UNIVERSITY OF Cincinnati

College of Engineering & Applied Science

Open Learning Fire Service Program
2850 Campus Way Drive
745 Baldwin Hall
Cincinnati OH 45221-0071

Phone (513) 556-6583

June 2019 – FIRE & EMS LAW Newsletter

[NEWSLETTER IS NOT PROVIDING LEGAL ADVICE.]
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Lawrence T. Bennett, Esq.
Program Chair
Fire Science & Emergency Management
Cell 513-470-2744
Lawrence.bennett@uc.edu

Recent cases supplement chapters of:

TEXTBOOK: FIRE SERVICE LAW (Second Edition): Jan. 2017 (ISBN 978-1-4786-3397-6); Waveland Press: (First Edition – Prentice Hall, 2008)

TEXTBOOK: EMS LAW (Second Edition): June 2018; FREE ONLINE TEXTBOOK: (ISBN: 978-1-949104-03-5); (First Edition, 2012, MBS Direct, Columbia, MO).

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Chap. 1 – American Legal System

IL: SUICIDE - U.S. SUP. CT. NOT TAKE APPEAL – SUICIDE BY ATTORNEY ON ANTI-DEPRESSANTS - FDA DID NOT APPROVE LABEL

On May 28, 2019, in **Wendy B. Dolin v. GlaxoSmithKline, LLC**, the U.S. Supreme Court declined to hear the appeal of widow of 57-year old attorney who committed suicide after taking Paxil. Thereby leaving in place the decision of the U.S. Court of Appeals for the 7th Circuit, which had set aside $3 million jury verdict for widow.

On Aug. 22, 2018, the 7th Circuit held that Food and Drug Administration refused to allow the manufacturer to added to Paxil label a warning that the drug may lead to increase in suicide of not only patients under 24, but also in older adults. The FDA wanted the same, uniform warning on all anti-depressant drugs.

> "GSK asked the FDA for permission to modify the paroxetine label as plaintiff argues was needed. The FDA said no, repeatedly. Federal law thus preempted plaintiff's Illinois-law claim that GSK should have warned of a risk of adult suicidality on the paroxetine label in 2010. GSK added a similar warning in 2006, and the FDA ordered that GSK remove that label and replace it with a class-wide SSRI warning in 2007."

Facts:

"At the time of Stewart's death, GSK manufactured brand-name Paxil and was responsible under federal law for the content of the drug's label. When Stewart died, the labels for paroxetine and similar antidepressant drugs warned that they were associated with suicide in patients under the age of 24. The labels did not warn about any association between the drugs and an increased risk of suicide in older adults."

Holding:

"We agree with GSK that federal law prevented GSK from adding a warning about the alleged association between paroxetine and suicides in adults. On that basis of federal preemption, we reverse the judgment. The case must be dismissed."

Here is an article about this case.

Legal Lessons Learned: FDs should have a drug-free workplace policy that requires disclosure of anti-depressant medication that could affect performance of their duties.

See IAFC Position: Drug and Alcohol-Free Awareness, including:

"Any personnel using over-the-counter or prescription medications where potential side effects that may reasonably affect the performance of their duties have been identified by a healthcare provider or manufacturer's packaging should report their use to their supervisor when they are functioning in a capacity responsible for emergency and non-emergency operations. Upon notification, supervisors should, in the case of prescription medications, direct personnel to obtain appropriate documentation from the prescribing healthcare provider attesting to the medication's safety while performing the essential duties of the fire service position. In the case of over-the-counter medications, supervisors should contact the fire department physician or other health care provider to consult on the potential side effects. Personnel should refrain from engaging in such activities until the appropriate release is obtained."

Chap. 1 – American Legal System

IA: STATE SUP. CT. UPHOLDS STATUTE - NO PAYROLL DEDUCT. OF UNION DUES – LIMITED COLLECTIVE BARG. LESS 30% PUB SAFETY

On May 17, 2019, in AFSCME Iowa Council 61, et al. v. State of Iowa and Iowa Public Employment Relations Board, the Iowa Supreme Court held (4 to 3) that the 2017 statute was constitutional.

"Our role is to decide whether constitutional lines were crossed, not to sit as a super legislature rethinking policy choices of the elected branches. We conclude the 2017 amendments withstand the constitutional challenges. The plaintiffs concede there is no constitutional right to public-sector collective bargaining or payroll deductions. The parties agree the equal protection claims are reviewed under the rational basis test. The legislature could reasonably conclude that the goal of keeping labor peace with unions comprised of at least thirty percent public safety employees, and the greater risks faced by emergency first responders, justified the classification. We hold the legislative classifications are not so overinclusive or underinclusive as to be unconstitutional under our highly deferential standard of review. We further hold the amendments do not violate constitutional rights of freedom of association. Public employees remain free to belong to the same unions. Accordingly, we affirm the district court's summary judgment."

Facts:

"In 1974, after public employees engaged in multiple strikes, the Iowa legislature enacted the Public Employment Relations Act (PERA), codified at Iowa Code chapter 20. See generally Waterloo Educ. Ass'n v. Iowa Pub. Emp't Relations Bd., 740 N.W.2d 418 (Iowa 2007) (detailing the history of public sector collective bargaining). PERA sought to create an orderly system of collective bargaining for public employees by establishing rules and procedures and by prohibiting strikes. Iowa Code §§ 20.6, .9, .10 (2017). PERA permitted, but did not require, public employees to join a public employee organization (union).3 Id. § 20.8. Employees could vote to select a union to represent them. Id. An employee who joined a union had the option to pay dues through automatic payroll deductions. Id. § 20.9; id. §§ 70A.17A, .19.

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In February 2017, the Iowa legislature enacted House File 291, amending PERA. 2017 Iowa Acts ch. 2 (codified in part at Iowa Code ch. 20 (2018)). On February 17, the Governor signed House File 291 into law. The amendments altered the scope of mandatory collective bargaining and arbitration and eliminated payroll deductions for all union dues. See generally Iowa Code ch. 20.

Collective bargaining laws for public employees vary by state, with some states allowing collective bargaining rights for police and firefighters not shared by other public employees. House File 291 gave public employees different bargaining rights depending on whether they are part of a bargaining unit with at least thirty percent "public safety employees." Public safety employees are defined to include: ****

> "A permanent or full-time fire fighter of a city, township, or special-purpose district or authority who is a member of a paid fire department."

Iowa Code § 20.3(11). Not included in the statutory definition of public safety employees are university police, probation or parole officers, fraud bureau investigation officers, airport firefighters, corrections officers, and emergency medical service providers.

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If a union represents a bargaining unit with at least thirty percent public safety employees, it may exercise broad bargaining rights on behalf of all of its members, including those who are not public safety employees. *Id.* § 20.9(1). The union continues to have the right to bargain and, in the event of an impasse, the right to mediate and arbitrate with public employers on the following mandatory topics:

> "wages, hours, vacations, insurance, holidays, leaves of absence, shift differentials, overtime compensation, supplemental pay, seniority, transfer procedures, job classifications, health and safety matters, evaluation procedures, procedures for staff reduction, in-service training, grievance procedures for resolving any questions arising under the agreement, and other matters mutually agreed upon."

In sharp contrast, for unions representing a bargaining unit with less than thirty percent public safety employees, House File 291 limited mandatory bargaining and, in the event of an impasse, mediation and arbitration, to the subject of 'base wages and other matters mutually agreed upon.' *Id.* The amendment specifies that these subjects "shall be interpreted narrowly and restrictively." *Id.* The amendments allow public employers to voluntarily bargain over formerly mandatory topics. Longevity pay, shift differentials, and overtime compensation are still *permissive* subjects of bargaining. *See* Iowa Code § 20.9(1), (3). This leaves it up to the state or local government or school board whether to negotiate on these matters.

***

House File 291 also eliminated the right of all public employees, including public safety employees, to bargain over union dues checkoffs and to pay union dues through payroll deductions. *Id.* § 20.9(3); *id.* § 70A.19. Public employees may still make other payments through payroll deductions, such as insurance premiums, charitable contributions, and dues in professional associations. *Id.* §§ 70A.15A, .17, .17A.

***

The plaintiffs in this case are a public employee union and four of its members. Iowa Council 61 of the American Federation of State, County and Municipal Employees (AFSCME) represents public employees throughout Iowa. The individual plaintiffs, Johnathan Good, a corrections officer; Ryan De Vries, a police officer; Terra Kinney, a motor vehicle enforcement officer; and Susan Baker, a drafter, are public employees and members of AFSCME. All of AFSCME's bargaining units in Iowa are comprised of less than thirty percent public safety employees. House File 291 restricted collective bargaining rights for every AFSCME bargaining unit, including those with public safety employees.

***

The district court denied the plaintiffs' motion for summary judgment and granted the defendants' motion for summary judgment. The court rejected the plaintiffs' freedom of association argument. With regard to the equal protection challenge, the court applied the rational basis test and ruled that House File 291 is constitutional. The court concluded that while the amendments distinguish between similarly situated people, the State's desire to avoid public safety employee strikes was a realistically conceivable purpose and was based in fact, and the relationship between the classification and the purpose was not so weak as to be viewed as arbitrary."

Holding:

"The defendants argue that the thirty percent threshold is rational because the risk from labor unrest is materially greater in a unit with a larger percentage of public safety employees. The defendants argue this thirty percent threshold had another rationale, protecting the public fisc. The thirty percent threshold also provides greater assurance that in the event of labor unrest there would be a critical mass of public safety employees available to enforce the law and preserve public safety.

***

We hold that maintaining labor peace is a valid, realistically conceivable purpose and has a basis in fact. The legislature could reasonably have found that giving public safety employees expanded bargaining rights would discourage them from engaging in strikes or sick-outs. It is true that there have been no strikes of public employees in Iowa since PERA was enacted in 1974. But it is also true that until 2017 there had never been legislation substantially curtailing the collective bargaining rights of Iowa public employees. Iowa legislators in 2017 could consider what happened several years earlier in Wisconsin to see that labor unrests and strikes may result when legislative amendments curtail public union bargaining rights. Wisconsin public employees staged mass protests in 2011, occupying the rotunda of the state capitol with great media fanfare. *See Walker,* 705 F.3d at 642-43, 655; *Wis. Right to Life State Political Action Comm. v. Barland,* 664 F.3d 139, 144-45 (7th Cir. 2011) (discussing the political unrest occurring in Wisconsin leading up to and after the collective bargaining amendments). *See generally Madison Teachers, Inc. v. Walker,* 851 N.W.2d 337 (Wis. 2014) (rejecting union challenge to Wisconsin's amended collective bargaining statute).

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Against that backdrop, Iowa legislators in 2017 could rationally decide to extend more beneficial negotiating rights to bargaining units comprised of at least thirty percent public safety employees.

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The 2017 amendments do not infringe on a fundamental right of association. The plaintiffs "come to us with a problem suitable only for political solution." *See Brown v. City of Lake Geneva,* 919 F.2d 1299, 1304 (7th Cir. 1990). The plaintiffs are free to attempt to persuade public employers, such as the State and local governments and school boards, to voluntarily bargain over formerly mandatory terms. The plaintiffs otherwise must look to the ballot box and the elected branches to change this lawfully enacted statute."

Dissent [Chief Justice Cady]:

"Our constitution requires laws to treat similarly situated people equally unless there is an adequate reason otherwise. In this case, the overinclusiveness and underinclusiveness written into the statute drowned this reason out. Our constitutional form of government depends on courts to see it and demand better."

Dissent [Justice Appel]:

"House File 291 is an odd statute. *See* 2017 Iowa Acts ch. 2, §§ 1, 6 (codified at Iowa Code §§ 20.3(11), .9 (2018)). It slices and dices the universe of public employees entitled to collective bargaining by various categories in multiple novel ways that are overinclusive and underinclusive. One of the two ostensible purposes—labor peace—is advanced even though severe sanctions for striking have been in place for forty years, and during that period, there has never been a strike by any public employees."

Legal Lessons Learned: Collective bargaining for fire & police has been addressed by many state legislatures. The U.S. Supreme Court's Janis decision on June 27, 2018, - "States and public-sector unions may no longer extract agency fees from nonconsenting employees" - may lead other states to also limit employer deduction of union dues.

See footnote 4 of the Majority's decision:

As of 2018, twenty-eight states require collective bargaining. Eric J. Brunner & Andrew Ju, *State Collective Bargaining Laws and Public-Sector Pay,* 72 ILR Rev. 480, 487 (2019) [hereinafter Brunner & Ju]. Fifteen states allow state employers to decide whether or not to collectively bargain. *Id.* The range of topics public employees are able to bargain over varies from state to state, as does the employees' ability to compel arbitration in the event of an impasse. Raskin-Ortiz & Martin at 4-10. Of the states that require or permit collective bargaining, Alabama, Delaware, Idaho, Kentucky, Oklahoma, Rhode Island, and Wyoming have separate bargaining rights for police officers and/or firefighters. *Id.* Three states—North Carolina, South Carolina, and Virginia—prohibit collective bargaining for any public employees. Brunner & Ju at 487. Arizona and Texas limit collective bargaining to police officers and firefighters, while Georgia limits collective bargaining rights to firefighters alone. *Id.*

See also this article: "Union Dues Deductions – Tips for Public Employers"

TX: APARTMENT FIRE - DRUG PARAPHERNALIA IN "PLAIN VIEW" - PD CALLED IN, SEARCH WARRANT – METH CONVICTION UPHELD

On May 16, 2019, in Casey Allen Martin v. State of Texas, the Court of Appeals of Texas, Second Appellate District (Fort Worth) held (3 to 0) the trial court properly denied the defendant's motion to suppress the methamphetamine.

> "Fire broke out in appellant Casey Allen Martin's apartment, and firefighters entered to battle the blaze. Firefighters saw drug paraphernalia inside, and they called police in to observe the scene. Officers then obtained a search warrant, which led to the discovery of the methamphetamine that was the basis for Martin's conviction. In one issue, Martin appeals the denial of his motion to suppress. Martin does not dispute that the fire permitted firefighters to enter the apartment. But he contends that the same exigent circumstances did not also authorize officers to enter and observe, in plain view, the same contraband that firefighters had already seen. Because we disagree, we affirm.

Facts:

> "On August 30, 2017, at approximately 10:47 p.m., the Bedford Fire Department ('BFD') was called to a fire at an apartment complex. Firefighter Darren Cook located the source of the fire as an apartment on the second floor, with smoke and water flowing from the door. Cook contacted the tenant, Martin, who indicated that he fell asleep while cooking on the stove.
>
> BFD made entry and extinguished a small fire on the cooktop. Cook then began efforts to ventilate the apartment. Cook attempted to open a window in the back bedroom, kneeling on a futon to reach the window, and his knee touched a firearm. Cook became concerned about his safety and the safety of the other firefighters. The firefighters began to look around the apartment and observed other firearms and ammunition scattered throughout the apartment, giving Cook additional safety concerns. Cook also saw multiple items of drug paraphernalia sitting on dressers, tables, and a shelf in an open closet—all in plain view. Cook decided to call the police due to his safety concerns and the drug paraphernalia.
>
> Officer Hunter Hart of the Bedford Police Department was dispatched to the scene. When Officer Hart arrived, he made contact with the BFD battalion chief. The chief told Officer Hart that BFD could not ventilate the back bedroom of the apartment because there were blankets over the windows and that BFD had located guns and drug paraphernalia inside the apartment. The chief told Officer Hart that he was concerned about the safety of BFD due to what they had observed, and he wanted Officer Hart to secure the apartment.
>
> Officer Hart went into the apartment and inspected each room, ending with the back bedroom. In the bedroom, he observed drug paraphernalia in plain view. Officer Hart described the paraphernalia as a pipe or bong containing drug residue, a plastic baggie containing drug residue, and additional plastic baggies commonly used to contain narcotics. Based on the items of drug paraphernalia, Officer Hart believed that an offense had been committed, and he "froze" the apartment as a crime scene. Officer Hart exited the apartment approximately two minutes after his initial entry 4 and determined that there was no one inside who could pose a safety risk. BFD remained at the scene while Officer Hart entered and exited the apartment.
>
> Additional officers went into the apartment to observe the contraband and to determine if they should obtain a search warrant for the apartment. The police did not seize any evidence at that time. The officers talked to

Martin, who stated that he was the only one residing in the apartment. Martin was arrested for possession of drug paraphernalia.

Officer Hart then left the scene, and Bedford police obtained a search warrant at 3:12 a.m. on August 31, 2017. In the warrant affidavit, an officer alleged that Cook and BFD had located what they believed to be drug paraphernalia inside the residence. Police executed the search warrant and found the methamphetamine that is the subject of this case.

After hearing the evidence, the trial court denied suppression and entered findings of fact and conclusions of law. In its conclusions, the trial court stated that the firefighters' entry into the apartment was lawfully related to exigent circumstances: combatting an ongoing fire. The trial court observed that under Supreme Court precedent, the firefighters would have been within their rights to seize the drug paraphernalia that they saw in plain view."

Holding:

"Firefighters' efforts are best devoted to fighting fire and sorting the aftermath, which are within their mission and core expertise. When, as here, the presence of firearms and contraband distracts from that mission, firefighters should be permitted to call upon police, whose expertise includes handling firearms and securing contraband.

***

We note that a contrary rule is stated by two courts: United States v. Hoffman, 607 F.2d 280, 283–85 (9th Cir. 1979), and State v. Bassett, 982 P.2d 410, 419 (Mont. 1999). These courts held that firefighters may not call police into the scene of a fire to witness or seize contraband without first observing the warrant requirement. As support, these courts offered two rationales. First, these courts rejected the notion that a police officer may legitimately 'step into the shoes' of a firefighter because the firefighter and the police officer entered burned houses for two entirely separate reasons. See,e.g., Bassett, 982 P.2d at 418. The firefighters entered the home to extinguish the fire, to clean up, and to ensure that the fire did not reignite. Id. But the police officer entered solely to seize criminal evidence unrelated to the fire. Id.The Bassett court held that because there were 'two separate reasons for entering the house . . . there thus must be two entirely separate justifications for each entry.' Id.; see Hoffman, 607 F.2d at 284–85(concluding that an officer's entry was not a 'mere extension' of the firefighter's entry in part because the officer's 'only purpose in entering appellant's trailer . . . was to seize evidence of an unrelated federal crime').We disagree with this line of reasoning. It is well established that an officer's subjective reasons for acting are irrelevant in determining whether that officer's actions violate the Fourth Amendment. Brigham City, Utah v. Stuart, 547 U.S. 398, 404, 126 S. Ct. 1943, 1948 (2006). '[T]he issue is not his state of mind, but the objective effect of his actions . . . .' Id. at 398, 126 S. Ct. at 1948 (quoting Bond v. United States, 529 U.S. 334, 338 n.2, 120 S. Ct. 1462, 1465 n.2 (2000)). Because this rationale would instead make an officer's subjective motivation a paramount concern, we must respectfully part ways with our brethren in Montana and the Ninth Circuit.

Legal Lessons Learned: The "Plain View Rule" is alive and well. The police probably could have seized the meth and the firearm without a search warrant, but getting the warrant "virtually guaranteed" that a motion to suppress would be denied.

IL: FF PRIOR HEART ISSUES - PATIENT DROPPED ON STRETCHER – LINE-OF-DUTY PENSION, LIFETIME HEALTH INSURANCE

On May 28, 2019, in Patrick Cronin v. Village of Skokie, the Appellate Court of Illinois, First District, held (3 to 0) that the retired firefighter was properly awarded lifetime health insurance.

> "In summary, because Mr. Cronin was awarded a line-of-duty disability pension by the Pension Board, he met the requirements of section 10(a) of the Benefits Act—that he suffered a catastrophic injury in the line of duty—as a matter of law. Mr. Cronin also met the requirements of section 10(b): the only work-related incident that was presented as a cause of his injury was his act of holding the stretcher as a cardiac patient was dropped onto it and he presented uncontradicted evidence that he reasonably believed he was responding to an emergency. Accordingly, Mr. Cronin is entitled to benefits under the Act, and the circuit court properly granted summary judgment in favor of Mr. Cronin and against the Village."

Facts:

> "Mr. Cronin worked as a full-time firefighter and emergency medical technician for the Village for more than 30 years. On February 24, 2013, he went to the hospital because of pain that he began experiencing after transporting a patient who appeared to be in cardiac arrest on a stretcher. Mr. Cronin never returned to work after that incident, and it is that incident that he claims entitles him to benefits under the Benefits Act.
>
> Mr. Cronin acknowledged that he was diagnosed with an ascending aortic aneurysm approximately one year before the February 2013 incident. But Mr. Cronin continued working as a full-duty firefighter from March 2012 to February 2013, during which time he experienced no heart-related symptoms, such as chest tightness, pain, or shortness of breath.
>
> At 8 a.m. on February 24, 2013, Mr. Cronin began a 24-hour shift at the firehouse. At approximately 7:58 p.m., an EMS call came in for a cardiac arrest. Mr. Cronin was in the truck that followed the ambulance to the call location. The paramedics went into the home with their equipment and told Mr. Cronin to bring the stretcher, so he did. Mr. Cronin described the patient as 'very big,' guessing that the individual weighed about 300 pounds. Mr. Cronin was holding up the stretcher when the paramedics 'kind of dropped' the patient onto it. Mr. Cronin felt a pain and 'thought [he] had pulled a muscle in [his] chest.'
> Mr. Cronin continued to feel chest discomfort and started experiencing additional symptoms as the night wore on—including a headache, lightheadedness, and nausea. Because his symptoms 'kept getting worse,' Mr. Cronin was transported to the emergency room by ambulance at approximately 6 a.m. After consulting with his doctor and a surgeon, Mr. Cronin had surgery to replace his aortic valve on May 1, 2013.
>
> In September 2013, Mr. Cronin was still having problems with his chest and decided to see if he was eligible for a disability pension. He applied for a pension with the Village's Firefighters' Pension Board (Board or Pension Board), and specifically requested an occupational disease disability pension. On the application, Mr. Cronin explained his disability as follows: 'After open heart surgery to repair upper aorta and replace aortic valve, I continue to experience chest pain, dizzy spells, fatigue and [am] unable to perform physically what I had been able, prior to surgery.'
>
> The Pension Board held a hearing on Mr. Cronin's application on March 17, 2014, which Mr. Cronin did not attend. On multiple occasions during the hearing, the hearing officer incorrectly stated that Mr. Cronin had

applied for a line-of-duty disability pension, rather than the occupational disease disability pension. At the conclusion of the hearing, four Board members voted in favor of granting Mr. Cronin a line-of-duty disability pension, and one dissented, believing instead that Mr. Cronin should have been awarded a nonduty disability pension. On April 9, 2014, the Board issued its written order awarding Mr. Cronin a line-of-duty disability pension pursuant to section 4-110 of the Illinois Pension Code (40 ILCS 5/4-110 (West 2010)).

On March 18, 2014, Mr. Cronin filed his application for benefits under the Benefits Act. The Village denied his application on August 4, 2014, explaining that, after reviewing the materials presented to it, it was 'unable to determine that [he] [was] entitled to free health insurance benefits under the [Act].' On December 19, 2014, Mr. Cronin filed his complaint in this case, challenging the Village's denial of his application for health insurance benefits.

In January 2017, the parties filed cross-motions for summary judgment. The circuit court granted Mr. Cronin's motion. In its written order of July 13, 2017, the court found that, under our supreme court's decision in Village of Vernon Hills v. Heelan, 2015 IL 118170, the award of a line-of-duty disability pension established, as a matter of law, that the February 24, 2013, incident caused Mr. Cronin's catastrophic injury and therefore Mr. Cronin met the criteria for an award of benefits found in section 10(a) of the Benefits Act. The court then considered whether Mr. Cronin had also met the additional requirement, under section 10(b) of the Benefits Act, that the catastrophic injury must have occurred "as a result of" one of four specific situations: '(1) a response to fresh pursuit; (2) a response to what is reasonably believed to be an emergency;(3) an unlawful act of another; or (4) the investigation of a criminal act.'"

Holding:

The purpose of the Benefits Act 'is to continue the provision of employer-provided health insurance coverage for public safety employees and their families in the event that an employee is killed or catastrophically injured in the line of duty.' Marquardt v. City of Des Plaines, 2018 IL App (1st) 163186, ¶ 18. Section 10 of the Act sets out the criteria for the award of such benefits. It provides:

> '(a) An employer who employs a full-time law enforcement, correctional or correctional probation officer, or firefighter, who, on or after the effective date of this Act suffers a catastrophic injury or is killed in the line of duty shall pay the entire premium of the employer's health insurance plan for the injured employee, the injured employee's spouse, and for each dependent child of the injured employee until the child reaches the age of majority or until the end of the calendar year in which the child reaches the age of 25 if the child continues to be dependent for support or the child is a full-time or part-time student and is dependent for support….
>
> (b) In order for the law enforcement, correctional or correctional probation officer, firefighter, spouse, or dependent children to be eligible for insurance coverage under this Act, the injury or death must have occurred as the result of the officer's response to fresh pursuit, the officer or firefighter's response to what is reasonably believed to be an emergency, an unlawful act perpetrated by another, or during the investigation of a criminal act." 820 ILCS 320/10 (West 2012).

Mr. Cronin takes the position that he has satisfied section 10(b) by demonstrating that his injury 'occurred as the result of' his response to the cardiac arrest call on February 24, 2013, which he 'reasonably believed to be an emergency' (820 ILCS 320/10(b) (West 2012)). In arguing that Mr. Cronin failed to meet this burden of proof under section 10(b), the Village places great emphasis on the phrase "occurred as the result of" Mr. Cronin's preexisting ascending aortic aneurysm and the inconclusive medical evidence as to what caused the aggravation of his aneurysm.

> Most of the Village's arguments fail to appreciate the limited scope of what actually remained to be decided in Mr. Cronin's case under section 10(b), once section 10(a) had been satisfied as a matter of law."

Legal Lessons Learned: The Illinois statute applies even to firefighters with a prior heart issue.

Chap. 5 – Emergency Vehicle Operations

TX: EMT LOST CONTROL AMBULANCE - INJURED ROAD GRADER – MAX LIAB. OF NOT-FOR-PROFIT CO. IS $100K

On May 23, 2019, in Jose Roel Garcia v. Jesse Perez and South Texas Emergency Care Foundation, Inc., the Court of Appeals of Thirteenth District, Corpus Christi held (3 to 0)

> "Thus, we conclude that Garcia's argument that STEC is not an emergency service organization because it is not operated by volunteer members is not supported by the statute. Accordingly, we reject this argument."

Facts:

> Perez, an EMT, was driving an ambulance owned by STEC when he lost control of the vehicle. The ambulance went off the northbound lane of Interstate 37 and struck Garcia, who was operating a road grader. Garcia sustained bodily injuries as a result of the collision.
>
> ***
>
> On July 18, 2016, Garcia sued appellees for negligence, negligence per se, and gross negligence, and he sought to recover damages for the personal injuries he suffered.
> In their answer to Garcia's suit, appellees asserted that they were 'entitled to immunity under the Texas Tort Claims Act [(TTCA)] as a matter of law.' Garcia filed a motion for partial summary judgment on January 31, 2017, and argued that '[t]he summary judgment evidence . . . conclusively establishes that because [STEC] is not a volunteer emergency service organization it is not entitled to immunity.' The trial court denied the motion.
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> ***
>
> The jury returned a verdict in favor of Garcia for $359,800.56 plus pre-judgment interest, but the trial court capped appellees' liability at $100,000 and entered a judgment for that amount. This appeal followed.
>
> ***
>
> Appellees then presented testimony from several witnesses, including William Aston, the executive director of STEC. Aston explained that STEC began in 1975 as a community-wide effort to improve healthcare at the pre-hospital level and began operating in 1979 after collecting donations and support. He stated STEC is an emergency services provider that serves as the 9-1-1 emergency provider for a large portion of Cameron County and numerous cities. According to Aston, STEC is a non-profit and charitable organization operated

by its members, its board is made up solely of volunteers, and it is exempt from state taxes. STEC's employees, however, are paid. Aston's testimony was uncontroverted, and the record also includes: the articles of incorporation of STEC, which provide that STEC is a non-profit corporation; and a certificate from the Secretary of State, which certifies that STEC is a non-profit corporation."

Holding:

"The TTCA [Texas Tort Claims Act] further provides that damages awarded against an 'emergency service organization' are capped at $100,000. See TEX. CIV. PRAC. & REM. CODE ANN. § 101.023(d) (providing that 'liability of an emergency service organization under this chapter is limited to money damages in the amount of $100,000 for each person . . . .").

***

An 'emergency service organization' is defined under the TTCA as 'a volunteer fire department, rescue squad, or an emergency medical services provider that is (i) operated by its members; and (ii) exempt from state taxes by being listed as an exempt organization under Section 151.310 or 171.083 [of the] Tax Code . . . .' Id. § 101.001(1); see also TEX. TAX. CODE ANN. § 171.083 (providing that "[a] nonprofit corporation that is organized for the sole purpose of and engages exclusively in providing emergency medical services, including rescue and ambulance services, is exempted from the franchise tax') (emphasis added).Garcia's argument is premised on the idea that an emergency medical services provider that is not operated by volunteer members is not covered by the statute's definition of 'emergency service organization.' We disagree."

Legal Lessons Learned: Helpful to have a statutory cap on liability for volunteer and not-for-profit emergency response organizations. This may also reduce the cost of insurance.

Chap. 6 – Employment Litigation

OH: FF CANCER - LUMBAR SPINE LYMPHOMA – CITY CONTESTED – FF FILED FOR COSTS / ATTY FEES, CITY LATE IN RESPONDING, MUST PAY

On May 23, 2019, in Robert T. Rodgers v. City of Rocky River, et al., 2010 Ohio 2006 (Ohio App, 2019), the Ohio Court of Appeals for Cuyahoga County (3 to 0), upheld the trial court's order that City reimburse the firefighter for his costs and attorney fees of $3,734.45.

"[W]e note that the plain language of R.C. 4123.512(F) authorizes the award of attorney fees and costs against 'the employer' who contests an injured worker's right to participate in the workers' compensation system after an injured worker's right to participate is established. The statute does not differentiate between public and private employers, unlike in R.C. 4123.01(B) where the legislature provided different definitions of "employers" — public (political subdivisions) and private. This demonstrates that the legislature had the ability to establish immunity for political subdivisions or public employers from an award of attorney fees and costs, but elected not to do so.

Facts:

"Plaintiff-appellee, Robert Rodgers, was employed by the city as a firefighter. In 2013, Rodgers was diagnosed with an occupational disease, lumbar spine lymphoma. Rodgers filed a workers' compensation claim, which was ultimately allowed for lumbar spine lymphoma. After exhausting its administrative appeals, the city filed a notice of appeal pursuant to with the Court of Common Pleas of Cuyahoga County, General Division. R.C. 4123.512(A).

***

[I]n March 2016, the city withdrew its notice of appeal, thus terminating the case. In April 2016, the trial court assessed court costs against the city; no appeal was taken.

[Two years later, on] November 7, 2018, Rodgers filed a motion for attorney fees and costs pursuant to R.C. 4123.512(F). The city did not file a timely response and on November 14, 2018, the trial court granted Rodgers's motion, awarding costs and attorney fees in the amount of $3,734.45. On November 21, 2018, the city filed a Civ.R. 60(B) motion for relief from judgment, which the trial court denied two weeks later."

Holding:

"In its motion, the city contends that it is entitled to relief from judgment under Civ.R. 60(B)(1) due to "mistake, inadvertence, or excusable neglect" because the law director was out of the office during a majority of the time allowed to respond to Rodgers's motion for attorney fees, and the law director acted under the assumption that he had a fourteen-day response time under the Ohio Civil Rules of Procedures, rather than the seven-day response time provided by Loc.R. 11 of the Court of Common Pleas of Cuyahoga County, General Division. Additionally, the city claimed that it had to search for the file because it had been closed for two years.

***

The city contends that the trial court failed to recognize its meritorious defense that an award of attorney fees against a political subdivision is against public policy.

***

Insofar as the city is attempting to collaterally attack the underlying judgment granting attorney fees, the city did not appeal this determination. A review of the record reveals that the city could have timely appealed the judgment awarding attorney fees after the trial court denied its motion for relief from judgment; the appeal clock had not expired. Accordingly, if the city wished to challenge the award of attorney fees, it could have done so through a direct appeal. We make no determination on whether the award of attorney fees was properly awarded in this case."

Legal Lessons Learned: City failed to timely appeal award of costs and attorney fees; no statute protects city from liability for court cost and attorney fees.

IL: FF KIDNEY CANCER – WORK. COMP. GRANTED – EXPERT WITNESS CAUSED BY JOB, NOT OBESITY & HYPERTENSION

On May 10, 2019, in City of Peoria v. Illinois Workers' Compensation Commission (Bryan Grant), the Appellate Court of Illinois, Third District, Workers Comp Division, held (5 to 0) that the firefighter's cancer was caused by the job.

> "By finding that the petitioner's workplace exposures to carcinogenic gases caused his kidney cancer, the Illinois Workers' Compensation Commission did not make a finding that was against the manifest weight of the evidence."

Facts:

> "Since April 1990, Grant has been a firefighter for the City. He was promoted to the position of engineer in August 1999, and in October 2012, he received a further promotion to the rank of fire captain.
>
> On August 19, 2008, when Grant was 51 years old, a computerized tomography (CT) scan revealed a mass on his right kidney. The mass proved to be cancerous, and on September 10, 2008, Grant had the kidney surgically removed. He filed a claim for workers' compensation benefits, alleging that being exposed to carcinogenic atmospheres as a firefighter for the City had caused his kidney cancer.
>
> B. The Arbitration Hearing
>
> In the arbitration hearing, Grant testified that, each year, on average, he responded to 6 structural fires, 6 dumpster fires, and from 8 to 12 car fires. He did not believe that the removal of his right kidney had impaired his ability to perform his job as fire captain.
> When fighting fires, Grant wore a self-contained breathing apparatus (apparatus), which was comparable to scuba diving gear: a mask connected to an air tank. During 'overhauls,' however—after the visible fires were extinguished and as he was inspecting the ashes and debris for live embers that might reignite the fire—he typically did not wear the apparatus. The theory in his workers' compensation case was that airborne chemicals he breathed during overhauls were a cause of his kidney cancer.
>
> [Battle of Two Experts]
>
> In support of his theory of causation, Grant presented the evidence deposition of his expert witness, Peter Orris…. For many years, [MD Peter] Orris had been an advisor to fire departments, municipalities, and the International Association of Firefighters (Firefighters Association), helping them with their health and safety programs, including the identification of carcinogenic agents and the prevention of exposure to such agents in the workplace.
>
> ***
>
> After examining Grant and reviewing his medical records, Orris opined, 'within a reasonable degree of medical and scientific certainty,' that Grant's occupation as a firefighter and his exposures to carcinogenic atmospheres since 1990 likely had 'contributed to and were a cause of his renal cell cancer.' Although Grant,

by his own account, 'religiously wore his [apparatus] during [fire] suppression,' he 'wore no mask routinely during overhaul,' when there was still a lot of smoke from partially combusted products, including plastics. '[T]his [was] the period,' Orris testified, 'whe[n] [firefighters] g[o]t the primary exposures to carcinogens,' such as polyaromatic hydrocarbons (PAHs), benzene, formaldehyde, arsenic, and asbestos.

***

In opposition to Grant's theory of causation, the City presented the evidence deposition of its own expert witness, Scott Eggener…. Scott Eggener was a urologist who had taken a two-month course on statistics and epidemiology. He admitted that his field of interest did not include the epidemiological effects of occupational exposures and that except in the 5% of cases in which the renal cell carcinoma was genetic, the question of what had caused the disease was irrelevant to his job as a urologist. Besides, he testified, kidney cancer was idiopathic in the remaining 95% of the cases.

***

The three most commonly accepted risk factors for kidney cancer were smoking, obesity, and hypertension, and Grant had the latter two risk factors. In Eggener's opinion, a case could be made that obesity and hypertension were causes of Grant's kidney cancer, but no case could be made that firefighting was a cause. Eggener opined, 'to a reasonable degree of medical and surgical certainty,' that there was 'no association between [Grant's] being a fireman and his subsequent development of kidney cancer.'"

[Arbitrator's decision]

On December 23, 2013, the arbitrator found that Grant's 'diagnosis and treatment of kidney cancer ha[d] not been causally connected to his employment as a firefighter.'

[Workers' Comp Commission]

On December 26, 2014, the Commission disagreed with the arbitrator and found occupational causation. The City petitioned for judicial review, and on August 24, 2015, the Peoria County circuit court confirmed the Commission's decision, finding it was not against the manifest weight of the evidence.

[Circuit Court]

The City petitioned for judicial review, and on August 24, 2015, the Peoria County circuit court confirmed the Commission's decision, finding it was not against the manifest weight of the evidence.

[Appellate Court]

The City appealed, and on September 26, 2016, the appellate court reversed the circuit court's judgment, vacated the Commission's decision, and remanded the case to the Commission with directions to reweigh the evidence without treating the presumption in section 1(d) of the Workers' Occupational Diseases Act (820 ILCS 310/1(d) (West 2008)) as evidence.

[Commission on remand]

On September 25, 2017, on remand, the Commission found, upon weighing the evidence anew—and giving no evidentiary weight to the presumption in section 1(d)—that Grant "ha[d] proven both accident and causal

connection by a preponderance of the evidence." Accordingly, the Commission awarded him workers' compensation benefits, including partial permanent disability in "the sum of $664.72 per week for a period of 100 weeks, for the reason that the injuries sustained caused the loss of use of 20% of the person as a whole."

[Circuit Court]

Again the City petitioned for judicial review. On June 28, 2018, the circuit court confirmed the Commission's decision, finding it was not against the manifest weight of the evidence."

Holding:

"If an expert testifies—as Orris testified—that his or her opinions are based on a reasonable degree of expert certainty within his or her field, a trier of fact may infer that the facts upon which the expert expressly relied are of a type customarily relied upon in that field.

***

Granted, as Eggener observed, Grant suffered from obesity and hypertension, which indisputably were risk factors for kidney cancer. But there is no necessary inconsistency between the proposition that Grant's obesity and hypertension were causes of his kidney cancer and the further proposition that his fire exposures also were causes. Grant did not have to prove that his employment was the sole cause of his kidney cancer or even the principal cause; he had to prove only that it was a cause.

***

For the foregoing reasons, we affirm the circuit court's judgment, which confirmed the Commission's decision."

Legal Lessons Learned: Many states, including Illinois, have now enacted a statutory presumption on FF cancer. But some employers are contesting claims, particularly if FF has poor health history.

See also this article on 2017 case involving Illinois firefighter who suffered a heart attack. "In this case, the petitioner was an obese smoker, mildly diabetic, and with a family history of heart disease."
The Court further quoted the bill sponsor as saying, "[s]o don't think it's conclusive that simply because you have lung cancer, you're going to get compensation of the Worker's Compensation Act. What we're saying is, we'll get you to the hearing. Then the other side can bring in evidence that you smoked for thirty (30) years and therefore, it wasn't a result of the actions taken at work." *Id.* at 82. *Johnston v. Illinois Workers' Comp. Comm'n*, 2017 IL App (2d) 160010WC.

NJ: FF's BACK INJURY - PLASTIC CHAIR COLLAPSED - PRIOR BACK ISSUES – NOT "ACCIDENTAL" DISABILITY, ONLY "ORDINARY" DISAB.

On May 10, 2019, in Terrence Crowder v. Board of Trustees, Police & Firemen's Retirement System, the Superior Court of New Jersey, Appellate Division, held (2 to 0) that Deputy Chief was not entitled to 72.7% accidental disability retirement, only "ordinary" disability retirement (43.6%).

> "The 2008 incident was not the direct cause of Crowder's disability. Rather, as the ALJ correctly found, Crowder's preexisting degenerative condition, which was aggravated by the 2008 incident, was the essential significant or the substantial contributing cause of his disability."

Facts:

> "Crowder worked for the City of Camden Fire Department for twenty-five years, ultimately serving as a Deputy Chief from 2003 to 2008. On April 23, 2008, while on duty, Crowder walked into the bay area of the fire department to talk to firefighter Luis Sanchez and Captain Howard Jones. As Crowder sat down on a plastic chair, the chair 'exploded,' breaking into several pieces and causing him to fall approximately two to three feet onto the concrete floor, hitting his lower back and tailbone (the 2008 incident). After Crowder fell, Sanchez and Jones lifted him off the floor. Crowder felt a 'very sharp pain' in his lower back and was transported to the hospital. It was subsequently determined that Crowder could no longer perform the duties of a firefighter. On February 4, 2009, he applied for accidental disability retirement benefits based solely on the 2008 incident.
>
> ***
>
> The Board does not dispute that the 2008 incident was a traumatic event within the meaning of N.J.S.A. 43:16A-7 and that Crowder is permanently and totally disabled from the performance of his regular and assigned duties. In addition, it is undisputed that Crowder suffered work-related injuries to his lower back in 1986, 1987, and 1995, and had a preexisting degenerative condition in his lumbar spine dating back to 1996. The Board determined that Crowder's disability was not a direct result of the 2008 incident, but rather was the result of a preexisting disease alone or a preexisting disease that was aggravated or accelerated by the work effort. Thus, the Board denied Crowder's application for accidental disability retirement benefits and granted him ordinary disability retirement benefits.
>
> ***
>
> [Footnote 3] A July 8, 1996 MRI of Crowder's lumbar spine showed he had disc desiccation and degeneration from L3-L4 though L5-S1, a disc bulge at L4-L5, and disc herniation at L3-L4. A July 13, 2005 MRI showed Crowder had disc desiccation, a disc bulge at L3-L4 and L4-L5, and a disc herniation at L5-S1. The MRI report also indicated that '[t]he findings are worse when compared to prior [MRI].' A June 9, 2008 MRI showed degenerative change at L3-L4 through L5-S1 with bulging and degenerative annular tears at multiple levels.
>
> ***
>
> Crowder appealed and the matter was transferred to the Office of Administrative Law (OAL) for a hearing. The ALJ had to determine whether Crowder's disability was a direct result of the 2008 incident. The ALJ

gave greater weight to the testimony of Crowder's orthopedic expert, Arthur H. Tiger, M.D., than the testimony of the Board's expert. Tiger testified that all of Crowder's MRIs showed significant worsening of his preexisting degenerative condition, Crowder's level of pain and discomfort had increased, and there was 'a great deal more pathology present.' Tiger admitted that the 2008 incident aggravated Crowder's preexisting degenerative condition, causing his disability. He concluded that the 2008 incident was the 'tipping point' that led to Crowder's inability to perform his duties as a firefighter.

***

Despite giving greater weight to Tiger's testimony, the ALJ found the 2008 incident was not the essential significant or substantial contributing cause of Crowder's disability. The ALJ reasoned:

> 'It is clear from the record that [Crowder's] pre-existing condition was longstanding and severe. . . . The mere fact that[Crowder]was unable to return to work after the . . . 2008 incident does not render the incident the substantial contributing cause of his disability. Even Dr. Tiger acknowledged that [the 2008 incident] had aggravated a prior degenerative condition in [Crowder's]lower back. . . . Signs of degenerative changes were present as early as 1996.'

***

The ALJ concluded that Crowder's preexisting degenerative condition, which was aggravated by the 2008 incident, was the essential significant or substantial contributing cause of his disability, and denied his appeal of the Board's denial of his application for accidental disability retirement benefits. The Board adopted the ALJ's initial decision."

Holding:

"Accidental disability retirement benefits under the PFRS are governed by N.J.S.A. 43:16A-7, which provides in part:

> 'any member may be retired on an accidental disability retirement allowance; provided . . . the member is permanently and totally disabled as a <u>direct result</u> of a traumatic event occurring during and as a result of the performance of his regular or assigned duties and that such disability was not the result of the member's willful negligence and that such member is mentally or physically incapacitated for the performance of his usual duty and of any other available duty in the department which his employer is willing to assign to him. [(Emphasis added).]'

***

The 2008 incident was not the direct cause of Crowder's disability. Rather, as the ALJ correctly found, Crowder's preexisting degenerative condition, which was aggravated by the 2008 incident, was the essential significant or the substantial contributing cause of his disability. Thus, the Board did not err in adopting the ALJ's decision."

Legal Lessons Learned: Aggravating a pre-existing degenerative condition does not meet the requirements of the state statute. Suggestion - get rid of plastic chairs in the station.

See this article on the case, "Former Camden firefighter loses court fight over disability retirement benefits." (May 14, 2019).

> "According to the state Treasury's website, an ordinary disability retirement pays 43.6 percent of an employee's salary averaged over his or her last three years of service. In contrast, an accidental disability retirement pays 72.7 percent of the base salary at the time of the 'traumatic event.'"

Chap. 13 – EMS

CA: FLIGHT PARAM. KILLED HELICOPTER CRASH – ONLY WORKERS COMP - CAN'T SUE HELICOPTER CO. - "SPECIAL EMPLOYEE"

On May 24, 2019, in Brooke Juarez v. Rogers Helicopters, Inc., et al., the Court of Appeals for California, Fifth Appellate District, held (3 to 0) in an unpublished decision, the trial court properly granted summary judgment to the helicopter company; the deceased paramedic was a "general employee" of American Airborne company, and a "special employee" of Rogers Helicopter, and therefore workers compensation was the sole remedy for the wife of the deceased paramedic.

> "In sum, based on the facts and circumstances of this case, since SkyLife was Juarez's special employer, SkyLife's general partners, American Airborne and Rogers Helicopters, are also Juarez's special employers. As such, respondents are all immune from tort liability and the trial court properly granted summary judgment in their favor."

Facts:

> "On December 10, 2015, flight paramedic Kyle Juarez (Juarez), flight nurse Marco Lopez (Lopez), and pilot Thomas Hampl (Hampl) were transporting a patient via air ambulance in a SkyLife2000 Bell model 407 helicopter (the helicopter). While en route from the Porterville airport to a Bakersfield hospital, the helicopter crashed into a low hillside outside McFarland, instantly killing all four occupants and destroying the helicopter. Juarez's heirs, his wife, Brooke Juarez,and their two children, Macey L.and Brody B. Juarez (collectively, appellants), filed a wrongful death lawsuit against the California general partnership that operated the air ambulance business, ROAM, which does business as SkyLife (SkyLife), and its general partners, Rogers Helicopters, Inc. (Rogers Helicopters) and American Airborne, EMS (American Airborne) (collectively, respondents). Respondents moved for summary judgment on the ground that workers' compensation was appellants' exclusive remedy because SkyLife and its general partners were Juarez's special employer as a matter of law. The trial court agreed and granted the motion."

Holding:

> "The workers' compensation system recognizes that employees may work for dual employers, with the original or 'general' employer hiring out employees to the 'special' employer.(Kowalski v. Shell Oil Co.(1979) 23 Cal.3d 168, 174 (Kowalski); see Santa Cruz Poultry, Inc. v. Superior Court(1987) 194 Cal.App.3d 575, 578; In-Home Supportive Services v. Workers' Comp. AppealsBd.(1984) 152 Cal.App.3d 720, 732 (In-Home Supportive Services).)In such circumstances, the employee who sustains work-related injuries will be limited to redress through the no-fault workers' compensation system. The employee accordingly is barred from bringing a civil action against either employer. (Kowalski,supra,at p. 175.)
>
> ***

American Airborne had no accounting records, payroll, personnel, facilities, employees or business activities separate from American Ambulance. Its only role in the partnership was to hold title to the SkyLife aircraft along with Rogers Helicopters. American Ambulance provided medical support services, including flight paramedics and nurses it employed, and billed its pertinent payroll, employee benefits and workers' compensation premiums to the partnership, while Rogers Helicopters did the same with respect to the aircraft operations it supplied to the partnership. These facts establish that a partnership was created between American Ambulance, American Airborne and Rogers Helicopters. While appellants correctly assert that American Ambulance is not mentioned in the written partnership agreement, appellants ignore the reality that the parties intended the partnership to be one between Rogers Helicopters and American Ambulance, via its shell corporation, American Airborne, and the partnership operated in that manner. The only conclusion from the evidence is that Rogers Helicopters and American Ambulance were the actual partners of SkyLife.III. SkyLifewas Juarez's Special Employer Respondents satisfied their burden on summary judgment of establishing SkyLife was Juarez's special employer, as the evidence they presented establishes SkyLifehad the ability to control Juarez's work and the means by which it was accomplished.

On the day of the accident, Juarez was an employee of American Ambulance who was performing his duties as a SkyLifeflight paramedic. With respect to this flight, consistent with the parties' practice, American Ambulance would have billed SkyLifefor the overhead expenses associated with Juarez's work, while Rogers Helicopters would have billed SkyLifefor the expenses associated with the flight's pilot-in-command, Hampl.

SkyLife was listed as a named insured on the workers' compensation policy issued to American Ambulance by Alaska National Insurance Company, which covered Juarez. Appellants have collected a workers' compensation death benefits award due to the accident.

Legal Lessons Learned: Flight paramedics may be considered "dual employees" in many states; and workers comp. is their sole remedy for injury or death in those states.

See article on the crash.

See trial court's summary judgment decision.

See this article about air care helicopter crashes:

> "Of course, if the crash was caused by a defect in the helicopter, the crew case may proceed against the helicopter manufacturer. But there are legal challenges to be overcome there as well. A federal statute of repose known as the General Aviation Revitalization Act, or GARA, bars claims against the manufacturer if the helicopter is older than 18 years. And beneath their shiny paint, most of the helicopters now in service date back to the 1970s. (In case you're wondering, GARA protects not just US helicopter manufacturers, but foreign helicopter manufacturers too.)"

Chap. 13 – EMS

KY: DRIVER / POSS. STROKE - REFUSED TREATMENT - PD TOOK McDONALDS' – KILLED WALKING HWY – QUALIF. IMMUNITY

On May 24, 2019, in Lisa K. Williams v. City of Georgetown, KY, et al., the U.S. Court of Appeals for 6th Circuit, in an unpublished opinion, held (2 to 1).

"This case presents tragic facts without a legal remedy. *** Although it is true that 'an officer's duty exists even after the custodial relationship has ended,' Davis, 143 F.3d at1025, it does not extend in perpetuity. Plaintiff admits that the officers concluded Burns was not a danger to himself or others. Calling an ambulance and giving Burns a ride to McDonald's does not strike us as the deliberate indifference described in Davis. 143 F.3d at1027; see also Salyers, 534 F. App'x at 460. There was no constitutional violation."

Facts:

"In October 2017, decedent Keith Burns was stopped by police in Georgetown, Kentucky on suspicion of driving recklessly. Burns appeared confused and gave inconsistent responses to officers' questions. The officers summoned emergency medical personnel but Burns refused treatment. The police allegedly dropped Burns at a McDonald's in Georgetown to wait for a ride. Burns was later killed in a roadway two miles away from the McDonald's.

***

On October 2, 2017at approximately 7:45pm, the Georgetown, Kentucky Police Department and the Scott County Sherriff's Office received a report of a reckless driver in a dark colored pickup truck. The report indicated that the truck was driving without its lights on, weaving across the center line, driving on the wrong side of the road, slamming on the brakes, and had almost hit several other cars. Defendant Georgetown police officer Tommy Enricco responded first and pulled the truck over. Defendants Georgetown police officer Jon Noel and Scott County Sherriff's Deputy Jeremy Nettles subsequently joined Enricco at the scene. The driver was 48-year-old Keith Burns. The truck belonged to Burn's deceased brother. Burns had recently been hospitalized for a stroke and was obviously frail and unsteady on his feet.

Burns 'would not make eye contact' and was unable to locate his driver's license or proof of insurance. Burns stated that he lived in London, Kentucky, but he could not explain what he was doing in Georgetown, Kentucky—some ninety miles north of London. Enricco inquired about a scab on Burns's head, and Burns responded that it was from an earlier fall and he told Enricco that he had recently been hospitalized for a 'neurological disorder.' Burns gave 'inconsistent responses' to Enricco's questions. Burns also told Enricco that he took medication for his blood pressure and a blood thinner but denied taking any medications that could affect his driving. Defendants Noel and Nettles also spoke with Burns at the scene. Burns told Noel that he was taking medication for diabetes, but that he had missed two doses of his medication that day. Based on this encounter, Enricco, Noel, and Nettles were 'sufficiently concerned' about Burns's medical condition to call the Georgetown Scott County Emergency Medical Service to examine Burns. Burns refused any treatment or transport to a medical facility, and defendants Noel, Enricco, and Nettles decided that Burns was not a danger to himself or to others. The truck was impounded.

***

Burns gave Officer Noel the phone number of his sister, plaintiff-administratrix Lisa Williams, who lives in London, Kentucky. Plaintiff's husband, Les Williams, received a call around 8:23pm from a Georgetown Police Department dispatcher who said Williams would receive a call from a Georgetown police officer in a few minutes about Burns. *** Noel told Mr. Williams that he needed to pick up Burns in Georgetown. Williams told Noel that Burns had recently been hospitalized for a stroke and that it would take about an hour for him to get to Georgetown after his wife got home from church. Noel advised Williams to call Georgetown Police dispatch for 'directions' when he got to Georgetown.

***

Mr. Williams arrived in Georgetown around 11:00pm. He had received no further communication from anyone prior to arriving in Georgetown. Once in Georgetown, Williams called the Georgetown Police dispatch and spoke to the same dispatcher with whom he had spoken earlier. The dispatcher informed him that Burns had been 'dropped off' at a McDonald's restaurant at 171 Southgate Drive in Georgetown. Mr. Williams would later learn that Burns had been dropped off at the McDonald's by Georgetown police officer Enricco to wait for his ride back to London. Mr. Williams went to the restaurant but could not find Burns. No McDonald's employee had seen the police drop off anyone, and no one remembers seeing Burns, who was 6'2" and 300 pounds, at the restaurant. Mr. Williams drove around the area near the McDonald's searching for Burns. He called the Georgetown police dispatch around midnight and spoke with the same dispatcher again. He gave the dispatcher his cell phone number. As Mr. Williams was nearing the interstate to head home, the dispatcher called him on his cell phone and gave him a number to call, saying only that "they have your brother-in-law." When Mr. Williams called, he discovered the number was the coroner's office. Burns had been struck and killed by a van just before midnight while he was walking 'in the roadway'

about two miles south of the McDonald's. The accident report indicated that Burns was 'not visible' because he was dressed in dark clothing."

Holding:

"Qualified immunity shields an officer from liability under 42 U.S.C. § 1983 where that officer's conduct did not violate clearly established rights. Peatross v. City of Memphis, 818 F.3d 233, 240 (6th Cir. 2016). Whether immunity should attach turns on whether a constitutional right has been violated and whether that right was clearly established.

***

Even assuming that Burns objectively needed medical treatment and that the officers subjectively perceived that need, they acted. 2018 WL 5793854, at *5, n.4 ('The objective fact that the officers summoned paramedics establishes that the officers subjectively did not disregard the risk to Burns.'). Thus, the officers are entitled to qualified immunity for their actions during the stop.

***

The second timeframe, when the officers allegedly dropped Burns off at McDonald's, presents a closer question.

Generally, 'a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause.' DeShaney v. Winnebago Cty. Dep't of Soc. Servs., 489 U.S. 189, 197 (1989). There are two exceptions to this rule: (1) the custodial exception, when the state has restricted the freedom of someone in police custody, and (2) the state-created danger exception. See Cartwright v. City of Marine City, 336 F.3d 487, 491 (6th Cir. 2003). The District Court below only analyzed the state-created danger avenue because Burns was not in police custody when he was killed several miles from the McDonald's. 2018 WL 5793854, at *6 ('Because Burns was not in custody at the time of the accident, only the state created danger theory is potentially applicable.'). We have articulated the test for assessing a state-created danger as follows: To show a state-created danger, plaintiff must show: 1) an affirmative act by the state which either created or increased the risk that the plaintiff would be exposed to an act of violence by a third party; 2) a special danger to the plaintiff wherein the state's actions placed the plaintiff specifically at risk, as distinguished from a risk that affects the public at large; and 3) the state knew or should have known that its actions specifically endangered the plaintiff. Cartwright, 336 F.3d at493. Here, the tragic harm visited

> upon Burns had nothing to do with the state. Burns was unquestionably safer at McDonald's waiting for a ride home than getting back in his car and driving home.
>
> ***
>
> Plaintiff admits that the officers concluded Burns was not a danger to himself or others. Calling an ambulance and giving Burns a ride to McDonald's does not strike us as the deliberate indifference described in Davis. 143 F.3d at1027; see also Salyers, 534 F. App'x at 460. There was no constitutional violation."

Dissent:

> "The law is sufficiently established that a reasonable officer would know not to leave an impaired person alone at night in a strange place. Plaintiff could discover evidence that at least creates a question of fact as to whether the officers violated this duty by acting with deliberate indifference when they dropped Burns off at McDonald's in a strange town late at night. At bottom, this is a case about responsible police action. Once police are involved, they cannot act with indifference to the welfare of the person before them."

Legal Lessons Learned: Fire & EMS Departments should have a written policy about patient refusals that includes handling situations where the individual cannot be safely left at the scene (such as MVA, with no ride home).

> See attached Policy on "High Risk" and "Low Risk" refusals.

Chap. 13 – EMS

CA: CHILD CHOKING, MOTHER CALLED 911 - ONLY SPOKE SPANISH – IMMUNITY - NO REQ. THAT DISPATCHERS MUST SPEAK SPANISH

On May 20, 2019, in Dylan Tellez v. City of Pomona, the Court Of Appeal of California, Second Appellate District / Division One held (3 to 0) in an unpublished decision, that the lawsuit against the City of Pomona was properly dismissed by the trial court.

> "That one person fails on an occasion to understand another is an everyday occurrence between even the best intentioned. And it appears from Dylan's allegations that the police officers' decision not to wait for an ambulance saved his life. A city cannot be held liable simply for failure to provide translators in its 911 call centers…."

Facts:

> "On the evening of January 7, 2014, three-year-old Dylan Tellez began choking on an unknown substance at his family residence in Pomona, and was unable to breathe. Dylan's mother called 911 and informed the dispatcher at least six times that Dylan was choking. The dispatcher repeatedly stated she could not understand what was happening, and the call ended abruptly. Another member of the household immediately called back, but spoke only Spanish. The dispatcher stated she did not speak Spanish, whereupon Dylan's mother came back on the line and repeated that Dylan was choking. The 911 dispatcher stated that police and

paramedics were on the way. The dispatcher then patched Dylan's mother through to a fire department dispatcher, who gave her instructions.
Approximately five minutes later, City of Pomona police officers arrived at the scene and radioed for an estimated time of arrival for the paramedics. Receiving no response, the officers decided not to wait, and officers transported Dylan directly to the hospital. Dylan suffered permanent, debilitating injuries as a result of being deprived of prompt medical care.

No paramedics ever responded to the scene.

***

The City of Pomona demurred to Dylan's second amended complaint on the grounds that the city could not be held liable for gross negligence in the absence of a special relationship giving rise to a duty to act; the city was entitled to absolute immunity under Government Code sections 845, 820.2, and 815.2; and the city was entitled to conditional immunity under Health and Safety Code section 1799.107 absent a showing of gross negligence, which the complaint failed to allege. The city also requested judicial notice of the existence of a1994 resolution seeking the city's inclusion in and annexation to the fire protection and emergency medical services of the County of Los Angeles, the result being that paramedics serving the city were employees of the county, not the city.

The trial court sustained the city's demurrer without leave to amend pursuant, it stated, 'to the grounds set forth in the moving papers.'"

Holding:

" 'A public entity is not liable for an injury,' '[e]xcept as otherwise provided by statute.' (Gov. Code, § 815, subd. (a).) No statute imposes direct liability on a public agency that employs an emergency dispatcher for the dispatcher's failure or delay in responding to a 911 call. (Eastburn v. Regional Fire Protection Authority (2003) 31 Cal.4th 1175, 1178 (Eastburn).

***

Health and Safety Code section 1799.107provides immunity to both a city and its employees for the ordinary negligence of an emergency dispatcher. Subdivision (b) of that section states that 'neither a public entity nor emergency rescue personnel shall be liable for any injury caused by an action taken by the emergency rescue personnel acting within the scope of their employment to provide emergency services, unless the action taken was performed in bad faith or in a grossly negligent manner.'

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A city cannot be held liable simply for failure to provide translators in its 911 call centers, for three reasons. First, a public entity cannot be held liable for failing to provide police or fire protection services in the first instance. (Gov. Code, §§ 845 ['Neither a public entity nor a public employee is liable for failure to establish a police department or otherwise to provide police protection service or, if police protection service is provided, for failure to provide sufficient police protection service'], 850 ['Neither a public entity nor a public employee is liable for failure to establish a fire department or otherwise to provide fire protection service'].) If a city need not provide emergency services at all, it need not provide translators for emergency services.

> Second, a public employee may not be held liable for discretionary actions or policy decisions. (See Gov. Code, §§ 820.2[‘Except as otherwise provided by statute, a public employee is not liable for any injury resulting from his act or omission where the act or omission was the result of the exercise of the discretion vested in him, whether or not such discretion be abused’], 815.2, subd. (b)[‘Except as otherwise provided by statute, a public entity is not liable for an injury resulting from an act or omission 8of an employee of the public entity where the employee is immune from liability’].) The decision not to place dispatchers in emergency call centers is an exercise of discretion for which public employees are immune from liability.
>
> Third, failure to provide interpreters does not demonstrate indifference toward non-English speakers. If it did, every emergency call center would have to be staffed 24 hours a day with translators for every language.”

Legal Lessons Learned: 911 Centers do not have to employee Spanish-speaking dispatchers. There are translation services available for dispatch centers.
See for example: “How to Break the 9-1-1 Language Barrier**,”**

“According to Gallegos, the LanguageLine system is built into the CAD system, so the ECO just has to push a button to be connected. The LanguageLine is used in call centers statewide and falls under the New Mexico Department of Finance and Administration.”

Chap. 16 - Discipline

IL: RESIDENCY – FF FIRED – PAST THREE YEARS DID NOT RESIDE IN VILLAGE – MAIL DROP LOCATION IS NOT RESIDENCY

On May 29, 2019, in John Cannici v. Village of Melrose Park, the Appellate Court of Illinois, First District, 2019 IL App (1st) 181422-U, held (3 to 0) that the fire fighter was properly terminated for violating residency ordinance.

> “The Board did not indicate that it found fault with Cannici’s earlier arrangement where he lived in the [Melrose Park] Norwood house for a majority of the week and would spend his weekends at the Orland Park house. Although this arrangement included physical absence from the Norwood house for ‘some’ of the time, this was not a violation of the residency ordinance as he still lived in the Norwood house for the majority of his time and treated it as his primary home or abode. However, when he leased the Norwood house to the Cichons, he no longer used the Norwood house as his primary home and spent practically no time in the Norwood house, except the time spent picking up his mail.”

Facts:

> “Richard Beltrame, the Fire Chief of the Village of Melrose Park, filed an official statement of charges against Cannici on June 28, 2016. Chief Beltrame alleged that Cannici did not maintain a bona fide residence in Melrose Park because it was not his principal place of residence and abode. Chief Beltrame submitted the matter to the Board [Fire and Police Commissioners of Melrose Park Board] to set a hearing date and take appropriate actions in accordance with the Board’s Rules and Regulations and the Illinois Municipal Code, see 65 ILCS 5/10-2.1-17 (eff. Aug. 23, 2007).

Cannici was charged with violating the residency ordinance which required:

> 'Each and every officer and employee of the village, unless exempted by this chapter, must be a resident of the village as that term has been defined herein. *** Each and every employee must maintain resident status during his or her period of employment.'

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Cannici was the only witness called at the hearing before the Board and the evidence adduced was as follows. Cannici was raised in Melrose Park, left the Village for college, and returned after completing his bachelor's degree. In 2000, around the same time he began his employment with the Village, he purchased and moved into a duplex at 1722 Broadway Avenue, Melrose Park. In 2002, he married and his wife also moved into the duplex. A year later, Cannici purchased a two-story single family home at 906 Norwood Street, Melrose Park and sold the duplex in anticipation of growing his family. His son was born in 2004 followed by his daughter in 2006. The Cannici family lived together at the Norwood house until 2008.

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In 2008, Cannici purchased a second house in Orland Park. According to Cannici, the new property was an investment property. Nonetheless, his wife and two children moved into the new house and had no intention of returning to the Norwood house. From 2008 through the spring of 2013, Cannici testified that he lived in the Norwood house alone and would spend the weekends with his family in Orland Park. He and his wife had no marital problems and were not living separately in anticipation of seeking a divorce.

Cannici's wife had many ties to the Orland Park community. Her parents and sister lived there, she was registered to vote there, she had long worked in the area, and in 2007 she became the owner of an Orland Park hair salon. Cannici and his wife agreed that they would live separately. The decision came after the couple worried about the children starting school and their work schedules interfering with school pick-ups and afterschool care. They believed that moving the children to Orland Park, so that the children's maternal grandparents and aunt could offer more assistance, was the best solution. Thus, the children moved to Orland Park with their mother and enrolled in school as 'in-district' students.

Two years into this living arrangement, Cannici hired a realtor and listed the Norwood house for sale. For the next three years, Cannici demonstrated a persistent effort to sell the Norwood house. He renewed his contract with the realtor twice and periodically lowered the sales price. Throughout this time, he continued to live in the Norwood house alone. He explained that as the only one using the house in Melrose Park, he planned to sell the house in order to buy a smaller place. In May 2013, Cannici abandoned his efforts to sell the house after the third sales contract expired, entered a leasing agreement with John and Angellica Cichon, and moved into the Orland Park house with his family.

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Although he physically lived at the Orland Park house throughout the term of the rental lease, Cannici continued to use the Norwood house as his mailing address for a number of items and he would call whenever he intended to drop by to pick up his mail. In support of his claim of maintaining his residency, Cannici submitted over 600 pages of documents which included his bills, credit card and investment statements, voter registration, retirement benefits, etc. which continuously listed the Norwood house as the mailing address between 2013 and 2016.

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The Cichons moved out shortly before Cannici's interview with the Village's investigators in June 2016. Cannici stated that his move back to the Norwood house was only coincidental to the investigation into his resident status."

Holding:

"The Board determined that cause existed for Cannici's termination where he admitted that he did not live at the Norwood house for this period of three years. The Board ruled that '[t]he residency ordinance is not satisfied by virtue of ownership of the property' where 'ownership of the property is not required by the ordinance at all.' The Board recognized that Cannici had since moved back into the Norwood house after the investigation was opened, but found that continuous residency was required, and the three-year gap during his employment for the Village constituted a violation of the ordinance. The Board further commented that it rejected the credibility of Cannici's testimony that he terminated the lease with the Cichon's coincidentally after the investigation began and it found that Cannici's actions exhibited an intent to try and emulate the facts of the *Maksym* [Maksym v. Board of Election Commissioners of the City of Chicago, 242 Ill. 2d 303 (2011),] to improperly circumvent the Village ordinance.

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In this case, the Melrose Park ordinance required all village employees to maintain their resident status during his or her period of employment. The ordinance clearly defined a resident as someone who occupies a dwelling place used as a home, within the boundaries of the Village, as their principal place of residence and abode. Melrose Park Municipal Code § 2.52.010. The ordinance did not require ownership, signifying that renting a property for uses a home was sufficient to comply with the ordinance. The word 'occupy' is generally understood to mean take up, seize, or hold possession of, and in the context most relevant to the ordinance, can be understood as to live or stay in a place. Black's Law Dictionary (10th ed. 2014). The word 'principal' is generally understood as the chief, primary, or most important. Black's Law Dictionary (10th ed. 2014). Reading the ordinance with these definitions in mind, the requirement is that the primary home, for employees of the Village, that they live or stay in must be within the boundaries of the Village throughout their period of employment. It is clear that for three years, Cannici did not live or stay in his Norwood house despite owning the property. Instead, he lived in a house in Orland Park with his family while renting out the Norwood house. Thus, he did not abide by the ordinance's requirements to be a resident and maintain his resident status during his employment period.

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For the reasons stated, we affirm the circuit court and the decision of the Board."

Legal Lessons Learned: Some states, such as Ohio, have enacted statutes that have set aside municipal residency requirements.

See article, **"**Ohio Supreme Court rules against city residency requirements," June 10, 2009.

Ohio Supreme Court opinion**:**

"R.C. 9.481(B)(1) states that 'no political subdivision shall require any of its employees, as a condition of employment, to reside in any specific area of the state." The issue in this case is whether R.C. 9.481 was enacted pursuant to the authority granted to the General Assembly by Section 34,

> Article II of the Ohio Constitution. If it was so enacted, its provisions override any conflicting law of a political subdivision, including residency requirements imposed by municipalities pursuant to the Home Rule Amendment, Section 3, Article XVIII of the Ohio Constitution. We hold that R.C. 9.481 was enacted pursuant to the authority granted by Section 34 and that the local laws before us in this case therefore cannot stand."

Ohio communities can adopt ordinance requiring firefighters and police officers to live in the county, or an adjacent county.

9.481 Residency requirements prohibited for certain employees.

> (b) To ensure adequate response times by certain employees of political subdivisions to emergencies or disasters while ensuring that those employees generally are free to reside throughout the state, the electors of any political subdivision may file an initiative petition to submit a local law to the electorate, or the legislative authority of the political subdivision may adopt an ordinance or resolution, that requires any individual employed by that political subdivision, as a condition of employment, to reside either in the county where the political subdivision is located or in any adjacent county in this state.

9.61 Residency not required for fire chief.

> (B) Nothing in the Revised Code requires, or shall be construed to require, that the fire chief of a firefighting agency reside in the territory of the firefighting agency.