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SEPT. 2019 – FIRE & EMS LAW Newsletter

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CA: ARSON - FF TESTIFIED AGAIN GIRLFRIEND – SHE ADMITTED ARSON CAR FIRE – HE WAS NOT ACCOMPLICE, NO JURY INSTRUCTION NEEDED

On Aug. 29, 2019, in The People v. Crystal Lynn Rothgery, the Court of Appeal of State of California, Third Appellate District, in an unpublished opinion, denied (3 to 0) her appeal of jury conviction of arson. The trial judge did not need to instructor jury about being suspicious of accomplice testimony since no evidence that her boyfriend [a "wilderness firefighter"] was involved in the car fire.

The Court wrote:

> "Here, the trial court was not required to instruct the jury sua sponte on accomplice testimony because there was no evidence from which a reasonable jury could find Hoskey was an accomplice. To be an accomplice, one must, 'act with knowledge of the criminal purpose of the perpetrator and with an intent or purpose either of committing, or of encouraging or facilitating commission of, the offense.' (People v. Stankewitz (1990) 51 Cal.3d 72, 90-91.) In arguing Hoskey was an accomplice, defendant cites no evidence to satisfy these elements."

Facts:

"On the night of April 28, 2016, Lindsay M. and her boyfriend, Bryan McClain, went to Rolling Hills Casino, where they encountered defendant and Breanna Cross. The next morning, Lindsay and McClain awoke to find Lindsay's car on fire. After Lindsay and McClain put out the fire, someone contacted the Orland Police Department. Officer Michael Branson responded to the call.

During his inspection of the car, Officer Branson found an 'incendiary device' made of rope, tissues, and a light bulb near the rear tire on the driver's side. Such a device acts as a time delay --the arsonist lights a rope on fire, which burns slowly into the gas inside the light bulb and then explodes to light the car on fire.

Lindsay told Officer Branson she believed defendant, Cross, and Hoskey [a "wilderness firefighter"], her ex-boyfriend, each could have been responsible. Lindsay, defendant, and Hoskey previously lived together when Lindsay and Hoskey were dating. After Lindsay and Hoskey broke up, Lindsay moved out and began dating McClain. At the time of the fire, there was an ongoing child custody dispute between Lindsay and Hoskey.

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At some point after the fire, Lindsay went to the house shared by defendant and Hoskey and took photographs of items under the carport that looked like those found near her car, including a rope and a light bulb.

Hoskey was called as a witness at trial. His trial testimony varied from earlier statements given at a prior proceeding and to the police. In those prior statements, Hoskey said Cross admitted that it was Cross who dumped the gas and lit the fire and he told Officer Branson defendant 'had nothing to do with it.' At trial, however, Hoskey testified he spoke to defendant within days of the fire and defendant said she and Cross set the fire together. Defendant told him they acquired the gas and went to Lindsay's house, but Cross was the

one who poured the gasoline on the car and lit it. Hoskey also testified both defendant and Cross were bragging about setting the car on fire. Hoskey acknowledged he is a firefighter and knows how a "drip can" can be used to pour a mixture of diesel and gasoline on an area to start a fire.

***

Defendant argues the trial court erred by failing to give accomplice instructions. She asserts the court had the sua sponte duty to give the accomplice instructions because there was sufficient evidence presented at trial to justify the conclusion that Hoskey was an accomplice to the arson. She further contends this error was prejudicial and violated her due process rights. We disagree.

> '[W]henever the testimony given upon the trial is sufficient to warrant the conclusion upon the part of the jury that a witness implicating a defendant was an accomplice,' the trial court must instruct the jury, sua sponte, to determine whether the witness was an accomplice. [Citation.] If the testimony establishes that the witness was an accomplice as a matter of law, the jury must be so instructed. [Citation.] In either case, the trial court also must instruct the jury, sua sponte, '(1) that the testimony of the accomplice witness is to be viewed with distrust [citations], and (2) that the defendant cannot be convicted on the basis of the accomplice's testimony unless it is corroborated.. . .' (People v. Zapien(1993) 4 Cal.4th 929, 982.)

***

While these facts may show a possible motive, opportunity, and access to materials used in the arson, the evidence was plainly insufficient to demonstrate Hoskey had prior knowledge of defendant's intent to commit the crime, shared in defendant's purpose at the time of the crime, or took any action 'with the intent or purpose either of committing, or of encouraging or facilitating commission of' the arson. (People v. Stankewitz, supra, 51 Cal.3d at p. 91.) There was further no evidence connecting Hoskey's understanding of 'how to use a drip can containing a mix of gasoline and diesel as a "torch" to light fires' to the incendiary device used in this arson."

Legal Lessons Learned: No proof this "wilderness firefighter" was involved in his live-in girlfriend's arson.

File: Chap. 1 – American Legal System

U.S. SUPREME CT: DRUNK DRIVER UNCONSCIOUS – BLOOD DRAW WITHOUT SEARCH WARRANT PERMITTED - EXIGENT CIRCUMSTANCES

On June 27, 2019, in Mitchell v. Wisconsin, the U.S. Supreme Court held (5 to 4), on the defendant's appeal from decision of the Wisconsin Supreme Court, that when the driver is unconscious, and cannot be given a breath test, they may generally obtain a blood draw at a hospital without a search warrant under the "exigent circumstances" doctrine.

Justice Samuel Alito wrote the majority opinion:

> "Today, we consider what police officers may do in a narrow but important category of cases: those in which the driver is unconscious and therefore cannot be given a breath test. In such cases, we hold, the exigent-circumstances rule almost always permits a blood test without a warrant. When a breath

test is impossible, enforcement of the drunk-driving laws depends upon the administration of a blood test. And when a police officer encounters an unconscious driver, it is very likely that the driver would be taken to an emergency room and that his blood would be drawn for diagnostic purposes even if the police were not seeking BAC information. In addition, police officers most frequently come upon unconscious drivers when they report to the scene of an accident, and under those circumstances, the officers' many responsibilities—such as attending to other injured drivers or passengers and preventing further accidents—may be incompatible with the procedures that would be required to obtain a warrant. Thus, when a driver is unconscious, the general rule is that a warrant is not needed."

Facts:

"The sequence of events that gave rise to this case began when Officer Alexander Jaeger of the Sheboygan Police Department [Wisconsin] received a report that petitioner Gerald Mitchell, appearing to be very drunk, had climbed into a van and driven off. Jaeger soon found Mitchell wandering near a lake. Stumbling and slurring his words, Mitchell could hardly stand without the support of two officers. Jaeger judged a field sobriety test hopeless, if not dangerous, and gave Mitchell a preliminary breath test. It registered a BAC level of 0.24%, triple the legal limit for driving in Wisconsin. Jaeger arrested Mitchell for operating a vehicle while intoxicated and, as is standard practice, drove him to a police station for a more reliable breath test using better equipment. On the way, Mitchell's condition continued to deteriorate—so much so that by the time the squad car had reached the station, he was too lethargic even for a breath test. Jaeger therefore drove Mitchell to a nearby hospital for a blood test; Mitchell lost consciousness on the ride over and had to be wheeled in. Even so, Jaeger read aloud to a slumped Mitchell the standard statement giving drivers a chance to refuse BAC testing. Hearing no response, Jaeger asked hospital staff to draw a blood sample. Mitchell remained unconscious while the sample was taken, and analysis of his blood showed that his BAC, about 90 minutes after his arrest, was 0.222%.

***

Mitchell was charged with violating two related drunk-driving provisions. See §§346.63(1)(a), (b). He moved to suppress the results of the blood test on the ground that it violated his Fourth Amendment right against 'unreasonable searches' because it was conducted without a warrant…. In the end, the trial court denied Mitchell's motion to suppress, and a jury found him guilty of the charged offenses.

***

It is no wonder, then, that the implied-consent laws that incentivize prompt BAC testing have been with us for 65years and now exist in all 50 States. Birchfield, supra, at ___ (slip op., at 6). These laws and the BAC tests they require are tightly linked to a regulatory scheme that serves the most pressing of interests. Finally, when a breath test is unavailable to promote those interests, 'a blood draw becomes necessary.' McNeely, 569 U. S., at 170 (opinion of ROBERTS, C. J.). Thus, in the case of unconscious drivers, who cannot blow into a breathalyzer, blood tests are essential for achieving the compelling interests described above.

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When police have probable cause to believe a person has committed a drunk-driving offense and the driver's unconsciousness or stupor requires him to be taken to the

hospital or similar facility before police have a reasonable opportunity to administer a standard evidentiary breath test, they may almost always order a warrantless blood test to measure the driver's BAC without offending the Fourth Amendment. We do not rule out the possibility that in an unusual case a defendant would be able to show that his blood would not have been drawn if police had not been seeking BAC information, and that police could not have reasonably judged that a warrant application would interfere with other pressing needs or duties. Because Mitchell did not have a chance to attempt to make that showing, a remand for that purpose is necessary."

Dissent:

Justice Sotomayor wrote for 3 dissenting Justices:

"To be sure, drunk driving poses significant dangers that Wisconsin and other States must be able to curb. But the question here is narrow: What must police do before ordering a blood draw of a person suspected of drunk driving who has become unconscious? Under the Fourth Amendment, the answer is clear: If there is time, get a warrant."

Justice Gorsuch wrote:

"While I do not doubt that the Court may affirm for any reason supported by the record, the application of the exigent circumstances doctrine in this area poses complex and difficult questions that neither the parties nor the courts below discussed. Rather than proceeding solely by self-direction, I would have dismissed this case as improvidently granted and waited for a case presenting the exigent circumstances question."

Legal Lessons Learned: Very helpful majority decision, expanding the "exigent circumstances" doctrine, to allow police to rapidly obtain blood draws without a search warrant.

File: Chap. 2 – LODD / SAFETY

MO: CANCER – WIFE OF DECEASED CAPTAIN - WINS WORKERS COMP CLAIM – OCCUPATIONAL EXPOSURES TO CARCINOGENS

On June 4, 2019, in David Cheney (Deceased), Donna Ceney (Spouse) v. City of Gladstone, the Missouri Court of Appeals, Western District, held (3 to 0) that the cancer was work related and she is entitled to workers comp death and burial benefits.

Judge Edward R. Arnidi, Jr. wrote:

"Both Drs. Lockey and Koprivica reviewed David Cheney's medical records. Dr. Koprivica also conducted a physical examination of David Cheney before his death. Based on the information gleaned from the records and the physical examination, both doctors concluded that David Cheney's occupational exposure to carcinogenic smoke, fumes, and particulates experienced during his employment as a firefighter for the City was the prevailing factor in the development of his NHL. The Commission found this evidence credible and persuasive, and we defer to this finding. *** The Commission determined that David Cheney suffered a compensable injury by occupational disease arising out of and in the course of his employment as a firefighter with the City. We affirm."

Facts:

"In 2008, after a nearly 28-year career as a firefighter, David Cheney, at age 48,was diagnosed with follicular non-Hodgkin's lymphoma ("NHL").1David Cheney immediately began treatment and was not actively employed thereafter. Following his diagnosis, David Cheney filed his claim for workers' compensation benefits, alleging that his NHL was caused by his work as a firefighter,during which he was exposed 'to smoke, gases, carcinogens, and inadequate oxygen.' In 2009, David Cheney retired from the City as a fire captain and continued receiving treatment until his death on May 22, 2014. Following David Cheney's death, Donna Cheney was substituted as the claimant in this case. A final hearing on the claim was held on February 2, 2017.

***

They were also provided a self-contained breathing apparatus ('SCBA'). The SCBAs were very heavy and restrictive, so the firefighters typically only wore them while actively suppressing a fire. The firefighters did not wear the SCBAs during the ventilation or overhaul phases, even though they would encounter smoldering materials, including household chemicals, plastics, insulation, and electronics, during those stages. In the mid-1990s, the City instituted a policy requiring that firefighters wear their SCBAs during the overhaul phase when the carbon monoxide levels were above 50 parts per million. The detectors used to determine the amount of carbon monoxide did not test for the presence or levels of other fumes or gasses. Firefighters did not wear their SCBAs if the carbon monoxide level was under 50 parts per million, even if some carbon monoxide was detected.

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[Firefighters] Porter, Rierson, and Cline described how, while fighting fires, particulates from the smoke would adhere to their gear and SCBAs. This black soot would also amass on the firefighters' skin and around their eyes, nose, ears, and mouth. Porter and Cline testified that they often saw black soot on David Cheney's face following a fire call. All three firefighters stated that it was common for firefighters to expel black mucous from their nose for several days after a fire.

The firefighters rarely washed their gear at the station but would spray it off with a hose at the firehouse when it became covered with insulation or other heavy debris after a fire call. The firefighters kept their gear in their personal vehicles as they were expected to respond to calls when off duty.

There were two fire stations in the City of Gladstone. Both stations had living quarters in addition to the garage bays where the firetrucks were parked. When the firetrucks were running, the living quarters would fill with diesel exhaust. In addition, the firefighters kept their gear next to their beds when they slept at the station. As a result, the firefighters were exposed to both the fumes from the diesel exhaust and their gear when sleeping.

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Donna Cheney's first medical expert, Dr. James E. Lockey,is a board-certified physician in pulmonary medicine and occupational and environmental medicine. He works and teaches at the University of Cincinnati College of Medicine where the focus of his research is occupational and pulmonary disease and occupational medicine….

Dr. Lockey further noted that a subsequent study published through the National Institute of Occupational Safety and Health ('NIOSH') similarly found that 'there was an increased risk for Non-Hodgkin's

> Lymphoma, particularly in people that had 20 years or longer duration of employment as a firefighter.' Based on his research and review of David Cheney's medical records, Dr. Lockey determined that 'Mr. Cheney's employment as a firefighter was the prevailing factor in relationship to any other factor that caused his Non-Hodgkin's Lymphoma or follicular lymphoma and the associated disability related to that condition.'
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> ***
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> Therefore, after reviewing the evidence, giving deference, as we must, to the weight and credibility determinations of the Commission, we conclude that the Commission's award is supported by sufficient competent evidence."

Legal Lessons Learned: Litigation such as this case reflects the need for statutory presumption for firefighter cancer. See 33 states with presumption statutes. See also July 7, 2019 article about this important win: "'Cancer is killing our firefighters': Missouri widow's court win may aid those at risk".

File: Chap. 3, Homeland Security

U.S. SUPREME CT: NEW U.S. GOV'T ASYLUM RULES REMAIN IN EFFECT – REFUGES FIRST APPLY TO MEXICO, ELSEWHERE – NO INJUNCTION

On Sept. 11, 2019, in William Barr, Attorney General v. East Bay Sanctuary Covenant, the majority of Justices (7 to 2) issued an Order granting U.S. Government's request for a stay of a nationwide injunction issued by U.S. District Court judge Jon Tigar in San Francisco, after the injunction was modified to only apply to California & Arizona, by a 3-judge panel the U.S. Court of Appeals for 9th Circuit (San Francisco).

> "The district court's July 24, 2019 order granting a preliminary injunction and September 9, 2019 order restoring the nationwide scope of the injunction are stayed in full pending disposition of the Government's appeal in the United States Court of Appeals for the Ninth Circuit and disposition of the Government's petition for a writ of certiorari, if such writ is sought."

Dissent: Justice Sotomayor wrote for dissent; Justice Ginsburg agreed.

> "Once again the Executive Branch has issued a rule that seeks to upend longstanding practices regarding refugees who seek shelter from persecution. Although this Nation has long kept its doors open to refugees—and although the stakes for asylum seekers could not be higher—the Government implemented its rule without first providing the public notice and inviting the public input generally required by law.
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> ***
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> The Attorney General and Secretary of Homeland Security promulgated the rule at issue here on July 16, 2019. See 84 Fed. Reg. 33829. In effect, the rule forbids almost all Central Americans—even unaccompanied children—to apply for asylum in the United States if they enter or seek to enter through the southern border, unless they were first denied asylum in Mexico or another third country. Id., at 33835, 33840; see also 385 F. Supp. 3d 922, 929–930 (ND Cal. 2019).

Legal Lessons Learned: The case, now pending before a Federal Judge in California, will most likely then go to the 9th Circuit, and eventually then reach the U.S. Supreme Court.

See Press Reports: "President Trump tweeted that the ruling was a "BIG United States Supreme Court WIN for the Border on Asylum!" The administration had argued in a brief to the Supreme Court that unless the injunctions were totally lifted everywhere, it 'would severely disrupt the orderly administration of an already overburdened asylum system.'"

File: Chap. 5 – Emergency Vehicle Operations

NY: VOL. FF INJURED ENGINE ROLLED OVER – CAN NOT SUE VOL. DRIVER OR FD - NO PROOF WILLFUL NEGLIGENCE

On Aug. 13, 2019, in Robert E. Lee v. Kyle M. Verstraete and Marbletown Volunteer Fire Department, Inc, et al., Superior Court, Wayne County, 2019 NY Slip Op 29270 (N.Y. Sup. Ct., 2019), Acting Supreme Court Justice John B. Nesbitt granted defense motion to dismiss.

> "After long thought and careful analysis, the Court grants both defendants motions for judgment dismissing the complaint and denying plaintiff's motion to amend the same. First, the Court finds, as a matter of law, upon the papers submitted, that plaintiff fails to demonstrate a triable issue whether the conduct of Kyle Verstraete constituted willful negligence or malfeasance."

Facts:

> "The material facts are uncomplicated and largely undisputed. In the morning of January 19, 2016, plaintiff Robert Lee and defendant Kyle Verstraete, as members of the Marbletown Fire Department, were dispatched and in route to a structure fire on Lembke Road in the Town of Arcadia. They met at the fire house to pick up their gear, and, with Verstraete driving, employed Kyle's father's (Gary) truck to drive to the fire scene with the vehicle's emergency lights activated. They did not get there. While northbound on Welcher Road in snowy weather and on wet pavement not far from the hamlet of Fairville, Verstraete failed to negotiate a sharp right curve about 200 feet east of the Norsen Road intersection. The vehicle slid into the opposite lane and across the road into a guardrail. The vehicle went over the guardrail and down embankment sixty feet, rolling over three times before coming to rest. South of the crash, facing northbound traffic, was a '90 Degree Curve' warning sign combined with a speed recommendation of twenty (20) mph in the posted forty-five (45) mph speed zone. At his EBT [deposition or Examination Before Trial], Verstraete testified that, at the time of the accident, he was going under the posted speed limit 'due to the snow,' but nevertheless 'too fast as far as the curve obviously or else we wouldn't have crashed.' Both Lee and Verstraete suffered injuries as a result.
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> The Accident Reconstruction Report issued by the Wayne County Sheriff's Office concluded:
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> > There are a couple of legal issues which are identified as to the cause of the crash and severity of injuries. Section 1180E, failing to reduce speed for a special hazard, the hazards being the intersection and the sharp curve. Section 1229C3, operating a motor vehicle and have a passenger in the front seat without a seatbelt.

A witness to the operation of the vehicle, prior to the crash, noted that the vehicle was operating with emergency lights. This is significant since 1104b allows the operator of certain emergency vehicles to disregard certain statutes with regard to speed and stopping among other things when operating in an emergency mode.

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First, Marbletown argues that Lee's exclusive remedy is provided in the NY Volunteer Firefighters' Benefit Law (VFBL), which bars actions seeking recovery for injuries covered by the VFBL. As such, argues Marbletown, the Court lacks subject matter jurisdiction over Lee's claims, in as much as his remedy lies exclusively under the VFBL.

***

First, the Court finds, as a matter of law, upon the papers submitted, that plaintiff fails to demonstrate a triable issue whether the conduct of Kyle Verstraete constituted willful negligence or malfeasance. These terms are not statutorily defined. One treatise opines:

> 'Willful and wanton negligence' has been declared to be acting consciously in disregard of another person's rights or acting with reckless indifference to the consequences, with the defendant aware, from his or her knowledge of existing circumstances and conditions, that the defendant's conduct probably would cause injury to another. Willful or wanton negligence involve a greater degree of negligence than gross negligence, particularly in the sense that in the former an actual or constructive consciousness of the danger involved is an essential ingredient of the act of omission* * *'Willful or wanton negligence' signifies the entire absence of care for the life, person, or property of others, with an element of conscious disregard of the rights or safety of others, which deserves extra punishment in tort.* * *In using 'willful,' it has been said that to constitute willful negligence, the act done or omitted to be done must be intended or must involve 'such reckless disregard of security and right as to imply bad faith.' (3 American Law of Torts §10:4 [2019 Update] [footnotes omitted]).

Legal Lessons Learned: The injured volunteer firefighter's only remedy is workers comp. Other lesson - wear your seat belt.

File: Chap. 5 – Emergency Vehicle Operations

IL: PATIENT INJURED AMBULANCE CRASH - 65 MPH WET HWY – PARAMEDIC REPRIMANDED - QUALIFIED IMMUNITY

On Aug. 6, 2019, in Jeremy Hicks and Isaiah Sampson (a minor) v. City of Fallon, et al., 2019 Ill. App. 5th 180397, the Appellate Court of Illinois, Fifth District, held (3 to 0) that the trial court properly granted summary judgment to the City and the EMS personnel.

Justice Barberis wrote:

> "[P]laintiffs argue that Sill's {paramedic] failure to operate the ambulance at a speed below the speed limit violated the City's policies and procedures, per Wild's deposition testimony, that required an

> ambulance to be operated slower in adverse conditions than it might be otherwise be operated in nonadverse conditions. First, we note that Wild [paramedic] testified that drivers were to maintain slower speeds during adverse weather conditions, although he was unsure whether a specific policy was in place. Moreover, our colleagues in the First District stated that a '[v]iolation of self-imposed rules or internal guidelines *** 'does not normally impose a legal duty, let alone constitute evidence of negligence, or beyond that, willful and wanton conduct.' Wade v. City of Chicago, 364 Ill. App. 3d 773, 781 (2006) (quoting Morton v. City of Chicago, 286 Ill. App. 3d 444, 454 (1997)). Thus, a violation of the City's policy, if one had existed at the time of the accident, would not alone constitute evidence of willful and wanton conduct."

Facts:

> "On November 11, 2015, Richard Palmer and Terry Sill, two paramedics employed by and in acting in their capacity as employees of the City, arrived at Sampson's guardian's home in Shiloh, Illinois, following a report of a seizure-like episode. It was determined that Sampson needed further care at Cardinal Glennon Children's Hospital (Cardinal Glennon) in St. Louis, Missouri. Sill drove the ambulance while Hicks, Sampson's uncle, sat in the passenger seat, and Palmer rode in the back of the ambulance with Sampson. While driving westbound on Interstate 64 towards St. Louis, Sill lost control of the ambulance, struck wire barriers, hit water in a median, and ran off the road.
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> ***
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> [Terry] Sill, a paramedic with 31 years of experience, had been employed by the City for 8 years at the time of the deposition. On November 17, 2015, Sill was driving an ambulance westbound on Interstate 64 from Illinois to St. Louis, Missouri, for 'five or six miles' when the accident occurred. Prior to the accident, Sill had used the windshield wipers intermittently, did not turn on the emergency lights or sirens, and did not see any puddling on the roadway. At the bottom of a hill, just past exit 157, Sill felt a sudden pull on the right side of the ambulance. Once he lost control, the ambulance first hit a wire barrier and then water in the median before it spun around crossways to the other lanes. Sill could not state the exact speed he was traveling, but he had 'no reason to doubt that [he] was going the speed limit,' which was 65 miles per hour, because he remembered driving with the flow of traffic. Sill believed he was driving at a comfortable speed and in control of the vehicle, and he did not experience any issues as he traversed down the hill. Following the accident, Sill checked on all passengers and then called for assistance. At that time, Hicks exited the ambulance from the passenger seat and laid down on the interstate before Sill assisted him to the back of the ambulance. Sill recalled attending training on the need to increase stopping distances when adverse conditions were present. Approximately two months after the accident, Sill was issued a written reprimand.
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> The legislature has generally insulated public entities and the employees who operate ambulances from negligence liability for decisions made and actions taken while operating a motor vehicle in response to an emergency. 745 ILCS 10/5-106 (West 2016). Section 5-106 of the Tort Immunity Act provides the following:
>
> > § 5-106. Except for willful or wanton conduct, neither a local public entity, nor a public employee acting within the scope of his employment, is liable for an injury caused by the negligent operation of

a motor vehicle or firefighting or rescue equipment, when responding to an emergency call, including transportation to a medical facility." 745 ILCS 10/5-106 (West 2016).

An important reason for 'limited immunity is that if an ambulance operator is burdened with potentially devastating personal liability for actions taken in the course of responding to an emergency, it is likely that his or her performance would be hampered.' Hampton v. Cashmore, 265 Ill. App. 3d 23, 29 (1994) (citing Buell v. Oakland Fire *16 Protection District Board, 237 Ill. App. 3d 940, 944 (1992)). If this general policy did not underlie section 5-106, 'employee performance will certainly be hampered.' Buell, 237 Ill. App. 3d at 944 (citing Stephens v. Cozadd, 159 Ill. App. 3d 452, 458 (1987)).

***

Viewing the evidence in the light most favorable to the plaintiffs, we cannot find that the evidence raises a question of fact relating to whether Sill's conduct was willful and wanton when he traversed Interstate 64 on the evening of November 11, 2015…."

Legal Lessons Learned: Immunity statute very helpful; but use caution when driving high speeds on a wet highway.

File: Chap. 6 – Employment Litigation

IL: BACK INJURIES - COURT AWARDS "ON DUTY" DISABILITY - CUMULATIVE EFFECT OF FIREFIGHTING

On Sept. 6, 2019, in Jerry Valadez v. Harvey Firefighter's Pension Fund, et al., the Appellate Court of Illinois, First Judicial District / 6th Division, held (3 to 0) that the firefighter is entitled to a "on duty" disability. 2019 IL App (1st) 181900-U (Ill. App., 2019).

Justice Harris wrote opinion, overturning the Administrative Board:

"Although the Board agreed with Dr. Pelinkovic and Dr. Gleason that plaintiff was permanently disabled, it disagreed with their determination that the October 21, 2015, incident, or the cumulative effects of acts of firefighting, contributed to his disability. Instead, they credited Dr. Graf's opinion that plaintiff's condition is solely the result of his preexisting lower back issues.

***

Dr. Graf's decision to place great weight on plaintiff's MRIs, with no consideration of whether plaintiff's extrication of a victim weighing over 300 pounds and another over 200 pounds could have aggravated his preexisting condition, renders his opinion unreliable."

Facts:

"At the [Board] hearing, plaintiff testified that he was born on May 24, 1962, and was hired by the city of Harvey on November 3, 1997, as a full-time firefighter. As a firefighter, plaintiff performed suppression, first responder, and emergency medical service duties while wearing heavy protective equipment. These

duties included the extrication of victims from vehicles in an accident. The Department of Labor classifies such duties in the highest physical requirement category. Plaintiff had passed a pre-employment physical examination, and did not receive medical treatment for his lower back prior to his employment.

***

[Plaintiff had long history of back injuries; including the follow two incidents.]

> On June 24, 2014, plaintiff was called to a multiple car garage fire. Plaintiff was on the hose line and while retreating from the burning structure, plaintiff tripped over his lieutenant who had fallen behind him. Plaintiff fell on his back and onto his oxygen tank. He was taken by ambulance to the hospital with no delay in treatment. The treating physician at the hospital prescribed physical therapy, pain medication and muscle relaxers. He was returned to full and unrestricted firefighting duty on July 25, 2014.
>
> On October 21, 2015, plaintiff was on duty and responded to an automobile accident that required extrication of victims. While performing the extrications, plaintiff felt pain in his back and right buttock. He could not stand up. Plaintiff told his lieutenant, Omari Rashedi Silvera, that he hurt his back. Silvera then informed the shift commander, Adam Wojciechowski of plaintiff's injury. Plaintiff was transported from the scene to the hospital. A CT scan revealed no acute injury. As his symptoms improved, plaintiff was discharged with a diagnosis of chronic back pain exacerbation.

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Dr. Graf gave no opinion on whether an act of duty or the cumulative effects of acts of duty contributed to plaintiff's disability because he did not find plaintiff disabled. When asked whether an act of firefighting duty exacerbated plaintiff's preexisting condition, he reiterated that plaintiff's condition 'bears no relation to any work related incident' and pointed to the unchanged MRI findings as support. Nowhere in his answers did Dr. Graf incorporate plaintiff's performance of heavy physical labor into his findings, as did the other physicians. The material issue here is whether 'the performance of an act of duty or from the cumulative effects of acts of duty' had a causative effect on plaintiff's condition. 40 ILCS 5/4-110 (West 2016); Luchesi, 333 Ill. App. 3d at 550. Dr. Graf's decision to place great weight on plaintiff's MRIs, with no consideration of whether plaintiff's extrication of a victim weighing over 300 pounds and another over 200 pounds could have aggravated his preexisting condition, renders his opinion unreliable.

***

Dr. Graf's selective regard of the record is further shown by his disbelief that plaintiff is severely disabled because 'he takes no pain medications.' However, his 40-plus page report, which primarily consisted of plaintiff's extensive medical history, recited the notes of Dr. Bonk indicating that plaintiff was taken off pain relieving medications because he developed elevated liver enzymes. Plaintiff stopped taking medications not because he felt no pain, but because it was dangerous for him to keep taking them. Dr. Graf believed, based on the MRIs and the fact plaintiff is not taking pain medications, that plaintiff could return to full and unrestricted duty as a firefighter. Based on a more complete view of plaintiff's records, the other doctors found that after the October 21, 2015, incident plaintiff could only perform light or medium duty work, with lifting no more than 10-20 pounds.

We find that the Board erred in assigning greater weight to Dr. Graf's opinion where he selectively regarded or failed to consider relevant evidence in the case."

Legal Lessons Learned: Overturning Administrative Board decision is rare; the firefighter made an excellent record with testimony of two treating physicians.

File: Chap. 8 – Race Discrimination

U.S. SUP. CT: MURDER DEFENDANT GETS NEW TRIAL (HIS 7TH) - PROSECUTOR REPEATEDLY REMOVED BLACKS FROM JURY

On June 21, 2019, in Flowers v. Mississippi, the U.S. Supreme Court (7 to 2), overturned the defendant's conviction of murdering four people, and remand the case for re-trial (he has previously been tried six times for the murders).

Justice Brett Kavanaugh wrote majority opinion:

> "Four critical facts, taken together, require reversal. First, in the six trials combined, the State employed its peremptory challenges to strike 41 of the 42 black prospective jurors that it could have struck—a statistic that the State acknowledged at oral argument in this Court. Tr. of Oral Arg. 32. Second, in the most recent trial, the sixth trial, the State exercised peremptory strikes against five of the six black prospective jurors. Third, at the sixth trial, in an apparent effort to find pretextual reasons to strike black prospective jurors, the State engaged in dramatically disparate questioning of black and white prospective jurors. Fourth, the State then struck at least one black prospective juror, Carolyn Wright, who was similarly situated to white prospective jurors who were not struck by the State."

Facts:

"The underlying events that gave rise to this case took place in Winona, Mississippi. Winona is a small town in northern Mississippi, just off I–55 almost halfway between Jackson and Memphis. The total population of Winona is about 5,000. The town is about 53 percent black and about 46 percent white. In 1996, Bertha Tardy, Robert Golden, Derrick Stewart, and Carmen Rigby were murdered at the Tardy Furniture store in Winona. All four victims worked at the Tardy Furniture store. Three of the four victims were white; one was black.

Justice Thomas provided additional facts in his dissent:

> On a summer morning in July 1996 in Winona, Mississippi, 16-year-old Derrick "Bobo" Stewart arrived for the second day of his first job. He and Robert Golden had been hired by the Tardy Furniture store to replace petitioner Curtis Flowers, who had been fired a few days prior and had his paycheck docked for damaging store property and failing to show up for work. Another employee, Sam Jones, Jr., planned to teach Stewart and Golden how to properly load furniture.
>
> On Jones' arrival, he found a bloodbath. Store owner Bertha Tardy and bookkeeper Carmen Rigby had each been murdered with a single gunshot to the head. Golden had been murdered

> with two gunshots to the head, one at very close range. And Stewart had been shot, execution style, in the back of his head. When Jones entered the store, Stewart was fighting for every breath, blood pouring over his face. He died a week later.
>
> On the morning of the murders, a .380-caliber pistol was reported stolen from the car of Flowers' uncle, and a witness saw Flowers by that car before the shootings. Officers recovered .380-caliber bullets at Tardy Furniture and matched them to bullets fired by the stolen pistol. Gun-shot residue was found on Flowers' hand a few hours after the murders. A bloody footprint found at the scene matched both the size of Flowers' shoes and the shoe style that he was seen wearing on the morning of the murders. Multiple witnesses placed Flowers near Tardy Furniture that morning, and Flowers provided inconsistent accounts of his whereabouts. Several hundred dollars were missing from the store's cash drawer, and $235 was found hidden in Flowers' headboard after the murders. 240 So. 3d 1082, 1092–1095, 1107 (Miss. 2017)."

***

In 1997, the State charged Curtis Flowers with murder. Flowers is black. Since then, Flowers has been tried six separate times for the murders. In each of the first two trials, Flowers was tried for one individual murder. In each subsequent trial, Flowers was tried for all four of the murders together. The same state prosecutor tried Flowers each time. The prosecutor is white.

***

In the initial three trials, Flowers was convicted, but the Mississippi Supreme Court reversed each conviction. In the first trial, Flowers was convicted, but the Mississippi Supreme Court reversed the conviction due to "numerous instances of prosecutorial misconduct." Flowers v. State, 773 So. 2d 309, 327 (2000).

In the second trial, the trial court found that the prosecutor discriminated on the basis of race in the peremptory challenge of a black juror. The trial court seated the black juror. Flowers was then convicted, but the Mississippi Supreme Court again reversed the conviction because of prosecutorial misconduct at trial.

In the third trial, Flowers was convicted, but the Mississippi Supreme Court yet again reversed the conviction, this time because the court concluded that the prosecutor had again discriminated against black prospective jurors in the jury selection process. The court's lead opinion stated: 'The instant case presents us with as strong a prima facie case of racial discrimination as we have ever seen in the context of a Batson challenge.' Flowers v. State, 947 So. 2d 910, 935 (2007). The opinion further stated that the 'State engaged in racially discriminatory practices during the jury selection process' and that the 'case evinces an effort by the State to exclude African-Americans from jury service.' Id., at 937, 939.

The fourth and fifth trials of Flowers ended in mistrials due to hung juries.

In his sixth trial, which is the one at issue here, Flowers was convicted. The State struck five of the six black prospective jurors. On appeal, Flowers argued that the State again violated Batson in exercising peremptory strikes against black prospective jurors. In a divided 5-to-4 decision, the Mississippi Supreme Court affirmed the conviction. We granted certiorari on the Batson question and now reverse. See 586 U. S. ___ (2018).

***

To reiterate, we need not and do not decide that any one of those four facts alone would require reversal. All that we need to decide, and all that we do decide, is that all of the relevant facts and circumstances taken together establish that the trial court at Flowers' sixth trial committed clear error in concluding that the State's peremptory strike of black prospective juror Carolyn Wright was not motivated in substantial part by discriminatory intent. In reaching that conclusion, we break no new legal ground. We simply enforce and reinforce Batson by applying it to the extraordinary facts of this case.

***

Finally, in combination with the other facts and circum-stances in this case, the record of jury selection at the sixth trial shows that the peremptory strike of at least one of the black prospective jurors (Carolyn Wright) was motivated in substantial part by discriminatory intent. As this Court has stated, the Constitution forbids striking even a single prospective juror for a discriminatory purpose. See Foster, 578 U. S., at ___ (slip op., at 9).

***

We reverse the judgment of the Supreme Court of Mississippi, and we remand the case for further proceedings not inconsistent with this opinion."

Dissent: Justice Thomas:

"If the Court's opinion today has a redeeming quality, itis this: The State is perfectly free to convict Curtis Flowers again. Otherwise, the opinion distorts our legal standards, ignores the record, and reflects utter disrespect for the careful analysis of the Mississippi courts. Any competent prosecutor would have exercised the same strikes as the State did in this trial. And although the Court's opinion might boost its self-esteem, it also needlessly prolongs the suffering of four victims' families. I respectfully dissent."

Legal Lessons Learned: The U.S. Supreme Court will not allow prosecutors to use peremptory strikes to unfairly exclude black jurors.

PA: PAINFUL TO SHAVE – POLICE DEPT. REQUIRED MEDICAL CERT. EACH 60 DAYS – LAWSUIT REINSTATED FOR ADA BREACH

On Aug. 8, 2019, in Joseph H. Lewis, Jr. v. University of Pennsylvania, the U.S. Court of Appeals for Third Circuit (Philadelphia), held (3 to 0) that a U.S. District Court incorrectly dismissed his ADA lawsuit.

Chief Judge Smith wrote:

> "This is an employment discrimination appeal arising out of Plaintiff Joseph Lewis's previous employment with the University of Pennsylvania Police Department. Lewis suffers from a skin condition, pseudofolliculitis barbae (PFB), which has led to issues giving rise to his discrimination claims. ***
> Lewis submitted a request for accommodation, requesting to 'not shave face or neck….' Penn was then on notice of Lewis's claimed disability and the fact that he wanted accommodation, such that Penn had a duty to engage with Lewis in good faith. It is not clear that Penn did so. According to Lewis, Penn issued a flat denial without making any effort to communicate with him regarding his needs.
>
> Where there is evidence that the employer did not act in good faith to identify an accommodation, 'we will not readily decide on summary judgment that accommodation was not possible and the employer's bad faith could have no effect.' Taylor, 184 F.3d at 31."

Facts:

> "The District Court granted summary judgment on Lewis's reasonable accommodations claim based on its finding that Lewis had never expressly requested the desired accommodation—exemption from filing medical certifications—that he alleged as the basis for his claim….That is not the proper standard. Applying the correct legal standard, there is a fact question as to whether Penn engaged with Lewis in good faith.
>
> ***
>
> Even if Penn did act in good faith, it is for the jury to decide whether permanently exempting Lewis from both shaving and the certification requirement would have been a reasonable accommodation. We will reverse.
>
> ***
>
> Under 42 U.S.C. § 12112(d), "[t]he [ADA] prohibition against discrimination . . . shall include medical examinations and inquiries." Penn's grooming policy allows for exemptions from the clean-shaven policy, but requires that a medical certificate be filed every 60 days to support the exemption. In his opposition to Penn's motion for summary judgment, Lewis identified the 60-day certification requirement as a basis for his ADA discrimination claim, citing § 12112(d)(4)(A). Specifically, Lewis argued that the certification requirement was prohibited under § 12112 because there was no legitimate business purpose for requiring him to submit a certification every 60 days.

> The District Court did not expressly address this issue in its summary judgment order, but in its order denying reconsideration, the Court dismissed Lewis's claim.5 The Court concluded that, while the Penn policy requires certificates, "Lewis has pointed to nothing in the record to indicate that getting a medical certificate requires repeated medical examinations," and as a result § 12112 did not apply. App. 40. This was error.
>
> Both medical examinations and inquiries are prohibited under § 12112. Even if the certificates at issue do not require examinations, they still qualify as a form of inquiry. Indeed, the EEOC Enforcement guidelines explain: 'Disability-related inquiries may include . . . asking an employee to provide medical documentation regarding his/her disability.' EEOC Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act (ADA), July 27, 2000, available at https://www.eeoc.gov/policy/docs/guidance-inquiries.html#N_29_.6 This definition would clearly encompass the Penn certificate requirement.
>
> We therefore conclude that § 12112(d)(4) applies to the Penn medical certificate requirement. The District Court did not address whether the requirement could be supported by a valid business purpose. We will therefore remand for further proceedings on this issue."

Legal Lessons Learned: The PD will now have to justify its business reasons for no beards, and its 60-day medical certifications. See Aug. 12, 2019 article on this case.

There has been race discrimination litigation in fire service about not shaving because of this skin condition, pseudofolliculitis barbae (PFB).

See also D.C. Fire Department case: March 25, 2015 article: "Fireman's Beard Bias Claims Given a Trim," – "Kennedy says that the discrimination against his race and disability kept him from advancing his firefighting career because of his beard growth, but U.S. District Judge Christopher Cooper dismissed parts of the action Friday after finding that 'PFB does not constitute a disability under the prevailing … interpretation' of the Americans with Disabilities Act.

See also 1993 decision by 11th Circuit involving the Atlanta FD: "The City defends the policy, contending that the respirator masks used by firefighters cannot safely be worn by bearded men. The district court granted summary judgment for the City and the firefighters have appealed. For the reasons set forth below, we affirm the judgment of the district court."

File: Chap. 11 - FLSA

FLSA: DOL OPINION LETTER – WHEN EMPLOYEE IS BOTH FF / POLICE OFFICER SAME PUBLIC AGENCY – CALCULATING OVERTIME

On Aug. 8, 2019, the U.S. Department of Labor issued Opinion Letter FLSA2019- 11, confirmed that if working for same public agency, then the total hours worked are aggregated when determining overtime pay.

> "If an employee works for separate and distinct employers, each employer may disregard work performed by the employee for the other employer when determining its responsibility under the Fair Labor Standards Act (FLSA). 29 C.F.R. § 791.2. However, where the employee performs "fire protection activities" for the fire

department and "law enforcement activities" for the police department of the same public agency, as you state is the case here, the hours are aggregated."

Facts:

"As 29 C.F.R. § 553.230 explains, no overtime is owed to an employee engaged in fire protection who works 212 or fewer hours in a 28-day work period or that same ratio of hours to days in any work period from 7-27 days (approximately 7.57 hours per day over the entire work period).

No overtime is owed to an employee engaged in law enforcement who works 171 or fewer hours in a 28-day work period or that same ratio of hours to days in any work period from 7-27 days (approximately 6.11 hours per day over the entire work period). See 29 C.F.R. § 553.230(b)-(c).

***

Further, 29 C.F.R. § 553.213(b) clarifies that when an employee is engaged in both fire protection and law enforcement, "the applicable [maximum hours] standard is the one which applies to the activity in which the employee spends the majority of work time during the work period." 29 C.F.R. § 553.213(b)."

Two examples:

A. Majority Time – Firefighter

"In the first example, in a 28-day work period, an employee works 17 days and no more than 129 hours engaged in fire protection for the fire department, and the employee works 7 days and no more than 43 hours engaged in law enforcement for the police department. The employee's total hours are no more than 172 (129 + 43). Section 553.213(b) instructs that the fire protection maximum hours standard applies since the employee spent the majority of work time in fire protection, rather than law enforcement. The maximum number of hours an employee may work for a fire department in a 28-day period and remain within the partial overtime exemption provided by Section 7(k) is 212. 29 C.F.R. § 553.230(a). As 172 (the total hours worked in fire protection and law enforcement in this example) is less than 212, this employee does not have to be paid overtime, even though the total hours is greater than the maximum for employees solely engaged in law enforcement. See 29 C.F.R. § 553.213(b); 29 C.F.R. § 553.230.

***

In the second example, he employee still works 17 days and no more than 129 hours engaged in fire protection but now works 11 days and no more than 67 hours in law enforcement. However, this increase of hours working in law enforcement does not change the end result. The fire protection maximum hours standard still applies since the employee still spends the majority of the work time in the 28-day period with the fire department. 29 C.F.R. § 553.213(b). As 196 (the total hours worked in fire protection and law enforcement in this example) is less than 212, the employee does not have to be paid overtime. See 29 C.F.R. § 553.213(b); 29 C.F.R. § 553.230."

B. Majority Time – Police Officer

"However, if these numbers were reversed, and the employee worked 129 hours in law enforcement activities and 43 or 67 hours in fire protection activities, the employee would spend the majority of

the work time in law enforcement, and therefore the lower maximum of 171 hours for employees engaged in law enforcement would apply. 29 C.F.R. § 553.213(b). Because the total hours worked would exceed 171 hours in the 28-day work period, the public agency would have to pay the employee overtime for either 1 hour, in the first example (129 + 43 - 171), or 25 hours in the second (129 + 67 - 171). See 29 C.F.R. § 553.213(b); 29 C.F.R. § 553.230. This is the case even when, as in your examples, in 'each position . . . the employees . . . work within the maximum hour standards' for that particular position."

Legal Lessons Learned: When in doubt about paying overtime, review FLSA opinion letters. If still not clear, call DoL Wage And Hour Division and consult with experienced Legal Counsel.

File: Chap. 12 – Drug Free Workplace

NY: COURT REFUSES TO DROP DUI CHARGES AGAINST POLICE OFFICER / EMT – NOT "INTEREST OF JUSTICE"

On Aug. 13, 2019, in The People Of The State Of New York v. Shreeganes Meade, 2019 NY Slip Op 51419(U), N.Y. Crim. Ct., 2019, trial judge Kate Paek, Criminal Court of the City of New York, denied the defense motion to dismiss the two misdemeanor counts "in the interest of justice."

The judge held:

"The defendant asserts that he will face discipline, including possible termination from the NYPD, if he is convicted of a misdemeanor DWI offense. He also states that he will face removal from the New York State Guard and could lose his license to work as an Emergency Medical Technician. Defense counsel asserts that these consequences would not only impact the defendant personally, but would deprive the community of the defendant's service in those roles. The court is mindful of these potential collateral consequences, but finds that they do not mandate dismissal in this case.'

Facts:

"As detailed above, the defendant is charged with Operating a Motor Vehicle while Intoxicated and/or Impaired by Alcohol. The defendant is alleged to have crashed his truck into a median on the West Side Highway multiple times before the vehicle came to a stop. The defendant left the scene holding what was initially reported to be two bottles of alcohol and several witnesses described the defendant as exhibiting signs of alcohol consumption and/or intoxication. After returning home briefly, the defendant sought medical treatment for head trauma and related injuries. A blood sample taken by the hospital and later tested by OCME indicated that the defendant's BAC was 0.13%, well over the legal limit.

Fortunately, no other vehicles or individuals were involved in the accident, but the defendant himself was injured and his vehicle was damaged. In addition, the defendant's two dogs were in his vehicle at the time of the accident. The dogs ran from the defendant's vehicle and one of the dogs was later struck and killed by another vehicle. While the defendant left the scene of the accident, the Con Edison worker (and 911 caller) parked his vehicle in front of the defendant's vehicle in order to alert oncoming traffic. Police officers also responded to the scene. All of those individuals were placed in harm's way as a result of defendant's alleged actions.

> Put simply, the potential for grave harm to motorists, pedestrians and property when a driver chooses to operate a motor vehicle after having consumed alcohol beyond the legal limit is well known and it is generally accepted that this category of offenses should be taken seriously. The particular facts of this case only highlight the serious nature of these charges."

Legal Lessons Learned: The job consequences of an emergency responder being convicted of driving while intoxicated can be very severe. The case will now go to a jury, unless the police officer elects to have a "bench trial" or pleads guilty.

File: Chap. 13 - EMS

OK: EMS HELD BACK FROM PD SHOOTING FOR 12 MINUTES – CONFIRM SCENE SECURE - QUALIFIED IMMUNITY

On Sept. 6, 2019, in Briena Crittenden, as personal representative of estate of Joshua P. Crittenden v. City of Tahlequah, Officer Randy Tanner, et al., the U.S. Court of Appeals for the 10th District (Denver) held (3 to 0) that U.S. District Court judge properly granted summary judgment to the police officers and the City.

Circuit Judge Michael R, Murphy wrote:

> "There is no precedent supporting the notion that police officers have an affirmative duty to provide immediate medical care in situations such as the instant case. See Wilson v. Meeks, 52 F.3d1547, 1556 (10thCir.1995), abrogated on other grounds by Saucier v. Katz, 533 U.S.194 (2001). In Wilson, after a police officer shot a man holding a gun, other officers handcuffed the victim before medical help arrived. Id. The officers did not provide medical care or first aid before EMS arrived. Id. The victim's estate alleged the officers interfered with EMS by refusing to remove the handcuffs upon request.Id. This court, applying the Fourteenth Amendment deliberate indifference standard, held that neither the handcuffing nor the refusal to remove the handcuffs amounted to a constitutional violation. Id. Further, Wilson refused to hold that the Due Process Clause establishes an affirmative duty on police officers to provide medical care (even something as basic as CPR), in any and all circumstances, or to render first aid."

Facts:

> "Following numerous unsuccessful attempts by police to have him come downf rom the attic, Crittenden jumped from an attic vent on the south end of the house. Rather than lie on the ground and surrender, Crittenden stood up, with his right hand forward, and moved [Officer] toward Tanner. Tanner immediately took aim and fired, but ceased firing when he saw Crittenden fall to the ground.
>
> ***
>
> The recording of the incident shows [Officer] Tanner standing with his gun drawn, facing west. As [Officer] Felts approached the south end of the house, he announced, "Shots fired. Shots fired. We need EMS [emergency medical services], we have a suspect down." [Officer] McNiel approached Crittenden and handcuffed him.
>
> ***

[Marshal] Buhl put on rubber gloves, approached Crittenden, and turned him over onto his back. A video reveals Crittenden was gasping for air. No more than few minutes later, EMS arrived on the scene. Buhl decided to hold EMS from the scene until the attic could be cleared.

***

Approximately twelve minutes after they arrived on the scene, EMS personnel were escorted to Crittenden. Although Crittenden was still breathing, none of the EMS personnel performed CPR on him after they were given access. An autopsy revealed Crittenden was struck by a bullet three times, a penetrating gunshot wound to the lower abdomen, a grazing wound of the right hand, and a penetrating gunshot wound to the head. The gunshot wound to the head was a fatal injury which no amount of medical treatment or care could have changed.

Legal Lessons Learned: Police enjoy qualified immunity, particularly where EMS is held back while scene is secured. EMS should document reasons for delay, and subsequent medical care provided.

File: Chap. 13 - EMS

GA: SOFT RESTRAINTS - MANIC EPISODE - POLICE VIDEOS SHOW NEED FOR RESTRAINTS - QUALIFIED IMMUNITY

On Aug. 29, 2019, in Kimberly Ellison v. Kenneth Hobbs, et al., the U.S. Court of Appeals for the 11th District (Atlanta), held (3 to 0) in an unpublished decision, that U.S. District Court judge had properly granted summary judgment to all EMS and Police.

The court held:

> "[C]ontrary to Ellison's contentions, the use of soft restraints is a tool available to Paramedic Gasaway and EMT Howard in performing their job-related functions. See Davenport, 906 F.3d at 940. Thus, because Paramedic Gasaway's and EMT Howard's actions were not outside their 'arsenal' of powers, they acted within their discretionary authority."

Facts:

> "In this action brought under 42 U.S.C. § 1983, Plaintiff Kimberly Ellison appeals the district court's grant of summary judgment in favor of five defendants: (1) Eric Gasaway, a paramedic, and Brandon Howard, an emergency medical technician ("EMT") , both with the Coweta County Fire Department, and (2) Officer Kenneth Hobbs, Officer Michael Condit, and Sergeant Patricia Ayers of the Newnan Police Department. Plaintiff Ellison's § 1983 action stems from the defendants' response to a 911 medical emergency call from Ellison's neighbor for Ellison, who was diagnosed with bipolar disorder and was experiencing a manic episode, and the defendants' transportation of Ellison to the hospital. The entire series of events occurred on June 16, 2015 and were captured on the 911 call audio recording and videos from the body cameras worn by the three police officers.
>
> ***

At the apartment, Ellison greeted Sergeant Ayers warmly and asked about her history in law enforcement. EMT Howard entered the apartment with Sergeant Ayers, and Officer Condit stood at the apartment's doorway. Ellison said 'Hi! How's everyone doing, welcome, tell me what your strengths are and introduce yourself in just a minute.' Paramedic Gasaway asked Ellison, 'are you going to go to the hospital with us,' and Ellison responded, 'no, I'm making my list.' The list consisted of various passwords, telephone numbers, and other directions to her neighbors to prepare for hospitalization. Ellison continued to walk around her apartment talking in a disconnected manner about different topics. Sergeant Ayers asked Paramedic Gasaway what was going on. He replied, 'We're gonna have to forcibly take her. That's all there is to it.' EMT Howard prepared the soft restraints.

***

Paramedic Gasaway and EMT Howard walked Ellison out of her apartment. Ellison walked out under her own power with Paramedic Gasaway and EMT Howard on each side of her holding on to the soft restraints. At the apartment's doorway, Ellison yelled about putting on shoes, and Paramedic Gasaway helped her put shoes on. She also said that she needed to get dressed. Paramedic Gasaway told her that she had been given an opportunity to get dressed, so Ellison instructed one of her neighbors to pack her bag. When Ellison was in the building's hallway, she began yelling and screaming again. Ellison discussed the possibility that she missed her medicine, stating that she needed to take her medicine at 8:00, and Paramedic Gasaway said he was bringing her medicine. Paramedic Gasaway and EMT Howard walked Ellison outside and helped her climb into the ambulance. Once she got to the stretcher, she unbuckled the straps on her own and laid down, stating 'I know how to get in here, so I'm going to help you, and I'm going to lay down here.'

***

Around 5:18 a.m., Paramedic Gasaway and EMT Howard transported Ellison to Piedmont Newnan Hospital. They assessed Ellison's vitals prior to transport. Ellison's blood pressure was dangerously high, reading 205/119, and her pulse was 120 bpm.

***

Dr. Gottfrid Karlsson saw Ellison in the emergency room. Around 6:42 a.m., Dr. Karlsson determined that Ellison needed to be admitted involuntarily and executed a Form 1013 order for psychiatric evaluation. Dr. Karlsson authorized Ellison's transport to Summit Ridge Hospital, an emergency receiving facility, confirming that he had 'personally examined Kimberly Ellison on 6/16, 2015 at 6:42 a.m.'

***

On June 17, Ellison executed a Form 1012 requesting that she be transferred "from involuntary status to voluntary status," which her physician approved. Ellison remained at Summit Ridge Hospital until her discharge on June 23, 2015.

***

The qualified immunity defense shields 'government officials performing discretionary functions . . . from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.' Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S. Ct. 2727, 2738 (1982). Qualified immunity balances two important public interests: 'the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials

from harassment, distraction, and liability when they perform their duties reasonably.' Pearson v. Callahan, 555 U.S. 223, 231, 129 S. Ct. 808, 815 (2009).

***

Ellison argues that Paramedic Gasaway and EMT Howard were not acting within the scope of their authority when they involuntarily placed her in soft restraints and transported her to Piedmont Newnan Hospital. We disagree because Gasaway, as a certified paramedic, and Howard, as a certified EMT, were authorized by state law to 'render first aid and resuscitation services,' which includes the authority to decide whether a person's medical condition warrants transport to a hospital. See O.C.G.A. §§ 31-11-53(a)(1), 31-11-54(a), and 31-11-55(1)(a) (authorizing medical services that may be rendered by certified paramedics and EMTs); cf. Griesel v. Hamlin, 963 F.2d 338, 342 (11th Cir. 1992) (determining, for purposes of state sovereign immunity, that an EMT responding to an official call had the authority to decide whether the plaintiff's medical condition made it necessary or appropriate to transport him to the hospital in the ambulance). Moreover, it was part of their jobs to determine if Ellison had adequate medical decision making capacity to refuse transport to a hospital for emergency medical care. Specifically, pursuant to state law and regulations, the Coweta County Fire Department has adopted Standing Orders and Protocols ('SOPs') for its emergency medical personnel."

Legal Lessons Learned: Thanks to officer's video cameras, both the U.S. District Court judge, and the Court of Appeals, had a "minute by minute" view of what occurred in getting this patient [who is a practicing attorney] out of her apartment and to the hospital.

File: Chap. 13 - EMS

IL: STROKE PATIENT WHO RAN OUT HOME – EMS TACKLED ON DRIVEWAY - LAWSUIT PROCEED, FACTS IN DISPUTE

On Aug. 28, 2019, in Douglas Johnson v. City of East Peoria, et al., U.S. District Court judge James E. Shadid, Central District of Illinois, Case No. 17-cv-1212-JES-JEH, denied motion for summary judgment by the City and several paramedics; pre-trial discovery may now proceed unless they take an immediate appeal.

Judge Shadid wrote:

"Between the bottom of the stairs and the front door, Plaintiff's pants began to fall down and Defendant Sauder attempted to pull them up. (Docs. 37 at 8, 42 at 10). Plaintiff turned at least the top half of his body in a manner Defendants Riggenbach and Sauder state they found aggressive. (Docs. 37 at 8, 42 at 10). He then ran out the front door, down the front steps, and into the driveway, falling three times as he ran. *** What happened next is disputed in large part, but the parties agree that Defendant Sauder bear-hugged Plaintiff, both Defendant Sauder and Plaintiff ended up on the ground, and Defendants Duckworth, Riggenbach, and Sauder, along with Knaus, restrained Plaintiff on the ground.

***

> However, Plaintiff is correct that the state-created danger theory is not duplicative of his other claims. See Monfils v. Taylor, 165 F.3d 511, 515–517 (7th Cir. 1998) (recognizing the existence of a substantive due process claim for a state-created danger)….Therefore, Plaintiff's due process claim survives summary judgment on the state-created danger theory alone."

Facts:

"The following facts are undisputed. Plaintiff Douglas Johnson has been diagnosed with bipolar disorder, anxiety, and partial symptomatic epilepsy, although the latter diagnosis came after the incident giving rise to this suit. (Docs. 42 at 3, 37 at 5-6). Prior to August 22, 2016, Plaintiff had suffered two seizures, at least one of which was related to head trauma. (Docs. 37 at 5, 42 at 6). On August 22, 2016, Plaintiff was doing schoolwork and watching television in his second-floor bedroom with his girlfriend, Ahna Ayler. (Doc. 42 at 17). Plaintiff began convulsing, foaming at the mouth, and making choking noises as his eyes became unfocused and rolled back in his head. (Doc. 42 at 2). Ayler called for Plaintiff's mother, Susan O'Neal, and telephoned 911, informing the operator Plaintiff was having a seizure. (Doc. 42 at 2, 8).

Defendants Erick Duckworth, Grant Hangartner, Kim Riggenbach, and Sam Sauder are firefighters and emergency medical technicians. (Doc. 34 at 1). Along with Zachery Knaus, who is not a party to this case and was then an intern with the East Peoria Fire Department (Doc. 34-9 at 4), Defendants Duckworth, Hangartner, Riggenbach, and Sauder were dispatched to respond to the 911 call. (Doc. 37 at 1).

The accounts begin to diverge at this point, but the broad outlines remain undisputed. Knaus, Defendant Sauder, and Defendant Hangartner approached the house and briefly spoke with O'Neal, before proceeding upstairs. (Doc. 37 at 6, 2). Defendants Duckworth and Riggenbach set up a cot outside of the house. (Doc. 37 at 2). The parties do not agree precisely what Plaintiff's condition was when the present Defendants and Knaus arrived in his room, but at minimum he was either not speaking or not speaking coherently and did not appear fully oriented. (Docs. 34 at 4, 37 at 6, 42 at 9). They then spoke with Ayler and O'Neal. (Doc. 37 at 7). Defendant Sauder instructed Plaintiff to walk to the cot outside; although Plaintiff needed to be directed, he walked under his own power down the stairs. (Docs. 34 at 5, 37 at 7-8).

Between the bottom of the stairs and the front door, Plaintiff's pants began to fall down and Defendant Sauder attempted to pull them up. (Docs. 37 at 8, 42 at 10). Plaintiff turned at least the top half of his body in a manner Defendants Riggenbach and Sauder state they found aggressive. (Docs. 37 at 8, 42 at 10). He then ran out the front door, down the front steps, and into the driveway, falling three times as he ran. (Docs. 37 at 8-9, 42 at 10-11). Defendant Sauder and Knaus, along with at least one other Defendant—Defendants initially stated it was Riggenbach, which Plaintiff disputes, but admit it was Hangartner in their Reply—followed Plaintiff out and were able to catch up with him. (Docs. 37 at 9-10, 42 at 2). What happened next is disputed in large part, but the parties agree that Defendant Sauder bear-hugged Plaintiff, both Defendant Sauder and Plaintiff ended up on the ground, and Defendants Duckworth, Riggenbach,1 and Sauder, along with Knaus, restrained Plaintiff on the ground. (Docs. 37 at 10, 42 at 11-12). What is disputed is whether Plaintiff was disoriented while running (Doc. 42 at 10-11), whether Plaintiff was behaving aggressively (Doc. 37 at 10), whether Plaintiff was prone or supine on the ground (Docs. 37 at 10-11, 42 at 11-12), and how Defendants restrained Plaintiff (Docs. 37 at 10-13; 42 at 11-12, 15). Defendants state, and Plaintiff disputes, that at some point Plaintiff struck Defendant Duckworth in the jaw. (Docs. 34 at 7, 37 at 12).

Defendants called the police. (Doc. 37 at 13). Defendant Bradley Catton, an officer with the East Peoria Police Department, arrived and handcuffed Plaintiff. (Doc. 37 at 2). Defendant S.H. Gann, another police

officer, arrived subsequently. (Doc. 37 at 14). Plaintiff was loaded into an ambulance and taken to the hospital.

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Plaintiff was arrested for aggravated battery by Defendant Catton fivedays later, with Defendant Catton having learned in the interim that Plaintiff had suffered a seizure, had taken off running and stumbling, and did not recall the relevant events; Defendant Catton believed Plaintiff might have been on drugs, and indeed, asked him if he was. (Doc. 42 at 2-3). The charges were dismissed by a Tazewell County Assistant State's Attorney."

Legal Lessons Learned: On an EMS run where there is a struggle with the patient, thoroughly documents on EMS run report the actions taken by each medic. This will help avoid "facts in dispute" in any subsequent civil lawsuit, and any prosecution for assault.

File: Chap. 13 - EMS

MI: GURNEY TIPPED – LAWSUIT TO PROCEED - EMS DIDN'T TELL HOSPITAL OR DOCUMENT – X-RAYS SHOWED NECK FRACTURES

On Aug. 27, 2019, in Estate of Ralph Brown, by Victoria Brown, Personal Representative v. Sean Wolan and Jeffrey Vescio, the Michigan Court of Appeals, held (2 to 1) in an unpublished opinion, that the trial court judge properly denied the two paramedics' governmental immunity motion to dismiss.

The 2-judge majority held:

"The failure to report the incident has additional import on the issue of whether the conduct of the defendants was grossly negligent. They had an undisputed duty to make such a report. Indeed, Vescio acknowledged in his deposition that the incident should have been reported. Vescio testified that Wolan was responsible for documenting the ambulance run and communicating information to the ER staff. Wolan explained that he did not report or document the incident because he did not believe the decedent had been injured. To the contrary, Everlove [expert witness] testified that the reporting of the incident, regardless of the paramedics' assessment of injury, was crucial to patient care at the hospital. Additionally, the veracity of Wolan's testimony regarding his belief that there was no injury is belied by his partner Vescio's description of the incident in his e-mail to his supervisors where he reported that, 'the patient [was] hanging sideways reaching out while remaining belted onto the stretcher.' A rational juror thus could believe that the EMTs did not assess the patient and failed to even report the indecent to those charged with the patient's medical care or record the incident in the transport record that would have been used by the hospital staff to inform patient care decisions. On this record, a reasonable juror could determine that the EMTs showed 'a substantial lack of concern for whether an injury results.' Defendants' failure in regards to reporting cannot be considered accidental."

Facts:

“This negligence suit arises from the death of Robert Brown (the plaintiff’s decedent) who had suffered injuries months earlier when, during a transport from the residential facility to the ambulance, the gurney he was on tipped over. Defendants are paramedics employed by the city of Southfield. On August 29, 2015, defendants were dispatched to an assisted living facility to transport plaintiff’s decedent to Botsford Hospital. The decedent was paraplegic from a prior injury and was being transported to the hospital because of blood in his urine. Defendant Sean Wolan was assigned as the “lead” paramedic and defendant Jeffrey Vescio as the ‘driver.’ Vescio used a stretcher (also referred to as a ‘cot’ or ‘gurney’) mounted on wheels to convey the decedent from the facility to the ambulance. After exiting the facility, Vescio used one hand to pull the stretcher from the end, at the decedent’s feet. Vescio carried a bag of medical supplies in the other hand. Wolan did not take control of the handles at the opposite end of the stretcher at the decedent’s head, but instead stayed in the facility to fill out paperwork. Vescio pulled the stretcher alone down a ramp at the exit of the facility, onto a stamped concrete patio walkway. The walkway had a 90-degree turn with a circle of stamped concrete at the corner. As Vescio pulled the stretcher, one of the rear wheels went off the walkway and onto the grass, which was approximately 2 inches lower than the concrete. The stretcher tipped downward. Vescio dropped his bag, turned around, and used his body and arms to prevent the stretcher from falling to the ground. Wolan saw what was happening and came to assist Vescio in returning the stretcher to the upright position onto the walkway.1

Footnote 1: The incident was recorded by the facility’s entryway security camera.

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Vescio testified in his deposition that he did not believe that the decedent could have been injured because neither his body nor the stretcher hit the ground. He testified that he palpated the decedent’s neck in the ambulance, but he did not find any sign of injury. According to Vescio, the decedent reported that he was not in pain. Wolan testified that he palpated the decedent’s neck before the stretcher was taken into the ambulance. Wolan explained that his examination could not be seen on the security video because a tree obscured the view of the stretcher when he conducted the brief examination. Defendants’ examinations were not documented in the decedent’s Patient Care Record. Neither did Wolan document the tipping incident.

Upon arriving to the Botsford Hospital Emergency Room (ER), defendants did not inform staff of the tipping incident. The ER staff learned of the incident from an employee at the assisted living facility who heard defendants ask the decedent if he was hurt. The employee heard decedent complain of pain in his neck. The decedent’s MRI and CT scan imaging revealed multiple acute fractures in the vertebrae of the decedent’s cervical and thoracic spine. Daniel Fahim, M.D., a neurosurgeon, performed surgery for open reduction and internal fixation of the vertebral fractures. During surgery, the decedent was found to have lytic lesions along his spine, suggesting metastatic cancer.

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The decedent was discharged to a nursing facility from September 10 to 26, 2015. While there, the decedent developed pneumonia, ‘which further developed into full sepsis and infected decubitus ulcers.’ He was admitted to William Beaumont Hospital on September 26, 2015, and remained there until his death on October 10, 2015. He was diagnosed with acute hypoxic respiratory failure caused by Methicillin Resistant Staph Aureus pneumonia. The decedent’s pneumonia and respiratory failure were identified as ‘healthcare associated.’ The decedent’s death certificate listed three causes of death: (1) ‘respiratory failure,’ (2)

> ‘healthcare associated pneumonia,’ and (3) ‘metatastic lung cancer.’ The manner of death was recorded as natural.
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> ***
> Regardless of the issue to report, defendants were not entitled to summary disposition because plaintiff established an issue of fact concerning whether defendants’ conduct rose to the level of gross negligence under the GTLA [governmental tort liability act (GTLA), MCL691.1401 et seq.] and as to whether defendants’ actions were a proximate cause of decedent’s death.

Dissent:

> “Suffice it to say, under these facts, plaintiff at best has established a negligence claim which is not sufficient as a matter of law to establish a genuine issue of material fact as to whether defendants’ conduct rises to the level of gross negligence. Accordingly, I would hold that plaintiff’s suit is barred by governmental immunity, and should have been dismissed.”

Legal Lessons Learned: When “things go bad” on a run, inform hospital and supervisors and document on EMS run report.