

“ETA?”
ESTIMATED TIME OF ARRIVAL: AN ANALYSIS OF NEW
JERSEY’S REMOTE TEXTING LIABILITY

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TABLE OF CONTENTS

| | |
|--|------|
| INTRODUCTION | 1940 |
| I. DISTRACTED DRIVING IN THE UNITED STATES | 1942 |
| A. <i>Distracted Driving</i> | 1945 |
| B. <i>Texting and Driving Law Before Kubert v. Best</i> | 1945 |
| II. <i>KUBERT V. BEST</i> | 1948 |
| A. <i>Facts and Procedural History</i> | 1948 |
| B. <i>Opinion of the Superior Court of New Jersey, Appellate Division</i> | 1949 |
| 1. The Majority..... | 1950 |
| a. Aiding and Abetting..... | 1951 |
| b. Independent Legal Duty | 1953 |
| 2. The Concurrence | 1954 |
| III. ANALYZING THIRD-PARTY LIABILITY IN <i>KUBERT V. BEST</i> | 1955 |
| A. <i>The Common Law Framework</i> | 1955 |
| 1. Analogous Forms of Liability..... | 1955 |
| 2. Civil Liability for Aiding and Abetting..... | 1957 |
| B. <i>Imposition of Liability Requires the Existence of a Duty of Care</i> | 1958 |
| 1. Full-Duty Analysis..... | 1958 |
| 2. New Independent Duty Not to Text: Remote Texting Liability | 1959 |

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|-----|--|------|
| C. | <i>Criticisms of a Rule of Remote Texting Liability</i> | 1961 |
| 1. | The Unnecessary Formulation of a New Legal Duty..... | 1961 |
| 2. | Inherent Unfairness..... | 1962 |
| a. | Causation: Foreseeability | 1962 |
| b. | Unforeseeable Intervening Cause..... | 1965 |
| D. | <i>Criticisms of Enforcing a Rule of Remote Texting Liability</i> | 1965 |
| 1. | Evidentiary Issues: The Dual-Knowledge Standard | 1966 |
| 2. | A State of Uncertainty..... | 1967 |
| IV. | PROPOSAL..... | 1969 |
| A. | <i>Narrowly Interpreting Kubert v. Best</i> | 1970 |
| B. | <i>A Comprehensive Approach to Combatting Texting While Driving</i> | 1971 |
| 1. | Legislative Action | 1972 |
| 2. | Heightened Law Enforcement | 1973 |
| 3. | Media Campaigns..... | 1974 |
| 4. | Advanced Smartphone Technology..... | 1975 |
| 5. | Third-Party Civil Liability for Aiding and Abetting..... | 1975 |
| | CONCLUSION..... | 1976 |

INTRODUCTION

Consider the following situation: Two friends communicate with each other throughout the day via text message. At one point, one friend sends a text message to the other while the other is driving home from work. The driver looks at his cellphone to respond to the text message while behind the wheel, an action that is illegal in the state in which he lives.¹ Being distracted causes him to crash into another vehicle. Can the individual who sent the text message be held liable in a civil action for the injuries that the driver's negligence and illegal action caused? Common sense would say "no," but an appellate court in New Jersey has said "yes"—as long as the plaintiff can show that the individual who sent the text message knew that the recipient was driving and knew that the text message would distract the recipient.²

A recent controversial New Jersey appellate decision, *Kubert v. Best*, extended texting and driving liability beyond the driver to the remote individual that sent the text message to the driver and thereby caused the driver to be distracted.³ This novel form of liability, "remote

¹ See *infra* note 29.

² See *Kubert v. Best*, 75 A.3d 1214 (N.J. Super. Ct. App. Div. 2013).

³ *Id.* at 1219.

texting liability,”⁴ has yet to be explored outside the context of the *Kubert* case.⁵ However, the issue has received national attention—popular news outlets reported the novel decision as a warning to the public.⁶ As a result of *Kubert*, New Jersey courts may impose liability on the sender of a text message for the injurious conduct of the recipient when the sender knew that the recipient was driving and knew, or had “special reason to know,” that the recipient would be distracted by the text message.⁷ The abundance of news articles in response to *Kubert* indicates a growing public concern over remote texting liability, but the issue has yet to be addressed in legal scholarship. Given the amount of public concern over distracted driving,⁸ as well as the expansion of smartphone technology, the issue demands scholarly attention. A rule of remote texting liability will likely have a profound impact on automobile accident litigation, as well as on human behavior, and it is

⁴ The phrase “remote texting liability,” or similar terms, will be used throughout this Note to refer, in an abbreviated manner, to the rule that imposes civil liability on the sender of a text message for the injurious conduct of the recipient, when the sender knew that the recipient was driving and knew, or had special reason to know, that the recipient would be distracted by the text message.

⁵ While a few cases and trial documents have cited the *Kubert* opinion, none have done so in a manner that sheds light on the future of “remote texting liability” in American jurisprudence. For example, the Superior Court of New Jersey, Appellate Division, the same court that decided *Kubert*, cited the opinion as authority for the proposition that more than one defendant can be the proximate cause of an injury. See *Faccas v. Young*, No. MON-L-696-12, 2015 WL 1721359 (N.J. Super. Ct. App. Div. Apr. 16, 2015) (denying defendant’s motion for summary judgment in an automobile accident case that did not involve liability on behalf of a remote texter). Still, no court has answered the question texters and drivers want addressed: Will my jurisdiction follow or decline to follow the *Kubert* ruling? Civil liability for a remote third-party sender of a text message had not been explored before *Kubert*. *Kubert*, 75 A.3d at 1218. (“The issue before [the court] is not directly addressed by . . . statutes or any case law that has been brought to [the court’s] attention.”). More commonly alleged bases for civil liability arising from cell phone use that courts have explored involve the liability of the driver, the telephone company supplying the wireless service, and the employer of an individual who is using his cell phone while driving in his capacity as employee. See Jay M. Zitter, Annotation, *Civil Liability Arising from Use of Cell Phone While Driving*, 36 A.L.R.6th 443 (2008); see also, e.g., *Williams v. Cingular Wireless*, 809 N.E.2d 473, 477–78 (Ind. Ct. App. 2004) (finding that cell phone service providers owe no duty of care to third parties injured by drivers using cell phones because there is no relationship between a carrier and a 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”).

⁶ See, e.g., Martha Neil, *Remote Texter Can Be Held Liable for Distracted Driver’s Crash*, *Appeals Court Rules*, AM. B. ASS’N J. (Aug. 27, 2013, 6:02 PM), http://www.abajournal.com/news/article/remote_texter_can_be_held_liable_for_distracted_drivers_crash; 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>.

⁷ *Kubert*, 75 A.3d at 1221 (“We conclude 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.”).

⁸ See *infra* notes 26–35 and accompanying text.

important to analyze the consequences of such an impact. This Note analyzes the current state of the law and argues that *Kubert v. Best* was not an isolated, idiosyncratic decision, but rather a forecast of where states are heading in the fight against texting and driving fatalities.

Part I of this Note begins by providing a brief history and background of distracted driving in the United States, tracing the law imposing liability on distracted drivers, and discussing texting and driving law prior to *Kubert*. Part II examines the recent New Jersey appellate court decision, *Kubert v. Best*. That Part provides background regarding the method and principles the court applied to determine whether there is an independent legal duty not to send a text message to a driver. Part III analyzes the *Kubert* court's introduction of remote texting liability. In particular, that Part analyzes the problems associated with a rule of remote texting liability and evaluate its impact on human behavior. Lastly, Part IV proposes that courts in other jurisdictions should decline to follow the *Kubert* court's implementation of remote texting liability, and suggests alternative methods for addressing the issue of texting while driving.

I. DISTRACTED DRIVING IN THE UNITED STATES

We are a wireless nation that is constantly communicating.⁹ Currently, 299 million Americans, ninety percent of the U.S. population, own cell phones.¹⁰ Cell phones provide unlimited access to information, essentially functioning as mobile personal computers.¹¹ In addition to voice calling, Americans use cell phones to listen to music,

⁹ In 2013, 153.3 billion text messages were sent in the United States every month. See *Annual Wireless Industry Survey*, CTIA, <http://www.ctia.org/your-wireless-life/how-wireless-works/annual-wireless-industry-survey> (last updated June 2015). One survey shows that “[e]very minute, Americans: exchange 3.6 million text messages (SMS); exchange almost 300,000 videos and photos (MMS); and use 7.7 million MB of data.” *CTIA—The Wireless Association Survey Shows Americans Used 26 Percent More Wireless Data in 2014*, CTIA (June 17, 2015), <http://www.ctia.org/resource-library/press-releases/archive/ctia-survey-shows-americans-used-26-percent-more-wireless-data-in-2014>. Another study found that “[e]very day, Americans use more than 8.8 billion MB of data. If every MB of data (roughly one minute of streaming music) equaled one mile, you could take: 18,523 round trips a day to the moon, or 13 round trips a minute.” *INFOGRAPHIC: Americans’ Data Usage Equals 13 Round Trips to the Moon Every Minute*, CTIA (Dec. 9, 2014), <http://www.ctia.org/resource-library/facts-and-infographics/archive/infographic-americans'-data-usage-equals-13-round-trips-to-the-moon-every-minute>.

¹⁰ See *Mobile Technology Fact Sheet*, PEW RES. CTR. (Dec. 27, 2013), <http://www.pewinternet.org/fact-sheets/mobile-technology-fact-sheet>.

¹¹ Voice calling is no longer the central function of the cell phone. The Pew Research Center reports that “[a]s of May 2013, 63% of adult cell owners use their phones” to access the Internet. *Id.*

make dinner reservations, obtain news updates, find directions, track health progress, and check the weather.¹² For Americans, “there’s an app for that” signifies not only a marketing slogan, but also a generation’s expectation that the mobile device can do anything that a computer can do.¹³ Even the Supreme Court of the United States has commented on the prevalence of cell phone-based communications in today’s society.¹⁴ Alongside the pervasiveness and technological enhancements of cell phones is the increase in text-based communications.¹⁵

As a result of the dependence on cell phones for information, communication, and even self-expression, individuals carry around their cell phones everywhere they go, including into the cars they

¹² See Alan Lazerow, *Near Impossible to Enforce at Best, Unconstitutional at Worst: The Consequences of Maryland’s Text Messaging Ban on Drivers*, 17 RICH. J.L. & TECH. 1, 36 (2010) (explaining that several phones, including the iPhone, boast hundreds of thousands of apps). An “app” is an abbreviation of “application,” and refers to the equivalent of a computer program that an individual installs on a smartphone. See Gertrude Block, *Language for Lawyers*, FED. LAW. MAY–JUNE 2010, at 70, 70. Examples of popular apps include: Facebook, Instagram, YouTube, Pandora Radio, Google Maps, Twitter, The Weather Channel, Uber, and Snapchat. See *iTunes Charts*, APPLE, <https://www.apple.com/itunes/charts/free-apps> (last visited Mar. 18, 2016) (showing top apps downloaded). “[S]martphones are equipped with a range of sensors,” as well as apps and GPS functionalities, “that can detect things like your location, elevation, orientation, and whether you’re walking or driving.” Sarah Perez, *Smartphone Makers Need to Put an End to Distracted Driving*, TECHCRUNCH (Jan. 9, 2015), <http://techcrunch.com/2015/01/09/smartphone-makers-need-to-put-an-end-to-distracted-driving>.

¹³ Jimmy Daly, *Mobile Computing Just Became the Third Digital Revolution of the Last Decade* [Infographic], EDTECH (Feb. 13, 2013), <http://www.edtechmagazine.com/higher/article/2013/02/mobile-computing-just-became-third-digital-revolution-last-decade-infographic> (“Mobile computing has been described as the third digital revolution . . .”).

¹⁴ See *City of Ontario v. Quon*, 560 U.S. 746, 760 (2010) (“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.”). At progressively younger ages, people are communicating with one another via electronic means, to the point that it has garnered criticism by social scientists. See Lauren Suval, *Does Texting Hinder Social Skills?*, PSYCHCENT.: WORLD PSYCHOL. (May 2, 2012), <http://psychcentral.com/blog/archives/2012/05/02/does-texting-hinder-social-skills> (“[T]echnological devices are redefining human connections,” and that text messaging is not an adequate substitution for real connections, and may contribute to isolation in some individuals (citing a talk entitled *Connected, But Alone?*, broadcast by Sherry Turkle, a psychologist and sociologist)); see also Lindsey Boerma, *Kids with Cell Phones: How Young Is Too Young*, CBS NEWS (Sept. 2, 2014, 5:37 AM), <http://www.cbsnews.com/news/kids-with-cell-phones-how-young-is-too-young>; Aaron Smith, *Americans and Text Messaging*, PEW RES. CTR. (Sept. 19, 2011), <http://www.pewinternet.org/2011/09/19/americans-and-text-messaging> (finding that “[y]oung adults are the most avid texters by a wide margin,” and that “text messaging and phone calling on cell phones have leveled off for the adult population as a whole”).

¹⁵ See Emily K. Strider, Note, *Don’t Text a Driver: Civil Liability of Remote Third-Party Texters After Kubert v. Best*, 56 WM. & MARY L. REV. 1003, 1007 (2015) (“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.”).

drive.¹⁶ Drivers are increasingly choosing to send and read text messages while driving, instead of waiting until a safer time to do so.¹⁷ Some polls suggest that current motor vehicle safety culture is one of indifference, embodying a “do as I say, not as I do” attitude.¹⁸ In a 2011 study by the Centers for Disease Control and Prevention, thirty-one percent of United States drivers aged eighteen to sixty-four reported that they had read or sent text messages or emails while driving at least once within the last thirty days prior to being surveyed.¹⁹ This trend has had devastating effects on roadway accidents and fatalities.²⁰

¹⁶ See Anthony Patterson, *Digital Youth, Mobile Phones and Text Messaging: Assessing the Profound Impact of a Technological Afterthought*, in THE ROUTLEDGE COMPANION TO DIGITAL CONSUMPTION 83, 84 (Russell W. Belk & Rosa Llamas eds., 2013) (“No one ever leaves the house these days without three things: their keys, wallet and their mobile.”). Even psychologists and sociologists recognize the profound presence of cell phones in our lives. According to psychologist Robert Bornstein, “super-connected” individuals can develop “dual-dependency” on technology—“the need to have portable devices nearby all the time and the need to have other people always be reachable.” MARY CHAYKO, PORTABLE COMMUNITIES: THE SOCIAL DYNAMICS OF ONLINE AND MOBILE CONNECTEDNESS 80 (2008).

¹⁷ See *Facts and Statistics*, DISTRACTION.GOV, <http://www.distraction.gov/stats-research-laws/facts-and-statistics.html> (last visited Mar. 16, 2016) (“In 2014, 3,179 people were killed, and 431,000 were injured in motor vehicle crashes involving distracted drivers.”). An FCC online guide on the dangers of distracted driving states that “[t]he National Highway Traffic Safety Administration reported that in 2012 driver distraction was the cause of 18 percent of all fatal crashes—with 3,328 people killed—and crashes resulting in an injury—with 421,000 people wounded.” *The Dangers of Texting While Driving*, FED. COMM. COMMISSION, <http://www.fcc.gov/guides/texting-while-driving> (last updated Nov. 4, 2015, 2:30 PM). The FCC guide continues, stating that “[f]orty percent of all American teens say they have been in a car when the driver used a cell phone in a way that put people in danger, according to a Pew survey.” *Id.*

¹⁸ See Morgan Gough, Comment, *Judicial Messaging: Remote Texter Liability as Public Education*, 44 U. BALT. L. REV. 469, 480 (2015) (“Nearly all drivers view texting while driving as completely unacceptable, and seven out of eight drivers do perceive social disapproval for texting while driving. Yet two out of three people report using their cell phone ‘while driving within the past month;’ one in four people admit to sending a text while driving in the past month; and one in three admit to reading a text while driving in the past month.” (footnotes omitted) (quoting *Teens Report Texting or Using Phone While Driving Significantly Less Often than Adults*, AAA NEWSROOM (Dec. 11, 2013), <http://newsroom.aaa.com/2013/12/teens-report-texting-or-using-phone-while-driving-significantly-less-often-than-adults>)).

¹⁹ See CTRS. FOR DISEASE CONTROL & PREVENTION, MORBIDITY & MORTALITY WEEKLY REPORT (MMWR): MOBILE DEVICE USE WHILE DRIVING—UNITED STATES AND SEVEN EUROPEAN COUNTRIES, 2011, at 177 (Mar. 15, 2013) [hereinafter CDC, MOBILE DEVICE USE WHILE DRIVING], http://www.cdc.gov/mmwr/preview/mmwrhtml/mm6210a1.htm?s_cid=mm6210a1_w; see also AT&T WITH SKDKNICKERBOCKER & BECK RESEARCH, AT&T TEEN DRIVER SURVEY 1–2 (2012), http://www.att.com/Common/about_us/txtng_driving/att_teen_survey_executive.pdf (showing that ninety-seven percent of teens surveyed said that they believed “texting while driving is dangerous,” but forty-three percent of them still admitted to doing it).

²⁰ Recent and rapid increases in texting volumes have resulted in thousands of additional road fatalities yearly in the United States. See Fernando A. Wilson & Jim P. Stimpson, *Trends in Fatalities from Distracted Driving in the United States, 1999 to 2008*, 100 AM. J. PUB. HEALTH 2213 (2010) (analyzing historical data on road fatalities, cell phone subscriber rates, and estimated text message volumes to identify trends in highway fatalities and the connection to increased cell phone use by drivers). In 2013, eighteen percent of all motor vehicle accidents in

A. *Distracted Driving*

Distracted driving describes any activity that requires the driver's attention and forces the driver to be distracted from the responsibilities of the road.²¹ A number of activities may fall within the meaning of distracted driving, including eating, drinking, smoking, rubbernecking, applying makeup, changing the radio station, operating a GPS device or navigation system, and, of course, using a cell phone.²² There are three classifications of driving distractions—visual, mechanical, and cognitive—and cell phone use engages all three simultaneously, making it one of the most dangerous forms of distracted driving.²³ Evidence shows that texting while driving might prove even more impairing than driving under the influence of alcohol.²⁴ Studies show that “[i]n recent years, the most frequent form of distraction while driving has been due to cell phone use and texting.”²⁵

B. *Texting and Driving Law Before Kubert v. Best*

Rising levels of vehicular injuries and fatalities attributed to cell phone use have caught the attention of a number of state legislatures across the country. Government agencies and state legislatures have responded with a vengeance to the influx of roadway accidents and publications of studies documenting the danger of cell phone use while

which someone was injured involved distracted driving. See *Distracted Driving*, CENTERS FOR DISEASE CONTROL & PREVENTION, http://www.cdc.gov/Motorvehiclesafety/Distracted_Driving (last updated Mar. 7, 2016). According to the National Highway Traffic Safety Administration, 3179 people were killed, and about 431,000 people were injured, as a result of distracted driving in 2014. *Facts and Statistics*, *supra* note 17.

²¹ *Facts and Statistics*, *supra* note 17.

²² *Id.*

²³ See Joanna I. Tabit, ‘Texting While Driving’ Ban in Effect—Put it down, or Pull over, W. VA. EMP. L. LETTER, July 2012, at 1; see also CDC, MOBILE DEVICE USE WHILE DRIVING, *supra* note 19.

²⁴ See Richard S. Chang, *Texting Is More Dangerous than Driving Drunk*, N.Y. TIMES: WHEELS (June 25, 2009, 3:18 PM), <http://www.wheels.blogs.nytimes.com/2009/06/25/texting-is-more-dangerous-than-driving-drunk> (explaining that texting delays reaction times as much as having a blood-alcohol concentration of .08%).

²⁵ *Distracted Driving, Talking & Texting*, SAFENY, <http://www.safeny.ny.gov/phon-ndx.htm> (last visited Mar. 16, 2016). Researchers have found “that drivers who text message while driving were 23.2 times more likely to be involved in a safety-critical event . . . than if they were not text messaging while driving.” FED. MOTOR CARRIER SAFETY ADMIN., U.S. DEP’T OF TRANSP., DRIVER DISTRACTION IN COMMERCIAL VEHICLE OPERATIONS 146 (2009), <http://www.distraction.gov/downloads/pdfs/driver-distraction-commercial-vehicle-operations.pdf>. A safety-critical event is defined “as a crash, near-crash, crash-relevant conflict, or unintentional lane deviation.” *Id.* at 25 (citation omitted).

driving.²⁶ New laws prohibiting the use of cell phones have emerged at state and local levels.²⁷ Over the last decade, every state has considered legislation banning or significantly restricting cell phone use while driving.²⁸ Public servants, concerned citizens, mobile phone service providers, and government agencies have launched antitexting while driving campaigns across the country.²⁹ These laws ban either text-based communications specifically, or, in some cases, any use of a handheld device while operating a motor vehicle.³⁰ Talking on a handheld cellphone while driving is banned in thirteen states and the

²⁶ See, e.g., *Driven to Distraction: Technological Devices and Vehicle Safety: Hearing Before the H. Subcomm. on Commerce, Trade, & Consumer Prot. and the Subcomm. on Commc'ns, Tech., & the Internet of the H. Comm. on Energy & Commerce*, 111th Cong. 45 (2009), (statement of Julius Genachowski, Chairman, Federal Communication Commission), <http://www.gpo.gov/fdsys/pkg/CHRG-111hrg74850/html/CHRG-111hrg74850.htm> (“[T]he most pressing vital [safety] issue [on our highways] now is texting and driving.”).

²⁷ See, e.g., CAL. VEH. CODE § 23123(a) (West 2014); CONN. GEN. STAT. § 14-296aa (West 2019); DEL. CODE ANN. tit. 21, § 4176C (2012); D.C. CODE § 50-1731.04(a) (2012); MD. CODE ANN., TRANSP. § 21-1124.1 (West 2010); N.J. STAT. ANN. § 39:4-97.3 (West 2012); N.Y. VEH. & TRAF. LAW § 1225-c (McKinney 2011); OR. REV. STAT. § 811.507 (2003); WASH. REV. CODE § 46.61.667 (2012).

²⁸ For a state-by-state breakdown of such text messaging legislation, see *Distracted Driving Laws*, GOVERNORS HIGHWAY SAFETY ASS'N, http://www.ghsa.org/html/stateinfo/laws/cellphone_laws.html (last visited Apr. 17, 2016). In addition, even though some states have not yet banned texting while driving, cities and municipalities within those states have done so. For example, “the State of Texas does not ban texting while driving, but its capital city of Austin does.” Adam M. Gershowitz, *Google Glass While Driving*, 47 ARIZ. ST. L.J. 755, 761 n.38 (2015) [hereinafter Gershowitz, *Google Glass While Driving*].

²⁹ While no state prohibits all cell phone use generally, the most aggressive approach, adopted by fourteen states and the District of Columbia, has been to ban all handheld cell phone use while driving. See *Distracted Driving Laws*, *supra* note 28. The fourteen states that have banned all cell phone use while driving are California, Connecticut, Delaware, Hawaii, Illinois, Maryland, Nevada, New Hampshire, New Jersey, New York, Vermont, Washington, and West Virginia. *Id.*; see also statutes cited *supra* note 27. Forty-five states and the District of Columbia have specifically banned texting while driving for all drivers: Alabama, Alaska, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, Wyoming. See *Distracted Driving Laws*, *supra* note 28; see also, e.g., ARK. CODE ANN. § 27-51-1504 (2016); D.C. CODE § 50-1731.04(a); HAW. REV. STAT. § 291C-137(a) (2014); 625 ILL. COMP. STAT. 5/12-610.2(d)(3) (2014); IND. CODE § 9-21-8-59(a) (2014); IOWA CODE § 321.276 (2013); MINN. STAT. § 169.475(subdiv. 3) (2015); N.J. STAT. ANN. § 39:4-97.3(a); N.C. GEN. STAT. § 20-137.4A(b)(4) (2012); OHIO REV. CODE ANN. § 4511.204(A)(8) (West 2008); OR. REV. STAT. § 811.507(3)(d); 31 R.I. GEN. LAWS § 31-22-30(d) (2006); UTAH CODE ANN. § 41-6a-1716(3)(g)(i) (West 2013); WIS. STAT. § 346.89(3)(b)(4) (2014).

³⁰ For example, New York forbids drivers from “using” portable electronic devices while driving, and defines “using” to mean that the driver is “holding a portable electronic device while viewing, taking or transmitting images, playing games, or . . . composing, sending, reading, viewing, accessing, browsing, transmitting, saving or retrieving e-mail, text messages, instant messages, or other electronic data.” N.Y. VEH. & TRAF. CODE § 1225-d(2)(b).

District of Columbia.³¹ The use of all cellphones by novice drivers³² is restricted in thirty-seven states and the District of Columbia.³³ Text messaging specifically is banned for drivers in forty-five states and the District of Columbia, with Arizona, Missouri, Montana, and Texas as the only exceptions.³⁴ One state in particular has demonstrated a strong effort to deter distracted driving: New Jersey. While some states specifically ban texting while driving, New Jersey prohibits any use of a cell phone that is not “hands-free” while driving,³⁵ except in certain specifically described emergency situations.³⁶

³¹ See *Distracted Driving Laws*, *supra* note 28; see also statutes cited *supra* note 29.

³² Of the thirty-seven states that expressly prohibit cellphone use by novice drivers, more than half define “novice drivers” as all those under age eighteen. See *Distracted Driving Laws*, *supra* note 28. Some define “novice drivers” as “those in the first two years of licensure permitting unsupervised driving,” specifying that a “novice driver” is one that holds an intermediate or provisional license, not a learner’s permit. Vivian E. Hamilton, *Liberty Without Capacity: Why States Should Ban Adolescent Driving*, 48 GA. L. REV. 1019, 1029, 1068–70 (2014). As a group, novice drivers have higher crash rates than do more experienced drivers. See A. James McKnight & A. Scott McKnight, *Young Novice Drivers: Careless or Clueless?*, 35 ACCIDENT ANALYSIS & PREVENTION 921, 921 (2003). In all but five states, cell phone use by a novice driver has primary enforcement, meaning an officer may cite the novice driver for a violation without the existence of another traffic offense. See *Distracted Driving Laws*, *supra* note 28.

³³ States that ban all cell phone use by novice drivers: Alabama, Arkansas, California, Colorado, Connecticut, Delaware, Georgia, Hawaii, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nebraska, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oregon, Rhode Island, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, and Wisconsin. See *Distracted Driving Laws*, *supra* note 28.

³⁴ See *id.*

³⁵ See N.J. STAT. ANN. § 39:4-97.3(a) (West 2012) (“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 . . .”).

³⁶ Specifically described emergency situations, which permit the driver to use a handheld wireless telephone while driving, include:

- (1) The operator has reason to fear for his life or safety, or believes that a criminal act may be perpetrated against himself or another person; or
- (2) The operator is using the telephone to report to appropriate authorities a fire, a traffic accident, a serious road hazard or medical . . . emergency, or to report the operator of another motor vehicle who is driving in a reckless . . . manner or who appears to be driving under the influence of alcohol or drugs.

Id. § 39:4-97.3(b)(1)–(2).

II. *KUBERT V. BEST*A. *Facts and Procedural History*

On September 21, 2009, David Kubert was riding his motorcycle with his wife, Linda. As they came around a curve in the road, they were struck by an eighteen-year-old driver, Kyle Best, who crossed over the double centerline of the roadway and into the plaintiffs' lane.³⁷ Both of the Kuberts were seriously injured, each losing a leg as a result of the accident.³⁸ The Kuberts brought a civil suit against Best.³⁹ During discovery, a timeline of the accident revealed that Best and his girlfriend, Shannon Colonna, began exchanging text messages with each other as Best drove home from work, and continued to text each other until seconds before the accident.⁴⁰

The phone record showed that on the day of the accident, Best had sent or received 180 text messages in a period of less than twelve hours.⁴¹ In her deposition, Colonna also admitted that it was her habit to text more than 100 times per day, explaining, "I'm a young teenager. That's what we do."⁴² In fact, the two teenagers "texted each other sixty-two times on the day of the accident, about an equal number of texts originating from each."⁴³ Most significantly, Best and Colonna exchanged a series of text messages in the seconds leading up to the accident.⁴⁴ At 5:48:14 p.m., Colonna sent Best a text message.⁴⁵ Only forty-four seconds later, at 5:48:58 p.m., Best responded.⁴⁶ At 5:49:15 p.m., seventeen seconds after his response to Colonna, Best called 911.⁴⁷ This sequence indicates that the accident occurred within seconds of Best's 5:48:58 p.m. text.⁴⁸ In the seventeen seconds between Best's response to Colonna and his phone call to 911, Best stopped the vehicle, exited the vehicle, and observed the severity of the Kuberts' injuries.⁴⁹

³⁷ *Kubert v. Best*, 75 A.3d 1214, 1219 (N.J. Super. Ct. App. Div. 2013).

³⁸ *Id.*

³⁹ *Id.* at 1218.

⁴⁰ *Id.* at 1219.

⁴¹ *Id.*

⁴² *Id.* at 1220.

⁴³ *Id.* at 1219.

⁴⁴ *Id.* at 1220.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

Therefore, the court found that Best crashed into the Kuberts' motorcycle immediately after he sent his last text message to Colonna.⁵⁰

The Kuberts added Colonna as a defendant in the matter, arguing that she had "an independent [legal] duty to avoid texting to a person who was driving a motor vehicle" and that her electronic presence in the vehicle as a result of her text message conversation with Best constituted aiding and abetting Best's illegal cell phone use.⁵¹ The trial court granted summary judgment for Colonna, which prompted the plaintiffs' appeal.⁵² The trial court based its finding on the grounds "that Colonna did not have a legal duty to avoid sending a text message to Best, even if she knew he was driving."⁵³ The sole issue on appeal in *Kubert v. Best* was whether Colonna, as a remote party, could be held liable for the Kuberts' injuries because Best was distracted by her text message.⁵⁴

B. *Opinion of the Superior Court of New Jersey, Appellate Division*

Under New Jersey law, any use of a cell phone or electronic communication device while operating a motor vehicle is illegal, except when the device "is used hands-free."⁵⁵ In their appeal, the "plaintiffs assert[ed] that Colonna and Best were acting in concert in exchanging text messages."⁵⁶ Although Colonna was sending the messages from a remote location, the "plaintiffs [argued that] she was 'electronically present' in" the moments leading up to the accident, and thus "she aided and abetted his unlawful use of his cell phone."⁵⁷ Ultimately, the Superior Court of New Jersey, Appellate Division, affirmed the trial court's dismissal.⁵⁸ What is most notable, however, is that the opinion recognized, for the first time,⁵⁹ the independent legal duty of a remote individual to refrain from sending a text message to someone that is

⁵⁰ *Id.*

⁵¹ *Id.* at 1221.

⁵² The Kuberts' claims against Best were settled and were not part of this appeal. *See id.* at 1218.

⁵³ *Id.* at 1221.

⁵⁴ *Id.* at 1219.

⁵⁵ N.J. STAT. ANN. § 39:4-97.3 (West 2012).

⁵⁶ *Kubert*, 75 A.3d at 1224.

⁵⁷ *Id.*

⁵⁸ *Id.* at 1229.

⁵⁹ The *Kubert* court was the first to introduce a legal duty for an individual to avoid sending a text message to someone that the individual knows is driving. *See* RESTATEMENT (SECOND) OF TORTS § 303 (AM. LAW INST. 1965) ("[T]his court held, as a matter of first impression, that, when a texter knew or had special reason to know that the intended recipient was driving and was likely to read the text message while driving, the texter had a duty to users of public roads to refrain from sending the driver a text at that time.").

driving a car.⁶⁰ This new independent legal duty is a form of liability separate and distinct from the preexisting doctrine of civil aiding and abetting, which would impute liability only on those remote texters that provided active encouragement or substantial assistance in the driver's distraction.⁶¹

1. The Majority

The majority's pronouncement of a legal duty not to send a text message to an individual operating a motor vehicle was premised on the idea that the remote texter's knowledge that the text message will reach the recipient while he is driving places the remote individual in a position equivalent to that of a guest passenger. In other words, to the majority, Colonna was perceived as a guest passenger, not by any physical presence in the vehicle, but by virtue of her electronic presence in the vehicle.⁶² Generally, guest passengers in motor vehicles are not liable for the injuries caused by the driver's negligence.⁶³ Nevertheless, there are two exceptions to the rule of passenger nonliability.⁶⁴ The first is when a special relationship exists between the passenger and the driver that affords the passenger "some control over the driver."⁶⁵ The second recognized exception to the rule of passenger nonliability is when the passenger aided and abetted the driver's injurious conduct or "substantially encourage[d] or assist[ed] in the driver's tortious conduct."⁶⁶ In *Kubert*, neither exception was applicable. Colonna did not have a special relationship with Best sufficient to satisfy the first condition,⁶⁷ "nor is there evidence that [Colonna] actively encouraged [Best] to text her while he was driving."⁶⁸ Of particular significance to

⁶⁰ The court affirmed the trial court's order dismissing plaintiffs' complaint against Colonna, but rejected the trial court's reasoning that a remote texter does not have a legal duty to avoid sending text messages to a driver. *Kubert*, 75 A.3d at 1219. The dismissal was based on the court's finding that the plaintiffs did not show sufficient evidence. *Id.*

⁶¹ *Id.* at 1224.

⁶² *Id.* at 1227.

⁶³ See Brian Shipp, Note, *Torts: Price v. Halstead: Liability of a Guest Passenger for the Negligence of His Drunk Driver*, 42 OKLA. L. REV. 159, 159 (1989).

⁶⁴ See, e.g., *Champion ex rel. Ezzo v. Dunfee*, 939 A.2d 825, 829 (N.J. Super. Ct. App. Div. 2008); see also *Kubert*, 75 A.3d at 1224.

⁶⁵ *Champion*, 939 A.2d at 830; see also RESTATEMENT (SECOND) OF TORTS § 315 (AM. LAW INST. 1965).

⁶⁶ *Champion*, 939 A.2d at 831.

⁶⁷ *Kubert*, 75 A.3d at 1224 ("In this case, Colonna did not have a special relationship with Best by which she could control his conduct."). Examples of special relationships that impose liability for the conduct of another include "an employer-employee [and] parent-child relationship." *Id.*

⁶⁸ *Id.*

the outcome of the case, the court explained, is that the content of Colonna's final text messages to Best remains unknown, because the subject matter of the texts was not revealed during discovery.⁶⁹

a. Aiding and Abetting

First, the majority addressed the plaintiffs' argument that Colonna owed a duty of care to the general public because she "aided and abetted" Best's violation of the law.⁷⁰ The basis for this argument is derived from the Restatement (Second) of Torts section 876 (section 876), which discusses liability "[f]or harm resulting to a third person from the tortious conduct of another."⁷¹ It explains that a person may be liable for the harm if he "knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other" person to act in that way.⁷² To prevail on the aiding and abetting theory, the plaintiffs must prove four elements.⁷³ First, the "plaintiff[s] must show that . . . 'the party whom the defendant aids . . . perform[ed] a wrongful act.'"⁷⁴ Second, the plaintiffs must show that "the defendant [was] generally aware of his role as part of an overall illegal or tortious activity at the time that he provide[d] the assistance."⁷⁵ Third, the plaintiffs must show that "the defendant . . . knowingly and substantially assist[ed] the principal violation."⁷⁶ Fourth, the plaintiffs must show "that the defendant's assistance or encouragement constitute[d] a proximate cause of the resulting" injury.⁷⁷

Courts have typically held that the primary issue in imposing liability on an aiding and abetting theory "is whether the assistance or encouragement was substantial."⁷⁸ Section 876 explains that the defendant's assistance may be so slight that he is not liable for the act of the other.⁷⁹ A comment to section 876(b) provides some assistance in

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ RESTATEMENT (SECOND) OF TORTS § 876 (AM. LAW INST. 1979).

⁷² *Id.* § 876(b).

⁷³ See Nathan Isaac Combs, Note, *Civil Aiding and Abetting Liability*, 58 VAND. L. REV. 241, 256, 264 (2005) (citing RESTATEMENT (SECOND) OF TORTS § 876 (AM. LAW INST. 1979)).

⁷⁴ See *Tarr v. Ciasulli*, 853 A.2d 921, 929 (N.J. 2004) (quoting *Hurley v. Atl. City Police Dep't*, 174 F.3d 95, 127 (3d Cir. 1999)).

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ Combs, *supra* note 73, at 256, 264.

⁷⁸ *Id.* at 288 (citing *Halberstam v. Welch*, 705 F.2d 472, 478 (D.C. Cir. 1983)). The inquiry focuses on both the significance of the assistance as well as the defendant's knowledge, or intent, in providing the assistance, making the substantiality requirement analogous to the incorporation of both an actus reus and mens rea in criminal law. *Id.* at 288–89.

⁷⁹ RESTATEMENT (SECOND) OF TORTS § 876(b) (AM. LAW INST. 1979). The Restatement provides an illustration of a scenario where the defendant's assistance is so slight that he is not liable for the injurious act of the other:

fleshing out the meaning of substantial assistance by listing five factors to be considered in the making of this determination: “[1] the nature of the act encouraged, [2] the amount of assistance given by the defendant, [3] his presence or absence at the time of the tort, [4] his relation to the other and [5] his state of mind.”⁸⁰ When the injurious conduct is the exchange of text messages between a driver and a nonpassenger, at least one of these five factors—the remote texter’s absence at the time of the tort—“will weigh against liability.”⁸¹ Here, the amount of assistance given by the defendant also weighs against liability, as the driver requires no assistance from the remote texter to pick up his phone.⁸² The inquiry would ultimately come down to the defendant’s state of mind, because this factor aligns closest with the requirement that the defendant knowingly and substantially assisted the principal violation.

The *Kubert* court held that the plaintiffs’ claim of aiding and abetting had no merit because there was no evidence proving that Colonna controlled Best’s actions or that Colonna provided substantial assistance to Best’s failure to follow the law.⁸³ In this case, there was no evidence presented to suggest that Colonna urged Best to read the text message or any evidence that would shed light on Colonna’s knowledge or state of mind at the time of the accident.⁸⁴ Furthermore, “her remote location afforded her limited, if any, knowledge of the circumstances of Best’s text messaging.”⁸⁵

Even assuming that the plaintiffs had been able to introduce evidence that Colonna knew that Best was driving when she sent him the text message, the injurious conduct at hand was of a nature that does

A is employed by B to carry messages to B’s workmen. B directs A to tell B’s workmen to tear down a fence that B believes to be on his own land but that in fact, as A knows, is on the land of C. A delivers the message and the workmen tear down the fence. Since A was a servant used merely as a means of communication, his assistance is so slight that he is not liable to C.

Id. at cmt. d, illus. 9.

⁸⁰ *Id.* at cmt. d.

⁸¹ *Kubert v. Best*, 75 A.3d 1214, 1231 (N.J. Super. Ct. App. Div. 2013) (Espinosa, J., concurring).

⁸² *See id.* at 1232 (“Consideration of the factors relevant to an aiding and abetting analysis in this case also supports our conclusion that the evidence was insufficient to impose liability upon Colonna for aiding and abetting Best’s negligent conduct. . . . Her ‘assistance’ consisted of receiving several text messages and sending one in reply before the accident.”).

⁸³ *Id.* at 1231.

⁸⁴ *Id.* at 1225 (majority opinion) (“[T]he evidence in this case is not sufficient for a jury to conclude that Colonna took affirmative steps and gave substantial assistance to Best in violating the law. Plaintiffs produced no evidence tending to show that Colonna urged Best to read and respond to her text while he was driving.”); *id.* at 1232 (Espinosa, J., concurring) (“The evidence regarding her state of mind fails to reveal any intention to assist Best in committing a tortious act.”).

⁸⁵ *Id.* at 1232 (Espinosa, J., concurring).

not trigger liability under section 876.⁸⁶ The injurious conduct—two companions exchanging a series of text messages—constitutes “mere presence and participation in the same activity that gave rise to the driver’s liability,”⁸⁷ much like two companions drinking alcohol together in a car, which is insufficient to constitute the substantial encouragement required for the imposition of liability under an aiding and abetting theory.⁸⁸

b. Independent Legal Duty

As an alternative to the argument that Colonna aided and abetted Best’s negligent driving, “[p]laintiffs argue[d] alternatively that Colonna independently had a duty not to send texts to a person who she knew was driving a vehicle.”⁸⁹ The *Kubert* court agreed, and created a new legal responsibility that is akin to making senders of a text message electronically present in the car.⁹⁰ The *Kubert* court explained that limiting this duty to only those individuals who have the requisite knowledge—both that the recipient was driving and that the recipient would be distracted by the text message—does not require that senders of text messages predict how a recipient will react, nor cause all senders of text messages to fear liability.⁹¹

The court cited increased public awareness of texting and driving as further justifications for the creation of a new legal duty.⁹² In the absence of a legally recognizable duty at common law, oftentimes courts

⁸⁶ See *supra* notes 72–79 and accompanying text.

⁸⁷ *Kubert*, 75 A.3d at 1232 (citing *Champion ex rel. Ezzo v. Dunfee*, 939 A.2d 825, 831–32 (N.J. Super. Ct. App. Div. 2008)); see also *Podias v. Mairs*, 926 A.2d 859 (N.J. Super. Ct. App. Div. 2007).

⁸⁸ See *Champion*, 939 A.2d at 831–32 (“[L]iability has not been imposed where it was established that the passengers were merely companions who did nothing to substantially encourage or assist the driver in his or her voluntary consumption of alcohol and operation of the vehicle while intoxicated.”); see also *Halberstam v. Welch*, 705 F.2d 472, 483 (D.C. Cir. 1983) (explaining that in order to establish a claim under an aiding and abetting theory, the plaintiff would have to present evidence that the defendant assisted or encouraged the tortious conduct, and thus evidence that the defendant was present and took pleasure in the tortious conduct was insufficient to establish liability); *Podias*, 926 A.2d at 867 (“[A]iding-abetting’ focuses on whether a defendant knowingly gave ‘substantial assistance’ to someone engaged in wrongful conduct, not on whether the defendant *agreed* to join the wrongful conduct.”).

⁸⁹ *Kubert*, 75 A.3d at 1225.

⁹⁰ See *id.* at 1226.

⁹¹ *Id.* at 1228 (“Limiting the duty to persons who have such knowledge will not require that the sender of a text predict in every instance how a recipient will act. It will not interfere with use of text messaging to a driver that one expects will obey the law.”).

⁹² *Id.* at 1229 (“[T]he public interest requires fair measures to deter dangerous texting while driving. Just as the public has learned the dangers of drinking and driving through a sustained campaign and enhanced criminal penalties and civil liability, the hazards of texting when on the road, or to someone who is on the road, may become part of the public consciousness when the liability of those involved matches the seriousness of the harm.”).

will, as a preliminary matter, proceed using a public policy analysis in order to determine whether or not a duty of care exists between the plaintiff and the defendant.⁹³ The court relied on the rising dangers posed by distracted drivers and the increased public interest in preventing automobile accidents caused by texting while driving to establish a duty of care between a remote texter and the general public.⁹⁴

2. The Concurrence

The concurring opinion by Judge Espinosa diverged from the majority on its introduction of a new legal duty.⁹⁵ Judge Espinosa argued that traditional tort principles were sufficient to decide that Colonna could not be held liable for the Kuberts' injuries in this case, and thus, the court should have dismissed Colonna as a defendant without saying more.⁹⁶ Judge Espinosa concluded by alluding to the legislature's role in effectuating public policy, as opposed to judicial interference,⁹⁷ an argument that is reminiscent of the dissent in *Kelly v. Gwinnell*, the seminal opinion recognizing social host liability.⁹⁸

⁹³ See W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS § 42, at 274 (5th ed. 1984).

⁹⁴ *Kubert*, 75 A.3d at 1229.

⁹⁵ *Id.* at 1229–30 (Espinosa, J., concurring) (“Still, I do not agree that it is necessary for us to articulate a new duty specific to persons in remote locations who send text messages to drivers, and I part company with my colleagues in their analysis of the duty imposed.”).

⁹⁶ *Id.* at 1230.

⁹⁷ *Id.* at 1233 (“The dangers associated with text messaging while driving, and the devastating consequences in this case, were known to the Legislature. We have nothing before us that reflects whether the Legislature considered legislation that would have imposed either civil liability or criminal penalties for a remote texter who sends a distracting text message to a driver.”).

⁹⁸ *Kelly v. Gwinnell*, 476 A.2d 1219, 1235–36 (N.J. 1984) (Garibaldi, J., dissenting) (“I do not propose to fashion a legislative solution. That is for the Legislature. I merely wish to point out that the Legislature has a variety of alternatives to this Court’s imposition of unlimited liability on every New Jersey adult. Perhaps, after investigating all the options, the Legislature will determine that the most effective course is to impose the same civil liability on social hosts that the majority has imposed today. I would have no qualms about that legislative decision so long as it was reached after a thorough investigation of its impact on average citizens of New Jersey.”); see also *infra* notes 111–15 and accompanying text.

III. ANALYZING THIRD-PARTY LIABILITY IN *KUBERT V. BEST*A. *The Common Law Framework*

1. Analogous Forms of Liability

As explained in this Section, the introduction of third-party liability of a remote texter in *Kubert*, while novel, contains similarities to other areas of tort law where courts have found it appropriate to extend liability to third parties. Liability for another individual's wrongdoing is not a new legal concept; rather, it has been a viable cause of action in American tort law since the 1800s.⁹⁹ Despite its long history, however, the doctrine's application appears most often in statutory securities cases, resulting in "limited common law precedent" and numerous uncertainties.¹⁰⁰

Generally, guest passengers in motor vehicles are not liable for the injuries caused by the driver's negligence.¹⁰¹ However, the law will find a passenger liable in some circumstances, such as when "an automobile passenger . . . is engaged in a joint enterprise . . . with the driver, if he commits an act or omission that constitutes negligence on his part, or if he assists or encourages the driver's negligent conduct."¹⁰² A well-recognized tenet of tort law, not only in New Jersey, but also throughout the United States, imposes on all passengers the duty not to interfere with a driver's operation of the vehicle.¹⁰³ Passengers who breach this duty by interfering with the driver's operation of the vehicle may be held liable under a theory of third-party liability.¹⁰⁴ It should be noted that the "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."¹⁰⁵

Remote texting liability is similarly analogous to the liability traditionally imposed on guest passengers who aided and abetted the driver's illegal drunk driving, and owners of vehicles who lend their cars

⁹⁹ See Josephine T. Willis, Note, *To (B) or Not to (B): The Future of Aider and Abettor Liability in South Carolina*, 51 S.C. L. REV. 1045, 1045 (2000) (citing *Clark v. Newsam* (1847) 154 Eng. Rep. 55, 57, 59).

¹⁰⁰ *Id.* at 1046.

¹⁰¹ See Shipp, *supra* note 63, at 159.

¹⁰² *Id.*

¹⁰³ See *Champion ex rel. Ezzo v. Dunfee*, 939 A.2d 825, 827 (N.J. Super. Ct. App. Div. 2008).

¹⁰⁴ *Id.*

¹⁰⁵ Strider, *supra* note 15, at 1012; see also *Tabor v. O'Grady*, 157 A.2d 701, 705 (N.J. Super. Ct. App. Div. 1960).

to persons they know to be intoxicated.¹⁰⁶ Interestingly, the cases that raise these issues often wind up demonstrating a court's reluctance to find liability for aiding and abetting, typically for failure to prove substantial assistance.¹⁰⁷ For example, in *Olson v. Ische*, the injured plaintiff argued that the passenger from the other vehicle aided and abetted the driver's illegal conduct by actively drinking with the driver prior to driving.¹⁰⁸ The court concluded that the plaintiff failed to state a viable cause of action against the passenger under section 876 because the passenger merely accompanied the driver.¹⁰⁹ In order to hold the third party liable, the plaintiff must show that the third party took affirmative steps to substantially encourage the injurious conduct.¹¹⁰

Perhaps the most analogous form of imputed liability to remote texting is social host liability. The New Jersey Supreme Court handed down the seminal opinion recognizing social host liability in *Kelly v. Gwinnell*.¹¹¹ Social host liability is the duty of a host to avoid serving alcohol to an adult guest that he knows is intoxicated and knows will thereafter be operating a motor vehicle.¹¹² In recognizing the duty of social hosts, the *Kelly* court explained that when a social host possessed the requisite knowledge—both that the guest was intoxicated and that the guest would subsequently be driving—the host “created an unreasonable risk of foreseeable harm resulting in injury; hence, all the elements needed to establish negligence are present.”¹¹³ The issue, then, was whether the law should impose a new duty on social hosts in these types of situations to prevent foreseeable harm.¹¹⁴ The *Kelly* court's resolution relied heavily on policy considerations, explaining that a great number of deaths involving automobiles are attributable to drunk driving.¹¹⁵

¹⁰⁶ See RESTATEMENT (SECOND) OF TORTS § 308 (AM. LAW INST. 1965).

¹⁰⁷ See, e.g., *Olson v. Ische*, 343 N.W.2d 284 (Minn. 1984); see also Patrick J. McNulty & Daniel J. Hanson, *Liability for Aiding and Abetting by Silence or Inaction: An Unfounded Doctrine*, 29 TORT & INS. L.J. 14, 21 (1993).

¹⁰⁸ *Olson*, 343 N.W.2d at 287.

¹⁰⁹ See McNulty & Hanson, *supra* note 107, at 21.

¹¹⁰ See *supra* notes 78–81 and accompanying text.

¹¹¹ *Kelly v. Gwinnell*, 476 A.2d 1219 (N.J. 1984).

¹¹² *Id.*

¹¹³ 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, 904–06 (1991); see also *Kelly*, 476 A.2d at 1222.

¹¹⁴ See Pritcher, *supra* note 113, at 904.

¹¹⁵ *Kelly*, 476 A.2d at 1222–23.

2. Civil Liability for Aiding and Abetting

As mentioned previously, there are two exceptions to the rule of passenger nonliability. One is where there is a “special relationship” between the driver and the passenger that gives the passenger control over the driver’s conduct, such as an employer-employee or parent-child relationship.¹¹⁶ The second is where a defendant passenger actively encourages the driver to commit the negligent act.¹¹⁷ When a defendant passenger actively encourages the driver to commit the negligent act, the defendant passenger can be held liable for injuries resulting from the driver’s operation of the vehicle.¹¹⁸ This articulation of the duty, however, does not come without limitations.

For example, mere failure to prevent wrongful conduct by another is not, without more, sufficient to impose liability.¹¹⁹ With respect to the application of an aiding and abetting theory to *Kubert*, “mere presence and participation in the same activity that gave rise to the driver’s liability, such as drinking alcohol in the car,” or, in this case, exchanging a series of text messages, is “insufficient to constitute the substantial encouragement required for the imposition of liability.”¹²⁰ The *Kubert* court proceeded to cite a series of New Jersey Supreme Court and appellate court cases that relied on section 876 to impose liability on a third party for a vehicular accident.¹²¹ However, none of the cases address the critical issue present in *Kubert*: the fact that the third party was not present in the vehicle at the time of the accident.¹²²

¹¹⁶ *Champion ex rel. Ezzo v. Dunfee*, 939 A.2d 825, 828–30 (N.J. Super. Ct. App. Div. 2008).

¹¹⁷ *Id.*; see also RESTATEMENT (SECOND) OF TORTS § 876(b) (AM. LAW INST. 1979).

¹¹⁸ *Champion*, 939 A.2d at 831–32.

¹¹⁹ *Id.*

¹²⁰ *Kubert v. Best*, 75 A.3d 1214, 1232 (N.J. Super. Ct. App. Div. 2013) (Espinosa, J., concurring) (citing *Champion*, 939 A.2d at 831–32). In *Champion*, the defendant girlfriend could not be held liable for failing to prevent her boyfriend’s negligent driving because her actions did not constitute substantial encouragement or assistance. *Champion*, 939 A.2d at 833–34.

¹²¹ See *Kubert*, 75 A.3d at 1223–25 (citing *Tarr v. Ciasulli*, 853 A.2d 921, 929 (N.J. 2004)); *Champion*, 939 A.2d at 825; *Podias v. Mairs*, 926 A.2d 859 (N.J. Super. Ct. App. Div. 2007).

¹²² See *Champion*, 939 A.2d at 825 (finding that the driver’s girlfriend, sitting in the front seat of the car, may have had a duty to prevent her boyfriend’s negligent driving if she had actively encouraged him to commit the negligent act, but not for merely failing to prevent his negligent driving); *Podias*, 926 A.2d at 863 (finding that the passengers could be found liable for aiding and abetting the driver’s violation of the law when the driver and the passengers all fled the scene of the accident after colliding into and injuring a motorcyclist on the Garden State Parkway).

B. *Imposition of Liability Requires the Existence of a Duty of Care*

As one hornbook describes it, “[n]egligence . . . is simply one kind of conduct. But a cause of action founded upon negligence, from which liability will follow, requires more than conduct.”¹²³ Judicial recognition of civil liability for negligence requires the existence of four fundamental elements: (1) duty, (2) breach,¹²⁴ (3) causation,¹²⁵ and (4) damages.¹²⁶ A duty is a legal obligation requiring the individual “to conform to a particular standard of conduct toward another” for the protection of the other against unreasonable harm.¹²⁷ The threshold question in any negligence action is always whether the defendant owed a duty of care to the plaintiff.¹²⁸

1. Full-Duty Analysis

The *Kubert* court used a “full duty analysis’ to determine whether the law recognizes a duty of care.”¹²⁹ The court explained that a duty must be viewed under the totality of the circumstances and that the scope of that duty must be reasonable under those circumstances.¹³⁰ The court introduced the “full duty analysis” after reviewing a series of precedents that, according to the court, provide the “most cogent explanation of the principles that guide [the courts] in determining whether to recognize the existence of a duty of care.”¹³¹ According to the New Jersey Supreme Court, the issue of “[w]hether a person owes a duty of reasonable care toward another turns on whether the imposition of such a duty satisfies an abiding sense of basic fairness under all of the circumstances in light of considerations of public policy.”¹³²

¹²³ KEETON ET AL., *supra* note 93, at 164.

¹²⁴ Breach refers to “[a] failure on the person’s part to conform to the standard required.” *Id.*

¹²⁵ Causation refers to “[a] reasonably close causal connection between the conduct and the resulting injury.” *Id.* at 165.

¹²⁶ Damages refers to “[a]ctual loss or damage resulting to the interests of another.” *Id.*

¹²⁷ *Acuna v. Turkish*, 930 A.2d 416, 424 (N.J. 2011) (quoting KEETON ET AL., *supra* note 93, at 356); *see also* RESTATEMENT (SECOND) OF TORTS § 4 (AM. LAW INST. 1965) (“The word ‘duty’ is used throughout the Restatement of this Subject to denote the fact that the actor is required to conduct himself in a particular manner at the risk that if he does not do so he becomes subject to liability to another to whom the duty is owed for any injury sustained by such other, of which that actor’s conduct is a legal cause.”).

¹²⁸ *See* KEETON ET AL., *supra* note 93, at 164.

¹²⁹ *See* *Kubert v. Best*, 75 A.3d 1214, 1223 (N.J. Super. Ct. App. Div. 2013).

¹³⁰ *Id.*

¹³¹ *Id.* (alteration in original) (quoting *Estate of Desir ex rel. Estiverne v. Vertus*, 69 A.3d 1247, 1258 (N.J. 2013)).

¹³² *Desir*, 69 A.3d at 1258 (alteration in original) (quoting *Hopkins v. Fox & Lazo Realtors*, 625 A.2d 1110 (N.J. 1993)).

Furthermore, the inquiry—whether fairness and public policy necessitate the imposition of a duty—“involves identifying, weighing, and balancing several factors,” including “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.”¹³³ In this regard, “[t]he analysis is . . . fact-specific,” but the end result “must lead to solutions that properly and fairly resolves the specific case and generate intelligible and sensible rules to govern future conduct.”¹³⁴

2. New Independent Duty Not to Text: Remote Texting Liability

After first concluding that neither exception to the rule of passenger nonliability was viable,¹³⁵ the *Kubert* court pronounced, in the alternative, that individuals owe a duty to the general public not to send text messages to individuals that the sender “knows or has special reason to know” are driving and will be distracted by the text message.¹³⁶ Section 303 of the Restatement (First) of Torts (section 303) discusses acts “likely to affect, the conduct of another, [or] a third person” and cause “unreasonable risk of harm.”¹³⁷ That section explains that an otherwise harmless act may in fact be negligent because of its tendency to cause an injurious act to another.¹³⁸ The *Kubert* court cited this provision as its basis for the creation of a duty of care owed by a remote third party texter,¹³⁹ and held that “[w]hen the sender knows

¹³³ *Id.* (quoting *Hopkins*, 625 A.2d 1110).

¹³⁴ *Id.* (quoting *Hopkins*, 625 A.2d 1110). According to Prosser, “[t]he actor’s conduct must be judged in the light of the possibilities apparent to him at the time, and not by looking backward ‘with the wisdom born of the event.’ The standard is one of conduct, rather than of consequences.” KEETON ET AL., *supra* note 93, at 170 (footnote omitted) (quoting *Greene v. Sibley, Lindsay & Curr Co.*, 177 N.E. 416 (N.Y. 1931)).

¹³⁵ See *supra* Section III.A.2.

¹³⁶ *Kubert*, 75 A.3d at 1229.

¹³⁷ RESTATEMENT (FIRST) OF TORTS § 303 (AM. LAW INST. 1934).

¹³⁸ *Id.* The *Kubert* court included a hypothetical example from section 303: “A is driving through heavy traffic. B, a passenger in the back seat, suddenly and unnecessarily calls out to A, diverting his attention, thus causing him to run into the car of C. B is negligent toward C.” *Kubert*, 75 A.3d at 1226 (quoting RESTATEMENT (FIRST) OF TORTS § 303 cmt. d, illus. 3 (AM. LAW INST. 1934)).

¹³⁹ *Kubert*, 75 A.3d at 1226 (“An act is negligent if the actor intends it to affect, or realizes or should realize that it is likely to affect, the conduct of another . . . in such a manner as to create an unreasonable risk of harm to the other.” (quoting RESTATEMENT (FIRST) OF TORTS § 303 (AM. LAW INST. 1934))); see also *id.* at 1223 (explaining that plaintiffs argue that a duty of care should be imposed upon Colonna because she aided and abetted Best’s violation of the law when he used his cell phone while driving and citing section 876 of the Restatement (Second) of Torts to support their argument). The court went on to explain an illustration in the Restatement which demonstrates that if A and B are in a fight in which B encourages A to throw a rock which in turn hits C, a bystander, B is subject to liability to C, even though B threw no rocks himself. *Id.*

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.”¹⁴⁰ As Judge Espinosa indicated in her concurrence, “[t]he premise for this holding is that [the individual’s] knowledge [that the] text message will ‘reach the driver while operating a vehicle’ . . . places the remote texter in a position equivalent to that of a passenger [physically present] in the vehicle.”¹⁴¹

The court used hypothetical examples to draw distinctions between the independent legal duty of a passenger not to distract a driver and actions amounting to aiding and abetting a driver’s negligent conduct.¹⁴² For example, a passenger may be held liable for injuries that resulted from an automobile accident where “the passenger obstructed the driver’s view of the road . . . by suddenly holding a piece of paper in front of the driver’s face and urging the driver” to take his eyes off the road “to look at what is written or depicted on the paper.”¹⁴³ Finding the passenger liable in this scenario would be neither unfair nor a departure from well-settled principles of liability, according to the majority, because the passenger directly and deliberately behaved in a way that is likely to result in harm under the circumstances. Thus, the reasonable and prudent person would not have behaved in that way.¹⁴⁴

Here, however, Colonna did not hold Best’s cell phone in front of his eyes. The record is devoid of any evidence suggesting that she urged Best to read the text message, which was the primary reason the court was unable to find Colonna liable under an aiding and abetting theory in the first place.¹⁴⁵ The record is also devoid of any evidence that she knew Best would be distracted by her text, a reason that the *Kubert* court cited as its basis for dismissal, despite Colonna’s independent legal

¹⁴⁰ *Kubert*, 75 A.3d at 1228.

¹⁴¹ *Id.* at 1230 (Espinosa, J., concurring) (quoting the majority).

¹⁴² *Id.* at 1226–27 (majority opinion).

¹⁴³ *Id.*

¹⁴⁴ *Id.*; see also 57A AM. JUR. 2D *Negligence* § 133 (perm. ed., rev. vol. 2016) (“The standard of care [in tort law] is often stated as the ‘reasonably prudent person standard,’ . . . or in other words, what a reasonable person of ordinary prudence would have done in the same or similar circumstances. With adults, all of whom are presumed by the law to have adequate experience, intelligence, and maturity to act reasonably, the objective test for negligence is normally stated simply in terms of the reasonably prudent person.” (footnote omitted)). Negligence is behavior that departs from a standard of conduct, and the standard of conduct, created by the law and by society, is for universal protection against unreasonable risk. See RESTATEMENT (SECOND) OF TORTS § 283 (AM. LAW INST. 1965). The standard of conduct “must be an objective and external one, . . . [and] the same for all persons In dealing with this problem the law has made use of the standard of a hypothetical ‘reasonable man.’” *Id.* at cmt. c.

¹⁴⁵ *Kubert*, 75 A.3d at 1225 (“[T]he evidence in this case is not sufficient for a jury to conclude that Colonna took affirmative steps and gave substantial assistance to Best in violating the law. Plaintiffs produced no evidence tending to show that Colonna urged Best to read and respond to her text while he was driving.”).

duty not to text Best while he was driving.¹⁴⁶ Despite the court's ultimate dismissal of the claims against Colonna, the opinion's recognition of an independent legal duty not to send a text message to an individual operating a motor vehicle marks a significant departure from the current state of third-party liability and of automobile accident liability in the United States.

C. Criticisms of a Rule of Remote Texting Liability

1. The Unnecessary Formulation of a New Legal Duty

As explained by the concurrence, the *Kubert* court's articulation of a new duty, while overreaching, was also unnecessary in light of preexisting tort principles, which provided adequate guidance for the analysis at hand.¹⁴⁷ The doctrine of imputing liability onto third parties for civil aiding and abetting is sufficient to determine whether a third party should be held liable in a particular situation.¹⁴⁸ In light of this preexisting doctrine, imposing a duty on remote individuals to avoid any conduct that might distract a driver is not only unnecessary, but will also greatly increase the likelihood of third-party liability as a result of distracted driving.

Proponents of remote texting liability argue that the issue of whether to impose a duty of care boils down to a question of policy, and courts, including the *Kubert* court, should look to policy objectives in order to justify the introduction of a new legal duty.¹⁴⁹ Those in favor of

¹⁴⁶ *Id.* at 1229 (“[P]laintiffs developed evidence pertaining to the habits of Best and Colonna in texting each other repeatedly. They also established that the day of the accident was not an unusual texting day for the two. But they failed to develop evidence tending to prove that Colonna not only knew that Best was driving when she texted him at 5:48:14 p.m. but that she knew he would violate the law and immediately view and respond to her text.”). In order to find Colonna liable under an independent legal duty, the plaintiffs would have had to also produce sufficient evidence that Colonna knew Best was driving at the time she sent the text message. *Id.*

¹⁴⁷ *Id.* at 1229–30, 1232 (Espinosa, J., concurring) (explaining that “traditional tort principles provide adequate guidance to determine whether liability should be imposed in such circumstances” and noting that those same “tort principles . . . provide the framework for the majority opinion”); see also *supra* note 96 and accompanying text.

¹⁴⁸ *Kubert*, 75 A.3d at 1230–32 (Espinosa, J., concurring) (explaining that an aiding and abetting liability analysis was sufficient to determine that Colonna could not be held liable for the Kuberts' injuries in this case, and thus the court should have dismissed Colonna without saying more).

¹⁴⁹ See Deborah B. Goldberg, Comment, *Imposition of Liability on Social Hosts in Drunk Driving Cases: A Judicial Response Mandated by Principles of Common Law and Common Sense*, 69 MARQ. L. REV. 251, 267 (1986) (“In these jurisdictions, determining whether a duty exists

a rule of remote texting liability would argue that the court's decision in *Kubert* is in line with the nation's trend of increasing penalties for texting while driving, and thus is appropriate.¹⁵⁰ The opinion signifies a significant step in the war against texting while driving. However, by imposing liability for remotely aiding and abetting distracted driving, the opinion goes too far, especially considering the available, preexisting doctrine of civil liability for aiding and abetting.¹⁵¹

2. Inherent Unfairness

One obvious critique of imputing liability on remote texters is that it was the illegal act of the driver, not the actions of the remote individual, which actually caused the accident.¹⁵² While there are situations in which third parties have been held liable for vehicular accidents, the third party in such cases was usually a passenger who was physically present in the vehicle.¹⁵³ The inherent unfairness in imputing liability on remote texters is ultimately an issue of causation.

a. Causation: Foreseeability

A final element of liability, left largely unaddressed by the *Kubert* court, is causation. Imposition of liability requires that a defendant's act be both a cause in fact (a "but-for" cause) and a legal ("proximate") cause of the resulting harm.¹⁵⁴ Thus, an actor must not only be a link in the chain of causation, but also a substantial factor in bringing about the harm.¹⁵⁵ To impose liability on remote senders of text messages in automobile accident cases, the finder of fact must determine that the sending of the text message sufficiently constituted a proximate cause of the resulting injuries.¹⁵⁶ Proximate cause is often understood to stand

[between the actor and the injured party] is in essence a 'value judgment, based on an analysis of public policy . . .'" (quoting *Kelly v. Gwinnell*, 476 A.2d 1219, 1222 (N.J. 1984)).

¹⁵⁰ See *supra* Section I.B.

¹⁵¹ See *supra* Section III.A.

¹⁵² See Gregory G. Sarno, *Liability of Motor Vehicle Passenger for Accident*, 50 AM. JUR. PROOF OF FACTS 2D *Liability of Motor Vehicle Passenger for Accident* § 1 (perm ed., rev. vol. 2016) ("Statistically speaking, it is likely that the most common culprit in motor vehicle accidents is the driver or drivers, who may be guilty of an array of negligent acts or omissions ranging from speeding and disregarding traffic-control lights or signals, to driving under the influence of alcohol or drugs and falling asleep at the wheel.").

¹⁵³ *Id.*

¹⁵⁴ See KEETON ET AL., *supra* note 93, at 263–80.

¹⁵⁵ *Id.*

¹⁵⁶ To successfully plead "a common-law negligence claim, the plaintiff [must] prove each of the elements of negligence: duty, breach of that duty, causation/proximate cause and damages caused by the breach." 35 CAUSES OF ACTION 2D *Causes of Action Arising out of Cell Phone Use While Operating a Motor Vehicle* § 5 (perm. ed., rev. vol. 2016); see also *Kubert v. Best*, 75 A.3d

for the proposition that “the scope of liability should ordinarily extend to but not beyond the scope of the ‘foreseeable risks.’”¹⁵⁷

Because foreseeability of the risk turns on the defendant’s knowledge, it is necessary to establish what is and is not foreseeable for the remote individual who sends a text message. The *Kubert* court explained that, while it is true that not every recipient of a text message who is driving will neglect his obligation to the law, “if the sender [of the text message] knows that the recipient is both driving and will read the text immediately, then the sender has taken a foreseeable risk in sending a text at that time.”¹⁵⁸ In other words, when a sender knowingly engaged in the distracting conduct that caused the injury, it is not unfair for liability to follow. Knowledge, in this case, turns on both knowledge that the recipient is driving and knowledge that the recipient will read the text message immediately.

The first causal problem with the imputation of liability on the sender of the text message is that the sender of the text message is not present in the automobile.¹⁵⁹ Judge Espinosa alluded to the issue of foreseeability in her *Kubert* concurrence when she maintained that, because remote texters lack the first-hand knowledge that passengers possess of the circumstances surrounding the driver’s operation of the vehicle, the majority’s conclusion that a remote texter is in an analogous position to a passenger present in the vehicle is unfounded.¹⁶⁰ Often times, courts will look at questions of proximate cause through the lens of a legally recognizable duty.¹⁶¹ The question of whether a duty exists has often seemed appropriate in cases such as this, where the principal issue is whether the defendant stands in any such relation to the plaintiff as to create any legally recognized obligation of conduct for the plaintiff’s benefit.¹⁶²

1214, 1230 (N.J. Super. Ct. App. Div. 2013) (Espinosa, J., concurring) (“Traditional tort theory emphasizes individual liability, which is to say that each particular defendant who is to be charged with responsibility must be proceeding negligently.” (quoting *Podias v. Mairs*, 926 A.2d 859 (N.J. Super. Ct. App. Div. 2007))).

¹⁵⁷ KEETON ET AL., *supra* note 93, at 273.

¹⁵⁸ *Kubert*, 75 A.3d at 1227. Although the *Kubert* court did not address causation, it did address foreseeability. The court considered foreseeability to be a fundamental component in determining whether it is reasonable to impose a duty on the third party under the circumstances. *See supra* notes 130–34 and accompanying text.

¹⁵⁹ *See Kubert*, 75 A.3d at 1230 (Espinosa, J., concurring).

¹⁶⁰ *See id.* (“[A] person who is not present in the automobile lacks the first-hand knowledge of the circumstances attendant to the driver’s operation of the vehicle that a passenger possesses and has even less ability to control the actions of the driver.”).

¹⁶¹ *See* KEETON ET AL., *supra* note 93, at 274 (“[D]uty’ may serve to direct attention to the policy issues which determine the extent of the original obligation and of its continuance, rather than to the mechanical sequence of events which goes to make up causation in fact.”).

¹⁶² *Id.*

The issue of a remote texter not being present in the vehicle is significant to the analysis.¹⁶³ Such an issue is ultimately a problem for causation: it is the driver's illegal act of reading the text message, not the remote texter's act of sending it, that is the proximate cause of any consequent injury.¹⁶⁴ The same argument may be made for social host liability: it is the drunk driver's illegal act of driving under the influence of alcohol that caused the injury, not the social host's act of furnishing the alcohol.¹⁶⁵ Similar to social host liability, liability of a remote third-party texter implicates a person not present at the place and time of the event giving rise to the cause of action.¹⁶⁶ Neither the social host nor the texter are "present at the time and place of the scene of the accident—both are remote."¹⁶⁷ The inherent unfairness of remote texting liability, however, can be seen in the significant difference between the foreseeability of these two situations.

"Consumption of alcohol creates a physiological, scientifically quantifiable response" in the consumer's body.¹⁶⁸ What happens is that "[a]lcohol depresses the body's central nervous system," affecting the consumer's mood, judgment, motor coordination, and overall mental and physical ability.¹⁶⁹ On the contrary, "receipt of a text message causes no such physiological, bodily responses."¹⁷⁰ The fact that the driver becomes aware of the fact that he has received a message, either by an audio notification or vibration, "does not in and of itself affect his ability to safely operate a motor vehicle."¹⁷¹ Therefore, while it is foreseeable and scientifically quantifiable that the driver who has been consuming alcohol will be unable to operate his vehicle safely, it is not as foreseeable that a person who simply received a text message while driving will open it. Proponents of remote texting liability may argue that, in light of the prevalence of distracted driving in today's society, experience informs senders of text messages that a recipient may reach for the phone while

¹⁶³ See *supra* note 144 and accompanying text.

¹⁶⁴ See Goldberg, *supra* note 149, at 266 ("The common-law immunity for social hosts and other providers of alcoholic beverages is based on the idea that it is the consumption of the liquor, not the furnishing of it, that is the proximate cause of any consequent injury."). The *Kelly* court did not address the issue of proximate cause because "[t]he court merely assumed the presence of the requisite degree of causation between a social host's furnishing of alcoholic beverages and injuries subsequently caused by the intoxicated guest's drunk driving." *Id.* However, there are significant distinctions between the causal relationship between a social host and an intoxicated driver and the relationship between a sender and recipient of a text message. See *infra* notes 168–70 and accompanying text.

¹⁶⁵ See Goldberg, *supra* note 149, at 266.

¹⁶⁶ See *supra* notes 111–15 and accompanying text.

¹⁶⁷ Strider, *supra* note 15, at 1015.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

driving.¹⁷² However, the problem with this line of reasoning is that it suggests that senders of text messages should anticipate that the recipient will violate the law.

b. Unforeseeable Intervening Cause

The second causal problem with the imputation of liability on the sender of the text message is that reading the text message is the voluntary, illegal action of the driver. Thus, it can be argued that the driver's illegal operation of the motor vehicle was an unforeseeable intervening cause of the accident. An intervening cause is one that comes into active operation in producing the harm only after the negligence of the defendant, and is useful in dealing with cases where a new and independent cause acts upon a situation once the defendant has created it.¹⁷³ The counterargument to this characterization of causation is that if the intervening cause—here, the driver's illegal act of reaching for his cell phone—is one which experience informs us is reasonably anticipated, the defendant will not be relieved of liability, either for failing to guard against it or otherwise.¹⁷⁴ However, in light of the fact that reading a text message while operating a motor vehicle is against the law in New Jersey,¹⁷⁵ Colonna, or any individual who sends a text message in a state that bans the use of a handheld device while operating a motor vehicle, “should be able to assume that the recipient will read a text message only when it is safe and legal to do so.”¹⁷⁶ Of course, whether a remote texter reasonably anticipates that the recipient will reach for the cell phone, in violation of the law, or continue to drive safely, depends largely on present circumstances and the prevalence of distracted driving.

D. *Criticisms of Enforcing a Rule of Remote Texting Liability*

In addition to remote texting liability's unfairness and departure from the current state of third-party liability, a rule of remote texting

¹⁷² See *supra* Part I; see also *Kubert v. Best*, 75 A.3d 1214, 1228 (N.J. Super. Ct. App. Div. 2013) (“Consequently, when 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.” (citation omitted)).

¹⁷³ See KEETON ET AL., *supra* note 93, at 300.

¹⁷⁴ See *id.*

¹⁷⁵ N.J. STAT. ANN. § 39:4-97.3 (West 2012) (“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”); see also *supra* Section I.B.

¹⁷⁶ *Kubert*, 75 A.3d at 1227.

liability also implicates problems of enforcement. A rule of remote texting liability will likely have profound negative impacts on the court system and human behavior by adding complexities to automobile accident litigation and creating uncertainty for texters.¹⁷⁷

1. Evidentiary Issues: The Dual-Knowledge Standard

With the pronouncement of New Jersey's remote texting liability rule, the *Kubert* court established a dual-knowledge standard, requiring that the plaintiff prove that the defendant knew *both* that the recipient was driving and that the recipient would be distracted by the text message.¹⁷⁸ The court stressed the significance of the dual-knowledge standard as limiting the scope of the duty to situations where the imposition of liability would be fair.¹⁷⁹ Furthermore, by mandating the dual-knowledge test, the court ensured that senders of text messages would only be held liable for the injurious conduct of the recipient in rare circumstances. The problem, however, is that the *Kubert* court failed to establish or even mention any specific guidelines on how to determine the remote texter's knowledge of the recipient's circumstances. For example, the court failed to state any hypothetical facts that would contribute to the conclusion of whether the recipient was driving and likely to be distracted by the text message. Failure to provide such guidelines will greatly impact the application of remote texting liability in the future.

For instance, one obvious form of evidence that would prove useful in determining the remote texter's knowledge under the circumstances is cell phone records. However, the use of cell phone records as the basis for finding liability implicates procedural and substantive problems. Procedurally, obtaining an individual's emails and text messages prolongs the discovery process and increases the price of litigation. Substantively, even assuming that attainment of the defendant's cell phone records reveals evidence that the remote texter had knowledge that the recipient was, indeed, operating a motor vehicle at the time, a factfinder is still left without any guidance regarding what constitutes

¹⁷⁷ See *infra* Section III.D.2.

¹⁷⁸ See *Kubert*, 75 A.3d at 1229.

¹⁷⁹ *Id.* at 1228 ("Limiting the duty to persons who have such knowledge will not require that the sender of a text predict in every instance how a recipient will act. It will not interfere with use of text messaging to a driver that one expects will obey the law. The limited duty we impose will not hold texters liable for the unlawful conduct of others, but it will hold them liable for their own negligence when they have knowingly disregarded a foreseeable risk of serious injury to others.").

sufficient knowledge that the driver would be distracted by the text message.¹⁸⁰

The *Kubert* court compared the facts of the instant case to those of *Podias v. Mairs*,¹⁸¹ and conceded that the evidence was insufficient for a jury to find that Colonna knew or had reason to know that Best would be so distracted by the text message as to violate the law. Unlike *Podias*, where the defendants were two passengers who encouraged the driver not to call the police before fleeing the scene of the accident together, the evidence in *Kubert* was insufficient for a jury to find that Colonna took affirmative steps and gave substantial assistance to Best in violating the law.¹⁸² In this situation, where the defendant, Colonna, was not in the presence of the driver or at the scene of the accident, the question remains as to what kind of evidence, and how much, would have been sufficient. The court explained that the plaintiffs failed to produce evidence “show[ing] that Colonna urged Best to read and respond to her text while he was driving,”¹⁸³ but gave no indication of what that evidence might look like.

2. A State of Uncertainty

The opportunities for a driver to be distracted are countless,¹⁸⁴ and the holding of *Kubert* opens the door to liability for remote individuals for a number of other forms of communication available through smartphone technology.¹⁸⁵ Moreover, the court’s delineation of

¹⁸⁰ See *id.* at 1229.

¹⁸¹ *Podias v. Mairs*, 926 A.2d 859 (N.J. Super. Ct. App. Div. 2007).

¹⁸² *Kubert*, 75 A.3d at 1225; see also *Podias*, 926 A.2d at 866–69.

¹⁸³ *Kubert*, 75 A.3d at 1225.

¹⁸⁴ The possibilities for distractions from smartphones are endless as a result of push notifications. Push notifications are a channel through which mobile device applications can communicate with and engage users. Push notifications use “push technology” to advance notifications from the servers of third party applications that consumers download onto mobile devices, and many push notifications use an audible sound to notify a user of an update. See *Apple Push Notification Service*, APPLE, <https://developer.apple.com/library/ios/documentation/NetworkingInternet/Conceptual/RemoteNotificationsPG/Chapters/ApplePushService.html> (last updated Mar. 21, 2016). While push notifications keep users up to date, they also provide a regular distraction. Push notifications are *designed* to pull the users’ attention away from other things. In many cases, the other thing may be driving a car. Ariel Seidman, the founder of two successful apps, described the capability of push notifications when he wrote that “[i]t’s hard to overhype the power of mobile push notifications. For the first time in human history you can tap almost two billion people on the shoulder and say ‘hey! pay attention to this!’” Ariel Seidman, *Fixing Mobile Push Notifications*, ARIEL SEIDMAN BLOG (Sept. 28, 2013), <http://arielseidman.com/post/62564939335/fixing-mobile-push-notifications>.

¹⁸⁵ One example of a potential distraction flowing from communications involving a push notification is the CNN application. Throughout the day, as CNN releases its breaking news alerts, the CNN smartphone application uses push notifications to alert users to breaking news.

proximate cause¹⁸⁶ leaves the scope of persons who may be held liable wide open. Drivers are exposed to a number of distractions, ranging from road signs, billboards, and holiday decorations, to aircrafts, pedestrians, and cars parked on the shoulder of the road. If a remote individual is a proximate cause of injury to a third party when a driver responds to a text message, why is the same reasoning not applicable to any remote individual or entity that causes a driver to be distracted? For example, what is stopping a plaintiff from using the same reasoning to argue that a remote corporation, such as McDonald's, should be held liable for the injuries resulting from a driver's inattention caused by a flashy and enticing billboard advertisement? Although, unlike sending a text message or using a handheld device while driving, looking away from the road to glance at a billboard is not a per se violation of the law, the designer of the billboard, unlike the remote texter, knew or had reason to know (assuming the billboard was designed effectively) that the billboard would distract the driver.

These loopholes and uncertainties create the potential for a string of complicated automobile accident lawsuits initiated by injured drivers seeking to recover from more than one defendant and text recipients seeking to shift blame to the senders in order to minimize personal liability. Significantly, one case currently pending in Illinois state court presents facts similar to those in *Kubert*, and a decision regarding one of the defendants' motion to dismiss requires the court to consider the imposition on remote individuals of a duty not to distract drivers (and consequently, liability flowing from that duty).¹⁸⁷ In *Farney v. Geerdes*, Kitty Mullins' estate brought a wrongful death action against Matthew Geerdes and Larry Thorndyke.¹⁸⁸ The complaint alleges that Kitty Mullins was driving south through an intersection when Matthew Geerdes drove west through the intersection, colliding with her vehicle and killing her.¹⁸⁹ Mullins' estate added Larry Thorndyke as a defendant in the action after it discovered that Geerdes was on the phone with Thorndyke at the time of the accident.¹⁹⁰ The basis for liability is that Thorndyke engaged in a telephone conversation with a person that he knew or should have known was operating a motor vehicle on a public

See *CNN App for iPhone*, iTUNES, <https://itunes.apple.com/us/app/cnn-app-for-iphone/id331786748?mt=8> (last visited Jan. 21, 2016).

¹⁸⁶ See *supra* notes 158–71 and accompanying text.

¹⁸⁷ See Plaintiff's Response to Defendant Larry Thorndyke's 2-615 Motion to Dismiss, *Farney v. Geerdes*, No. 2013L14, 2014 WL 7778763 (Ill. Cir. Ct. Oct. 23, 2014) (No. 2013L14), 2015 WL 606159.

¹⁸⁸ Third Amended Complaint at *1, *Farney*, 2014 WL 7802976 (No. 2013L14).

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* at *4; see also Plaintiff's Response to Defendant Larry Thorndyke's 2-615 Motion to Dismiss at *2, *supra* note 187.

roadway, distracting the driver and resulting in collision.¹⁹¹ Thorndyke moved to dismiss the complaint, arguing that it failed to allege a recognizable duty against him and failed to allege that the negligent conduct was the proximate cause of the accident.¹⁹² Neither Shannon Colonna, the defendant in *Kubert*, nor Larry Thorndyke, was present at the collision that gave rise to the dispute. Both were communicating with the driver via telephone from a remote location, and thus, both were brought into court under a theory of “remote” liability. The plaintiff in *Farney* argues that Thorndyke’s motion to dismiss should be denied because Mullins’s death was a reasonably probable and foreseeable consequence of his conduct: distracting an individual he knew or should have known was driving on a public roadway.¹⁹³

Like *Kubert*, the Illinois court’s forthcoming decision granting or denying Thorndyke’s motion to dismiss will send an important message to individuals in Illinois on this issue. If the motion is denied, Illinois is signaling the existence of a legal duty similar to that articulated in *Kubert*, and the confines of that duty will need to be fleshed out in the court’s ultimate decision in the case. Even if the court grants Thorndyke’s motion to dismiss, the possibility for remote texting liability in Illinois remains intact. Unlike Colonna, Thorndyke did not send a text message to the driver. He spoke to the driver on the phone, an action that, in states that allow talking on a hands-free device, can be perfectly legal for the driver, albeit distracting. The fact that texting while driving is against the law full stop, whereas talking on the phone becomes illegal only when it is done in way that is not hands-free, signifies a belief or opinion held by the legislature that texting is *more distracting* than talking on the phone. Thus, much like the result in New Jersey after *Kubert*, the question of whether there is a legal duty not to send a text message to an individual one knows or should know is driving could very well remain unanswered, despite dismissal.

IV. PROPOSAL

In the context of civil liability for third parties, the new duty of care articulated in *Kubert* represents a significant expansion of liability.¹⁹⁴ This Note argues that although ultimately the court correctly decided

¹⁹¹ Third Amended Complaint at *7, *supra* note 188.

¹⁹² See Plaintiff’s Response to Defendant Larry Thorndyke’s 2-615 Motion to Dismiss at *2, *supra* note 187.

¹⁹³ *Id.* at *3. Plaintiff pointed to *Kubert* for further “public policy support,” explaining that courts outside of Illinois are assigning duty to individuals that distract motorists with cell phones. *Id.*

¹⁹⁴ See *supra* note 144 and accompanying text.

the issue presented in *Kubert*, courts should narrowly interpret the scope of *Kubert*, limiting the holding to its facts in order to exclude any future application of remote texting liability. Liability should not be placed on remote third-party texters, as doing so would extend liability beyond any recognized duties in American jurisprudence, and would represent an unnecessary departure from the current state of third-party liability, given the preexisting doctrine of liability for aiding and abetting. Thus, New Jersey, and other states seeking to deter texting while driving, should decline to follow the *Kubert* court's rule of remote texting liability and limit the scope of the *Kubert* decision to prohibit the use of remote texting liability. Furthermore, states seeking to address the growing issue of texting while driving should turn instead to more certain measures for deterrence. This Note proposes that, as an alternative to remote texting liability, states should adopt a comprehensive approach to reducing distracted driving, and specifically texting while driving, including legislative action, heightened law enforcement, media campaigns, advanced smartphone technology, and, when appropriate, the preexisting doctrine of civil liability for aiding and abetting.

A. *Narrowly Interpreting Kubert v. Best*

There are two possible readings of *Kubert*—a broad interpretation and a narrow one. Reading *Kubert* broadly, a remote individual may be held liable for injuries resulting from an automobile accident caused by the driver's inattention, as long as it can be shown that the individual who sent the text message knew that the recipient was driving and knew or had special reason to know that the recipient would be distracted by the text message.¹⁹⁵ This broad interpretation poses a number of problems for New Jersey. In addition to its departure from the long-standing principles of third-party liability,¹⁹⁶ this broad interpretation would add complexities to automobile accident litigation¹⁹⁷ and lead to unfair results.¹⁹⁸ Ultimately, it would leave New Jersey residents in a state of confusion when it comes to whether an individual can send a text message without fearing personal liability for an automobile accident—a hypothetical accident that would be more the result of the recipient's violation of the law than the individual's choice to send a text message.

¹⁹⁵ See *Kubert v. Best*, 75 A.3d 1214, 1227–28 (N.J. Super. Ct. App. Div. 2013).

¹⁹⁶ See *supra* note 144 and accompanying text.

¹⁹⁷ See *supra* Section III.D.

¹⁹⁸ See *supra* Section III.C.

Interpreting *Kubert* narrowly, on the other hand, limits its application to stand for nothing more than the dismissal of Colonna, a remote texter, from an automobile accident lawsuit because of the failure to prove the elements necessary to hold a third party liable under a theory of aiding and abetting.¹⁹⁹ While the result the *Kubert* court ultimately reached is sound, the precedential value of the case should be limited to Colonna's dismissal, with nothing novel to say on the subject of remote texting liability. If courts do follow the *Kubert* court's imposition of liability upon remote texters, however, they should strictly interpret the dual-knowledge requirement to make this standard a difficult one to meet, and provide specific guidelines to clarify how courts should analyze the available evidence in determining whether or not the standard has been met.²⁰⁰ In particular, courts should highlight examples of evidence, which would sufficiently establish that the individual knew the recipient was driving and knew or "had special reason to know" that the recipient would be distracted by the text message.²⁰¹

B. *A Comprehensive Approach to Combatting Texting While Driving*

For the most part, many of the mechanisms that states should use to combat texting while driving are largely already in place. However, some states have gone further than others when it comes to the issue.²⁰² Legislative action and law enforcement prohibition on cell phone use behind the wheel is not the only way states should attempt, or have attempted, to halt distracted driving. States should also institute a number of nonlegislative initiatives to combat distracted driving. The most effective way for states to deter dangerous cell phone use is to move beyond legislative action to heightened law enforcement, state and nationwide media campaigns, and cutting-edge smartphone technology. This type of widespread and diversified solution to the issue would emulate the nation's approach to deterring drunk driving.²⁰³

¹⁹⁹ See *supra* note 146 and accompanying text.

²⁰⁰ See *supra* Section III.D.1.

²⁰¹ See *supra* Section III.D.1.

²⁰² See *supra* note 29. While the state of Texas has not yet banned texting while driving, the state's capital, Austin, has. See Gershowitz, *Google Glass While Driving*, *supra* note 28, at 761 n.38.

²⁰³ See Adam M. Gershowitz, *Texting While Driving Meets the Fourth Amendment: Deterring Both Texting and Warrantless Cell Phone Searches*, 54 ARIZ. L. REV. 577, 580–81, 589 (2012) [hereinafter Gershowitz, *Fourth Amendment*].

1. Legislative Action

State legislatures have designed their own statutory schemes to ban distracted driving, and in many cases, texting while driving is explicitly prohibited by law.²⁰⁴ One problem with many of the state statutes prohibiting cell phone use is that they often fail to provide a clear definition of “using” or “text-based communication.”²⁰⁵ For example, some states define “written communication” or “text-based communication” as a “text message, an instant message, electronic mail, and Internet web sites,”²⁰⁶ which fails to consider viewing a GPS map, looking at a smartphone app,²⁰⁷ or playing a game. Even states that drafted more specific statutes are left with loopholes because smartphone technology is advancing so quickly.²⁰⁸ For example, the New York Legislature passed a comprehensive ban on cell phone use while driving.²⁰⁹ The New York Vehicle and Traffic Law forbids drivers from “using” portable electronic devices while driving and defines “using” to mean that the driver is “holding a portable electronic device while viewing, taking or transmitting images, playing games, or . . . composing, sending, reading, viewing, accessing, browsing, transmitting, saving or retrieving e-mail, text messages, instant messages, or other electronic data.”²¹⁰ The statute’s definition of the term “holding” excludes voice-activated smartphone functionality, such as Siri.²¹¹ State legislatures, in addition to banning handheld cell phones

²⁰⁴ See statutes cited *supra* note 29.

²⁰⁵ Gershowitz, *Fourth Amendment*, *supra* note 203, at 586.

²⁰⁶ *Id.* (citing GA. CODE ANN. § 40-6-241.2 (2008) (defining “text-based communication [as] including but not limited to a text message, instant message, e-mail, or Internet data”); see also NEB. REV. STAT. § 60-6,179.01 (2009); 31 R.I. GEN. LAWS § 31-22-30 (2006) (defining text message as “including, but not limited to, text messages, instant messages, electronic messages, or e-mails, in order to communicate with any person or device”).

²⁰⁷ See *supra* note 12.

²⁰⁸ See Joseph C. Vitale, Note, *Text Me, Maybe?: State v. Hinton and the Possibility of Fourth Amendment Protections over Sent Text Messages Stored in Another’s Cell Phone*, 58 ST. LOUIS U. L.J. 1109, 1111 (2014).

²⁰⁹ See N.Y. VEH. & TRAF. LAW § 1225-d(2)(b) (McKinney 2011). In 2001, New York became the first state to ban the use of handheld mobile devices while driving. See Kimberly Brown, *Steering the Nation’s Cell Phone Laws in the Right Direction*, 31 TEMP. J. SCI. TECH. & ENVTL. L. 31, 34 (2012). Three years later, in 2004, New Jersey followed New York by enacting its own version of the ban on cellular use while driving. See N.J. STAT. ANN. § 39:4-97.3 (West 2012) (prohibiting cellular phone use while driving and allowing an exception for the use of a handheld cellular phone when the driver “fear[s] for his life or safety” or other emergency situations).

²¹⁰ N.Y. VEH. & TRAF. LAW § 1225-d.

²¹¹ See *id.*; see also Siri, APPLE, <https://www.apple.com/ios/siri> (last visited Mar. 16, 2016) (“Talk to Siri as you would to a friend and it can help you get things done—like sending messages, placing calls, and making dinner reservations. You can ask Siri to show you the Orion constellation or to flip a coin. Siri works hands-free, so you can ask it to show you the

while driving, should carefully draft these statutes to be as inclusive as possible.

Another legislative solution to the rise of texting while driving accidents is heightening penalties for cell phone use while driving, by increasing fines, revoking licenses after an individual's first or second offense, and even authorizing jail time for more serious violations.²¹² Despite the danger of texting while driving and its similarities to drunk driving,²¹³ "drunk driving is punished far more severely."²¹⁴ Analogizing texting while driving to drunk driving, by increasing punishments for texting while driving to resemble punishments for drunk driving, will both stigmatize the activity and effectively spread the message of its dangers.

2. Heightened Law Enforcement

Although a step in the right direction, harsher punishments are weak solutions in the absence of correspondingly heightened law enforcement.²¹⁵ Like the general public, most law enforcement officers do not yet view texting while driving as a serious offense.²¹⁶ In some states, however, law enforcement officials are looking for new methods of enforcement. For example, ComSonic, a Virginia-based company that provides calibration services for speed enforcement equipment, is currently developing a radar gun that will pick up radio frequencies to identify texting drivers.²¹⁷ Other states attempting to enhance

best route home and what your ETA is while driving. It works with HomeKit to let your voice be the remote control for connected products in your home. And it's tuned in to the world, working with Wikipedia, Yelp, Rotten Tomatoes, Shazam, and other online services to get you even more answers. The more you use Siri, the more you'll realize how great it is. And just how much it can do for you.").

²¹² See Gershowitz, *Fourth Amendment*, *supra* note 203, at 580–81.

²¹³ See Chang, *supra* note 24 (explaining that texting delays reaction times as much as having a blood alcohol concentration of .08%).

²¹⁴ See Gershowitz, *Fourth Amendment*, *supra* note 203, at 604. Compare TEX. PENAL CODE ANN. § 49.08 (West 2011) (intoxication manslaughter is a second-degree felony), and TEX. PENAL CODE ANN. § 49.07 (West 2011) (intoxication assault is a third-degree felony), with *Distracted Driving Laws*, *supra* note 28 (highlighting that Texas is one of the few states that has not yet banned texting while driving).

²¹⁵ Gershowitz, *Fourth Amendment*, *supra* note 203, at 581 ("Social scientists have long found that the severity of punishment is less important than certainty of punishment in deterring undesirable behavior.").

²¹⁶ See *id.* at 615 ("Given that police deal with murders, robberies, burglaries, drug smuggling and other serious offenses, most officers likely will not be interested in prolonging texting while driving detentions without good reason.").

²¹⁷ See John Nassivera, *Texting and Driving: ComSonic's Police Radar Gun Helps Cops Find Motorists on Their Phones*, HEADLINES & GLOBAL NEWS (Sept. 17, 2014, 4:54 PM), <http://>

enforcement as a means to crack down on distracted driving use Concealed Identity Traffic Enforcement (CITE) vehicles, which are raised, unmarked, black SUVs that enable state troopers to be seated in a position that allows them “to peer down into other cars” to detect cell phone usage.²¹⁸

3. Media Campaigns

Mothers Against Drunk Driving (MADD) was one of the most effective campaigns aimed at reducing drunk driving fatalities because it significantly “rais[ed] public disapproval of drunk driving.”²¹⁹ While some states have introduced campaigns against texting while driving similar to MADD, via television commercials, billboards, and other advertisements, there has not yet been a unified, nationwide campaign to the extent that there was with MADD. For example, in New York, the state highway created “texting zones” or “text stops” along roadsides and highways as part of its campaign against distracted driving.²²⁰ Approximately 300 signs were posted along state highways with messages such as “It can wait, text stop 5 miles,” as well as signs attached to existing rest stop signs that read “texting zone.”²²¹ According to the New York Governor’s office, the campaign is an attempt to provide awareness about texting by “rebranding” the existing rest stops.²²² The rebranding of state highway rest stops, while a noteworthy movement, is unlikely to raise public disapproval of texting while driving to the extent that a national campaign would.

www.hngn.com/articles/42727/20140917/texting-and-driving-comsonics-police-radar-gun-helps-cops-find-motorists-on-their-phones.htm.

²¹⁸ Kevin Short, *New York State Troopers Battle Texting While Driving, Cell Phone Use on the Roads*, HUFFINGTON POST (July 23, 2013, 7:29 AM), http://www.huffingtonpost.com/2013/07/23/new-york-texting-driving_n_3634973.html.

²¹⁹ David J. Hanson, *Mothers Against Drunk Driving: A Crash Course in MADD*, ALCOHOL ABUSE PREVENTION, <http://www.alcoholfacts.org/CrashCourseOnMADD.html> (last visited Mar. 16, 2016).

²²⁰ See *NY Highway Signs Direct Drivers to “Text Stops”*, NBC 4 N.Y. (Sept. 23, 2013, 3:53 PM), <http://www.nbcnewyork.com/news/local/New-York-State-Highway-Texting-Stops-Zones-Signs-Distracted-Driving-Crackdown-224910432.html>; see also Short, *supra* note 218.

²²¹ *NY Highway Signs Direct Drivers to “Text Stops”*, *supra* note 220.

²²² See Jacob Kastrenakes, *New York Unveils ‘Text Stops’ to Curb Crashes by Distracted Drivers*, VERGE (Sept. 24, 2013, 4:21 PM), <http://www.theverge.com/2013/9/24/4767060/new-york-cuomo-unveils-text-stops-to-combat-distracted-driving> (quoting Governor Cuomo as stating that “[w]e are sending a clear message to drivers that there is no excuse to take your hands off the wheel and eyes off the road because your text can wait until the next Texting Zone”).

4. Advanced Smartphone Technology

A problem introduced by technology should be solved by technology. Despite the many unwanted effects of technological advancement, recent developments in smartphone technology shed light on its benefits. There are currently dozens of applications that can either disable or limit the ability to send text messages while behind the wheel.²²³ These technologies use the phone's GPS or in-vehicle Bluetooth technology to determine when the vehicle is moving, and may shut off specific applications on the phone, or even lock the keypad.²²⁴ One application can even detect when the vehicle is speeding over a preset limit, allowing the smartphone to prevent more than just texting while driving.²²⁵ Integrating these new smartphone capabilities alongside national media campaigns, heightened penalties, and increased law enforcement will decrease the incidence of texting while driving while simultaneously raising awareness and increasing negative public perception.

5. Third-Party Civil Liability for Aiding and Abetting

As Judge Espinosa pointed out in her *Kubert* concurrence, traditional long-standing tort principles are sufficient to determine whether or not a third party should be held liable in the particular situation.²²⁶ As such, this Note's proposal would not preclude the possibility for an individual to be held liable for the injurious conduct of a driver as a result of the individual's text message, but rather suggests that, in the event that liability is appropriate, courts should defer to an aiding and abetting analysis, a preexisting and widely recognized tort doctrine.

²²³ See Joshua L. Becker & Brad M. Strickland, *Distracted Driving: Technology as a Double-Edged Sword*, LAW360 (Aug. 29, 2014, 9:56 AM), http://www.law360.com/articles/572054/distracted-driving-technology-as-a-double-edged-sword?article_related_content=1.

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ See *Kubert v. Best*, 75 A.3d 1214, 1230 (N.J. Super. Ct. App. Div. 2013) (Espinosa, J., concurring) (explaining that an aiding and abetting liability analysis was sufficient to determine that Colonna could not be held liable for the Kuberts' injuries in this case, and thus the court should have dismissed Colonna without saying more).

CONCLUSION

In *Kubert v. Best*, the court held that a sender of a text message may be held liable for the injurious conduct of the recipient when the sender knew that the recipient was driving and knew, or had special reason to know, that the recipient would be distracted by the text message.²²⁷ Although the risks of distracted driving are substantial, risk alone does not justify the imposition of a duty of care from one party to another. In light of the rule's departure from traditional understanding of third-party liability, inherent unfairness, and the potential for an increase in complex automobile accident litigation, jurisdictions should decline to follow New Jersey's imposition of remote texting liability. States looking for new ways to minimize distracted driving should look instead to legislative action, heightened law enforcement, media campaigns, advanced smartphone technology, and, when appropriate, the preexisting doctrine of aiding and abetting liability.

²²⁷ *Id.* at 1228 (majority opinion).