Civil Practice Update

All the Law That's Fit to Print

by Michael J. Epstein

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Can a Person Be Held Liable for Personal Injuries Sustained From a Car Accident When the Person Sent a Text Message to the Driver? In an unpublished decision dealing with this issue of first impression, the trial court in Morris County concluded that the texter owes no duty of care to the injured person. See Kubert v. Best, MRS-L-1975-10. In Kubert, the defendant lost control of his pickup truck and struck the plaintiffs' motorcycle causing significant and permanent injuries. At the time that the defendant lost control of his truck, he was answering a text from a friend. The trial court rejected the plaintiffs' arguments that the text messenger aided and abetted in the accident and that she knew or should have known that the defendant was in the car and driving. Although the plaintiffs' arguments were creative, this case presents a very difficult case to prove a duty. For example, what if a person sent a text message so that the driver would read it while stopped or when he got out of the car? How does one prove that the texter intended or knew that the driver would read it while he was driving? We think that Judge Rand reached the correct result. However, we also believe that the Legislature should increase the penalties for texting while driving because the activity is extremely dangerous and leads to distracted driving.

Can an Owner of a Pet Who Witnesses the Death of the Pet Sue for Emotional Distress? For those of you who said no, you would be correct. See McDougall v. Lamm, 211 N.J. 203 (2012). In rejecting plaintiff's claim, the Supremes concluded that a pet is not a family member such as to permit a claim for emotional distress under Portee v. Jaffee, 84 N.J. 88 (1980). The Supremes correctly affirmed the trial court's and Appellate Division's rejection of the plaintiff's claim. By definition, a dog is not a family member and is not human, and thus, the loss of a dog does not fit within the ambit of Portee.

RULE AMENDMENTS. The Supreme Court adopted numerous rule changes this

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year. Here is a summary of significant rule changes:

1:8-8(a). Factors to Consider for Providing Jury with Written Instructions. The Supreme Court established 7 factors for trial courts to consider when exercising its discretion in deciding whether or not to provide the jury with a written copy of the instructions. The factors include the complexity of the case, the track of the case, the length of the trial, whether a party requested that the jury receive a copy of the charge, and whether providing the charge would delay the proceedings. We like this new rule because it creates a standard for submitting or not submitting the charge to the jury in writing.

4:5-3. Answers in Medical Malpractice Cases. Any physician defending against a malpractice case must now include his or her field of medicine in which he or she specialized at the time of the alleged malpractice and whether the treatment involved that specialty. This is a great rule, and should eliminate issues related to the Affidavit of Merit when the doctor's field of medicine is unclear.

Contributions. If you have an interesting case, rule interpretation, ethics issue, or civil-related story, please contact me at (201) 845-5962, (f) (201) 845-5973, or e-mail mjepstein@theepsteinlawfirm.com.