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APRIL 2019 – FIRE & EMS LAW Newsletter

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COMMUNITY PARAMEDICINE / HOSPITAL PARTNERSHIPS: See March 20, 2019 seminar video, including five (5) Fire & EMS departments sharing their programs.

DRONES FOR INCIDENT COMMAND / HAZMAT: Fall, 2019 two-day (one credit) class, UAVs FOR EMERGENCY RESPONDERS (FST 3055): Nov. 8, 2019 / Incident Commanders, to be held at UC Aerospace Flight Lab; and Nov. 9, 2019 / HAZMAT drill for multi-agencies, to be held Cincinnati FD live burn training tower.

Items in Newsletter

File: Chap. 1, American Legal System

IL: BILLING FOR FD SEVICES – ORDINANCE LAWFUL TO BILL NON-RESIDENTS, INCLUDING EXTRICATING EMPLOYEE UNDER VEHICLE

On March 28, 2019, in The City of Effingham, Illinois v. Diss Truck & Repair, LLC, the Appellate Court of Illinois - Fifth District, held (3 to 0) that the Fire Department may bill for these services for a non-resident. "After reviewing the legislative history, both before and after the enactment of the statute, we conclude that the legislature's intent in allowing a municipality to seek reimbursement for firefighting services provided to nonresidents was to eliminate the taxpayer's burden for such services; the intent was to allocate the cost of the services to nonresidents so that the citizens of the municipality were not forced to bear the cost of services performed on behalf of those not paying taxes to the municipality."

Facts:

"On June 6, 2017, Lowell Ingram and his partner, Charles Kevin Diss, were contacted by UP trucking to repair a semitrailer that had broken down at the Pinnacle parking lot in Effingham. While performing those repairs, the trailer jacks failed, and the semitrailer fell on top of Ingram, trapping him underneath. The front of the semitrailer was completely on the ground.

Diss flagged down a Pinnacle employee to call 9-1-1, and the EFD was among the responding authorities. Joseph Holomy, the chief of the EFD, was at the scene and requested extrication assistance from a towing and recovery company and local plant personnel. The local plant personnel brought forklifts from inside the plant to assist with lifting the semitrailer. Although Ingram was freed from the semitrailer, he subsequently passed away as a result of his injuries.

There were six full-time EFD firefighters and four part-time EFD firefighters on the scene to assist with the extrication services. Pursuant to the union contract, each firefighter was paid for two hours of time. A bill for the extrication services was sent to the LLC because Ingram was its employee and co-owner, and neither the business nor its owners were residents of Effingham. The bill included labor and equipment charges totaling $2072. The LLC did not pay the bill, and the City filed a small claims complaint against the LLC on November 9, 2017.

After a hearing on the small claims complaint, the trial court questioned whether section 11-6-1.1 of the Code allowed the City to obtain reimbursement for extrication services as 'firefighting services.' The court noted that the statute did not define 'firefighting services' and that it was not clear whether 'firefighting services' included extrication services performed by the EFD on behalf of nonresidents. The court noted that a similar provision of the Code (id. § 11-6-10(a)) provided for reimbursement to the volunteer fire departments for 'all services' rendered to nonresidents and not just for 'firefighting services.' Ultimately, the court found that section 11-6-1.1 of the Code did not include extrication services performed by the EFD and
entered judgment in favor of the LLC. Thereafter, the court entered a docket entry on January 23, 2018, finding that the City had not proven its case. The City appeals."

Holding:

"Here, section 11-6-1.1 of the Code allows the corporate authorities of a municipality to fix, charge, and collect firefighting service fees not exceeding the actual cost of the service for all firefighting services rendered by the municipality against persons, businesses, and other entities that are nonresidents. 65 ILCS 5/11-6-1.1 (West2016). There is no statutory definition for the term 'firefighting services.' A reasonable interpretation of 'firefighting services' could be that the term is limited to the specific service of fighting fires and those services directly incidental to fighting any such fires; the trial court took this view.
However, another reasonable interpretation of the term is that 'firefighting services' includes all services performed by a municipal fire department on behalf of nonresidents, which includes extrication services. As the statutory language is ambiguous (i.e., it is subject to two or more reasonable interpretations), it is appropriate for us to consider extrinsic evidence, such as legislative history, to ascertain the legislative intent. See Solon, 236 Ill. 2d at 44.

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Thereafter, on May 9, 2003, during the Senate's third reading of House Bill 120, Senator George P. Shadid, the Senate sponsor of the bill, stated as follows:

"House Bill 120 addresses a problem in downstate communities where there are holes in the fire protection services. If a municipality or a township fire department is called to serve an area that doesn't pay any fire protection tax, House Bill 120 allows those municipalities and township fire departments to charge nonresident persons, businesses and other entities for fire protection services." 93d Ill. Gen. Assem., Senate Proceedings, May 9, 2003, at 7 (statements of Senator Shadid).

House Bill 120 passed without further discussion and became effective on July 23, 2003.

There is no indication in the legislative history that the legislature's intent was to limit a municipality's or township's recovery of the cost of services to only services performed while fighting fires. Instead, the legislative history reveals that the intent was to allow reimbursement from nonresidents whenever the fire department is called to serve an area.

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After reviewing the legislative history, both before and after the enactment of the statute, we conclude that the legislature's intent in allowing a municipality to seek reimbursement for firefighting services provided to nonresidents was to eliminate the taxpayer's burden for such services; the intent was to allocate the cost of the services to nonresidents so that the citizens of the municipality were not forced to bear the cost of services performed on behalf of those not paying taxes to the municipality. Like with the fire protection districts and the volunteer firefighters, a municipality's and township's fire department services are not just limited to fighting fires; thus, the most reasonable interpretation of 'firefighting services' in light of the legislative history is all services rendered by the municipality's fire department."

Legal Lessons Learned: Ordinances authorizing billing of non-residents for fire department services are becoming increasingly common.

File: Chap. 2 – LODD; Safety

NJ: FF ACCIDENTAL DEATH BENEFITS - ONLY FOR THOSE WHO DIED WHILE IN "ACTIVE SERVICE" – NOT THOSE DIED AFTER RETIREMENT

On March 26, 2019, in Scott Rogow (Deceased) v. Board of Trustees, Police And Firemen's Retirement System, the Superior Court of New Jersey / Appellate Division held (3 to 0) in an unpublished option: "Accordingly, we conclude the Board properly determined that Rogow was ineligible for accidental death benefits because he was not a member in active service at the time of his death, as required by N.J.S.A. 43:16A-10,but was retired and receiving an accidental disability retirement allowance. The legislative history supports the Board's decision."

Facts:

"Scott Rogow ('Rogow') was a firefighter with the City of Paterson (City) who retired [Nov. 1, 2010] on an accidental disability retirement allowance] under N.J.S.A. 43:16A-7 and received his monthly retirement allowance until his death. Rogow's children and widow, appellant Lynne Rogow, received survivor accidental disability retirement benefits after Rogow's death pursuant to N.J.S.A. 43:16A-7(3).

***

Rogow died on August 28, 2012. After receiving notice of Rogow's death, on September 20, 2012, the Division of Pensions and Benefits (Division) notified appellant that she would receive a survivor accidental disability retirement benefit of $3,884.06 per month for the rest of her life or until she remarried, plus a group life insurance benefit in the amount of $326,261.64. In addition, Rogow's two minor children would each receive $971.02 per month.

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In October 2012, appellant and the children began receiving their monthly benefits. Appellant also received the $326,261.64 group life insurance benefit. The children's monthly benefits terminated on July 1, 2017. By that time, they had received a total of $114,580.36.

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Approximately four years after Rogow's death, appellant requested that the Board of Trustees (Board) of the Police and Firemen's Retirement System (PFRS) amend Rogow's pension status so that she could receive the enhanced survivor accidental death benefits [50% of final compensation] under N.J.S.A. 43:16A-10. Appellant appeals from the Board's October 19, 2017 final agency decision denying reconsideration of its May 12, 2017 denial of her request."

Holding:

"The language of N.J.S.A. 43:16A-10(1) is clear on its face. The statute expressly provides that accidental death benefits are payable '[u]pon the death of a member in active service.'(Emphasis added).

First, Rogow was not a 'member in service' at the time of his death, as he and the City were not making pension contributions to the PFRS at that time.See N.J.A.C.17:4-6.7(a)(1) ('A "member in service" means that the member or the employer was making pension contributions to the retirement system at the time of filing the application for a disability retirement allowance').

Second, although N.J.S.A. 43:16A-10does not specifically define ‘active service,’ it is clear that Rogow also was not in ‘active service’ at the time of his death. The term ‘active’ is defined, in part, as ‘engaged in full-time service especially in the armed forces.’ Merriam-Webster's CollegiateDictionary13 (11th ed. 2014).

“N.J.S.A. 43:16A-9(1) provides for payment of death benefits to the survivor of a PFRS member who dies from non-accidental means while in active service:

Upon the receipt of proper proof of the death of a member in active service on account of which no accidental death benefit is payable under [N.J.S.A. 43:16A-10]there shall be paid to such member’s widow or widower a pension of [fifty percent] of final compensation for the use of himself or herself and children of the deceased member, to continue during his or her widowhood; if there is no surviving widow or widower or in the case the widow or widower dies or remarries, [twenty percent] of final compensation will be payable to one surviving child, [thirty-five percent] of final compensation to two surviving children in equal shares and if there be three or more children, [fifty percent] of final compensation will be payable to such children in equal shares.”

Legal Lesson Learned: Courts will enforce the plain language of statutes, particularly when the language is supported by the legislative history of the statute.

File: Chap. 3, Homeland Security

CT: ACTIVE SHOOTER - SANDY HOOK ELEMENTARY SCHOOL - LAWSUITS AR-15 MANUF. MAY PROCEED / VIOLENT ADVERTISEMENTS

On March 14, 2019 in Donna L. Soto, Administratrix (Estate of Victoria L. Soto), et al. v. Bushmaster Firearms International, et al., the Connecticut Supreme Court (4 to 3) reinstated the lawsuit brought by families of nine of the 20 children and six adults killed in the elementary school. The Court held: "The plaintiffs have offered one narrow legal theory, however, that is recognized under established Connecticut law. Specifically, they allege that the defendants knowingly marketed, advertised, and promoted the XM15-E2S for civilians to use to carry out offensive, military style combat missions against their perceived enemies. Such use of the XM15-E2S, or any weapon for that matter, would be illegal, and Connecticut law does not permit advertisements that promote or encourage violent, criminal behavior."

Facts:

"On December 14, 2012, twenty year old Adam Lanza forced his way into Sandy Hook Elementary School in Newtown and, during the course of 264 seconds, fatally shot twenty first grade children and six staff members, and wounded two other staff members. Lanza carried out this massacre using a Bushmaster XM15-E2S semiautomatic rifle that was allegedly manufactured, distributed, and ultimately sold to Lanza's mother by the various defendants in this case.

There is no doubt that Lanza was directly and primarily responsible for this appalling series of crimes. In this action, however, the plaintiffs—administrators of the estates of nine of the decedents—contend that the defendants also bear some of the blame. The plaintiffs assert a number of different legal theories as to why the defendants should be held partly responsible for the tragedy. The defendants counter that all of the plaintiffs' legal theories are not only barred under Connecticut law, but also precluded by a federal statute, the Protection of Lawful Commerce in Arms Act (PLCAA), Pub. L. No. 109-92, 119 Stat. 2095 (2005), codified at 15 U.S.C. §§ 7901 through 7903 (2012), which, with limited exceptions, immunizes firearms manufacturers, distributors and dealers from civil liability for crimes committed by third parties using their weapons. See 15 U.S.C. §§ 7902 (a) and 7903 (5) (2012).

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The plaintiffs brought the present action in 2014, seeking damages and unspecified injunctive relief. The defendants include the Bushmaster defendants (Remington), one or more of which is alleged to have manufactured the Bushmaster XM15-E2S semiautomatic rifle that was used in the crimes; the Camfour defendants, distributors that allegedly purchased the rifle from Remington and resold it to the Riverview defendants; and the Riverview defendants, etailers that allegedly sold the rifle to Adam Lanza's mother, Nancy Lanza, in March, 2010.

The gravamen of the plaintiffs' claims, which are brought pursuant to this state's wrongful death statute, General Statutes § 52-555,7 is that the defendants (1) negligently entrusted to civilian consumers an AR-15 style assault rifle8 that is suitable for use only by military and law enforcement personnel, and (2) violated the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110a et seq.,9 through the sale or wrongful marketing of the rifle."

Holding:

"For the reasons set forth in this opinion, we agree with the defendants that most of the plaintiffs' claims and legal theories are precluded by established Connecticut law and/or PLCAA. For example, we expressly reject the plaintiffs' theory that, merely by selling semiautomatic rifles—which were legal at the time1—to the civilian population, the defendants became responsible for any crimes committed with those weapons.

The plaintiffs have offered one narrow legal theory, however, that is recognized under established Connecticut law. Specifically, they allege that the defendants knowingly marketed, advertised, and promoted the XM15-E2S for civilians to use to carry out offensive, military style combat missions against their perceived enemies. Such use of the XM15-E2S, or any weapon for that matter, would be illegal, and Connecticut law does not permit advertisements that promote or encourage violent, criminal behavior.

Following a scrupulous review of the text and legislative history of PLCAA, we also conclude that Congress has not clearly manifested an intent to extinguish the traditional authority of our legislature and our courts to protect the people of Connecticut from the pernicious practices alleged in the present case. The regulation of advertising that threatens the public's health, safety, and morals has long been considered a core exercise of the states' police powers. Accordingly, on the basis of that limited theory, we conclude that the plaintiffs have pleaded allegations sufficient to survive a motion to strike and are entitled to have the opportunity to prove their wrongful marketing allegations. We affirm the trial court's judgment insofar as that court struck the plaintiffs' claims predicated on all other legal theories.

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We are confident, however, that, if there were credible allegations that a firearms seller had run explicit advertisements depicting and glorifying school shootings, and promoted its products in video games, such as 'School Shooting,' that glorify and reward such unlawful conduct, and if a troubled young man who watched those advertisements and played those games were inspired thereby to commit a terrible crime like the ones involved in the Sandy Hook massacre, then even the most ardent sponsors of PLCAA would not have wanted to bar a consumer protection lawsuit seeking to hold the supplier accountable for the injuries wrought by such unscrupulous marketing practices. That is not this case, and yet the underlying legal principles are no different.

Once we accept the premise that Congress did not intend to immunize firearms suppliers who engage in truly unethical and irresponsible marketing practices promoting criminal conduct, and given that statutes such as CUTPA are the only means available to address those types of wrongs, it falls to a jury to decide whether the promotional schemes alleged in the present case rise to the level of illegal trade practices and whether fault for the tragedy can be laid a their feet."

Legal Lessons Learned: The case will not be sent back for trial or settlement by Remington Arms Co. LLC and its "daughter company" Bushmaster Firearms International LLC.

File: Chap. 3, Homeland Security

PA: SANCTUARY CITY / ICE - 3rd CIRCUIT HOLDS FED. GOVT CANNOT WITHHOLD FORMULA GRANT FROM PHILADELPHIA

On Feb. 15, 2019, in City of Philadelphia v. Attorney General Of The United States Of America, the U.S. Court of Appeals held (3 to 0), "Concluding that Congress did not grant the Attorney General this authority, we hold that the Challenged Conditions were unlawfully imposed. Therefore, we will affirm the District Court's order to the extent that it enjoins enforcement of the Challenged Conditions against the City of Philadelphia. We will vacate part of the order, however, to the extent that it exceeds the bounds of this controversy."

Facts:

"The City of Philadelphia has received funds under the federal Edward Byrne Memorial Justice Assistance Grant Program ('Byrne JAG') every year since the program's inception in 2006. Last year, however, the Justice Department notified the City that it was withholding its FY2017 award because the City was not in compliance with three newly implemented conditions ('the Challenged Conditions'). These conditions required greater coordination with federal officials on matters of immigration enforcement.

The City filed suit to enjoin the Attorney General from withholding its award, and after discovery and extensive hearings, the District Court granted summary judgment in its favor. The City attacked the government's ability to impose the Challenged Conditions on several statutory and constitutional fronts. But we need only reach the threshold statutory question. Where, as here, the Executive Branch claims authority not granted to it in the Constitution, it 'literally has no power to act … unless and until Congress confers power upon it.' La. Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 374 (1986). Therefore, our inquiry is straightforward: did Congress empower the Attorney General to impose the Challenged Conditions?

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Federal grants to state and local governments play a large role in facilitating national, state, and local policy. In FY2018 alone, the federal government was expected to give approximately $728 billion to state and local governments through 1,319 federal grant programs. Robert Jay Dilger, Cong. Research Serv., R40638, Federal Grants to State and Local Governments: A Historical Perspective on Contemporary Issues 1 (2018). These programs encompass a wide range of policy areas, from health care to special education to infrastructure projects. Our immediate concern, however, is one particular grant program for state and local law enforcement: the Edward Byrne Memorial Justice Assistance Grant Program.

Byrne JAG, named for a fallen New York City police officer, was established in 2006 through the merger of two law enforcement grant programs. See Pub. L. No. 109-162, § 1111, 119 Stat. 2960, 3094 (2006). The Department of Justice administers the program through the Office of Justice Programs ("OJP"), which is headed by an Assistant Attorney General ('AAG'). Byrne JAG is the "primary provider of federal criminal justice funding to States and units of local government" and distributes over $80 million in awards each year. Edward Byrne Memorial Justice Assistance Grant Program FY 2017 Local Solicitation, Dep't of Justice (Aug. 3, 2017); App. 332. It is a 'formula grant,' meaning that funds are distributed among all grantees based on a statutorily fixed formula. In the case of Byrne JAG, the formula considers two factors:
population and violent crime statistics. See 34 U.S.C. § 10156. Once approved, grantees may spend those funds within any of the eight statutorily enumerated areas.

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Philadelphia has received an award under Byrne JAG every year since the program's inception in 2006. Its average annual award from the program is $2.5 million, which it has used to modernize courtroom technology, fund reentry programs for persons on release from prison, and operate substance abuse programs, among other programs.

In the FY2017 applications that are the subject of this case, the Department included three new conditions. These Challenged Conditions are:

• The Certification Condition. Grantees must "certify compliance with [8 U.S.C. § 1373 ("Section 1373")]." Backgrounder on Grant Requirements, Dep't of Justice (July 25, 2017); App. 246. Section 1373 prohibits state and local governments from restricting the sharing of information relating to an individual's immigration status—lawful or unlawful—with federal immigration officials.

• The Access Condition. Grantees must "permit personnel of the U.S. Department of Homeland Security ("DHS") to access any detention facility in order to meet with an alien and inquire as to his or her right to be or remain in the United States." Id.

• The Notice Condition. Grantees must "provide at least 48 hours advance notice to DHS regarding the scheduled release date and time of an alien in the jurisdiction's custody when DHS requests such notice in order to take custody of the alien." Id.

The Attorney General maintains that these conditions are "designed to ensure that the activities of federal law-enforcement grant recipients do not impair the federal government's ability to ensure public safety and the rule of law by detaining and removing aliens upon their release from local criminal custody." Att'y Gen. Br. 12.

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Philadelphia is not alone in being advised that its Byrne JAG award depends upon compliance with the Challenged Conditions. Indeed, several other jurisdictions have sued to enjoin enforcement of the Challenged Conditions, including the City of Chicago, the City and County of San Francisco, and the City of New York (which was joined by seven states—New York, Connecticut, New Jersey, Rhode Island, Washington, Massachusetts, and Virginia). In all of these cases, the courts that have ruled have enjoined enforcement of the Challenged Conditions."

Holding:

"The Attorney General points to several conditions—such as compliance with laws regarding human research, body armor purchases, and military equipment purchases—as establishing a practice of conditioning Byrne JAG funds on certification of compliance with broader categories of federal law. But these conditions are not blanket requirements with which the grantee must comply under all circumstances; rather, their applicability is conditioned on whether federal funds are used in a particular area. See, e.g., App. 379 (requiring compliance with 28 C.F.R. § 46, which sets out regulations for human research that is "conducted or supported by a federal department or agency"). For example, if a grantee uses funds to purchase body armor or military style equipment, then it must comply with the applicable federal regulations regarding those purchases. And if a grantee uses funds to conduct research on human subjects, then it must comply with the applicable federal regulations in that area. The Certification Condition is written differently: regardless of how a grantee uses its funds, it must certify compliance with this federal law. The Attorney General has not pointed to any historical precedent for the kind of unconditional requirement it now seeks to impose.

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[A]s we have noted, Congress structured the Byrne JAG program as a 'formula grant,' under which a jurisdiction's award is calculated through a formula that considers only population and violent crime statistics. The Attorney General asserts that the Applicable Laws Clause authorizes him to condition Byrne JAG funds on compliance with any law in the U.S. Code. But that reading of the Clause would destabilize the formula nature of the grant. Allowing the Attorney General to withhold all funds because a jurisdiction does not certify compliance with any federal law of the Attorney General's choosing undermines the predictability and consistency embedded in the program's design, thus turning the formula grant into a discretionary one. Moreover, if Byrne JAG were intended to be a discretionary grant, one would think that Congress would house it in the section of the U.S. Code containing discretionary Justice Department grants, see 34 U.S.C. Subt. I, Ch. 101, Subch. V, Part B ("Discretionary Grants"), not its own, neighboring section, see 34 U.S.C. Subt. I, Ch. 101, Subch. V., Part A ("Edward Byrne Memorial Justice Assistance Grant Program").

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After reviewing the three sources of authority offered by the Attorney General, we hold that Congress has not empowered the Attorney General to enact the Challenged Conditions. Because the Attorney General exceeded his statutory authority in promulgating the Challenged Conditions, we needn't reach Philadelphia's other arguments. Therefore, all that remains for the purposes of our review is the District Court's injunctive order.

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[Court did set aside one order of the District Court – Judicial Warrant.]

Accordingly, we hold that the District Court abused its discretion as to the scope of the equitable relief and will vacate its order to the extent it imposed a requirement that the federal government obtain a judicial warrant before seeking custody of aliens in City custody."

Legal Lessons Learned: Sanctuary City policy is a hot issue. But for a "formula grant" program based on population and crime levels, the 3rd Circuit has struck down the power of federal government to withhold grant funds.

File: Chap. 4 – Incident Command / Drones

GA: DRONE VIDEO DEMONSTRATION IN ATLANTA, AFTER SHOOTING IN FERGUSON, MO – SHOWS ARREST LAWFUL, LAWSUIT DISMISSED

On March 28, 2019, in John Ruch v. Sergeant Michelle McKenzie, U.S. District Court judge Michael L. Brown, US District Court, Northern District of Georgia / Atlanta, granted motion for summary judgment for Sergeant McKenzie, writing: "The video footage shows Plaintiff step off the sidewalk in one location, walk around a group of people watching and filming the fight, and step back onto the sidewalk — directly into the area where Defendant stood protecting the officers making arrests. (Id. at minute mark 3:58.) Contrary to Plaintiff's allegations, he was not standing still at the time of his arrest. He was moving toward the area Defendant was trying to secure."

Facts:

"Plaintiff John Ruch sued Atlanta Police Sergeant Michelle McKenzie for violating his constitutional rights and for false arrest after she arrested him for disorderly conduct during a protest in downtown Atlanta.

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On November 24, 2014, a crowd gathered in downtown Atlanta to march and protest the police shooting of a young man in Ferguson, Missouri. Plaintiff John Ruch, a freelance reporter, traveled to the downtown area 'to find breaking news in Atlanta about spontaneous protests that were happening nationwide, relating to the Ferguson, Missouri police controversy.' (Dkt. 124-2 at 42:3–6.) Plaintiff photographed protest activity, police officer response to the same, and posted those photos to Twitter from 8:48 P.M. until 11:04 P.M. without interference from police. (Dkt. 122-1 at ¶ 2.)

Shortly before midnight, a crowd of protesters moved toward the Atlanta Police Department's ('APD') Zone 5 Precinct downtown. (Id. at ¶ 3.) Some protestors began striking the Precinct windows and a large fight broke out. (Id. at ¶ 4.) Officers began arresting people. (Id.) Major James Whitmire, who was outside the Precinct, radioed other APD officers, including Defendant, for help stopping the fight. (Id. at ¶ 5; Dkt. 124-7 at 36:1–4.) He also used a bullhorn to order the protestors to clear the area around the fight and to leave the vicinity.1 (Dkt. 122-1 at ¶ 6.)

Defendant [Sgt. McKenzie] was on the same city block as the fight. (Dkt. 124-7 at 38:2–3; 38:9.) She saw the group of protestors fighting on the sidewalk outside of the Precinct. (Id. at 36:19–21.) She also saw protesters crowding around the police officers who were arresting the individuals involved in the fight. (Id. at 42:1–2.) She saw and heard Major Whitmire tell everyone in the area to disperse and clear away from the area around the fight. (Id. at 31:22–32:3.) Defendant and other officers tried to secure the area where the officers were making arrests to ensure none of the protestors attacked the officers while making those arrests. (Dkts. 122 at 15; 124-6 at 47:2–8.) Apparently, that "happens a lot" during protests. (Dkt. 124-6 at 47:2–8.) Defendant faced the street with her back to the arresting officers. (Dkt. 124-7 at 40:4–5.)

Plaintiff walked directly toward the area that APD was trying to secure. (Dkts. 122-1 at ¶ 7; 124-7 at 34:21–23.) Defendant McKenzie spotted him.2 (Dkt. 124-7 at 42:21–22.) Defendant perceived Plaintiff's presence in the r

restricted area as hazardous to the arresting officers' safety and an obstacle to the arresting officers' access to the booking teams inside the Precinct.3 (Id. at 78:6.) She stepped directly in front of Plaintiff's path. (Dkt. 122, Ex. L at minute mark 3:59.) She intercepted Plaintiff, preventing him from moving any closer toward the group of officers arresting the protestors who had been involved in the fight. Defendant grabbed Plaintiff on his left wrist or forearm area with some force, causing him to take a step backward. (Dkt. 124-2 at 151:6–7.)

Major Whitmire also saw Plaintiff approaching the area where officers were making arrests. (Dkt. 122, Ex. L at minute mark 3:58.) At about the time Plaintiff withdrew from Defendant's initial grasp, Major Whitmire tapped Plaintiff on the shoulder and said, "Take this one."4(Dkts. 122-1 at ¶ 8; 124-2 at 151:13–16.) Defendant told Plaintiff that he was under arrest and to put his phone away. (Dkt. 124-2 at 152:2–5.) She ordered him to lie on the ground and put his hands behind his back. 5(Dkt. 129-2 at ¶ 10.) Plaintiff complied without argument. (Dkt. 124-2 at 152:7–8.)

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Defendant turned Plaintiff over to APD's booking team. (Dkt. 122-1 at ¶ 11.) The arrest citation states that Plaintiff "refused to clear the area when officers were in-gaged [sic] in a fight. The accused remained in the path of officer [sic] and refused to comply, blocking officers from each other." (Dkt. 122-2, Ex. A.) Police took him to the Atlanta Detention Center but released him before placing him in a cell. (Dkt. 122-1 at ¶ 12.) The police later dropped all charges. (Id. at ¶ 13.)"

Holding:

For the reasons below, the Court grants Defendant McKenzie's Motion for Summary Judgment (Dkt. 122).

***

In his complaint, Plaintiff claims he was standing still on the sidewalk and 'remained there' prior to his arrest. (Dkt. 32 at ¶ 16.) He says he stayed on the sidewalk and merely 'shifted his body slightly' to get a better camera angle just before his arrest. (Id. at ¶ 20.) But video shot by a drone that night shows otherwise. (Dkt. 122, Ex. L.) The video footage shows Plaintiff step off the sidewalk in one location, walk around a group of people watching and filming the fight, and step back onto the sidewalk — directly into the area where Defendant stood protecting the officers making arrests. (Id. at minute mark 3:58.) Contrary to Plaintiff's allegations, he was not standing still at the time of his arrest. He was moving toward the area Defendant was trying to secure. Plaintiff also claims she arrested him while he was shooting video of the police action. (Dkt. 32 at ¶¶ 16–17, 20, 24.) But other people were taking photos or shooting video, and police did not arrest them. (Dkt. 122, Ex. L at minute mark 3:33–3:50.)

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As mentioned above, a drone recorded much of the action relevant to Plaintiff's claims. Under Eleventh Circuit precedent, 'in cases where a video in evidence obviously contradicts the nonmovant's version of the facts, [a court] accept[s] the video's depiction instead of the nonmovant's account and view[s] the facts in the light depicted by the videotape.' Shaw v. City of Selma, 884 F.3d 1093, 1098 (2018) (citations omitted) (alterations accepted). Neither party has disputed the accuracy or authenticity of the video nor suggested that it is untrustworthy. As a result, the Court 'accept[s] facts clearly depicted in a video recording even if there would otherwise be a genuine issue about the existence of those facts.' Id. at 1097 n.1.

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Based on the undisputed material facts, the Court finds that, in the light of the totality of circumstances, Defendant had a reasonable belief that, at the time of the arrest, Plaintiff was or was about to obstruct the work of the officers arresting those involved in the fight.

***

In addressing the obligations of police officers facing protestors and chaotic circumstances, the Supreme Court stated:

Like prison officials facing a riot, the police on an occasion calling for fast action have obligations that tend to tug against each other. Their duty is to restore and maintain lawful order, while not exacerbating disorder more than necessary to do their jobs. They are supposed to act decisively and to show restraint at the same moment, and their decisions have to be made 'in haste, under pressure, and
frequently without the luxury of a second chance.' Cty. of Sacramento v. Lewis, 523 U.S. 833, 853 (1998) (citation omitted).

The law does not second-guess the split-second decisions of police officers in the field.

***

Defendant McKenzie is entitled to immunity for her actions.

Legal Lessons Learned: Drone video footage, like body camera video, is admissible in evidence, and can lead to dismissal of lawsuits against police and other emergency responders. Fire & EMS Departments should consider adopting an SOG regarding use of videos.

For example, see Phoenix Fire Department Social Media SOG:

"Employees are prohibited from posting on any networking or internet site any photographs, video, or audio recordings taken on department property and/or in the performance of official duties (including all official department training, activities, or work specific assignments) that are detrimental to the mission and functions of the department, that undermine respect or public confidence in the department, could cause embarrassment to the department or City, discredit the department or City, or undermine the goals and mission of the department or City."

File: Chap. 6, Employment Litigation

PA: FIREFIGHTER TRIED TO RETIRE AT AGE 50 – BUT CITY AND UNION IN CBA SET THE MINIMUM AGE AT 55 – STATE MIN. OF 50 NOT APPLY

On March 25, 2019, in Joseph C. Bongivengo v. City of New Castle Pension Plan Board and The City of New Castle, the Commonwealth Court of Pennsylvania held (3 to 0): "This ruling also disposes of Bongivengo's

argument that the City violated Section 607(e) of Act 205 because it did not engage in collective bargaining before it implemented the new age and years of service requirements. As noted above, the City and the Union did collectively bargain for the age and years of service requirement, as first reflected in the 1992 CBA and subsequently in every CBA thereafter."

Facts:

"The City hired Bongivengo as a firefighter on August 1, 1988. During that time, the City and the Union operated under the terms of a CBA governing the years 1987 through 1990 (1987 CBA).

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The General Assembly enacted what was then commonly referred to as the Third Class City Code through the Act of June23, 1931, P.L. 932, as amended, 53 P.S. §§ 35101-39701, which the General Assembly repealed (and recodified) by the current version of the Third Class City Code, now codified at 11 Pa. C.S. §§ 10101-14702. Section 14321(a) of the current Code, 11 Pa. C.S. § 14321(a), provides:

With regard to continuous service and minimum age requirements, the ordinance establishing or regulations governing the firefighters pension fund shall prescribe as follows: (1) A *minimum* period of continuous service of not less than 20 years. (2) If a *minimum* age is prescribed, a minimum of 50 years of age. (Emphasis added.)

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By letter dated January 20, 2017, Bongivengo notified the Chief Administrative Officer for the City's Fireman's Pension Plan (Plan CAO) of his intent to retire upon his 50thbirthday, in September 2017. (R.R. at 2a.) With respect to retirement pension benefits, the CBA in effect for the years 2017 through 2019 (2017 CBA) provided, in relevant part:

Employees hired as of or promoted to Firefighter after January 1, 1998, but before January 1, 1992, may retire after completing twenty (20) years of service as a Firefighter and attaining the age of fifty-five (55) years.... The 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.(R.R. at 208a-09a.)Moreover, beginning with the CBA covering the years 1998 through 2002(1998 CBA), the City and the Union removed from their CBAs any express reference to the ["Third Class City] Code, particularly the null and void clause in the 1987 CBA.

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In his letter, Bongivengo acknowledged that the 1991 Amendment to the Pension Ordinance sets a minimum retirement age of 55. Bongivengo contended, however, that the 1991 Amendment was in conflict with the [Third Class City] Code, which allowed him to retire at the age of 50 with 20 years of service. As between the two, Bongivengo contended that the Code prevails. He asked the City to confirm his eligibility to retire at the age of 50 pursuant to the Code. Bongivengo did not reference any CBA provision in his letter.
***

[B]eginning with the CBA covering the years 1998 through 2002(1998 CBA), the City and the Union removed from their CBAs any express reference to the Code, particularly the null and void clause in the 1987 CBA. In its place, subsequent CBAs, including the 2017 CBA, provided:

"Any provisions of this Agreement inconsistent with the applicable provisions of the Optional Third Class City Charter Law or other applicable law are hereby deemed to be null and void." (R.R. at 197a (emphasis added).)

Bongivengo appealed the City Council's determination to common pleas. (Id. at 25a.) Common pleas denied Bongivengo's appeal, concluding, inter alia, that Bongivengo is bound by the terms of the Pension Ordinance, as amended, which requires a minimum retirement age of 55 and a minimum of 20 years of service. (Id. at 51a.) Bongivengo now appeals to this Court."

Holding:

"We see no merit to Bongivengo's contention that because the City passed the 1991 Amendment before the terms of the ordinance were enshrined in a CBA, the pension benefit provision of the 2017 CBA is legally infirm. Regardless of which came first, the Union and the City agreed that, with respect to firefighters hired at or around the time the City hired Bongivengo, the minimum age for retirement benefit eligibility would be 55. Just as we stated in Norcini [Norciniv. City of Coatesville,915 A.2d 1243 (Pa. Cmwlth. 2007), Bongivengo is "bound by the total result negotiated by the union on [his behalf] and cannot selectively choose or reject aspects of the negotiated agreement." Norcini, 915 A.2d at 1245-46.

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Footnote 12: We also note that beginning with the 1998 CBA, the Union and the City agreed to increase the monthly retirement benefit from 50% of the retiring firefighter's final monthly average salary, as set forth in the Pension Ordinance, to 75% of the retiring firefighter's average compensation. (R.R.at 185a.) It is clear, then, that over the years the Union has successfully negotiated with the City for increased retirement benefits for its members, including Bongivengo."

Legal Lessons Learned: Firefighters represented by a union are bound to the terms of the CBA, including minimum age until eligible to retire.

File: Chap. 11, FLSA

DC: "REGULAR RATE OF PAY" - U.S. DEPT. OF LABOR PROPOSED NEW RULE – CLARIFY ITEMS NOT INCLUDED IN CALCULATION

On March 28, 2019, the U.S. Department of Labor (Department) announced a proposed rule to amend 29 CFR part 778 to clarify and update regular rate requirements under section 7(e) of the Fair Labor Standards Act (FLSA).

"The FLSA generally requires overtime pay of at least one and one-half times the regular rate of pay for hours worked in excess of 40 hours per workweek. Regular rate requirements define what forms of payment employers include and exclude in the "time and one-half" calculation when determining workers' overtime rates.

Under current rules, employers are discouraged from offering more perks to their employees as it may be unclear whether those perks must be included in the calculation of an employees' regular rate of pay. The proposed rule focuses primarily on clarifying whether certain kinds of perks, benefits, or other miscellaneous items must be included in the regular rate. Because these regulations have not been updated in decades, the proposal would better define the regular rate for today's workplace practices.

The Department proposes clarifications to the regulations to confirm that employers may exclude the following from an employee's regular rate of pay:

- the cost of providing wellness programs, onsite specialist treatment, gym access and fitness classes, and employee discounts on retail goods and services;
- payments for unused paid leave, including paid sick leave;
- reimbursed expenses, even if not incurred "solely" for the employer's benefit;
- reimbursed travel expenses that do not exceed the maximum travel reimbursement permitted under the Federal Travel Regulation System regulations and that satisfy other regulatory requirements;
- discretionary bonuses;
- Benefit plans, including accident, unemployment, and legal services; and
- Tuition programs, such as reimbursement programs or repayment of educational deb

The proposed rule also includes additional clarification about other forms of compensation, including payment for meal periods, 'call back' pay, and others.

Legal Lessons Learned: This new rule will hopefully provide more clarification for Fire & EMS Departments and avoid litigation about "regular rate" of pay.

See, for example, DoL Advisory Opinion FLSA2018-5 (Jan. 5, 2018) regarding a Fire Department's calculation of "regular rate of pay" concerning annual bonuses, such as certification pay, education pay, and longevity pay.

File: Chap. 13, EMS

MI: PRIVATE AMBULANCES – COUNTY ORDINANCE THAT CO. MUST GET THEIR APPROVAL – FED. JUDGE WILL NOT DECLARE THIS LAWFUL

On March 25, 2019, in Saginaw County v. State Emergency Medical Service, Inc., U.S. District Court Judge Terrence B. Berg, again denied the County's request for a declaratory judgment that its ordinance is lawful and not a restraint of trade under Sherman Antitrust Act. "Plaintiff sought a declaration that their ambulance plan was legal and not in violation of the Sherman Act, among other statutes. But they did not plead adequate facts to show that this is true. The Court made no finding whatever on the question of whether Saginaw County's plan ran afoul of the Sherman Act, it simply concluded that, on the facts as alleged, the Court could not declare as a matter of law that the plan does not violate the Act."

Facts:

"Saginaw County—a Michigan county organized as a municipal corporation under Michigan law—passed an ordinance in 2016 requiring anyone seeking to provide ambulance services in the county to first obtain the approval of the County Board of Commissioners. One ambulance company—licensed to provide ambulance services by the State of Michigan—operated in the county without the Board's approval. The County ('Plaintiff' or 'Saginaw') sued that company, STAT Emergency Medical Services ('STAT' or 'Defendant'), seeking a declaratory judgment that its ordinance is le-gal under state law and that enforcing it against Defendant would not violate the federal Sherman Antitrust Act (the 'Sherman Act'). STAT is a for-profit corporation that operates ambulance services throughout the state of Michigan, including within Saginaw County. STAT moved to dismiss the County's complaint. The Court heard oral argument on the motion to dismiss on May 2, 2018. In a detailed Opinion and Order dated July 31, 2018, that motion was granted. See Opinion and Order, ECF No. 22.

Saginaw County now moves this Court to reconsider its opinion, per Fed. R. Civ. P. 59(e) and Local Rule 7.1(h).

[From Aug. 8, 2018 article, "Federal judge dismisses Saginaw County's lawsuit against ambulance company."

FLINT, MI -- A federal judge has dismissed a lawsuit filed by Saginaw County against a Flint-based ambulance company.

U.S. District Judge Terrence G. Berg on July 31 signed the dismissal order in the case of Saginaw County versus STAT Emergency Medical Service, Inc.

Saginaw County had filed its suit in January 2017, claiming STAT was violating a county ordinance. The preceding year, the county passed an ordinance requiring anyone seeking to provide ambulance services in the county to first obtain the approval of the county's Board of Commissioners. STAT, however, operated in the county without the board's approval, though it had been authorized by state officials to provide services throughout Michigan.

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In 2009 and again in 2013, the county had entered into contracts with Mobile Medical Response (MMR), a nonprofit entity. The contracts stated MMR was designated "the sole provider of mobile basic and advanced life support ambulance services for (Saginaw) County during the term of this Agreement."

In a September 2013 meeting, STAT counsel argued the MMR contract would violate an antitrust act and the 14th Amendment's due process clause.

"Saginaw County's claims and those made by the real party in interest funding this lawsuit, Mobile Medical Response (MMR)," said Joseph R. Karlichek, STAT's vice president and chief operating officer, "were clearly intended as scare tactics designed to create the false impression that STAT EMS, and other licensed ambulance providers do not have the legal right to operate in the county,

knowing full well that their actions are not only contrary to the EMS statutes of the State of Michigan, but in violation of Federal law. A new day is coming for Saginaw patients and for healthcare systems in Michigan and STAT intends to continue to fight for the legal rights guaranteed by both state and federal law."

Holding:

"As an initial matter, it is not clear that Plaintiff's efforts to enforce the Ordinance, whatever they might be, would lead to STAT initiating a federal antitrust lawsuit against Plaintiff. If confronted with sanctions, STAT could very well adapt its behavior; there is no way for the Court to know what might happen.

Plaintiff's suit nevertheless seeks a declaration of what the law would be if the County were to undertake enforcement activity against STAT and STAT were to respond by filing an antitrust lawsuit against it. But, even assuming for a moment that such an enforcement action may take place in the future, to be ripe, a suit seeking a declaratory judgment must allege what harm the defendant would suffer from the denial of judicial relief right now. The prospect of protracted federal antitrust litigation is no more diminished if it is pursued in this litigation than through a subsequent action brought based on a ripe and actual controversy.

For these reasons, the Court finds that parties will suffer little hardship if judicial relief is denied at this stage and further that, based on the record to 7 date, it is unclear whether the harm alleged by Plaintiffs will ever come to pass."

Legal Lessons Learned: Competition among private ambulance companies is generally good for patients.

See also article on this decision in Antitrust News.

File: Chap. 13

DC: COMMUNITY PARAMEDICINE - HHS OPINION - CLINIC PROVIDE FREE HOME VISITS – CHF / COPD PATIENTS – NOT FED. ANTI-KICKBACK

On March 6, 2019, the HHS Office of Inspector General issued Advisory Opinion No. 19-03.

"Requestor [clinic] has developed a program to provide free, in-home follow-up care to certain patients who it certifies are at higher risk of admission or readmission to a hospital. Under the Current Arrangement, Requestor offers in-home care to patients with congestive heart failure ('CHF') who qualify for participation, and under the Proposed Arrangement, Requestor would expand the program to qualifying patients with chronic obstructive pulmonary disease ('COPD'). According to Requestor, the goals of both Arrangements are to increase patient compliance with discharge plans, improve patient health, and reduce hospital inpatient admissions and readmissions.

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Under the Arrangements, patients who meet all eligibility criteria and who choose to participate receive two visits from a community paramedic each week for approximately 30 days following enrollment. Each visit takes place in the patient's home or ALF and lasts approximately 60 minutes, during which time the community paramedic may perform some or all of the following activities (collectively, the 'Services'):

i.Review the patient's medication;
ii.Assess the patient's need for follow-up appointments;
iii.Monitor the patient's compliance with the discharge plan of care or the patient's disease management;
iv.Perform a home safety inspection; and
v.Perform a physical assessment, which may include checking the patient's pulse and blood pressure, listening to the patient's lungs and heart, checking any wounds, running an electrocardiogram, drawing blood and running blood tests using a portable blood analyzer, or administering medication.

The community paramedic uses a clinical protocol to deliver interventions and to assess whether a referral for follow-up care is necessary. The community paramedic documents all activities and interventions he or she performs during the course of the visit in the patient's electronic medical record. If a patient requires care that falls outside the community paramedic's scope of practice, the community paramedic directs the patient to follow up with his or her established provider. For urgent but non-life-threatening medical needs, the community paramedic calls the patient's established provider, and such provider follows up with the patient as he or she deems appropriate."

Holding:

"First, although the remuneration provided under the Arrangements implicates the Beneficiary Inducement CMP because it could influence a patient to select Requestor or the Clinic for federally reimbursable items or services, we believe that the Arrangements' benefits outweigh any risk of inappropriate patient steering that the statute was designed to prevent. Before learning about the Current Arrangement or the Proposed Arrangement, patients already must have selected Requestor or the Clinic for follow-up services related to their CHF or COPD. In other

words, the risk that the remuneration will induce patients to choose Requestor or the Clinic for CHF- or COPD-related services is negligible because patients already have made this selection.

With respect to future services unrelated to their CHF or COPD, Requestor certified that the community paramedics direct patients to follow up with their established provider—whether or not that established provider is Requestor or the Clinic—if they require care outside the community paramedics' scope of practice. And while the community paramedics contact Requestor or the Clinic in those instances where a patient does not have an established provider, the patient may obtain care from the provider of his or her choosing, and the community paramedic informs the patient of this freedom of choice.

***

Second, if the Arrangements work as intended, they are unlikely to lead to increased costs to Federal health care programs or patients through overutilization or inappropriate utilization. With the exception of one Medicaid program in the Health System's service area, the Services provided by the community paramedic are not covered or reimbursed by Federal health care programs."

Legal Lessons Learned: Clinic's seeking an OIG Advisory Opinion is a smart, given the penalties for breach of Federal Anti-Kickback Statute. Community Paramedicine programs continue to grow nationwide.

OH: DUI - BLOOD DRAW BY NURSE FROM UNCONSCIOUS DRIVER LAWFUL – PD HAD NO TIME TO GET SEARCH WARRANT

On Feb. 12, 2019 in State of Ohio v. Richard Barnhart, Jr., Court of Appeals of Ohio, Fourth Appellate District – Meigs County, held (3 to 0) that trial court properly allowed into evidence the results of the blood draw. The Court write: "[B]ased upon the totality of the circumstances, we conclude that the blood sample obtained from Appellant, which was taken while he was unconscious at the hospital and being prepared for transfer to another facility, was both lawful and constitutionally valid pursuant to Ohio's Implied Consent statute, as well as both the consent and exigent circumstances exceptions to the warrant requirement."

Facts:

"Appellant, Richard Barnhart, Jr., was involved in a motor vehicle accident on January 13, 2017, at approximately 10:10 p.m. on State Route 143 in Meigs County, Ohio. When first responders initially arrived at the scene of the accident, they found an individual identified as Jesse Carr deceased and underneath the vehicle in a ditch area. They also found Appellant, initially moaning but otherwise unresponsive, partially ejected through the windshield of the vehicle. The record reveals that the victim, Jesse Carr, had been pronounced dead and Appellant had already been transported to the hospital by the time law enforcement reached the scene of the accident.

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The investigation of the accident, however, ultimately led to Appellant's indictment on February 16, 2017 on multiple charges, including: 1) a first-degree felony in violation of R.C. 2903.06(A)(1)(a) and (B)(2)(b) and (c); 2) one count of aggravated vehicular homicide, a first-degree felony in violation of R.C. 2903.06(A)(2)(a) and (B)(3); 3) one count of vehicular manslaughter, a first-degree misdemeanor in violation of R.C. 2903.06(A)(4) and (D); 4) one count of OVI, a fourth-degree felony in violation of R.C. 4511.19(A)(1)(a) and (G)(1)(d); and 5) one count of OVI, a fourth-degree felony in violation of R.C. 4511.19(A)(1)(f) and (G)(1)(d).

***

The State argued that Appellant was, in fact, the driver of the vehicle as evidenced by statements of the first responders as to his location in the vehicle as well as a statement made by Appellant to first responders that 'I fucked up, didn't I[,]' when asked by a medic if he was the driver of the vehicle."

***

A suppression hearing was held [on defendant's Motion To Suppress the blood draw] on May 24, 2017, and was followed by the submission of written arguments…. The trial court ultimately denied Appellant's motion on June 29, 2017, finding that Appellant was unconscious at the time his blood was drawn pursuant to Ohio's Implied Consent statute and that he was never in custody or under arrest that night.

***

Here, the evidence introduced at the suppression hearing included Sergeant Robert Hazlett's testimony that he arrived at the crash scene to find Appellant had already been transported to the hospital for medical treatment. He testified he spoke with first responders and observed beer cans in and around the crashed vehicle. He then contacted Trooper Chris Finley and advised him to go straight to the emergency room to make contact with Appellant, due to the fact that there had been a fatality and the possibility Appellant, who had been determined to

the driver, was impaired. He testified he directed Trooper Finley to obtain a blood draw, if needed, explaining on cross-examination that it would ultimately be Trooper Finley's decision whether to obtain a blood draw.

Trooper Finley testified that he made contact with Appellant at Holzer Medical Center in Pomeroy, Ohio, where he found Appellant to be unconscious, with a 'breathing tube.' He testified that although he had not been to the crash scene, he had been 'advised that alcohol abuse was probably going to be in the nature of the crash.' He further testified that when he arrived at the hospital, he could smell alcohol on Appellant's person. He then testified as follows:

"Um, looking at Mr. Barnhart's record and the nature of a crash, it being a fatal crash. Um, Mr. Barnhart had three (3) prior OVI convictions in a previous six (6) years, I know it's ten (10) years now is our lookback period, but it was six (6) years at the time. So it would make it a felony OVI in case. Um, so that was the reason for the draw.'

Further, with respect to why Trooper Finley believed Appellant to be the driver, he testified as follows:

'Uh, my supervisor was the one that was on the scene and he was advising me that Mr. Barnhart was going to be the driver of the vehicle. And there was also testimony from the first responders, which would be the fire department members, that advised the nature of the crash.'

Holding:

"We believe, based upon the record before us, that probable cause existed to believe to Appellant was not only the driver of the vehicle but also that he had operated his vehicle while under the influence of alcohol.

***

Based upon the foregoing, we conclude that an arrest was not necessary before law enforcement could obtain Appellant's blood for testing, pursuant to Ohio's implied consent statute, as the trooper possessed probable cause to believe Appellant was driving under the influence of alcohol. Accordingly, we reject this portion of Appellant's argument.

***

Next, Appellant argues that his blood had to be drawn within two hours of the accident, and that it was not. However, contrary to Appellant's argument, we note that R.C. 4511.19(D) states, in relevant part, that a trial court may admit evidence of the "concentration of alcohol * * * at the time of the alleged violation as shown by chemical analysis of the substance withdrawn within three hours of the time of the alleged violation." R.C. 4511.19(D)(1)(b) (emphasis added); see also State v. Barger, 2017-Ohio-4008, 91 N.E.3d 277, ¶ 32 (permitting blood test results to be admitted where blood was drawn from a defendant more than three hours after an alleged violation and holding the results were admissible to prove that a person was under the influence of alcohol as proscribed by R.C. 4511.19(A)(1)(a) in the prosecution for a violation of R.C. 2903.06, provided that the administrative requirements of R.C. 4511.19(D) are substantially complied with and expert testimony is offered, citing State v. Hassler, 115 Ohio St.3d 322, 2007-Ohio-4947, 875 N.E.2d 46, ¶ 2, in support).

Here, expert testimony was offered and Appellant stipulated to the reliability of the test results, aside from the timing requirement. Further, evidence introduced at the suppression hearing indicated the accident occurred at approximately 10:10 p.m. on January 13, 2017. Appellant's blood sample was drawn by hospital personnel at 12:13 a.m. on January 14, 2017. These times are not disputed by Appellant. Thus, based upon the record before us, we cannot conclude the trial court erred in finding Appellant's blood was drawn in a timely manner, within the three hour window provided in R.C. 4511.19(D)(1)(b).

***
Thus, in light of the foregoing, we reject Appellant's arguments that the United States Constitution required a warrant for the seizure of blood in this particular case, that Ohio's Implied Consent statute violated his right to refuse to give a blood sample, and that implied consent is not an exception to the warrant requirement.

***
Appellant contends that the United States Constitution requires a warrant for the seizure of blood, that Ohio's Implied Consent statute violated his right to refuse to give a blood sample, and that implied consent is not an exception to the warrant requirement. It is true that the United States Supreme Court has recently determined, in *Birchfield v. North Dakota*, 136 S.Ct. 2160, 2162, 2172-2186 (2016), that "the taking of a blood sample or the administration of a breath test is earch[,]" and that "[t]he Fourth Amendment permits warrantless breath tests incident to arrest for drunk driving but not warrantless blood tests." However, after thorough research, we are not persuaded that the holding in Birchfield invalidates the blood draw at issue sub judice, or Ohio's Implied Consent statute, in general.

In *Birchfield*, the Court was confronted with three different petitioners from two different states, all of which faced criminal penalties under their respective states' implied consent laws for refusal of blood or breath testing. The holding in Birchfield was as follows: "1. The Fourth Amendment permits warrantless breath tests incident to arrests for drunk driving but not warrantless blood tests. * * * 2. Motorists may not be criminally punished for refusing to submit to a blood test based on legally implied consent to submit to them. It is one thing to approve implied-consent laws that impose civil penalties and evidentiary consequences on motorists who refuse to comply, but quite another for a
State to insist upon an intrusive blood test and then to impose criminal penalties on refusal to submit…."*Birchfield* at 2163, 2165.

***
Based upon those facts, the Court found the officer did not need a warrant for the blood draw. We believe the principles contained in *Schmerbe*r [Schmerber v. California, 384 U.S. 757, 86 S.Ct. 1826 (1966)] apply here. In the case sub judice, Appellant was taken to the hospital after a serious accident which involved the death of his passenger. Believing alcohol to be a factor in the accident, which occurred late at night on a weekend, the officer, also faced with the facts that Appellant was unconscious and was being readied for transport to another facility, was justified in requesting a blood draw based upon the exigent circumstances exception to the warrant requirement.

***
Trooper Finley testified at the suppression hearing that the accident occurred at 10:10 p.m. and that he did not arrive at the hospital until 11:55 p.m. This would have left him with just over an hour to secure a warrant for a blood draw. The trooper further testified that there would have been no way to obtain a warrant before Appellant was transferred to another facility. Further, the E.R. nurse testified that she drew Appellant's blood at the trooper's request just before he was transferred. Based upon these specific facts, we conclude the exigent circumstances exception to the warrant requirement permitted Appellant's blood to be drawn while he was unconscious, without a warrant."

Legal Lessons Learned: Ohio Implied Consent statute, similar to many states, allows warrantless blood draws from unconscious patient.

See Ohio Rev. Code 4511.191,:

(4) Any person who is dead or unconscious, or who otherwise is in a condition rendering the person incapable of refusal, shall be deemed to have consented as provided in division (A)(2) of this section, and the test or tests may be administered, subject to sections 313.12 to 313.16 of the Revised Code.

Note: The U.S. Supreme Court in Birchfield v. North Dakota, 579 U.S. ___ (2016) held [9 to 0] that states that make it a crime to refuse consent [in addition to suspension of driver's license], the Fourth Amendment permits warrantless breath tests incident to arrests for drunk driving, but not warrantless blood tests, unless there are exigent circumstances. The DUI defendants in *Birchfield* were all conscious.

Justice Alito wrote the decision:

"So every State also has long had what are termed 'implied consent laws.' These laws impose penalties on motorists who refuse to undergo testing when there is sufficient reason to believe they are violating the State's drunk-driving laws. In the past, the typical penalty for noncompliance was suspension or revocation of the motorist's license. The cases now before us involve laws [like Minnesota, North Dakota] that go beyond that and make it a crime for a motorist to refuse to be tested after being lawfully arrested for driving while impaired. The question presented is whether such laws violate the Fourth Amendment's prohibition against unreasonable searches. *** In the three cases now before us, the drivers were searched or told that they were required to submit to a search after being placed under arrest for drunk driving. We therefore consider how the search-incident-to-arrest doctrine applies to breath and blood tests incident to such arrests. *** Because breath tests are significantly less intrusive than blood tests and in most cases amply serve law enforcement interests, we conclude that a breath test, but not a blood test, may be administered as a search incident to a lawful arrest for drunk driving. As in all cases involving reasonable searches incident to arrest, a warrant is not needed in this situation."

File: Chap. 16 - Discipline

KS: IAFF ATTORNEY HELPED FF IN GRIEVANCE - NOT HIS PERSONAL COUNSEL - CAN NOW DEFEND UNION IN RACE DISCRIM. LAWSUIT BY FF

On March 25, 2019, in Randall Austin Ester v. Christopher Buell, et al., U.S. Magistrate Judge Gwynne E. Birzar, U.S. District Court for Kansas, denied plaintiff's motion to have IAFF Local 64 attorney disqualified from representing IAFF in his racial discrimination lawsuit. The Magistrate held, "The totality of the evidence, viewed in conjunction with the caselaw, weighs against formation of an attorney-client relationship. Written documents identify Mr. Brown as 'attorney for the union.'"

Facts:

"Plaintiff, an African-American man, worked as a firefighter for the Kansas City, Kansas Fire Department ('KCKFD') and the Unified Government ('UG') from May 2004 until September 28, 2016, when he was suspended pending termination for alleged misconduct regarding his time worked. As part of his employment, he was a member of the IAFF Local 64 labor union('IAFF'), which has a collective bargaining agreement [MOU] … with the KCKFD. After his suspension, on Plaintiff's behalf, the union filed a grievance per the MOU procedure. Months later, as part of this procedure, an arbitration was held, and Plaintiff's termination was upheld by the arbitrator.

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After initiating the grievance procedure, but prior to arbitration, Plaintiff filed this federal case against his employers and the IAFF. He asserts claims of discrimination in employment and union representation, and for retaliation under the Americans with Disabilities Act, as amended, 42 U.S.C. § 12101 et seq. ('ADA') and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. ('Title VII'). Plaintiff claims his actions regarding his time worked were in full compliance with the regular practices of the department and were pretexts for suspending and terminating him. He alleges he was suspended due to his race and because of his disability, or perceived disability, after being injured twice while on duty. He also contends IAFF failed to properly pursue his grievance and represent him during the grievance and arbitration proceedings. Currently, the litigation is progressing through discovery. Discovery is set to close on April 19, with a pretrial conference set for April 22, 2019, and a jury trial scheduled for January 2020. (ECF No. 53).

***

Mr. Brown met with Plaintiff prior to the arbitration proceeding, in approximately January 2018. Plaintiff contends Mr. Brown worked with him to prepare for the arbitration, he shared information and statements from other firefighters with Mr. Brown, and Mr. Brown advised him on the strength of his case. (ECF No. 18-1, Ex. A, ¶ 20.) Plaintiff states he understood Mr. Brown was his attorney. (Id.) Again, Mr. Brown claims he explained to Plaintiff that he represented IAFF in the arbitration proceedings. (ECF No. 22-7, Ex. G, ¶ 6.)

***

As a part of the process outlined in the MOU, the grievance advanced to arbitration after several months. Plaintiff was unhappy with the lack of progress on the grievance (see ECF No. 18-1, Ex. A, at ¶¶ 13-14), although IAFF claims it was actively investigating the merits of the grievance over those months (ECF No. 22, at 3). Regardless, in the months between the initial grievance and the arbitration, Plaintiff took additional action on his claims.

On July 19, 2017, Plaintiff filed a Charge of Discrimination with the Equal Employment Opportunity Commission ('EEOC') against all Defendants, including IAFF. (ECF No. 1, Ex. A.) Mr. Brown responded to the EEOC charge on behalf of IAFF on August 18, 2017. (ECF No. 22-2, Ex. B, Position Statement of IAFF.) At some time prior to filing his EEOC charge, Plaintiff retained his current counsel at the law firm of Edelman, Liesen & Meyers, LLP, by whom he continues to be represented. After receiving Notices of Right to Sue, Plaintiff filed this action on February 19, 2018."

Holding:

"During the March 6, 2019 hearing [before Magistrate Judge], Mr. Brown proffered, and Plaintiff did not dispute, that Mr. Brown never met with Plaintiff alone; rather, a union representative or other individual was always present.4Plaintiff claims both Mr. Brown and IAFF representatives told him they would be representing him, but never told him Mr. Brown solely represented IAFF. (ECF No. 18-1, Ex. A, Decl. of Jyan Harris, ¶¶ 10, 23.) But Mr. Brown claims he explained to Plaintiff he was representing IAFF in the grievance matter and, at no time, did he tell Plaintiff he represented him personally. (ECF No. 22-7, Ex. G, Decl. of Scott Brown, ¶¶ 6-7.)5Mr. Brown did not present an engagement letter to Plaintiff, or otherwise engage in any written correspondence with Plaintiff, and the IAFF paid Mr. Brown's fees.

***
IAFF presents four primary arguments: 1) federal courts have found no attorney-client relationship between union counsel and the union member; 2) under KRPC 1.9(a), plaintiff cannot show an attorney-client relationship existed; 3) the Kansas Public Employer-Employee Act ('PEERA') contradicts Plaintiff's argument an attorney-client relationship exists between union counsel and Plaintiff; and 4) Plaintiff was not deprived of procedural Due Process rights under PEERA.

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The totality of the evidence, viewed in conjunction with the caselaw, weighs against formation of an attorney-client relationship. Written documents identify Mr. Brown as 'attorney for the union.' Plaintiff admits IAFF paid Mr. Brown for his services. Mr. Brown and Plaintiff never met alone. Although it is true none of these things alone mean no relationship existed, the Court must examine them in the aggregate. In addition to these facts, Plaintiff retained Ms. Liesen as counsel prior to the arbitration hearing. The emails between Ms. Liesen and Mr. Brown prior to arbitration make clear she is Mr. Brown's personal representative—not Mr. Brown."

Legal Lessons Learned: IAFF counsel in a grievance proceeding is not personal legal counsel for the union member.