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Dec. 2022 – FIRE & EMS LAW NEWSLETTER

[NEWSLETTER IS NOT PROVIDING LEGAL ADVICE.]

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PET THERAPY – FIRST RESPONDER CHAPLAINS

To learn more about the First Responders Pet Therapy, click here.
Prof. Bennett serves on Tri-State Peer Support Team with his Labrador retriever - FRYE

20 RECENT CASES

- **ONLINE LIBRARY OF CASE SUMMARIES: Fire & EMS Law Summary at Scholar@UC.**
- **NEWSLETTERS:** If you would like to be added to UC Fire Science listserv, just send him an e-mail. Check out the current and past newsletters on the UC Fire Science webpage.
- Updating 18 chapters of my textbook (2018 to current). FIRE SERVICE LAW (SECOND EDITION), Jan. 2017

File: Chap. 1 – American Legal System

PA: TWO FIRE CALLS APARTMENT BLDG – "SPARKING OVEN" – NO SEARCH WARRANT REQ. ENTER BASEMENT

On Nov. 29, 2022, in George Cannarozzo v. Borough of West Hazelton, et al., the U.S. Court of Appeals, Third Circuit (Philadelphia) held (3 to 0) that the basement search did not require a search warrant since with a "sparking oven" there was reasonable belief of imminent emergency and need to enter the basement to shut off electricity.

> "Cannarozzo [owner 5 unit apartment building} contends the record contains factual discrepancies about the actual dangers precipitating the search. But based on the undisputed facts, Panzarella [Code Enforcement Officer and Building Code Official for Borough] had an 'objectively reasonable basis' for believing an imminent emergency existed which created a 'compelling urgency to inspect' the basement."

FACTS:

> "On the day of the search, the Fire Department had been called twice to the property. The first time, they responded to a reported commercial fire alarm. The crew, including Deputy Fire Chief Robert Segaria, investigated the first-floor unit and observed the entire downstairs had a light smoke haze. Within a few minutes, they identified grease in a pan on the stove, cautioned an occupant to be careful when frying and cooking, and cleared the scene.
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> Twelve minutes later, 911 dispatched the Department, including Segaria and Fire Chief Shawn Evans, to the same property. Around that time, Evans contacted Panzarella. When Panzarella arrived, the Department was at the scene and in control. It had identified heavy smoke coming from the kitchen area and burnt papers with heavy black charring outside the back door. Segaria informed Panzarella that the crew observed a sparking cooktop and would check the basement for potential spread of the fire. While in the basement, the crew thought they could also access and secure the circuit breaker that powered the entire building, including the unit with the sparking oven. Cannarozzo kept the basement locked and inaccessible to tenants.
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> At Evans's instruction, Segaria and the crew entered the basement. Segaria observed hazardous conditions from the faulty wiring. He emerged and told Panzarella to 'get down there.' Once in the basement, Panzarella observed dangling, spliced, frayed, and corroded wires. She believed the wires posed 'an imminent danger to life or property,' so she called Carl Faust, a building inspector contracted by the Borough. The Department remained in control of the scene when Faust arrived. Faust joined Segaria and Panzarella in the basement and observed the hazardous conditions. Given the dangers posed by the faulty wiring, the Department requested utilities be shut off. Just after 1:00 PM, the Department cleared the scene and ceded control to code enforcement officials who eventually condemned the property.
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> Given the circumstances and her knowledge of the sparking oven, a reasonable person in Panzarella's shoes could have believed an emergency was afoot, requiring immediate investigation, when Segaria emerged from the basement."

Legal Lesson Learned: Fire and Fire Code officials may enter property without a search warrant when there is a reasonable belief of an imminent emergency.

File: Chap. 1 – American Legal System

KY: OVEN FIRE – EXPERT OPINIONS THAT INSTALLERS SHOULD ENCLOSED BASE – MAY TESTIFY, NFPA GUIDELINE

On Nov. 18, 2022, in American National Property & Casualty Company, et al. v. R&N Enterprises, Inc, D/B/A B&W TV and Appliance Company, the Court of Appeals of Kentucky held (3 to 0) that the trial court improperly excluded the testimony of the insurance company's expert. Installers replace old oven, which never had enclosed bottom, directly over pull out drawer with lots of cloths. Trial judge excluded insurance company's two experts because they didn't use another oven to measure the heat under the bottom, per NFPA 921, as did Appliance company's expert. Court of Appeals disagreed – NFPA guidelines, not mandatory under Kentucky law.

> "Appellant argues that the circuit court erred in excluding the testimony of Appellant's experts and in denying its request for a *Daubert* hearing. After careful review, we conclude that the testimony was improperly excluded. Accordingly, we reverse and remand the judgment on appeal.
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> Appellee asserts, and the circuit court so found, that the framework for evaluating the reliability of the scientific principles of fire investigation found in NFPA 921 is controlling in the matter before us. Appellee, however, has not cited any case law or statutory law from this jurisdiction so holding. Rather, Appellee has relied on unpublished federal case law and other extra-jurisdictional case law, wherein courts looked to NFPA 921 for guidance in fire investigations. While the guidelines of the National Fire Protection Association provide insight into fire investigation, and though extra-jurisdictional case law can be informative, our research has not revealed any Kentucky case which applied NFPA standards to fire investigation or holds that NFPA standards are controlling.
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> Burns and Hollis found, and Appellee so acknowledges, that the fire started on the east wall of the kitchen. They excluded the possibility of other ignition sources based on physical examination and interviews with the Colletts. Additionally, they found charred cloth material on the bottom of the oven, and noted that combustible kitchen towels and other items were stored in the drawer directly under the oven. And finally, they found no evidence of a full enclosure under the oven, though they acknowledged that it could have been destroyed by the fire. In sum, we conclude that their opinions rise to the level of deductive reasoning or thought experiments, and are more than mere baseless speculation."

FACTS:

"On March 15, 2018, a fire occurred in the Colletts' home causing $555,381.17 in damages. The home was insured by Appellant, which paid benefits to the Colletts per the policy of insurance. On November 22, 2019, Appellant filed the instant action against Appellee in Johnson Circuit Court. As a basis for the action, Appellant alleged that, 1) the oven sold and installed by Appellee caused the Collett's house fire; 2) Appellant paid $555,381.17 in damages to the Colletts under the terms of their policy of insurance; and 3) Appellant was entitled to recover damages from Appellee in its capacity as the Colletts' subrogee. Specifically, Appellant alleged that the cabinet containing the new have a solid bottom, and thus was not a "complete enclosure" within the meaning of the installation instructions. It asserted that Appellee was negligent in installing the oven without a complete enclosure which proximately resulted in the fire.

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The matter proceeded in Johnson Circuit Court and discovery was undertaken. Mrs. Collett stated in a deposition that on the morning of the fire, she placed the bottom oven in self-cleaning mode in anticipation of preparing an upcoming Easter meal. She stated that she followed the instructions in the manual, removed the racks in the bottom oven, and closed the door before initiating the self-cleaning mode. She remained at home for about 90 minutes after starting the oven.

Mrs. Collett stated that a pull-out drawer was located under the bottom oven in which she stored oven mitts, aprons, and dish towels. She described the drawer as "fairly full." Mrs. Collett left the home around 8:30 a.m., and returned at about 11:10 a.m. Upon her return, she saw heavy smoke emanating from the house. She attempted to enter the house through a side door and a front door, but the smoke was too heavy. She saw flames coming out of the kitchen windows and called 911.

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Malcolm Ratliff, president of Appellee, stated that when installing the new oven in the Collett's kitchen, his employees merely removed the old oven and inserted the new one. They did not alter the existing cabinetry, which housed the old double oven during its 15 years of operation."

Legal Lesson Learned: Expert witnesses met the standards in *Daubert v. Merrell Dow Pharmaceuticals Inc*, 509 U.S. 579 (1993) – their testimony was both relevant and reliable.

File: Chap. 1 – American Legal System

PA: SPONTANEOUS COMPUSTION – DECK STAIN, OILY RAGS ICONTAINER – SHERWIN-WILLIAMS LABEL WARNINGS

On Nov. 10, 2022, in Scott Mains v. The Sherwin-Williams Company, d/b/a The Thompson's Company, U.S. District Court Judge John M. Gallagher, U.S. District Court for Eastern District of Pennsylvania, granted the defendant's motion for summary judgment; the label warned of the risk of spontaneous combustion. Rags were left in metal painting cans, contrary to warnings on the label; the homeowner had never read the warnings.

"Defendant asserts Plaintiffs insufficiently prove causation concerning the fire cause and origin, as well as the inadequate warnings claim because Mr. Main failed to consult any warnings on the can. The Court again finds Defendant's causation argument persuasive.

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The front panel also provides the following instruction: 'Before using, carefully read CAUTIONS on back panel.' The label's back panel provide instructions for the product's application and disposal…. Specifically addressing the possibility of spontaneous combustion, the label's back panel provides:

> **DANGER: Rags, steel wool, other waste soaked with this product, and I sanding residue may spontaneously catch fire if improperly discarded. Immediately place rags, steel wool, other waste soaked with this product and sanding residue in a sealed, watered, metal container. Dispose of in accordance with local fire regulations.**

***

Plaintiffs ask the Court to find a product is defective because it spontaneously combusted after use. But … Plaintiffs in the instant matter must provide evidence showing a defect in the wood stain's design or manufacture caused the fire at issue. And Plaintiffs have not put forward sufficient expert or circumstantial evidence to prove the product at issue caused the fire, let alone that a *defect* of the product at issue caused the fire. Plaintiffs minimal evidence concerning defect and causation is fatal where the alleged defect relies on the product lighting on fire."

FACTS:

"In Spring of 2019, Plaintiff Scott Mains sought to stain his wood deck with Defendant's WaterSeal Penetrating Timber Oil ("wood stain")…. A trained mechanic and mason, Mr. Mains owned his own business as a home remodeler while also working as a realtor…. he home included an attached deck with flooring, rails, and a roof…. The deck had steps leading down to a concrete patio in the back of the house.

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Mr. Mains bought one can of Defendant's wood stain at Lowe's a few months before he stained the deck. He never read instructions nor any cautions on the wood stain label. Mr. Mains later claimed none of the warnings, cautions, or instructions indicating the potential danger of the product had 'jump[ed] out at [him]' when he bought the can…. Moreover, Mr. Mains also claimed he would have complied with any warnings and instructions had they jumped out at him…. Mr. Mains had 'very limited' experience using wood stain prior to this project…. Mr. Mains later stated he did not have any notion wood stain or rags used for wood stain would be flammable. *Id.* Mr. Mains also stated, prior to the fire, he was unaware rags or other materials used during stain application could self-heat and spontaneously combust.

***

Around 7:00pm, Mr. Mains and Ms. Perilli ran out of stain…. At that point, they had used two t-shirt rags throughout the day and had cleared the paint tray of wood stain….

Mr. Mains later described the rags as ‘pretty saturated’ with stain. No wood stain remained in the can…. They then stored two t-shirt rags, two brushes, and two rollers-all the tools they used-in the metal paint tray, planning to return to finish the staining process upon buying more stain…. They did not clean off any of the tools prior to placing them in the tray…. Mr. Mains then placed the tray on grass next to the staircase leading up to the deck…. At this time, Mr. Mains did not read any of the labels concerning cleaning up after staining.

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Around 5:00am on Sunday, June 9th, Mr. Mains awoke to Mrs. Mains' screams about a fire outside the sliding glass doors…. Mr. Mains joined Mrs. Mains in the living room and saw flames outside the sliding doors, which he later described as ‘a big fireball…’ Upon fleeing the home, Mr. Mains observed the entire deck, including its roof, in flames.

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At the time of the fire, Mr. and Mrs. Mains maintained insurance from State Farm…. State Farm paid the Mains' insurance claims for the complete loss of their home and contents…. State Farm also covered the Mains' living expenses while they could not live at home-a period of a little over a year and a half.

***

The Court agrees Plaintiffs have not put forward sufficient evidence to support a failure-to-warn claim. As Plaintiffs acknowledge, neither Mr. Mains nor Ms. Perilli read the warnings displayed on the wood stain label.”

Legal Lesson Learned: Read and follow the warning label on products you purchase.

File: Chap. 2 – Firefighter Safety / LODD

DE: LINE-OF-DUTY DEATH – DEATH BENEFITS TO CHILDREN – FATHER'S BREACH FIDUCIARY DUTY – HE OWES $366,412

On Nov. 28, 2022, in Senior Partner, Inc. As Trustee Of The Ardythe Hope Children's Hospital v. David L. Lee, Selena E. Molina, Master in Chancery, Court of Chancery of Delaware, issued a Final Report in this "breach of fiduciary duty action" against father of three daughters of Ardythe Hope. She was a senior firefighter with the City of Wilmington, who was injured in the line of duty on September 24, 2016. She succumbed to her injuries December 1, 2016, leaving behind three (3) daughters: Aryelle Hope, Alexis D. Lee, and Ardavia D. Lee. See article, Dec. 1, 2026: "Third firefighter dies from Canby Park blaze." "Ardythe Hope, seriously injured in the Canby Park rowhome blaze that killed two colleagues in September, has died. Hope was injured after entering the rowhome in an attempt to save another firefighter when the floor gave way. Burned over more than 70 percent of her body, she had been at Crozer-Chester Medical Center in critical condition since the fire."

> "Based on the above findings, judgment should be entered against the Defendant in the total amount of $366,412.34, representing $46,653.23 in missing income, $331,401.82 in unsupported expenditures, and $2,750.00 for attorneys' fees, minus a credit of $14,392.71. Pre-judgment and post-judgment interest should be added to this judgment, compounded quarterly. I find the Defendant should be required to make monthly payments on the judgment and accept the Defendant's proposal for a 360-month period as unopposed.
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> [Regarding new house he purchased with their LODD benefits] I recommend the Defendant be ordered to convey the Property to the Trust and vacate the Property within one year of this report becoming an order of the Court."

FACTS:

> "After her death, the Decedent's two minor daughters, Alexis and Ardavia Lee (together, the "Beneficiaries"), moved in with their father, David Lee (the "Defendant").
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> With the Decedent's death, the Beneficiaries were entitled to their share of benefits from the federal Public Safety Officers Benefit Office (the 'PSO benefits'), lost wages from the City (the 'PMA benefits'), and the Decedent's pension (the 'Pension benefit,' collectively, with the PSO benefits and the PMA benefits, the Benefits'). On July 26, 2017, the PSO benefits were confirmed for a total of $343,589.00.
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> [Footnote 16] The Defendant testified that the Plaintiff's involvement was a resolution to a guardianship action initiated by a family member of the Beneficiaries, who accused the Defendant of 'pocketing money or whatever the case may be.'
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> ***
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> For the foregoing reasons, I find the Defendant failed to account for all income owed to the Trust or support all his expenditures as trustee. He should, therefore, be charged with

the missing income and his unsupported expenditures. In fairness, I will, however, credit the Defendant with the only viable alternative method of calculation before me. Altogether, the Defendant owes the Trust $366,412.34 and judgment should be entered against him as explained herein. Further, the Property should be transferred and vacated as provided herein.

Legal Lesson Learned: The father breached is fiduciary duty as original Trustee of the funds.

Note: The Master in Chancery shared this comment.

[Footnote 5.] "I would be remiss not to acknowledge the triumphs and successes of the Beneficiaries. When this matter was heard, the Beneficiaries were both in college, with Alexis on a full volleyball scholarship at Maryland Eastern Shore and Ardavia studying political science and pre-law at Delaware State University…. Their perseverance, drive, and determination in the face of tragedy is inspiring … (explaining that not only is Alexis on a volleyball scholarship but that she was All-State in basketball and track and field, and that Ardavia was Delaware's Boys and Girls Club Youth of the Year and awarded a Sallie Mae scholarship)."

File: Chap. 2 – Firefighter Safety

TX: FF FELL THROUGH 3½ FOOT OPENING IN OVERPASS CATWALK – FELL 20+ FEET – DOT CONTRACTOR IMMUNITY

On Nov. 18, 2022, in A.S. Horner, Inc. v. Rafael Navarrette, the Court of Appeals of Texas, Eight District, El Paso, held (3 to 0)that the trial court improperly denied the construction company's motion for summary judgment; under Texas statute, a contractor who performs work pursuant to the Texas DOT contract is immune from liability; court rules this applies both during the construction phase and afterwards.

"At the time of the incident that is a basis of the suit, Navarrette was on duty responding to a multi-vehicle crash that occurred in the middle of the night on a Loop 375 overpass. Navarrette's suit alleged that, '[w]hile between the barricades, on a defectively designed and installed cement catwalk without restraining railings he fell 20 to 30 feet through [a] 3 1/2 or 4 feet opening.' Horner constructed the overpass from which Navarrette fell. Navarrette asserted claims against Horner pursuant to premises liability based on a dangerous condition on the road or property, and alternatively, based on theories of negligence.

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Because TxDOT designed this project and required Horner to perform its work pursuant to contract terms, and because Navarrette did not challenge or otherwise dispute that Horner's work complied with those terms, we determine that section 97.002's conditional pre-requisite was met.

FACTS:

"Whether a contractor may be held liable for personal injury, property damage, or death arising from the performance of the contractor's construction or repair of a highway, road,

or street for TxDOT, does not hinge on whether the work is ongoing or completed. Instead, the liability depends on whether, at the time of the personal injury, property damage, or death, the contractor is in compliance with its contract documents which were material to the condition or defect that was the alleged proximate cause of the personal injury, property damage, or death. *See* Tex. Civ. Prac. & Rem. Code Ann. § 97.002. Since it is undisputed that (1) Horner qualifies as a contractor who performed work on a roadway for TxDOT, and (2) it was in compliance with TxDOT's contract documents material to the condition or defect that allegedly caused the personal injury at issue- at the time of such injury-we hold that Horner has conclusively established its no liability defense as a matter of law."

DISSENT - YVONNE T. RODRIGUEZ, Chief Justice

"I agree with Navarrette's interpretation of section 97.002 and would hold that the statute applies only in the context of active construction, rather than also applying to damage, injury, or death occurring after construction is completed."

Legal Lesson Learned: The Texas statute provides immunity to contracts who follow DOT contract requirements.

Note: See June 4, 2014 article: Texas firefighter plunges 20 feet off overpass at crash scene; The lieutenant fell through an opening in the overpass and suffered fractures to his face.

See also: June 3, 2014: El Paso (TX) Firefighter Injured in Fall at MVA Scene.

File: Chap. 3 – Homeland Security

GA: 11th CIR. – FBI SEIZED DOCS. PRES. TRUMP'S MAR-A-LARGO SEARCH WARRANT – "SPECIAL MASTER" SET ASIDE

On Dec. 1, 2022, in Donald J. Trump v. United States of America, the U.S. Court of Appeals for the 11th Circuit (Atlanta) held (3 to 0) that U.S. District Court Judge Aileen M. Cannon of Florida had no authority to appoint Judge Raymond J. Dearie of Brooklyn (retired) as a special master to review the documents seized by FBI pursuant to a search warrant by a U.S. Magistrate Judge. President Trump's arguments are "a sideshow."

"This appeal requires us to consider whether the district court had jurisdiction to block the United States from using lawfully seized records in a criminal investigation. The answer is no.

Former President Donald J. Trump brought a civil action seeking an injunction against the government after it executed a search warrant at his Mar-a-Lago residence. He argues that a court-mandated special master review process is necessary because the government's Privilege Review Team protocols were inadequate, because various seized documents are protected by executive or attorney-client privilege, because he could have declassified documents or designated them as personal rather than presidential records, and—if all that fails—because the government's appeal was procedurally deficient. The government disagrees with each contention.

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In considering these arguments, we are faced with a choice: apply our usual test; drastically expand the availability of equitable jurisdiction for every subject of a search warrant; or carve out an unprecedented exception in our law for former presidents. We
choose the first option. So the case must be dismissed.

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The magistrate judge decided that issue when approving the warrant. To the extent that the categorization of these documents has legal relevance in future proceedings, the issue can be raised at that time… All these arguments are a sideshow.

FACTS:

"In August 2022— over one-and-a-half years after the end of Plaintiff's presidential administration, six months after the first transfer of boxes to the National Archives, and three months after the subpoena was served—the Department of Justice sought a search warrant. It presented an FBI agent's sworn affidavit to a Florida magistrate judge, who agreed that probable cause existed to believe that evidence of criminal violations would likely be found at Mar-a-Lago.

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The FBI executed the search warrant on August 8. Agents seized approximately 13,000 documents and a number of other items, totaling more than 22,000 pages of material. Despite the certification from Plaintiff that '[a]ny and all" documents bearing classification markings had been produced, fifteen of the thirty-three seized boxes, containers, or groups of papers contained documents with classification markings, including three such documents found in desks in Plaintiffs office. All told, the search uncovered over one hundred documents marked confidential, secret, or top secret.

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No doubt the threat of prosecution can weigh heavily on the mind of anyone under investigation.

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All these arguments are a sideshow."

Legal Lesson Learned: Documents were seized pursuant to a search warrant issued with probably cause. Nice to see the 11th Circuit stop the "sideshow."

File: Chap. 4 – Incident Command

NB: FF FIRED – AFTER SHE CLAIMED CAPT. "ABANDONED" HER IN WAREHOUSE FIRE – MAY DEPOSE INVEST. ATTY

On Nov. 20, 2022, in Amanda Benson v. City of Lincoln, et al., U.S. Magistrate Judge Michael D. Nelson, U.S. District Court for District of Nebraska, held that if the City intends in the defense of this civil suit to call the attorney they retained to conduct the investigation, then the city has waived its attorney-client privilege and the plaintiff, who has been provided the Investigation Report, may now depose that attorney and obtain copies of her investigative notes

> "After review, the Court finds that the City has now waived any claim of privilege in Ms. Gerdes' investigation into the April Warehouse Fire by affirmatively representing that the City intends to offer Ms. Gerdes' Investigation Report as evidence at trial and by representing that the City will rely on Ms. Gerdes' investigation as part of its defense to

Plaintiff's claims…. It would be 'patently unfair' for the City to present Ms. Gerdes' Investigation Report to a jury without providing Plaintiff with a full opportunity to explore and cross-examine Ms. Gerdes on the investigation."

FACTS:

"Briefly, the dispute before the Court concerns the permissible scope of discovery into the third-party independent investigation performed by attorney Torrey Gerdes at the request of the City regarding Plaintiff's complaint of retaliation. Plaintiff alleges that she and Captain Shawn Mahler were dispatched to a warehouse fire on April 26, 2021, and during their response Captain Mahler 'refused to make eye contact' with Plaintiff, 'did not indicate how [Plaintiff]'s crew should assist with his ventilation plan,' ignored or refused to communicate with Plaintiff, and 'deserted [Plaintiff's truck] in . . . an immediately dangerous to life or health environment.' Plaintiff alleges Mahler's actions were retaliatory because she had filed an internal complaint against him four days earlier. Plaintiff asserts her complaint was not adequately internally investigated and requested that the City retain an independent investigator.

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Chief Engler's stated reasons for terminating Plaintiff's employment were that:

> The evidence confirms that you made serious false allegations against a fellow firefighter. You reported to Lincoln Fire and Rescue (LF&R) and have continuously stated thereafter that you and your crew were abandoned in a dangerous burning warehouse by Captain Shawn Mahler at the April 26, 2021 fire scene. You also stated that his behavior 'could have injured or killed [you], FAO Roberts, and FF Recruit Hurley.' See, e.g., your June 11, 2021 sworn statement and incorporated attachments filed in Case No. 4:18CV3127. However, none of the evidence, audio recording/transcript, witness statements, the findings of investigator Torrey Gerdes, or the findings of Judge Kopf lend any credibility to your statements.

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In sum, the Court agrees with Plaintiff: the City must now choose. If the City chooses to proceed with its tactical decision to use Ms. Gerdes' investigation as evidence in this matter, thereby placing the investigation 'at issue,' then the City will waive any and all privileges attached to the investigation, and Ms. Gerdes' deposition can proceed without limitation as to the April Warehouse Fire. If the City stipulates that it will not call Ms. Gerdes to testify regarding her investigation and will not offer Ms. Gerdes' Investigation Report as evidence in this matter, then it may properly preserve the privileges attached to her investigation."

Legal Lesson Learned: Attorney-client privilege can be waved by the client calling the attorney as a witness in civil trial.

File: Chap. 5 – Emergency Vehicle Operation

TX: AMBULANCE DRIVER CAME TO FULL STOP – SLOWLY ENTERED INTERSECTION WITH "BLIND SPOTS" - IMMUNITY

On Nov. 8, 2022, in City of Houston v. Martha Vogel and Maria Escalante, the Court of Appeals of Texas, First District, held (3 to 0) that the trial court improperly denied the City's motion to dismiss the case. The deposition testimony of the EMT, his passenger, and civilian witnesses confirmed the ambulance driver had lights and siren operating, came to a complete stop, and slowly entered the intersection; the plaintiffs vehicle struct and rolled the ambulance.

> "Here, like in *Kuhn*, whether the intersection was 'blind' did not create a material fact issue in light of the undisputed evidence that EMT Brooks was responding to a 9-1-1 emergency call, activated his lights and siren, came to a complete stop at the stop sign on Euel, and looked for traffic.
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> Fogel and Escalante also asserted that their evidence raised a fact issue because it showed that EMT Brooks was reckless in entering the intersection 'completely blind.' They presented photographs of the intersection at issue, which they asserted 'show EMT Brooks' view of Hardy was *completely blocked* by construction, a house, parked box trucks, trees and shrubs.' (Emphasis added.) The record does not support their assertion. The photographs do not show that Brooks's view of Hardy was 'completely blocked.' Rather, the Exhibit 3 photograph shows a view of traffic on Hardy Street. Although plastic barriers and pylons appear, traffic behind them is readily visible. Their field diagram shows the stop sign located at the corner of the intersection, and the tree depicted in the photographs is shown in Exhibit 3 to be set back from the corner. There is not a house shown in the photographs attached their response to the City's plea."

FACTS:

> "Vogel and Escalante alleged that, on August 3, 2018, they were involved in a traffic accident with a City of Houston Fire Department ('HFD') ambulance operated by a City employee, emergency medical technician ('EMT') J. Brooks. Vogel asserted that she was driving her Toyota Tundra truck southbound in the 5800 block of Hardy Street, with her mother, Escalante, as a passenger. EMT Brooks was driving the ambulance westbound on Euel Street. Vogel alleged that she had the right-of-way at the intersection of Hardy and Euel, and that Brooks 'ran a stop sign' governing traffic on Euel, drove across Hardy Street and into her lane of travel, and collided with her truck.
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> Vogel asserted that the collision 'totaled' her truck and that she 'sustained substantial injuries.' Escalante asserted that she suffered a head injury, fractures to her ribs and left hand, lacerations to her liver, and 'severed intestines,' requiring surgical repair. Escalante asserted that she continues to suffer 'concussion-like symptoms,' including impaired vision and balance. Together, they sought personal-injury damages 'totaling more than $2,500,000.'
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> ***

The City noted that witnesses in a vehicle traveling near Vogel's truck testified that they heard the ambulance siren and saw its emergency lights ahead of them and came to a stop…. Alexander Medina testified that he and a co-worker, Angel Huerta, were traveling down Hardy Street in a delivery truck, saw Vogel's truck, and witnessed the collision. Medina testified that he and Huerta:

> noticed that there was a truck that was next to us on the driver's side. So as we were passing by the light we were going down Hardy and we hear an ambulance and we see the lights. As the ambulance was trying to come across, we stopped and the truck just kept on going. And as soon as the truck hit the ambulance, the ambulance just spun. It spun out of control.

Medina opined that Huerta was 'going at least 35 miles per hour' as they approached the intersection, but that Vogel's truck, 'on the other hand, was going way beyond that' and passed them. Medina noted that he saw the ambulance 'right there in the corner of the intersection,' that he had a 'clear view of the ambulance,' and that 'the lights and siren were on.' He noted that, '[a]automatically, we stopped,' but Vogel's truck 'just didn't stop.'

***

We reverse the trial court's order and render judgment dismissing Vogel and Escalante's suit against the City for want of jurisdiction."

Legal Lesson Learned: Testimony of civilian witnesses about ambulance coming to full stop, and slowly entering the intersection, was extremely helpful.

File: Chap. 6 – Employment Litigation

IL: FIRE CHIEF – SEVERANCE – PENSION MUST INCLUDE 4 ½ MONTHS ON PAID LEAVE AND 3% PAY INCREASE FOR FF

On Nov. 30, 2022, in Kenneth Brucki v. Orland Fire Protection District, et al., the Court of Appeals of Illinois, Third Division, held (3 to 0) that Pension Board is reversed; the Fire Chief's pension should be increased based on his salary with 3% increase to $186,449 (from $181,220), and shall include his pay while on administrative leave. The Fire Chief had been under investigation and "Brucki agreed to pay $12,500 as reimbursement for charges on the District's credit cards."

> "After his 50th birthday in October 2017, Brucki was entitled to a pension. In his pension application, he listed his last day worked as January 4, 2016, and his annual pensionable salary as $186,449, which included the 3% adjustment on January 1, 2016. The pension fund submitted paperwork indicating that his last day was August 20, 2015, and his salary was $181,220.
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> We thus reverse the decision of the Board and the circuit court and remand with instructions to recalculate and award pension benefits to Brucki based on a final date of

service of January 4, 2016, and an annual salary amount which includes the 3% adjustment - $186,449."

FACTS:

"The District and Brucki entered into a three-year employment contract on June 1, 2013, whereby Brucki was retained as the 'chief/administrator' (chief). The contract provided for an annual salary adjustment of 3% or the cost of living, whichever is greater.

***

Brucki was placed on paid administrative leave on August 21, 2015. After negotiations, on October 14, 2015, Brucki and the District executed a retirement agreement and general release (retirement agreement), which was intended to resolve any disagreements, *e.g.,* relating to Brucki's employment with the District, without any admission of liability or wrongdoing. The retirement agreement provided that he would continue to be on paid administrative leave through January 4, 2016 - his deferred retirement date and the date of his termination of employment.

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[I]n a letter dated February 23, 2016, the District stated that Brucki was entitled to payment for his unused vacation days in accordance with his employment contract. As Brucki apparently had not made the $12,500 payment required by the retirement agreement, such amount was deducted from checks sent by the District to Brucki relating to unused vacation and sick days.

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The parties agree that Brucki had more than 20 years of creditable service, as he was employed by the Pleasantview Fire Department for more than 17-1/2 years prior to joining the District. Rather, their disagreement centers on the 'monthly salary attached to the rank held by him *** in the fire service at the date of retirement.'

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In conclusion, while we recognize that the Board has a fiduciary obligation to all participants and beneficiaries of the pension fund - and that the Board cannot and should not pay a beneficiary more than that to which he is entitled *(Philpott,* 397 Ill.App.3d at 372) - we are left with the firm and definite conviction that a mistake has been made in the instant case. We thus reverse the decision of the Board and the circuit court and remand with instructions to recalculate and award pension benefits to Brucki based on a final date of service of January 4, 2016, and an annual salary amount which includes the 3% adjustment - $186,449. In light of the foregoing, we need not address Brucki's alternative argument regarding due process."

Legal Lesson Learned: When negotiating a severance agreement with 4 ½ months of paid leave, the parties should include a clause regarding how those months and any pay increases would impact pension calculations.

Note: See Aug. 23, 2011 article, **Orland fire chief retires under cloud: 'I didn't do anything wrong.'**

File: Chap. 6 – Employment Litigation

IL: FF STROKE AT HOME – "CUMULATIVE EFFECTS OF ACTIVE DUTY" – OCCUP. DISEASE DISABILITY PENSION

On Nov. 29, 2022, in The City of East Peoria, Illinois v. Charles Melton, II, et al., the Court of Appeals of Illinois, Fourth District, held (3 to 0) that the Pension Board properly held that the 56-year-old Lieutenant was entitled to the disability pension. NFPA requires wait one year after stroke to return to work; but he can't ever return since on blood thinner from 2017 pulmonary embolism. City argued that the stroke was not caused by the job, but from blood thinner, but Board had three physicians review his medical records (not statutory requirement they give him physical exam) and a physician said "cannot discount the cumulative effects of active duty of Firefighting in regards to his stroke."

> "The Board argues that Melton's pre-existing medical conditions, including his prior voluntary use of anticoagulants, does not disqualify him from receiving an occupational disease pension. The Board argues that there was no evidence that Melton was prohibited from performing full unrestricted duties prior to his stroke and that he continued those duties even after voluntarily beginning the medications in 2017. The Board argues that there is no dispute that Melton suffered a stroke, and as a result of the stroke he thereafter was prescribed a mandatory, higher dose of anticoagulants that he must take for the rest of his life.
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> We conclude that the Board's finding that Melton's stroke resulted from his 'service as a firefighter' was not against the manifest weight of the evidence."

FACTS:

> "The Board held a hearing on Melton's application for disability benefits on November 13, 2020. Melton testified in relevant part as follows. He was 56 years old and had been employed by the East Peoria Fire Department since 2000. At the time of hiring, he passed the pre-employment physical. Leading up to March 10, 2020, he held the position of lieutenant. His normal duties included being in charge of the station, the calls, everyone's safety on a call, and coordinating with other crews on calls. While not on calls, he was involved with maintaining the station, education, and inspections. Melton performed all of the duties listed in the job description for his position.
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> On March 10, 2020, Melton got off of work at about 11 a.m. While at home later that day, he experienced dizziness for a few minutes while doing paperwork. At midnight, Melton woke up his wife because he was dizzy and could not sleep. She was a nurse and took his blood pressure, which was high. They decided to go to a hospital, where a CT scan did not reveal anything but an MRI showed that he had a stroke in his right cerebellum.

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That is, nothing in the statute prohibited the physicians from reaching opinions based on the firefighter's medical records. The trial court additionally found that evidence in the record supported the Board's decision and that its findings were not clearly erroneous, and it denied the City's petition for administrative review."

Legal Lesson Learned: The Board relied on physician's report that "cannot discount the cumulative effects of active duty of Firefighting in regards to his stroke."

Chap. 7 – Sexual Harassment, incl. Hostile Work Atmosphere, Pregnancy Discrimination, Gay Rights

File: Chap. 8

NY: FDNY EMS OFFICERS – NON-WHITE – CLAIM RACE / SEX DISCRIMINATION IN PROMOTIONS – NO CLASS ACTION

On Nov. 22, 2022, in Local 3621, EMS Officers Union, et al. v. City of New York, U.S. District Court Judge Lewis J. Liman, U.S. District Court, Southern District of New York, denied the plaintiffs motion in this 2018 lawsuit for class certification, since plaintiffs have failed to show a "specific employment practice" in the promotion process that is discriminatory. "In other words, the proposed class members do not appear to have "common answer to the crucial question *why was I disfavored*."

"In the case at bar, Plaintiffs, however, fail to demonstrate that these specific employment practices have a discriminatory impact on a class wide basis. Instead, the evidence supports that the question of which of these specific employment practices has a discriminatory impact on an applicant is largely an individualized inquiry. As summarized in Background Section I.B.1, each of Plaintiffs' declarants submitted their own unique story, highlighting a different part of the promotional process that disfavored them: Boyd alleges that she was discriminatorily given a lower grade on her annual performance evaluation, which in turn hurt her chances for promotion…. Mascol, on the other hand, alleges that 'notwithstanding her credentials, she has been passed over after completing the promotion process five times before she became Captain' as she was told during her interview that 'she did well, but not well enough' and 'had been secretly removed from the list of potential candidates' due to a disciplinary action…. And, Rodriguez alleges that he was unlawfully denied a promotion as he was told he 'had taken 'too much' leave for a line of duty injury…."

FACTS:

"Defendants are correct that Plaintiffs may not point to the promotional process generally as the basis for their disparate impact. The Supreme Court has stated that 'it is not enough to . . . point to a generalized policy that leads to such an impact. Rather, the employee is responsible for isolating and identifying the *specific* employment practices that are allegedly responsible for any observed statistical disparities.' *Smith v. City of Jackson, Miss.*, 544 U.S. 228, 241 (2005) (internal quotation marks and citations omitted).

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Plaintiffs' statistical evidence from Dr. Thompson does not offer significant proof of a general policy of discrimination.

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[Dr. Erath, Defendants' expert] found that '[a]mong those eligible for a promotion to Captain by Lieutenant service, white men were less likely to be promoted to Captain than their counterparts over the 2013-2019 period; men were less likely to be promoted to Captain than women; and whites were less likely to be promoted to Captain than non-whites.'"

Legal Lesson Learned: Class certification requires a showing that there are questions of law or fact common to the class.

Chap. 9, ADA
Chap. 10 – Family Medical Leave Act, incl. Military Leave
Chap. 11 – Fair Labor Standards Act

File: Chap. 12 – Drug-Free Workplace

CT: FF BREACHED LAST CHANCE AGREEMENT – FIRED – PRESCRIPTION MARIJUANA – WINS UNEMPLOYMENT

On Nov. 29, 2022, in City of Waterbury v. Administrator, Unemployment Compensation Act, et al., the Court of Appeals of Connecticut held (3 to 0) that the referee decision and the Board of Review correctly held that firefighter Thomas F. Eccleston II, fired for use of marijuana, was entitled to unemployment compensation. He was using prescribed marijuana under the state's Palliative Use of Marijuana Act (PUMA); the Last Chance Agreement was signed prior to new marijuana prescription statute. Under state law, employees may receive unemployment unless not discharged for "wilful misconduct."

> "It is undisputed that the claimant is a qualifying patient entitled to protections under PUMA, which likewise entails protection against employment penalties resulting from the claimant's legal, off-duty use of medical marijuana. General Statutes § 21a-408p (b) (3); see also General Statutes § 21a-408a (a) (' [a] qualifying patient who has a valid registration certificate from the Department of Consumer Protection . . . and complies with the requirements of [PUMA] . . . shall not be subject to arrest or prosecution, penalized in any manner, including, but not limited to, being subject to any civil penalty, or denied any right or privilege, including, but not limited to, being subject to any disciplinary action by a professional licensing board, for the palliative *use* of marijuana' (emphasis added)). Consequently, the board reasonably concluded that, insofar as the last chance agreement operated to allow the plaintiff to terminate the claimant's employment for his palliative use of marijuana, it was unreasonable. See Regs., Conn. State Agencies § 31-236-26b (d). Further, the unreasonable application of the last chance agreement to

the claimant's palliative marijuana use forecloses the possibility that the claimant's employment was terminated for willful misconduct.

FACTS:

> "The claimant was employed by the plaintiff as a firefighter beginning in 1995. On November 23, 2015, in light of his issues with alcohol abuse and domestic violence, the claimant entered into a last chance agreement with the plaintiff and his union. The last chance agreement contained several stipulations regarding the claimant's employment, including one that stated the claimant 'may be subject to immediate termination . . . [i]f [the claimant] tests positive for alcohol (at the level of 0.04 or above) or a controlled substance.' Subsequently, the claimant was prescribed and began lawfully using medical marijuana in compliance with the terms of PUMA. Following a random drug test administered on March 20, 2018, the claimant's employment was terminated for testing positive for marijuana, a controlled substance, in violation of the last chance agreement and other employer policies.
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> Therefore, the decision of the board was not unreasonable, arbitrary, illegal, or an abuse of discretion, and the court was correct in so holding."

Legal Lesson Learned: The last chance agreement was signed prior to the State's new palliative marijuana legislation; future last chance agreements should address prescription marijuana.

File: Chap. 13 – EMS

MI: INTOXICATED PERSON GUILTY ASSAULT MEDIC & PD - EMS CAN DISREGARD DRUNK PATIENTS "REFUSAL" HELP

On Nov. 17, 2022, in People of the State of Michigan v. Sean Michael Pach, the Court of Appeals of Michigan held 3 to 0 (unpublished opinion) that jury properly found defendant guilty of assaulting both of police officer and a paramedic. Under Michigan statute, the medic lawfully determined that Pach would not be safe on his own and could therefore restrain him.

> [T]he paramedic was acting in his capacity as a paramedic. He responded to the scene to aid Pach. The paramedic testified that if someone does not want his assistance, the person must answer his questions appropriately and sign a refusal form. Pach, however, failed to answer the questions and kept saying that he wanted to go home. Instead, as noted above, he was unable to take more than two steps before falling. The paramedic was not acting unlawfully when he helped stop Pach from hitting the ground and when he tried to convince him to sit down so he would not hurt himself. Moreover, viewed in the light most favorable to the jury verdict, there was sufficient evidence to find that the paramedic, exercising his professional judgment, lawfully determined that Pach would not be safe on his own. See MCL 333.20969 (providing that emergency medical services personnel must abide by the decision of the patient to refuse treatment or transportation unless 'emergency medical services personnel, exercising professional judgment,

determine that the individual's condition makes the individual incapable of competently objecting to treatment or transportation ....').

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In sum, there was sufficient evidence to support both convictions."

FACTS:

"On April 18, 2020, three people observed Pach falling, getting up, and stumbling toward a major highway. The witnesses believed that he was intoxicated and were unsure if he would be a harm to himself, so they both called 9-1-1. All three witnesses left after emergency services arrived.

In response to the calls, a police officer and a paramedic attempted to help Pach. The officer arrived in a marked police car and identified himself as an officer when he approached Pach. At the time, Pach was sitting on a flatbed trailer. The officer testified that he could smell alcohol when he was near Pach, that Pach's eyes were 'gloss' and 'droopy,' and that he was slurring his words. Pach told him that he had had ten beers and that he was going to go home, but he would not provide the officer with his address. The paramedic arrived in an ambulance and was wearing a 'Rampart uniform shirt,' a badge, a radio, and a pager. He testified that he smelled 'presumed alcoho' on Pach and that when he asked Pach questions about how he was feeling, Pach became agitated. Because Pach did not answer his questions, the paramedic was unable to determine if Pach would be safe if he were left alone.

While the paramedic was questioning him, Pach stood up and tried to walk away. However, as soon as he got up, he stumbled and fell forward. The officer and the paramedic caught him before he hit the ground. At that point, the officer determined that Pach would be unable to get home by himself. Although the officer and the paramedic tried to get Pach to sit down, he kept trying to walk away. They also tried to walk him back to the flatbed trailer, but he tensed his muscles and fought them. At one point, Pach hit the officer in the chest and shoulder with an elbow. He also got 'hands' and threw his arms at the paramedic, grabbed the paramedic, and pushed him away. Eventually, he used his elbow to hit the paramedic between his shoulder and head. The officer ordered Pach to stop resisting them and to stop assaulting them, but Pach elbowed them again. Pach turned to look at the officer and then tensed his muscles. Believing that Pach was going to try and elbow him again, the officer decided to take Pach to the ground. While the officer and the paramedic were attempting to control Pach's arm, Pach continued to tense his muscles. As a result, they used force to get his arms behind his back."

Legal Lesson Learned: Under Michigan law, paramedic had authority to disregard patient's refusal of treatment if individual's condition makes the individual incapable of competently objecting to treatment or transportation.

File: Chap. 13 – EMS

AR: KETAMINE, PATIENT DIED – NO PUNITIVE DAMAGES – NO EVIL INTENT BY MEDIC - EMERGENCY DECISION

On Nov. 17, 2022, in Robert Steven Carter v. County of Pima, et al., U.S. District Court Judge John C. Hinderaker, United States District Court for District of Arizona, denied plaintiff's request to add a claim for punitive damages. Deceased David Cutler had been wandering in desert for over two hours, naked and covered in abrasions, when discovered by County Sheriff deputies, who resisted efforts to bring him down the hill. Paramedic Reed administered ketamine. "Here, Reed's alleged breach of Ketamine protocol, even when combined with other evidence and viewed most charitably for Plaintiffs, may establish gross negligence, but cannot establish that Reed acted with an 'evil mind.'"

> "[P]laintiffs allege Reed went up the hill to David Cutler with a syringe of Ketamine, having decided in advance its use was warranted…. Plaintiffs also allege David Cutler's appearance when Reed arrived indicated hyperthermia rather than a need for Ketamine, but Reed nevertheless ignored the hyperthermia and proceeded to administer Ketamine…. Plaintiffs also allege Reed administered Ketamine without certain required resuscitative equipment, and may have injected more than the established limit…. Plaintiffs also allege David Cutler's respiratory arrest was 'the exact risk identified' for Ketamine administration, and Reed could not adequately treat it for lack of proper equipment on hand…. Finally, Plaintiffs allege that Reed's statement that he 'would do it the exact same way'again indicates Reed 'has not learned his lesson,' and poses a threat to future patients.
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> These allegations do not amount to 'outrageous' conduct for several reasons. First, Plaintiffs' evidence, even if proved, likely establishes Reed's behavior created only a risk of harm, not a" *substantial*" risk of harm. Plaintiffs refer to respiratory depression as "an adverse effect" of Ketamine, and to excessive salivation as "a potential adverse effect" of Ketamine, but do not allege these effects are highly likely or substantially certain. (*See* Doc. 256 at 1-2.) Second, Plaintiffs' evidence, even if proved, cannot establish" *conscious*" and" *deliberate*" disregard of David Cutler's interests. Any course of emergency treatment involves risk. Healthcare providers must act with incomplete information in highly uncertain environments. They do not disregard a person's interests merely by making a judgment call under difficult, emergency circumstances. Failing to act or acting differently would involve other risks. In hindsight, the balance may be clearer. But liability does not follow armchair clarity. Plaintiffs' evidence arguably tends to show that Reed consciously chose a course of treatment with certain risks over other courses of treatment with other risks. That is not enough for conscious or deliberate disregard. Third, Plaintiffs' evidence does not establish "something more" than gross negligence….

FACTS:

From June 29, 2021 Court order;

> "On June 5, 2017, David Cutler ('David') died while being rescued from a rugged area at the top of a hill in Pima County, Arizona. By the time he was located by Pima County Sheriff's Department ('PCSD1) deputies, David had been wandering the desert for over

two hours and he was naked and covered in abrasions. He was delusional and resisted the deputies' efforts to bring him down the hill to medical attention. Rural Metro responded to the scene after receiving a call from PCSD dispatch requesting that 'meds' respond. During David's attempted rescue, Reed, a certified EMCT-Paramedic with Rural Metro, injected David with Ketamine to sedate him. Plaintiffs' claim against Rural Metro and Reed arise out of Reed's actions during David's rescue."

From this 2022 decision:

"Moreover, Reed repeats that he became a paramedic to help people, that he wanted to help David Cutler, and that he feels "awful for the family." (*Id.*) And he repeats that he would "do it again *to try to help* [David]." (*Id.* (emphasis added).) These statements undermine any claim that Reed acted with an "evil mind" when he said he would do things the same way again."

Legal Lesson Learned: No evil intent by the paramedic; no punitive damages claim.

Chap. 14 – Physical Fitness, incl. Heart Health

File: Chap. 15 – CISM, PEER SUPPORT, PTSD

FL: PTSD – MEDIC WINS WORKERS' COMP – WHILE TRAUMA RUNS PRIOR NEW STATUTE, LOSS WAGES AFTER 2018 LAW

On Nov. 2, 2022, in Mandy Lynn Wyatt v. Polk County Board of Commissioners, et al., the Florida Court of Appeals, First District, held (3 to 0) that the firefighter is entitled to workers comp coverage for PTSD. She first began experiencing nightmares in 2016; began seeing a therapist in 2017; after trauma runs involving children in 2017 and 2018, she left the Department on Nov. 27. 2018. Statute no longer requires proof of physical injury for workers comp. claim for mental stress. The new Florida statute expanding coverage for emergency responders with PTSD, without need to prove physical injury, was effective Oct. 1, 2018. She lost wages because her PTSD after the effective date of the statute and is therefore entitled to workers' comp for her prior traumatic incidents

"Application of section 112.1815 makes a difference in the determination of a claim like Wyatt's. For example, Wyatt does not claim to have suffered a physical injury at work, and the Workers' Compensation Law generally places strict limits on compensability for a mental or nervous work injury. A compensable physical injury must be the major contributing cause of the mental or nervous injury, and temporary benefits may not
be paid for more than six months following the date of maximum medical improvement for the physical injury. See § 440.093, Fla. Stat. (2018). Under this provision (considered alone), Wyatt's claimed injury would not be compensable at all. Since its original enactment in 2007, however, section 112.1815 has eased this limitation for first responders like Wyatt by allowing for medical benefits under section 440.13 to treat a mental or nervous injury suffered at work, even if it was 'unaccompanied by a physical injury.' § 112.1815(2)(a)3., Fla. Stat. (2018).

***

In 2018, the Legislature added a subsection five to section 112.1815. *See* ch. 2018-124, § 1, at 1655-57, Laws of Fla. The law took effect October 1, 2018, which was after Wyatt's exposure to the various traumas that we identified above, but before Wyatt suffered lost wages as a result of going out of work for her PTSD. *See id.* § 3, at 1657. The new provision expands compensability for first responders who

suffer specifically from PTSD, a particular type of mental injury that ordinarily would have to be addressed under subparagraph (2)(a)3., which we just discussed. Subsection five now directs that PTSD suffered by a first responder be considered a 'compensable occupational disease' as provided in section 440.151. § 112.1815(5)(a), (c)1, Fla. Stat. (2018); *see Wilkes*, 309 So.3d at 688. Under section 440.151, then, a first responder who cannot work because of PTSD is entitled to not just medical benefits but also indemnity for lost wages stemming from the disability-even without any accompanying physical injury. *Cf.* § 440.151(1), Fla. Stat. (providing that an employee 'shall be entitled to compensation as provided by this chapter' if the employee becomes disabled as a result of 'an occupational disease').

FACTS:

"Mandy Lynn Wyatt started working as an emergency medical technician ('EMT') and paramedic for Polk County Fire Rescue in August 2015. Over the course of her employment, she witnessed several horrible things on the scene at emergency calls involving women and children. According to unrebutted testimony and other evidence, the first of these occurred when Wyatt responded in May 2016 to a domestic violence incident in which the victim had been badly beaten by her boyfriend and suffered severe head trauma. The victim died shortly after arriving at the hospital. Then, in January 2017 and June 2017, Wyatt responded to cardiac arrest calls involving three-month-old children. In between these two events, she went to a call where a mother had wrecked her car, pulled her child out of the car, and run into a pond with the intent to drown him. In April 2018, she responded to a call involving a small child seriously injured by two pit bulls. Finally, in June 2018, she responded to a car crash in which a five-year-old had been killed. The deceased child had already been removed from the scene, but Wyatt was responsible for taking care of the child's two-year-old sister. As she did so, Wyatt noticed the deceased child's brain matter stuck in the girl's hair and proceeded to pick out the pieces.

***

Wyatt first began experiencing nightmares and flashbacks - the first signs of a possible post-traumatic stress disorder ('PTSD') - in 2016, as a result of the domestic violence call. Around the same time, she sought assistance with her symptoms from a critical incidence stress management team, which was available to first responders with on-the-job experiences like Wyatt's. She began seeing a therapist in March 2017. Her trauma worsened as she was exposed to the incidents in 2017 and 2018 involving children. She continued to feel depressed and anxious and consistently experienced nightmares. Even so, she was not exposed to another traumatic incident at work following the tragic June 2018 crash scene. Wyatt continued working, but there were times when she would have to take leave and cut short her overnight shifts so she did not have to sleep at the fire station. She worked her last shift with Polk County Fire Rescue on November 27, 2018. A few days later, she took a leave of absence under the Family and Medical Leave Act because she felt like she no longer could do her job. Her condition did not improve during that leave, and she never returned.

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Prior to the final evidentiary hearing on Wyatt's claim, the employer conceded in its trial memo that Wyatt suffers from PTSD that developed because of her exposure to the on-the-job traumatic events described above. It explained that it denied Wyatt's claim

because all of the qualifying events that led to her PTSD occurred before the effective date of the law adding subsection five: October 1, 2018. The JCC denied Wyatt's claim in its entirety-her claim for both medical treatment under section 440.13 and wage indemnity under section 440.15.

***

Wyatt was exposed to various traumas between 2016 and June 2018 and suffered from PTSD as a result-all before the new subsection went into effect. But she did not experience a compensable *loss* (in terms of wages) until that PTSD led to an "incapacity" to earn a wage.[5] The new subsection five allows for such PTSD experienced by a first responder to be treated as an occupational disease, meaning that the first responder is entitled to indemnity for that wage loss if it flows from the PTSD. For Wyatt, that loss did not occur until her ongoing PTSD caused her to walk away from her job after November 27, 2018. By operation of section 440.151(1)(a), that date is when Wyatt's "injury by accident" occurred. By that date, subsection five had gone into effect, and Wyatt had the right as a first responder to claim indemnity for lost wages because of her PTSD. The JCC's refusal to consider that claim, then, misses the mark."

Legal Lesson Learned: The new PTSD statute covers loses of income incurred after its effective date.

File: Chap. 16 – Discipline

NM: LT. DISCIPLINED FOR "PUSHING HIS RELIGION" – WORKPLACE HOSTILITY NOT SEVERE AND PERVASIVE

On Nov. 30, 2022, in Ryan S. Lucero v. City of Albuquerque, the Court of Appeals of New Mexico held (3 to 0) that trial court properly granted summary judgment for the city; the plaintiff was not disciplined for being a "conservative pro-Christian" but instead for his "pushing his politics and religion on people" while at work and his confrontation with his Captain at Station 5.

"Lucero further maintains that in May 2016, after he was promoted to lieutenant and assigned to Station 5, his captain, A.B., 'made jokes behind [his] back.' As proof that his treatment at Station 5 was based on religious animus, Lucero cites an incident with A.B. in June 2016. According to his deposition testimony, Lucero went to A.B.'s office to ask why there was friction between them. A.B.'s response was that he did not like how Lucero 'push[ed] his politics and religion on people.' After that, according to Lucero's affidavit, A.B. 'grabbed [him] and threw [him] against the wall.'

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In support of his retaliation claims, Lucero maintains that he was subjected to various retaliatory actions by the City following his report of the June incident to his area commander, in which he expressed his belief that he was being treated differently because of his religion. Such actions included being placed in a floating position and being denied opportunities for overtime and a transfer to his desired station.

***

As relevant here, to make out a hostile work environment claim, Lucero must make two basic showings…. First, that he was subjected to an objectively and subjectively hostile work environment.... *See id.*; *see also Herald v. Bd. of Regents of Univ. of N.M.*, 2015-NMCA-104, ¶ 53, 357 P.3d 438 (providing that, to make out a hostile work environment claim, the harassing conduct must be 'so severe and pervasive that the workplace is transformed into a hostile and abusive environment for the employee'…. Second, that the harassing conduct was based on his religion…. We accordingly affirm the district court's grant of summary judgment on Lucero's religious discrimination claim."

FACTS:

"In support of his hostile work environment claim, Lucero maintains that in 2007, when he was a probationary firefighter, coworkers at Station 5 had 'been talking behind [his] back, writing things about [him] on a dry-erase board, harassing [him] about using the restroom, criticizing [his] choice to not don bunker gear before driving, and ignoring [him].' Lucero further maintains that in May 2016, after he was promoted to lieutenant and assigned to Station 5, his captain, A.B., 'made jokes behind [his] back.' As proof that his treatment at Station 5 was based on religious animus, Lucero cites an incident with A.B. in June 2016.

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In the words of the City's counsel at the summary judgment hearing: '[T]he distinction is that, saying, 'I don't like the way you push your religion on others,' is, legally, a world apart from saying, 'I don't like your religion.' The City contends only the latter supports a showing of animus based on Lucero's religion.

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We thus reject Lucero's contention that the letter of reprimand constituted an adverse employment action."

Legal Lesson Learned: Hostile work atmosphere claim requires proof of "severe" workplace environment.

Note: Court in Footnote 2 referenced plaintiff watching Fox News.

"Although Lucero additionally asserts, in an affidavit he submitted in his response to the City's motion for summary judgment, that A.B. criticized him for watching a 'conservative, pro-Christian news channel,' he does not rely on A.B.'s criticism of Lucero's news source as proof of religious animus. Moreover, the news source Lucero cites is apparently Fox News. In his deposition, Lucero agreed that 'Fox News is a well-known Republican-affiliated news source' and testified that A.B.'s disapproval of Lucero watching Fox News was political, not religious. We observe that, although Lucero alleged discrimination based on 'political views' in his administrative grievance, he did not advance such a claim in his complaint in district court, nor did he raise any claim based on the First Amendment to the United States Constitution. We therefore disregard his assertions concerning the news channel."

File: Chap. 16 – Discipline

IN: VOLUNTEER FF – PLED GULTY ARSON - 5 STRUCTURE FIRES, WANTED TO BE "HERO" – 20 YEARS PRISON

On Nov. 29, 2022, in Adam Selbee v. State of Indiana, the Court of Appeals of Indiana held (3 to 0) that the defendant knowingly pled guilty after consulting with legal counsel; his claim of ineffective legal counsel is denied. Selbee pled guilty to the arson charges and was sentenced, pursuant to the terms of his plea agreement, to an aggregate term of thirty-two years, with twenty years executed and twelve years suspended to probation.

> "Beginning in July of 2016, Selbee, using combustibles or ignitable liquid, set five structure fires and three ;hay bale fires….' The structure fires included the following types of buildings: a gymnasium, a non-residential structure on a couple's property, and a residence. The fires were set on different days in July, September, and October of 2016. In addition to setting the fires, Selbee-who was a volunteer fire fighter and an EMT-later indicated that 'he said [he] enjoyed responding to [the fires] and, and kind of being a hero.… He kind of got a pleasure from doing that…. '
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> On May 25, 2017, Selbee entered into a plea agreement, under the terms of which Selbee agreed to plead guilty to all four arson counts in exchange for the dismissal of the criminal-mischief counts and a separate criminal case."

FACTS:

> "Selbee argues that his guilty plea was not knowing, intelligent, and voluntary because he was not advised that he was waiving (1) his privilege against compulsory self-incrimination, (2) his right to trial by jury, and (3) his right to confront one's accusers as required by *Boykin v. Alabama*, 395 U.S. 238 (1968). The State argues to the contrary, claiming that Selbee was adequately advised that he was waiving the aforementioned rights. We agree with the State.
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> Given the record before us, including Selbee's statement that he had signed the advisement of rights and understood the rights he was waiving by pleading guilty, we cannot say that the PCR court erred in finding that Selbee was sufficiently informed of his *Boykin* rights and that his guilty plea was knowingly, intelligently, and voluntarily made."

Legal Lesson Learned: Arsons by firefighters seeking to be "heroes" is unfortunately a well known issue.

> Note: See articles on firefighter arsonists.
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> National Volunteer Fire Council: *Firefighter Arson*
>
> Fire Rescue 1 by Lexipol: *Understanding the firefighter arsonist*
>
> CBC News: *Fires set by firefighters a long-standing problem, experts say*

Chasing Fires: *The Minds Behind the Fire*

Edmonton Journal: *Firefighters who start fires: a look at the phenomenon of "firefighter arson'*

File: Chap. 16 – Discipline

GA: BREACH CHAIN OF COMMAND – FF CALLED COUNTY COMM. AIDE – 5 TRUCKS OOS - DEMOTED, NO 1st. AMEND.

On Nov. 22, 2022, in Scott Millspaugh v. Conn County Fire And Emergency Services, the U.S. Court of Appeals for the 11th Circuit (Atlanta) held (3 to 0) (unpublished decision) that trial court properly granted summary judgment for Cobb County; the firefighter failed to go up chain of command about his concerns about apparatus and staffing before leaving voicemail with Commissioner's assistant and was properly demoted from FF III to FF II.

> "[W[e hold that Millspaugh spoke as a public employee when leaving his voicemail and that his voicemail was not protected by the First Amendment. We also hold that the Individual Defendants were entitled to qualified immunity. We, therefore, affirm the district court's order granting summary judgment. *** But even if Millspaugh's voicemail were protected speech under the First Amendment, the district court correctly determined that the Defendants' interest in promoting the efficiency of fire suppression services outweighed Millspaugh's interest in the speech."

FACTS:

> "According to Millspaugh, he was a Firefighter III, who assisted with the scheduling of staff in Battalion Four. He regularly discussed staffing with his Battalion Chief, John Graham, as part of his job duties.
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> "On the morning of May 2, 2019, Millspaugh left a voicemail with County Commissioner] Gambrill's assistant, Ryan Williams. In the voicemail, he stated, "[h]ey, Ryan, this is Scott.... I was wanting to know if you guys knew why there was five fire trucks not operational today in [Political] District One. Thank you very much."
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> According to Millspaugh, he became concerned after reviewing the Department's status board, which showed the non-op-erational status of various fire-related vehicles. Ordinary citizens of the District did not have real time access to the information on the status board. A screenshot of the status board from May 2, 2019, reflected that six fire vehicles within District were out of service. On the day he called Gambrill's office, Millspaugh did not raise his staffing concerns with anybody in his chain of command at the Department. Prior to leaving the voicemail, Millspaugh did not tell any manager or supervisor of the Department that he intended to contact Gambrill's office.
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On July 19, 2019, Millspaugh again met with [Fire Chief Randy] Crider, [Deputy Chief of Response, Kevin] Gross,]District One Chief, Scott] White, and [Battalion Chief] Graham. At that meeting, Millspaugh was notified that he was being demoted from Firefighter III to Firefighter II. He was told that he was being disciplined for making poor decisions, violating the chain of command, and making inaccurate or misleading statements in his voicemail to Gambrill's office. The demotion resulted in a ten percent reduction in Millspaugh's pay. Millspaugh's annual performance evaluation was changed from exceeds expectations to meets expectations because of his voicemail to Gambrill. The reduction of his performance evaluation negatively affected the percentage of pay raise for which he was eligible the following year.

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The Defendants argued that because his speech fell within his ordinary duty of securing staffing, he spoke as an employee, and his speech was not protected by the First Amendment. The Defendants also argued that even if he spoke as a citizen, the County had a stronger interest in promoting the efficiency of public fire suppression services than Millspaugh had in the speech. They argued that their expert witnesses, Gordon Henderson and Tim Milligan, testified that a firefighter should only circumvent the chain of command in a life-threatening situation and that breaking the chain of command impacts the level of trust between firefighters and their supervisors. The Defendants also argued that the Individual Defendants were entitled to qualified immunity because they acted within the scope of their discretionary authority when the allegedly wrongful act occurred. Lastly, the Defendants argued that the Individual Defendants did not violate a clearly established constitutional right.

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After the hearing, the district court granted summary judgment for the Defendants on all of Millspaugh's claims. The district court found that Millspaugh left the voicemail with Gambrill's office while on duty, shortly after discussing staffing issues with Graham, and in direct response to information he acquired while performing his job as a Firefighter III. Therefore, the voicemail involved the subject matter of his job duties and was not protected by the First Amendment. The district court also determined that the County's interest in the efficiency of the Department outweighed Millspaugh's interest in the speech. Trust is particularly important in providing effective emergency services to the public, and the voicemail undermined the trust Millspaugh's superiors had in him. Finally, the district court determined that the Individual Defendants were entitled to qualified immunity. The district court concluded that because Millspaugh did not engage in constitutionally protected speech, he could not prove that the Individual Defendants violated his constitutional rights.

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Accordingly, the district court did not err in determining that Millspaugh's voicemail arose within the scope of his professional responsibilities and was not protected by the First Amendment…. But even if Millspaugh's voicemail were protected speech under the First Amendment, the district court correctly determined that the Defendants' interest in

promoting the efficiency of fire suppression services outweighed Millspaugh's interest in the speech. *See Pickering [vs. Board of Education]*, 391 U.S. at 568."

Legal Lesson Learned: Breaching chain of command can result in discipline. First Amendment only protects firefighter's speech when speaking as a citizen on a matter of interest to public.

Chap. 16 - Discipline

CA: CAPT. FIRED - ASSUALT BROTHER (FF) AT PARTY – NO "WHISTLEBLOWER" DEFENSE FOR RPT. BROTHER'S FRAUD

On Nov. 14, 2022, in Sean Olguin v. City of Hollistter, the California Court of Appeals, Sixth Circuit, held (3 to 0; unpublished opinion) that Captain was properly fired, after a pre-termination meeting with Fire Chief, and then hearing with City Manager. During these meetings he claimed his bother was committing insurance fraud by faking his injuries; but there is no causal link between plaintiff's disclosure and his termination.

> "The allegations in plaintiff's complaint are based on his disclosure of unlawful conduct (in the form of insurance fraud) by plaintiff's brother, a city firefighter.
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> Plaintiff's complaint nonetheless fails as a matter of law because it draws no causal link between plaintiff's disclosure and his termination. Plaintiff was issued a notice of intended termination in October 2019, following an extensive internal affairs investigation into the October 2018 altercation. Plaintiff's *Skelly* hearing-at which he challenged the misconduct charges in part through disclosure about his brother's alleged fraud-occurred after the investigation and notice of intended termination…. If the rules were otherwise, a plaintiff could orchestrate a retaliation claim by purporting to reveal an unlawful act of a coworker at any time during a disciplinary process."

FACTS:

> "Plaintiff was employed with the City of Hollister Fire Department for over 25 years before he was discharged for misconduct. He was hired as a firefighter, promoted to firefighter/engineer, and served as a fire captain for approximately five years before he was terminated. Following an internal affairs investigation, the city notified plaintiff on October 11, 2019, of its intent to terminate his employment. The written notice described the misconduct giving rise to the adverse action, which involved an altercation between plaintiff and his brother (also a city firefighter) at a birthday party the previous October.
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> According to a declaration submitted by plaintiff's attorney in the trial court, plaintiff presented evidence at the *Skelly* conference that he was not the initial aggressor at the October 2018 party; that his brother had been physically violent to him in the past; and that despite claimed injuries attributed to the October 2018 incident, his brother was physically active and earned money working side jobs while on paid medical leave.

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As he had at the *Skelly* conference, plaintiff offered evidence at the administrative appeal hearing to demonstrate that his brother was not a credible witness. The city manager found that even if plaintiff's brother lacked credibility, it was undisputed that plaintiff struck his brother in front of members of the public, including children. Further, independent evidence established plaintiff was the physical aggressor and neither he nor his wife were at risk of imminent danger at the time he struck his brother. The city manager found plaintiff's conduct violated the fire department's personnel policies and the city personnel system's rules and regulations."

Legal Lesson Learned: Off duty conduct can lead to termination.

Note: *Skelly v. State Personnel Board* (1975) 15 Cal.3d 194, 215 (due process protections afforded to public employee facing disciplinary action).

CA Whistleblower Statute:

"An employer . . . shall not retaliate against an employee for disclosing information . . . to a government or law enforcement agency, to a person with authority over the employee or another employee who has the authority to investigate, discover, or correct the violation or noncompliance, . . . if the employee has reasonable cause to believe that the information discloses a violation of state or federal statute, or a violation of or noncompliance with a local, state, or federal rule or regulation, regardless of whether disclosing the information is part of the employee's job duties." (§ 1102.5, subd. (b).)

File: Chap. 17 – Arbitration; Mediation; Union Relations

TX: AUSTIN - CBA 5,600 HOURS FOR UNION OFFICERS IS LAWFUL – TAXPAYERS LAWSUIT FRIVOLOUS, PENALTY

On Nov. 22, 2022, in Roger Borgelt, Mark Pulliam, Jay Wiley, et al. v. Austin Firefighters Association, IAFF Local 975, et al., the Court of Appeals of Texas, Third District (Austin) held (3 to 0) that trial court properly dismissed lawsuit by two taxpayers who claimed the granting of paid time to Association President violated the Texas Constitution's "Gift Clauses." Trial court also imposed $75,000 sanction and attorney fees against Pulliam and Wiley for filing a frivolous lawsuit.

"Borgelt and the State's argument fails because Borgelt and the State ignore the fact that, as the trial court found, the Association's mission-facilitating good labor relations between the AFD and its public-servant employees, furthering professional standards for firefighters, and promoting firefighter and public safety-overlaps with the mission of the AFD, and the two organizations' missions are not mutually exclusive. Thus, work done on behalf of the Association by firefighters who are using Association Leave not only furthers the mission of the Association but also furthers AFD's mission and public purpose of providing safe and efficient fire safety and emergency services.

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We conclude that the trial court did not abuse its discretion by determining that a $75,000 sanction was required to deter further similar actions by Pulliam or Wiley…. Wiley admitted to using the lawsuit as publicity to support his political platform as a 'fiscal conservative' seeking 'union reform' and 'right-to-work laws' in Texas. In 2016, when

this suit was initially filed, and again in 2018, Wiley ran in the Republican primaries for seats in the Texas House of Representatives."

FACTS:

"This appeal arises from a constitutional challenge to a provision of the 2017-2022 Collective Bargaining Agreement (Agreement) between the City of Austin and the Austin Firefighters Association, Local 975 (Association). The challenged provision provides a shared bank of paid leave ("Association Leave") for City firefighters to use for Association activities, subject to contractual requirements and restrictions on its use. Taxpayers Mark Pulliam and Jay Wiley initiated the challenge to this contractual provision on the ground that it violates Article III, Sections 50, 51, and 52(a), and Article XVI, Section 6(a) of the Texas Constitution (collectively, the 'Gift Clauses'), asserting that it is an unlawful transfer of public funds to a private entity. The State of Texas intervened in the lawsuit in support of the taxpayers' challenge.

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As will be discussed in more detail below, the Association Leave Provision establishes a pool of 5,600 hours of paid leave for the Association's President and other Authorized Association Representatives to use to conduct Association business under the conditions specified in Article 10.

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Association President Nicks is allowed to use 2,080 hours of the Association Leave bank. [CBA helpful all parties.] These matters include hiring, promotions, disciplinary investigations, disciplinary appeals, allowing for differences in base wages based upon seniority, longevity pay, required certifications, required education, specialized assignments, the designation of personnel in certain positions with certain leave and pay levels, drug testing, and the ability to merge the Austin Fire Department with Travis County Emergency Services Districts. These terms favorable to the City are incorporated into the Agreement.

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A key duty of the Association is its role in the grievance-resolution procedure established in the Agreement 'to establish an effective method for the fair, expeditious and orderly adjustment of grievances.; The Association Grievance Committee makes the initial determination of whether a valid grievance exists, and if it does, the Association moves the grievance forward through the process, which can include arbitration, on behalf of the firefighter. The Association also agreed to attempt to resolve grievances informally both before their filing and before arbitration 'in an attempt to avoid costly arbitration.'"

Legal Lesson Learned: CBA provision for paid time for union officers is lawful.

File: Chap. 17 – Arbitration

PA: CBA - FF PENSION 75% - ARBITRATOR UPHELD - CITY ORDINANCE CAN'T REDUCE WIDOWS PENSION TO 50%

On Nov. 22, 2022, in City of New Castle v. International Association of Firefighters, Local 160, the Commonwealth Court of Pennsylvania held (3 to 0) that the arbitrator's decision will be enforced; firefighter's widow is entitled to the same 75% of final average compensation he was receiving per CBA. The City cannot pass an ordinance that violates the CBA and pay the widow only 50%.

> "The arbitrator found that the parties did not agree to change the survivor benefit in the 1998 CBA from what it had been in 1997; the Union was not aware that Ordinance 7343 had been enacted in December of 1997; and the Union never agreed to reduce the survivor benefit to 50% as provided in Ordinance 7343…. The arbitrator arrived at a reasoned interpretation of the 1998 CBA, concluding that the City violated the parties' agreement by paying Stone's surviving spouse a pension lower than what Stone had received in his lifetime."

FACTS:

> **"**Dennis Stone began employment with the City as a full-time firefighter on April 1, 1967, and he retired on December 31, 2006, after 39 years of service. At the time of his death on June 26, 2020, Stone was receiving a retirement pension at the rate of 75% of his final average compensation in accordance with the CBA in effect at the time of his retirement. After Stone died, the City paid a survivor benefit to his widow at the rate of 50% of Stone's final average compensation. The Union filed a grievance, asserting that under the CBA, Mrs. Stone was entitled to a survivor pension benefit equal to that paid to Stone during his lifetime.
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> ***
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> On September 23, 1997, the City and the Union entered into a four-year agreement that, *inter alia*, increased the firefighter's pension benefit and became effective on January 1, 1998. The 1998 CBA states that '[t]he monthly amount of the normal retirement benefit for those who retire on or after January 1, 1998 shall be equal to *seventy-five percent* (*75%*) of the participant's average compensation.'
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> ***
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> On December 11, 1997, prior to the effective date of the 1998 CBA, the City enacted Ordinance 7343…. It set the survivor benefit in the City's Firemen's Pension Plan for firefighters retiring after January 1, 1998, at 50% of the deceased firefighter's average compensation at the time of his or her retirement.
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> Although the 1998 CBA was silent on survivor benefits, it addressed "existing benefits" as follows:
>
> > The purpose of this Agreement is to codify and incorporate all existing benefits, terms and conditions of employment into an all-inclusive Agreement. The Parties hereto agree that *all existing benefits, terms and conditions of employment* currently enjoyed by all members of the City of New Castle Fire Department, but

omitted from this Agreement are hereby retained as if the same had been specifically set forth herein.

***

On December 11, 1997, prior to the effective date of the 1998 CBA, the City enacted Ordinance 7343. New Castle City Ordinance No. 7343 (1997). It set the survivor benefit in the City's Firemen's Pension Plan for firefighters retiring after January 1, 1998, at 50% of the deceased firefighter's average compensation at the time of his or her retirement.

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The arbitrator found that with the enactment of Ordinance 7343, the City unilaterally changed the survivor pension benefit from that bargained for in the 1998 CBA. Based on these findings, the arbitrator awarded Mrs. Stone a survivor benefit equal to the pension Stone had been receiving prior to his death, *i.e.*, 75% of Stone's final average compensation.

***

The trial court denied the petition to vacate. It found no merit in the City's contentions. In so holding, the trial court relied upon the arbitrator's findings. The arbitrator found that approximately one year before the inception of the 1998 CBA, the City had undertaken an actuarial study of the impact of increasing survivor benefits, as required by Act 205.

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Under the so-called "essence test," there is a strong presumption that the Legislature and the parties intended for an arbitrator to be the judge of disputes under a collective bargaining agreement. That being the case, courts must accord great deference to the award of the arbitrator chosen by the parties. A fortiori, in the vast majority of cases, the decision of the arbitrator shall be final and binding upon the parties.

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The arbitrator concluded that the contract language, not Ordinance 7343, was dispositive. The arbitrator did not exceed his jurisdiction by holding Ordinance 7343 irrelevant to his construction of the 1998 CBA."

Legal Lesson Learned: The collectively bargained CBA controls; not a unilaterally enacted ordinance.

Chap. 18, Legislation