

6/30/2015 | Articles

New Texting and Driving Decision in Delaware

A recent case in the state of Delaware adds to the growing body of case law interpreting state statutes banning the use of cell phones and other hand-held electronic devices while driving. In *Johnson v. Nelson*, 2015 Del. Super. LEXIS 224, decided on April 29, 2015, the trial court determined that the mere presence of a cell phone in a vehicle next to the driver is insufficient to establish that the driver was in fact using the cell phone just before or during an accident – particularly when the cell phone records establish that the last text sent from the phone was sent over a minute and a half prior to the accident.

According to the most recent data published by the National Highway Traffic Safety Administration, from 2004 to 2012 the percentage of drivers holding cell phones to their ear while driving hovered between five and six percent – despite increasing national and state campaigns from several different entities to decrease the use of cell phones (both texting and talking) while driving. That amounted to approximately 660,000 people at any moment of the daytime hours driving while using a cell phone.

Most states have enacted some form of legislation to prevent distracted driving through a ban of texting and driving (for example the Pennsylvania and Ohio statutes) or banning all hand-held cell phone use (for example the Delaware and New Jersey statutes) while operating a motor vehicle. Most statutes and case law focus on the conduct of the driver, but at least one state has expanded that duty to include non-drivers. In August of 2013, the New Jersey Appellate Division decided *Kubert v. Best*, 75 A.3d 1214 (NJ Super. Ct. App. Div. 2013). In *Kubert*, the Appellate Division determined that a sender of a text to a driver can potentially be liable to an injured party if the sender knew or had a special reason to know that the recipient would view the text while driving (and thus be distracted).

The most recent *Johnson* decision in Delaware shows again the importance of obtaining as much information as possible, including detailed cell phone records, when distracted driving is alleged. The mere fact that a witness was on the scene soon after the accident and saw a cell phone was plugged into the center console of the vehicle (and would have been accessible to the driver) was not enough for the Court to infer that she had been using the cell phone at the time of the accident. The cell phone records from the driver's phone showed she had sent a text to her husband at 5:56 p.m. and that she had placed a call to 911 at 5:58 p.m. Importantly, a surveillance video from a local business showed the impact with the pedestrian occurred at 5:57:33 and thus the driver's last text message was over a minute and a half prior to the accident. This evidence was enough in the Court's mind that there was insufficient evidence to show that the driver was operating her handheld electronic device in violation of the Delaware statute (21 Del. Code § 4176C) at the time of the accident with the pedestrian. In Delaware, had the driver violated the statute, it would have resulted in her being negligent *per se*.

If you have questions or would like additional information regarding the *Johnson* case specifically or concerning distracted driving in general, please feel free to contact us.



William R. Adams
302-428-6133
wadams@dmclaw.com