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JUNE 2020 – FIRE & EMS LAW Newsletter

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UC FIRE SCIENCE: COURSE ON "NEXT GEN TECHNOLOGIES"

Video by Adjunct Professor Kirk McKinzie [recently retired Captain, Cosumnes Fire Department, Elk Grove, CA]
7-week accelerated online course: FST 3055: UAVs & EMERGING TECHNOLOGIES (10/14/2020 – 12/5/2020)

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NY: PHOTO OF KNEELING FDNY FIREFIGHTER DURING 911 RECOVERY – PROF. PHTOGRAPHER COPYRIGHTED PHOTO – COMPANY MUST PAY USE ON SWEATSHIRTS, TEE SHIRTS

On May 28, 2020, in Matthew McDermott v. NYFirestore.com, Inc., U.S. District Court judge Alison J. Nathan, Southern District of New York, held that the plaintiff, a professional photographer, has provided the Court with the photograph's Certificate of Registration, and is granted a default judgment for liability against NYFirestore company for unauthorized use of the photo on sweatshirts, tee shirts and throw blankets. Plaintiff seeks $20,000 in actual damages; under the Digital Millennium Copyright Act the photographer must now show he placed a digital watermark or other "copyright management information" on the photo; has 30 days to file motion for damages and attorney fees, with evidence of licensing fees he has charged others for use of his photos.

> "According to the Complaint, Defendant—a domestic corporation that produces merchandise, including sweatshirts, tee shirts, and throw blankets—displayed on its merchandise unauthorized reproductions of a copyrighted photograph of a New York City firefighter kneeling during September 11th recovery operations in Lower Manhattan…. The Complaint alleges that this photograph is owned and registered by Plaintiff, a professional photographer, and that Defendant had neither a license, nor Plaintiff's permission or consent, to publish the photograph on its merchandise.
> ***
> The Digital Millennium Copyright Act, 17 U.S.C. § 1202, prohibits doing any of the following 'without the authority of the copyright owner or the law' and with knowledge or reasonable grounds to know that it will 'induce, enable, facilitate, or conceal' infringement:
>
> (1) intentionally remov[ing] or alter[ing] any copyright management information….
>
> Plaintiff's Complaint fails to allege facts establishing any of the elements of a Digital Millennium Copyright Act violation. Indeed, most basically, it fails to allege the existence of copyright management information on the photograph at issue. Accordingly, Plaintiff has failed to establish a *prima facie* case for recovery with respect to his Digital Millennium Copyright Act claim.
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> ***
> In his motion papers, Plaintiff seeks $20,000 in actual damages and profits…. With respect to actual damages, Plaintiff's counsel Richard Liebowitz avers that "Plaintiff estimates he would have been entitled to charge up to $5000 for use of the Photograph in the manner used by Defendant, which was to sell and distribute tangible merchandise." Dkt. No. 18 ¶ 14. However, Plaintiff's motion papers do not provide *any documentary evidence* whatsoever—"such as invoices for Plaintiff's past licensing fees for his photographs or the Photograph itself," *Pasatieri v. Starline Prods., Inc.*, No. 18-cv-4688 (PKC) (VMS), 2020 WL 207352, at *4 (E.D.N.Y. Jan. 14, 2020)—that would support his estimate of $5,000 as the lost licensing fee for this photo …. As a result, the Court is "unable to ascertain . . . the market value" of the photograph and cannot award actual damages on the basis of Plaintiff's undue speculation alone…. Accordingly, the Court denies without prejudice Plaintiff's request for actual damages with leave to renew his request supported by evidence "setting forth some reasonable basis for his computation."

Legal Lessons Learned: In order to help protect copyrighted photos, add a copyright watermark pattern to the photo.

Note: See this article, "Add A Copyright Watermark Pattern To A Photo With Photoshop."

File: Chap. 1, American Legal System

OR: FALSE 9-1-1 CALLS – FOUR CALLS, FEMALE DEF. CLAIMED ANOTHER FEMALE WAS REPEATEDLY STALKING HER – "SCREENSHOTS" GOOGLE MAPS PROVED SHE LIED

On May 28, 2020, in State of Oregon v. H.D.E., 304 Or App 375, the Court of Appeals of the State of Oregon held (3 to 0) upheld her convictions, holding that trial judge properly allowed the screenshots into evidence, and State proved that claims by defendant that Ms. Garcia was stalking her were false.

> "In March 2016 … defendant obtained a temporary SPO prohibiting Garcia from contacting her. The SPO remained in effect pending a hearing on the merits scheduled for May 31, at which time the order was dismissed. On four separate occasions over that timeframe, defendant called 9-1-1 to report that Garcia had violated—or was actively violating—the SPO by contacting defendant at or near her home in Hermiston. Specifically, on April 10, defendant called to report that Garcia was trying to break into her shop, had driven by her house several times, and had shot a BB gun towards the house. Defendant was adamant that it was Garcia she had seen, because Garcia had looked her 'dead in the face.' On April 21, defendant again called to report Garcia driving by her house, this time slowing down to 'flip her off." Similarly, On April 24, defendant reported that Garcia had violated the SPO three times that day by driving by her house in various cars while waving at defendant, 'flipping her off,' and honking. Finally, on May 1, defendant called to report that Garcia had parked near defendant's house and had taken pictures of her as she got out of her car.
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> ***
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> On appeal, defendant assigns error to the trial court's admission, over her objection, of four exhibits depicting 'screenshots' taken from Garcia's smartphone. Those screenshots purportedly displayed global positioning system (GPS) data generated by the smartphone's 'Google Maps' application and, in turn, suggested that the phone's owner, Garcia, had not been in Hermiston at the reported times.
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> ***
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> [W]e readily conclude that state sufficiently authenticated the GPS evidence at issue here and that the trial court, therefore, did not err."

Legal Lessons Learned: New technology, such as cell phone screenshots, can be powerful proof in a trial.

File: Chap. 1, American Legal System

IA: FF ARSONIST – SEARCH WARRANTS GPS TRACKER / CELL PHONE LOCATIONS – PLEA DEAL, COOPERATE, NO OTHER CHARGES - BUT INDICTED 4 MORE ARSONS, DISMISSED

On May 15, 2020, in State of Iowa v. Chance Ryan Beres, the Iowa Supreme Court held (7 to 0) that the State is bound by its plea agreement, and cannot bring four additional arson charges.

> "Between January and May 2018, a number of unexplained fires occurred in and around Poweshiek County. These included a January 26 fire involving a pole barn containing hay bales in Grinnell, an April 12 grass fire on private property in Grinnell, an April 29 grass and shed fire at the county-owned Fox Forest Wildlife Area, an April 29 nighttime grass fire in Montezuma, an April 30 early morning fire involving an abandoned two-story farmhouse at the same location, and a May 27 fire at an abandoned barn in Montezuma. Twenty-year-old Chance Beres, a Montezuma firefighter and Grinnell paramedic, seemed to be a common denominator in these fires. Either he had reported the fire, responded to the fire, been prepared to respond to the fire, or had a combination of these types of involvement.

***

A search warrant was obtained allowing the placement of a GPS tracker on Beres's truck. The warrant application stated a belief that Beres 'has committed and is committing' arsons. It referred specifically to the April 29 and April 30 fires. The warrant application was approved, and the GPS tracker was attached to Beres's vehicle the same day…. On May 11, investigators obtained a search warrant for records relating to Beres's cell phone calls and cell tower locations for January through April 2018.

***

The plea agreement here provided that the defendant would plead guilty to his pending charge of second-degree arson, that he would cooperate in an interview regarding some other suspicious fires that had occurred, and that the State would not bring charges regarding those other fires. After the defendant pled guilty, the State changed its mind and decided it did not need or want the interview. It advised the defendant before sentencing he would be charged with other arsons and gave him an opportunity to withdraw from the plea agreement. The defendant declined to withdraw. Nonetheless, the State brought four additional arson charges. The defendant moved to dismiss them as a breach of the plea agreement. The district court denied the motion, and we granted interlocutory review.

***

Consistent with the law of contracts, we now hold that the State could not unilaterally withdraw from the plea agreement either by declining to conduct the interview or by making an offer of rescission that the defendant did not accept. Because the State remains bound by its plea agreement under these circumstances, we reverse the order denying the defendant's motion to dismiss and remand with directions to grant that motion."

Legal Lessons Learned: Prosecutors should not agree to a plea agreement until the defendant has been thoroughly interviewed, and also given a complete, written statement about all his arsons.

File: Chap. 1, American Legal System

KS: ARSON - 71-YR-OLD WOMAN, HOUSE FORECLOSURE – ARSON INVESTIGATOR INTERVIEWED HER 2-HOURS IN HOSPITAL – MIRANDA WARNING NOT REQUIRED, NOT IN CUSTODY

On May 8, 2020, in State of Kansas v. Patricia E. Sinclair, the Court of Appeals of State of Kansas, held (3 to 0) in unpublished opinion, that trial judge properly denied her motion to suppress the tape recorded interview. "Thus, looking at the totality of the circumstances, we find Sinclair's interview was not a custodial interrogation."

"Sinclair was convicted by a jury of arson based on a fire at her house on October 11, 2016. At trial, the State presented evidence reflecting Sinclair knowingly set fire to her house on the day she was scheduled to be served with an eviction notice after the completion of foreclosure proceedings.

***

Sinclair was taken to an ambulance and treated for smoke inhalation. According to one medic, Sinclair appeared very angry and was cussing and saying things like, 'They should have left me there to die,' and 'I can't believe the police were smoking me out.' Sinclair mentioned to the medic she had taken pills and admitted she had tried to commit suicide. Another medic similarly testified Sinclair had mentioned she wanted to die. Sinclair was air-lifted to a hospital in Kansas City for treatment.

***

Jason Love, a lieutenant and fire investigator with the Department, investigated the house to determine the fire's origin and cause. He took photographs of the house to document his investigation, which the State admitted into evidence. Love ruled out an extension cord, the chimney, the electrical panel, and the furnace as the origin. By tracing the smoke, burn, and char patterns throughout the house, he concluded someone had intentionally started the fire a few feet inside the basement door. He found a used match surrounded by burnt debris at the origin of the fire. In the kitchen adjacent to the basement, Love found a box of matches and a metal-headed hammer next to a green wooden chair. He testified the matches in the kitchen, like the match recovered from the basement, had wooden stalks with square-shaped ends.

***

About two weeks after the fire, as part of Love's investigation, he interviewed Sinclair at the hospital. Love made an audio recording of the interview, which the State admitted into evidence. According to Love, when he asked Sinclair during the interview whether she had started the fire, Sinclair responded, '[A]nything's possible.'

***

Before trial, Sinclair moved to suppress her conversations with several firefighters, including Love's recorded interview of her while still a patient in the hospital. At the hearing on Sinclair's motion, Love testified he did not give Sinclair Miranda warnings before asking her whether she had started the fire. Love said Sinclair was the only suspect in the case when he interviewed her. The district court reviewed the audio recording of the interview before ruling on the motion. The district court made the following factual findings about the interview:

- The interview occurred at the hospital;
- Love's demeanor was 'very kind and very patient' and Sinclair's demeanor was 'coherent and very conversational;
- The interview lasted about two hours, but for most of the interview, 'Sinclair was simply talking without questions being asked,' and Love 'patiently listened to everything she had to say without . . . directing her;
- Love asked Sinclair directly whether she had started the fire, but they also discussed other ways the fire might have started;
- They 'talked at length about other people in [Sinclair's] neighborhood, their personal habits, [and] their private lives';
- Sinclair never asked Love to leave, and when Love tried to finish the interview, Sinclair kept the conversation going; and
- Sinclair was not arrested after the interview.

Based on these factual findings, the district court found '[w]ith the exception of the fact of whether she was being questioned as a suspect, I believe every other [factor definitely weighs in favor that it was an investigative interview.' Accordingly, the district court denied Sinclair's suppression motion.

***

But the *Miranda* safeguards are triggered only when the accused is subject to custodial questioning, which occurs when law enforcement has taken a person into custody or the person is otherwise deprived of his or her freedom in any significant way at the start of the interview. Miranda, 384 U.S. at 444. 'A custodial interrogation is distinguished from an investigatory interrogation, which occurs as a routine part of the fact-finding process before the investigation has reached the accusatory stage.' State v. Warrior, 294 Kan. 484, 496, 277 P.3d 1111 (2012)."

Legal Lessons Learned: Non-custodial interviews do not require a *Miranda* warning. One technique is to start interview by informing person that it is an "investigative interview" and they are not in custody.

File: Chap. 1, American Legal System

U.S. SUP. CT: NJ GOV STAFF SHUT DOWN LANES GW BRIDGE – POL. "BACKBACK" MAYOR FT. LEE – FED. CONVICTIONS PROGRAM FRAUD & WIRE FRAUD REVERSED

On May 7, 2020, in Bridget Anne Kelly v. United States, et al., the U.S. Supreme Court (9 to 0) held that convictions of Ms. Kelly, Deputy Chief of Staff of New Jersey Governor Chris Christie, and William Baroni, Deputy Executive Director of tri-state Port Authority, were reversed. Justice Elana Kagan, writing for unanimous Court, wrote: "But not every corrupt act by state or local officials is a federal crime. Because the scheme here did not aim to obtain money or property, Baroni and Kelly could not have violated the federal-program fraud or wire fraud laws."

> "For four days in September 2013, traffic ground to a halt in Fort Lee, New Jersey. The cause was an unannounced realignment of 12 toll lanes leading to the George Washing-ton Bridge, an entryway into Manhattan administered by the Port Authority of New York and New Jersey…. The public officials who ordered that change claimed they were reducing the number of dedicated lanes to conduct a traffic study. In fact, they did so for a political reason—to punish the mayor of Fort Lee for refusing to support the New Jersey Governor's reelection bid.
>
> ***
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> Exposure of their behavior led to the criminal convictions we review here. The Government charged the responsible officials under the federal statutes prohibiting wire fraud and fraud on a federally funded program or entity. See 18 U. S. C. §§1343, 666(a)(1)(A). Both those laws target fraudulent schemes for obtaining property. See §1343 (barring fraudulent schemes "for obtaining money or property");§666(a)(1)(A) (making it a crime to "obtain[] by fraud . . . property"). The jury convicted the defendants, and the lower courts upheld the verdicts.
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> ***
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> The question presented is whether the defendants committed property fraud. The evidence the jury heard no doubt shows wrongdoing—deception, corruption, abuse of power. But the federal fraud statutes at issue do not criminalize all such conduct. Under settled precedent, the officials could violate those laws only if an object of their dishonesty was to obtain the Port Authority's money or property…. The realignment of the toll lanes was an exercise of regulatory power—something this Court has already held fails to meet the statutes' property requirement. And the employees' labor was just the incidental cost of that regulation, rather than itself an object of the officials' scheme. We therefore reverse the convictions."

Legal Lessons Learned: Public corruption is a common issue; Fire & EMS must be extremely careful in expending funds for only public purposes [classic case of using fire engine to fill a politician's pool can result in state criminal charges].

MN: ARSON – HOMEOWNER INTENTIONALLY SET FIRE - 41 MONTHS PRISON – TRIAL JUDGE REJECTED PROBATION - KILLED DOG, LIED INVESTIGATORS, INSURANCE FRAUD

On April 13, 2020, in State of Minnesota v. Jeffrey George Ackerson, Jr., the State of Minnesota Court of Appeals, held (3 to 0) that the trial judge did not abuse his discretion in refusing to impose a reduced sentence.

> "In January 2018, on a very cold winter day, Ackerson set fire to his home while the family dog was inside. The fire destroyed the house and the family dog died. Three weeks after the incident, Ackerson confessed that he lit a cigarette using a culinary torch, locked the torch in the "on" position, and threw the torch on the house floor. At the time, Ackerson was in a room that he used for woodworking. The floor was covered with a thick layer of sawdust. The sawdust ignited when the torch hit the floor. After starting the fire, Ackerson walked out of the house, passing his sleeping dog on his way out.
> In October 2018, Ackerson pleaded guilty to one count of first-degree arson of a dwelling under Minn. Stat. § 609.561, subd. 1 (2016), and one count of cruelty to animals resulting in death under Minn. Stat. § 343.21, subds. 7, 9(d) (2016). In exchange for pleading guilty, the state dismissed one count of insurance fraud under Minn. Stat. § 609.611, subd. 1(a)(2) (2016). At the plea hearing, Ackerson stated that he acted impulsively when he started the fire. He explained that he did so because he was struggling financially and emotionally.
>
> ***
> Prior to sentencing, Ackerson moved for a departure. A dispositional advisor from the public defender's office filed a memorandum in support of Ackerson's motion. The advisor recommended a dispositional departure to probation based on her view that Ackerson is particularly amenable to probation and her opinion that his offense was less serious than the typical arson offense.
>
> ***
> Here, the record demonstrates that Ackerson did not cooperate until nearly three weeks into the investigation when he was confronted with evidence of his involvement. The record also contains evidence of a prior probation violation and evidence calling into doubt Ackerson's claim of remorse. And, while Ackerson maintains that he would benefit from mental health treatment in the community, there is nothing in the record to indicate that Ackerson has been admitted into an outpatient treatment program.
>
> ***
> But here, there is evidence to support that the fire was actually more serious—not less serious—than the typical arson because the fire destroyed the entire structure, the family dog died, and the weather conditions created dangerous conditions for the firefighters and first responders.
>
> ***
> The district court did not abuse its broad discretion when it imposed a sentence within the presumptive guidelines range [41 to 57 months]."

Legal Lessons Learned: Minnesota uses presumptive sentencing guidelines; the trial court wisely rejected the public defender office "dispositional advisor" recommendation of probation.

MD: WIFE OF DECEASED FF ENTITLED TO DEATH BENEFITS – 2-YRS PRIOR HE SETTLED WORKERS COMP FOR HEART DISEASE / HYPERTENSION – WIFE DID NOT WAIVE RIGHTS

On May 26, 2020, In The Matter Of Bernard L. Collins, the Court of Appeals of Maryland held (7 to 0) that Mrs. Collins was not a party to the settlement between Mr. Collins and the workers comp insurance companies for the fire department, and the settlement did not extinguish her future claim for death benefits.

> "Respondent Peggy Collins, the widow of firefighter Bernard Collins [died of cardiac arrest on June 8, 2017], filed a dependent's claim for death benefits under the Act against her late husband's former employer, the Huntingtown Volunteer Fire Department (the 'Department'), and its insurers, Chesapeake Employers' Insurance Company ('Chesapeake') and Selective Insurance Company of America ('Selective'), who collectively are the Petitioners in this case. Mrs. Collins claimed that her husband's death was due to heart disease he had developed while working as a firefighter for the Department.
>
> ***
>
> Two years before he died, Mr. Collins [approved by Workers Comp Commission on June 4, 2015] settled claims he had brought under the Act against Petitioners for disability benefits related to his heart disease. In the parties' settlement agreement, Mr. Collins purported to release Petitioners from any and all claims that Mr. Collins, his personal representative, dependents, spouse, children, and other potential beneficiaries might then or could later have 'of whatsoever kind' which might arise under the Act from Mr. Collins's disability…. Selective [Insurance Co.] would pay Mr. Collins a lump sum of $100,000; Chesapeake [Insurance Co.] would pay Mr. Collins a lump sum of $50,000; and Chesapeake also would fund a 'Medicare Set Aside' annuity in the amount of $47,192, by way of an initial payment of $9,438.08, followed by annual payments of $4,194.88 for nine years during Mr. Collins's life.
>
> ***
>
> We resolve the parties' conflicting interpretations of §9-722 by holding that: (a) dependents may settle their future claims for death benefits; (b) an employee lacks the power to release his or her dependents' independent claims for death benefits; and (c) the Commission's approval of a settlement agreement that purports to release dependents' claims for death benefits does not render the release enforceable against a dependent who is not a party to the agreement.
>
> ***
>
> If, as Mrs. Collins argues, a dependent cannot release his or her potential death benefits claims as part of a global settlement involving an employee's claims under the Act, employers/insurers might insist on the need to reduce settlement offers to employees based on the risk that their dependents subsequently will submit claims for death benefits. We find it difficult to imagine that the General Assembly intended to encourage employers and insurers to offer smaller settlements to injured and sick employees when it enacted §§9-722(a) and (d)(1)."

Legal Lessons Learned: If the insurance companies wish to negotiate a "global settlement" with an employee, that also includes waiver of future death benefits for employee's spouse, then invite the spouse to participate in settlement discussions and sign the settlement agreement.

File: Chap. 2, LODD / Safety

UT: STATE SUPREME COURT ALLOWS FF TO SUE TREE COMPANY FOR INJURIES – "PROFESSIONAL RESCUER RULE" MODIFIED FOR GROSS NEGLIGENCE BY BUSINESS

On May 20, 2020, in David Scott Ipsen v. Diamond Tree Experts, Inc., the Utah Supreme Court held (3 to 2) that the injured firefighter may pursue his lawsuit for damages from injuries at a mulch fire.

> "A mulch fire occurred on the property of appellee, Diamond Tree Experts, Inc. In the week before the mulch fire, there had been at least two other fires on the property. And ten days before the mulch fire, a representative from the Salt Lake County Health Department told Diamond Tree that the mulch on its property was piled too high and that Diamond Tree needed to reduce it. Diamond Tree did not comply, meaning that at the time of the fire, it was in knowing violation of several ordinances—including the fire code—and of industry standards regarding the safe storage of mulch. David Scott Ipsen was one of the firefighters who responded to the mulch fire. While working by the fire engine, and away from the fire, a thick cloud of smoke and embers engulfed him, leaving him unable to breathe. Ipsen sustained severe and permanent injuries—injuries that prevented him from returning to his job as a firefighter.
>
> ***
>
> The district court agreed with Diamond Tree and dismissed Ipsen's claim for three main reasons. First, it held that under Fordham [Fordham v. Oldroyd, 2007 UT 74,¶13,171 P.3d 411], Diamond Tree owed Ipsen no duty of care, even if Diamond Tree's underlying conduct was egregious carelessness or violated ordinances. Second, the district court found that all the injuries that Ipsen alleged were inherent in firefighting. Third, the district court held that although Fordham does not immunize intentional behavior from liability, Ipsen had not established a genuine dispute of fact about an intentional behavior on Diamond Tree's part.
>
> ***
>
> Today, we hold that the professional rescuer rule extends no further than Fordham's definite and careful formulation and that a person does owe a duty of care to a professional rescuer for injury that was sustained by the gross negligence or intentional tort that caused the rescuer's presence. Accordingly, we partially reverse and remand this case to the district court to allow it to adjudicate Ipsen's gross negligence claims."

Legal Lessons Learned: A significant decision on behalf of all Utah emergency responders.

File: Chap. 2, LODD / Safety

CA: LODD – AIR TANKER MISTAKENLY DROPPED RETARDENT 100 FEET ABOVE FF – DOUGLAS FIR TREE KILLED FF – WIFE CANNOT SUE STATE OR TANKER CO – GOV'T IMMUNITY

On May 19, 2020, in Heather Burchett v. State of California Department of Forestry And Fire Protection, et al., U.S. District Court Judge Morrison C. England, Jr., Eastern District of California, granted motion to dismiss by CalFire and by Global Super Tanker Service, LLC.

> "At approximately 5:25 p.m., a Very Large Airtanker ("VLAT"), a 747 airplane believed to be owned by GSTS, dropped retardant in the safe zone. The VLAT and its pilot had purportedly not performed drops in the area, were not familiar with the heavy vegetation and elevation changes in the flight path, and thus initiated the drop directly over Decedent and other ground forces. The drop occurred less than 100 feet above the tops of the trees, which is a much lower elevation than required for such retardant drops. As a result, 'misting' of

the retardant did not occur and it instead struck the area where Decedent and others were located with extreme force. Tragically, the retardant struck an 87-foot tall Douglas fir tree with a 15-inch diameter at breast height and uprooted the tree, which fell directly onto Decedent, killing him.

***

The California Government Code provides, however, that:

> Neither a public entity, nor a public employee acting in the scope of his employment, is liable for any injury resulting from the condition of fire protection or firefighting equipment or facilities or, except as provided in Article 1 (commencing with Section 17000) of Chapter 1 of Division 9 of the Vehicle Code, for any injury caused in fighting fires.

Cal. Gov. Code § 850.4. Accordingly, by the plain language of the statute and pursuant to the interpretive case law, the State Defendants are all immune given that Decedent's fatal injury was sustained in the throes of battling a wildfire. See State v. Superior Court (Nagel), 87 Cal. App. 4th 1409 (2001) (defendants entitled to § 850.4 immunity as against claims brought by pilot injured during the course of an attempted retardant drop).

***

According to GSTS, Plaintiffs' claim against it must be dismissed because it is immune to suit under: (1) California Government Code § 850.4; (2) California Health and Safety Code § 1799.107; and (3) California Public Utility Code § 774. GSTS's argument as to § 1799.107 is well taken, and the Court need not address the application of the remaining statutes.

California Health and Safety Code § 1799.107 provides:

> (a) The Legislature finds and declares that a threat to the public health and safety exists whenever there is a need for emergency services and that public entities and emergency rescue personnel should be encouraged to provide emergency services. To that end, a qualified immunity from liability shall be provided for public entities and emergency rescue personnel providing emergency services.
>
> (b) Except as provided in Article 1 (commencing with Section 17000) of Chapter 1 of Division 9 of the Vehicle Code, 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.

Here, GSTS has shown it was acting as a private fire department during the course of the events underlying Plaintiffs' claims and that its employees are thus entitled to qualified immunity where, as here, there are no allegations of bad faith or gross negligence. See Walsh v. American Medical Response, Case No. 2:13-cv-02077-MCE-KJN, 2014 WL 2109946 (E.D. Cal. May 20, 2014) (discussing vicarious liability of a private entity when analyzing the similar immunities set forth in California Health and Safety Code § 1799.106). Accordingly, GSTS has shown that the statutory immunity applies, and its Motion is GRANTED with leave to amend."

Legal Lessons Learned: What a tragic loss of life. Government and qualified immunity are important legal protections for both government employees, and private companies rendering emergency services under contract with government.

Note: See Sept. 11, 2019 article: "Family of fallen Draper firefighter suing California for wrongful death."

File: Chap. 2, LODD / Safety

OK: FF LODD – FF SUCKED INTO DRAIN PIPE / NO SAFETY GATE – WORKERS COMP IS WIDOW'S SOLE REMEDY – AMAZING THAT SECOND FF IN PIPE BUT SURVIVED

On May 5, 2020, in Shelli Farley v. City of Claremore, 2020 OK 30, the Oklahoma Supreme Court held (8 to 1) that the surviving spouse's lawsuit for negligence and intentional tort was properly dismissed by the trial court. "The wrongful death injury was adjudicated and compensated by a successful workers' compensation claim after the death
of the decedent. This successful adjudication demonstrates the decedent's injury was exclusively before the Commission and not cognizable as a District Court claim at the time of decedent's death."

> "[O]n May 23, 2015, Captain Jason Farley, a fireman for the City of Claremore, died while responding to an emergency request for assistance to help people trapped in a flash flood….
> Farley alleged the City failed to perform reasonable maintenance to a drainpipe and drainage safety grate.
>
> ***
> Shelli Farley, as surviving spouse and mother of the deceased's minor child, sought and obtained workers' compensation death benefits for the death of Jason. The amount awarded to Farley was a lump sum ($100,000.00) plus $571.55 per week (backdated and continuing). The amount awarded to the surviving minor child was a lump sum ($25,000.00) to be paid into an interest bearing account with Farley as guardian until the child is 18 years of age, and a weekly benefit of $122.48.
>
> ***
> An employer has a duty to provide a safe workplace for employees. We have explained in the context of the dual-capacity doctrine that when the employer's negligence causing a lack of safety is so inextricably bound to the employer's status and duty as an employer, then the employee's remedy for an injury flowing from employer's negligence is workers' compensation. One reason for this is the general rule that an injury from an employer's negligent failure to provide a safe working environment is addressed by the workers' compensation remedy. Historically, an employee gave up the right to bring a negligence action against his or her employer in exchange for the statutory no-fault worker's compensation remedy. In the present context, the City's argument is that Jason Farley, as an employee, had no survivable negligence or tort claim action which could serve as a basis for a wrongful death action after his death.
>
> ***
> Farley's suit is an assertion she may obtain a full and complete recovery against the City by an action in an Oklahoma District Court for an intentional tort which is not within the remedial jurisdiction of the Workers' Compensation Commission. Farley made a choice to prosecute her claim before the Workers' Compensation Commission as a workers' compensation claim. Again, a basic concept from *Pryse* and its progeny is that a successfully obtained workers' compensation remedy erects a bar or estoppel preventing a District Court tort recovery for the *same injury* against the same employer. Farley's success before the Commission shows Jason Farley possessed a legally cognizable workers' compensation claim as an *exclusive* remedy, and Farley's District Court petition is not saved from dismissal by characterizing her District Court action as alleging negligence or intentional conduct torts which survived Jason Farley's death in a wrongful death action.
>
> ***
> [Sovereign Immunity]
> Farley argues her petition should not be dismissed because it alleges an action pursuant to the Oklahoma Governmental Tort Claim Act (OGTCA, 51 O.S.2011 § 151-171) against the City of Claremore. Farley

> alleged the City failed to perform reasonable maintenance to a drain pipe and drainage safety grate. Farley invoked the City's status as both an employer and the dual-capacity doctrine with the City acting as a governmental entity for her OGTCA claim…. Farley asks us to construe an OGTCA exemption from sovereign immunity (maintenance of drainage structures by the City) as applying to a tort claim against an employer/governmental entity. Generally, a governmental entity is immune unless the Legislature has expressly waived the immunity. We must construe the OGTCA as part of a consistent whole."

Legal Lessons Learned: Tragic loss of life, but workers comp is sole remedy.
Note: See this May 28, 2015 article, "Firefighter's death highlights municipal storm drain dangers." CLAREMORE, Okla. — "The drowning of an Oklahoma firefighter and a Texas teenager in storms that swept through those states highlight the persistent dangers posed by storm drains that help protect neighborhoods during flash flooding but can suck in unsuspecting residents and rescue workers."

File: Chap. 5, Emerg. Vehicle Operations

AL: PARAMEDIC INJURED IN MVA - SETTLED WITH DRIVER $25K, BUT WITHOUT CONSENT OF MEDIC'S INSURANCE CO. – STATE FARM NO LONGER REQ. COVER "UNDERINSURED"

On May 29, 2020, in David R. Turner v. State Farm Mutual Insurance Company, the Supreme Court of Alabama, upheld the trial court's dismissal of the paramedic's lawsuit against his own insurance company [All State].

> "On appeal, Turner does not challenge the validity of the pertinent provision in his insurance policy with State Farm that required Turner to obtain State Farm's consent before entering into a settlement agreement with Norris [driver who collided with ambulance] and Norris's insurance carrier, i.e., the 'consent-to-settle' provision. ***In particular, the policy provided, in pertinent part: 'There is no coverage ... for an insured who, without our written consent, settles with any person or organization who may be liable for the bodily injury and thereby impairs our right to recover our payments.'
>
> ***
>
> Moreover, by releasing Norris and Norris's insurance carrier from liability for Turner's injuries, any subrogation interest State Farm may have otherwise had against either of those parties was extinguished. *** Turner has failed to demonstrate that, under principles of contract law or the public-policy principles articulated by this Court in Lambert and its progeny, the circuit court's judgment should be reversed based on the undisputed facts presented."

Legal Lessons Learned: If injured in MVA, do not settle and release the other driver's insurance company without the consent of your insurance company. Since medic also covered by worker's comp, the state fund has a right to recover from the $25K settlement.

TX: MEMBER OF COMMUNITY. EMER. RESPONSE TEAM [CERT] - ILLEGALLY USING LIGHTS & SIREN – CONVICTION CONFIRMED

On April 14, 2020, in Michael Thomas Paul v. State of Texas, the Court of Appeals, Seventh District of Texas at Amarillo, held (3 to 0) that defendant was properly convicted after a bench trial (not jury trial) of the offense of impersonating a public servant, a third-degree felony.

> "In September of 2017, while on patrol, San Antonio Police Officer Daniel Rickel was sitting in his vehicle at a red light. As the light turned green, Officer Rickel heard an emergency siren and noticed the traffic was not moving. At first, Officer Rickel did not see an emergency vehicle, but he soon noticed vehicular traffic moving to the side of the road. He then saw a white Kia Rio go through the intersection with flashing white lights and a siren. The white lights were mounted in the center of the dash. There were no lights on the top of the vehicle. According to Officer Rickel, 'It didn't appear to be an emergency vehicle whatsoever. That is not the manner in which an emergency vehicle looks and/or operates, with just one light.'
>
> ***
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> As Officer Rickel followed the Kia, it was 'cutting in and out of the lanes of traffic.' He noticed several vehicles yielding to the lights and siren. Once Officer Rickel was close enough to get the license plate, he initiated a traffic stop because the Kia did not appear to be a legitimate emergency vehicle…. Appellant, the driver of the Kia, told the officer that he was responding to an 'emergency call in Comal County.' At that time, appellant did not provide any specific information other than 'he was heading to a medical call.' When Officer Rickel asked appellant for documentation to substantiate his authority to operate the vehicle with his siren activated, appellant handed him a 'stack of paperwork that said that this was his authority.' The paperwork included portions of the transportation code, and a purported order of dismissal from municipal court for the city of San Antonio. Based on this paperwork, Officer Rickels arrested appellant for the offense of impersonating a public servant.
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> ***
>
> Scott Paul, the brother of appellant, is employed by the Bexar County Fire Marshall's Office as an emergency management coordinator. He manages five volunteer programs including the Community Emergency Response Team (C.E.R.T.). He testified that his brother organized a neighborhood association C.E.R.T. but that 'it was not affiliated with any jurisdictional department or organization within Comal County.' An unaffiliated C.E.R.T., such as the one that appellant established, is not authorized to operate outside the immediate surrounding neighborhood community. He further testified that it was "not normal" for C.E.R.T. members of such neighborhood-association organizations to have emergency lights and sirens on their vehicles, and that the practice is 'discouraged' because they are not first responders. He also explained that C.E.R.T. members are not dispatched to emergency calls unless activated by an emergency-operations-authority request for assistance.
>
> ***
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> Appellant's repeated claims during the traffic stop that he was headed to a medical call and his attempt to substantiate his authority as an emergency first responder, coupled with the emergency response decal and emergency accessories on his vehicle, are sufficient to show his impersonation of a public servant. Appellant's sole issue is overruled."

Legal Lessons Learned: Members of CERT Teams should be reminded they are not emergency responders, and use of emergency lights & sirens can lead to conviction.

Note: Defendant was very fortunate to receive a suspended sentence and placed on probation for three years.

File: Chap. 6, Employment Litigation

MD: FF WITH HERNIA – DENIED WORKERS COMP – IN MARYLAND JUST "SPRAIN" – NOT OCCPATIONAL DISEASE UNLESS CAUSED BY "ACCIDENTAL PERSONAL INJURY"

On May 28, 2020, in Justin Greer v. Montgomery County, Maryland, the Court of Special Appeals of Maryland held (3 to 0) that the Workers Compensation Commission, and the trial court properly denied the firefighter's workers comp claim for inguinal (groin area) hernia.

> "Mr. Greer filed a claim with the Commission on February 24, 2017 alleging that he had suffered an inguinal hernia caused by repetitive lifting during his ten years of employment as a Montgomery County firefighter…. Mr. Greer had been diagnosed with a small hernia at a medical examination on July 27, 2015. Mr. Greer had surgery to repair the hernia on December 19, 2016.
>
> ***
>
> The parties stipulated that Mr. Greer's hernia was pre-existing in that it was diagnosed as a small hernia in July 2015 and it did not require an immediate operation as required for hernia to be compensable pursuant to LE § 9-504(1)(ii).
>
> ***
>
> [The Workers Compensation Commission ruled that hernia are only considered "strains" under Maryland law – so cost of surgery not covered.]
>
> > '[P]ursuant to Maryland Law, a hernia can only be compensable as an accidental injury or strain pursuant to 9-504. Hernia as an occupational disease is not recognized under the current statute and the Commission will disallow the claim filed herein.'
>
> ***
>
> The Commission correctly recognized that it only had the authority to award benefits for hernias that satisfied the requirements of LE § 9-504. Mr. Greer did not present a claim for a hernia that was compensable under LE § 9-504, nor does the Act permit compensation for a hernia as an occupational disease. Accordingly, we affirm.

Legal Lessons Learned: Courts when reviewing administrative agency decisions will generally give deference to the agency's interpretation of a statute enforced by that agency.

File: Chap. 6, Employment Litigation

OR: WORKERS COMP DENIED – FF WITH NON-HODGKIN'S LYMPHOMA – MEDICAL EXPERT DID NOT ESTABLISH THAT SMOKE EXPOSURE WAS MAJOR CONTRIBUTING CAUSE

On May 21, 2020, In The Matter Of The Compensation Of Alvin D. Rohrscheib, Claimant**, 72** Van Natta 421, WCB Case No. 18-02473, the Oregon Workers' Compensation Division, Reviewing Panel upheld (2 to 0) the Administrative Law Judge order that upheld the self-insured employer's denials of his occupational disease claim for non-Hodgkin's lymphoma.

> "In July 2018, Dr. Segal signed a concurrence summary letter from claimant's counsel, which provided claimant's firefighting history of smoke exposure, as well as a history of smoking cigarettes. (Ex. 154-1, -2). Dr. Segal agreed that claimant's work as a firefighter 'may' have contributed to his non-Hodgkin's lymphoma,

but that the condition can have a wide variety of causes. (Ex. 154-2). Under such circumstances, he considered it difficult to say 'for sure' the cause of claimant's condition. (*Id*.) Based on medical evidence (which included a description of the Oregon firefighter's presumption and a journal article) 'suggesting a correlation' between the condition and firefighting, Dr. Segal concluded that it was medically probable that claimant's work was a 'possible cause' of his condition. (Ex. 154-3).

***

Further, although acknowledging that he was unable to determine the cause of the condition for a particular individual, Dr. Segal concluded that inhaling smoke as a firefighter was the major contributing cause of claimant's cancer. (157-19, -24). In doing so, he relied on general statistical meta-analysis studies, which he described could 'potentially guide research to try and dissect the cause of the relationship,' and give insight into what 'may' have contributed. (Ex. 157-20, page 424 -22); *see Kyle G. Anderson*, 61 Van Natta 2117, 2117-18 (2009) (the words 'can be' and 'may b'" indicate only possibility, not medical probability). Without further explanation, we are unable to reconcile these apparent inconsistencies. *See Moe v. Ceiling Sys*., *Inc*. 44 Or App 429, 423 (1980) (rejecting unexplained opinion); *Howard L. Allen*, 60 Van Natta 1423, 1424-25 (2008) (internally inconsistent medical opinion, without explanation for the inconsistencies, was unpersuasive). Thus, for these additional reasons, Dr. Segal's opinion does not persuasively establish that claimant's work exposure was the major contributing cause of his non-Hodgkin's lymphoma condition."

Legal Lessons Learned: Many states have now enacted statutory presumption laws, including Oregon. See the article by First Responder Center for Excellence, "Occupational Cancer Legislation".

Note: See article, Jan. 4, 2010, **"**Oregon's Expanded Cancer Presumption Law Takes Effect, signed by Gov. Ted Kulongoski last March, the law added 12 types of cancer to existing firefighter presumptions for employment-caused occupational diseases under workers' comp." [including non-Hodgkin's lymphoma]

File: Chap. 6, Employment Litigation

LA: HEARING LOSS – WORKERS COMP DENIED – UNDER LOUISIANA LAW ONLY IF LOSS FROM A SINGLE TRAUMATIC ACCIDENT

On May 20, 2020, in James L. Hartman, Jr. v. St. Bernard Parish Fire Department, et al., the Court of Appeals, Fourth Circuit, State of Louisiana, affirmed the Office of Workers' Compensation judge, deny benefits to District Chief Hartman.

"Mr. Hartman has worked as a fireman with the St. Bernard Parish Fire Department ('Fire Department') since May 5, 1990. His work exposed him to high noise levels, which caused him to undergo audiograms on January 24, 2008, April 10, 2014, March 1, 2017, and September 27, 2017. The audiograms showed increasing levels of hearing loss. The March 1, 2017 and September 27, 2017 audiograms revealed a 42.2% binaural hearing loss. Although Mr. Hartman continued to work, on March 31, 2017, he filed a formal claim under La. R.S. 23:1221(4)(p)to obtain permanent partial disability benefits for his hearing loss. The Fire Department disputed Mr. Hartman's claim for permanent partial disability benefits, arguing, in part, that the language of R.S. 23:1221(4)(p) did not permit recovery for Mr. Hartman's cumulative hearing loss.

***

Here, Mr. Hartman did not meet the eligibility requirements to receive temporary total, permanent total, or SEB indemnity payments because, as stipulated, he continued to work and did not suffer a wage loss. Accordingly, he sought permanent partial disability benefits under R.S. 23:1221(4)(p). As referenced, infra,

that statute expressly authorizes benefits to an employee who 'suffers a permanent hearing loss solely due to a single traumatic incident.'

***

The medical report of Dr. Daniel Bode, Mr. Hartman's audiologist, concluded that, 'Mr. Hartman's repeated exposure to loud noises for extended periods of time (1990-2017) is likely a contributing factor in his bilateral sensorineural hearing loss.' Thus, the medical evidence established that Mr. Hartman's permanent hearing loss did not result solely from a single traumatic accident. Mr. Hartman failed tomeet his burden of proof to satisfy the statutory conditions required for recovery. Based on our de novo review, we find no error in the judgment denying Mr. Hartman permanent partial disability benefits pursuant to R.S. 23:1221(4)(p)for his hearing loss."

Legal Lessons Learned: Where hearing protection when on apparatus using siren, or near equipment with load noises.

File: Chap. 6, Employment Litigation

PA: KIDNEY CANCER – FF RETIRED 2006, KIDNEY CANCER / SURGERY IN 2015 – PA 2011 STATUTORY PRESUMPTION LAW ALLOWS COVERAGE BACK TO 600 WEEKS

On May 6, 2020, in City of Johnstown v. Workers' Compensation Appeals Board (Michael Sevanick), the Commonwealth Court of Pennsylvania held (3 to 0) in unreported decision that "Claimant timely filed his Petition, and it was supported by the substantial, competent evidence of record. The WCJ and the Board correctly applied the standards set out in the Act and in the pertinent case law."

"Claimant testified [before Workers Comp Admin. Law Judge] that he joined Employer's fire department on June 1, 1977, at which time he underwent a physical examination. He was not treated for any form of cancer during his 20-plus-year firefighting career with Employer. He was a firefighter until 1997 and held the rank of captain from 1997 until 2005. He then served as acting assistant chief, and then assistant chief, until his retirement. He worked in five different fire stations throughout his career and was located at headquarters for approximately two years immediately prior to his retirement on September 10, 2006.

***

Claimant was diagnosed with kidney cancer in 2015 and underwent surgery for it. He received no radiation, chemotherapy, or medication. However, he received a CT scan six months after surgery and was told to get annual, follow-up CT scans for the next five years…. He was never informed by a physician that there was a relationship between his fire service and his cancer until he reviewed a January7, 2016 report from Tee L. Guidotti, M.D., who is board certified in internal, pulmonary, and occupational medicine.

***

Act 46 [PA 2011 statutory presumption statute] defined a distinct limitations period in Section 301(f), mandating that an occupational disease claim under Section 108(r) be filed within 600 weeks of the last date of workplace exposure to a Group 1 carcinogen.

***

Employer further asserts that the 600-week filing limitation at issue in the present matter is measured from the last date of exposure to the hazard alleged to have caused the disease, not from the last date of

employment. However, in Fargo, we stated that '[t]he "triggering event" for the purposes of Section 301(f) of the Act is not the date of injury or disability, as in Section 315, but rather the claimant's last day at work with exposure to a known Group 1 carcinogen.' Fargo, 148 A.3d 514at521. In the present matter, Claimant's last workplace exposure would have occurred in approximately August 2006, well within the 600weeks prior to the filing of his Petition.

[AVERAGE WEEKLY WAGE – Footnote 10]

> Employer argues that the W-2 records show Claimant [when working as driver for local Honda dealership] earned $3,816.22 in 2015, down from $4,353.66 in 2014, and that Claimant's AWW, based on the higher earnings in 2014, would be approximately $83.00 per week, resulting in a compensation rate of $75.00 per week for disability benefits. However, the WCJ awarded disability benefits based on Claimant's AWW beginning on September 10, 2006, looking back 52 weeks. The resulting AWW was $821.85 with a compensation rate of $547.90. Thus, Employer maintains that Claimant was awarded $4,383.20 for the eight-week disability period, when his actual wage loss was only approximately $650.00.

Employer's argument strains credulity, as it disregards *Fisk* [Fisk v. Workmen's Comp. Appeal Bd. (Gen. Elec.), 633 A.2d 1305 (Pa. Cmwlth. 1993)] and attempts to create a distinction in the current context where none exists…. *Fisk* leaves no uncertainty that the rate of compensation in an occupational disease case is fixed in the year during which the claimant is last exposed and that the AWW is subject to the maximum rate in effect at the date of the claimant's last exposure. In the present matter, that was 2006. Thus, the WCJ committed no error when he calculated Claimant's AWW based on his wages as a firefighter for Employer in 2006, and the Board did not err when it affirmed the same."

Legal Lessons Learned: Fortunately, PA has enacted a statutory presumption statute that includes firefighters who retired within 600 weeks prior to enactment of the statute.

File: Chap. 7, Sexual Harassment

TX: HOUSTON FD – U.S. DEPT. JUSTICE LAWSUIT – MALES URINATING WALLS, FLOORS, SINKS WOMENS' BATHROOM – COLD WATER SHOWERS DISCONNECTED / SPEAKERS

On May 15, 2020, in United States of America, Jane Draycott and Paula Keyes v. The City of Houston, Texas, Senior U.S. District Judge Sim Lake, Southern District of Texas (Houston Division) issued a lengthy opinion denying the City's motion to dismiss case. U.S. Department of Justice Press Release of Feb. 28, 2018 is eye opening. "The lawsuit, filed in the Southern District of Texas, alleges that Jane Draycott and Paula Keyes were subjected to a hostile work environment based on sex when they were employed as firefighters at HFD's Station 54. According to the complaint, HFD's hostile work environment included males urinating on the walls, floors and sinks of the women's bathroom and dormitory, disconnecting the cold water to scald the women while they were showering, and deactivating the female dormitory's announcement speakers so the women could not respond to emergency calls. The complaint further alleges that the conduct culminated in death threats and vulgar slurs written on the walls of their work and living spaces at Station 54 and on their personal possessions. This conduct continued despite at least nine complaints made to management, according to the allegations." [Jane Draycott later resigned from FD; Paula Keyes is now a Captain.]

> "Plaintiffs allege that Draycott was subjected to a hostile environment based on sex, and that when she opposed the City's discriminatory treatment she suffered retaliation and constructive discharge for having complained of discrimination. Plaintiffs seek recovery of back pay and future lost wages and benefits

incurred by Draycott as a result of the alleged discrimination, damages for mental anguish and emotional distress caused by the COH's [City of Houston] wrongful acts, and injunctive relief.

***

Although the COH cites testimony that the men's bathroom had urine on the toilets, walls, and floors, Draycott and Keyes testified that the women's bathroom regularly had urine not only on the toilets, walls, and floors but also in the sink where women washed their faces and brushed their teeth. The COH cites evidence that male firefighters regularly found spit cups left at various places throughout Station 54, but Draycott testified that in addition to finding spit cups in the women's dormitory and bathroom, she also found tobacco spit directly into her desk drawers. Draycott also testified that after she began to complain about the conditions in the women's dormitory and bathroom, she found fireworks attached to the doors of the stalls in the women's bathroom and one exploded when she opened the door, the cold water to the women's shower was turned off causing her to be scalded, the volume on the announcement speakers in the women's dormitory and bathroom was turned down causing Keyes to miss a call, and on July 7, 2009, the women's dormitory was vandalized and the words "die bitch" were scrawled above her desk and on the door to her locker.

***

In October of 2017, HFD staff psychologists, Dr. Jana Tran and Dr. Sam Buser, produced a memo ('Tran-Buser Memo') that they provided to HFD command staff stating the findings from a survey of female firefighters that they undertook in an effort to determine how the HFD compared to fire departments across the country with respect to gender discrimination and harassment in a range of categories including, shunning and isolation, verbal harassment, pornography, hazing, and hostile notes. In pertinent part the Tran-Buser Memo stated:

> We surveyed our women based on the April 2008 National Report Card on Women in Firefighting, which documented gender discrimination and harassment problems in departments across the nation. How did HFD compare? . . . Our HFD female firefighters were given the opportunity to elaborate. In reviewing their responses, it was clear that they are often faced with harassment, bullying, and discrimination. Specifically, they gave personal accounts of sexual advances, walking in on men watching porn, and finding pornographic material at the station. They described incidents of being bullied by their crew, being told they are not good enough, and not having the same opportunities as men to prove themselves."

Legal Lessons Learned: Case is now scheduled for trial; serious allegations.

Note: See DoJ Press Release of Feb. 28, 2018, "Justice Department Files Lawsuit Against City of Houston for Sex Discrimination and Retaliation."

File: Chap. 11, FLSA

WI: PARAMEDIC SUED VILLAGE – CLAIMED NOT PAID OVERTIME AFTER 40 HRS - PROPOSED $55K SETTLEMENT, COURT REQUIRES MORE INFO TO CONFIRM FAIR AMOUNT

On May 13, 2020, in Joshua Wendorf v. Village of Plover, U.S. District Court William M. Conley, Western District of Wisconsin, declined to approve the settlement, and gave parties 14 days to submit further information regarding "whether (a) plaintiff's compensation under the agreement is reasonably consistent with the minimum hourly wage

calculation contemplated by the FLSA; and (b) counsel's fee recovery is consistent with plaintiff's written agreement or otherwise supported on this record."

> "In this case, plaintiff Joshua Wendorf brought suit against his former employer, the Village of Plover ('the Village'), alleging that it had failed to properly compensate him for overtime worked in violation of the Fair Labor Standards Act ('FLSA'), 29 U.S.C. § 203, *et seq*.
>
> ***
>
> Here, Wendorf alleges that the Village improperly compensated him -- a paramedic -- in the same fashion in which it compensated its firefighter personnel and, in doing so, failed to compensate him for all hours worked in excess of forty in a workweek in violation of the FLSA…. The Village, for its part, maintains that it 'compensated Wendorf properly and lawfully pursuant to the FLSA and disputes that it misclassified his position for overtime compensation purposes.'
>
> ***
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> On March 12, 2020, one day before the dispositive motion deadline, the parties notified the court that they had reached a settlement agreement. Although the settlement only concerns the claim brought by Wendorf personally, and does not involve any FLSA collective action or Rule 23 class claims, because the settlement agreement would release all of Wendorf's claims with prejudice, including his FLSA claims, the parties seek court approval. (Dkt. #11.)
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> ***
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> As set forth in the agreement, the Village has agreed to pay a total of $55,575.02. Of that amount, $ 18,031.62 is payable directly to Wendorf for his alleged overtime wages owed ($9,015.81) and liquidated damages ($9,015.81). The remaining $37,543.40 is to be paid to plaintiff's counsel as reimbursement for attorneys' fees and costs. In exchange, Wendorf has agreed to release all claims against the Village. Ordinarily, this court would readily approve as reasonable a settlement agreement between adverse parties represented by counsel, but the information provided to date is insufficient for the court to adequately review the settlement agreement under the FLSA.
>
> ***
>
> Because the parties have only indicated that Wendorf sometimes worked more than 40 hours per week, the court is unable to determine whether the agreement proposed is reasonable and does not establish a 'sub-minimum wage.' *See Butz v. Automation Solutions of Am., Inc.*, 16-cv-696-jdp, at *3 (W.D. Wis., Sept. 5, 2017) (denying without prejudice motion to approve individual FLSA settlement where the parties 'only indicate that [plaintiff] received a salary (we don't know what it was) and sometimes worked more than 40 hours a week').
>
> Moreover, the court observes that the attorneys' fees and costs represent over 65% of the total settlement amount, which is significantly greater than the standard one-third contingency fee."

Legal Lessons Learned: If the paramedic was not "cross-trained" as a firefighter, or had no firefighting duties, he would normally be entitled to overtime pay after 40 hours in a work week.

Note: Section 7(k) of the FLSA provides a partial overtime pay exemption for fire protection and law enforcement personnel (including security personnel in correctional institutions) who are employed by public agencies on a work period basis.

LA: FF REINSTATED – FIRED FOR POSITIVE MARIJUANA –HIS DOCTOR HAD APPROVED USE OF OVER-THE-COUNTER CANNABIODAL (CBD) FOR PAIN

On May 20, 2020, in Gregory Matusoff v. New Orleans Department of Fire, the Court of Appeal, Fourth Circuit, State of Louisiana, held (3 to 0) that City's Civil Service Commission abused its discretion in deny the firefighter's appeal.

> "Gregory Matusoff was a permanent, classified employee of the NOFD with twelve and one-half (12 ½) years of experience. Mr. Matusoff had suffered a number of serious injuries during his employment as a firefighter with the NOFD. In fact, as a result of his injuries, Mr. Matusoff missed a year of work from August 2016 to August 2017. Mr. Matusoff's pain management treatment consisted of approximately a dozen prescribed medications. His pharmacist recommended and his doctor approved the use of an over-the-counter cannabiodiol (CBD) to assist in pain management. Mr. Matusoff used Ananda Professional CBD gel caps, which he legally purchased from a pharmacy in Mississippi where he resides.
>
> ***
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> On November 10, 2018, Mr. Matusoff, along with fellow firefighters, responded to a fire at a local restaurant. While on the roof, Mr. Matusoff tripped on an undetected pipe and fell on his hip, injuring his hip, back, and shoulder. The fall resulted in a serious injury, which led to multiple surgeries and exacerbated the prior injuries that Mr. Matusoff had sustained in his work as a firefighter. Consistent with NOFD and Civil Service rules, because an injury was sustained in the course of his duties, Mr. Matusoff submitted to a substance abuse test. His urine sample tested positive for marijuana metabolite.
>
> ***
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> By a mailed letter, dated November 16, 2018, Civil Service Director Lisa Hudson notified Mr. Matusoff of his positive test and that he had five days to appeal the result or provide an explanation to the Medical Review Officer ("MRO"). Mr.Matusoff received the letter on November 21, 2018, the last day of the five-day period. The MRO verified the positive result, without considering Mr. Matusoff's explanation, medical history, and biomedical information on November 19, 2018, two days prior to the expiration of the five-day period.
>
> ***
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> Mr. Matusoff received a pre-termination letter dated November 28, 2018. On December 3, 2018, a pre-termination hearing took place. Mr. Matusoff submitted over one hundred pages of documents, including letters from his pharmacist and doctor, supporting his explanation that he was taking CBD, which was recommended by his pharmacist and approved by his doctor, as part of his pain management regimen. On December 4, 2018, the Deputy Chief of Safety called Mr. Matusoff and asked whether he had submitted the information provided at the pre-termination hearing to the MRO. Mr. Matusoff stated that he had not provided this information to the MRO. Only after Mr. Matusoff's termination did the NOFD provide this information to the MRO.
>
> ***
>
> In the instant case, the NOFD and the Commission apparently accept Mr. Matusoff's explanation that the CBD product was the cause of his positive test for a prohibited substance. There are a number of problems with the NOFD's case against Mr. Matusoff. Chief amongst them is that the sole reason given for his termination in the termination letter and the reason the Commission's denied his appeal are not the same. The NOFD charged Mr. Matusoff with violation of X.B.5 of PM 89, which is the consumption of a prohibited

substance while on duty. The NOFD failed to meet its burden of proving that Mr. Matusoff had either used an illegal/prohibited substance or consumed it while on duty.

***

We also note that civil service employment has been recognized by the United States Supreme Court as a property right and therefore protected by the Due Process Clause of the Fourteenth Amendment to the United States Constitution. See Evangelist v. Dep't of Police, 2008-1375, p. 5(La.App. 4 Cir. 9/16/09),32 So.3d 815, 838. "No person who has gained permanent status in the classified . . . city service shall be subjected to disciplinary action except for cause expressed in writing." La. Const., art. X, § 8(A)."The tenured public employee is entitled tooral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story." Cleveland Bd. of Ed. v. Loudermill, 470 U.S. 532, 546, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985).

***

It is also clear that Mr. Matusoff's due process rights were violated by the NOFD and the Commission. The NOFD sent a termination letter to Mr. Matusoff, advising him that he had five days to respond with an explanation, but he did not receive this letter until the fifth day of the five-day time frame. The MRO also confirmed his positive test before the five-day period had run (the MRO was supposed to take into account any explanations or extenuating circumstances the subject could identify). The Commission also denied Mr. Matusoff's appeal on grounds other than those stated in his termination letter. These events illustrate that Mr. Matusoff was not given an opportunity to be heard in a meaningful way either before his termination or at his hearing before the Commission.

***

For the above and foregoing reasons, the Commission abused its discretion in denying Mr. Matusoff's appeal. We reverse the Commission's judgment, grant Mr. Matusoff's appeal, vacate the discipline imposed by the NOFD and restore Mr. Matusoff to his status as an active firefighter."

Legal Lessons Learned: This termination makes one wonder what the FD and the Civil Service Commission were thinking. Suggestion to FF using CBD; ask your physician for a "prescription" or other written authorization, that you can then share with your FD.

File: Chap. 13, EMS

U.S. SUPREME COURT – CARONA VIRUS – UPHOLDS CALIF. RESTRICTIONS ON RELIGIOUS GATHERINGS

On May 29, 2020, in South Bay United Pentecostal Church, et a. v. Gavin Newsom, Governor of California, the Court (5 to 4) denied the church's request for an injunction, in a rare late-night ruling, and upheld the California restriction of attendance at places of worship to 25% of building capacity, or a maximum of 100 attendees. The San Diego area church had lost before a U.S. District Court judge, and also the 9th Circuit.

Chief Justice John Roberts wrote:

"Although California's guidelines place restrictions on places of worship, those restrictions appear consistent with the Free Exercise Clause of the First Amendment. Similar or more severe restrictions apply to comparable secular gatherings, including lectures, concerts, movie showings, spectator sports, and theatrical performances, where large groups of people gather in close proximity for extended periods of time. And the Order exempts or treats more leniently only dissimilar activities, such as operating grocery stores, banks, and

laundromats, in which people neither congregate in large groups nor remain in close proximity for extended periods.

***

The precise question of when restrictions on particular social activities should be lifted during the pandemic is a dynamic and fact-intensive matter subject to reasonable disagreement. Our Constitution principally entrusts '[t]he safety and the health of the people' to the politically accountable officials of the States 'to guard and protect.' Jacobson v. Massachusetts, 197 U. S. 11, 38 (1905). When those officials 'undertake[] to act in areas fraught with medical and scientific uncertainties,' their latitude 'must be especially broad.' Marshall v. United States, 414 U. S. 417, 427 (1974). Where those broad limits are not exceeded, they should not be subject to second-guessing by an 'unelected federal judiciary,' which lacks the background, competence, and expertise to assess public health and is not ac-countable to the people. See Garciav. San Antonio Metropolitan Transit Authority, 469 U. S. 528, 545 (1985)."

Dissenting Opinion by Justice Brent Kavanaugh:

"I would grant the Church's requested temporary injunction because California's latest safety guidelines discriminate against places of worship and in favor of comparable secular businesses. Such discrimination violates the First Amendment.

***

The basic constitutional problem is that comparable secular businesses are not subject to a 25% occupancy cap, including factories, offices, supermarkets, restaurants, retail stores, pharmacies, shopping malls, pet grooming shops, bookstores, florists, hair salons, and cannabis dispensaries.

Legal Lessons Learned: There has been litigation throughout the nation challenging corona virus restrictions; this is the first case to reach the U.S. Supreme Court.

Note: On May 6, 2020, the U.S. Supreme Court declined to hear an appeal by PA businesses seeking an injunction. The Court will not hear an appeal unless at least 4 Justices agree to hear case. See article: "U.S. Supreme Court rejects request to end Pennsylvania's coronavirus lockdown."

File: Chap. 13, EMS

NJ: MAINTENANCE ISSUES OF EMS VEHICLES – STATE SUSPENDS LICENSE – INSTEAD OF ADMIN. APPEAL, WENT TO COURT – COURT OF APPEALS UPHOLDS SUSPENSION

On May 27, 2020, in Americare Emergency Medical Service, Inc. v. City of Orange Township; State of New Jersey Department of Health, Office of EMS, et al., the Superior Court of New Jersey Appellate Division, held (3 to 0) in unpublished decision that the State's suspension is reinstated; they must exhaust administrative appeal to Commissioner of Dept. of Health.

"On May 30, 2019, OEMS received a complaint that doors on an AmeriCare vehicle were falling off their hinges, oxygen cylinders were empty due to system leaks, and wheels were falling off an AmeriCare ambulance while n use. The complainant informed OEMS that those same vehicles were responsible for providing emergency medical services for the City of Irvington and Village of South Orange. At the time of the initial complaint, one of AmeriCare's BLS/SCTU vehicles, Vehicle 5261, was deemed out of service by

the Department for having an inoperable front emergency grill light, missing protective jackets, and a missing fire extinguisher inspection tag.
In response, on May 31, 2019, OEMS conducted an unannounced inspection on two of AmeriCare's BLS/SCTU vehicles, Vehicles 5256 and 5258. The inspectors found serious safety concerns and the vehicles were deemed out of service. Vehicle 5256 had expired vehicle credentials, a loose rear step, an unsecure oxygen retention system, a balding front tire, an improperly attached side door, a hole in the passenger seat making it pervious to blood borne pathogens, and a map light with exposed wires. OEMS also found similar violations with Vehicle 5258 including a balding front tire, unsecured portable oxygen, a missing front license plate, a hole in the arm rest of the front passenger seat making it pervious to bloodborne pathogens, a dashboard radio which falls out while driving, and an unsanitary portable suction unit.

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[O]n June 18, 2019, the Department summarily suspended AmeriCare's license to operate emergency medical transportation services. The suspension letter contained a detailed history of the inspection of AmeriCare's vehicles, as well as a description of the other violations OEMS found during the investigation.

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On July 1, 2019, the Law Division judge heard oral argument on the order to show cause and motion for injunctive relief. The court found it had jurisdiction to issue the relief sought and ordered that the summary suspension be lifted to permit AmeriCare to operate the vehicles that were re-inspected and re-authorized by OEMS, provided they remained in compliance with the applicable legal standards.
[TRIAL COURT REVERSED]

[W]hile the exhaustion requirement [appeal to Commission of the Department] is not a prerequisite to bringing a CRA [N.J. Civil Rights Act] claim in the Law Division, we have also refused to allow plaintiffs to avoid the exhaustion of administrative remedies when their claims amount to nothing more than a collateral attack of a State administrative determination…. Here, AmeriCare was entitled to emergency relief by the Commissioner of the Department for review of OEMS's period of suspension and was so advised."

Legal Lessons Learned: Proper maintenance of EMS transport vehicles is extremely important; it is generally best to exhaust administrative appeals before going to Court.

File: Chap. 13, EMS

NY: DIFFICULTY BREATHING CALL - RAPID PD RESPONSE, BUT 20 MINUTES MUTUAL AID AMBULANCE - GOVERNMENTAL IMMUNITY - NO "SPECIAL DUTY" OWED

On May 27, 2020, in Kathlene Marks-Barcia v. Village of Sleepy Hollow Ambulance Corps, et al., the Supreme Court of New York, Appellate Division (Second Judicial Department), held (3 to 0) that the trial judge properly granted summary judgment to the Village since they owed no "special duty" to the 911 caller or her husband.

"In the early morning hours of September 15, 2013, the plaintiff awoke to the sound of her husband, Nicholas A. Barcia, gasping for air. She called the 911 emergency number, and Police Officer Craig Kelly of the defendant Village of Sleepy Hollow Police Department (hereinafter SHPD) answered her call. The plaintiff informed Officer Kelly that her husband was having a medical emergency, to which Officer Kelly responded, "Okay, we'll have it right there." Officer Kelly dispatched two police officers, one of whom was a certified emergency medical technician (hereinafter EMT), to the plaintiff's home. The officers arrived within minutes,

connected the plaintiff's husband to an automated external defibrillator, and began performing CPR. Officer Kelly also radioed the defendant Village of Sleepy Hollow Ambulance Corps (hereinafter SHAC), and requested that an ambulance respond to the plaintiff's home; however, he received a response that no EMT was available.

Officer Kelly then called '60 Control' (or 'mutual aid'), which is an outside agency which would provide ambulances, to request an ambulance. The plaintiff also called the telephone company operator in an effort to get an ambulance rom a nearby hospital, but was transferred to a Tarrytown police officer who advised her that an ambulance would be there shortly. An ambulance arrived at the plaintiff's home 20 minutes after the initial 911 call andapproximately7-8 minutes after the second 911 call. Despite the efforts of the police officers to revive the plaintiff's husband using the automated external defibrillator, he died in his home.

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Here, we agree with the Supreme Court's determination that the defendants were engaged in a governmental function as a provider of emergency medical services pursuant to a municipal emergency response 911 system, such that the defendants could not be held liable to the plaintiff unless they owed her a special duty….

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There is nothing in the record to suggest that Officer Kelly or any of the defendants' agents lulled the plaintiff into a false sense of security, or induced her to forego other avenues to transport her husband to the hospital, and therefore placed the plaintiff in a worse position than she would have been had the defendants never assumed the duty…. On the contrary, the evidence established that while the plaintiff was waiting for the ambulance to arrive, she continued to seek help to get an ambulance to her home by calling the telephone company operator and then speaking to the Tarrytown police officer. Accordingly, we agree with the Supreme Court's determination granting the defendants' motion for summary judgment dismissing the complaint."

Legal Lessons Learned: Governmental immunity is an important protection against liability for EMS.

Note: Some states, such as Florida, have by statute abolished the "Professional Rescuer Rule" [also known as "Fireman's Rule"]. See the State of Florida 2019 statute for EMS liability.

File: Chap. 13, EMS

IL: TRANSP. FEMALE FROM PD TO HOSPITAL - KICKED PARAMEDIC IN NECK – CONVICTED BY JURY AGGRAVATED BATTERY – VIDEO FROM HOSPITAL / PHOTO OF MEDIC'S BRUISED NECK – SENTENCED 2 YEARS IN PRISON

On May 13, 2020, in The People of State of Illinois v. Krystina Stoch, the Appellate Court of Illinois, First District, held (3 to 0) that conviction of aggravated battery was affirmed, and rejected the defense that she didn't intend to hurt the paramedic when she kicked out at him when being moved from stretcher to a wheel chair at the hospital.

"The record shows that Williams and his partner transported defendant, who complained of a wrist injury, from the police station to the hospital. Before defendant was placed in the ambulance, Williams noted defendant was 'angry, agitated, and swearing.' [Chicago Paramedic] Tokarz was unable to examine defendant prior to transporting her to the hospital because she was 'very combative, [and] verbally abusive' toward the paramedics. At the hospital, [Chicago Police Officer] Branch removed the handcuff from one of defendant's

wrists as the paramedics attempted to lift her from the gurney to a wheelchair. Defendant became combative, flailed her arms, and fought with the paramedics. As the paramedics tried to place defendant into the wheelchair, she kicked [Paramedic] Williams in the neck with enough force to stun him 'pretty good.' Williams
sustained bruises to his neck from defendant's kick. Tokarz corroborated Williams's testimony. The State presented video and photographic evidence of the injury and bruising to Williams.
Defendant admitted kicking Williams, but claimed she was responding to pain in her wrists. Given this evidence, a rational trier of fact could find defendant acted knowingly, i.e., was consciously aware her conduct was certain to cause bodily harm to Williams. Stated differently, the evidence presented was not so improbable, unsatisfactory, or inconclusive to justify a reasonable doubt as to defendant's guilt.

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In reaching this conclusion, we are not persuaded by defendant's argument that she did not intend to hurt Williams, but only kicked him in reaction to the pain she felt in her wrists when she was suspended in midair by her arms. Defendant essentially asks us to reweigh the evidence in her favor and substitute our judgment for that of the trier of fact. This we cannot do. It was the responsibility of the trier of fact [jury] to determine the credibility of the witnesses, the weight to be given to their testimony, and to resolve any inconsistencies and conflicts in the evidence."

Legal Lessons Learned: The hospital video, and photo of the paramedic's bruised neck, were shown to the jury.

File: Chap. 13, EMS

NY: PATIENT LEG PAIN, FLUID – EMS ADVISED SEE HER DOCTOR IN MORNING – SIGNED "RMA" REFUSAL MEDICAL ASSISTANCE – DIED 6 DAYS LATER - IMMUNITY

On May 5, 2020, in Anthony L. Pioli, Administrator Estate of Anna Pioli v. New York City Fire Department et al., Judge Rosemarie Montalbano, Supreme Court of the State of New York, County of Kings: Part 22, dismissed the lawsuit since the EMTs did not owe a "Special Duty" to the patient. In addition, "The decedent signed the RMA [Refusal of Medical Assistance] expressly stating that she did not want to be transported to the hospital."

"Upon their arrival plaintiff engaged the EMTs regarding his mother's physical ailments. The EMT's then began assessing and examining the patient. They evaluated her mental competency, tended to the discharging fluid and pain in her leg, and inquired about current medication. It was determined that Anna Pioli was alert, oriented but had leg pains, swelling, chills and nausea. She had no fever and 'vitals were stable'. The EMT's concluded their patient was suffering from 'edema', 'not in a dire condition', and bandaged the leg that was discharging fluid.

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The EMTs further stated that Anna Pioli 'should see her primary care physician' the next morning. They stated to her that it would be better that she to wait until the morning and see her primary care physician because 'there are more emergencies out there, and emergency rooms are overcrowded'. Anna Pioli then signed a Refusal of Medical Assistance and both technicians left. The EMT's remained outside the residence in their ambulance in the case circumstances change and after some time left.

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The next morning plaintiff received a call from his father that Anna Pioli was again not well. 'She was out of it.' Upon arriving at the residence, plaintiff called emergency services and mother-Pioli was then transported to NYU Lutheran Medical Center and admitted, on October 11, 2016, five days later, after suffering two cardiac arrests at the hospital Anna Pioli died.

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Special Duty

In addressing the motion, where a municipality exercises a governmental function, the threshold inquiry focuses on the extent to which the municipality owed a 'special duty' to the injured party (*Applewhite v. Accuhealth*, *Inc*., 21 NY3d 420, 426 [2013]; *Valdez v. City of New York*, 18 NY3d 69, 80 [2011]). Assistance rendered by FDNY EMTs is viewed as 'a classic governmental' function, which requires the existence of a special duty (*Valdez*, 18 NY3d *at* 75; *see also Applewhite*, 21 NY3d at 430; *DiMeo v. Rotterdam Emergency Med. Servs*., *Inc*., 110 AD3d 1423, 1424 [3d Dept 2013]). 'Without a [special] duty running directly to the injured person there can be no liability in damages, however careless the conduct or foreseeable the harm' (*Lauer v. City of New York*, 95 NY2d 95, 100 [2000]).

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Plaintiff argues, through the affidavit of a proposed expert, that the EMTs should have been aware or recognized that the deceased had an infection. Plaintiff claims that the EMTs should have been aware Anna Pioli had an infection is unavailing. The EMT testimony shows they recommended to her that she see her primary care physician the following morning. There is nothing presented that demonstrates the EMTs had knowledge that Anna Pioli's condition would have led to her passing within the next six days."

Legal Lessons Learned: The Special Duty doctrine helps protect EMS and their employers from liability. If patient is complaining of leg pain and using fluid, consider a call to Medical Control at the hospital.

File: Chap. 15 - CISM

NY: FORMER FDNY EMT WITH PTSD – U.S. SOCIAL SECURITY DENIED BECAUSE SHE CAN PERFORM OTHER JOBS – COURT ORDERS SOCIAL SECURITY TO MAKE FUTHER REVIEW

On May 18, 2020, in Eileen Dechberry v. Nancy A. Berryhill, Acting Commissioner of Social Security, Chief U.S. District Court Judge Roslynn R. Mauskopf, Eastern District of New York (Brooklyn) granted the EMT's motion to remand to Social Security for further review.

> [Administrative Law Judge Lisa Hibner, following a 5 step process] found that Dechbery could not return to her past relevant work as either an emergency medical technician, a phlebotomist, or a medical technician. (*Id*. at 30.) At step five, ALJ Hibner found that there existed a significant number of jobs in the national economy that Dechbery could perform. (*Id*. at 30-31.) Accordingly, ALJ Hibner found that Dechbery was not disabled within the meaning of the SSA from March 10, 2012, through the date of the decision. (*Id*. at 32).
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> An ALJ must determine whether a claimant's impairment meets or equals an impairment listed in 'The Listing of Impairments' ('the Listings'). *See* 20 C.F.R. Part 404, Subpt. P, App. 1. The Listings describe specific impairments of each of the major body systems that are considered "severe enough to prevent a person from

doing any gainful activity, regardless of his or her age, education, or work experience." 20 C.F.R. §§ 404.1525(a), 416.925(a).

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ALJ Hibner erred in her Listing 12.15 analysis in three ways. First, ALJ Hibner's 'A' criteria analysis failed to consider that Dechbery 're-experiences' her trauma. It was the finding of both Dechbery's treating psychiatrist and the consultative examiner that Dechbery relives her trauma 'over and over again.' While ALJ Hibner acknowledged that Dr. Hriso found that Dechbery re-lived her trauma, this was not considered with regard to the listing, as is required by 12.15 A(2). Moreover, ALJ Hibner failed to acknowledge that Dr. Lefkowitz specifically made the finding that Dechbery re-lived her trauma over and over again. This was error - proper consideration of this fact may have resulted in a finding that Dechbery meets the 'A' criteria of listing 12.15.

Second, in concluding that Dechbery did not meet the "C" criteria, ALJ Hibner did not consider the fact that Dechbery had seen a psychiatrist for more than five years on a consistent, monthly basis and had been prescribed medication throughout that period without success in fully alleviating her symptoms. Moreover, the record supports that Dechbery was helped by the prescribed medication. For instance, Dechbery needed to resume taking Xanax during her pregnancy, despite initially discontinuing it due to concerns for the child she was carrying. Although the medication brought some improvement, Dechbery was still not capable of functioning fully. It was the finding of Dr. Lefkowitz that Dechbery's prognosis was only "fair" with "intensive treatment" and that her illness would cause significant limitations in her ability to function, despite the fact that she was taking medication. ALJ Hibner did not properly consider these facts.
Third, ALJ Hibner erred in asserting that Dechbery's ability to engage in ADLs, to speak to clinicians, and to care for her child were all inconsistent with a finding that Dechbery met the 'C' criteria. (Tr. at 16-18, 20, 28.) The ability to speak with a trained medical professional in a clinical setting cannot be equated with the ability to sustain ordinary stress of interacting with the public in general. And as courts in this Circuit have previously explained, ALJs may not infer non-disability from one's ability to parent a child. *See*, *e.g.*, *Harris v. Colvin*, 149 F. Supp. 3d 435, 445-45 (W.D.N.Y. 2016) (citing cases).

In sum, ALJ Hibner failed to properly consider whether Dechbery met or equaled Listing 12.15. The Court therefore remands with the direction that the ALJ properly consider whether Dechbery has met the criteria of Listing 12.15."

Legal Lessons Learned: Mental health for emergency responders is thankfully now an item of great attention in the Fire, EMS and Law Enforcement, including Peer Support Teams.

File: Chap. 16, Discipline

TN: TAPE RECORDER SECRETLY PLACED UNDER TABLE FIRE HALL – TO RECORD "GOSSIP" – VIOLATION OF TN LAW – 5 FF AWARDED $10,000 EACH & ATTORNEY FEES

On May 8, 2020, in Ronald Ledford, et al, v. John Ben Sneed and Ray Wilson, Jr., the Court of Appeals of Tennessee at Knoxville, held (3 to 0) that "Defendants' vague assertions that they would be listening were also not enough to garner consent from Plaintiffs to record their conversations via a tape recorder taped under the table."

"Ronald Ledford, Stephanie Ledford, Kyle Motes, Ricky Motes, and Betty Motes (collectively 'Plaintiffs') were members of the Hillsview Fire Department ('HFD'). Mr. Ledford also served as the captain and

training officer at the time in question. In January2016, Plaintiffs filed suit against John Ben Sneed and Ray Wilson, Jr. (collectively 'Defendants'), also members and officers of the HFD, based upon Defendants' taping of their conversations without their knowledge in violation of Tennessee Code Annotated section 39-13-601, et seq. Plaintiffs alleged that Mr. Ledford was fired in violation of the HFD's bylaws based upon information gathered from the recordings.

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At the outset of the trial, the jury was presented with conclusive admitted facts establishing, inter alia, that tape recorders were hidden in the fire hall of the HFD, that Defendants each purchased one recorder, that Plaintiffs were unaware of the recorders, and that certain conversations were recorded. Plaintiffs then confirmed through their testimony that they were unaware that their conversations were being recorded and that they had not provided their consent for the recording.
Mr. Ledford testified that the fire hall was kept locked and that entry was gained via an access code or key. He stated that those who visited knocked to request entry. Testimony was presented establishing that Plaintiffs knew that the HFD's security system was capable of audio and video recording. The minutes from a July 2014 meeting confirmed that all members had been informed that the security system was "up and running" and recorded both audio and video. However, Plaintiffs testified that they were advised that the audio capabilities of the system were never actually activated. Mr. Sneed, the former Fire Chief of the HFD, confirmed that the audio capabilities were never activated.

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Daryl Leamon, also a member of the fire hall, testified that Mr. Sneed and Mr. Wilson advised the members of the HFD to refrain from gossip because someone could be listening. Mr. Sneed likewise confirmed that he advised the members that they would be listening in an attempt to impede the gossip that had been occurring in the fire hall. He stated that he affixed a sticker to the main door advising entrants that video surveillance was in use on the property and that another sticker also advised entrants that the premises was protected and monitored by a security system. He then authorized Mr. Wilson, a Senior Lieutenant, to place one of the recorders purchased under the table in the HFD. He noted that the tape recorder purchased by him was never used and that the recorder was placed without his participation.

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Following the trial, the court granted Plaintiffs' motion for a directed verdict at the close of the case, holding that Defendants violated Section 39-13-601 when they intentionally intercepted private oral communications without consent and used the contents thereof. In so holding, the court found the minutes from the July 2014 meeting unreliable. The court awarded each plaintiff $10,000, in addition to costs and attorney fees.

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Tennessee law provides that it is lawful for a person to intercept an oral communication if (1) the person intercepting the communication is a party to the communication or (2) one of the parties to the communication has given prior consent to the interception. Tenn. Code Ann. § 39-13-601(b)(5). Otherwise, a person commits an offense who '[i]ntentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication[.]' Tenn. Code Ann. § 39-13-601(a)(1)(A). The legislature defines an oral communication as 'any oral communication uttered by a person exhibiting an expectation that the communication is not subject to interception under circumstances justifying that expectation[.]' Tenn. Code Ann. § 40-6-303(14). The legislature defines intercept as 'the aural or other acquisition of the contents of any wire, electronic, or oral communication through the use of any electronic, mechanical, or other device[.]' Tenn. Code Ann. § 40-6-303(11).

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Here, the evidence presented was uncontroverted that neither defendant was a party to the communication. Defendants argued at trial and now on appeal that Plaintiffs consented to the recording of their communications. We, like the trial court, believe that the record overwhelmingly established that Plaintiffs did not consent to the interception of their communications."

Legal Lessons Learned: Secretly placing tape recorders can lead to both civil, and in some states, criminal liability.

File: Chap. 16, Discipline

CA: FF SEXUAL E-MAILS TO 16-YR-OLD GIRL HE MET AT FIRE STATION TOUR – ALSO CONDUCT TOWARDS FEMALE FF – TERMINATION UPHELD, EMBARASSMENT TO FD

On May 7, 2020, in Grant Seibert v. City of San Jose, the Court of Appeal of State of California, Sixth Appellate District, held (3 to 0) in unreported opinion, "Insofar as Seibert sexualized his job, his actions reasonably could be found to be disrespectful to the general public, which is rightly entitled to expect professionalism from its public servants. In addition, insofar as those actions tended to undercut the public's trust of and respect for the Department and its members, the trial court could reasonably find that those actions were detrimental to the public service, which was a cause for discipline specified in charge No.1."

"Grant Seibert, a firefighter and paramedic, was terminated for cause from his position as a fire engineer in the San Jose Fire Department (Department) in the City of San Jose (City)…. This court is considering this matter for the second time. We first considered it in Seibert v. City of San Jose (2016) 247 Cal.App.4th1027 (Seibert I) In Seibert I, this court reversed the first judgment of the trial court [where trial court judge reversed the termination.] and remanded for further proceedings…. This is an appeal from the second judgment [where trial court upheld the termination.]

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The NOD [Notice of Discipline] stated that the disciplinary action was based on the following conduct:

1. "On or about and between November 27, 2008 and December 15, 2008, you exchanged emails with a female San Jose resident, during work hours, which became sexual in nature";
2. On or about and between November 27, 2008 and December 15, 2008, you interacted inappropriately during work hours with the same female noted above, who[m]you either knew or should have reasonably known was a minor";
3. About and between March 9, 2009 and April 6, 2009, you inappropriately touched a female coworker";
4. About and between March 9, 2009 and April 6, 2009, you made inappropriate comments to a female coworker";
5. About and between March 9, 2009 and April 6, 2009, you engaged in inappropriate conduct, including but not limited to[] unwelcome attention[] and/or leering/staring, towards a female co-worker"; and
6. On or about March 18, 2009, June 4, 2009 and July 28, 2009, you were dishonest during an administrative investigation and were not forthcoming with the investigator on several occasions."

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Upon Seibert's request, the [City's Civil Service] Commission held a hearing on the disciplinary action. In its written decision, the Commission found that Seibert had engaged in the conduct stated in charge Nos. 1 to 5and cited the same legal bases for disciplinary action specified in the NOD. The Commission did not sustain the sixth charge of dishonesty. The Commission sustained the disciplinary action of dismissal against Seibert.

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[Appeal to trial court]

While the trial court found that there was 'sufficient evidence to sustain charge [No.]1,'it nevertheless concluded that Seibert's e-mails did not warrant termination. The court indicated that such conduct might 'support some progressive disciplinary action' '[b]ecause of the risk of embarrassment to the City.' However, the court also incongruously concluded that 'even though the December 15 emails were becoming increasingly full of innuendo and sexualization, if they had been sent to an adult, they would not be actionable violations under the then-existing policies of the City of San Jose' and that the conduct had not been shown to violate 'any written City or Fire Department policy.'

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Upon remand, the trial court [different Judge] (Joanne McCracken, J.) reviewed the Commission's decision based on the same administrative record. This time the court found that the weight of the evidence supported the Commission's findings on charge Nos. 1 to 5. Exercising its independent judgment, the trial court sustained the five charges and upheld the decision to terminate Seibert.

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While no rule or policy expressly prohibited conduct that creates a 'risk of embarrassment' to the Department, conduct 'tending to bring reproach or discredit upon the Department or its members' (S.J.F.D.Rules & Regs., §26.1, italics added) was expressly prohibited. The verb 'discredit' is synonymous with 'cast reproach upon' and 'humiliate,' for which the word 'embarrass" is a synonym…. Thus, the Department's prohibition against conduct 'tending to bring reproach or discredit upon the Department or its members' (S.J.F.D.Rules & Regs., rule 26.1) is closely intertwined with the question whether an employee's conduct is liable to bring reproach or discredit upon or embarrass the Department.

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Although the penalty of termination is harsh, this is not an exceptional case in which reasonable minds cannot differ…. Seibert has not demonstrated that his termination was a manifest abuse of discretion."

Legal Lessons Learned: The firefighter's e-mails clearly can bring embarrassment to the Fire Department.

File: Chap. 16, Discipline

KY: FD LIEUTENANT – INVEST. EXPOSED HIMSELF TO MINOR - PONOGRAPHY FOUND ON HIS FD COMPUTER – FIRE CHIEF [HIS FATHER] SIGNED CONSENT TO SEARCH

On May 4, 2020, in United States of America v. Robert Christopher England, U.S. District Court Judge Claria Horn Boom, Eastern District of Kentucky / Southern Division (at London) held that the FD computer was properly searched with the written consent of the Fire Chief, in agreement with recommendation of U.S. Magistrate who heard motion to suppress.

"This case arose when state authorities initiated an investigation into allegations that Defendant, a lieutenant with the Middlesboro Fire Department, exposed himself to a minor in a Walmart bathroom in June 2018…. Later information that Defendant might be deleting evidence on his fire department-issued laptop ultimately led state and local police to contact Chief England and request he turn over the laptop for inspection…. Chief England retrieved the laptop from his son, the Defendant, who lived with him, and told investigators they would not find anything suspicious on the laptop except perhaps searches for AR-type rifles…. Chief England signed a consent to search form…

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After Chief England became chief of the Middlesboro Fire Department in January 2017 the fire department purchased three laptops, and Chief England assigned them to the lieutenants at the time, one of whom was Defendant…. When Chief England assigned the laptops he made clear to Defendant and the other lieutenants that the laptops were to be available to other firefighters who needed them for training, certificates, or other work purposes: 'I made it clear to [the lieutenants] when they got the laptop that if [another firefighter] needed them, they was [*sic*] to be made available to them.' [*Id*. at pp. 236-37] Unlike other lieutenants, Defendant largely controlled access to his work laptop…. Defendant's laptop was password-protected [R. 59-1 p. 8]; he frequently took the laptop home with him at night [R. 89 p. 15]; and whenever he left the lieutenant's office (which was shared by all the lieutenants), he would lock his laptop inside. [R. 89 pp. 15, 18]

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Defendant argues that Chief England never actually used or physically controlled the laptop, that there was no written policy expressly permitting its search, and Defendant had 'total control' over the laptop (citing the fact that it was password protected, had a sticker with his name on it, and Defendant took it home at night)…. But, while it is largely undisputed that Defendant controlled access to the laptop, it is equally undisputed that his use and control was always subject to the authority and control of Chief England.

***

Warrantless searches and seizures are considered 'per se unreasonable—subject only to a few specifically established and well-delineated exceptions.' *Katz v. United States*, 389 U.S. 347, 357 (1967). A search conducted with an individual's consent is one of these exceptions. *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973). Where valid consent is given, a search is permissible under the Fourth Amendment even without a warrant or probable cause. *Id*. Valid consent may be given not only by the defendant but also by 'a third party who possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected.' *United States v. Matlock*, 415 U.S. 164, 171 (1974). As the Supreme Court in *Matlock* explained, common authority does not derive from 'the mere property interest a third party has in the property,' but rather stems from mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched.

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It is undisputed that Chief England assigned the laptops to the Lieutenants, he had the authority to reassign them at any time he saw fit, and he was responsible for Middlesboro Fire Department property. . . . Defendant England has never argued that he had the right or authority to refuse an order from Chief England reassigning the laptop. Defendant England has never argued he could deprive the Fire Department or the City of Middlesboro of ownership of the laptop. He could not do these things."

Legal Lessons Learned: FDs should have a computer use policy that allows FD to audit the contents of the computer, and to authorize others (including law enforcement) to access contents.

Note: California's wiretapping law is a "two-party consent" law. California makes it a crime to record or eavesdrop on any confidential communication, including a private conversation or telephone call, **without the consent of all parties to the conversation**. See Cal. Penal Code § 632. https://www.dmlp.org/legal-guide/california-recording-law
Ohio's wiretapping law is a "one-party consent" law. Ohio law makes it a crime to intercept or record any "wire, oral, or electronic communication" **unless one party to the conversation consents**. Ohio Rev. Code § 2933.52. Thus, if you operate in Ohio, you may record a conversation or phone call if you are a party to the conversation or you get permission from one party to the conversation in advance. That said, if you intend to record conversations involving people located in more than one state, you should play it safe and get the consent of all parties. https://www.dmlp.org/legal-guide/ohio/ohio-recording-law

File: Chap. 16, Discipline

MA: CAPTAIN –– CONV. 5 COUNTS LARCENY – VENDOR GIFTS – JUDGE ALLOWED PROS. TELL JURY OPENING STATEMENT HE ALSO "SWAPPED" RECRUITS CLOTHING

On April 27, 2019, in Commonwealth v. Edward A. Scigliano, Fourth, the Commonwealth of Massachusetts Appeals Court, held in a summary decision (3 to 0) that his conviction is affirmed. "The Commonwealth properly introduced evidence that the defendant previously "swapped" goods purchased by the city for other goods from which he derived a personal benefit because it "tended to rebut the defense of innocent intent and make more probable the existence of the requisite illegal intent, that of committing a larceny," during the transactions alleged in the indictments."

"The defendant was the drillmaster at the Boston Fire Department's training academy from 2007 until 2012, during which time he was responsible for ordering apparatus and equipment for the fire academy and department. In 2016, a Suffolk County Superior Court jury convicted the defendant of five counts each of larceny over $250 and procurement fraud based on evidence that he had used his position as drillmaster to manipulate vendors into (1) providing him goods for his personal use in addition to those purchased for the fire department by the city of Boston (city), and (2) reimbursing him for personal expenses using city funds. The defendant appeals from his convictions, claiming that the indictments should be dismissed because Suffolk County is not the proper venue. He also claims that he was denied a fair trial as a result of the prosecutors' repeated efforts to introduce and repeated references to excluded evidence. We affirm.

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Venue

The indictments allege that the defendant stole property in the form of money, belonging to the city, 'while a Captain in the Boston Fire Department, at Boston, in the County of Suffolk.' The defendant induced vendors to submit false invoices to the city's purchasing department, which then used the false statements to calculate the amounts due. All of the money received by the vendors, and ultimately by the defendant, came from the city's purchasing office, located in Boston City Hall. Where the defendant was employed by the city, the victim of the defendant's crimes, and the defendant engaged in a scheme that largely took place in the city, and the defendant never objected to the venue, the belated argument that Suffolk County was an improper venue lacks all merit.

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Uncharged Acts.

Before trial, the Commonwealth sought permission to introduce evidence of the defendant's other bad acts, for which he was not charged, in order to establish a 'course of conduct' by the defendant of manipulating public employers. Although the judge excluded most of the Commonwealth's proposed uncharged prior bad act evidence, the judge admitted evidence that the defendant procured and sold to fire academy recruits substituted, less costly, clothing than what was reflected on purchase orders the defendant submitted to the city.

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The Commonwealth properly introduced evidence that the defendant previously 'swapped' goods purchased by the city for other goods from which he derived a personal benefit because it 'tended to rebut the defense of innocent intent and make more probable the existence of the requisite illegal intent, that of committing a larceny,' during the transactions alleged in the indictments. Commonwealth v. Campbell, 371 Mass. 40, 43 (1976). See Commonwealth v. Abbott Eng'g, Inc., 351 Mass. 568, 572-573 (1967). Having received the judge's permission to introduce evidence regarding the defendant's sale of clothing to recruits, it was not improper for the prosecutor to refer to that evidence in her opening statement."

Legal Lessons Learned: The prosecutor properly obtained Trial Judge's permission to discuss the uncharged act of "swapping" recruit clothes.