

# Behind the Buzz: Text Sender Claims Will Be Difficult to Prove

[By Donald Scarinci](#)

While efforts to deter distracted driving should be encouraged, the enormous buzz surrounding a New Jersey court decision regarding text sender liability leaves out a very important consideration — claims will be extremely difficult to prove. In fact, it's what ultimately led to the dismissal of the lawsuit.

The Appellate Division of the New Jersey Superior Court made headlines around the world when it held that the sender of a text message could be held liable to a third party injured by recipient in subsequent car accident. As explained in the [opinion](#), "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." This is first such decision in the United States.

The case, *Kubert v. Best*, centered on a horrific [distracted driving accident](#) involving a vehicle driven by 18-year-old Kyle Best and a motorcycle carrying husband and wife, David and Linda Kubert. The Kuberts both suffered serious injuries, including leg amputations. Best later acknowledged that he had been texting with his girlfriend, 17-year-old Shannon Colonna, shortly before he crossed the centerline and triggered the collision.

While the Kuberts settled their claim against Best, they continued to pursue a lawsuit against Colonna, arguing that she aided and abetted Best's unlawful texting. They further maintained that while she was at a remote location from the site of the accident, Colonna was "electronically present" in the vehicle shortly before the crash.

The trial court did not buy the argument; however, the Appellate Division refused to find that there are no situations in which the sender of a text can be held liable. "The sender should be able to assume that the recipient will read a text message only when it is safe and legal to do so, that is, when not operating a vehicle. However, if the sender 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. The sender has knowingly engaged in distracting conduct, and it is not unfair also to hold the sender responsible for the distraction," the court explained.

Although the court concluded that there *could* be a basis for liability, it did not find enough evidence in this case that Colonna "actively encouraged" Best to respond to her text from behind the wheel. "Even if a reasonable inference can be drawn that she sent messages requiring responses, the act of sending such messages, by itself, is not active encouragement that the recipient read the text and respond immediately, that is, while driving and in violation of the law."

The Appellate Division undeniably created a new cause of action that should make texters think twice about trying to contact friends and family who are known to be driving. However, the

ability for those injured in distracted driving accident to seek recourse from remote texters remains to be seen.

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