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# Nov. 2018 – FIRE & EMS LAW Newsletter

[NEWSLETTER IS NOT PROVIDING LEGAL ADVICE.]
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**COMMUNITY PARAMEDICINE**: UC Fire Science is offering Community Paramedicine course on March 18-20, 2019, FST 3043 for undergrads and others; also offered as a Grad course, FST 6043 (first grad course in history of UC Fire Science program). Course Flyer:

**Six FDs will be presenting:** City of Cincinnati; Colerain Township, OH; Monroe, OH; Springfield Township, OH; Violet Township, OH; Crawfordsville, Indiana. See their updated program reports: Quick Response Teams, 62% reduction in overdose calls; Safe Stations to seek treatment; new Hospital partnerships – home visits, reducing 911 calls.

## NEW CASES COVERED IN THIS NEWSLETTER

**File: Chap. 1, American Legal System**

## KY: KENTUCKY SUPREME COURT UPHOLDS KY "RIGHT TO WORK" STATUTE – SEE JUNE 2018 U.S. SUP. CT. DECISION

On Nov. 15, 2018, in Fred Zuckerman, As Representative Of The General Drivers, Warehousemen And Helpers Local Union No. 89 v. Matthew G. Bevin, Governor, the Kentucky Supreme Court (4 to 3) upheld the statute: "we hold that the Unions' constitutional challenges to the Act are without merit. In this area of economic legislation, the legislature and the executive branch make the policy, not the courts."

Facts:

> "In 2017, Kentucky's legislature passed, and the Governor signed, 2017 HB21, commonly referred to as the Kentucky Right to Work Act, 2017 Ky. Acts ch. 1, §15 (the 'Act'). Significantly, this Act amended KRS 3336.130(3) to provide that no employee is required to become, or remain, a member of a labor organization,

or to pay dues, fees, or assessments to a labor organization. The Act's stated goal was 'to attract new business and investment into the Commonwealth as soon as possible.' 2017 Ky. Acts ch. 1,§ 14.

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At the [legislative] hearing, proponents of the Bill testified in support of the Bill. Their testimony included statistics that right-to-work states experience superior economic development and superior employment growth in both union and non-union jobs, specifically referring to Michigan, Indiana, and Tennessee.

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The Unions and the Union *Amicae* strenuously argue that the Act creates a classification which has no substantial or justifiable basis. They claim right-to-work policies reduce wages for union and non-unions employees, have mixed impact on employment outcomes, and have no statistically significant impact on overall state employment. They argue the true motivation is 'to starve labor organizations and their members based on perceived political bent.'"

Holding:

"The legislature is permitted to set the economic policy for the Commonwealth. Even assuming that the Act creates a classification that discriminates between labor unions and all other organizations operating in the state, or any sort of classification among union and non-union workers, we are unable to say that the legislature did not have a reasonable basis for so doing."

**Legal Lessons Learned: Fire & EMS departments, not only in Kentucky, but in all states must now follow the U.S. Supreme Court's decision, June 27, 2018, in Janus v. American Federation of State, County, and Municipal Employees, Council 31, which held (5 to 4), "Under Illinois law, public employees are forced to subsidize a union, even if they choose not to join and strongly object to the positions the union takes in collective bar gaining and related activities. We conclude that this arrangement violates the free speech rights of nonmembers by compelling them to subsidize private speech on matters of substantial public concern."**

See IAFF statement in response to the *Janus* decision:

**General President Harold Schaitberger issued this statement on the Supreme Court 5-4 decision overruling decades of precedent in the case of *Janus v AFSCME Council 31*:**

Washington, DC – "The Janus v AFSCME Council 31 case was pushed by forces that want to take away the voices of fire fighters and the power of all public employee unions. The intent is to handicap unions in our ability to improve members' lives and to weaken the political power of public employees.

"We know the potential negative impacts that could come from the Supreme Court's decision in *Janus*, however we are ready to take the best punch and deliver some blows ourselves to those that want to see fire fighters and their unions weakened.

"While the Janus decision is another attack on organized labor, every attack can be turned into an opportunity, and we are determined not to let this decision hold us back from our important mission. The IAFF has operated successfully under *Janus*-like rules in right-to-work and non-collective bargaining states for decades. We have proven that you can have strong affiliates that deliver better pay, health care, retirement security, health and safety provisions and a voice in keeping their communities safe in these tough environments.

“We represent more than 85 percent of all professional fire fighters and paramedics in the U.S. because we consistently demonstrate our value, through our strong affiliates, that being union fire fighters provides a significantly better standard of living and safer working environment than those who are not union. We believe that difference will become even more stark, and we are working to represent that small percentage of fire fighters who aren't in our union so that we can raise their standard of living and increase their ability to have a strong voice in public safety.

“This case was intended as a political push to eliminate the power of people who work to support their families and the power of their unions. But instead, the *Janus* case is activating an army of union leaders to better engage their members.”

# WI: 3-DAY FOREST FIRE STARTED BY LOGGING EQUIP – INSURANCE COMPANY ONLY LIABLE $500,000, NOT $2 MI – "ONE OCCURRENCE"

On Oct. 30, 2018, in SECURA Insurance, A Mutual Company v. Lyme St. Croix Forest Company, LLC, et al., the Wisconsin Supreme Court reversed the trial court, and the Wisconsin Appeals Court, and held (7 to 0): "Despite the fact that the fire crossed several property lines, Secura contends it was a single, uninterrupted cause of the alleged damages. *** We conclude that the fire at issue constitutes a single occurrence pursuant to the CGL [Commercial General Liability] policy. Consequently, the $500,000 per-occurrence limit for property damage applies."

Facts:

> "On May 16, 2013, a fire broke out on forest land owned by Lyme St. Croix Forest Company (Lyme St. Croix). Known as the 'Germann Road Fire,' it burned 7,442 acres over the course of three days. Real and personal property belonging to many individuals and businesses sustained damage.
>
> The fire allegedly began in the cutting head of a piece of logging equipment known as a feller buncher, owned by Ray Duerr Logging, LLC (Duerr). Flames quickly spread from dry grass to a pile of recently felled jack pine and subsequently into the surrounding forest.
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> At the time of the fire, Secura insured Duerr under both a CGL policy and an umbrella policy. The CGL policy contained a $2 million general aggregate policy limit, and a $1 million per-occurrence limit. However, the CGL policy also incorporated a 'Logging and Lumbering Operations Endorsement.' Pursuant to this endorsement, the per-occurrence policy limit is reduced to $500,000 for property damage 'due to fire, arising from logging or lumbering operations. . . .'
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> Secura brought this declaratory judgment action to determine its coverage obligations with respect to Duerr. Moving for declaratory judgment and partial summary judgment, Secura argued that the Germann Road Fire was a single occurrence. Consequently, it advanced that the $500,000 policy limit from the Logging and Lumbering Operations Endorsement was applicable, rather than the $2 million aggregate limit. Secura also contended that the umbrella policy afforded no coverage for the damage from the fire.
>
> The circuit court rejected Secura's argument regarding the applicable policy limit. Relying on Wilson Mut. Ins. Co. v. Falk, 2014 WI 136, 360 Wis.2d 67, 857 N.W.2d 156, the circuit court concluded that 'although there was one uninterrupted cause of the fire, each 'seepage' of fire onto another's property constitute[d] a separate occurrence for purposes of the policy.' However, the circuit court agreed with Secura that its umbrella policy provided no coverage for any damages.
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[The Court of Appeals] It affirmed the circuit court's determination regarding the CGL policy, concluding that the circuit court properly applied the $2 million aggregate policy limit."

Holding:

"[I]n *Falk*, the insured spread liquid cow manure on farm fields as fertilizer. 360 Wis.2d 67, ¶5. Several neighbors alleged that the manure contaminated their wells…. Applying the cause theory, this court determined that '[b]ecause the occurrence under the ... policy is well contamination, not manure application, there was an occurrence each time manure seeped into a unique well.' Id., ¶67. 'As such, an "average person" would not consider the well contamination to be one event because manure had to seep into each individual well for the alleged contamination to occur.'

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Here, the court of appeals concluded that *Falk* controlled. It analogized the fire at issue to the seepage of manure that occurred in *Falk* . The court of appeals' approach is unpersuasive for several reasons.

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First, there are significant factual differences between a forest fire and the seepage of manure into a well. When determining whether there is one occurrence or multiple occurrences, we must take into account elements of time and geography. Specifically, a single occurrence takes place if the cause and result were 'so simultaneous or so closely linked in time and space as to be considered by the average person as one event ....' Plastics Eng'g Co., 315 Wis.2d 556, ¶38 (quoting Welter, 126 Wis.2d at 251).

In *Falk*, the manure seeped over the course of an unspecified period of time. Conversely, the fire in this case burned continuously for three uninterrupted days. A three-day fire in a discrete area caused by a single precipitating event would reasonably be considered by the average person to be one event. Regardless of how many property lines the fire crossed, the damage closely follows the cause in both time and space.

***

Our conclusion that the fire here constitutes a single occurrence is buttressed by decisions from other jurisdictions likewise determining a fire destroying the property of multiple claimants to be a single occurrence. See Denham v. La Salle-Madison Hotel Co., 168 F.2d 576, 583 (7th Cir. 1948) (explaining that a fire that damaged property in numerous hotel rooms was a single occurrence) …."

**Legal Lessons Learned: The logging equipment company, which paid for insurance against this type of loss, must feel that its insurance company has treated their customer like "manure." Insurance policies are often difficult to interpret. Fire & EMS departments should invite their liability insurance carrier(s) in for a discussion about what is covered and what is not covered.**

# OH: UNOCCUPIED PROPERTY, OWNER CONV. CODE VIOLATIONS – COURT CAN REQUIRE INTERIOR INSPECTIONS WITHOUT WARRANT

On Oct. 11, 2018, in City of Cleveland v. James Grunt, Jr., the Ohio Court of Appeals for Cuyahoga County held (3 to 0) that a judge on the Cleveland Municipal Court – Housing Division had authority to allow warrantless inspections of the property to confirm that owner is complying with Cleveland Building Department requirements. "[W]e find no cases in Ohio directly on point, i.e., discussing the constitutionality of ordering a property inspection as a condition of CCS. However, we find guidance in R.C. 2951.02, which authorizes warrantless searches during an offender's misdemeanor CCS under certain circumstances."

Facts:

> "On December 5, 2016, the city of Cleveland ('Cleveland') filed this case against Grunt alleging eight exterior violations of Cleveland's housing code relating to Grunt's property located at 4894 W. 13th Street. On July 25, 2017, Grunt pled no contest to failure to comply with a housing code violation notice for 42 days. This court has interpreted Cleveland Codified Ordinances 367.99 to mean that 'each day of noncompliance constitutes a separate offense.' Cleveland v. Lucas, 8th Dist. Cuyahoga No. 105521, 2018-Ohio-167, ¶ 6. On September 12, 2017, the court sentenced Grunt to two years of community control sanctions ('CCS'), to include 60 hours of court community service and an interior inspection of the property. ***
>
> Grunt also argues that the court-mandated interior inspection of his property violates his constitutional rights. Specifically, Grunt argues that this inspection amounts to an unreasonable 'warrantless administrative search.' Grunt cites to Cleveland Codified Ordinances 367.03, which states that the city 'may enter at reasonable times, * * * any dwelling * * * in the City to perform any duty imposed [under the] Housing Code * * *, provided that permission to enter is obtained from the * * * owner * * * . If such permission is refused or is otherwise unobtainable, a search warrant shall be obtained * * *.' Grunt argues that no permission was given, no warrant was issued, and no probable cause established; therefore, the ordered interior inspection violates his constitutional private property rights.
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> ***
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> Cleveland presented evidence during the resentencing hearing that the house has been unoccupied for the past eight years and Grunt's repairs to cure the violations are 'nowhere near complete.' For example, according to the housing court specialist who prepared Grunt's presentence investigation report, the violations to the driveway were no longer visible 'because of the junk and debris that's accumulated now.' Additionally, on October 16, 2017, the garage was condemned. Furthermore, Grunt has been cited for violations to this same property in 2000, 2002, 2008, 2014, 2015, and 2016. "

Holding:

> "We find that inspecting the interior of Grunt's property for violations is related to rehabilitating Grunt, who has been cited for continuing exterior violations regarding this property since 2000. Furthermore, we find

that there is 'some relationship' between the condition of the interior of the property and the condition of the exterior of the property. Finally, we find that inspecting the property is reasonably related to failure to comply with a notice of housing violations. Under *Jones*, [State v. Jones, 49 Ohio St.3d 51, 53, 550 N.E.2d 469 (1990)], the interior inspection of the property as a condition of Grunt's CCS furthers the statutory goals of misdemeanor sentencing."

**Legal Lessons Learned: This decision can be helpful precedence in Ohio for communities struggling with empty properties.**

**File: Chap. 1, American Legal System**

## OH: 8 SHOT TO DEATH - PRELIM. AUTOPSY REPORTS / NOTES NOT PUB. RECORDS, BUT JOURNALISTS HAVE RIGHT TO SEE

On Sept. 19, 2018, in The State Ex Rel. Cincinnati Enquirer v. Pike County General Health District, et al., the Ohio Supreme Court held (5 to 0) that: "the function of R.C. 313.10(D) is to give journalists limited access to records that are not public records. If a journalist could review only autopsy reports that are public records, then he would have no greater access than the general public, and R.C. 313.10(D) would be a dead letter."

Facts:

"This case arises out of the murders of eight members of the Rhoden and Gilley families in Pike County in April 2016. On May 16, 2016, Kevin Grasha, a Cincinnati Enquirer reporter, contacted the Pike County General Health District, asking to view the preliminary autopsy and investigative notes and findings relating to the homicides of Christopher Rhoden Sr., Christopher Rhoden Jr., Dana Rhoden, Clarence Rhoden, Hanna Rhoden, Hannah Gilley, Kenneth Rhoden, and Gary Rhoden. Grasha made his request pursuant to R.C. 149.43, the Ohio Public Records Act. Grasha made a second request on May 24.

On May 25, 2016, the Pike County prosecuting attorney, in his role as counsel for the Pike County General Health District and appellee, Pike County's medical examiner and coroner ("coroner"), denied the request to view the records.

During further exchanges, counsel for the Enquirer invoked R.C. 313.10(D), which provides that upon a request in proper form, journalists must be given access to review, but not copy, the preliminary autopsy reports of a county coroner. The prosecuting attorney again denied the Enquirer access to the records.

[Under Ohio Revised Code, 313.10(A)(2) following records are NOT public records.]

313.10(A(2): Except as otherwise provided in division (D) or (E) of this section, the following records in a coroner's office are not public records:

(a) Preliminary autopsy and investigative notes and findings made by the coroner or by anyone acting under the coroner's direction or supervision;

(b) Photographs of a decedent made by the coroner or by anyone acting under the coroner's direction or supervision;

(c) Suicide notes;

(d) Medical and psychiatric records provided to the coroner, a deputy coroner, or a representative of the coroner or a deputy coroner under section 313.091 of the Revised Code;

(e) Records of a deceased individual that are confidential law enforcement investigatory records as defined in section 149.43 of the Revised Code;

(f) Laboratory reports generated from the analysis of physical evidence by the coroner's laboratory that is discoverable under Criminal Rule 16.

[But journalists may read, but not copy, following coroner documents]:

313.10 (D): A journalist may submit to the coroner a written request to view preliminary autopsy and investigative notes and findings, suicide notes, or photographs of the decedent made by the coroner or by anyone acting under the coroner's discretion or supervision. The request shall include the journalist's name and title and the name and address of the journalist's employer and state that the granting of the request would be in the best interest of the public. If a journalist submits a written request to the coroner to view the records described in this division, the coroner shall grant the journalist's request. The journalist shall not copy the preliminary autopsy and investigative notes and findings, suicide notes, or photographs of the decedent.

Naming the health district and coroner as respondents, in July, the Enquirer filed a complaint for a writ of mandamus asking the Fourth District Court of Appeals to order the respondents to make the records available pursuant to R.C. 149.43(B) and 313.10. The Enquirer also asked for statutory damages and attorney fees.

In September 2016, the coroner released heavily redacted versions of the preliminary autopsy reports to the public, calling the reports 'confidential law enforcement investigatory records' under R.C. 313.10(A)(2)(e) and R.C. 149.43 (which states that confidential law-enforcement investigatory records are not public records), see R.C. 149.43(A)(1)(h) and (2). In February 2017, the court of appeals ordered the health district and coroner to submit the unredacted preliminary autopsy reports to it under seal for in camera inspection.
***

After reviewing the unredacted portions of the final autopsy reports, the court of appeals held that they were properly withheld because they constituted confidential law-enforcement investigatory records of the eight decedents and therefore were not subject to the journalist exception in R.C. 313.10(D)…."

Holding:

"The language of R.C. 313.10(D) is clear: if a journalist submits a proper request to review preliminary autopsy and investigative notes and findings, suicide notes, or photographs of the decedent made by the coroner, the coroner 'shall' grant the request. The language of R.C. 313.10(D) does not condition that right of access in any way, and the right of access certainly does not depend on whether the records in question are confidential law-enforcement records. Indeed, the statute accounts for the possibility that the materials might be sensitive by denying journalists the ability to copy the materials.

***

Based on the plain language of R.C. 313.10(D), we reverse the judgment of the court of appeals and grant a writ of mandamus."

**Legal Lessons Learned: The Cincinnati Enquirer may next seek reimbursement of attorney fees. Fire & EMS departments, when requested to produce documents that may not be "public records" (for example, HIPAA-protected EMS run reports), should consult legal counsel before deciding whether to release the documents.**
Note: On Nov. 13, 2018, arrests were made: "Pike County: Wagner Family Arrested In The Rhoden Family Massacre…. Arrested and charged with murder and a slew of other charges were Angela Wagner, 48, her husband George 'Billy' Wagner, 47, and their two sons, George Wagner IV, 27, and Edward 'Jake' Wagner, 26."

**File: Chap. 2, LODD / Safety**

## IL: PROSTATE CANCER – STAT. PRESUMPTION – DENIED COVERAGE, FF's MD WAS NOT BOARD CERTIFIED ONCOLOGY OR UROLOGY

On Nov. 14, 2018, in Clifford A. Ekkert v. Illinois Workers Compensation Commission and Village of Oak Brook, the Appellate Court of Illinois, Second District, Workers Compensation Division, held (5 to 0) that firefighter Ekkert is not covered by workers comp: "claimant did not adequately set forth and develop an argument as to why the ultimate decision of the Commission was contrary to the manifest weight of the evidence."

Facts:

> "Defendant was diagnosed with prostate cancer in 2011 [at age 55]. He asserts that various environmental exposures he was subjected to as part of his employment with respondent was a causal factor in the development of his cancer. The following evidence was presented at the arbitration hearing.
>
> Claimant testified that he was employed by the Village of Oak Brook fire department beginning in 1991. He was initially employed as a fireman and paramedic. Seven or eight years later, he was promoted to lieutenant and subsequently —in 2008 or 2009—to battalion chief.
>
> Claimant described his various duties. As a firefighter and paramedic, he was part of the 'first line-in company.' They would 'enter all structure fires, [and] respond to dumpster fires, brush fires, [and] car fires.' Claimant would also respond to ambulance calls and perform general maintenance around the fire station. He was exposed to fire and smoke approximately 10 to 12 times per year. When he was promoted to battalion chief, the number of exposures increased, as he was required to be present at additional fires. When he was first hired, he underwent a medical and physical examination, which he passed. He underwent annual physicals.
>
> Early in his career, firefighters did not always use SCBA (self-contained breathing apparatus) equipment. However, they later used it 'pretty much on all structure fires, car fires, etc.' After the fire was extinguished, they removed this equipment during the 'overhaul' phase. 'Overhaul' is the phase after the main fire is extinguished and the firefighters are inspecting for 'hot spots.' Often, during overhaul, the smoke 'hadn't cleared yet.' Overhaul was 'probably the longest period of a fire.' Sometimes, the air in his SCBA equipment would be expended, and, because he was 'taxed' he would continue without getting another bottle of air. He estimated that he proceeded without SCBA equipment on 30 to 50 occasions.

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Claimant testified that he was evaluated by Dr. Ernest Chiodo at the request of his attorney on November 6, 2014…. Claimant stated that he saw Chiodo on one occasion. He was aware that Chiodo would not be providing him with medical care. Chiodo's office was not a typical doctor's office; it did not have an examination room…. On cross-examination, Chiodo acknowledged that he was not board certified in oncology and he is not a specialist in that field. He added that 'oncology is part of the knowledge, training and testing of a general internist.' He is also not board certified in urology. Though he is licensed in the state of Illinois, he does not have an active practice here.
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[The Village of Oak Brook's expert witness was Dr. Leva Elterman,] Dr. Lev Elterman also testified via evidence deposition. He is a board-certified urologist. As part of his practice, he performs prostatectomies. He sees 50 to 60 patients per week, and half of them 'have some condition of the prostate.' Recognized risk factors for prostate cancer are 'heredity, ethnic origin, age, and diet.' Patients with no known risk factors start being screened at the age of 50, which indicates an 'increasing risk of us finding cancer."

Elterman testified that '[t]here is no known risk factors for the firefighters with respect to the risk of prostate cancer.' He added, 'there are a large body of literature looking at that,' but 'my understanding is that there is no clear evidence that firefighter exposure would lead to increased risks of prostate cancer formation.'"

Holding:

"The [firefighter statutory] presumption contained in section 1(d) of the Act (820 ILCS 310/1(d) (West 2010)) is substantially the same as the presumption contained in section 6(f) of the Illinois Workers' Compensation Act (Workers' Compensation Act) (820 ILCS 305/6(f) (West 2010)). Section 1(d) of the Act states, in relevant part:

> 'Any condition or impairment of health of an employee employed as a firefighter, emergency medical technician (EMT), emergency medical technician-intermediate (EMT-I), advanced emergency medical technician (A-EMT), or paramedic which results directly or indirectly from any bloodborne pathogen, lung or respiratory disease or condition, heart or vascular disease or condition, hypertension, tuberculosis, or cancer resulting in any disability (temporary, permanent, total, or partial) to the employee shall be rebuttably presumed to arise out of and in the course of the employee's firefighting, EMT, EMT-I, A-EMT, or paramedic employment and, further, shall be rebuttably presumed to be causally connected to the hazards or exposures of the employment.' 820 ILCS 310/1(d) (West 2010).

***

In sum, we hold that the evidence set forth by respondent was sufficient to rebut the presumption set forth in section 1(d) of the Act (820 ILCS 310/1(d) (West 2010)).
Regardless of whether the Commission should have ultimately rejected Elterman's opinion as a question of fact, it did constitute evidence of a cause for claimant's cancer outside of his employment with respondent."

**Legal Lessons Learned: A firefighter with prostate cancer, seeking workers compensation, needs to consult a board-certified expert in urology. The statutory presumption is rebuttable by employer's expert witness.**

# NY: JUVENILE ARRESTED TERRORISM – WHEN FATHER BECAME U.S. CITIZEN, SON NOW A CITIZEN, CAN NOT BE DEPORTED

On Sept. 13, 2018, in Mohammed Khalid v. Jefferson Sessions, U.S. Attorney General, the U.S. Court of Appeals for Second Circuit [N.Y.], held (3 to 0): "We hold that the short, temporary physical separation caused by Khalid's time in federal pretrial juvenile detention did not strip Khalid's father of his 'physical custody' of Khalid as that term is used in 8 U.S.C. §1431(a), and that consequently, Khalid is a U.S. citizen.

Facts:

> "Petitioner Mohammed Hassan Faizan Khalid entered the United States with his family as an LPR [legal permanent resident] in 2007. He was born in the United Arab Emirates, but as the child of two Pakistani parents, he was a Pakistani citizen.
>
> From at least the summer of 2009, when he was 15 years old, until his arrest in July 2011 at age 17, Khalid used the internet to attempt to assist extremists in the United States and abroad.
>
> According to the government, Khalid helped with recruitment efforts by translating jihadist videos from Urdu into English, and then posting those videos online. In addition, Khalid assisted a co-defendant who aspired to commit jihad in Europe by attempting to fundraise for that co-defendant and by concealing evidence from the FBI.
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> Federal agents arrested Khalid on July 6, 2011. At the time he was arrested, Khalid was seventeen years old, had just graduated from high school, and was living at home with his parents in suburban Baltimore. Following his arrest, Khalid was detained at the Berks County Youth Correctional Center '('Berks') in Berks County, Pennsylvania. Shortly thereafter, a federal district judge ordered Khalid's continuing detention at that Facility pursuant to 18 U.S.C. §§5034–5035, which governs federal pretrial juvenile detention.
>
> A little over a month after his arrest, on August17, 2011, Khalid's father became a U.S. citizen. At the time Khalid's father naturalized, Khalid was still detained at Berks. The government transferred Khalid to an adult facility that October, after Khalid turned eighteen years old.
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> Khalid cooperated extensively with the government following his arrest. He met with federal investigators over twenty times and testified in grand jury proceedings for two investigations. The government acknowledged that 'Khalid's assistance advanced multiple national security investigations in important ways.'

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Khalid pleaded guilty to violating 18 U.S.C. §2339A, but because of his cooperation, the government requested a downward departure from Khalid's recommended guidelines sentence of fifteen years' imprisonment. The district court sentenced Khalid to five years' imprisonment, which he has served.

In late 2015, after Khalid served his sentence, the government transferred him to the custody of Immigration and Customs Enforcement, and the DHS commenced removal proceedings against Khalid based upon his conviction.

Khalid moved to terminate the removal proceedings on the ground that he is a U.S. Citizen by virtue of his father's naturalization… "

[Immigration Law Judge denied his motion, and his appeal to Board of Immigration Appeals affirmed the denial.]

Holding:

"We hold that the brief, temporary separation created by Khalid's pretrial juvenile Detention did not prevent Khalid from satisfying the 'physical custody' requirement of 8 U.S.C. §1431(a), and that consequently, he obtained derivative citizenship from his father in 2011. As a result, Khalid is a citizen of the United States. Accordingly, we GRANT the petition for review, VACATE the BIA's decision, and REMAND with instructions to terminate Khalid's removal proceedings."

**Legal Lessons Learned: Citizenship is a great privilege. Congress needs to consider revising the Immigration laws so that those convicted of terrorism are not automatically granted citizenship when their parent becomes a citizen.**

See article, "Mohammad Hassan Khalid given five years in jail for his part in jihadist plot," Khalid, the youngest person at 15 to be prosecuted for terrorism in the US, found guilty of involvement in conspiracy by 'Jihad Jane' to kill Swedish artist. Khalid, a Pakistani migrant living in Maryland, was 15 years old when he first began chatting on the internet with Colleen LaRose, the Philadelphia housewife who called herself "Jihad Jane". LaRose, who is serving a 10-year prison sentence for her part in the conspiracy, drew him into a plan to kill the Swedish artist Lars Vilks, who had drawn the head of the prophet Muhammad on the body of a dog.

# PA: 62,000 HOSPITAL EMPLOYEE RECORDS HACKED – PA SUPREME COURT - EMPLOYERS HAVE DUTY TO PROTECT

On Nov. 21, 2018, in Barbara A. Dittman, et al. v. UPMC d/b/a The University of Pittsburgh Medical Center, et al., the PA Supreme Court ruled (4 to 3), the lawsuit was reinstated against the hospital. "We hold that an employer has a legal duty to exercise reasonable care to safeguard its employees' sensitive personal information stored by the employer on an internet-accessible computer system."

Facts:

> "In the complaint, Employees alleged that a data breach had occurred through which the personal and financial information, including names, birth dates, social security numbers, addresses, tax forms, and bank account information of all 62,000 UPMC employees and former employees was accessed and stolen from UPMC's computer systems…. Employees further alleged that the stolen data, which consisted of information UPMC required Employees to provide as a condition of their employment, was used to file fraudulent tax returns on behalf of the victimized Employees, resulting in actual damages.
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> ***
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> … Employees contend that the fact that the ultimate harm in this case resulted from criminal activity does not eviscerate the duty UPMC owed to Employees to handle its collection and storage of employee data with reasonable care. Employees acknowledge that one generally does not owe a duty to others to protect them against criminal conduct. Employees contend, however, that there are many exceptions to this rule and that the duty to take reasonable anticipatory measures against foreseeable criminal conduct in certain scenarios has deep roots in common law.
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> In response, UPMC challenges Employees' assertion that it assumed a legal duty to protect against a criminal data breach through commission of an affirmative act. UPMC contends that it merely possessed employee information incident to a general employment relationship, which cannot constitute an affirmative act that entails legal liability for third-party criminal conduct. UPMC notes that it is not in the business of providing data security, was not retained to provide data security, was not otherwise tasked with providing data security, and never pursued such an undertaking."

Holding: Lawsuit may proceed [reversing a trial judge, and 3-judge Superior Court decisions]

> "[W]e agree with Employees that, in collecting and storing Employees' data on its computer systems, UPMC owed Employees a duty to exercise reasonable care to protect them against an unreasonable risk of harm arising out of that act.
>
> Further, to the extent that UPMC argues that the presence of third-party criminality in this case eliminates the duty it owes to Employees, we do not agree.

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Based on the foregoing, we conclude that the courts below erred in determining that UPMC did not owe a duty to Employees to use reasonable care to safeguard their sensitive personal data in collecting and storing it on an internet-accessible computer system. We further hold that the lower courts erred in concluding that Pennsylvania's economic loss doctrine bars Employees' negligence claim.

Accordingly, we vacate the judgment of the Superior Court, reverse the order of the trial court, and remand the matter to the trial court for further proceedings consistent with this opinion."

Legal Lessons Learned: This is an important decision that will now proceed to trial or settlement. Hopefully this decision will prompt employers in PA, and other states, including Fire & EMS agencies, to review their electronic data safeguards with IT experts.
Note: Ohio has enacted the Ohio Data Protection Act, effective Nov. 2, 2018 (to be in Ohio Revised Code 1354.01-05), which provides companies with an affirmative defense to lawsuits involving release of personal information, if the company has a written cybersecurity program that conforms to the NIST Cybersecurity Framework.

See Sept. 20, 2018 article, "New Ohio law incentivizes businesses that comply with cybersecurity programs,"

**File: Chap. 6, Employment Litigation**

## U.S. SUP. CT: TWO CAPTAINS LAID OFF - AGE DISCRIM. ACT COVERS PUBLIC AGENCIES WITH ONE OR MORE EMPLOYEES – 20 FOR PRIVATE

On Nov. 6, 2018, in Mount Lemmon Fire District v. Guido, et al., the U.S. Supreme Court (8 to 0) held: "that state and local governments are 'employer[s]' covered by the ADEA regardless of their size" [while private employers are only covered if have 20 or more employees].

Facts:

"Faced with a budget shortfall, Mount Lemmon Fire District, a political subdivision in Arizona, laid off its two oldest full-time firefighters, John Guido (then 46) and Dennis Rankin (then 54). Guido and Rankin sued the Fire District, alleging that their termination violated the Age Discrimination in Employment Act of 1967 (ADEA), 81Stat. 602, as amended, 29 U. S. C. §621 et seq.

The Fire District sought dismissal of the suit on the ground that the District was too small to qualify as an 'employer' within the ADEA's compass."

[The U.S. District Court dismissed the lawsuit; the U.S. Court of Appeals for the 9th Circuit reversed, and the U.S. Supreme Court agreed to hear the FD's appeal.]

Holding:

"The Fire District warns that applying the ADEA to small public entities risks curtailment of vital public services such as fire protection. Experience suggests otherwise. For 30 years, the Equal Employment

Opportunity Commission has consistently interpreted the ADEA as we do today. EEOC Compliance Manual: Threshold Issues §2–III (B)(1)(a)(i), and n. 99. See also Kelly, 801 F. 2d, at 270, n. 1.

And a majority of States forbid age discrimination by political subdivisions of any size; some 15 of these States subject private sector employers to age discrimination proscriptions only if they employ at least a threshold number of workers. See Brief for Respondents28–29, and n. 6 (collecting citations). No untoward service shrinkages have been documented."

**Legal Lessons Learned: The two former Captains may now proceed with their lawsuit. Fire & EMS departments, when conducting layoffs, should carefully document their rational for any layoffs not involving the "last hired."**

See 9th Circuit decision:
"John Guido and Dennis Rankin were both hired in 2000 by Mount Lemmon Fire District, a political subdivision of the State of Arizona. Guido and Rankin served as full-time firefighter Captains. They were the two oldest full-time employees at the Fire District when they were terminated on June 15, 2009, Guido at forty-six years of age and Rankin at fifty-four."

**File: Chap. 9, Americans With Disabilities Act**

## LA: BACK INJURY – FF DISABILITY RETIREMENT – FAILED TO TIMELY FILE FOR WORKERS COMP - ONE YEAR REQUIREMENT

On Nov. 21, 2018, in Brian Mule v. St. Bernard Parish Fire Department, the Court of Appeal, 4th District held (3 to 0) that Office of Workers Compensation trial judge properly ruled that the employee was not entitled to supplemental benefits: "Mr. Mule waited more than seven years after this May 22, 2009 injury to pursue his claim for indemnity benefits. The OWC, having reviewed the record, exhibits and listening to the testimony of Mr. Mule and Ms. Bradbury, held that Mr. Mule did not establish that he was lulled into not filing a claim within the prescriptive period under the totality of the circumstances."

Facts:

"Mr. Mule was an employee of the Appellee [St. Bernard Parish Fire Department], when, on May 22, 2009, he injured his back while transporting a patient down a set of stairs. It is uncontested that he properly reported the incident and injury to the Appellee. As a result of the incident, he received medical treatment and was restricted from work. He received epidural injections and physical therapy treatment for his injuries. Mr. Mule was paid Worker's Compensation indemnity benefits from the date of his injury through July 24, 2009, when he was released to return to work.

The record reflects that a Worker's Compensation Form 1002, a Notice of Payment form, was submitted by the Appellee to the Louisiana Workforce Commission on July 2, 2009, stating that Mr. Mule has been paid 'full pay in lieu of comp.' However, Mr. Mule testified no one ever explained this to him.

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Mr. Mule testified that he received his full pay while out from work and did not lose any of his benefits as a result of sustaining an on-duty injury.

Following his return to work in 2009, Mr. Mule periodically suffered with more intensive back pain, causing him to miss more time from work. He received full pay during each of these absences, as more fully described below.

He experienced back pain in March 2011, for which he received treatment and had to miss time from work. He was diagnosed with a herniated disc. He again received full pay while absent from work in 2011. He later returned to work. In 2013, his back pain returned and he received treatment and underwent surgery, causing him to miss time from work.

He continued experiencing pain and had another surgery in 2014, wherein a neuro-stimulator was implanted into his spinal cord on June 26, 2014. He returned to work on August 18, 2014. Nevertheless, Mr. Mule testified that the stimulator dislodged a few months later, causing him to have another surgery, but to no avail.

Despite passing a functional capacity exam in December 2014, Mr. Mule was not able to return to work because he was unable to perform his job without taking pain medications.
In 2016, Mr. Mule was advised by his treating neurologist, Dr. Gregory L. Fautheree, that his treatment options for pain had been exhausted and that it was best for Mr. Mule to
Retire. Mr. Mule did opt to retire.

Thereafter, he filed a Disputed Claim for Compensation on March 16, 2017, wherein he
Named the Appellee as a defendant.

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A trial was held on November 30, 2017, in the OWC. Mr. Mule and Stephanie Bradbury were the only two witnesses who testified at trial. Ms. Bradbury, the insurance or risk manager for St. Bernard Parish, testified that Mr. Mule received indemnity benefits from May 22, 2009, through July 24, 2009.

She explained that the Appellee and St. Bernard Parish government are self-insured.
She stated that Mr. Mule received no further indemnity benefits after July 2009. She testified that she explained to Mr. Mule in 2013, when he called her seeking assistance with having his initial surgery approved, that his indemnity benefits had prescribed.

She further testified that she explained to him that his indemnity or supplemental earnings benefits had prescribed when he retired in 2016. Lastly, she explained that
in 2011, an internal notation was made within the file of the third party administrator, FARA/York, citing that Mr. Mule's indemnity claim had prescribed. This notation was admitted into evidence at trial.

The OWC later ruled that Mr. Mule's right to indemnity benefits had prescribed under the Louisiana Worker's Compensation Act, and that the estoppel exception to prescription was inapplicable. Mr. Mule's claim was dismissed with prejudice."

Holding:

> "Mr. Mule asserts that his herniated disc is an occupational disease, and his disputed claim for compensation was timely filed within one year of the date he became disabled from firefighting under La. Rev. Stat. 23:1031.1(E). The Appellee notes, however, that Mr. Mule did not raise this issue before the OWC. Therefore, it argues that he is precluded from raising this issue for the first time on appeal. We agree."

**Legal Lessons Learned: Fire & EMS personnel, injured on the job and facing disability retirement, should consult with a workers comp. expert regarding filing requirements for workers comp indemnity benefits.**

**File: Chap. 11, Fair Labor Standards Act**

## NC: FLSA – VOLUNTEER NONPROFIT, PRIVATE FD – NOT ELIGIBLE OVERTIME EXEMPTION – NOT "PUBLIC AGENCY"

On Nov. 8, 2018, the U.S. Department of Labor issued Opinion Letter FLSA 2018-24, concluding: "Based on the facts you have provided, the nonprofit, privately owned fire departments that you describe are not public agencies within the meaning of Section 7(k) and are therefore not entitled to its partial overtime exemption."

Facts:

> "Your letter represents that your client, a nonprofit firefighters' association, consists partly of nonprofit, privately owned volunteer fire departments that contract with North Carolina municipalities and counties to provide fire protection services to the general public. These fire departments do not consider themselves political subdivisions and do not avail themselves of the partial exemption in Section 7(k). They provide fire protection services as independent contractors, purchase most of their own equipment, and independently elect their board of directors, which appoints their officers. Their bylaws give them independent judgment and discretion over their operations.
>
> These fire departments receive public funds from the North Carolina Department of Insurance and their local government clients. Additionally, the North Carolina legislature has authorized local government s to collect a 'fire fee' from taxpayers, which helps to fund the fire departments. The local governments also provide oversight; for example, they may review and audit the fire departments' financials and budgets, make suggestions or provide input concerning their funding, and appoint several nonvoting seats to their board of directors. Upon dissolution, the fire departments' bylaws require the distribution of their assets to the government for a public purpose."

Holding:

> "The FLSA provides a partial exemption to the overtime pay requirements of Section 7(a) for employees of public agencies engaged in fire protection activities. See 29 U.S.C. §207(k). FLSA Section 3(x) defines a 'public agency' as, among other things, 'any agency of ... a State, or a political subdivision of a State.' 29 U.S.C. §2 03(x); see
> 29 C.F.R. §553.1(c). 'The key factors in determining whether a private party should be considered a public agency are whether the entity is directly responsible to public officials or to the general public and whether

the parties' contracts designate them as state agencies rather than independent contractors.' Wilcox v. Terrytown Fifth Dist. Volunteer Fire Dep't, Inc., 897 F.2d 765, 767 (5th Cir. 1990)(holding that a nonprofit fire fighting corporation that is required to provide its annual budget to the local government, is funded almost exclusively by local taxes, is subject to local government audit, and whose contract gives the local government 'governing authority' over its operations is a public agency)….

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In determining whether in entity is 'directly responsible' to the public, the 'single most determinative factor' is whether public officials select and control the entity's board of directors. WHD Opinion Letter FLSA1226, 1986 WL 383425, at *4 (Mar.18, 1986); see WHD Opinion Letter FLSA 730 (Oct. 9, 1990) (describing appointment and removal of board members as 'the key factor'); see also Powell, 771 F.2d at 1312 (focusing on appointment and removal of board members); Williams v. Eastside Mental Health Ctr., Inc., 669 F.2d 671, 679 (11th Cir. 1982) (same). Another important factor is whether public officials hire and fire the entity's employees.

OPINION

To begin with, the fire departments do not satisfy the first Wilcox factor because they are not 'directly responsible' to public officials or to the general public. See Wilcox, 897 F.2d at 767. They purchase most of their own equipment, exercise independent judgment and discretion over their operations, and—most importantly—independently elect their board of directors."

**Legal Lessons Learned: When in doubt, it is helpful to seek an "official" Opinion Letter; helps avoid litigation. These North Carolina nonprofit FDs must therefore continue to pay overtime to employees working over 40 hours in a work week. They don't enjoy the "7(k) exemption" which allows public-sector FDs, for example, to pay overtime after 212 hours in a 28-day pay period (after 53 hours in a work week).**

See IAFF Manual (page 8); court cases involving 7k exemption:

**File: Chap. 13, EMS**

## OH: PUBLIC RECORDS – EMS JOB DESCRIPTIONS, ETC. - RESPONSE FIVE MONTH DELAY, MUST PAY ATTORNEY FEES

On Nov. 14, 2018, in Cleveland Association Of Rescue Employees – Local 1975 v. City of Cleveland, the Ohio Court of Appeals for Cuyahoga County, held (3 to 0) held that the City must reimburse CARE $8,812.50 in attorney fees. "This court finds that the city's failure to respond to the records request by releasing the requested records in this case was unreasonable. The city's two-month delay in producing some of the records and more than five-month delay in producing all the requested records constitutes a failure to respond within a reasonable time."

Facts:

"On December 7, 2017, CARE [labor union for Cleveland paramedics, EMTs, dispatcher, submitted a public records request for City records seeking, including]:

Current job descriptions for the following positions: Patrol Officer, journeyman Fire Fighter, Emergency Medical Dispatcher, Emergency Medical Technician, Paramedic.

1.) Identification of the current certifications and/or minimum educational requirements for the following positions: Patrol Officer, Journeyman Fire Fighter, Emergency Medical Dispatcher, Emergency Medical Technician, Paramedic.

***

The record before this court does not include justifications that would warrant a finding that the city acted reasonably in the present case. This court finds that some of the records produced did not require redaction or extensive gathering of far-flung information. In its first and second requests, CARE sought the job descriptions and required certifications for various safety-related positions within the city. Information responsive to these requests is regularly maintained by the city and requires little review, redactions, or scrutiny. Yet, the city failed to respond to these requests until the mandamus action was filed.

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As a result of the city's delay, CARE asserts that it was prevented from using some of the requested records during the collective bargaining process. According to CARE, arbitration proceedings took place on March 6, 2018, and April 6, 2018. During these
proceedings, CARE was prevented from using records that the city failed to timely produce — specifically requests three, four, and ten.

3.) Identification of the number and type of work-related injuries or illness sustained by the following positions (on an annual basis, from 01/01/2012 through the current date): Patrol Officer, Journeyman Fire Fighter, Emergency Medical
Dispatcher, Emergency Medical Technician, Paramedic.

4.) Identification of the total number of injuries suffered by Division of EMS employees, Division of Police employees, and Division of Fire employees, from 01/01/2012 through the current date, by year, with the number of hazardous duty injuries and non-hazardous duty injuries identified, including, but not limited to documentation summarizing employee injuries put together by or provided to the City Safety Review Committee, Dr. Edweana Robinson and/or Risk Manager Ed Romero.

10.) Attrition Reports and/or other documents identifying employees separating from service, including the employee's position, separation date and reason for separation (resign, terminate, transfer, retire, etc.) for years 2012 through 2017, for Cleveland EMS, Cleveland Fire and Cleveland Police."

Holding:

"Based on the statutory language in R.C. 149.43(C)(3)(b), even when a claim for
the production of records is moot as a result of the release of the requested records during the pendency of a mandamus action, a court may award attorney fees where the public office or official fails to respond to the request affirmatively or negatively within a reasonable time under R.C. 149.43(C) (3)(b)(i), R.C. 149.43(B)(1), and R.C. 149.43(B)(7)(a).

***

> This court determines that CARE has demonstrated the amount of reasonable attorney fees expended in the pursuit of receiving records to which it is entitled. R.C. 149.43(C)(4)(b). Further, under R.C. 149.43(C)(4)(c), CARE is entitled to attorney fees for hours expended demonstrating its entitlement to attorney fees. Therefore, CARE is awarded $8,812.50 in attorney fees."

**Legal Lessons Learned: Public records act statutes require prompt response; political subdivision should promptly produce readily available records, such Fire & EMS job descriptions and certifications.**

**File: Chap. 16, Discipline**

## NJ: DUI DEVICE - STATE POLICE LAB OFFICER – FALSELY CERTIFIED THAT CALIBRATED TWICE A YEAR – OFFICER INDICTED - 20,000+ CASES

On Nov. 13, 2018, in State v. Eileen Cassidy, the New Jersey Supreme Court held: "The Court considers the admissibility of breath test results produced by Alcotest machines not calibrated using a thermometer that produces temperature measurements traceable to the standards set by the National Institute of Standards and Technology (NIST)…. The Special Master determined that the State had not shown that other states' practices revealed general acceptance of the reliability of Alcotest results without the use of a NIST-traceable thermometer. Because the Special Master's findings are supported by substantial credible evidence in the record, the Court adopts them."

Facts:

> "Marc W. Dennis, a coordinator in the New Jersey State Police's Alcohol Drug Testing Unit, was tasked with performing the semi-annual calibrations on Alcotest instruments used in Middlesex, Monmouth, Ocean, Somerset, and Union Counties. He is charged with neglecting to take required measurements and having falsely certified that he followed the calibration procedures. Dennis was indicted in 2016 for failing to use a NIST-traceable thermometer to measure the temperature of simulator solutions used to calibrate Alcotest devices. When Dennis was criminally charged, the Attorney General's Office notified the Administrative Office of the Courts that evidential breath samples from 20,667 people were procured using Alcotest machines calibrated by Dennis."

Holding:

> "The Court orders the State to notify all affected defendants of its decision that breath test results produced by Alcotest machines not calibrated using a NIST-traceable thermometer are inadmissible and commends to the State that it require the manual recording of the NIST-traceable readings going forward.
> Further, the Court lifts the stay on all pending cases so that deliberations may commence on whether and how those cases should proceed. For those cases already decided, affected defendants may now seek appropriate relief. "

**Legal Lessons Learned: False certifications can lead to unwarranted convictions, and criminal charges. EMS personnel must likewise follow EMS protocols, or patient injury or death may occur; false EMS run reports can also lead to termination of employment and even criminal charges.**