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Kubert v. Best: Oops, I Sent it Again!

Julia Blackmon*

I. INTRODUCTION

Text messages permit cell phone users to maintain communication in situations where a voice call would be impractical, impossible, or socially unacceptable. Because of the distraction that this new form of communication might bring, some states have rightly provided civil and criminal penalties for those who text while driving and, as a result, unintentionally injure others.¹ *Kubert v. Best* takes a radical approach in fighting the texting while driving craze. The issue in this case is whether a person, who is not operating a motor vehicle but sending a text message to the operator of a motor vehicle, may also be liable to persons because the driver was distracted by receiving the text message.²

The Appellate Division of the Superior Court of New Jersey held that a “sender of a text message can potentially be liable if an accident is caused by texting, but only if the sender knew or had special reason to know that the recipient would view the text while driving and thus be distracted.”³ The court explained that the mere sending of a text is not enough to find liability.⁴ Hence, the court held that it will only hold the sender of a text liable if the sender knows or had reason to know that the recipient of a text message is driving and is likely to read the text message while driving.⁵ The court opined that if the sender of a text has such knowledge, then the sender has “taken a foreseeable risk in sending the text message at that time.”⁶ Although this case presents another avenue to stop the texting while driving trend, the sender of a text should not be held liable for the recipient’s actions. It is the recipient of a text who decides when to answer the phone or respond to messages, not the sender. It is unfair to hold a sender of a text liable when the recipient is the one who chooses to disobey the law and text while driving. In addition, it will be difficult for plaintiffs who bring this type of claim to

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1. See, e.g., FLA. STAT. ANN. § 316.305 (West 2012); IOWA CODE ANN. § 321.276 (West 2012) (provides no civil or criminal penalties, but prohibits the conduct).
2. See *Kubert v. Best*, 75 A.3d 1214, 1218–19 (N.J. Super. Ct. App. Div. 2013).
3. *Id.* at 1219.
4. *Id.* at 1226.
5. *Id.* at 1219.
6. *Id.* at 1227.

prove that the sender knew or should have known the recipient was driving and would immediately respond to the text, as illustrated in this case.

II. FACTUAL BACKGROUND

In *Best*, plaintiffs Linda Kubert and David Kubert (collectively, “the Kuberts”) “were grievously injured by an eighteen-year-old driver who was texting while driving and crossed the center-line of the road,” which caused an accident.⁷ The defendants were Kyle Best (“Best”) and Shannon Colonna (“Colonna”).⁸ Best was the driver who was texting while driving and injured the plaintiffs.⁹ Colonna, a seventeen-year-old, sent Best text messages seconds before the accident.¹⁰ The Kuberts’ claims against Best were settled and were not part of this appeal.¹¹ This case deals with the Kuberts’ appeal of the trial court’s dismissal of their claims against Colonna.¹²

The day of the accident, Best and Colonna began to exchange text messages as Best drove home from work.¹³ Best and Colonna saw each other socially, but were not exclusively dating.¹⁴ Best’s phone records show that Best and Colonna “texted each other sixty-two times on the day of the accident, about an equal number of texts originating from each.”¹⁵ Best initiated the texting as he was about to drive home.¹⁶ At 5:48:14 p.m., Colonna sent Best a text.¹⁷ Best responded to Colonna’s text at 5:48:58 p.m.¹⁸ The sequence of the text messages exchanged imply that the plaintiffs’ accident, occurred sometime between Best’s text message to Colonna, and the call made to the police at 5:49:15p.m.¹⁹

That same day, the Kuberts were riding their motorcycle.²⁰ As they came around the curve on the road, the pick-up truck Best was driving crossed the double centerline of the roadway into the plaintiffs’ lane.²¹ The

7. *Id.* at 1218.

8. *Kubert*, 75 A.3d at 1214.

9. *Id.* at 1219.

10. *Id.* at 1220.

11. *Id.* at 1218.

12. *Id.*

13. *Id.* at 1220.

14. *Kubert*, 75 A.3d at 1219.

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Kubert*, 75 A.3d at 1219.

21. *Id.*

Kuberts attempted to dodge Best's pick-up truck but were unable to do so.²² The front driver's side of the truck struck the plaintiffs and their motorcycle.²³ The collision nearly severed David Kubert's left leg and it fractured Linda Kubert's left leg, leaving her fractured thighbone protruding out of the skin as she lay injured in the road.²⁴ Best stopped his truck and after seeing the severity of the injuries, he called 911.²⁵ Best, a volunteer fireman, aided the Kuberts to the best of his ability until the police and the medical responders arrived.²⁶ Medical treatment did not save the plaintiffs from losing their left legs.²⁷ At the time of the accident, a New Jersey statute prohibited texting while driving.²⁸ Under New Jersey law, it is illegal to use a cell phone that is not hands-free while driving, except in certain specifically described emergency situations.²⁹ Before the outcome of this case, the New Jersey legislature enacted a new law that provides criminal penalties for those who are distracted by the use of cell phones while driving and injure others.³⁰ This new statute, however, does not apply to this case.³¹

III. PLAINTIFFS' CLAIMS

The Kubert's appealed the dismissal of their claims against Colonna in the Superior Court of New Jersey, Appellate Division in 2013 alleging several causes of action.³² The plaintiffs' claims were that Colonna: (1) was potentially liable to the Kuberts if a jury finds that her texting was a proxi-

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. *Kubert*, 75 A.3d at 1219.

27. *Id.*

28. *Id.* at 1218.

29. *Id.*; *see also* N.J. STAT. ANN. § 39:4-97.3 (2010) (noting 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. *Kubert*, 75 A.3d at 1218; *see also* N.J. STAT. ANN. § 2C:12-1(c)(1) (2012) ("[A] person is guilty of assault by auto or vessel when the person drives a vehicle or vessel recklessly and causes either serious bodily injury or bodily injury to another. Assault by auto or vessel is a crime of the fourth degree if serious bodily injury results and is a disorderly persons offense if bodily injury results. Proof that the defendant was operating a hand-held wireless telephone while driving a motor vehicle . . . may give rise to the inference that the defendant was driving recklessly.").

31. *Kubert*, 75 A.3d at 1233 n.2.

32. *Id.* at 1221.

mate cause of the accident; (2) aided and abetted Best's unlawful texting while he was driving; and (3) had an independent duty to avoid texting a person who was driving a motor vehicle.³³

IV. PROCEDURAL AND SUBSTANTIVE HISTORY

Prior to this appeal, the Kuberts filed a claim against Best and after learning of Colonna's involvement, added her to the lawsuit.³⁴ The claims against Best have been settled and are not part of this appeal.³⁵ The plaintiffs appeal the trial court's dismissal against Colonna.³⁶ The trial court held that a remote texter does not have a legal duty to avoid sending text messages to a driver.³⁷

V. COURT OF APPEALS HOLDING AND OVERVIEW OF RATIONALE

The Appellate Division of the Superior Court of New Jersey held that Colonna was not liable for the accident because the plaintiffs failed to prove that Colonna not only knew that Best was driving when she texted him, but that she knew that Best would immediately respond to her text while he was driving.³⁸ The court stated that there is no liability when a sender of a text message merely texts the recipient, who happens to be driving, and that the recipient still bears the responsibility for obeying the law and maintaining safe control of the vehicle.³⁹

VII. COURT'S RATIONALE

The court noted that although Best was the driver of the vehicle in the accident, more than one defendant can be the proximate cause of an injury and be liable for causing the injury.⁴⁰ The court stated that limited duty of care may be imposed on the sender of a text message if the sender of the text knew or had a special reason to know that the receiver of the text was driving, and was likely to read the text message while driving.⁴¹ First, the court examined past precedent on the duty of care of passengers of motor vehicles to third parties. Second,, since duty of care is "generally a matter for a court to decide," the court analyzed the process by which it determined whether a

33. *Id.*

34. *Id.* at 1221.

35. *Id.* at 1218.

36. *Id.* at 1219.

37. *Kubert*, 75 A.3d at 1218.

38. *Id.* at 1219.

39. *Id.*

40. *Id.* at 1222.

41. *Id.* at 1229.

duty of care exists by applying a full duty analysis.⁴² Third, the court analyzed if the sender of a text has taken a foreseeable risk in sending a text to the recipient.⁴³

First, the court looked at past precedent to determine whether a duty of care should be imposed on passengers to third parties.⁴⁴ The plaintiffs claimed that although Colonna was not physically present in the vehicle with Best, she was “electronically present” and should be liable for aiding and abetting his unlawful use of a cell phone.⁴⁵ The court found that the plaintiffs second claim of aiding and abetting had no merit, since there was no evidence proving that Colonna controlled Best’s actions or that Colonna provided “substantial assistance” to Best in failing obey the law.⁴⁶ The court, however, stated that a passenger who distracts a driver could be held liable for the passenger’s own negligence in causing an accident.⁴⁷ Thus, a passenger in a motor vehicle has a duty to not interfere with the driver’s operations.⁴⁸ The court went on to say that one form of interference by a passenger might be obstructing the driver’s view or diverting the driver’s attention from tasks other than driving.⁴⁹ The court opined that a passenger could also be held liable for urging the driver to take his eyes off the road and to look at distracting objects, but only if the passenger’s conduct is unreasonably risky; that is, the passenger knows, or has special reason to know, that the driver will in fact be distracted and drive negligently as a result of the passenger’s actions.⁵⁰

Second, the court determined whether a limited duty could be imposed on the sender of text messages by applying a full duty analysis as described by the New Jersey Supreme Court in *Estate of Desir ex. rel. Estiverne v. Vertus*.⁵¹ The court analyzed the process to decide whether a duty of care exists to prevent injury to another.⁵² The New Jersey Supreme Court in *Desir* held that to engage in a “full duty analysis,” four factors must be evaluated: (1) the relationship of the parties; (2) the nature of the risk; (3) the ability to

42. *Id.* at 1222.

43. *Kubert*, 75 A.3d at 1222.

44. *See id.* at 1221–23.

45. *Id.* at 1224.

46. *Id.* at 1225.

47. *Id.* at 1226.

48. *Id.*

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

50. *Id.* at 1227.

51. *Id.* at 1223; *see also* *Estate of Desir ex rel. Estiverne v. Vertus*, 69 A.3d 1247, 1255 (2013).

52. *Kubert*, 75 A.3d at 1223.

exercise care; and (4) public policy considerations.⁵³ The *Best* court stated that these factors should be analyzed to determine whether the law recognizes a duty of care in the particular circumstances of a negligence case.⁵⁴ The court acknowledged that “[i]t is the primary responsibility of the driver to obey the law and to avoid distractions”⁵⁵ and that imposing a duty on a passenger for “any conduct” that could distract the driver would unnecessarily broaden the scope of conduct that could create liability.⁵⁶ The court stated that such duty must be viewed under the totality of the circumstances and that the scope of that duty must be reasonable under those circumstances.⁵⁷

Third, since foreseeability of the risk of harm is the foundational element in the determination of whether a duty exists, the court analyzed if a sender of text messages has taken a foreseeable risk in sending a text to the recipient.⁵⁸ The court reasoned that foreseeability is based on the “defendant’s knowledge of the risk of injury.”⁵⁹ The court stated it is:

foreseeable that a driver who is actually distracted by a text message might cause an accident and serious injuries or death, but it is not generally foreseeable that every recipient of a text message who is driving will neglect his obligation to obey the law and will be distracted by the text.⁶⁰

The court opined that a sender should be able to assume that the recipient will read a text message only when it is safe and legal to do so; that is, when not operating a vehicle.⁶¹ Nonetheless, if the sender knows that the recipient is driving and will read the text message immediately, then the sender has taken a foreseeable risk in sending a text to the recipient.⁶² The court went on to say that if the sender knowingly engaged in this distracting conduct (*i.e.*, sending a text), it is not unwarranted to hold the sender responsible for the distraction.⁶³ The court stated that when a defendant’s actions are easily corrected and the harm sought to be presented is serious, it is fair

53. *Desir*, 69 A.3d at 1258.

54. *Kubert*, 75 A.3d at 1223.

55. *Id.* at 1227.

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

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

61. *Id.*

62. *Id.*

63. *Id.*

to impose a duty.⁶⁴ The court indicated that when a risk of harm is posed by a third person, the plaintiff may be required to prove that the third person knew or had reason to know, either from actual knowledge or past experience, that the conduct of the third person would likely endanger the safety of another.⁶⁵ Thus, the court concluded that when the sender of a text message knows, from actual or inferred knowledge, that the recipient would view the text while driving, the sender has breached a duty of care to the public by distracting the driver.⁶⁶

Ultimately, the court concluded that a limited duty on senders of text messages is supported by the “full duty analysis” outlined by the New Jersey Supreme Court.⁶⁷ There are four elements for the court to look at.⁶⁸ First, as to the relationship of the parties, the court noted that when the sender of a text message knows that the text will reach the recipient while operating a vehicle, the sender has a responsibility to the public who use the roadways.⁶⁹ The court analogized it to the responsibility of a passenger physically present in the vehicle.⁷⁰ Thus, although the sender is not physically present, he is “electronically present” and must avoid distracting the driver.⁷¹ Second, as to the nature of the risk, the court stated that when the sender texts a recipient driver, knowing that the recipient will immediately view the text while driving, the sender has disregarded the attendant and foreseeable risk of harm to the public.⁷² Third, as to the ability to exercise care, the court stated that a sender of a text has the opportunity to exercise care and prevent the risk.⁷³ The court noted that “[w]hen the defendant’s actions are ‘relatively easily corrected’ and the harm sought to be prevented is ‘serious,’ it is fair to impose a duty.”⁷⁴ Thus, the court opined, that it is easy for the senders of the text to avoid knowingly texting a recipient driver who will immediately view the text, which will distract the driver from driving safely.⁷⁵ Fourth, as to the public policy considerations, the court stated that it is in the public’s interest to require fair measures to deter texting while driving.⁷⁶ The court analogized

64. *Id.* at 1228.

65. *Id.* at 1227–28.

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

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.* at 1224.

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

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.* at 1229.

drinking and driving to texting and driving.⁷⁷ The court opined that just as drinking and driving has become a public interest, the hazards of texting when on the road “may become part of the public consciousness when the liability of those involved matches the seriousness of the harm.”⁷⁸ The court can use these four elements and a totality of the circumstances analysis to determine if it can impose a limited scope of duty.⁷⁹

In the end, Colonna’s summary judgment motion was granted and the Kubert’s claims against Colonna were dismissed.⁸⁰ The court concluded that the plaintiffs did not have enough evidence to prove that Colonna knew both that Best was driving when she texted Best, and that he would violate the law and immediately respond to her text.⁸¹

VII. CRITIQUE OF THE COURT’S APPROACH

Sending a “quick text” has become a popular mode of communication in our fast-paced society. This mode of communication, however, has also been the cause of many injuries and fatalities since drivers of motor vehicles insist on responding to text messages while driving; even when it is against the law to do so.⁸² Although this case presents another approach to stop the tragedies that occur while texting and driving, it is unfair for the court to hold the sender of texts liable for the recipient’s actions. It is the recipient, not the sender, who ultimately decides when to respond to messages.

This holding will open the floodgates to frivolous lawsuits because recipients will want to shift the blame to the sender and minimize their personal liability. This holding shifts the focus from the recipient to the sender of the text, who may not know that the recipient is driving, let alone, that the recipient will respond to the text while driving. Because the sender is not physically present in the vehicle, the sender lacks the first-hand knowledge of the circumstances surrounding the recipient at the time the message is being sent.⁸³ Ultimately, it is the recipient, not the sender, who has the personal responsibility to obey traffic laws and exercise appropriate care for the safety of other drivers while on the road.⁸⁴

77. *Id.*

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

79. *Id.* at 1228.

80. *Id.* at 1229.

81. *Id.*

82. *See id.* at 1218 (explaining that New Jersey law prohibits texting while driving).

83. *See id.* at 1230 (Espinosa, J., concurring).

84. *See Kubert*, 75 A.3d at 1230 (Espinosa, J., concurring).

The concurring opinion noted “the bar set by the majority for the imposition of liability is high and will rarely be met.”⁸⁵ This limited duty will be difficult to prove since the liability arises from the conduct of a person that was not in the vehicle and lacks the first-hand knowledge of the recipient’s attendant circumstances.⁸⁶ There is no need to establish a new standard, especially when the present case does not support liability upon the remote sender.⁸⁷ As illustrated in this case, Colonna, the sender of the texts, was not found liable for the plaintiffs’ injuries since there was not enough evidence to establish that Colonna knew or should have reasonably known that Best was on the road and that he would immediately answer her text.⁸⁸ Colonna could not have known that Best was driving, unless he specifically told her in his texts that he was in the vehicle driving.

This holding may also have some implications on the right to privacy. The court in the present case noted that the content of the texts between Best and Colonna was unknown.⁸⁹ Had the plaintiffs been able to obtain and examine the messages that Best and Colonna exchanged with one another, seconds before the Kubert’s accident, the plaintiffs might have been able to prove that Colonna knew or had reason to know that Best was driving when she texted him. This raises the question of whether the content of text message communications will be examined by third parties—who are not parties to the communication—in order to determine if the sender knew or should have known that the recipient was driving and would immediately text back. The United States Supreme Court has noted that “cell 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 . . . [which] might strengthen the case for an expectation of privacy.”⁹⁰ Thus, some courts have held that as technology has progressed, text messages deserve the same Fourth Amendment protections afforded to letters and phone calls.⁹¹ Although the issue of privacy in text messages has not yet been fully decided by the Supreme Court, courts should not use this opportunity to narrow the privacy protections provided by the Fourth Amendment. It is well established that, “nothing new can be put into the

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

86. *See id.* at 1230 (Espinosa, J., concurring).

87. *See id.* at 1229-30 (Espinosa, J., concurring).

88. *Id.* at 1229

89. *Id.* at 1221.

90. *City of Ontario, Cal. v. Quon*, 130 S. Ct. 2619, 2630 (2010); *see also* *Kamalu v. Walmart Stores, Inc.*, No. 1:13-cv-00627-SAB, 2013 WL 4403903, at *3 (E.D. Cal. Aug. 15, 2013) (holding that the plaintiff did not have privacy rights in phone records sought since defendant was only seeking subscriber information, which is voluntarily conveyed to cell phone provider by third parties, and not the content of any communications).

91. *State v. Clampitt*, 364 S.W.3d 605, 611 (Mo. Ct. App. 2012).

Constitution except through the amendatory process.”⁹² Hence, legislators, not courts, have the privilege of expanding or narrowing basic constitutional protections. For instance, before this case was decided, the New Jersey legislature enacted a new law that makes an assault by auto or vessel a crime of the fourth degree.⁹³ This law explicitly permits a jury to infer that a driver who was using a hand-held cell phone and caused serious bodily injury to another was driving recklessly.⁹⁴ Thus, this new amendment exposes the driver to a potential sentence in state prison.⁹⁵ Had the legislature wanted to expand the liability to senders of text messages, it would have done so when the new law was enacted.

VIII. OVERVIEW OF THE CRITIQUE

In summary, the Appellate Division of the Superior Court of New Jersey took a radical approach and stated that a limited duty may be imposed to senders of text messages. This presents an excessive approach to combating the texting while driving trend by broadening the scope of liability to persons who are in a remote location from the driver of a vehicle. Questions have been raised as to whether this will open up the floodgates to frivolous lawsuits, how the elements required for the limited duty imposed by this holding will ever be met, and whether this holding will eventually infringe on an individual’s right to privacy. In addition, this holding could impact cell phone manufacturers and carriers. No doubt consumers will be afraid to send text messages because of the risk of liability. Cell phone manufacturers and carriers could be required to make all cell phones incapable of use when sensing they are in motion. And if this holding catches on, it could eventually minimize or take away all personal responsibility from the driver and shift the liability to cell phone manufacturers, leaving the driver with little or no liability for his or her actions.

92. *Ullmann v. United States*, 350 U.S. 422, 428 (1956).

93. N.J. STAT. ANN. § 2C:12-1 (2012).

94. *See id.*

95. *Kubert*, 75 A.3d at 1218.