SPRING 2015

atissue

A STONE | DEAN PUBLICATION

Connecting you to trending and relevant legal developments in California

inside this issue:

Q&A with Suzanne R. Feffer

With 30 years of experience, Sue Feffer brings a practical approach to litigation and is a valued senior associate at Stone | Dean specializing in premises liability and the defense of complex bodily injury claims. Conducting herself with the core belief that each case is, in fact, quite different, she works to move a case quickly to the heart of the matter with an eye toward ultimate resolution. As a result, she is able to resolve cases promptly, professionally, and to the advantage of her clients.

What do you enjoy most about practicing law?
Even more than the challenge of the law and facts, I am intrigued by challenge of the parties' personalities. The sincerity with which a party describes the incident and injuries, as well as the manner in which he or she responds to inconsistencies, tells quite a bit about the veracity of the claim. There are often "hidden pearls" in a party's medical records or prior claims and carefully watching a party respond to those forgotten earlier claims and injuries will often reveal whether those facts were truly overlooked or intentionally omitted.

If you could pick any other field to work in besides law, what would it be, and why?
I hold a Master's Degree in Psychology (which I received after practicing law for a few years) and can imagine working as a family counselor, perhaps with an emphasis on teens. As mother of two teens, I appreciate how difficult that time can be for the entire family. Psychology, like the law, is all about conflict resolution.

Did you consider other career paths before choosing to become a lawyer?
As a child, I wanted to be a veterinarian until I saw an operation performed on my pet. After nearly passing out during the surgery, I had no doubt that pet medicine (or medicine of any kind) was not going to work for me and quickly moved to the practice of law. I was a young teen when I saw the movie "The Paper Chase" and knew that was my future.

Are there areas of law other than litigation that you would consider practicing?
Many years ago, I looked into the practice of law concerning children's rights. I found the topic to be compelling but admittedly was warned of the high "burnout" rate as it takes a significant emotional toll.

For you, what is the most rewarding aspect of practicing law?
I have a strong sense of right and wrong and take great comfort when the story plays consistent with those beliefs. It is frustrating to be the only lawyer in a case to file all the documents on time and comply with all the court rules but when playing by those rules makes a difference that benefits my client, there is a sense of vindication. When that vindication extends to a favorable court or jury verdict, it is absolutely the best feeling.

What is the most valuable lesson you learned while attending law school?
I learned that commitment makes all the difference. Lots of students came to law school smart and many with financial means I wish I had. I knew then that I had to want it more. I worked at up to three jobs at a time and carried a full load of classes and still managed to become Lead Articles Editor for the Law Review, sit on the Moot Court Honors Board, and win awards. I was not the smartest kid in class, but I was and am very determined.

Do you find that television shows and films about law are realistic?
Absolutely not! Trials are, in fact, far more boring than television and movies would suggest. As a favor to my family and friends, I try not to scream out at the screen when an actor makes a ridiculous "objection" or accusation. Experience has proven that my professional commentary is not welcome during TV time.

What is your philosophy towards your work?
I believe that laws, rules and court orders are not mere suggestions. They mean something and it is incumbent upon all of us to adhere to them. More to the point, we must do so in a way that honors the profession and the court. While most of my opposing counsel are honest and reputable, there are a few that do not honor the profession and practice in a manner designed to inflate the cost of litigation. As to those counsel, I believe we must fight the litigation on the merits and in compliance with the law.

How would you describe your work ethic?
My grandmother used to say that "the devil is in the details" and she was right. It is the little note in the medical records about a prior injury or a review of the employment records showing a different Social Security Number that can change the complexion of a case. The only way to discover those details is to obsessively review documents and follow-up. I do not delegate work well as I don't want to miss out on any of these "surprises."

Where do you see yourself in ten years?
I would still like to be practicing law in ten years but perhaps either volunteering more time as a judge pro tem or even sitting as a commissioner or judge.

Do you believe that anyone can pursue a career in law, or must you have a certain type of personality to do it?
I am a firm believer that you must love the law, or at least the challenge, before pursuing a career in it. It is an extraordinarily stressful career and it would be an unfortunate choice for the faint of heart. For me, the decision was perfect but I am well aware of the downsides!

What advice would you give to law school graduates about to enter the workforce?
We all learn more when we listen than when we speak. As a young lawyer, there is a wealth of knowledge in a room full of lawyers taking a deposition or while sitting in a courtroom watching a trial. Evaluate the manner in which other lawyers approach a situation. Whether that "style" is successful or offensive, the fact remains that a young lawyer will be wiser after having considered the options.

The Drones Have Arrived and They're Here to Stay

By Lisa Lee, Esq.

The use of UAVs (Unmanned Aerial Vehicles) is no longer limited to the Department of Defense. Retail businesses like Amazon.com are setting up drone delivery systems to get packages delivered to customers within 30 minutes of the orders. Kids are no longer flying kites at the playground, they are flying drones. As this type of technology has become easily accessible to commerce and the individual, drone legislation is now one of the fastest growing and most innovative areas of law.

Fortune magazine noted that that the non-military drone industry is a $2.5 billion business, with an annual growth of 15%-20%.

In February 2015, after 10 years in the making, the Federal Aviation Administration (FAA), the United States' aviation regulator, submitted proposed draft rules to integrate non-military drones into the national airspace. Congress gave the FAA a deadline to finalize these rules by September 30, 2015, but reports now indicate that the FAA is running significantly behind schedule due to unresolved technological, regulatory and privacy issues.

The proposed rules would require unmanned aircraft pilots to obtain special certificates, stay away from bystanders and fly only during the day. They limit flying speed to 100 miles per hour and the altitude of 500 feet above ground level. The rules also say pilots must remain in the line of sight of its radio-control drones.

If the rules survive their current form, retailers like Amazon, who unveiled their futuristic product delivery plan of "Octocopter" drones that will fly packages to your doorstep in 30 minutes, may be delayed in their plans, since the rules would require FAA-certified small drone pilots to fly the aircraft and keep it in the line of sight at all times.

However, retailers like Amazon are not the only proponents of non-military drone use pushing for less stringent rules. Billionaire entrepreneur and Virgin Group founder, Richard Branson, recently announced that he is one of the latest investors in 3D Robotics, a commercial drone company founded by ex-Wired Magazine chief editor, Chris Anderson.

Other industries are planning to take advantage of this new technology to streamline their costs and maximize their profits in ways that could only be dreamed of 10 years ago. Drones can be equipped with a multitude of different devices such as video recorders, thermal cameras, GPS mapping equipment, 3D scanners, and 3D printers. The sky's the limit – literally.

The agriculture industry wants to use drones with thermal cameras for crop maintenance and development. The movie industry wants to use drones to shoot scenes from the air, which is cheaper than using manned planes or helicopters. Businesses such as news and private surveillance want to use drones to monitor news stories and follow individuals who may pose a threat.

CONTINUED ON PAGE 5

High Court Reminds Employers to Review Policies on Accommodating Pregnant Employees

By Robyn M. McKibbin, Esq.

The U.S. Supreme Court recently analyzed whether an employer must provide the same work accommodations to a pregnant employee as the employer provides to similarly situated, non-pregnant employees (*Young v. United Parcel Services, Inc.*). Peggy Young was a part-time driver for UPS. UPS drivers are required to lift up to 70 pounds. In 2006, Young became pregnant and was instructed by her physician to lift only up to 20 pounds during the first 20 weeks of her pregnancy and only up to 10 pounds thereafter.

UPS had policies that accommodated workers who were injured on the job, had disabilities covered by the Americans with Disabilities Act (ADA), or lost Department of Transportation (DOT) certifications. Young sought but was denied a reasonable accommodation for her pregnancy. UPS claimed that since Young did not fit into these categories, she was not entitled to an accommodation; that because it treated her just as it treated all "other" employees, it did not discriminate against her on the basis of pregnancy.

Young stayed home without pay during most of her pregnancy and eventually lost her medical coverage. Young sued for disparate treatment discrimination, contending that UPS discriminated against its pregnant employees because it offered light duty positions for numerous "other persons" but not for pregnant employees. The District Court granted UPS' motion for summary judgment, finding that Young was not similarly situated as the employees for whom UPS accommodated. The Fourth Circuit Court of Appeal affirmed. It held that Young's situation was different from the other employees UPS accommodated because she was not injured on the job, was not "disabled under the ADA," which only protects employees with permanent disabilities, and had no legal obstacle between her and her work (as opposed to those who lost their DOT certifications).

The U.S. Supreme Court vacated the order and remanded the matter back to the trial court. The Court agreed with UPS that Congress did not grant pregnant employees an unconditional "most-favored-nation status" meaning, if an employer provides one or two workers with an accommodation, then it must provide similar accommodations to all pregnant workers irrespective of the nature of their jobs, the employer's need to keep them working, their ages, or any other criteria. However, the Court did not understand "[W]hy, when the employer accommodated so many, could it not accommodate pregnant women as well?"

The Court discussed the burden-shifting analysis in pregnancy discrimination cases: If an employer offers an apparently "legitimate, nondiscriminatory" reason for its practice, the employee must show that the proffered reason is actually a pretext for discrimination. A plaintiff could create a genuine issue of material fact (which would preclude summary judgment and proceed to trial) that the employer accommodates a large percentage of nonpregnant workers while not accommodating a large percentage of pregnant workers. In Young's case, there was sufficient evidence that UPS accommodated most nonpregnant workers with lifting restrictions while categorically failing to accommodate pregnant workers with lifting restrictions. Thus, a jury could find that UPS' reasons for failing to accommodate pregnant workers gave rise to an inference of intentional discrimination.

Interestingly, the Supreme Court rejected the Equal Employment Opportunity Commission's (EEOC) recent Enforcement Guidance which was promulgated after the Court agreed to hear the Young case. While the EEOC's rulings, interpretations and opinions are not binding on the Court, they are persuasive authority upon which the Court may rely. However, the Court held the new guidelines took a position about which the previous guidelines were silent, therefore, were not persuasive.

The *Young* case has limited impact on California employers as the Fair Employment and Housing Act (FEHA) already requires employers to reasonably accommodate pregnant employees. Under FEHA, if an accommodation is medically advisable, an employer must engage in a good faith interactive process to identify and implement a reasonable accommodation unless it would create an undue hardship.

Employers are advised to review their policies to ensure that policies exist to accommodate pregnant workers. Further, employers should review and compare all accommodation policies to determine whether similarly situated employees are being treated similarly. Employees begin to accrue paid sick leave under California's new law on July 1. Employers are advised to consult with employment law counsel whether or not they currently have a paid sick leave policy to ensure compliance.

The Drones Have Arrived

CONTINUED FROM PAGE 3

The Insurance industry wants to use drones to map catastrophic damages like tornadoes, hurricanes, fires, and other sites. Last and certainly not least, hobbyists and the average citizen want to use drones for something much more simple and fun.

Drone hobbyists are amongst the fastest growing group of drone users in the United States. Drone sales on E-bay in the past year alone totaled close to $20 million. A quick Google search will easily find dozens of drone hobbyist websites each boasting memberships in the hundreds of thousands, with members ranging from ages six to 96.

This open source community is pushing drone technology to explode. The members are not merely kids who are flying remote control planes and helicopters for fun; they are tech savvy teenagers and professionals, who are developing gadgets for every use imaginable. These enthusiasts have the interest, resources, ability and time to push drone technology beyond what Lockheed or Boeing are currently doing.

Drones don't cost as much as one would expect. You can buy a drone at a toy store for $50. Enthusiasts can purchase cheap pieces and parts from websites catering specifically to drones, and build a fully operational and customized drone for under $500. Retail drones with standardized technology can cost about the same.

The future only gets more complicated. "Drones" are not limited to the sky. Google has been successfully testing self-driving cars. Despite the public outcry against drones invading our most fundamental right to privacy, the drones have arrived and they're here to stay. Lawmakers have a big task ahead.

New Laws in 2015

By Leslie Blozan, Esq.

During 2015, we have seen over 900 new laws go into effect in California. Most of these do not affect the average person, but many are significant in our daily lives. Here are the highlights of the most important and most interesting new laws.

Altered initiative process: The initiative process to change the state law has been altered, with new regulations involving signature gathering, ability to amend initiatives and required Legislative hearings on proposed ballot measures. The likely impact will likely be delays in promoting initiatives for citizenry commentary and less ballot measures.

Care home penalties: Care homes are now subject to additional fines and penalties for specific violations. This law applies only to state-licensed assisted-living homes. Fines that were as low as $150 per violation have been raised to $10,000 when there is a physical injury and $15,000 if the injury leads to a death.

Cell phone kill switches: All cell phones manufactured after July 1, 2015 and sold in the state must contain a kill switch, allowing the phone to be disabled if it is not in the hands of an authorized user.

College sexual assault policies: Colleges and universities are now required to adopt policies against sexual assaults. The law changes the level of consent, requiring both parties to say "yes", as opposed to the absence of either party saying "no."

Driver's licenses: Persons in the country without legal documentation may now obtain driver's licenses. Requirements for a license include passing written and road tests and showing proof of insurance. The license issued will have a distinct design, different from licenses issued to legal residents.

Elder care home admissions: State-licensed elder care homes may not admit new residents if there are uncorrected health and safety violations, or the facility has failed to pay fines previously assessed.

Groundwater protection: For the first time in its history, California will begin to regulate groundwater use. New state agencies will create a groundwater management plan for the parched state. For now the agencies are regulating large property owners and commercial property, but will likely reach homeowners by summer.

High school football: Due to concerns over the effects of sports concussions, high school football teams will only be able to hold two full-contact practices per week.

Humane poultry conditions: All eggs sold in California must come from chickens raised with enough room to stand, turn around and stretch their wings. The likely effect will be to increase the cost of eggs, but the chickens across the state who advocate free range status reputedly see the legislative effort as a "paltry" penance.

New birth certificates: California birth certificates now have a new format, recognizing the birth of children to same sex parents. Now, the certificates can designate "parent" instead of "mother" and "father."

Massage parlor regulation: The power of local governments to regulate and control massage parlors has been restored. In 2008, a law was passed, placing regulation in the hands of a non-profit entity, resulting in a proliferation of massage parlors, and the inability of local governments to intervene.

Mugshot protection: Websites will no longer be able to profit from publication of mugshots taken of persons arrested in California. There is now a $1,000 civil penalty for each violation.

Revenge porn law extended: Privacy laws now protect persons taking nude "selfies", if the photos are intended to be private. Prior revenge porn legislation did not include "selfie" photos, creating a loophole that is now closed.

Unpaid intern protection: Unpaid interns now are protected from harasssment on the job. Previously, their non-employee status barred them from pursuing harassment claims.

Court Debates Employee-Status of Uber & Lyft Drivers

By Kori Macksoud

Uber and Lyft are ride-sharing companies that connect freelance drivers with nearby pedestrians needing a ride via a mobile application that serves as a navigation system and a point of payment, making the transaction cash-free. Some of the drivers of those companies are now finding fault in their classification as independent contractors, and are demanding full employee status.

Classified as independent contractors, Uber and Lyft drivers pay out-of-pocket for expenses related to their services. Besides demanding the protection that full employee status enjoys, the drivers contend that, as employees, those costs should be paid by the companies, and all such expenditures should be reimbursed. At first glance, the drivers do not really seem like employees. An employee is traditionally someone who works under the direction of a supervisor, for an extended period, with fairly regular hours, receiving most or all his income from that employer. The drivers at Uber and Lyft can work as little or as much as they want and can schedule their driving around their other activities. Therefore, the drivers may treat driving for Uber or Lyft as a supplemental income where they can bring in a little extra cash when they so choose.

Conversely, the drivers don't really seem like independent contractors either. Traditionally, courts view the "notion [of] an independent contractor [as] someone hired to achieve a specific result that is attainable within a finite period of time, such as plumbing work, tax service, or the creation of a work of art for a building's lobby." *Antelope Valley Press v. Poizner*, (2008)162 Cal.App.4th 1542. "Independent contractor" is typically someone with a special skill (and the power to negotiate the rate for his or her skill), who works for more than one client, performs tasks for limited periods, and uses his or her own discretion over the manner in which the work is completed. Uber and Lyft drivers use no special skill when they give rides, and while the companies may not control when the drivers work, they have strict guidelines pertaining to how the work is done. The company retains the power to terminate their contract if they don't comply. In contrast to the occasional driver, those who treat their work as a full time job and rely on it for 100% of their income, argue that they are exactly the workers that should be protected as "employees".

Uber and Lyft assert they are merely platform/technology companies that connect users with a service, not transportation companies. That assertion fell on judicial deaf ears in an effort by the defendant to obtain a summary adjudication in one of two pending matters before California courts. In *Cotter v. Lyft Inc.*, the Court rejected, as a matter of law, that the passengers alone decided whether the drivers were retained or terminated, the companies were sufficiently involved in the evaluation process, and there was a triable issue of fact as to whether the drivers were employees or independent contractors. The question of classification is headed for the jury.

In his ruling on *Cotter v. Lyft*, U.S. District Judge Vince Chhabria wrote: "The jury in this case will be handed a square peg and asked to choose between two round holes. The test the California courts have developed over the 20th Century for classifying workers isn't very helpful in addressing this 21st Century problem … absent legislative intervention, California's outmoded test for classifying workers will apply in cases like this."

Businesses and the legal community both anxiously await a ruling in *O'Connor v. Uber Technologies*., and the jury's decision in *Cotter v. Lyft*, these rulings may be momentous to the employee/independent contractor determination, and is likely to resurface in a multitude of fact patterns and business scenarios. The stakes are considerable.

Latest Legalities

By Kristi W. Dean, Esq.

Here are some interesting legal stories to amuse, entertain and provoke your grey matter.

Better Hold It: Or Else… The San Diego Unified School District, its former principal and teacher were sued by a mother of a student over a restrictive restroom policy which denied students the right to use the bathroom during class. Students of the Loma Portal Elementary School were given two passes a day, and were punished with detention if additional visits were made. The suit pleads the District's policy violated the California Education Code which says restrooms must be maintained and accessible to K-12 students. The mother and other parents claim bodily injury, including urinary tract infections and bowel obstructions resulting from the policy. Soon after this suit was filed, the District lifted the policy.

[April, 2015, Source: Fox 13, www.q13fox.com]

Sizzling Skillet Suit Scrapped by NJ CoA Applebee's was vindicated by a New Jersey Court of Appeal for serving a customer a plate of fajitas which allegedly burned the claimant. After the skillet of steak fajitas was placed in front of him, Mr. Hiram Jimenez bowed his head "close to the table," heard a loud, sizzling noise, followed by a "pop noise" and then felt burning in his left eye and face. He panicked, knocked his plate onto his lap, and caused his prescription eyeglasses to fall from his face. He used his left arm to brush the food from his lap, "pulled" something in this right arm, and banged his elbow on the table. He claimed serious and permanent personal injuries for which he sought damages.

Defendants moved for summary judgment, arguing that the condition was "open, obvious and easily understood." The court agreed, stating the food was sizzling, but determined that the plaintiff was injured because of the actions plaintiff took. He had the opportunity and ability to act to protect himself from any danger it posed, since the danger was open and obvious.

[March 4, 2015, Hiram Jimenez v. Applebee's, Docket No. A-0, http://law.justia.com/cases/new-jersey/appellate-division-unpublished/2015/a2247-13.html]

Protecting a Drunk Against Himself? The Case of Fernandez v. California Highway Patrol A drunk motorcyclist was pulled over by a CHP officer for driving over 100 miles per hour on I-5 near Disneyland. According to Daniel Ray Fernandez, the officer impounded his motorcycle, gave him a traffic ticket, and left him on the side of the highway, heavily intoxicated, moneyless and without a cell phone. According to a police report, Fernandez walked home and in route was struck by cars 30 minutes later while walking on a 22 Freeway ramp near Grand Avenue. He sustained a broken left arm, elbow, and wrist, a broken right ankle and lacerations to his head and body. He was determined to have a blood alcohol level of .204, almost 3x the legal limit.

Fernandez sued the CHP, alleging the officer affirmatively placed him in a position of danger or acted with deliberate indifference to a known danger, violated his rights to due process and was negligent based on state law.

The CHP moved to dismiss which will soon be argued before the trial court. The motion rests on the general rule established by the United States Supreme Court in *DeShaney v. Winnebago County Department of Social Services*, which held that a state's failure to protect an individual against private violence does not constitute a violation of the Due Process Clause. However, the *DeShaney* rule is modified by two exceptions: (1) the "special relationship exception," and (2) the "danger created exception."

A special relationship is created where the state through its agents voluntarily assumes a protective duty toward a certain member of the public and undertakes action, inducing reliance. (*Williams v. State of CA*, 1983) Citing two similar cases involving stops of drunk drivers (*Whitton v. State of CA*, 1979; *Stout v. City of Porterville*, 1983), the defense argues that the officer did not voluntarily assume a protective duty or engage in any affirmative action to impart a special relationship.

To prevail under the "danger created" exception, Fernandez must show that the officer left the person in a situation that was more dangerous than the one in which he found him. Given the danger he put himself in, the defendant relies on *Munger v. City of Glasgow P.D.*, and other cases, and asks the court to consider whether the condition in which the officer left Fernandez was more dangerous than the situation in which the officer found him; a condition imparted by Fernandez himself. Even though Fernandez claims he was mentally and physically incapacitated, the CHP argues that Fernandez could handle a motorcycle at speeds over 100 miles per hour and could walk home. The CHP argues the officer was not legally compelled to arrest Fernandez.

[Source: Fernandez v. CHP; et.al. SACV15-00021-JLS-(DFMx); DeShaney v. Winnebago County Dep't of Social Svs. (1989) 489 U.S. 189; Williams v. State of Calif. (1983) 34 Cal.3d 18; Whitton v. State of Calif. (1979) 98 Cal.App.3d 235; Stout v. City of Porterville (1983) 148 Cal.App.3d 937; Munger v. City of Glasgow PD (9th Cir. 2000) 227 F.3d 1082.]

STONE | DEAN LLP
ATTORNEYS AT LAW

21600 Oxnard Street
Upper Lobby – Suite 200
Woodland Hills, CA 91367

PRSRT STD
U.S.POSTAGE
PAID
VAN NUYS, CA
Permit No. 2929

NEWS & ANNOUNCEMENTS

➔ Congratulations to Robyn McKibbin for successfully defending an unpaid wage claim before the Labor Commissioner. The former employee sought over $45,000 in overtime wages plus liquidated damages and other penalties and alleged she worked more than 12 hours/day performing housekeeping duties. After an evidentiary hearing, the Labor Commissioner held that the employee's testimony was not credible and awarded her $0.

➔ Stone | Dean LLP was recognized as a President's Circle Member by the San Fernando Valley Bar Association for our demonstrated commitment and leadership in supporting the legal profession and its work in the community. Only fifteen firms were selected as President's Circle Members, and our firm was chosen based on our continued contributions to the legal community and the field of law. Stone | Dean LLP and the other recipients of the award were listed in the May issue of Valley Lawyer.

➔ Greg Stone and Leslie Blozan were successful in obtaining summary judgment on a Federal District Case involving a default on a promissory note. The client was granted judgment for the full amount of the note, which was then paid by the defaulting party.

➔ In March, Leslie Blozan represented family members in a Probate Court trust dispute. Arguing a little-used Probate Code section, she was able to have a trust beneficiary declared pre-deceased, based on a conviction of physical elder abuse.

➔ In May, Kristi Dean presented a two hour continuing education course for the members of the Independent Insurance Agents and Brokers of Orange County. The topic was producer and compensation agreements, and attendees received 2 hours of credit towards their required license continuing education requirements.

➔ In May, Stone | Dean sponsored the Insurance Brokers and Agents of San Fernando Valley's annual golf tournament at the Moorpark Country Club. Kristi Dean drove a beverage cart, offering refreshments and snacks to the participants on the golf course during the day's event.

➔ Greg Stone had a very busy quarter in settlement conferences. He successfully mediated over a dozen cases to full resolution.

STONE | DEAN LLP
21600 Oxnard Street
Upper Lobby – Suite 200
Woodland Hills, CA 91367
T: (818) 999-2232
F: (818) 999-2269

Questions or Comments:
Marleigh Green – Editor
mgreen@stonedeanlaw.com

Contributions By:
Staff

VISIT US ONLINE:
www.stonedeanlaw.com

STONE | DEAN is a business law firm specializing in business transactions and litigation. We represent businesses and their owners in the areas of Litigation, Business Transactions, and Employment.