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Jan. 2019 – FIRE & EMS LAW Newsletter

[NEWSLETTER IS NOT PROVIDING LEGAL ADVICE.]
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UC FIRE SCIENCE: COMMUNITY PARAMEDICINE / HOSPITAL PARTNERSHIPS: March 20, 2019, free seminar, 6 FDs sharing best practices; will be videotaped and posted on our web page. See seminar Flyer and prior seminars videotapes.

Items in Newsletter

File – Chap. 1 – American Legal System

U.S. SUPREME COURT: QUALIFIED IMMUNITY - DOMESTIC VIOL. ARREST – POLICE BODY CAMERA, NO CONSTIT. VIOL.

On Jan. 7, 2019, in City of Escondido, California v. Mart Emmons, the U.S. Supreme Court (9 to 0), in a per curiam decision [not authored by a specific Justice], reversed the 9th Circuit without the need to even hear oral argument. The Court held: "As to Officer Craig, the Ninth Circuit also erred. As we have explained many times: 'Qualified immunity attaches when an official's conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.' Kisela v. Hughes, 584 U. S. ___, ___ (2018) (per curiam). The Court of Appeals made no effort to explain how that case law prohibited Officer Craig's actions in this case."

Facts:

> "The record, viewed in the light most favorable to the plaintiff, shows the following. In April 2013, Escondido police received a 911 call from Maggie Emmons about a domestic violence incident at her apartment. Emmons lived at the apartment with her husband, her two children, and a roommate, Ametria Douglas. Officer Jake Houchin responded to the scene and eventually helped take a domestic violence report from Emmons about injuries caused by her husband. The officers arrested her husband. He was later released.
>
> A few weeks later, on May 27, 2013, at about 2:30 p.m., Escondido police received a 911 call about another possible domestic disturbance at Emmons' apartment. That 911 call came from Ametria Douglas' mother, Trina Douglas. Trina Douglas was not at the apartment, but she was on the phone with her daughter Ametria, who was at the apartment. Trina heard her daughter Ametria and Maggie Emmons yelling at each other and heard her daughter screaming for help. The call then disconnected, and Trina Douglas called 911.

Officer Houchin again responded, along with Officer Robert Craig. The dispatcher informed the officers that two children could be in the residence and that calls to the apartment had gone unanswered. Police body-camera video of the officers' actions at the apartment is in the record.

The officers knocked on the door of the apartment. No one answered. But a side window was open, and the officers spoke with Emmons through that window, attempting to convince her to open the door to the apartment so that they could conduct a welfare check. A man in the apartment also told Emmons to back away from the window, but the officers said they could not identify the man. At some point during this exchange, Sergeant Kevin Toth, Officer Joseph Leffingwell, and Officer Huy Quach arrived as backup.

A few minutes later, a man opened the apartment door and came outside. At that point, Officer Craig was standing alone just outside the door. Officer Craig told the man not to close the door, but the man closed the door and tried to brush past Officer Craig. Officer Craig stopped the man, took him quickly to the ground, and handcuffed him. Officer Craig did not hit the man or display any weapon. The video shows that the man
was not in any visible or audible pain as a result of the takedown or while on the ground. Within a few minutes, officers helped the man up and arrested him for a misdemeanor offense of resisting and delaying a police officer.

The man turned out to be Maggie Emmons' father, Marty Emmons. Marty Emmons later sued Officer Craig and Sergeant Toth, among others, under Rev. Stat. §1979, 42 U. S. C. §1983. He raised several claims, including, as relevant here, a claim of excessive force in violation of the Fourth Amendment. The suit sought money damages for which Officer Craig and Sergeant Toth would be personally liable."

Holding:

"The District Court held that the officers had probable cause to arrest Marty Emmons for the misdemeanor offense. The Ninth Circuit did not disturb that finding, and there is no claim presently before us that the officers lacked probable cause to arrest Marty Emmons. The only claim before us is that the officers used excessive force in effectuating the arrest.

***

The District Court rejected the claim of excessive force. 168 F. Supp. 3d 1265, 1274 (SD Cal. 2016). The District Court stated that the 'video shows that the officers acted professionally and respectfully in their encounter' at the apartment. Id., at 1275. Because only Officer Craig used any force at all, the District Court granted summary judgment to Sergeant Toth on the excessive force claim.

Applying this Court's precedents on qualified immunity, the District Court also granted summary judgment to Officer Craig. According to the District Court, the law did not clearly establish that Officer Craig could not take down an arrestee in these circumstances. The court explained that the officers were responding to a domestic dispute, and that the encounter had escalated when the officers could not enter the apartment to conduct a welfare check. The District Court also noted that when Marty Emmons exited the apartment, none of the officers knew whether he was armed or dangerous, or whether he had
injured any individuals inside the apartment.

The Court of Appeals reversed and remanded for trial on the excessive force claims against both Officer Craig and Sergeant Toth. 716 Fed. Appx. 724 (CA9 2018). The Ninth Circuit's entire relevant analysis of

the qualified immunity question consisted of the following: 'The right to be free of excessive force was clearly established at the time of the events in question. Gravelet-Blondin v.
Shelton, 728 F. 3d 1086, 1093 (9th Cir. 2013).' Id., at 726.

We reverse the judgment of the Court of Appeals as to Sergeant Toth, and vacate and remand as to Officer Craig.

With respect to Sergeant Toth, the Ninth Circuit offered no explanation for its decision. The court's unexplained reinstatement of the excessive force claim against Sergeant Toth was erroneous—and quite puzzling in light of he District Court's conclusion that 'only Defendant Craig was involved in the excessive force claim' and that Emmons 'fail[ed] to identify contrary evidence.' 168 F. Supp. 3d, at 1274, n. 4.

As to Officer Craig, the Ninth Circuit also erred. As we have explained many times: 'Qualified immunity attaches when an official's conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.' Kisela v. Hughes, 584 U. S. ___, ___ (2018) (per curiam) (slip op., at 4) (internal quotation marks omitted); see District of Columbia v. Wesby, 583 U. S. ___, ___–___ (2018); White v. Pauly, 580 U. S. ___, ___–___ (2017) (per curiam); Mullenix v.Luna, 577 U. S. ___, ___–___ (2015) (per curiam)."

Legal Lessons Learned: Great decision on "qualified immunity" for emergency responders.
In also our case review [Chap. 13]: Aug. 14, 2018 decision by 7th Circuit in Billie Thompson v. Lance Cope where Indianapolis police called EMS to help with person found naked, running in street, high on amphetamines, and combative. EMS administered a sedative – Versed - patient stopped breathing, and was revived; he ultimately died 8-days later. The Court held (3 to 0), "The paramedic is entitled to qualified immunity on the excessive force claim. Case law did not (and does not) clearly establish that a paramedic can violate a patient-arrestee's Fourth Amendment rights by exercising medical judgment to administer a sedative in a medical emergency."

File: Chap. 1 – American Legal System

PA: ARSON – DEFENDANT SMELLED OF GASOLINE - TRAINED & FED. CERTIFIED CANINE ALERTED FOR GASOLINE ON DEF. CLOTHES

On Jan. 11, 2019, in Commonwealth of Pennsylvania v. Jamat Ali Manzoor, the Superior Court of PA (3 to 0) upheld the jury conviction on two counts of arson, and insurance fraud.

Facts:

"Manzoor owned a single family home at 3507 Elmerton Avenue in Susquehanna Township ('Property') , which he had previously rented out but was then vacant. On April 1, 2014, Matthew Hartman, a volunteer firefighter with Progress Fire Company, responded to a fire at the Property, at which time the first and second floors were in flames. Hartman was the first through the side door of the home, which he had to force open with an axe. Within a few minutes, Hartman felt his shoulder catch on fire and his fingers began to hurt. He was subsequently treated for burns to his finger and both shoulders at the Hershey Medical Center. Hartman testified that the blistering lasted for three weeks and the pain was excruciating.

***

Detective Dennis Woodring, of the Dauphin County District Attorney's Office, testified as an expert in the causes and origins of fire and K-9 accelerant odor detection. Detective Woodring's K-9 partner, Loki, is one of about fifty K-9s in the United States federally certified to assist in the search for trace evidence of ignitable fluid in a fire.

When Detective Woodring and Loki arrived at the Property, he was advised that some of the firefighters had smelled what they believed to be gasoline on the second floor of the structure. As a result, Detective Woodring used a ground ladder to access the second
floor of the structure, where he immediately smelled gasoline.

***

Detective Woodring further testified that he and Loki went to the police station on the date of the fire to search Manzoor's clothing, at which time Loki alerted on both legs of Manzoor's jeans."

Holding:

"The evidence presented at trial demonstrated that there was a fire and that gasoline was present in the upstairs bedroom and hallway and on the stairs leading from the first to second floors. Manzoor reeked of gasoline during his interview with police and laboratory testing found gasoline on two samples taken from Manzoor's pants. Although Manzoor claimed to have returned home to discover the fire and stated that he had not entered the dwelling, his key to the residence was found in the kitchen. There were only three keys to the residence, and the other two were accounted for. Firefighter Hartman was treated at the hospital for burns to his shoulders and hands and suffered blistering and 'the most excruciating pain' for three weeks after
the incident. N.T. Trial, 10/31/16, at 11. This evidence, if believed by the jury, was sufficient to establish that Manzoor committed the offense of arson.

***

Judgment of sentence affirmed."

Legal Lessons Learned: Evidence of trained arson K-9 alerting for accelerants is admissible in arson trial, as is testimony by firefighters that defendant "reeked" of gasoline.

File: Chap. 5 – Emergency Vehicle Operations

CA: DRUNK DRIVER RUNS INTO ENGINE – MUST PAY FULL RESTITUTION COST OF $154,283.07, EVEN IF FD INSURED

On Jan. 15, 2019, in The People v. Christian A. Zuniga, the Court of Appeal of California, First Appellate District, held 3 to 0 [unpublished opinion], "We have carefully reviewed the entire record in accordance with our *Wende* obligations, and we conclude there are no arguable issues on appeal that require further briefing. (See *People v. Birkett* (1999) 21 Cal.4th 226, 245-247 [victim entitled to restitution in the 'full amount of the loss caused by the crime, regardless of whether, in the exercise of prudence, the victim had purchased private insurance that covered some or all of the same losses'].)"

Facts:

“Defendant Christian Antonio Zuniga was sentenced to four years of felony probation with eight months in county jail and ordered to pay restitution after a jury found him guilty of driving under the influence of alcohol and causing injury in connection with an incident in which he drove into the rear of a fire engine. We previously affirmed Zuniga’s conviction. (People v. Zuniga, Mar. 8, 2018, A151618) [nonpub. opn.]

****

Around 1:54 a.m. on March 15,2015, while driving past the scene of an accident on Interstate 80 in Contra Costa County, Zuniga struck the rear of a fire engine, injuring a firefighter inside…. Blood tests performed later that morning found that Zuniga was under the influence of alcohol.

***

The prosecution requested restitution in the amount of $154,283.07 to the Rodeo Hercules Fire Protection District (RHFPD) for repairs to the damaged fire engine**.**
***

Meanwhile, Zuniga filed a motion to oppose the requested restitution. He argued that because the RHFPD had been reimbursed through the county by a third-party insurance company for the damages exceeding $100,000, he should only be ordered to pay restitution in that amount, less $5,000 that his own insurance company was willing to contribute.

On May 18, after a hearing, the trial court rejected Zuniga’s arguments and ordered restitution to the RHFPD in the full amount of $154,283.07, from which order he
Now appeals.”

Holding:

“We have carefully reviewed the entire record in accordance with our Wende [People v. Wende (1979) 25 Cal.3d 436] obligations, and we conclude there are no arguable issues on appeal that require further briefing. (See People v. Birkett(1999) 21 Cal.4th 226, 245–247 [victim entitled to restitution in the ‘full amount of the loss caused by the crime, regardless of whether, in the exercise of prudence, the victim had purchased private insurance that covered some or all of the same losses’].)”

Legal Lessons Learned: Great lesson for this drunk driver. [Note: Insurance company may be entitled to a refund, if defendant ultimately pays full amount.]

File: Chap. 7 – Sexual Harassment & also Chap. 14 – Physical Fitness

IL: 12 FEMALES IN CHICAGO PARAMEDIC SCHOOL FAILED FITNESS TESTING - 6 EEOC "RIGHT TO SUE" LETTERS

On Jan. 14, 2019, in Jennifer Livingston, et al. v. City of Chicago, U.S. District Court Judge Sara L. Ellis, held: "Because the Non-Filing Plaintiffs can rely on the single-filing rule to bring their claims based on the charges filed by other plaintiffs in this case, the Court denies the City's motion to dismiss."

Facts:

> "Plaintiffs are all licensed and experienced paramedics whom the City hired as candidate Fire Paramedics for the CFD. Fire Paramedics provide services, including emergency medical services, to residents of the City. They are not responsible for fire-suppression activities.
>
> ***
>
> In 2000, the City added a requirement that Fire Paramedic candidates pass a physical test before they could proceed to the Training Academy. The City used the physical test this way for over a decade, until multiple women who were disqualified from being Fire Paramedics because of this test sued the City alleging discrimination under Title VII —the Seventh Circuit ultimately found that the study that formed the basis for imposing the physical test was unreliable and invalid. See Ernst v. City of Chicago, 837 F.3d 788, 802 (7th Cir. 2016).
>
> During this litigation, in 2014, the City stopped using the original physical test and began using a new test, referred to in the complaint as the 'PPAT.' All Plaintiffs passed the PPAT and made it into the Academy. However, at the time it began administering the PPAT, the City also added additional physical testing requirements that it administered during the Academy and required candidates to pass before graduating from the Academy. The City imposes these new physical requirements primarily through two tests: a 'Lifting and Moving Sequence' and a 'Step Test.' In 2014 and 2015, 100 percent of men who took these tests passed, while only 79 percent of women passed.
>
> Looking at Plaintiffs specifically, Livingston, Snevely, Guarino, Burroughs, Lazzara, Markey, Maples, Chavez and Ruch took and did not pass both the Lifting and Moving Sequence and the Step Test. The City subsequently fired these women.
>
> Bain, Venegas, and Youngren had slightly more unique experiences. Bain took and did not pass the Step Test. The City's medical officer, Dr. William Wong, threatened to permanently disqualify her from the CFD if she did not quit, and Bain alleges that the City constructively discharged her. CFD's director of training required Venegas to perform an ad hoc 'lunge' test, and the City terminated her on the basis of this performance. Finally, Youngren was injured while taking the Step Test, and the City placed her on unpaid Suspended Assignment as a result. Suspended Assignment means that the City will allow her to complete Academy training following medical clearance —she has received medical clearance and is waiting for the opportunity to retake the Step Test.

Livingston, Snevely, Guarino, Burroughs, Markey, and Chavez (the 'Filing Plaintiffs') filed timely charges of class wide sex discrimination with the Equal Employment Opportunity Commission ('EEOC'). The EEOC

provided them with notices of Right to Sue, and the Filing Plaintiffs brought this complaint within 90 days of receipt of those notices. Lazzara, Bain, Maples, Ruch, Venegas, and Youngren did not file EEOC charges. However, the City does not challenge Lazzara and Maples' participation in this case at this time—only that of Bain, Ruch, Venegas, and Youngren."

Holding:

> "The City argues that the Court should dismiss the Non-Filing Plaintiffs from the case because they have not exhausted their administrative remedies.
> ***
>
> To bring a Title VII suit, a plaintiff must have exhausted her administrative remedies by filing a timely EEOC charge and receiving a right to sue letter. Allen v. City of Chicago, 828 F. Supp. 543, 555 (N.D. Ill. 1993). Certain exceptions to this rule exist: under the single-filing rule or 'piggybacking' doctrine, 'an individual who has not exhausted his administrative options may join a lawsuit filed by another individual who has administratively exhausted.' Simpson v. Cook County Sheriff's Office, No. 18-cv -553, 2018 WL 3753362, at *2 (N.D. Ill. Aug. 8, 2018); see also Anderson v. Montgomery Ward & Co., 852 F.2d 1008, 1017–18 (7th Cir. 1988).
>
> ***
>
> To qualify for the single-filing rule, the EEOC charge must note the 'collective nature of the discrimination complained of,' and the Non-Filing Plaintiffs' claims must arise out of the same or similar discriminatory conduct committed during the same period as the conduct described in the EEOC charge on which they seek to piggyback their claims.
> Simpson, 2018 WL 3753362 at *2.
>
> ***
>
> CONCLUSION
>
> For the foregoing reasons, the Court denies the City's motion to dismiss.

Legal Lessons Learned: Physical fitness tests, whether during Recruit School or prior to hiring, that have an adverse impact on females, should be validated by an expert.
See EEOC guidance, "Use of tests and other selection procedures can also violate the federal anti-discrimination laws if they disproportionately exclude people in a particular group by race, sex, or another covered basis, unless the employer can justify the test or procedure under the law." See EEOC June 13, 2018 press release: "CSX Transportation to Pay $3.2 Million To Settle EEOC Disparate Impact Sex Discrimination Case… According to the EEOC's lawsuit, CSXT conducted isokinetic strength testing as a requirement for workers to be hired for various jobs. The EEOC said that the strength test used by CSXT, known as the 'IPCS Biodex' test, caused an unlawful discriminatory impact on female workers seeking jobs as conductors, material handler/clerks, and a number of other job categories. The EEOC also charged that CSXT used two other employment tests, a three-minute step test seeking to measure aerobic capacity and a discontinued arm endurance test, as a requirement for selection into certain jobs, and that those tests also caused an unlawful discriminatory effect on female workers."

File: Chap. 13 - EMS

WA: CHEST PAIN - PATIENT REFUSAL – FORCIBLY TRANSPORTED TO HOSPITAL, THEN RELEASED - LAWSUIT MAY PROCEED

On Jan. 11, 2019, in El-Fatih P. Nowell v. Trimmed Ambulance, LLLC, et al, U.S. District Court Judge Robert S. Lasnik (Seattle, WA), denied EMS defendants' motion for summary judgments on most of the allegations of "involuntary detention and transport to a medical facility."

Facts:

> "On June 18, 2015, Mr. Nowell was not feeling well: he had chest pains and pain in his right leg/foot. Co-workers noticed that he seemed to be in distress, and a supervisor sent another employee into the bathroom to check on him. The employee found Mr. Nowell splashing water on his face and 'kind of just gathering himself.' Mr. Nowell was not particularly talkative and the co-worker did not want to badger him, but he thought Mr. Nowell was slightly disoriented and not quite steady on his feet.
>
> The co-worker walked Mr. Nowell to the supervisor's office. In response to the supervisor's inquiries, Mr. Nowell told her that he was having a little chest pain and pain in his right leg/foot. She offered to call the medics, which Mr. Nowell declined for a number of reasons. First, he did not think whatever he was experiencing was serious. A couple of years earlier, Mr. Nowell had chest pains that quickly evolved into numbness and loss of consciousness: that episode alarmed him enough to want to seek medical care. This episode was different. The pain was minor, more of an ache, with no dizziness. He was feeling strong enough to continue to work. Second, Mr. Nowell wanted to complete his shift in order to keep his perfect attendance record intact. Finally, Mr. Nowell did not have insurance. The supervisor told him not to worry about the lack of insurance and pushed to call the medics so that they could check him out. Mr. Nowell acquiesced.
>
> The Kent Fire Department arrived first. David White, a 25-year veteran fire fighter and engineer, led the three-person response team. After the team spoke with the employee who found Mr. Nowell in the bathroom, the supervisor, and Mr. Nowell, Mr. White saw reason for concern. Mr. Nowell did not remember having been in the bathroom, his symptoms were consistent with a heart attack, he was fairly slow in responding to the team's questions, and he was repeating things in response to those questions. On the other hand, Mr. Nowell was able to provide his medical history when asked, his vital signs and EKG readings were fine, he was consistently focused on maintaining his attendance record and avoiding uninsured expenses, he promised to follow up with his wife and doctor, and Mr. White felt that Mr. Nowell was improving as time went on. At that point, Mr. White concluded that no further medical interventions were needed: Mr. Nowell could continue working or make his way home as he saw fit.
>
> The supervisor, however, caught Mr. White's attention and indicated that Mr. Nowell was not quite right. This 'new' information was enough to make Mr. White reconsider, and he apparently decided that Mr. Nowell needed to be seen by a doctor immediately. From Mr. Nowell's perspective, the conversation went from, 'well, all your signs are good and there does not seem to be anything wrong with you' to 'although we don't see anything particularly alarming, we'd like to take you to the hospital just to be on the safe side.'

While Mr. Nowell was, at this point, apparently willing to give up on his perfect attendance record, he did not want an ambulance ride to the hospital given how he was feeling and his ambiguous insurance status. He tried to contact his own doctor to have the doctor assure the Fire Department that he was capable of making his own medical decisions, a plan that Mr. White seemed to support. Mr. Nowell was unable to get through to the doctor, however, and Mr. White felt that the conversation with the receptionist was 'starting to go on and on and on and on, and we needed to determine what was going to happen with him, what we needed to do to resolve this or get it checked out.' Mr. White told the receptionist that they were going to take Mr. Nowell to the hospital.

While all this was happening, TriMed arrived with an ambulance. Two TriMed employees brought a gurney into the building and were standing outside the supervisor's office. Mr. Nowell began getting uncomfortable as he realized that Mr. White doubted his capacity as a patient to act on his own and was leaning toward a course of action that Mr. Nowell disagreed with. He left the supervisor's office, but was greeted by two other fire fighters and the two TriMed employees. He found himself seated on the gurney. When he tried to stand up, he was pushed back down. His steadfast insistence that he was fine, that there was no cause for alarm, and that he neither needed to go to the hospital nor could afford an ambulance ride fell on deaf ears. When he tried to walk away, the five men tackled him at Mr. White's direction, held his arms and legs down, and strapped him to the gurney.

After Mr. Nowell was restrained, Mr. White recognized they were in the midst of taking a person to the hospital against his will and that they needed to have Mr. Nowell involuntarily committed 'to cover all the bases to make sure that legally what we were doing was okay.'

The Fire Department called the City of Kent Police Department. Officer Dorff arrived and spoke with Mr. White, the employee who found Mr. Nowell in the bathroom, and possibly one or two other witnesses. Plaintiff, who was by now in the back of the ambulance, had lost all confidence in the process and would not speak to the officer. Officer Dorff concluded that given Mr. Nowell's prior medical history, 'his odd behavior and not cooperating with answering questions, that he should probably medically be checked out.' He completed an involuntary commitment report form noting that Mr. Nowell was unable to care for himself and had medical problems.

Mr. Nowell was transported to a hospital. One of the TriMed employees used plaintiff's phone to call his wife while they were enroute. When his wife arrived at the hospital, she insisted that the restraints be removed and that Mr. Nowell be seen by a doctor. After checking his vital signs and speaking with Mr. Nowell, the doctor found nothing wrong and no reason for alarm. Mr. Nowell went home with his wife.

He filed this lawsuit two years later, alleging physical and emotional injuries caused by the conduct of defendants' employees. Plaintiff asserts claims of assault and battery, false imprisonment, negligence, unlawful seizure, and use of excessive force."

***

Defendants' version of events differs from the above in at least two significant respects. First, defendants maintain that they were forced to detain Mr. Nowell because plaintiff insisted that he was going to drive himself home and therefore posed a risk to the communities and schools he would have passed along the way. Defendants go so far as to say that Mr. Nowell 'testified unequivocally during his deposition that he had every intention of getting behind the wheel of his car and driving on public roads while suffering from stroke-like symptoms.' ** * Second, defendants argue that Mr. Nowell attacked them when he charged

the door of his supervisor's office, attempting to knock one of the fire fighters out of his way in his efforts to escape in his car. Plaintiff and at least one other witness disagree."

Holding:

> The Court cannot resolve such factual disputes in the context of a motion for summary judgment.
> ***
>
> Plaintiff's state law [assault and battery; false imprisonment; negligence] and Fourth Amendment [false imprisonment; excessive force] claims may proceed.

Legal Lessons Learned: When EMS are faced with the difficult decision on whether to forcibly transport a patient, consider first calling the hospital emergency department and getting medical clearance to transport.

File: Chap. 13 – EMS

OH – PUBLIC RECORDS REQUEST - CLEVELAND DISPATCH 911 CAD REPORTS ON OVERDOSE RUNS – ADDRESSES NOT HIPAA PROTECTED, UNLESS PHI

On Dec. 14, 2018, in Rachel L. Dissell v. City of Cleveland, the Ohio Court of Claims appointed a Special Master to advise the Court on request for records by a reporter for the The Plain Dealer newspaper. The Special Master concluded that Computer Aided Dispatch records, including addresses where EMS responded, be released under Ohio Public Records Act. "Upon consideration of the pleadings and attachments, I recommend that the court order respondent to provide requester with a copy of the EMS/Fire CAD event summary records, as submitted under seal."

Facts:

> "On June 26, 2017, requester Rachel Dissell, a reporter for The Plain Dealer, sent respondent City of Cleveland an email containing the following public records request:
>
> > For Jan 1, 2016 - Dec. 31, 2016 and for Jan. 1, 2017 through June 1, 2017 the following electronically collected EMS and Cleveland Division of Fire information:
> >
> > CAD (Computer Aided Dispatch) records for calls where Cleveland EMS and/or Cleveland Fire Department units were dispatched for opioid overdose calls, including heroin, synthetic opioids, fentanyl, carfentanil or opioid mixtures that include marijuana or [sic]. (Complaint at 3.)
>
> On August 9, 2017, Cleveland Public Records sent a response stating:
>
> > "In response to your public records request, there are no responsive records because the City generally cannot determine whether an incoming 911 emergency call is an opioid-related call, a prerequisite to providing the requested CAD reports.

The same day, Dissell amended her request as follows:

> For Jan 1, 2016 - Dec. 31, 2016 and for Jan. 1, 2017 through August 1, 2017 the following electronically collected EMS/Cleveland Division of Fire or Cleveland Police Department records:
>
> Any records that document Cleveland EMS/Cleveland Fire Department or Cleveland Police Department units dispatched or called to respond to opioid related overdose calls, including heroin, synthetic opioids, fentanyl, carfentanil or opioid mixtures that include marijuana or cocaine.
>
> Please include the date and time of the call, location or address of the call, neighborhood (if collected), on scene disposition and/or non-patient identifying narrative….

On November 13, 2018, the City filed responsive EMS/Fire CAD records under seal."

Holding:

> "The confidentiality provisions of the federal Health Information Portability and Accountability Act (HIPAA) apply to 'protected health information' obtained by a 'covered entity,' i.e., health plan, health care clearinghouse, or health care provider. 42 U.S.C. 1320d; 45 C.F.R. 160.103. Respondent asserts that street addresses in the event summaries must be redacted pursuant to HIPAA.
>
> At the outset, even were Cleveland EMS/Fire a HIPAA 'covered entity' and the dispatch records of EMS/Fire units 'protected health information,' HIPAA does not supersede the Ohio Public Records Act. In *State ex rel. Cincinnati Enquirer v. Daniels*, 108 Ohio St.3d 518, 2006-Ohio-1215, 844 N.E.2d 1181, ¶ 25-26, the Ohio Supreme Court found that,
>
> > A review of HIPAA reveals a "required by law" exception to the prohibition against disclosure of protected health information. With respect to this position, Section 164.512(a)(1), Title 45, C.F.R. provides, "A covered entity may * * * disclose protected health information to the extent that such
> >
> > * * * disclosure is *required by law* * * *." (Emphasis added.) And the Ohio Public Records Act requires disclosure of records unless the disclosure or release is prohibited by federal law. R.C. 149.43(A)(1)(v).
> >
> > Hence, we are confronted here with a problem of circular reference because the Ohio Public Records Act requires disclosure of information unless prohibited by federal law, while federal law allows disclosure of protected health information if required by state law.
>
> The Court noted that the secretary of the Department of Health and Human Services had explained that 45 CFR 164.512(a) was intended to preserve access to information considered important enough by state or federal authorities to require its disclosure by law, and that the federal Freedom of Information Act ("FOIA") is one law requiring disclosure of records under this exception to HIPAA protection. *Id.* at ¶ 27-28. The Court then held:
>
> > Even if the requested [records] did contain 'protected health information' as defined by the Health Insurance Portability and Accountability Act ("HIPAA"), and even if the Cincinnati Health Department operated as a 'covered entity' pursuant to HIPAA, the [records] would still be subject to disclosure under the "required by law" exception to the HIPAA privacy rule because Ohio Public

> Records Law requires disclosure of these reports, and HIPAA does not supersede state disclosure requirements.
>
> *Id.* paragraph two of the syllabus, *see generally Id.* at ¶ 19-28, 34. Under the 'required by law' exception, as interpreted in *Daniels,* I find that no content of the EMS/Fire event summaries is subject to withholding under HIPAA.
>
> Even if HIPAA were applicable, the City does not cite any federal or Ohio statute, regulation, or case law recognizing an agency providing transport/paramedic services as a 'covered entity' under 45 CFR 160.103. *But see* OR2003-8500, 2003 Tex. AG LEXIS 9701. Nor has the City shown that street addresses to which units were dispatched are 'individually identifiable' health information as defined in 45 CFR 160.103. *Id.* Finally, the code SDO reflects only that the *caller* identifies the reason for his/her call as a suspected drug overdose (Moore Aff. at ¶ 4). It does not reflect a medical professional's history, diagnosis, prognosis, condition, or treatment information.
>
> This is not to say that street addresses could not be excepted under different circumstances. If the addresses met the definition of a 'medical record' under Ohio law, R.C. 149.43(A)(1)(a) and (A)(3), then they would not be "public records" R.C. 149.43(A)(1). As such, they would be exempt under *both* Ohio law and under HIPAA, because the conflict relied on in *Daniels* between the Ohio Public Records Act and HIPAA would be removed. However, under Ohio law the records of 'name, address, age, location of the incident, nature and time of the call, and disposition of the patient' on an EMS run sheet are not "medical records" as defined in R.C. 149.43(A)(3). 1999 Ohio Atty.Gen.Ops. No. 006; 2001 Ohio Atty.Gen.Ops. No. 041.
>
> I conclude as a matter of law that HIPAA does not apply to any portion of the withheld records. Separately, I find that the City has not shown by clear and convincing evidence that the records would fall squarely within HIPAA definitions and terms."

Legal Lessons Learned: In producing CAD or other records on EMS calls, be very careful to exclude any "Protected Health Information." [Note: City may appeal the Special Master's report and conclusions to the Court.]

File: Chap. 13 - EMS

IN: EMS GAVE COMBATIVE PERSON A SEDATIVE – LATER DIED – PARAMEDIC HAS "QUALIFIED IMMUNITY"

Aug. 14, 2018 decision by 7th Circuit in Billie Thompson v. Lance Cope where Indianapolis police called EMS to help with person found naked, running in street, high on amphetamines, and combative. EMS administered a sedative; patient died 8-days later. The Court held (3 to 0), "The paramedic is entitled to qualified immunity on the excessive force claim. Case law did not (and does not) clearly establish that a paramedic can violate a patient-arrestee's Fourth Amendment rights by exercising medical judgment to administer a sedative in a medical emergency

Facts:

> "On October 5, 2014, paramedic Lance Cope was dispatched to the south side of Indianapolis for an animal bite. When he arrived, he learned that the bite was not from an animal but from a man, Dusty Heishman.

Before Cope could treat the bite patient, an Indianapolis police officer approached Cope and said he needed him to 'take a look' at Heishman, who 'was being combative.'

Heishman was naked and lying prone in the middle of the street. His hands were cuffed behind his back and his ankles were shackled together. He had been tased by a police officer and had been punched and choked in a physical struggle with two civilians who helped the officer wrestle Heishman to the ground.

The police had responded to a report that Heishman was naked, belligerent, and roaming the neighborhood. The responding officer noticed that Heishman was sweating profusely and appeared to be on drugs. Heishman approached the officer's vehicle despite the officer's oral commands to calm down and sit down on the ground. The officer tased Heishman, but Heishman pulled the wires out of the taser, jumped back onto his feet, and tried to get into the officer's car. Despite oral commands to calm down or sit down, Heishman stared through the officer and repeatedly said 'they're trying to kill me, they're trying to kill me.' After more officers arrived, they tried to put Heishman in the back of a police transport wagon. Heishman resisted and knocked the officers off balance, but the officers ultimately got Heishman back on the ground and held him there. Heishman was still struggling and fighting the officers who were holding him down. That was the scene when paramedic Cope arrived.

Cope assessed Heishman. After checking Heishman's airway, breathing, and pulse, he suspected Heishman was on amphetamines. The district court relied on Cope's report (which is consistent with his deposition testimony), which said he injected Heishman with a sedative, Versed, as a 'chemical restraint for patient and crew safety.' While the sedative took effect, Cope visually monitored Heishman by watching his breathing and watching for any struggling. Cope did not use medical equipment to monitor Heishman's vital signs. The medics and the officers picked Heishman up, laid him on his back on a cot, covered him with a blanket, and moved him toward a waiting ambulance.

The darkness (it was after 8:00 p.m. on an October night) made it difficult for Cope to make an assessment. But once Heishman was in the ambulance, Cope saw that Heishman was not breathing and found he had no pulse. Seven minutes of CPR restored Heishman's heartbeat and breathing, but he remained unconscious. Heishman lost brain function and died eight days later."

Holding:

"Heishman's estate sued Cope, the Health and Hospital Corporation of Marion County ('the hospital'), and other defendants in state court. The estate brought claims under 42 U.S.C. § 1983 against Cope in his individual and official capacities for excessive force, deliberate indifference, and failure to protect/intervene…. The defendants removed the case to federal court based on federal-question jurisdiction over the constitutional claims, with supplemental jurisdiction over the state-law claims.

***

Cope moved for summary judgment on the federal constitutional claims. The district court granted the motion on the official-capacity claims and the claims against Cope for deliberate indifference and failure to protect/intervene, but denied it on the excessive force claim against Cope in his individual capacity. Thompson, 2017 WL 4248006, at *4–10. Cope ap-pealed, and we consolidated that appeal with the interlocutory appeal on the state malpractice issue.

***

The plaintiff estate has not cited any cases holding that a paramedic could violate a patient's Fourth Amendment rights by rendering medical treatment.

***

As we view this case, the question for qualified immunity is whether it was clearly established in 2014 that a paramedic 'seizes' an arrestee and is subject to Fourth Amendment limits on excessive force by sedating the arrestee—who appears to the paramedic to be suffering from a medical emergency— before taking the arrestee by ambulance to the hospital. It was not.

***

Qualified immunity exists to avoid or at least to reduce the risk of the kind of catch-22 that would result from accepting the estate's position: treat the arrestee or don't treat him, but face a lawsuit either way. Suppose we put aside for a moment the human and professional ethics and responsibilities of paramedics and police officers when confronting a person in dire straits. Let's focus only on legally enforceable duties. If the officers and paramedic had not responded to Heishman's excited delirium, they could easily have found themselves defending against a deliberate indifference claim for ignoring his obvious and serious medical needs.

***

Defendant Cope was entitled to summary judgment on the Fourth Amendment claim.

***

The denial of Cope's motion for summary judgment on the excessive force claim and the denial of defendants' motion to dismiss the state-law claims are REVERSED. The case is REMANDED with instructions to dismiss the estate's state=law claims without prejudice and to dismiss the federal claims against Cope with prejudice."

Legal Lessons Learned: Qualified Immunity protects police, fire, EMS personnel from personal liability. See also U.S. Supreme Court's Jan. 7, 2019 decision, in City of Escondido, California v. Mart Emmons, (9 to 0), in a per curiam decision [not authored by a specific Justice], reversed the 9th Circuit without the need to even hear oral argument. The Court held: "As to Officer Craig, the Ninth Circuit also erred. As we have explained many times: 'Qualified immunity attaches when an official's conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'"

File: Chap. 15 - CISM

MN: PTSD – NEW STATUTORY PRESUMPTION THAT PTSD IS WORK RELATED - COVERED BY WORKERS COMP

Effective Jan. 1, 2019, the new state statute, "post-traumatic stress disorder was reclassified as an occupational disease for first responders. That includes police officers, firefighters, paramedics, emergency medical technicians, and nurses who provide emergency medical services outside of a medical facility." Jan. 16, 2019).

New statute:

> "(e) If, preceding the date of disablement or death, an employee who was employed on active duty as: a licensed police officer; a firefighter; a paramedic; an emergency medical technician; a licensed nurse employed to provide emergency medical services outside of a medical facility; a public safety dispatcher; an officer employed by the state or a political subdivision at a corrections, detention, or secure treatment facility; a sheriff or full-time deputy sheriff of any county; or a member of the Minnesota State Patrol is diagnosed with a mental impairment as defined in paragraph (d), and had not been diagnosed with the mental impairment previously, then the mental impairment is presumptively an occupational disease and shall be presumed to have been due to the nature of employment. This presumption may be rebutted by substantial factors brought by the employer or insurer. Any substantial factors that are used to rebut this presumption and that are known to the employer or insurer at the time of the denial of liability shall be communicated to the employee on the denial of liability. The mental impairment is not considered an occupational disease if it results from a disciplinary action, work evaluation, job transfer, layoff, demotion, promotion, termination, retirement, or similar action taken in good faith by the employer."

Legal Lessons Learned: Several states have enacted similar statutes. See also "Update: Workers' Comp Coverage for Firefighters,".

See also this blog:

- "So far in 2018, of 103 state bills dealt with workers compensation provisions for first responders and only 6 bills past passed "true occupational presumption for PTSD." Washington State, Florida, Vermont, Hawaii, New Jersey, and New Hampshire enacted inclusion of the PTSD presumption into their workers' compensation legislation.
- In 2017, Colorado passed a bill recognizing PTSD as compensable under workers compensation. Then the state passed a bill allowing the treatment of PTSD using medical marijuana.
- South Carolina created a $500,000 fund to help fund first responders out of pocket medical costs related to the treatment of PTSD.
- Texas passed an act that eases the burden for first responders filing PTSD claims, requiring the lower standard of proof: "preponderance of evidence" and without the need to declare medical impairment.
- New York included PTSD references in the 2018 budget that would allow first responders to claim personal injury based on "extraordinary work-related stress" [Hanson & Watson, "Addressing the Emergence of PTSD Presumption: Issues and Solutions" pdf]."

See also Jan. 17, 2019 article on new Massachusetts law: "Critical incident intervention for first responders' bill signed into law."