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SPRING 2019

LEGAL HIGHLIGHTS

Also Inside...

EIGHT ATTORNEYS SELECTED TO 2019 SUPER LAWYERS LIST

Eight (8) Szaferman Lakind attorneys have been included in the 2019 Super Lawyers List issued by Thomson Reuters. The attorneys represent five (5) practice areas including Environmental Litigation, Family Law, Personal Injury: Plaintiff, General Litigation and Class Action.

Brian Paul was further recognized by his inclusion in the Top 100 New Jersey Super Lawyers list for 2019. Associate Brandon C. Simmons was included in the New Jersey Super Lawyers Rising Stars list, also issued by Thomson Reuters.

According to Super Lawyers, "Each candidate is evaluated on 12 indicators of peer recognition and professional achievement. Selections are made on an annual, state-by-state basis. The objective is to create a credible, comprehensive and diverse listing of outstanding attorneys that can be used as a resource for attorneys and consumers searching for legal counsel." Only 5% of attorneys are selected to Super Lawyers and only 2.5% are selected to Rising Stars. Candidates are eligible for Rising Stars if they are under the age of 40 and have been practicing for less than 10 years.

"As with all of the firm's attorneys, those recognized by Super Lawyers this year are dedicated to finding creative solutions to clients' issues while striving to provide the highest level of service." commented Managing Partner Barry Szaferman. "It is a privilege to work beside them as part of the Szaferman Lakind team. I would like to further congratulate Brian Paul on his inclusion in the Top 100 Super Lawyers list in New Jersey."

For more information regarding the standard or methodology upon which the Super Lawyers list issued by Thomson Reuters, is based, please visit their website.

*SZAFERMAN LAKIND LAWYERS WERE SELECTED TO THE SUPER LAWYERS LIST. THE SUPER LAWYERS LIST IS ISSUED BY THOMSON REUTERS. A DESCRIPTION OF THE SELECTION METHODOLOGY CAN BE FOUND AT SUPERLAWYERS.COM/ABOUT/SELECTION_PROCESS. NO ASPECT OF THIS ADVERTISEMENT HAS BEEN APPROVED BY THE SUPREME COURT OF NEW JERSEY.

MICHAEL PAGLIONE ACHIEVES $700,000 SETTLEMENT IN AUTO ACCIDENT CASE

Michael R. Paglione
Partner

Partner Michael Paglione recently settled a case involving a 48-year-old male who sustained significant injuries in a 2012 motor vehicle accident.

The victim was injured when a motor vehicle suddenly and without warning veered from the left turn lane into the right travel lane, striking the driver's side of the Plaintiff's 2009 Hyundai Santa Fe. As a result of the accident, the victim suffered injuries to the cervical and lumbar regions of his spine requiring three separate surgeries. Notwithstanding the surgical interventions, the Plaintiff continues to experience traumatic low back pain requiring ongoing pain management treatment.

As a result of the injuries, the Plaintiff's quality of life has been significantly limited. His neurological surgeon has opined that the victim's condition prevents him currently and in the future from gainful employment, causing substantial economic hardship. Many of the social activities enjoyed by the victim prior to the accident have been curtailed or entirely eliminated. The Plaintiff continues to require pain medication as a sleep aid.

Michael, in preparation for trial, utilized the services of a licensed professional vocational counselor in determining past and future economic losses suffered by the victim resulting from the accident.

The parties agreed to the $700,000 settlement shortly after the beginning of trial.

Scott P. Borsack
Partner

NEW TAX ON SHORT TERM PROPERTY RENTALS THREATENS SHORE COMMUNITIES

An Article By: Scott P. Borsack, Esq.

While most of us were distracted by the potential for a New Jersey government shutdown over Governor Murphy's demand for revisions to the so-called millionaire's tax this past fall, one tax provision found its way into the compromise legislation without much attention. Dubbed the "Airbnb" tax, the New Jersey legislature has adopted a tax of 11.6 percent of the fee paid for rentals of less than 14 days completed without a realtor. The tax applies to rentals statewide but its likely impact will be greatest felt in the shore communities from Stone Harbor to Barnegat. Though there are several ways to avoid the tax, such as renting for two weeks or avoiding websites that broker rentals without a realtor, the furor over the tax is likely to boil over as more owners become aware of its application.

A recent article in the New York Times highlighted the experiences of many owners of property on Long Beach Island who in years past reported that their properties were fully rented for the coming summer season by March each year. As word of the tax spread, many summer beachgoers made other plans and rental owners reported a significant decrease in volume.

The new tax is levied at the rate of 11.6 percent, which is nearly equivalent to the 5 percent state tax on hotel rental income when added to the state sales tax of 6.625 percent that hotel occupancies are subject to. Many municipalities charge local occupancy fees as well. The statewide rental tax is seen as a way of collecting taxes similar to what the typical hotel guest pays throughout New Jersey.

Once the summer rental season kicks off in late spring, watch for protests from organized groups of rental owners as they seek to demonstrate that this new tax, which promises to raise millions in additional revenue statewide, has an adverse impact on tax revenue from Jersey shore communities during the all too important summer season. New Jersey is likely not the last state to consider such income to fill revenue-strapped state coffers.

Keith L. Hovey
Of Counsel

SEXUAL ASSAULT AT HACIENDA HEALTHCARE FACILITY: THE VULNERABILITY OF THE COGNITIVELY LIMITED

An Article By: Keith Hovey

Recently, as reported in the national media, a 29-year-old in a persistent vegetative state recently gave birth. The victim is unable to speak, has limited movement of her limbs, and requires a feeding tube for nutrition. She had been a resident at the facility for the past ten years. Instead of providing her with the care she needed, a licensed practical nurse now stands accused of sexually assaulting her after a DNA test apparently matched the newborn's DNA with that of the LPN.

This case is a tragic reminder of the vulnerability individuals with cognitive disabilities face, especially the elderly. As with this victim, individuals with cognitive disabilities are unable to report sexual and physical abuse. Even for those victims who can report, often times their claims are ignored as a symptom of their disease. The New York State Elder Abuse Prevalence Study suggests that only 1 in 25 cases of elder abuse are reported. It is estimated that 5 million people are affected by elder abuse each year.

As a result, many incidents of abuse of the elderly and individuals with cognitive disabilities go unreported. Family members and facility staff must be cognizant of the signs of sexual abuse. Many organizations dedicated to elder care and the prevention of sexual abuse provide online information to help individuals identify signs of sexual assault. If you suspect sexual abuse, you should document and photograph the injuries and then immediately contact the Ombudsman in the county where the individual resides, as well as an attorney. If you believe that the person is susceptible to more immediate harm, you should call 911.

Hon. Linda R. Feinberg (Ret.)
Of Counsel

JUDGE LINDA FEINBERG PRESENTS TOWN HALL PROGRAM FOR NJSBA

Hon. Judge Linda R. Feinberg (Ret.) presented "A Town Hall Meeting – A Conversation with the Judges" at the NJSBA 2019 Solo & Small Firm Conference on February 23, 2019 held at the Renaissance Woodbridge Hotel in Iselin.

With Judge Feinberg both participating and acting as the moderator, Hon. Douglas H. Hurd and Hon. C. Judson Hamlin joined the discussion to offer their views and insights. The Bar Association sponsors forums such as this one to give lawyers, both new and experienced, the opportunity to understand what judges expect from attorneys who appear in their courtroom as well as tips that can be utilized in everyday practice.

The panel offered advice regarding quality brief writing, including the elements of a well-crafted brief. The judges also provided views on the characteristics of a good attorney. Also discussed were appropriate etiquette and the need to be prepared, respectful and professional in the courtroom.

The Town Hall discussion will continue at the NJSBA Annual Meeting and Convention in May at the Borgata Hotel, Casino and Spa in Atlantic City, New Jersey. For registration information please visit the NJSBA website.

NURSE-ATTORNEY, KEITH HOVEY, TESTIFIES BEFORE NJ SENATE COMMITTEE ON MEDICAL MARIJUANA

Keith L. Hovey
Of Counsel

Keith Hovey, board member of the New Jersey State Nurses Association, recently testified with respect to proposed legislation amending the current medical marijuana law. In his testimony, Keith advocated for funding to develop an objective method for determining the level of impairment of those using and exposed to medical marijuana.

Testing for acute impairment is currently subjective. Impairment is determined by the observations of the individual who administers the test. The presence of marijuana in the blood only indicates a prior exposure to marijuana, not the level of current impairment. Much more preferable would be an objective test for acute impairment, similar to one used to test alcohol impairment.

Under the proposed amendment, nurses may obtain a certification that would permit them to administer medical marijuana to patients. Nurses currently can obtain a certification as a permissible user based on their own medical need. However, with no test for acute impairment, the National Council for State Boards of Nursing does not recommend an exception to disciplinary action for nurses who demonstrate a medical need for medical marijuana. An objective test for acute impairment would minimize the risk of a mistaken conclusion based on a subjective test - the result of which could jeopardize a nurse's employment, license to practice, or both.

A subjective determination of impairment along with a positive blood test for the presence of marijuana, irrespective of whether it is as a result of accidental exposure or medically recommended treatment, could have serious consequences for a nurse. Beyond the benefits to nurses, an objective impairment test would also benefit other medical professionals, law enforcement personnel, those in high risk jobs, and employers establishing a baseline for impairment.

Medical marijuana and the possibility of its legal recreational use pose a plethora of issues to be addressed. We will continue to monitor all aspects of the legislative process regarding medical and recreational marijuana and its impact on New Jersey.

Craig J. Hubert
Partner

Brian A. Heyesey
Partner

CRAIG HUBERT & BRIAN HEYESEY SETTLE SEXUAL ASSAULT SUIT FOR $450K

Partners Craig Hubert and Brian Heyesey recently settled a case against a private boarding school in Mercer County where their client, a former student of that institution, was sexually assaulted by a member of the faculty. After details about the repeated sexual assaults were discovered, local law enforcement began a criminal investigation. The school's faculty member was eventually convicted of a second degree indictable offense.

The allegations set forth in the civil complaint filed on behalf of the former student centered on the school's failure to provide proper training regarding appropriate boundaries between faculty and students. The plaintiff's expert highlighted that the school's faculty handbook lacked specific instructions, thereby leaving to the individual staff member the decision regarding when the role of a trusted authoritative figure/mentor became an inappropriate companion/confidant with a student. The lack of clear instruction fostered an environment for criminal conduct in the form of sexual assault and child endangerment.

In addition to being compelled to leave the school, the Plaintiff suffered psychiatric damage as a result of her victimization.

The case settled on the eve of jury selection for $450,000.

SPORTS AND THE LAW: SHOULD COLLEGE ATHLETES BE PAID?

An Article By: Lionel J. Frank, Esq.

Lionel J. Frank
Partner

Most observers of college sports realize the amount of time players devote to training, practice and competing in games. And it has escaped no one's notice how many millions of dollars top athletic schools receive for television rights and the licensing of team logos on apparel and in sports video games. But how do college athletes benefit from any of this and should they receive a part of the revenue stream flowing from their athletic efforts?

In 2008, Ed O'Bannon, a former All-American basketball player at UCLA, learned that he was depicted in a college basketball video game produced by Electronic Arts ("EA"), a software company that manufactures video games based on top college football and men's basketball teams. O'Bannon's consent was never obtained, nor did he receive any compensation for the use of his likeness in the video game.

Based upon the unauthorized use of his likeness – "a virtual player who visually resembled O'Bannon, played for UCLA, and wore O'Bannon's jersey number" – O'Bannon filed a class action lawsuit against the NCAA, the College Licensing Company ("CLC") (the entity which is authorized to license trademarks for the NCAA), and EA in federal court.[1] The lawsuit alleged that the NCAA's "amateurism rules" violated the Sherman Antitrust Act by preventing student athletes from receiving compensation for the use of their "name, image and likeness" ("NIL").

After a fourteen-day trial, 23 witnesses and 287 exhibits, the trial judge found that the NCAA's amateurism rules, which restrict the amount of basketball and football athletic scholarships to no more than tuition and fees, room and board, and books, violated Section 1 of the Sherman Antitrust Act because they amounted to an agreement to fix compensation among NCAA member schools. The judge found that the purpose of the rules to promote amateurism in college sports could be accomplished through less restrictive policies, and it entered an injunction against the NCAA from enforcing its athletic scholarships rule which prohibited member schools from offering full "cost of attendance" scholarships, including money for transportation and other expenses related to attendance.

Additionally, the trial judge found that student athletes were entitled to be compensated for use of their NIL, and concluded that up to $5,000.00 per year should be set aside as deferred compensation to be paid to student athletes after they left college.

Of course, the NCAA appealed such a significant decision, as did the student athletes hoping to receive additional compensation for the use of their NIL. The Ninth Circuit Court of Appeals reviewed the trial record and applicable antitrust precedent applied by the trial judge in reaching its decision. (O'Bannon v. NCAA, 802 F.3d 1049 (9th Cir. 2015)) It affirmed the finding that the NCAA's amateurism rules were not exempt from antitrust scrutiny.

However, it disagreed with the trial judge that there was a sufficient evidential basis for valuing NILS at $5,000.00 per year, writing that such payments "untethered to [student athlete's] educational expenses" was not a "viable alternative" to remedying the NCAA's ban on payments for NILs because "not paying student athletes is precisely what makes them amateurs".

To no one's surprise, both parties appealed the Ninth Circuit's opinion to the U.S. Supreme Court, which, with only eight Justices then sitting because of the death of Antonin Scalia, denied the appeal.

So who won and what can we expect going forward? Clearly, the plaintiffs in O'Bannon were successful in obtaining a judgment finding that the amateurism rules in question amounted to unlawful agreements between the NCAA and its 1,200 member colleges which violated the Sherman Antitrust Act. That decision is a very significant ruling for student athletes in pending cases working their way through other federal courts, and for future cases expected to challenge rules prohibiting payments to student athletes beyond the award of athletic scholarships. However, the Ninth Circuit opinion also refused to permit student athletes to be paid for use of their NILs as inconsistent with the legitimate reasons espoused by the NCAA for its amateurism rules.

At some point, the U.S. Supreme Court may take up the "pay for play" issue, but for now it appears that additional decisions from other circuit courts of appeal around the country will be necessary before it does.

[1] After the trial court certified the class action, a settlement was reached with EA which paid a reported $40 million dollars to resolve NIL video claim complaints, and settled with CLC as well.

THE ALIMONY REFORM STATUTE AND THE IMPACT ON COHABITATION CLAIMS

Janine Danks Fox
Partner

On September 10, 2014, N.J.S.A. 2A:34-23 was amended to reform the alimony statute. Since the passage of the statute, there has been considerable debate regarding the application of the statute when a supporting spouse is seeking to alter his/her alimony obligation on the basis of cohabitation. N.J.S.A. 2A:34-23(n) provides: *Alimony may be suspended or terminated if the payee cohabits with another person. Cohabitation involves a mutually supportive, intimate personal relationship in which a couple has undertaken duties and privileges that are commonly associated with marriage or civil union but does not necessarily maintain a single common household.*

When assessing whether cohabitation is occurring, the court shall consider the following: (1) Intertwined finances such as joint bank account and other joint holdings or liabilities, (2) Sharing or joint responsibility for living expenses; (3) Recognition of the relationship in the couple's social and family circle; (4) Living together, the frequency of contact, the duration of the relationship, and other indicators of mutually supportive intimate personal relationship; (5) Sharing household chores; (6) Whether the recipient of alimony has received an enforceable promise of support from another person; (7) and all other relevant evidence.

Following the passage of the statutory amendment, the Appellate Division confirmed that the statute does not apply to cases in which the parties contractually agree to other language in their Agreement or Judgment. Moreover, unless a statute specifically delineates a retroactive effect, then the statute can only be applied prospectively.

The factors set forth in the statute largely memorialized criteria adopted by New Jersey Courts in prior decisional law. There are two distinctions, however, in which the strict reading of the statute departs from prior decisional law. First, the statute provides that alimony may be suspended or terminated if cohabitation is established. While the statute no longer includes specific language as to a modification of alimony, there is considerable disagreement about whether modification under the statute is an available remedy. Some argue that the lack of the word modification does not preclude such relief as it is inherent in the legislative intent and prior decisional law that modification is a remedy to address a spouse's ongoing economic dependency and need for alimony. Others opine that a strict reading of the statute precludes modification. Second, prior to the enactment of the reform statute, the moving party had the burden of demonstrating that the parties were living together in a common residence. With the passage of the alimony reform statute, the statute no longer requires a common residence between the alimony recipient and his or her partner.

While the amended statute no longer requires a common residence, unpublished court opinions make clear that there must be credible documentary evidence establishing consistent and dedicated overnights. The New Jersey Appellate Court has underscored that the frequency of overnights is a key component in any cohabitation analysis, noting that 2 to 3 overnights per week is arguably more consistent with a romantic dating relationship than a relationship tantamount to marriage. Similarly, another decision opined that evidence of 100 to 110 overnights in a year was insufficient to meet the burden of establishing cohabitation.

The New Jersey Supreme Court in Quinn v. Quinn also cautioned against Courts qualifying dating relationships as cohabitation. Specifically, the Supreme Court stated:

> **We do not today suggest that a romantic relationship between an alimony recipient and another, characterized by regular meetings, participation in mutually appreciated activities, and some overnight stays in the home of one or the other, rises to the level of cohabitation. We agree that this level of control over a former spouse would be unwarranted...**

With the passage of the statute, Court filings seeking to modify, terminate or suspend alimony on the basis of cohabitation are on the rise. The Court must first be guided by the specific terms of the parties' Agreement or Judgment when reviewing a claim of cohabitation to determine whether prior decisional law or the amended statute applies. If the Agreement or Judgment is silent on the subject, then presuming the alleged cohabitation occurred after the passage of the statute on September 10, 2014, the statute applies.

There are many challenges that the bench and bar face when evaluating a cohabitation claim; namely that many of the factors are subjective in nature. For example, when does spending holidays and vacationing with a partner, as dating couples often do, rise to the level of cohabitation? If the parties are not living together, what number of overnights is sufficient to terminate or suspend alimony? What constitutes a lasting and enduring relationship when weighed against the length of the former marriage? If there is a showing of some factors, but not all and the supported spouse continues to demonstrate an economic need, is it equitable to eliminate or suspend alimony? Given the scant decisional law since the statute was passed, judges and attorneys have vastly differing views as to what constitutes cohabitation.

While the above cases provide some guidance, the law is still relatively new and will continue to develop over time as New Jersey Courts issue opinions on the subject. The passage of the statute demonstrates a trend toward opening the door to alter alimony obligations presuming that the moving party is able to provide credible evidence of the factors listed within the statute. If you have questions regarding a cohabitation claim, it is in your interest to consult with an attorney to determine your rights based upon your own specific circumstances.

SZAFERMAN LAKIND CARES

This recent holiday season Szaferman Lakind gave back to the community by providing donations to two local organizations, HomeFront and Womanspace, both located in Lawrenceville, New Jersey.

Through HomeFront, the firm sponsored the holiday wishes of 45 local children affected by homelessness in our area. Attorneys and staff provided toys, clothing, electronics and gift cards to help fulfill the children's holiday wishes. HomeFront works to end homelessness in Central Jersey by providing a variety of resources to the community. Their services include emergency shelter and transitional and permanent housing to over 400 people in Mercer County. They also provide emergency food, clothing, household goods and job placement and training. For children, the agency offers pre-school, summer camps, after-school tutoring and other activities.

Szaferman Lakind also donated to Womanspace, a second nonprofit organization in the Lawrenceville area. By collecting various toiletry items such as toothbrushes, toothpaste, shampoo, soap and lotion, the firm was able to provide for the basic needs of adults and children affected by domestic and sexual violence who have been forced to seek shelter through the agency. Womanspace works to prevent domestic and sexual abuse, protect families and change lives via empowerment and supportive services. The organization provides services and programs such as crisis intervention, emergency shelter, counseling and court advocacy.

"We were grateful for the opportunity to give back to our community during the holiday season," observed Managing Partner Barry Szaferman. "It is during that time of year that the need is greatest. We are fortunate to be able to come together as a firm to help these wonderful organizations."

The Szaferman Lakind team gathered together to fulfill holiday wishes through HomeFront and Womanspace

KEITH HOVEY GIVES COMMENCEMENT ADDRESS AT CHAMBERLAIN UNIVERSITY GRADUATION

On December 21, 2018, Keith Hovey gave the commencement address for Chamberlain University's College of Nursing graduation. Keith spoke to graduates from Chamberlain's North Brunswick, New Jersey campus, touching on his experience as both a registered nurse and attorney.

"The world needs you." Keith stressed in his speech. "In addition to the bedside we will need nurses in ways you can't even imagine and in places and arenas you haven't even considered."

He goes on to tell the graduates "The nursing process, like proper handwashing, is an invaluable tool, one that can transcend geography or subject matter. It is a tool that will serve you well regardless of the path you choose. Every problem for which we seek a solution requires assessment, diagnosis, planning, implementation and evaluation."

Szaferman Lakind congratulates all of the graduates and wishes them success in their nursing careers.

To see a full video of Keith's speech please visit Szaferman.com.

ROBERT L. LAKIND AND BRIAN A. HEYESEY ACHIEVE PARTNER STATUS

Szaferman Lakind recently announced that two of its associates, Robert L. Lakind and Brian A. Heyesey have become partners.

Robert Lakind
Partner

Robert L. Lakind, a member of both the firm's Business and Litigation Departments, focuses his practice principally on aviation law. As a former commercial airline pilot who flew both international and domestic flights, Robert has extensive knowledge and experience regarding compliance with Federal Aviation Administration Regulations, as well as aviation operations, transactions and taxation issues.

In addition to his aviation work, Rob assists banks, developers and commercial property owners in the area of commercial real estate transactions and regulatory issues. Rob has also assisted clients in complex litigations and corporate matters.

"Rob's wealth of knowledge and experience in the aviation industry has opened up many new opportunities for the firm. His dedication, work ethic and expertise will make him a great partner" shared Robert Lytle, of the Litigation department.

Brian A. Heyesey
Partner

Brian A. Heyesey is a member of the Szaferman Lakind Personal Injury Department. Brian focuses his practice on personal injury by helping victims of crime, sexual assault and those who have suffered due to medical malpractice. He was included in the Super Lawyers Rising Stars List issued by Thomson Reuters* in 2015 and 2016 and also was included in the "Top 40 under 40" list by National Trial Lawyers.*

Prior to joining the firm Brian served as a judicial law clerk for the Honorable Maryann K. Bielamowicz, J.S.C., Mercer Vicinage, Superior Court of New Jersey. He also served as an assistant county prosecutor for the Monmouth County's Prosecutor's Office. Brian then turned his focus to criminal and municipal defense.

Craig Hubert, Chair of the Personal Injury practice, noted "Brian's professionalism and experience in the courtroom make him a great asset to the Personal Injury department. I am pleased to welcome him as a partner."

*No aspect of this advertisement has been approved by the Supreme Court of New Jersey. For information regarding the standard or methodology upon which any honor or accolade is based, please see: Super Lawyers List issued by Thomson Reuters and The National Trial Lawyers issued by The National Trial Lawyers.

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