new duty as well as other instances where the courts have found passengers in a vehicle liable for harm caused by the driver.

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10. *Injury Prevention & Control: Motor Vehicle Safety*, CTR. FOR DISEASE CONTROL AND PREVENTION (Jan. 28, 2014), [http://www.cdc.gov/motorvehiclesafety/distracted\\_driving/](http://www.cdc.gov/motorvehiclesafety/distracted_driving/).

11. *Kubert v. Best*, 75 A.3d 1214, 1221 (N.J. Super. Ct. App. Div. 2013).

12. *Acuna v. Turkish*, 930 A.2d 416, 424 (N.J. 2007) (quoting DAN B. DOBBS ET AL., PROSSER AND KEETON ON TORTS: LAWYER'S EDITION § 53, at 356 (W. Page Keeton ed., 5th ed. 1984)).

13. *Kubert*, 75 A.3d at 1228.

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

### A. Duty Analysis in *Estate of Desir ex rel. Estiverne v. Vertus*

In *Estate of Desir ex rel. Estiverne v. Vertus*, the New Jersey Supreme Court established that creating a new duty of care must be fair in consideration of the circumstances while also addressing public policy concerns.<sup>18</sup> To determine fairness, a court must identify, weigh, and balance “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.”<sup>19</sup> The court determined that a duty based strictly upon the foreseeability of harm and how the defendant should have responded does not support traditional goals of tort law.<sup>20</sup> A new duty should not be created unless it formulates a rational rule that will uniformly remedy both current and future issues.<sup>21</sup>

The Supreme Court of New Jersey pointed out that although the foreseeability of an injury is a significant factor in determining the existence of a duty, “[f]airness, not foreseeability alone, is the test.”<sup>22</sup> In assessing whether to apply a new duty of care, a court should focus on all the factors discussed above and not allow foreseeability alone to dictate a new duty of care.<sup>23</sup>

Although courts have the authority to establish a new duty of care, they can also look to other torts theories when determining liability. To establish liability for third parties, courts may examine whether parties fall into legally recognized special relationships and also whether one party aided and abetted the other party’s tortious conduct through substantial assistance or encouragement.<sup>24</sup>

### B. Liability for Passengers

Courts have generally recognized a duty does not extend to a third party’s ability to control the conduct of another to prevent him from causing harm.<sup>25</sup> However, courts have found exceptions to this general rule by

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18. 69 A.3d 1247, 1255 (N.J. 2013).

19. *Id.* at 1258.

20. *Id.* at 1261.

21. *Id.* at 1258.

22. *Id.* at 1260.

23. *Id.*

24. *See Podias v. Mairs*, 926 A.2d 859 (N.J. Super. Ct. App. Div. 2007) (examining both the duty analysis and aiding and abetting and holding that passengers have a duty to take precautions to prevent a driver from leaving the scene of an accident or are deemed liable for substantially encouraging the driver to leave the scene of the accident).

25. RESTATEMENT (SECOND) OF TORTS § 315 (1965).

examining other tort principles such as the existence of a legally recognized special relationship and aiding and abetting.<sup>26</sup>

### 1. *Champion ex rel. Ezzo v. Dunfee*

Rather than pure control, courts have held that passengers may be liable for the unlawful conduct of a driver if there is a special relationship or if the passenger aids and abets the tortfeasor's misconduct.<sup>27</sup> In *Champion ex rel. Ezzo v. Dunfee*, the court analyzed these exceptions to passenger non-liability.<sup>28</sup>

A special relationship exists when the passenger can exercise control over the driver's conduct.<sup>29</sup> The court cited the *Restatement (Second) of Torts*, which provides that a duty to control the conduct of another occurs if "a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct."<sup>30</sup> Special relationships that are legally recognized include relationships between a parent-child, master-servant, landlord-tenant, and guardian-ward.<sup>31</sup> If a relationship does not fit into one of the special relationship categories described, "the actor is not subject to liability if he fails, either intentionally or through inadvertence, to exercise his ability so to control the actions of third persons as to protect another from even the most serious harm."<sup>32</sup>

In *Champion*, the defendant, a front seat passenger, did not have a special relationship with the driver who crashed an automobile and injured a backseat passenger.<sup>33</sup> The defendant was dating the driver at the time of the accident,<sup>34</sup> and the court held that the defendant's relationship with the driver did not qualify as a special relationship.<sup>35</sup>

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26. See *Podias*, 926 A.2d 859 (examining both the duty analysis and aiding and abetting and holding that passengers have a duty to take precautions to prevent a driver from leaving the scene of an accident or are deemed liable for substantially encouraging the driver to leave the scene of the accident).

27. A defendant aids and abets another's tortious conduct when, "(1) a primary tortfeasor committed a tort against a plaintiff, (2) the defendant knew that the primary tortfeasor's conduct was a breach of duty, and (3) the defendant *substantially assisted or encouraged* the primary tortfeasor in committing the tort." 74 AM. JUR. 2D *Torts* § 61 (2014) (emphasis added).

28. 939 A.2d 825, 831 (N.J. Super. Ct. App. Div. 2008).

29. *Id.* at 830.

30. *Id.*

31. *Id.*

32. RESTATEMENT (SECOND) OF TORTS § 315 cmt. b (1965).

33. *Champion*, 939 A.2d at 833.

34. *Id.* at 827.

35. *Id.* at 833.

The second “no duty” exception results if the passenger aids and abets the driver’s tortious conduct through substantial assistance or encouragement.<sup>36</sup> A passenger who is merely a companion in the vehicle and has not encouraged the driver to engage in tortious conduct is not liable for the party’s conduct.<sup>37</sup> Substantial encouragement does not require active physical participation in the tortious conduct; rather, advice and encouragement are sufficient to satisfy the test.<sup>38</sup> The court cited several examples when a passenger encouraged a driver to engage in a tortious act.<sup>39</sup> Substantial encouragement was shown where a “respected . . . authority figure” encouraged a minor driver to prove an automobile’s performance ability.<sup>40</sup> In *Champion*, the defendant was a companion, and there was no proof she supported the motorist in driving while intoxicated.<sup>41</sup> Although the evidence showed the defendant did not object to the intoxicated driving, she repeatedly told the driver to slow down, which was sufficient to demonstrate the defendant’s behavior did not constitute substantial encouragement.<sup>42</sup>

## 2. Podias v. Mairs

The full duty analysis and aiding and abetting theory of negligence were both illustrated in *Podias v. Mairs*.<sup>43</sup> In that case, an intoxicated driver lost control of his vehicle and collided with a motorcyclist.<sup>44</sup> The two passengers encouraged the driver to leave the scene of the accident and the motorcyclist lying in the middle of the road.<sup>45</sup> The passengers had cell phones and used them numerous times following the accident, but they never phoned for emergency assistance.<sup>46</sup> As the motorcyclist lay injured in the road, he was eventually run over by another driver.<sup>47</sup>

The Court held that the passengers owed a duty to the motorcyclist.<sup>48</sup> Creation of a duty requires a court to balance factors including the “nature of the underlying risk of harm . . . the opportunity and ability to exercise care to

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36. *Id.* at 831.

37. *Id.* at 831–32.

38. See Nathan Isaac Combs, *Civil Aiding and Abetting*, 58 VAND. L. REV. 241, 255 (2005).

39. *Champion*, 939 A.2d at 831.

40. *Id.* See also *Cobb v. Indian Springs, Inc.*, 522 S.W.2d (Ark. 1975) (holding the nature of a security guard’s comments and his authoritative relationship to the minor motorist evidenced substantial encouragement).

41. *Champion*, 939 A.2d at 833.

42. *Id.*

43. 926 A.2d 859 (N.J. Super. Ct. App. Div. 2007).

44. *Id.* at 862.

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.* at 866.

prevent the harm, the comparative interests of, and the relationships between or among the parties, and ultimately, based on considerations of public policy and fairness . . . .”<sup>49</sup> Courts should also examine whether the defendant is responsible for creating the harm and “whether the defendant had sufficient control, opportunity, and ability to have avoided the risk of harm.”<sup>50</sup> Plaintiffs must prove a defendant knowingly provided substantial assistance.<sup>51</sup>

By failing to assist the injured motorcyclist, the passengers were responsible for his death.<sup>52</sup> It was foreseeable the injured motorcyclist would be harmed or killed when the passengers left him lying in the middle of the road.<sup>53</sup> Furthermore, the death “might have been avoided with little effort and inconvenience . . .” had the passengers used their phones to call for emergency assistance.<sup>54</sup> The court determined that imposing a duty that passengers assist an injured motorist under these circumstances was fair and rationally related to public policy.<sup>55</sup>

Alternatively, the court determined that the passengers could be found liable under the common-law tort theory of aiding and abetting.<sup>56</sup> A defendant can be held to have aided and abetted if he provides “substantial assistance” to a tortfeasor.<sup>57</sup> The factors a court must use to determine substantial assistance are, “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 [tortfeasor] and his state of mind . . . .”<sup>58</sup> The court found that one could conclude the passengers either collaborated in or encouraged the driver’s decision to abandon the motorcyclist because the passengers were aware of the driver’s wrongdoing and wanted to disassociate themselves from the potential legal repercussions.<sup>59</sup> By encouraging the driver to leave the scene of the accident, the passengers exhibited their substantial assistance in preventing the driver from calling for emergency assistance and fleeing the scene of the accident.<sup>60</sup>

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49. *Id.* at 865.

50. *Id.* at 866.

51. Combs, *supra* note 38, at 290.

52. *Podias*, 926 A.2d at 866.

53. *Id.* Although the *Desir* court held that foreseeability alone is insufficient to control a duty, the court in *Podias* held that foreseeability was a factor to consider. *Estate of Desir ex rel. Estiverne v. Vertus*, 69 A.3d 1247, 1261 (N.J. 2013).

54. *Podias*, 926 A.2d at 869.

55. *Id.* at 866.

56. *Id.* at 869.

57. *Id.* at 867 (citing *Halberstam v. Welch*, 705 F.2d 472, 478 (D.C. Cir. 1983)).

58. *Id.* (citing RESTATEMENT (SECOND) OF TORTS § 876(b) cmt. d (1979)).

59. *Id.* at 868.

60. *Id.*

In summary, a third party generally does not have a duty to control the conduct of another to prevent harm<sup>61</sup> unless a special relationship exists or the third party aided and abetted the behavior through substantial assistance or encouragement.<sup>62</sup> A court may impose a new duty, but the “duty [must] derive from considerations of public policy and fairness,”<sup>63</sup> and cannot hinge completely on the foreseeability of harm.<sup>64</sup> However, in *Kubert*, the court created a duty for remote texters based almost entirely on the foreseeability of harm.<sup>65</sup>

### III. EXPOSITION OF THE CASE

In *Kubert v. Best*, the Superior Court of New Jersey, Appellate Division, considered whether seventeen-year-old Shannon Colonna (“Defendant”) was liable when the person she was texting lost control of his car and severely injured the Plaintiffs.<sup>66</sup> The court found that she was not liable.<sup>67</sup> However, in so doing the court held “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.”<sup>68</sup>

#### A. Facts and Procedural Posture

In September 2009, eighteen-year-old Kyle Best and Shannon Colonna (collectively, “Defendants”) were friends who texted each other every day.<sup>69</sup> On September 21, 2009, the Defendants texted each other sixty-two times, ate lunch at Best’s home, and remained together until Best had to leave for work.<sup>70</sup> At 5:41 p.m., Best clocked out of work and texted the Defendant at 5:42 p.m.<sup>71</sup> Best then left his job and began the drive home.<sup>72</sup> A record of the Defendant’s text messages showed that at 5:48:14 p.m. the Defendant sent a text to Best, and he responded at 5:48:58.<sup>73</sup> The content of these text

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61. RESTATEMENT (SECOND) OF TORTS § 315 (1965).

62. *Champion ex rel. Ezzo v. Dunfee*, 939 A.2d 825, 831 (N.J. Super. Ct. App. Div. 2008).

63. *Estate of Desir ex. rel. Estiverne v. Vertus*, 69 A.3d 1247, 1258 (N.J. 2013) (citing *Hopkins v. Fox & Lazo Realtors*, 625 A.2d 1110, 1116 (N.J. 1993)).

64. *Id.* at 1260.

65. *Kubert v. Best*, 75 A.3d 1214, 1227 (N.J. Super. Ct. App. Div. 2013).

66. *Id.*

67. *Id.* at 1229.

68. *Id.* at 1221.

69. *Id.* at 1119.

70. *Id.* at 1220.

71. *Id.*

72. *Id.*

73. *Id.*

messages is unknown.<sup>74</sup> Within seconds of his responding text, Best's pickup truck crossed the centerline of the road and struck the Plaintiffs who were riding a motorcycle.<sup>75</sup> As a result of the accident, both of the Plaintiffs suffered severe injuries and lost their left legs.<sup>76</sup>

Best settled with the Plaintiffs, and he was no longer a party to the suit.<sup>77</sup> The Plaintiffs sued the Defendant, arguing that she "aided and abetted Best's unlawful texting while driving, and . . . she had an independent duty to avoid texting a person who was driving a motor vehicle."<sup>78</sup> The Plaintiffs argued that the Defendant knew Best was driving because she texted him at 5:48 p.m., less than a minute before the accident.<sup>79</sup> The Defendant moved for summary judgment, arguing that she was unaware Best was driving and had no duty to avoid sending text messages to him.<sup>80</sup> The trial judge agreed and granted summary judgment to the Defendant.<sup>81</sup> The Plaintiffs appealed to the New Jersey Superior Court, Appellate Division, to overrule the trial court's grant of summary judgment and hold the Defendant liable under a proximate cause theory of negligence for texting Best when she knew Best was driving.<sup>82</sup>

#### B. The Majority Opinion

To begin, the court determined that the Defendant's liability could not be established through a special relationship or an aiding and abetting theory.<sup>83</sup> Special relationships are legally recognized relationships in which one party can exercise control over another's conduct.<sup>84</sup> The Defendant and Best were just friends, which does place them into a legally recognized special relationship through which the Defendant could control Best's conduct.<sup>85</sup>

Aiding and abetting requires a passenger to have "actively encouraged the driver to commit the negligent act."<sup>86</sup> To prove aiding and abetting, the

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74. *Id.* at 1221.

75. *Id.* at 1219.

76. *Id.*

77. *Id.* at 1222.

78. *Id.* at 1221.

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.* at 1225.

84. *Id.* at 1224.

85. *Id.*

86. *Id.* (citing *Champion ex rel. Ezzo v. Dunfee*, 939 A.2d 825, 831 (N.J. Super. Ct. App. Div. 2008)).



Plaintiffs had to show the Defendant “urged Best to read and respond to her text while he was driving,” which they failed to do.<sup>87</sup>

There was no evidence that by texting Best, the Defendant actively encouraged him to respond.<sup>88</sup> The Defendant sent one text message approximately twenty-five seconds before the crash, and although the content of the message was unknown, the mere sending of text messages, without more, does not constitute active encouragement that the driver violate the law by responding immediately.<sup>89</sup>

As for the Plaintiffs’ argument that the Defendant had a duty not to text someone she knew was driving, the court determined that “one should not be held liable for sending a wireless transmission simply because some recipient might use his cell phone unlawfully and become distracted while driving.”<sup>90</sup> A texter is not liable for merely sending a message to a specific recipient, even if he knows the recipient is driving.<sup>91</sup>

Although the court found the Defendant was not liable, the court determined that it was necessary to create a new duty for remote third party texters.<sup>92</sup> The remote sender “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.”<sup>93</sup> To breach this duty, the sender must know or have special reason to know, the driver will read the message while driving and will become distracted from the task of driving.<sup>94</sup> Showing prior experiences in which the recipient responded to a text message while driving can prove knowledge or special reason to know.<sup>95</sup>

The court compared a remote texter to a passenger physically present in a car who distracts a driver.<sup>96</sup> Like a physically present passenger, the sender of a text must avoid distracting the driver of a vehicle to protect motorists sharing the roadways.<sup>97</sup> A passenger would be liable for an accident if the passenger distracted the driver by placing a photo in front of the driver’s face and encouraging the driver to look at the photograph.<sup>98</sup> The court concluded the passenger’s purposeful distraction of the driver would

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87. *Id.* at 1225.

88. *Id.*

89. *Id.* at 1224.

90. *Id.* at 1226. *See also* *Durkee v. C.H. Robinson Worldwide, Inc.*, 765 F. Supp. 2d 742 (W.D.N.C. 2011) (dismissing a products liability claim against the manufacturer of a text message device in a tractor-trailer and holding that the driver has a duty to avoid distraction by not viewing a message).

91. *Kubert*, 75 A.3d at 1226.

92. *Id.* at 1221.

93. *Id.*

94. *Id.* at 1226.

95. *Id.* at 1228.

96. *Id.*

97. *Id.*

98. *Id.* at 1226–27.

constitute independent negligence, not aiding and abetting.<sup>99</sup> In the same way, a sender of a text message could distract a driver by encouraging the driver to look and respond to a text message.<sup>100</sup>

The court believed foreseeability was crucial in determining whether to impose a duty.<sup>101</sup> If a party is aware their actions create a risk of injury, the harm is foreseeable.<sup>102</sup> A sender of a text message disregards a foreseeable risk when he or she texts someone he or she knows is driving because “it is foreseeable that a driver who is actually distracted by a text message might cause an accident and serious injuries or death.”<sup>103</sup> The court determined that this foreseeable harm could be avoided relatively easily by refraining from texting someone known to be driving who will immediately view the text.<sup>104</sup>

In this case, the Plaintiffs did not offer sufficient evidence to prove the Defendant knew Best was driving and would view and respond to the text while driving.<sup>105</sup> The evidence showed that the Defendant sent one text to Best while he was driving, but no evidence indicated she was aware Best would read and respond to the text immediately while driving.<sup>106</sup> Based on the foregoing analysis, the court concluded that the trial judge properly granted summary judgment for the Defendant.<sup>107</sup>

### C. Judge Espinosa’s Concurring Opinion

Judge Espinosa agreed with the majority’s holding that summary judgment for the Defendant was correct.<sup>108</sup> However, in Espinosa’s view, the majority should not have created a new duty specifically for remote texters.<sup>109</sup> Rather, Espinosa believed traditional tort principles, specifically aiding and abetting and special relationships, provide ample guidance to determine whether a remote texter is liable for an accident caused by the recipient of the text message.<sup>110</sup>

Espinosa disagreed with the majority’s comparison of a remote texter to a passenger physically present in a vehicle.<sup>111</sup> He argued that a remote texter cannot be held to the same standard as a passenger physically present

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99. *Id.* at 1227.

100. *Id.* at 1228.

101. *Id.* at 1227.

102. *Id.*

103. *Id.*

104. *Id.* at 1228.

105. *Id.* at 1229.

106. *Id.*

107. *Id.*

108. *Id.* (Espinosa, J., concurring).

109. *Id.* at 1229–30.

110. *Id.* at 1230–31.

111. *Id.*

in a vehicle because a remote texter does not have the ability to control the driver's actions.<sup>112</sup> Furthermore, remote texters lack "first-hand knowledge of the circumstances attendant to the driver's operation of the vehicle that a passenger possesses."<sup>113</sup>

Espinosa did, however, believe a discussion regarding passenger liability was useful.<sup>114</sup> The *Restatement (Second) of Torts* and the New Jersey courts have recognized two exceptions to passenger non-liability: when a special relationship exists between the passenger and driver that affords the passenger some control over the driver, and when the passenger aids and abets in the driver's tortious conduct through substantial encouragement or assistance.<sup>115</sup> The first exception was not applicable here because the Defendant did not have a special relationship with Best through which she could control his conduct.<sup>116</sup> With regard to the second exception, substantial encouragement is proven by showing the Defendant "knowingly and substantially" assisted a party in completion of an illegal activity.<sup>117</sup>

Espinosa believed summary judgment should be upheld because the Plaintiffs provided no evidence that the Defendant was aware she was participating or furthering an illegal activity.<sup>118</sup> Furthermore, the Defendant was not present in the car and therefore, was unaware of the circumstances.<sup>119</sup> The mere act of responding to Best's text message did not prove any substantial encouragement.<sup>120</sup> Espinosa also commented that if a duty is to fall on remote texters, it should be considered and decided by the legislature.<sup>121</sup>

#### IV. ANALYSIS

The majority's decision in *Kubert* to create a new duty for remote texters was unnecessary. The majority's comparison of remote texters to passengers physically present is inappropriate because remote texters have no knowledge of the circumstances of the recipient. Part A of this section will discuss how the duty not to text while driving falls completely on the driver. Part B will discuss how other tort principles do not support

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112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.* at 1230–31 (citing RESTATEMENT (SECOND) OF TORTS §§ 315, 876 (1965 & 1979)).

116. *Id.* at 1231.

117. *Id.* at 1231 (citing *Tarr v. Ciasulli*, 853 A.2d 921, 929 (N.J. 2004)).

118. *Id.* at 1232.

119. *Id.*

120. *Id.*

121. *Id.* at 1233.

establishing liability for remote texters. Part C will discuss how the new duty created by the court in *Kubert* will rarely be met.

#### A. It Is the Driver's Duty not to Text and Drive

The majority was incorrect in creating a new duty for a remote texter because the responsibility not to text while driving should fall solely on the driver. In *Estate of Desir*, the Supreme Court of New Jersey held that the creation of a new duty of care hinges on fairness.<sup>122</sup> However, in creating this duty for remote texters, the court in *Kubert* overlooked fairness in exchange for what the majority believed to be the foreseeability of harm.<sup>123</sup>

While it may be true that texting while driving creates a foreseeable risk of injury, this is a foreseeable risk that the driver alone holds. In *Estate of Desir*, the court held that a duty which focuses on the foreseeability of harm and how the defendant should have responded does not support traditional goals of tort law.<sup>124</sup> By creating a new duty for remote texters, the *Kubert* court did just what the Supreme Court of New Jersey held was inappropriate because a duty does not revolve around the foreseeability that harm may occur. Furthermore, the foreseeable risk of harm is lessened by the sender's assumption that the recipient will not view and respond to the text message until it is safe to do so.

The remote texter is entitled to the assumption that once the recipient actually begins driving, he or she will not read or respond to text messages. The majority even concedes that "the driver bears responsibility for obeying the law and maintaining safe control of the vehicle."<sup>125</sup> The majority attempts to overcome this rule by extending the duty only when the sender knows the recipient is driving and will read the text while driving;<sup>126</sup> however, this duty is unnecessary because the driver is ultimately the person responsible for avoiding texting while driving. Just as it is the driver's responsibility to avoid changing the radio station or talking to a passenger in a potentially dangerous situation, it is the driver's responsibility to avoid viewing a text message, not the sender's responsibility to avoid sending a text message. The State of New Jersey has acknowledged this responsibility by enacting a law that provides criminal penalties to drivers who cause injuries to others while distracted by cellphones.<sup>127</sup>

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122. *Estate of Desir ex rel. Estiverne v. Vertus*, 69 A.3d 1247, 1260 (N.J. 2013).

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

124. *Estate of Desir*, 69 A.3d at 1261 (arguing the goal of creating a new duty is advancing a public interest and holding a duty that applied only to the facts of the case was not generally applicable and thus did not advance a public interest).

125. *Kubert*, 75 A.3d at 1229.

126. *Id.*

127. N.J. STAT. ANN. § 2C:11-5.

The analogy between a remote texter and a passenger physically present in a vehicle is inappropriate because a remote texter cannot appreciate the circumstances surrounding the recipient of a text message. Judge Espinosa correctly asserted in his concurring opinion that a remote texter has no first-hand knowledge of the situation and no control over the driver's actions.<sup>128</sup> Drivers are aware of the illegality of texting while driving and the grave risk of harm it can cause, and only drivers have the ability to avoid viewing and responding to a text message.

In *Podias*, the court created a duty that passengers assist an injured motorist when the injury was related to their actions, the harm was foreseeable, and the harm could have been avoided with little effort.<sup>129</sup> The passengers' physical presence allowed them the opportunity to assess the risk of harm their actions created. A remote texter does not have the same opportunity. The inherent nature of texting undermines this analogy because texting is meant to be quick and can be done at almost any time, at any place. Unlike a physically present passenger, a sender cannot hear background noises or see the surroundings of the recipient to infer a dangerous situation. Thus, using this comparison as a basis for creating a new duty of care is improper.

The creation of a new duty of care requires a court to examine whether a defendant is responsible for creating the harm by determining if the defendant had sufficient control and ability to avoid the risk.<sup>130</sup> Remote senders of text messages do not have sufficient control to avoid the risk; the control is in the hands of the driver. In *Podias*, the passengers had the ability to control the harm to the motorcyclist by calling for emergency assistance or allowing the driver of the vehicle to call for emergency assistance.<sup>131</sup> In *Champion*, the passenger, as the driver's girlfriend, was not responsible for creating the harm because she did not encourage the driver's behavior and had no ability to avoid the risk.<sup>132</sup> A remote sender of a text message should be considered a remote companion who similarly has no control over the recipient's automobile. The majority mistakenly held a remote sender has any duty at all to avoid texting someone they know is driving, as the duty to avoid texting while driving falls completely on the driver.

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128. *Kubert*, 75 A.3d at 1229 (Espinosa, J., concurring).

129. *Podias v. Mairs*, 926 A.2d 859, 866 (N.J. Super. Ct. App. Div. 2007).

130. *Id.* at 866.

131. *Id.* at 869.

132. *Champion ex rel. Ezzo v. Dunfee*, 939 A.2d 825, 833 (N.J. Super. Ct. App. Div. 2008).

## B. Traditional Tort Principles Do Not Support Liability for Remote Texters

Although the court established a new duty for remote texters, the court could not find the Defendant liable based on the new duty.<sup>133</sup> In Judge Espinosa's concurrence, he argued that the creation of a new duty was not necessary to dismiss the Defendant from liability.<sup>134</sup> He argued that traditional tort principles, specifically aiding and abetting or special relationships, are sufficient to determine liability for a remote texter.<sup>135</sup> Although these tort principles have been used in other cases as an exception to the general principle of passenger non-liability, they will not be useful in determining the liability of a remote texter.

### 1. Special Relationships

"A special relationship exists where the occupant has some control over the driver . . . ."<sup>136</sup> Special relationships are insufficient to establish liability for remote texters because there is no element of control. Unlike a child on good behavior around a parent, a child who is driving cannot feel pressure to respond because he or she should not even be looking at their phone while driving to know a parent has texted them.

Furthermore, establishing liability for remote texters through a special relationship is difficult because the only special relationships recognized by New Jersey courts are master-servant, parent-child, landlord-tenant, and guardian-ward.<sup>137</sup> Arguments may be made that husband-wife relationships could be included in this special relationship category,<sup>138</sup> but it is not one of the relationships listed in the *Restatement (Second) of Torts*, the authority adopted by New Jersey.<sup>139</sup> Although special relationships may be beneficial to determine liability in some circumstances, the small amount of special relationships enforced will be insufficient to cover the majority of texting relationships. For example, in *Champion*, the court held that the passenger had no special relationship to the driver because they were just dating.<sup>140</sup> Special relationships would be helpful in determining liability only between

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133. *Kubert v. Best*, 75 A.3d 1214, 1229 (N.J. Super. Ct. App. Div. 2013).

134. *Id.* at 1229–30 (Espinosa, J., concurring).

135. *Id.* at 1230–31.

136. *Champion*, 939 A.2d at 830.

137. RESTATEMENT (SECOND) OF TORTS §§ 316-20 (1979).

138. *See Wagner v. Shlue*, 605 A.2d 294, 297 (N.J. Super. Ct. App. Div. 1992) (holding that a husband may be found liable if he gave car keys to his visibly intoxicated wife and she drove negligently, injuring another driver).

139. *Kubert*, 75 A.3d at 1231.

140. *Champion*, 939 A.3d at 833.

the few relationships covered in the *Restatement (Second) of Torts*.<sup>141</sup> As such, special relationships will not be useful to assert liability for remote texters in the majority of situations because many texters will not fall into these legal relationships. Most importantly, however, the driver should not even be looking at his phone while driving to know if the texter is a person with whom he or she has a special relationship.

## 2. *Aiding and Abetting*

Liability for a remote texter cannot be established through aiding and abetting, which requires substantial encouragement or assistance.<sup>142</sup> As illustrated in *Champion*, substantial encouragement requires a party to be more than a companion to the tortious conduct.<sup>143</sup> Sending a text message creates a companionship rather than substantial encouragement because either party can choose whether and when they respond. Substantial encouragement cannot be established even where texters send messages immediately back and forth because there is no requirement, and it is even strongly discouraged, to respond to a message while driving. Unlike a physically present passenger, a remote texter cannot offer substantial encouragement because one cannot force a driver to view a text message. A physically present passenger can encourage a driver to speed or drive erratically because the driver will hear them, but a remote texter cannot urge a driver to read a text message. The power is completely in the driver's hands to avoid viewing a text message and responding when he or she pulls over or arrives at his or her destination.

One factor a court must consider when determining substantial assistance is presence at the time of the tortious conduct.<sup>144</sup> A remote texter will never meet this element of substantial assistance because they will never be physically present with the driver in the vehicle. Unlike *Podias*, where the passengers were present and were aware of the risk created by encouraging the driver to leave an injured motorcyclist in the road,<sup>145</sup> a remote texter has limited knowledge of the recipient's circumstances and any negligent act that may be occurring. To hold a remote texter liable for an action they are unaware of and do not encourage is inappropriate.

Although aiding and abetting and special relationships provide an exception to passenger non-liability in some circumstances, they do not

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141. RESTATEMENT (SECOND) OF TORTS §§ 316–20 (1979).

142. See 74 AM. JUR. 2D *Torts* § 61 (2014).

143. *Champion*, 939 A.2d at 831–32.

144. *Podias v. Mairs*, 926 A.2d 859, 867 (N.J. Super. Ct. App. Div. 2007).

145. *Id.* at 866.

support establishing liability for remote texters. It will be difficult to prove in the majority of circumstances that a remote texter either falls into a special relationship category or has the requisite knowledge to substantially assist or encourage a driver to unlawfully text and drive. In *Kubert*, the majority examined these principles and determined liability for the Defendant did not exist.<sup>146</sup> The court should have ended their analysis there and not gone on to create a new duty—a duty the Defendant was not even found to have breached.

### C. The Duty Created Will Rarely Be Met

The duty of care created by the court in *Kubert* and the imposition of liability will rarely be met.<sup>147</sup> The court's requirement that the sender of a text message know not only that the recipient was driving, but also that he or she would immediately view and respond to the message is an extremely high burden and could not even be met in *Kubert*.<sup>148</sup>

In determining liability, it will be extremely difficult to establish whether the sender knows the recipient of a text message is driving. The majority's argument that past experiences may provide the sender with knowledge that the recipient will read and respond while driving places too great of a risk on the sender. The inherent nature of texting is it is a quick and easy way to get in touch with someone. The sender cannot hear background noises and rarely has any clue as to where someone is when they respond. Neither party has any control over when the other will view or respond to the message. Thus, it is ridiculous to place a duty on the sender of a text message to be aware of whether the recipient is driving, and if the recipient is driving, to know they will look and respond to the text message. Only the recipient of a text message can control when and where he or she views and responds to the message, and the duty to avoid texting and driving should fall completely on the driver, recipient.

The only scenario where it seems plausible that a remote texter may have the requisite knowledge required to breach this newly created duty is if two parties had a text conversation where the recipient admitted he was driving. In only this scenario would a remote texter know with certainty that the recipient is both driving and will respond regardless of the act's illegality. A remote texter would not have the requisite knowledge even if the recipient texted he or she was about to drive somewhere because the remote texter is entitled to the assumption that once the recipient actually begins driving, he or she will not read or respond to text messages. Thus, the court created an

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146. *Kubert v. Best*, 75 A.3d 1213, 1221 (N.J. Super. Ct. App. Div. 2013).

147. *Id.* at 1229 (Espinosa, J., concurring).

148. *See id.* at 1229 (majority opinion).



unnecessary duty that will almost never be breached due to a lack of knowledge by the sender.

#### V. CONCLUSION

Texting while driving obviously creates grave risks that can end in serious injury or death; however, the majority in *Kubert* was incorrect to impose a duty on remote texters. The majority's comparison of remote texters to passengers physically present was inappropriate because remote texters have no knowledge of the circumstances of the recipient. By examining traditional tort principals such as special relationships and aiding and abetting, the court could have reached the same result that the Defendant was not liable for the injuries to the Plaintiffs. The court should have stopped their analysis after determining that the Defendant was not liable because the duty to avoid texting and driving is a duty that falls solely on drivers. As such, it should not have been extended to include remote texters. Finally, because the imposition of liability for breaching the duty will rarely, if ever, be met, the majority did little more than create a useless duty of care.

