



Portfolio Media, Inc. | 230 Park Avenue, 7th Floor | New York, NY 10169 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Assault Victim Asks 9th Circ. To Revive Uber Negligence Fight

By **Dorothy Atkins**

Law360 (November 14, 2023, 9:03 PM EST) -- An Uber passenger who was assaulted after getting into a suspended driver's car that still bore the Uber decal asked the Ninth Circuit Tuesday to revive her negligence claims, arguing the ride-hailing giant affirmatively created risk by failing to retrieve its decal despite knowing the driver had assaulted other passengers.

During a hearing before a three-judge panel, Sara Peters of Walkup Melodia Kelly & Schoenberger argued on behalf of an anonymous Jane Doe assault victim that the Ninth Circuit should split with a state appellate court finding in a similar case — titled *Jane Doe v. Uber Technologies*, and referred to as *Jane Doe 1* — and find that Uber affirmatively created risks by not requesting that the former driver, Brandon Sherman, either return his Uber decal, destroy it or stop using it, despite knowing that he had assaulted two passengers in the past.

The appeal challenges U.S. District Judge Jacqueline Scott Corley's **September 2022 decision** to toss the lawsuit, which initially sought to hold Uber liable for false imprisonment, assault, battery and negligence. After **trimming** all claims except the negligence claim, Judge Corley dismissed the complaint, finding that no special relationship exists between the woman and Uber to give rise to the company's duty to protect her.

The plaintiff, using the pseudonym Jane Doe, alleged she was raped and partially strangled Sherman after getting into his car, which bore an Uber sticker. She said she believed it was the car her fiancé had ordered for her back to her hotel after her phone died at the end of a day of shopping in the San Francisco Bay Area in August 2018.

Doe alleged that Sherman happened to be roving around the area, slowed down and addressed her, and that she got in his car after seeing the Uber insignia taped on his vehicle. But once she was inside the vehicle, Sherman activated rear-door childproof locks, trapping Doe before driving her to a remote location where he raped and tried to strangle her, she alleged. Sherman began driving to another location where he purportedly planned to attack her again, but Doe said she managed to escape and was rescued by a passing motorist.

Sherman, who was booted off the Uber platform after two assault complaints were filed, was subsequently convicted and sentenced for his crimes. Doe alleged in her complaint that Uber knew for months before the attack that Sherman was a "menace to women," and that Uber was responsible for her safety as a common carrier.

During the hearing Tuesday, Peters argued that the trial judge erred and that the case raises two exceptions to California's general rule that a business has no duty of care to protect others from the conduct of third parties.

Peters argued that Uber engaged in an "affirmative creation of risk" by creating a business model that encourages young women to get into strangers' vehicles bearing Uber decals without better protections, and Uber had a special relationship with Doe due to her vulnerability and Uber's purported increased control over her welfare.

But Uber's counsel, Gregory F. Miller of Perkins Coie LLP, argued that Doe is asking the courts to

radically expand civil liability, which he argued would conflict with the Jane Doe 1 holding, as well as others, and it would be unprecedented.

"The clear and consistent message that we have gotten from California courts is that we are not going to go down that road," Miller said.

All three judges on the panel asked both sides many questions, questioning the victim's counsel about prior California state case law, including Jane Doe 1.

U.S. Circuit Court Judge Susan Graber told Peters that her client's appeal was putting the Ninth Circuit in "the awkward position" of reviewing an intermediary state appellate court decision in Jane Doe 1 that the California Supreme Court declined to take up, "which we are not authorized to do."

Judge Friedland also said it appears Peters wants the Ninth Circuit to hold businesses responsible for the intervening criminal acts of anyone who drives for Uber who has a fake decal or an old Uber decal.

"Otherwise your argument doesn't work, and that seems like a pretty sweeping conclusion when you're dealing with intervening criminal acts of third parties," Judge Graber said.

U.S. Circuit Court Judge Michelle Friedland questioned the limits of the victim's general duty of care argument, calling it "very confusing," and "almost question-begging."

"If we were to hold Uber has an obligation to not create outrageous risk or unreasonable risk, does that further the law at all?" Judge Friedland asked. "Is that going to help? It seems like a tautology almost, isn't it? Don't we have to say something more specific than that for it to be applicable to the situation?"

Peters replied that she does not think the panel needs to be more specific. She added that the case does not raise a "classic Good Samaritan situation" in which a person does not have a duty to jump into a pool to try to save someone from drowning. Instead, it is more like a situation in which an individual builds a pool and then pushes someone into the pool, because the individual is creating a foreseeable risk that the person might drown, Peters said, adding that Uber created a risky business model and added additional risks with its decal markers on top of it.

"They've created risk, and they've done so actively," she said.

Meanwhile, the third judge on the panel, U.S. Circuit Court Judge Richard Paez, doubted Miller's arguments that Uber did not create a risky situation by not attempting to recover the Uber decal.

"Here Uber knew about this guy's sex abuse ... and didn't do anything to put some sort of restriction on [his use of Uber's] decals," Judge Paez said.

Miller replied that Uber has no duty to retrieve the decals, but Judge Friedland appeared skeptical.

"You're starting a baseline very late in the game there," Judge Friedland retorted. "How could you not say they created the risk when they gave a decal to someone who ... they knew committed two assaults, and then they didn't get the decal back? If you start where they don't get the decal back, it sounds like they're not doing something, but they gave him the decal and I know they didn't know at that point that he was bad ... but they started the process by giving him the decal."

Miller replied that "there are incredible line drawing problems that come [up] if we don't accept some sort of limiting principle" to the general duty of care. He said ultimately, Doe has not identified a single case in California or any other state where such a duty to protect or warn due to a third party's criminal conduct has been imposed against parties like Uber.

Miller added that adopting Doe's position would be a "seismic" shift in case law and would promote a "wide-ranging undefined theory of liability," with no rational indication of where liability stops and begins.

"If just having a business ... is the basis for holding a party liable, there is not a limiting principle, he said.

At the end of the hearing, the panel took the arguments under submission.

U.S. Circuit Court Judges Susan Graber, Richard Paez and Michelle Friedland sat on the panel.

Doe is represented by Sara Peters of Walkup Melodia Kelly & Schoenberger.

Uber is represented by Gregory F. Miller of Perkins Coie LLP.

The case is Jane Doe v. Uber Technologies Inc., case number 22-16562, in the U.S. Court of Appeals for the Ninth Circuit.

--Additional reporting by Gina Kim. Editing by Vaqas Asghar.

All Content © 2003-2024, Portfolio Media, Inc.