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SEPTEMBER 2020 – FIRE & EMS LAW Newsletter

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THREE NEW PUBLICATIONS BY PROF. BENNETT – FREE / ONLINE

- **TEXTBOOK:** **FIRE & EMS OFFICER DEVELOPMENT – AMERICAN HISTORY / LEGAL LESSONS LEARNED (2020)**
- **TEXTBOOK:** **EMS LAW (Third Edition, 2020)**
- **LIBRARY:** LEGAL LESSONS LEARNED CASE SUMMARIES (2018 – Present)

September Newsletter – 18 Recent Cases Reviewed

Chap. 1 – American Legal System, incl. Fire Codes, Fire Invest.

OH: "EMERGENCY" DEMOLITION ORDER – ONLY AFTER CITY COUNCIL MEMBER COMPLAINT – LAWSUIT PROCEED

On Aug. 25, 2020, in Lisa Haddon, et al. v. City of Cleveland, Senior U.S. District Court Judge Christopher A. Boyko, Northern District of Ohio, held that the lawsuit shall proceed to a jury trial for damages, denying the City's motion for summary judgment. The Judge wrote:

> "T]he City claims it tried, but could not give Plaintiff predeprivation notice because it did not have her California address, yet the fire department report clearly shows Haddon's California address. The Court finds this creates an issue of fact for the jury to determine whether the City could have provided Haddon with notice prior to the demolition. *** Plaintiffs further argue that whether the property was a danger to the public, warranting emergency demolition, is a question of fact, particularly as in cases such as this, when the City waits for over a month to commence the actual demolition and when the fire department records show no serious structural damage from the fire. The real motive for the demolition, according to Plaintiffs, was political, as evidenced by the email from a City Councilmember which spurred the Director to act."
> https://www.leagle.com/decision/infdco20200826e64

Facts:

> "According to their Complaint, Plaintiffs allege that on or about May 15, 2017, there was a fire at the subject property resulting in substantial damage to the structure and loss of personal property of each Plaintiff. Plaintiffs boxed their respective personal property, including clothes, shoes, furniture and other personal effects that were not destroyed in the fire for removal. Plaintiffs allege the personal property totaled approximately $70,000.
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> Plaintiffs contend that after the fire, the subject property was still sound, could be repaired with reasonable notice and did not require condemnation. However, on June 27, 2017, the City of Cleveland ('The City') inspected the property and produced a Notice of Violation of Building and Housing Ordinances, finding the property was damaged and required Lisa Haddon to abate the damage within thirty days of the Notice. The Notice instructed Haddon she could appeal within thirty days of the Notice.
> On June 29, 2017, the City condemned the subject property and hired Defendant Obon, Inc. to demolish the home. Obon proceeded to demolish the home on July 15, 2017, which was prior to the running of the thirty day appeal or abatement time.
> Notice was only achieved on Haddon by certified mail on August 5, 2017, after demolition occurred and the appeal and abatement times had run. As a result, Plaintiffs lost the value of their personal property and Haddon incurred costs for the demolition totaling approximately $10,000.00.
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> ***
> According to Obon, Haddon moved to California in May of 2014, during which time the sole occupants of the subject property were Haddon's daughter and [then boyfriend Cy] Rabb. In August 2015, Rabb moved to California. Consequently, from August 2015 till the fire of May 2017, the property was uninhabited except for the three to four times per year Haddon returned to Cleveland.
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> ***
> Following the fire, Haddon had a personal contractor board up the home and contacted a damage repair company to provide an estimate of the costs to repair the property. Haddon ultimately did not retain the company to perform the repairs and returned to California. Haddon did nothing to secure the personal property in the home after the fire and made no provision for the receipt of mail which was now undeliverable due to the damage from the fire.

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The City, through the Director of Building and Housing, has exclusive authority under the City's Ordinances to demolish vacant, abandoned, nuisance or damaged structures and emergency authority to expeditiously demolish structures determined to be an immediate hazard to the public. In order to exercise its emergency demolition powers, the City must consider the structural integrity of the property, efforts to communicate with the property owner and determine whether the property is vacant or occupied.

Obon asserts that the City performed an inspection of the property in June of 2017 that found the flooring separating the first and second floors of the subject property was completely gone and that the property was an immediate risk to collapse. Furthermore, the City inspection concluded the property was vacant or abandoned because the water had been shut off since January of 2017. There had been no communication between the property owner and the City since the fire occurred. In light of these facts, the City decided the subject property was an immediate risk to the public and decided to demolish the property under its emergency authority.

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Despite several attempts to contact Haddon, the City was unsuccessful. The City attempted to contact Haddon via old phone numbers from previous permits and tax info. The only address they had for Haddon was the subject property. When all other attempts failed they executed a search warrant. Finally, the City issued formal notice to the address of the subject property. Obon asserts Haddon testified to being aware of the condemnation notice through her sister who photographed and scanned the notice prior to demolition. Haddon admits she never updated her tax mailing address with the City when she moved to California.

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Obon agrees that a Notice of Violation of Building and Housing Ordinances was delivered to the subject property address on June 27, 2017, that gave Haddon thirty days to abate or appeal the condemnation or the property. However, Obon asserts that just two days later, on June 29, 2017, an emergency demolition notice was issued to Haddon. Under the City Ordinances, emergency situations are exempt from the thirty day appeal process. In these circumstances, an aggrieved property owner may appeal post-demolition under the City Ordinances. Haddon did not avail herself of this post-demolition appeal.

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On May 15, 2017, a fire damaged the subject property, however, Plaintiffs assert that records from the Cleveland Fire Department demonstrate that the property was not a danger to the public. In its report of the fire, the Cleveland Fire Department noted the attic was scorched and had soot and smoke damage. In a checklist of the report next to the headings ‘Significant Damage’ and ‘Extreme Damage’ the Fire Department placed a ‘0’. The report further notes Haddon's California address.

***

Haddon walked through the fire damaged property sometime in June of 2017 and found the home in good condition and personal property stored there intact and undamaged. Haddon had an insurance policy and provided her insurer with a list of the personal items in the house. The insurer performed an inspection of the house and provided Haddon with an estimate for its repair. An estimator for Puroclean, a home rehabilitation company, also inspected the home and provided Haddon with an estimate of the costs to repair the property. Both the insurer and Puroclean estimates evidence the fact that the property could be repaired. Neither indicated the property was a public danger.

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Plaintiffs contend the City did nothing after the fire for a month until a Cleveland City Councilmember employee inquired about two fire damaged properties, including the subject property asking, ‘where are we with getting these two vacant and dangerous eyesores out of the community.’ (Plaintiff's exhibit 28). It was

upon receipt of this inquiry of a Councilmember that the City dispatched an inspector to determine the extent of the structural damage. The next day a judge issued a search warrant for the property. The subsequent inspection resulted in the Notice of Violation. The Building Inspector recommended to the Director of the Department of Building and Housing that the subject property be declared an emergency and the Director issued his emergency demolition order on June 29, 2017. Yet, the demolition did not occur until July 15, 2017."

Legal Lessons Learned: An "emergency demolition order" should require the demolition be done promptly.

Chap. 1 – American Legal System, incl. Fire Codes, Fire Invest.

MI: LODD - ARSON INVESTIGATORS SUED FOR "FABRICATING EVIDENCE" – LAWSUITS TO PROCEED

On August 21, 2020, in George Marvaso, et al. v. Richard Sanchez, John Adams, Michael F. Reddy, Jr. and Michael J. Reedy, Sr., the U.S. Court of Appeals for the 6th Circuit held (2 to 1) that the U.S. District Court Judge in Flint, Michigan properly denied qualified immunity to the three arson investigators in lawsuit alleging a "civil conspiracy" using fabricated evidence to violate property owner's constitutional rights. Read the NIOSH Fire Fighter Fatality Investigation Report F2013-14, Career Probationary Fire Fighter Runs Out of Air and Dies in Commercial Structure Fire – Michigan, F2013-14 Date Released: April 15, 2016.

> "For these reasons and those given in the district court's order, Plaintiffs have adequately alleged that Defendants Adams and Reddy Jr. engaged in an unlawful conspiracy to fabricate evidence and thereby caused Plaintiffs' constitutional injury. Moreover, as the district court found, it was certainly clearly established at the time of Plaintiffs' constitutional injury that the "knowing fabrication of evidence violates constitutional rights." *Marvaso*, 2019 WL 3003641, at *6 (citing *Mills v. Barnard*, 869 F.3d 473, 486 (6th Cir. 2017); *Gregory v. City of Louisville*, 444 F.3d 725, 744 n.8 (6th Cir. 2006))."

Facts:

> "Plaintiffs lease and operate a restaurant called Marvaso's Italian Grille. The restaurant is adjoined by a charity pool hall and poker facility, Electric Stick, which Plaintiffs also lease and operate. On the morning of May 8, 2013, a fire broke out in the kitchen of Marvaso's and spread to Electric Stick. Within ten minutes of receiving the emergency calls, the City of Wayne-Westland Fire Department responded. The firefighters eventually succeeded in putting out the fire, but in the process a probationary firefighter, Brian Woelke, died from smoke and soot inhalation.
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> ***
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> The Michigan State Police Department initially offered to investigate the cause and origin of the fire, but Defendant John Adams (the Wayne-Westland Fire Marshal) and Defendant Michael Reddy Jr. (the Wayne-Westland Fire Chief) declined. They chose instead to have the Fire Department conduct the investigation itself. Within two days, Adams completed his on-scene investigation. He found no evidence of accelerants. Two other investigators, one representing Plaintiffs' landlord and the other representing Plaintiffs' insurer, also investigated the cause of the fire. They each found the cause of the fire to be 'undetermined.'
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> ***
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> From May 8, 2013 until June 30, 2013, the Michigan Occupational Safety and Health Administration (MIOSHA) investigated Brian Woelke's death. It concluded that his death resulted, at least in part, from the Fire Department's multiple violations of health and safety regulations. For example, it found that the

Department did not establish and implement written procedures for emergency operations, including a "two-in/two-out" rule, and failed to follow procedures for issuing a mayday call as soon as the firefighters exited the building with one firefighter missing. As a result, MIOSHA cited the Fire Department and assessed it a $3,500 fine. In a September 2013 letter, the Fire Department admitted its violations and agreed to pay the fine.

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Meanwhile, according to Plaintiffs, Fire Marshal Adams, Fire Chief Reddy Jr., and his father, retired Fire Chief Michael Reddy Sr., were planning a scheme to try to divert attention away from the Fire Department for its involvement in Woelke's death. At some point during the period between June 27, 2013 and early September 2013, those three individuals met and had a least one conversation during which they agreed to change the cause of the fire from accidental or undetermined to 'incendiary.' They knew that doing so would likely trigger an arson and homicide investigation into Plaintiffs' role in the fire.

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In November 2013, "despite having received no new evidence," Adams "suddenly reversed course, concluding that the fire had an incendiary cause." (*Id*. at Pg. ID 112.) Adams then, in furtherance of the conspiracy, knowingly submitted the false fire report to the Michigan State Police. Doing so triggered an unjustified homicide investigation into Plaintiffs, which resulted in the search and seizure of their property, loss of employment, and 'inability to rebuild their family business' because of the loss of insurance proceeds. (*Id*. at Pg. ID 115-16.) Plaintiffs were never arrested for any involvement in the fire and no charges against them were ever brought. According to Plaintiffs, Adams' intentionally false report was the only evidence of any possible wrongdoing by Plaintiffs. They allege that their damages, including the searches of their homes and seizure of their property, occurred as a direct result of this false report.

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[Civil lawsuit complaint included following allegations.]

> 41. On or about December 12, 2013, Defendant, Sanchez, swore out an affidavit in support of a search warrant to seize numerous items from the homes of George and Mary Marvaso, Geo Marvaso, and Sunday Gains.
>
> 42. The affidavit to support the search warrant lacked the necessary specificity to warrant a person of reasonable caution to conclude that evidence of criminal conduct would be in the stated place to be searched.
>
> 43. The facts to support the search warrant were knowingly false or were made with reckless disregard for the truth and did not provide probable cause for the search warrant and the invasion of Plaintiffs' homes.

***

Nevertheless, [Lt.] Sanchez moved to dismiss Plaintiffs' complaint against him in the district court by arguing that he was entitled to qualified immunity because he searched Plaintiffs' homes pursuant to a judicially secured warrant. He attached his search warrant affidavit as an exhibit to his motion.[2] Sanchez's search warrant affidavit first stated that '[a]lmost immediately after the fire was extinguished, Westland Police received tips that the fire was suspicious and most likely an arson fire…' It stated that a bar patron named Andrew Baldoni said that Plaintiffs had placed construction materials in the ceiling of the building and started the fire themselves. However, in an interview with police, Baldoni denied having actual knowledge of the origin of the fire and was simply repeating the local gossip.

The affidavit further provided that another person, Sean Quigley, reported to police that he had seen two vehicles in the restaurant's parking lot a few hours before the fire (i.e., very early in the morning), and Fire Marshal Adams reported that he saw George Marvaso Jr. driving a vehicle that matched one of the descriptions. The affidavit next stated that a relative of the Marvasos, Robert Mulka, told sheriff's deputies that George Marvaso, Sr. 'was distraught over the fire because it was supposed to be an insurance job and no one was supposed to get hurt." (*Id*. at Pg. ID 46.) The affidavit then went on to describe Fire Marshal Adams' false report, discussed above. It stated, 'In his cause an[d] origin report, Adams described finding two points of origin in the building. . . . He concluded and opined that the fire was incendiary in nature and resulted from an 'open flame' applied by human hands to combustibles to start this fire.' (*Id*.)

Finally, the affidavit summarized the Marvasos' financial situation. It stated that George Marvaso Sr. 'had been in bankruptcy since 2007 and was currently making monthly payments to satisfy his long term debt.' (*Id*.) It provided that Marvaso was going through financial difficulties at the time of the fire, owed overdue property and business taxes, and had increased the insurance coverage on his businesses from $400,000 to $600,000 three to four months before the fire.

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Generally, '[p]olice officers are entitled to rely on a judicially secured warrant for immunity from a § 1983 action for illegal search and seizure unless the warrant is so lacking in indicia of probable cause, that official belief in the existence of probable cause is unreasonable.' *Yancey v. Carroll Cty*., 876 F.2d 1238, 1243 (6th Cir. 1989). Moreover, "[w]here the alleged Fourth Amendment violation involves a search or seizure pursuant to a warrant, the fact that a neutral magistrate has issued a warrant is the clearest indication that the officers acted in an objectively reasonable manner or, as we have sometimes put it, in 'objective good faith.'" *Messerschmidt v. Millender*, 565 U.S. 535, 546 (2012) (footnote omitted) (quoting *United States v. Leon*, 468 U.S. 897, 922-23 (1984)).

However, there is an important exception to this general rule that provides that 'an officer cannot rely on a judicial determination of probable cause if that officer knowingly makes false statements and omissions to the judge such that but for these falsities the judge would not have issued the warrant.' *Yancey*, 876 F.2d at 1243. That is precisely the situation that Plaintiffs allege here."

DISSENT [Circuit Judge John Balor Nalbandian]:

"Even taking Plaintiffs' factual allegations as true, Sanchez, Adams, and Reddy, Jr. are entitled to qualified immunity. Plaintiffs also fail to adequately plead their § 1983 conspiracy claim.

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All in all, these facts[in search warrant application] leave 'a fair probability' in the view of 'reasonable and prudent men, not legal technicians[,]' 'that contraband or evidence of [arson would] be found' in the homes Sanchez sought to search. *See Illinois v. Gates*, 462 U.S. 213, 231, 238 (1983). Probable cause is not 'a neat set of legal rules.'"

Legal Lessons Learned: This is a very unusual case; normally a search conducted pursuant to a search warrant would result in a finding of qualified immunity.

Note: READ NIOSH REPORT: Career Probationary Fire Fighter Runs Out of Air and Dies in Commercial Structure Fire – Michigan, F2013-14 Date Released: April 15, 2016:

"On May 8, 2013, a 29-year-old male career probationary fire fighter died after running out of air and being trapped by a roof collapse in a commercial strip mall fire. The fire fighter was one of three fire fighters who had stretched a 1½-inch hoseline from Side A into a commercial strip mall fire. The hose team had stretched deep into the structure under high heat and heavy smoke conditions and was unsuccessful in locating the seat of the fire. The hose team decided to exit the structure. During the exit, the fire fighter became separated from the other two crew members.

The incident commander saw the two members of the hose team exit on Side A and called over the radio for the fire fighter. The fire fighter acknowledged the incident commander and gave his location in the rear of the structure. The fire fighter later gave a radio transmission that he was out of air. A rapid intervention team was activated but was unable to locate him before a flashover occurred and the roof collapsed. He was later recovered and pronounced dead on the scene."

Chap. 1 – American Legal System, incl. Fire Codes, Fire Invest.

CT: WAREHOUSE FIRE – 1500 BARRELS OILS – NO CODE INSPECTIONS 15 YRS, USED WATER NOT FOAM - IMMUNITY

On Aug.18, 2020, in 25 Grant Street, LLC v. City of Bridgeport, et al., the Court of Appeals of the State of Connecticut, held (3 to 0) held that the trial court properly granted summary judgment to the City, but on different grounds: that the June, 2018 complaint alleging city negligence in failing to find fire code violations was filed too late under statute of limitations.

> "In the present case, the plaintiff failed to provide the city with notice of its theory of liability concerning fire code violations in the warehouse in all iterations of the complaint preceding the proposed June, 2018 complaint. Thus, even if the plaintiff described this theory in its response to an interrogatory, this response alone is insufficient for it to relate back for purposes of compliance with the statute of limitations."

Facts:

> "This appeal arises from an action brought by the plaintiff, 25 Grant Street, LLC, against the defendant city of Bridgeport (city),[1] following the destruction of the plaintiff's warehouse by a fire that caused substantial environmental damage to the surrounding area. The plaintiff ultimately alleged that the city was liable for the damage because it had failed to inspect the warehouse prior to the fire, which constituted a reckless disregard for health and safety.
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> ***
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> The plaintiff owned property located at 25 Grant Street in Bridgeport, which 'consisted of 5.92 acres improved with a 44,802 square foot one story industrial/commercial warehouse that sat toward the back of the property near Seaview Avenue.' The plaintiff leased this warehouse to the Rowayton Trading Company (Rowayton) and JWC Roofing and Siding Company. Inside the warehouse were fragrance and essential oil products contained in several hundred fifty-five gallon barrels.
>
> On the evening of September 11, 2014, 'someone contacted 911 to report that a small fire had broken out . . . at the [plaintiff's] warehouse.' To extinguish the fire, the fire department used only water and did not use foam. The fire eventually 'consum[ed] the entire warehouse; and caused the release of [at least] 1500 . . . fifty-five gallon barrels of various chemicals into the soil, air, and water surrounding the property.' In total, the fire resulted in the plaintiff 'sustain[ing] a total loss of [its] warehouse; loss of use of the [25 Grant Street] property; loss of rents; stigma to [the plaintiff's] business; the cost of an [Environmental Protection Agency (EPA)] cleanup; the costs of [the plaintiff's] own attempted cleanup; legal fees [and] costs; and the loss of future profits on the appreciation of its value and/or continued rental of the property.'
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> ***
>
> The plaintiff commenced this action against the city on June 13, 2016. The plaintiff filed its original complaint on June 28, 2016 (original complaint), and then filed or attempted to file five amended or revised complaints thereafter. In the first count[3] of the original complaint, which was titled 'negligence,' the plaintiff made the following relevant allegations:

37. Instead of applying foam to the small fire existing at the site when they first arrived, first responding members of the Bridgeport Fire Department and those manning its command structure, applied massive amounts of solid water streams [despite the city being warned against using water] . . . caus[ing] the fire to expand rapidly [and] consum[e] the entire warehouse; and [also resulted in] the release of 1500 or more fifty-five gallon barrels of various chemicals into the soil, air and water surrounding the property. . . .

43. Defendant [William] Cosgrove, as Bridgeport fire marshal, failed to conduct an inspection of the [plaintiff's warehouse], which was required pursuant to Connecticut General Statutes § 29-305 (a) and (d) (knowledge hazardous to life and safety from fire) and such failure satisfies the exception for liability set forth at . . . § 52-557n (b) (8) in that the knowledge that certain chemicals present could be hazardous to life and safety from fire constitutes reckless disregard for health and safety under all relevant circumstances.

44. Defendant [Brian] Rooney, as Bridgeport fire chief, failed to conduct an inspection of the [plaintiff's warehouse], for the purposes of 'preplanning the control of a fire [involving] any combustible material . . . that is or may become dangerous as a fire menace,' pursuant to General Statutes § 7-313e (e); and such failure satisfies the exception for liability set forth at . . . § 52-557n (b) (8) in that the knowledge that certain chemicals present could be hazardous to life and safety from [a] fire constitutes reckless disregard for health and safety under all relevant circumstances. . . .

[Plaintiff filed amended complaint in June, 2018]

"14. *Because there had been no inspection* of the property for over fifteen years, *and therefore no remediation of code violations that would have been found upon inspection, a minor fire turned into a conflagration that destroyed the entire property*.

"15. Then and there, *because of the repeated lack of inspection, the fire . . . expand*[*ed*] *rapidly*, consuming the entire warehouse; *and caused the release of several hundred fifty-five gallon barrels of various chemicals* into the soil, air and water surrounding the property.

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On June 25, 2018, the court granted the city's second motion for summary judgment on the basis of governmental immunity…. In rendering summary judgment in favor of the city, the court noted that the plaintiff's case was not brought within the narrow exception to governmental immunity for a municipality's reckless failure to conduct an inspection for fire code violations that was established in *Williams* v. *Housing Authority*, 327 Conn. 338, 364, 368, 174 A.3d 137 (2017). In *Williams*, our Supreme Court determined that, despite general principles concerning governmental immunity, a municipality may be liable for damages to person or property if the municipality has a 'general policy of not conducting inspections of a certain type'; id., 368; and that 'it is clear that the failure to inspect may result in a catastrophic harm, albeit not a likely one.' Id., 364. Such conduct, according to the court, would 'in the context of § 52-557n (b) (8), [constitute] a . . . reckless disregard for health or safety.' Id., 364.

In light of this narrow exception to governmental immunity, the trial court rendered summary judgment in favor of the city because the plaintiff had failed to establish that there was a genuine issue of material fact that 'there [had] been [any fire] code violations that [were] . . . a substantial factor in causing either the fire or the method of response by the Bridgeport Fire Company . . . .' Furthermore, the court concluded that 'there's no genuine issue of fact [as to whether the city's failure to inspect the warehouse constituted recklessness] because no violation of the code is shown . . . .'"

Legal Lessons Learned: Government mental immunity prevailed, but alleged failure to inspect a large warehouse in 15 years raises serious questions about the City's code enforcement practices.

Note: See the Supreme Court of Connecticut's Dec. 26, 2017 decision establishing municipal liability for failure to conduct inspections: Williams v. Housing Authority of Bridgeport, 327 Ct. 338, 174 A.3d 137 (2017):

"This certified appeal arises out of a tragic fire in which four residents of a Bridgeport public housing complex — Tiana N.A. Black and her three young children — lost their lives.
***
"The Appellate Court reversed [trial court's summary judgment for the city], concluding that a jury reasonably could find that the conduct of the municipal defendants demonstrated 'a reckless disregard for health or safety under all the relevant circumstances' and, therefore, that they were potentially liable pursuant to § 52-557n (b) (8)."

Chap. 1 – American Legal System, incl. Fire Codes, Fire Invest.

RI: FIRE INVESTIGATIONS - ADJUSTERS, RESTORES CAN CONTACT OWNERS, BUT NOT VISIT SCENE 24 HRS

On Aug. 11, 2020, in Ernest G. Pullano, PA, doing business as Pullano Public Adjusters, LLC, et al. v. Rhode Island Division of State Fire Marshal, U.S. District Court Judge John J. McConnell, Jr., District of Rhode Island, granted the State's motion to dismiss, based on the Judge's narrow interpretation of the statute – does not prohibit e-mail or other off-premises contact with property owner.

"The Court is convinced that the second interpretation, using the 'series-qualifier principle,' is the correct interpretation and thus holds that R.I. Gen. Laws § 23-28.2-11 only prohibits solicitation *on the premises* during an investigation. It does not prohibit other types of non-premises solicitations, like phone, email, or mail. And it does not prevent on-the-premise solicitations if the person is invited onto the property by the homeowner. This is the right interpretation because it offers the most logical reading of the plain language of the Statute, while following the State's interpretation of the Statute, and avoiding constitutional transgressions."

Facts:

"This suit challenges the constitutionality of R.I. Gen. Laws § 23-28.2-11(c) and (d) (the 'Statute'), which provides that the state fire marshal or any authority delineated by the Statute may prohibit insurance adjusters, contractors, and restorers from entering onto a premises until twenty-four hours after the fire marshal or fire department has concluded its investigation…. The Plaintiffs claim that this prohibition violates the First Amendment to the United States Constitution, made applicable to the State pursuant to the Fourteenth Amendment, because it deprives them of their right to solicit business. … The Plaintiffs seek redress in the form of injunctive relief and a declaratory judgment.

***

R.I. Gen. Laws § 23-28.2-11 was amended in 2016 and 2017 to include the following:

(c) The state fire marshal, and/or any of the deputy state fire marshals or assistant state fire marshals, and/or municipal officials, including, without limitation, police, fire, and building officials, *shall prohibit any and all insurance adjusters, contractors, and restoration companies from engaging in any solicitation or inspection or any physical presence on the premises under investigation until twenty-four (24) hours* after either the municipal fire department and/or the state fire marshal, deputy state fire marshal, or assistant state fire marshal releases control of the premises back to its legal owner(s) or occupant(s), unless the insurance adjuster, contractor, or restoration company is accompanied by, or acting with, permission of the premises' legal owner.
(d) Any insurance adjuster, contractor, or restoration company in violation of the provisions of subsection (c) shall be subject to a civil penalty of one thousand dollars ($1,000) for each violation and may be subject to revocation of the appropriate professional license or registration.
R.I. Gen. Laws § 23-28.2-11 (emphasis added).

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The Plaintiffs allege that these provisions unconstitutionally impede their right to solicit business from a fire victim for an unknowable amount of time…. According to the Plaintiffs, the phrase 'any solicitation' prohibits them from any type of business solicitation—in person, telephonically, or by mail—thus violating their constitutional right to speech and association…. The Plaintiffs next allege that although the Statute says 'twenty-four (24) hours' this period is indeterminable because the Plaintiffs are not privy to when the fire marshal will return the property to its legal owner.

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At the risk of trading the lawyer's pen for the grammarian's red fine, it appears that Plaintiffs' misunderstanding stems from the difference between the rule of the last antecedent and the series-qualifier principle. These two grammatical rules are best understood through example.

Suppose a friend asked for: "a song, album, or live recording by the Beatles." Under the rule of the last antecedent, any song or any album by any artist will do, only the live recording needs to be by the Beatles. Under the series-qualifier principle, the friend has impeccable taste, as the friend is only interested in songs by the Beatles, albums by the Beatles, and live-recordings by the Beatles.

Put another way, the rule of the last antecedent takes the last modifying phrase . . . and only applies it to the last item in the list. The series-qualifier principle reads the last modifying phrase to apply to all items in the list . . ..

The language of the Statute is certainly open to reasonable interpretation. Does the phrase 'on the premises' in the phrase 'engaging in any solicitation or inspection or any physical presence on the premises' refer to solicitations, inspections, and physical presence, or does it only refer to 'physical presence' Under the first interpretation (advanced by the Plaintiffs), all acts of solicitation or inspection, regardless of where they take place, are included…. Under the second interpretation, the only prohibited acts are ones that take place on the premises, thus allowing the Plaintiffs to solicit and inspect from any place (e.g., by telephone, mail) other than physically on the premises. The Court is convinced that the second interpretation, using the 'series-qualifier principle,' is the correct interpretation and thus holds that R.I. Gen. Laws § 23-28.2-11 only prohibits solicitation *on the premises* during an investigation. It does not prohibit other types of non-premises solicitations, like phone, email, or mail. And it does not prevent on-the-premise solicitations if the person is invited onto the property by the homeowner. This is the right interpretation because it offers the most logical reading of the plain language of the Statute, while following the State's interpretation of the Statute, and avoiding constitutional transgressions.

***

2. Constitutionality of the Statute

The proper maintenance of professional standards through professional regulations is also a substantial state interest…. 'States have a compelling interest in the practice of professions within their boundaries . . . and [therefore] have the broad power to establish standards for licensing practitioners and regulating the practice of professions.' *Goldfarb v. Va. State Bar*, 421 U.S. 773, 792 (1975).

Finally, the State has an interest in ensuring the integrity of effective and efficient investigations…. There is no doubt that the State has an interest in ensuring that any fire investigation is carried out without unnecessary outside interference."

Legal Lessons Learned: The State may now either accept this interpretation of the statute, or seek to appeal the decision.

Note: See Florida statutes on public adjusters – 48 hour notice visit property:

“The law states that company adjusters, independent adjusters, attorneys, investigators, or others acting on behalf of the insurer must give the insured, claimant, public adjuster or legal representative of the insured at least 48 hours notice that they need access to the damaged property. The insured or claimant can waive this notice.”

Chap. 4 – Incident Command, incl. Training, Drones

GA: CONTROLLED BURN AT FORT STEWART – BURN LEFT PROPERTY, DAMAGED LOGGING EQUIPMENT – IMMUNITY

On August 24, 2020, in Foster Logging, Inc. and American Guarantee & Liability Insurance Company v. United States of America, the U.S. Court of Appeals for the Eleventh Circuit (Atlanta, GA) held (2 to 1) that U.S. District Court judge properly granted the U.S. Government’s motion to dismiss based on the “discretionary function” exception to liability under the Federal Tort Claims Act, since the U.S. Forestry Branch exercised discretion on how it conducted and monitored the controlled burn at Fort Stewart – Hunter Army Airfield.

> “We assume, as we must at this stage, that U.S. Forestry Branch officials were negligent in their observation, monitoring, and maintenance during the controlled burn itself as alleged in the complaint. But that alleged conduct—the steps and measures taken to safely execute a controlled burn—by its nature, involves an exercise of discretion and considerations of social, economic, political, and public policy. *** The government's decisions about how to monitor and maintain a controlled burn are shielded from judicial second-guessing by the discretionary-function exception to the FTCA.”

Facts:

> [Controlled burn was started at Fort Stewart.] “The following day, a Friday, Foster Logging parked its equipment and left area [on neighboring private property] around 2:30 p.m. According to the complaint, the U.S. Forestry Branch ‘negligently failed to observe, monitor[,] and maintain said burn, allowing fire to escape area B-20 and to enter the land and pine trees on which [Foster Logging] was logging.’ As the fire entered area B-19.5, certain equipment and property of Foster Logging were burned and destroyed, causing loss of equipment, fuel, and harvested timber, among other things.
>
> ***
>
> As a result of the damage to the property, Plaintiff Foster Logging was unable to harvest timber for three days and was required to rent equipment to continue harvesting timber in area B-19.5. Plaintiff American Guarantee, as Foster Logging's insurer, ultimately paid Foster Logging a total of $247,384.12 for its insured losses. Foster Logging also incurred $125,110.25 in out-of-pocket damages beyond the indemnity payments.
>
> ***
>
> Importantly, Plaintiffs did not dispute that the challenged conduct involved an element of judgment or choice. Rather, Plaintiffs focused their analysis solely on whether the U.S. Forestry Branch officials exercised that judgment in a permissible manner.
>
> ***
>
> Congress, however, has carved out certain exceptions to that limited waiver, including the discretionary-function exception in 28 U.S.C. § 2680(a).[4] The discretionary-function exception provides that, notwithstanding § 1346(b), the United States preserves its sovereign immunity as to "[a]ny claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 U.S.C. § 2680(a) (emphasis added). "[T]he purpose of the exception is to prevent judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political

policy through the medium of an action in tort." Gaubert, 499 U.S. at 323, 111 S. Ct. at 1273 (quotation marks omitted).

Dissent: 11th Circuit Judge Adalberto Jordan [allow pre-trial discovery in this case]:

"Prescribed fires are highly regulated, and federal agencies involved with prescribed burns (including the National Park Service, the U.S. Fish and Wildlife Service, the Bureau of Land Management, and Bureau of Indian Affairs, and the U.S. Forest Service) must adhere to the 'minimum mandates' articulated in the Prescribed Fire Plan. *See* Robert H. Palmer III, *A New Era of Federal Prescribed Fire: Defining Terminology and Properly Applying the Discretionary Function Exception*, 2 Seattle J. Envtl. L. 279, 310 (2012).

***

As I acknowledged at the beginning, it may well be that the plaintiffs' claims will be barred by the discretionary function exception. The government might be correct that the conduct at issue here was "influenced by considerations such as the promotion of military training and operations activities at Ft. Stewart, the conservation and rehabilitation of its natural resources, and the risk of harm to military personnel and private citizens." Br. for Appellee at 13. But we can only make that decision at summary judgment on a fully developed record, and not on a facial challenge to the complaint where we must draw all reasonable inferences in favor of the plaintiffs."

Legal Lessons Learned: This case does raise the question of why someone wasn't posted to make sure the "controlled burns" stayed on Ft. Stewart property.

Chap. 4 – Incident Command, incl. Training, Drones

MD: PG COUNTY FIRE CHIEF – BATTALION CHIEFS TO OUTRANK VOLUNTEER CO. CHIEF - AUTHORIZED

On Aug. 4, 2020, in Prince George's Volunteer Fire And Rescue Association, Inc. v. Prince George's County, Maryland, the Court of Special Appeals of Maryland, held (3 to 0; unreported decision) that the County Fire Chief had the authority in 2016 to issue revised General Order 01-03 that elevated the rank of County Battalion Chiefs, over that of Chiefs of volunteer fire companies.

"Ultimately, PGCVFRA failed to sufficiently allege that it suffered irreparable injury through the Fire Chief's revision of General Order 01-03 and its amendment of the chain of command. As noted in our discussion on PGCVFRA's governmental takings claim, PGCVFRA failed to establish any sort of injury. Its claims regarding potential injury are hypothetical, speculative, and depend on future—uncertain—conduct that PGCVFRA alleges the County may undertake. The speculative nature of these complaints is apparent, and these 'mere allegations' are insufficient to ground PGCVFRA's claim for permanent injunctive relief."

Facts:

"In this appeal, we examine the breadth of the Prince George's County Fire Chief's authority. In 2016, the Fire Chief revised General Order 01-03, which made certain modifications to the chain of command within the County's Fire/EMS Department ('the Department') that elevated the rank of a 'Battalion Chief, Career/Volunteer' above that of a 'Volunteer Company Chief[.]' Appellant, Prince George's County Volunteer Fire & Rescue Association ('PGCVFRA') took issue with the revised chain of command under General Order 01-03 arguing—in essence—that the revisions infringed upon its constitutional rights and fell outside the Fire Chief's scope of authority under the Prince George's County Charter (the 'County Charter') the Prince George's County Code ('PGCC'), and the Court of Appeals' decision in *Prince George's Cty. v.*

Chillum-Adelphi Volunteer Fire Dept., Inc., 275 Md. 374, 383, 340 A.2d 265, 271 (1975). After PGCVFRA unsuccessfully sought relief in the Circuit Court for Prince George's County, this appeal followed.

***

Appellant, PGCVFRA is an organization that represents the thirty-eight volunteer fire companies located in Prince George's County (the 'County').

> ["The Prince George's County Volunteer Fire and Rescue Association represents 38 volunteer fire and rescue corporations in Prince George's County, Maryland. staffing 46 stations providing dedicated and continuous fire, rescue and EMS service to more than 700,000 citizens bordering our nation's capitol."]

***

In its amended complaint, PGCVFRA averred that General Order 01-03's chain of command revision, *i.e*. elevation of Battalion Chiefs over Volunteer Chiefs, 'with the incredibly broad scope for the chain of command creates a leadership structure that **will allow** Battalion Chiefs control over the private property owned by volunteer fire departments.' (emphasis added). This broad assertion is rooted in hypothetical action allegedly taken by the County. As we have already noted, to succeed on its claim of a governmental taking, PGCVFRA was required to demonstrate that General Order 01-03 entirely deprived it of the beneficial uses of property which it owns. This is simply not the case. There is no evidence in the record that the County attempted—in any way—to deprive or actually deprived PGCVFRA of the beneficial use of its property. Despite General Order 01-03's modification of the chain of command, PGCVFRA failed to cite any instance in which the County unconstitutionally exercised—or even attempted to exercise—control over its properties.

***

The fact that the chief is in control of fire fighting would not give him the right to prescribe how volunteer fire companies could spend their own money or dispose of their own assets, nor could he prescribe on what night of the week or at what hours these volunteer fire companies might meet. His control certainly would extend to imposing limitations upon the speed of fire engines proceeding to and from fires and to specifying the training and duties of paid firemen assigned to the volunteer fire companies since all of this would be directly related to the fighting of fires. However, his powers would not go so far as to say that volunteer firemen not then fighting a fire could not engage in a friendly game of pinochle at the firehouse or watch a sports event there on television."

Legal Lessons Learned: The County Fire Chief has authority over firefighting and chain of command.

Note: Under revised General Order 01-03, the relevant portion of the chain of command reads as follows:

1. County Fire Chief
2. Chief Deputy
3. Deputy Fire Chief
4. Assistant Fire Chief, Career/Volunteer
5. Battalion Chief, Career/Volunteer
6. Volunteer Company Chief

[Footnote 8 of the Court's decision.]

Chap. 5 – Emergency Vehicle Operations

NY: VOL. FF IN MVA – CROSSED AGAINST RED LIGHT- NO SIREN, ONLY EMER. LIGHT - 40% LIABLE – JURY $20,000

On Aug. 19, 2020, in Jeffrey K. Schleger v. Michael F. Jurcsak, the Supreme Court of the State of New York, Appellate Division (Second Judicial Department) upheld (3 to 0) the jury's verdict, finding plaintiff 60% liable and only awarding him $20,000 in damages.

> "Issues of credibility are for the jury, which had the opportunity to observe the witnesses and the evidence,' and its credibility determination is entitled to deference" (*id*., quoting *Aronov v Kanarek*, 166 AD3d 574, 575 [internal quotation marks omitted]). Contrary to the plaintiff's contention, the jury's verdict on the issue of liability finding that the plaintiff was negligent and 60% at fault in the happening of the accident was not contrary to the weight of the evidence because a fair interpretation of the evidence supports the verdict (*see Khaydarov v AK1 Group, Inc*., 173 AD3d at 722; *Vazquez v County of Nassau* 91 AD3d at 857)."

Facts:

> "The plaintiff commenced this action to recover damages for personal injuries he allegedly sustained on August 2, 2009, when his vehicle collided with a vehicle operated by the defendant Michael F. Jurcsak, Jr. (hereinafter the defendant driver). At the time of the accident, the defendant driver was responding to a fire in his capacity as a volunteer firefighter for the defendant Valley Stream Fire Department and attempted to cross an intersection against a red light.
>
> At a trial on the issue of liability, the plaintiff testified that he had a green light at the intersection where the accident occurred, and did not hear any horns, see any flashing lights, or see any vehicles attempting to cross the intersection until it was too late to take evasive maneuvers. The defendant driver testified that he stopped at a red light at the intersection with his emergency light flashing, saw there was minimal cross traffic, and attempted to cross the intersection when the plaintiff's vehicle collided with his vehicle.
>
> ***
>
> The plaintiff's unsubstantiated testimony regarding his earnings was insufficient to meet his burden to establish damages for lost earnings with reasonable certainty, and thus, we agree with the court's determination to dismiss his claim of lost earnings (see Tarpley v New York City Tr. Auth., 177 AD3d 929; Lodato v Greyhawk N. Am., LLC, 39 AD3d at 496)."

Legal Lessons Learned: Fire Departments should require fire & EMS personnel to use both emergency lights and sirens when entering intersection against a red light. Volunteers should inform their personal insurance companies in writing they are using their personal vehicles to respond and request written confirmation they have coverage.

Chap. 6 – Employment Litigation, incl. Work Comp.

MD: EMT NECK INJURY – STATE STATUTE INCLUDED PARAMEDICS, FF BUT NOT "EMTs" – SHE IS COVERED

On Aug. 26, 2020, in Ashley N. Downer v. Baltimore County, Maryland, the Court of Special Appeals of Maryland, held (3 to 0) that EMTs are covered by the 1987 statute that awards increased compensation to a "public safety employee" injured on the job, even though the statute did not specifically include EMTs in its definitions [receives two-thirds of her average weekly wage, instead of one-third]. The Court reversed the Circuit Court trial judge and held:

> "The Court concludes that the term "paramedic" was used by the legislature in accordance with its commonly understood meaning, and includes persons who are also known as emergency medical technicians. *** We conclude that Ms. Downer should have been considered a public safety employee within the definition of LE § 9-628(a)(1)."

Facts:

"While lifting a heavy bag of equipment at work, Ms. Downer suffered an injury to her neck, which resulted in a permanent partial disability, for which the Workers' Compensation Commission awarded her 45 weeks of compensation at [one-third of her average weekly wage, instead of two-thirds as a public safety employee.]

***

In this appeal, as in the circuit court, the sole disputed issue is whether Ms. Downer meets the statutory definition of 'public safety employee' set forth in LE § 9-628(a), which reads:

> (a) **In this section**, **"public safety employee" means**:
> (1) **a firefighter**, **fire fighting instructor**, **or paramedic ….**
> **or**
> (2) **a volunteer firefighter or volunteer ambulance**, **rescue**, **or advanced life support worker who is a covered employee under § 9-234 of this title and who provides volunteer fire or rescue services….**

***

The County responds by asserting that the statutory definition does not cover *paid* EMT employees, although the County concedes in its brief that the definition of 'public safety employee' includes 'volunteer ambulance, rescue, or advanced life support worker[s]' who provide volunteer 'rescue services.' Despite the clear inclusion of those similar volunteer emergency medical positions within the definition in LE § 9-628(a), the County maintains: 'At no time has the General Assembly seen fit to add paid EMT employees to those public safety employees included in LE § 9-628.'

***

Baltimore County currently maintains detailed job descriptions that clearly differentiate between a paramedic and an emergency medical technician, but the common dictionary definition of 'paramedic' in 1987 would have aptly described Ms. Downer's job. In 1987, the term "paramedic" was defined in a generally available dictionary as 'a person who is trained to assist a physician or to give first aid or other health care in the absence of a physician, often as part of a police, rescue, or firefighting squad.' THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 1408 (2d ed. 1987).

***

Were we to adopt the County's interpretation, the legal effect would be to treat Baltimore County's paid EMTs less favorably under LE § 9-628(h) than emergency medical technicians who volunteer and perform similar work under similar circumstances. Because the purpose of the Workers' Compensation Act 'is to protect workers and their families from hardships inflicted by work-related injuries by providing workers with compensation for loss of earning capacity resulting from accidental injury arising out of and in the course of employment,"'*Deibler*, 423 Md. at 61 (internal citationand quotation marks omitted), it would be illogical, if not absurd, for the legislature to have treated volunteers more advantageously in the Workers' Compensation Act than paid EMTs who are injured while performing the same emergency services."

Legal Lessons Learned: Nice to see Court broadly interpreting a workers compensation statute broadly.

Chap. 6 – Employment Litigation, incl. Work Comp.

WA: FF HEART ATTACK – FAMILY HISTORY - JURY FOUND CAUSED BY PLAQUE – STAT. PRESUMPTION OVERCOME

On Aug. 18, 2020, in Andrew P. Leitner v. City of Tacoma and Department of Labor And Industries, the Court of Appeals of the State of Washington, Division II, held (3 to 0; unpublished decision) that the trial court gave a proper instruction to the jury, and the jury's verdict will not be reversed.

> "Ultimately, the question of whether Leitner's other heart problems qualified for application of the statutory presumption was a factual question for the jury. The question of whether the Board incorrectly applied the presumption by failing to address Leitner's other heart problems was also a question for the jury. Therefore, we conclude that Leitner's argument that the superior court erred by failing to reverse or modify the Board's findings and decision lacks merit."

Facts:

> "Leitner worked as a firefighter for the City for over 30 years. While working as a firefighter, Leitner also served as a marine officer, an incident commander, a fire lieutenant, and a member of the hazardous material team. As a part of his job, Leitner regularly physically exerted himself. Leitner was also regularly exposed to smoke, fumes, and other toxic substances. In particular, Leitner was often exposed to diesel fumes from the diesel-powered fire engines and fireboat.
>
> As a marine officer, Leitner performed duties on a fireboat. On December 31, 2014, Leitner responded to a disabled boat when working on the fireboat. While pulling up the boat's anchor, Leitner experienced upper back pain between his shoulders that radiated into his chest and down his left arm. Leitner also experienced weakness, dizziness, shortness of breath, and nausea. After the December 31 incident, Leitner reported regularly feeling pain between his shoulders and into his left arm, weakness, dizziness, fatigue, and nausea. On February 25, 2015, Leitner began a 24-hour shift. His shift was busy, and he was exposed to diesel fumes while working, which was normal for Leitner. During his shift, Leitner assisted two other firefighters in lifting a heavy man from the floor while on a suppression call. After lifting the man, Leitner experienced extreme left arm pain and felt dizzy, lightheaded, and fatigued.
>
> Leitner's symptoms significantly worsened. On the morning of February 28, Leitner called 911 and was transported to the hospital. Leitner experienced a myocardial referred to as a heart attack. Leitner had a 100 percent blockage in his left descending artery. Dr. Peter Chen conducted an emergency stent placement.
>
> ***
>
> The City presented Cardiologist Dr. Robert Thompson to testify to his independent medical examination performed on Leitner. Thompson noted that Leitner had no history of high blood pressure, high cholesterol, or cigarette smoking. Leitner 'has a family history of coronary artery disease in that his mother had a coronary bypass in her mid-50s,' which increased Leitner's chances of a myocardial infarction. *Id*. at 269. Thompson diagnosed Leitner with coronary artery disease. He opined that the first manifestations of the disease occurred on December 31, 2014, when Leitner experienced angina pectoris, or chest pain, during exertion due to inability to increase blood flow through narrow arteries. Eventually, his coronary artery disease caused a total blockage on February 28, 2015.
>
> Thompson explained that Leitner's coronary artery disease was a pre-existing condition in which cholesterol had been building in his arteries for many months or years. Thompson stated that exposure to open air diesel fumes from the fire engines or fireboat could not cause a myocardial infarction. He testified that Leitner's work did not cause, aggravate, or light up his heart condition. He also testified that Leitner's myocardial infarction did not occur within 24 hours of performing strenuous activity as a firefighter."

Legal Lessons Learned: Under the State of Washington statute, the employer can seek a jury trial on the issue of the cause of a firefighter's heart attack.

Note: The State of Washington statutory presumption, RCW 51.32.185:

> (1)(a) In the case of firefighters as defined in RCW 41.26.030(17) (a), (b), (c), and (h) who are covered under this title and firefighters, including supervisors, employed on a full-time, fully compensated basis as a firefighter of a private sector employer's fire department that includes over fifty such firefighters, and public employee fire investigators, there shall exist a prima facie presumption that: (i) Respiratory disease; (ii) any heart problems, experienced within seventy-two hours of exposure to smoke, fumes, or toxic substances, or experienced within twenty-four hours of strenuous physical exertion due to firefighting activities; (iii) cancer; and (iv) infectious diseases are occupational diseases under RCW 51.08.140.

On April 24, 2019, the Governor signed an amendment to the statute, including additional cancers covered by the statutory presumption:

> (10)(a)The director must create an advisory committee on occupational disease presumptions. The purposes of the advisory30committee are to review scientific evidence and to make recommendations to the legislature on additional diseases or disorders for inclusion under this section.

Chap. 8 – Race Discrimination

MI: CITY OF WARREN – "DIVERSITY AND INCLUSION COORDINATOR" RESINGNED - LAWSUIT MAY PROCEED

On Aug. 19, 2020, in Gregory Murray v. City of Warren, U.S. District Court Judge Gershwin A. Drain, Eastern District of Michigan (Southern Division) denied the city's motion to dismiss portions of the lawsuit.

> "Plaintiff also claims similarly situated employees who are not in a protected class were treated more favorably than he was where his efforts to perform his job duties were thwarted forcing his resignation while his counterparts were able to retain their positions even after engaging in illegal discrimination, which had been reported to Defendants. Additionally, Defendant City's police commissioner allegedly called Plaintiff a racial slur and prevented Plaintiff, with Defendant Fouts' full support, from investigating past incidents of racial discrimination and civil rights violations within the police department. Accordingly, Plaintiff has stated a viable race discrimination claim under both Title VII and the [Michigan statute] ELCRA."

Facts:

> "Plaintiff was hired by Defendant [Mayor James R.] Fouts to work as the City's Diversity and Inclusion Coordinator on January 6, 2017. … Plaintiff alleges that the City 'has a notorious history of racially discriminatory practices, customs, and policies against African Americans.' *Id*. Because of this, Plaintiff's employment objective was to institute diversity and inclusion training throughout the Defendant City, including for the police, fire and other City Departments…. Plaintiff was further tasked with examining past and current customs, practices and policies of unlawful racial, gender, and other discrimination and to develop training and policy that would promote diversity within the Defendant City and its departments…. Additionally, Plaintiff was to provide assistance with investigating claims of inappropriate, improper or illegal activities that could impair diversity and inclusion in the City's Departments.
>
> ***
>
> Plaintiff alleges that the Defendants thwarted his ability to perform his job duties…. For instance, Plaintiff asserts various incidents occurred during his employment and that Plaintiff was ignored and retaliated against for raising his concerns. *Id*. One of the incidents occurred early in Plaintiff's employment with the

City when he introduced himself to the police chief…. Thereafter, while discussing his introduction to Plaintiff with a deputy sheriff, the police chief stated, 'I told that n….. to stay out of my house.'

***

In early 2017, Plaintiff became aware that a City fire department official referred to firefighter Jose Suarez as the station's 'house n……' Plaintiff again recommended termination, but Defendant Fouts rejected Plaintiff's suggestion. *Id*. Later, in August of 2017, the Equal Employment Opportunity Commission came to the City and conducted a training…. During the training, Defendant Fouts mocked a person with disabilities in front of his executive staff…. Plaintiff confronted Defendant Fouts after the training, and Fouts prohibited Plaintiff from conducting any further trainings in retaliation."

Legal Lessons Learned: The lawsuit will now proceed to pre-trial discovery. The alleged comments are unacceptable in any workplace.

Chap. 8 – Race Discrimination

PA: REVERSE DISCRIMINATION NOT PROVED - WHITE BATTALION CHIEF & CAPTAIN LAWSUIT DISMISSED

On Aug. 4, 2020, in Lawrence Boyle and Gerald Boyle v. City of Philadelphia, Senior U.S. District Court Judge Jan E. DuBois, Eastern District of Pennsylvania, granted the City's motion for summary judgment.

"Plaintiffs offer no analysis of statistical significance whatsoever with regard to the record evidence of exam results and promotions. That failure alone is enough to grant the City's Motion on plaintiffs' disparate impact claim. *** Finally, courts have rejected alleged Equal Protection violations based on an employer's 'reliance on various subjective criteria during the promotional process.' *Baldwin v. Gramiccioni*, No. 16-1675, 2019 WL 2281580, at*16 (D.N.J. May 29, 2019). Indeed, courts have held that '[s]ubjective promotion criteria are not discriminatory *per* se.'*Beckett v. Dep't of Corrections*, 981 F. Supp. 319, 327 (D. Del. 1997) (citing *Shealy v. City of Albany*, 89 F.3d 804, 805 (11th Cir. 1996))."

Facts:

"Lawrence Boyle is a Caucasian male who holds the rank of Fire Captain in the Philadelphia Fire Department…. Gerald Boyle is a Caucasian male who holds the rank of Battalion Chief in the Philadelphia Fire Department.

***

The Deputy Chief and Battalion Chief exams are administered orally and consist of two questions: one testing supervisory knowledge and the other testing technical knowledge…. The exams are administered and graded by a two-person panel made up of officials from fire departments from around the country…. For both questions, 80 percent of the grade a candidate receives is based on the candidate's knowledge and 20 percent is based on his or her communication skills.

***

Evidence of exam results have only been produced for the 2013 Battalion Chief and Deputy Chief exams, as follows[2]:

• Deputy Chief Exam: Of the 25 candidates who took the 2013 Deputy Chief exam, 24 passed—including Gerald Boyle…. Of the 24 candidates who passed, seven were African American and sixteen were Caucasian. *Id*. Six Caucasian candidates and four African American candidates were promoted from the promotional list generated from the 2013 Deputy Chief exam. *Id*. Gerald Boyle

was not promoted….

• Battalion Chief Exam: Of the 44 candidates who took the 2013 Battalion Chief exam, 37 passed. Of the 37 candidates who passed, ten were African American and 27 were Caucasian. *Id*. Ex. F. Nineteen Caucasian candidates and seven African American candidates were promoted from the list.

Disparate Impact under Title VII

Plaintiffs allege that the employment practices of the City have a 'disparate and adverse impact on White Firefighters.' Am. Compl. ¶ 58. In particular, plaintiffs contend that the City's promotional exams are 'designed, scored, and utilized with a discriminatory intent to provide advancement based upon race' and 'have a discriminatory impact in favor of African-Americans and against white or Caucasian applicants.'

***

In support of these allegations, plaintiffs cite the results of the 2013 Battalion Chief and calculate that 90.9 percent of African American candidates passed the exam whereas only 78.7 percent of Caucasian candidates passed the exam. Opp'n Def.'s Mot. 9. Plaintiffs also cite the results of the 2013 Deputy Chief exam, noting that the top three candidates were African American while only one Caucasian candidate was among the top six candidates. *Id*.[4] Finally, plaintiffs point out that, between the 2013 Deputy Chief exam and the 2013 Battalion Chief exam, seven of the eight candidates who failed the exams were Caucasian.

***

There are two standard approaches to analyzing statistical significance in disparate impact cases recognized by the Third Circuit: (1) calculation of probability levels and standard deviation and (2) application of the 'four-fifths' or '80 percent' rule.

With regard to the first approach, the Third Circuit has affirmed that 'a finding of statistical significance with a probability level at or below 0.05, or at 2 to 3 standard deviations or greater, will typically be sufficient' to establish statistical significance. *Stagi*, 391 F. App'x at 140. The second approach, the four-fifths rule, is drawn from the EEOC's Uniform Guidelines on Employee Selection Procedures. 29 C.F.R. § 1607.4(D). Under this analysis, a court considers whether the 'selection rate for any race, sex, or ethnic group' is 'less than four-fifths (4/5) (or eighty percent) of the rate for the group with the highest rate.' *Id*. However, this rule has 'come under substantial criticism' and has been relegated to 'a rule of thumb for the courts.' *Stagi*, 391 F. App'x at 138-39 (quoting *Watson*, 487 U.S. at 995 n.3). Moreover, the four-fifths rule is not favored in cases presenting small sample sizes. *See* 29 C.F.R. § 1607.4(D) ('[g]reater differences in selection rate may not constitute adverse impact where the differences are based on small numbers.'); *see, e.g., Stout v. Potter*, 276 F.3d 1118, 1123 (9th Cir. 2002) ('A sample involving 6 female applicants in a pool of 38 applicants is likely too small to produce statistically significant results.').

***

Plaintiffs offer no analysis of statistical significance whatsoever with regard to the record evidence of exam results and promotions. That failure alone is enough to grant the City's Motion on plaintiffs' disparate impact claim."

Legal Lessons Learned: Lack of statistical significance in exams and promotions led to dismissal of this lawsuit.

Chap. 11 – Fair Labor Standards Act

DC: FLSA – WORKING FROM HOME – NEED SYSTEM THAT REQUIRES HOURLY EMPLOYEES TO REPORT THEIR HOURS

On Aug. 24, 2020, the U.S. Department of Labor, Wage & Hour Division, published FIELD ASSISTANCE BULLETIN No. 2020-5: "Employers' obligation to exercise reasonable diligence in tracking teleworking employees' hours of work."

> "In a telework or remote work arrangement, the question of the employer's obligation to track hours actually worked for which the employee was not scheduled may often arise. While this guidance responds directly to needs created by new telework or remote work arrangements that arose in response to COVID-19, it also applies to other telework or remote work arrangements. An employer is required to pay its employees for all hours worked, including work not requested but suffered or permitted, including work performed at home. See 29 C.F.R. § 785.11-12. If the employer knows or has reason to believe that work is being performed, the time must be counted as hours worked.
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> ***
>
> If an employee fails to report unscheduled hours worked through such a procedure, the employer is not required to undergo impractical efforts to investigate further to uncover unreported hours of work and provide compensation for those hours."

Legal Lessons Learned: Fire departments that allow administrative or other hourly personnel to work from home should implement an online system for reporting of hours worked.

> Note: The DoL referenced Allen v. City of Chicago, 865 F.3d 936, 945 (7th Cir. 2017), cert. denied, 138 S. Ct. 1302 (2018), where the 7th Circuit held:
>
> "This appeal arises from a Fair Labor Standards Act collective action. Plaintiffs are current and former members of the Chicago Police Department's Bureau of Organized Crime who claim that the Bureau did not compensate them for work they did off-duty on their mobile electronic devices (BlackBerrys). The case was tried to the court, Magistrate Judge Schenkier, presiding by consent under 28 U.S.C. § 636(c). The judge issued detailed findings of fact and conclusions of law in favor of the Bureau, finding that it did not prevent plaintiffs from requesting payment for such non-scheduled overtime work and did not know that plaintiffs were not being paid for it. Plaintiffs appeal, but we find no persuasive reason to upset the judgment of the district court. We affirm the judgment for the Bureau.
>
> ***
>
> The [trial court judge, after a 6-day bench trial] agreed with plaintiffs that some of their off-duty BlackBerry activity was work that was compensable under the FLSA. It acknowledged evidence that Bureau supervisors knew plaintiffs sometimes worked off-duty on their Black-Berrys. But the court also found that the supervisors did not know or have reason to know that plaintiffs were not submitting slips and therefore were not being paid for that work. Although supervisors in theory could have checked what they knew of plaintiffs' off-duty work against the time slips they approved, the court found that requiring them to do so would be impractical: supervisors approved a large number of slips per day, and slips were sometimes submitted and reviewed well after the work was performed. Also, the court found, plaintiffs never told their supervisors that they were not being paid for such work."

Chap. 11 – Fair Labor Standards Act

MO: FLSA – FLIGHT MEDIC – AIR EVAC IS "COMMON CARRIER" AND CAN PAY OVERTIME AFTER 84 HRS / 2 WKS

On Aug. 17, 2020, in Jacob Rieglsberger, individually and on behalf of all similarly situated persons v. Air Evac EMS, Inc. et al., the U.S. Court of Appeals for the 8th Circuit (St. Louis) held (3 to 0) that plaintiff's arguments "do not get off the ground."

> "Riegelsberger's arguments to the contrary do not get off the ground. It makes no difference, for example, that medical providers, rather than the patients themselves, are the primary points of contact in arranging transportation. Just as a major airline can still be a common carrier if a passenger uses a travel agent to arrange transportation, health-care providers can provide the same service for their patients without affecting Air Evac's common-carrier status. *Cf. Air Evac EMS, Inc.*, 910 F.3d at 764 (making a similar analogy). The fact that intermediaries are involved, in other words, does not change what Air Evac 'actually does,' which is to transport patients for a fee. *United States v. One Rockwell Int'l Commander 690C/840, Serial No. 11627*, 754 F.2d 284, 287 (8th Cir. 1985)."

Facts:

> "Riegelsberger is a flight paramedic with Air Evac, an 'air ambulance' service that provides emergency medical transportation by helicopter. Under company policy, he does not receive overtime pay until he works more than 84 hours over a two-week pay period. He believes that this policy violates the Fair Labor Standards Act ('FLSA'), which requires most employers to pay overtime after an employee works more than 40 hours in a single week. *See* 29 U.S.C. § 207(a)(1). He seeks to recover unpaid overtime wages under FLSA. *See id.* § 216(b).
>
> ***
>
> Before the district court, Air Evac argued that it was a 'carrier by air,' which would make Riegelsberger's job exempt from FLSA's overtime requirements. *Id.* § 213(b)(3).
>
> ***
>
> The controversy arose after Air Evac took over an air base from REACH Air Medical Services, one of its sister companies. As part of the transition, REACH employees had an option to continue doing the same work for Air Evac. Riegelsberger, who was a REACH employee at the time, took advantage of the offer. The two companies had similar human-resources policies, but overtime was not one of them. REACH paid overtime after an employee reached 40 hours of work in a *single* week. Air Evac, by contrast, required 84 hours over *two* weeks. In a notice to employees before the transition, Air Evac explained that the 84-hour overtime policy was one of just 'a few differences' between the two companies.
> Air Evac also sent an offer letter to Riegelsberger. In it, under the heading 'Compensation,' the letter stated that the job was a *non-exempt* position for purposes of Federal Wage and Hour Law, which mean[t] that [he was] eligible for overtime pay for hours actually worked in excess of 84 hours in a pay period.
>
> ***
>
> FLSA exempts certain jobs from its overtime requirements, including 'employee[s] of a carrier by air subject to the provisions of title II of the Railway Labor Act.' 29 U.S.C. § 213(b)(3). The Railway Labor Act, for its part, covers employees of 'every common carrier by air engaged in interstate or foreign commerce.' 45 U.S.C. § 181.
>
> ***
>
> Based on this understanding, Air Evac checks all the necessary boxes. First, it is a transportation company that "holds itself out to the public" for hire. *Arrow Aviation, Inc.*, 266 F.2d at 490. One way it does so is by selling 'memberships,' a form of prepaid protection against some costs. It also markets its services to

medical providers and emergency responders, who request rides on behalf of those who need them. Through both channels, Air Evac is willing to provide transportation services for hire to all within its definable segment: people in critical medical condition who require an air evacuation, either from a remote location to a hospital or between two hospitals."

Legal Lessons Learned: Flight medics are entitled to overtime.

Note: See this recent settlement: "Air medical company agrees to $78M settlement for overtime" (July 2, 2020);

"OAKLAND, Calif. — A medical helicopter operator has been ordered to pay $78 million to its flight crew employees for unpaid overtime and missed breaks in a class-action lawsuit settlement. Alameda County Superior Court Judge Winifred Y. Smith agreed Wednesday to the preliminary settlement filed by about 450 former and current medical flight crew members employed in California by Air Methods Corporation of Colorado.

Air Methods also is expected to pay daily overtime to its medical flight crew starting from June 28, resulting in an estimated 20% or more increase to their salaries, according to the attorneys representing the crew.
Air Methods is reportedly the country's largest air medical transport company and operates helicopter bases. Teams of nurses and paramedics are dispatched in the helicopters, often to remote areas.
Air Methods was accused of refusing to pay daily overtime for crews working more than eight hours in a workday. The flight crew commonly worked 24-hour shifts, according to attorney James Sitkin, who represented the crew. He alleged that Air Methods did not allow the flight crew to take off-duty meal breaks or rest breaks."

Chap. 12 – Drug-Free Workplace

PA: TACO BELL MANAGER CALLS 911 – CUSTOMER "ASLEEP STANDING UP" – PD FIND DRUGS – CUSTOMER CONVICTED

On Aug. 14, 2020, in Commonwealth of Pennsylvania v. Obed Nunez, Superior Court of Pennsylvania, 2020 PA Super 198, held (3 to 0) that the trial court judge properly held that the PA Overdose Immunity statute does not apply since the Taco Bell Manager William Jay called 911 because a customer was "asleep standing up," not because the customer was necessarily having an overdose. Also PA statute requires 911 caller to remain with overdose person.

"However, Mr. Jay [Taco Bell Manager] did not make any statement during this call that he reasonably believed Appellant required immediate medical attention, *see id.*, nor did Mr. Jay relay to the dispatcher that he reasonably believed Appellant was experiencing a drug overdose event, as defined by the Act."

Facts:

[From recording of the Manager's 911 call.]

3:59:18 [p.m.]

[Mr. Jay]: Oh, yeah. Can I have, I'm at the Taco Bell in

Upper Darby. Can I have an escort across the —

Dispatcher: O kay. You're at Taco Bell. Where are you going to?

[Mr. Jay]: No. I need, a customer, actually he's extremely high.

Dispatcher: Which Taco Bell you at, sir?

[Mr. Jay]: That one on West Chester Pike. (Noise)

Dispatcher: Is he a white male, black male, [H]ispanic?

[Mr. Jay]: He's a white male.

Dispatcher: White male. What color shirt? What color pants?

[Mr. Jay]: He's got on a gray hoodie and black, purple and white sweat pants.

Dispatcher: Black, purple and white sweat pants? (Noise)

[Mr. Jay]: Yes, he's staying right in the lobby. (Noise) . . . He's asleep standing up. Sir.

Dispatcher: Is he a customer?

[Mr. Jay]: Yes. (Noise)

[From PD affidavit.]
"On Monday September 10th, 2018 at 15:59 hours your Affiant, Officer Michael Wilson #80 of the Upper Darby Township Police Department, was on duty, working in full uniform, and operating marked patrol vehicle 79-23. During my course of duty I was dispatched to the Taco Bell located at 7500 West Chester Pike, Upper Darby, PA, 19082 for the report of a customer dispute in progress. While en route DELCOM advised that a male inside of the store was now unconscious. Upon entering the store I located [Appellant] being held up on a chair by Taco Bell employees. [Appellant] was unresponsive and appeared to be overdosing on narcotics. Myself and Officer Michael Begany [#137] placed [Appellant] flat on the ground, and I administered (1) 4mg dose of Naloxone through his nostril. During a search of [Appellant] for officer safety, Officer Begany located (1)[] clear, glassine bag containing (1) blue wax paper bag stamped "White House" which contained a white powdery substance, suspected to be heroin, in [Appellant's] right front pants pocket. [Appellant] did eventually regain consciousness, however due to his intoxicated state he was transported by paramedics to Delaware County Memorial Hospital. At police headquarters the suspected heroin was field tested using the NARKII (Heroin/Fentanyl Reagent) test kit, which produced positive results for the presence of Fentanyl. . . .

Trial Court's finding:
However, Mr. Jay did not make any statement during this call that he reasonably believed Appellant required immediate medical attention, *see id.*, nor did Mr. Jay relay to the dispatcher that he reasonably believed Appellant was experiencing a drug overdose event, as defined by the Act. *See id.*; *see also* 35 P.S. § 780-113.7. Rather, our review of the record reveals that the trial court correctly characterized Mr. Jay's first 911 call as 'a manager of an establishment contacting the police for assistance in removing an individual who, by his intoxicated nature, [was] causing a disturbance to the regular course of business.'"
The Court agreed with the Commonwealth:

> "The [Act] does not apply to the facts of this case because [Appellant] failed to prove that [Mr. Jay] reasonably believed that [Appellant] was overdosing and needed immediate medical attention to prevent death or serious bodily injury. The trial court found that [Mr. Jay] called 911 to remove the uncooperative [Appellant], not to provide him with medical attention. As the trial court accurately and succinctly summarized, the 911 call was made out of concern for the business; not out of concern for Appellant's well-being.
>
> The [Act] does not grant blanket immunity to everyone who overdoses. The plain language of the statute provides the conditions that must be met for the statute to apply and the trial court correctly found that these conditions were not present."

Legal Lessons Learned: Over 40 states have enacted Drug Overdose Immunity statutes, designed to encourage fellow drug users to call 911, without fear of their own arrest.

> Note: A similar decision involving a customer in a McDonald's restaurant, Aug. 13, 2020: Commonwealth of Pennsylvania v. Francis South, 2020 PA Super 194:
> "During her shift, Ms. Glass called 911 and [reported that an adult white male was passed out in the restaurant, and during the call, he got up and proceeded to exit the building and stumble through the parking

lot…. To qualify for immunity, it was Appellant's burden to show that Ms. Glass reasonably believed he required emergency medical care due to a drug overdose. 35 P.S. § 780-113.7(2)(i); *Lewis*, 180 A.3d at 791. We agree with the trial court's conclusion that there was no evidence submitted at Appellant's trial 'which would support that Ms. Glass, as the reporter, had any reasonable belief that Appellant was in need of immediate medical attention to prevent death or serious bodily injury from a drug overdose." Trial Court Opinion, 1/10/20, at 8.'"

See also Ohio law – ORC 2925.11 Possession of controlled substances.

(viii) "Qualified individual" means a person who is not on community control or post-release control and is a person acting in good faith who seeks or obtains medical assistance for another person who is experiencing a drug overdose, a person who experiences a drug overdose and who seeks medical assistance for that overdose, or a person who is the subject of another person seeking or obtaining medical assistance for that overdose as described in division (B)(2)(b) of this section.

But there is a treatment requirement:

(ii) Subject to division (B)(2)(g) of this section, within thirty days after seeking or obtaining the medical assistance, the qualified individual seeks and obtains a screening and receives a referral for treatment from a community addiction services provider or a properly credentialed addiction treatment professional.

But see criticism: The Network For Public Health Law - "Overdose 'Good Samaritan' Laws Should Protect, Not Punish" (Jan. 26, 2020):

"These laws have further limitations as well. In at least a dozen states, the Good Samaritan is required not only to call for help but also to jump through additional hoops such as providing their full name to law enforcement, staying on the scene, and cooperating with responding officers. None of those requirements are necessary to help the person suffering from an overdose; all are likely to discourage people from calling for help."

Chap. 13 – EMS, incl. Community Paramedicine, Corona Virus

TX: "UNRESTRAINED" PATIENT DROPPED FROM STRETCHER – UNEVEN DRIVEWAY – NO EXPERT REPORT

On Aug. 25, 2020, in City of Houston v. Shirley Houston, the Court of Appeals for the First District of Texas held (3 to 0) that the lawsuit should be dismissed, reversing a trial judge's denial of City's motion to dismiss.

"In its sole issue, the City contends that the trial court erred in denying its motion to dismiss because Houston's claim constitutes a health care liability claim[2] and she failed to serve it with a statutorily-required expert report. *** Here, the allegations in Houston's first amended petition show that her claim is against a health care provider and is based on facts that implicate the defendant's conduct during the course of a patient's care, treatment, or confinement…. Thus, [the Plaintiff] bore the burden of rebutting the presumption that her claim against the City was a health care liability claim…. She has not done so."

Facts:

"In her first amended petition, [Ms] Houston alleges that on or about March 12, 2017, Houston, while in her home, 'pressed her emergency Life Alert button after experiencing difficulty breathing.' In response, two Houston Fire Department ('HFD') emergency medical technicians ('EMTs') arrived at her home. The EMTs then 'used a motor-operated gurney owned by' the City to transport Houston to an ambulance. According to Houston, the EMTs lowered the gurney and placed Houston on the gurney 'in a laying position.' As Houston lay on the gurney, the EMTs raised it 'to its highest height[,] without properly securing' Houston. While the

EMTs transported Houston from her home to the ambulance outside, 'the gurney suddenly gave way, tilted, and caused [Houston] to [be] drop[ped] on the ground.' Houston lay on the ground in pain for over twenty minutes before additional HFD personnel arrived. Houston alleges that, as a result of her fall, she 'suffer[ed] severe, painful, and permanent injuries that require[d] [her] to undergo surgery.'

***

The 'EMS Patient Care Report' from the HFD, which Houston attached to her supplemental response to the City's motion to dismiss, states that the HFD EMTs arrived at Houston's home in an ambulance in response to a '[f]all [v]ictim' call. Upon arrival, the EMTs found Houston, a sixty-four-year old, lying on her left side on the floor. Houston's chief complaint was 'weakness.' Houston's family members stated that Houston 'ha[d] been falling more frequently for the past two weeks' and had swelling in her lower extremities. The EMTs took Houston's vital signs, completed an '[a]ssessment [e]xam,' and obtained Houston's '[m]edical [s]urgery history' and 'medication allergies.' Houston told the EMTs that she needed help to get 'off the floor,' and she agreed to be transported to a hospital by the EMTs. To take Houston from her home to the ambulance outside, the EMTs 'loaded and secured' Houston to the ambulance's 'stretcher' because of certain conditions: an 'uneven driveway,' 'minimal lighting,' an 'unseen pothole,' Houston's weight, and 'the stretcher being top heavy.'

According to the report, as the HFD EMTs rolled Houston on the stretcher to the ambulance outside, the stretcher 'tipped over' and Houston fell to the ground because she was 'unsecured.' Upon falling, the EMTs assessed Houston. Houston stated that her left elbow hurt, and the EMTs observed an abrasion on her elbow. Additional HFD personnel were dispatched to Houston's home, and upon their arrival, the EMTs 'loaded' Houston on a 'backboard,' and secured her onto the stretcher. The EMTs placed Houston in the back of the ambulance, cleaned and bandaged her left elbow abrasion, and provided her with oxygen. While transporting Houston to a hospital, the EMTs monitored and evaluated Houston and took her vital signs.

***

The City answered, generally denying the allegations in Houston's petition. The City then moved to dismiss Houston's negligence claim against it, asserting that Houston had alleged a health care liability claim, she had failed to serve the statutorily-required expert report, and the trial court had to dismiss Houston's claim… In response, Houston argued that she was not required to serve an expert report because she had not alleged a health care liability claim and the City was not a health care provider.

***

Under the Texas Medical Liability Act ('TMLA'), a plaintiff whose claim constitutes a health care liability claim must serve an expert report, with a curriculum vitae for the expert whose opinion is offered, on a defendant physician or health care provider within 120 days of the filing of an answer by the defendant. TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(a); *see also Weems*, 575 S.W.3d at 360-61.

***

[Ms] Houston argues that her claim cannot constitute a health care liability claim because her 'injuries did not occur in a health care setting, a health care facility, or hospital' and she sustained her injuries 'just outside her front door in her driveway.' That said, the location of where the health care is provided does not determine whether a claim constitutes a health care liability claim.

***

As a result, because Houston's claim constitutes a health care liability claim and Houston failed to serve the City with a statutorily-required expert report, we hold that the trial court erred in denying the City's motion to dismiss.
We sustain the City's sole issue."

Legal Lessons Learned: When moving a patient on a stretcher from her home the patient must be "secured" to the stretcher and extreme caution must be exercised.

Chap. 16 – Discipline

WA: FIRE CHIEF TERMINATED – CONTRACT REQUIRES "CAUSE" – LAWSUIT MAY PROCEED TO TRIAL

On Aug. 19, 2020, in David W. Bathke v. City of Ocean Shores & Crystal Dingler, U.S. District Court Judge Benjamin H. Settle, U.S. District Court, Western District of Washington at Tacoma, held that the City's motion for summary judgment was denied concerning the "breach of contract" claim. As to Bathke's other claims, the Court grants Defendants' motion for summary judgment and dismisses Bathke's claims for retaliation, promissory fraud, and negligent misrepresentation.

> "In a wrongful termination case, whether an employer properly determined it had just cause for termination is a question for the trier of fact." *Lund v. Grant Cty. Pub. Hosp. Dist. No. 2,* 85 Wn. App. 223, 228 (1997). *** "In this case, Bathke's declaration and supporting evidence sufficiently creates a question of fact on the issue of whether the City had just cause to terminate him. In reply, Defendants attempt to undermine the holding in *Lund* by misquoting employment discrimination cases…. Defendants, however, fail to provide any persuasive authority or reason to take this question of fact away from the factfinder. Therefore, the Court denies Defendants' motion on Bathke's breach of contract claim."

Facts:

> "Bathke has over 35 years of experience in firefighting and managing fire departments and has served as the fire chief of three different city fire departments. n April of 2017, Bathke interviewed for the fire chief position with the City…. After the interview, Dingler, the City's mayor, asked Corey Kuhl ('Kuhl'), a lieutenant in the City's Fire Department, to conduct a background check on Bathke…. In addition to speaking with the individuals Bathke had listed as references, Kuhl decided to reach out to individuals at several fire departments in Washington that he knew interviewed Bathke as well…. Kuhl contacted PJ Knowles ("Knowles"), the union president for the Maple Valley fire department. *Id*. On April 11, 2017, Knowles responded by sending Kuhl the two-page letter Knowles had drafted as his recommendation against hiring Bathke in Maple Valley….
>
> ***
>
> On April 22, 2017, Dingler offered Bathke the position as the City's fire chief. *Id*. ¶ 12. As part of the hiring process, Bathke and theity entered into an agreement stating that he could not be terminated except for 'cause….' In November 2017, Bathke completed his probationary period, and the City converted his position to a full-time position.
>
> ***
>
> In November 2018, Dingler met with the City's Human Resource Specialist Dani Smith ('Smith') regarding concerns about Bathke and the fire department. Smith informed Dingler that the union firefighters were considering a vote of 'no confidence' against Bathke…. Dingler then spoke with Kuhl who confirmed that Bathke had lost the confidence of the department…. Dingler contends that she then spoke with Bathke regarding the impending vote of 'no confidence.' Bathke declares that this meeting did not happen.
>
> ***
>
> On February 13, 2019, Dingler… directed Bathke to appear at a pre-termination hearing and provided a summary of charges. *Id*. Dingler set forth six categories of charges as follows: (1) failure to establish trust and confidence among staff, (2) poor judgment and decision-making with respect to purchases and expenditures,

(3) failure to comply with policies and legal requirements in personnel matters, (4) failure to respond promptly or properly to calls, (5) disrespectful comments and behavior to and about others, and (6) dishonesty. *Id*. Dingler attached over 150 pages of documents supporting the charges. *Id*. On March 12, 2019, the hearing was held. On March 22, 2019, Dingler sent Bathke a letter informing him of the City's decision to terminate his employment for cause."

Legal Lessons Learned: Fire Chiefs, when accepting a new position, should include in their agreement that they cannot be fired except for "cause."

Chap. 16 – Discipline

OH: EMS CAPTAIN FIRED – FACEBOOK POST ABOUT DEATH TAMIR RICE – LAWSUIT REINSTATED, "PUBLIC CONCERN"

On Aug. 19, 2020, in Jamie Marquardt v. Nicole Carlton & City of Cleveland, the U.S. Court of Appeals for the 6th Circuit (Cincinnati) held (3 to 0) that the U.S. District Court judge in Cleveland improperly granted the city's motion for summary judgment.

> "Because Marquardt's social media posts addressed a matter of public concern, the district court erred in granting summary judgment on that basis."

Facts:

> "While employed as a captain in the Cleveland Emergency Medical Services (EMS), Jamie Marquardt allegedly made incendiary comments on his private Facebook page regarding the death of twelve-year-old Tamir Rice, a tragic incident that gripped Cleveland and the nation. Following his dismissal from the EMS, Marquardt brought suit alleging he was terminated in retaliation for exercising his First Amendment free speech rights.
>
> ***
>
> The Facebook posts, all agree, did not identify Marquardt as a City employee, nor were they made during work hours. Nor would one likely dispute their controversial nature. The posts related to an incident that made local and national headlines: the shooting death of Tamir Rice. As the many who followed this fatal episode are well aware, Cleveland officers received an alert that a male was purportedly pointing a gun at people at a Cleveland recreation center. When officers responded to the scene, they shot and killed the suspect. The suspect turned out to be twelve-year-old Tamir Rice. And the 'gun' he was alleged to possess was just a toy. Vigils and protests followed, questioning this use of lethal force.
>
> ***
>
> The events at issue today unfolded some fourteen months later, when a disturbing post appeared on Marquardt's private Facebook page. Although Marquardt contends he did not author the post, there is little dispute that the content on his Facebook page expressed satisfaction at Rice's killing:
>
> > Let me be the first on record to have the balls to say Tamir Rice should have been shot and I am glad he is dead. I wish I was in the park that day as he terrorized innocent patrons by pointing a gun at them walking around acting bad. I am upset I did not get the chance to kill the criminal fucker.
>
> Someone by the name of Kevin, apparently one of Marquardt's cousins, posted a comment in reply. A second post then appeared on Marquardt's page:
>
> > Stop Kevin. How would you feel if you were walking in the park and some ghetto rat pointed a gun in your face. Would you look to him as a hero? Cleveland sees this felony hood rat as a hero . . .

The posts were visible only to those whom Marquardt had added as a "friend" on the Facebook platform. Marquardt removed the posts within hours. And he later claimed an acquaintance with access to his phone made the posts while he slept. Yet the posts quickly became a subject of discussion among Marquardt's EMS colleagues. After various EMS employees expressed concern over the jarring content of the posts, EMS Commissioner Nicole Carlton cited the posts in a complaint filed with the City of Cleveland. A hearing was held to determine whether Marquardt had violated the City's social media policies. Two weeks later, Carlton notified Marquardt that he had been terminated by the City. The termination letter advised Marquardt that his speech violated City policies and 'did not involve a matter of public concern.'

***

And just days before those posts appeared, the incident's aftermath again made national news when Cleveland was found to have billed Rice's family for his ambulance ride, a decision for which the City later apologized. Christine Hauser, *Cleveland Drops Attempt to Collect $500 From Tamir Rice Family*, N.Y. Times (Feb. 11, 2016), https://www.nytimes.com/2016/02/12/us/cleveland-500-bill-tamir-rice-shooting.html (last accessed July 26, 2020).

***

The ensuing posts on Marquardt's Facebook page made certain assertions about the well-documented shooting that plausibly relate to the officers' handling of the encounter and the resulting community reaction. In the posts, the author seems to assert that Rice's shooting was justified because he was 'terroriz[ing]' people by pointing a gun at them. The posts also assert that Rice, due to his conduct at the time of the killing, should not be viewed as a hero by Clevelanders. Given the widespread local and national scrutiny of the Rice shooting, these aspects of the posts directly relate to a "subject of general interest and of value and concern to the public." *City of San Diego v. Roe*, 543 U.S. 77, 84 (2004) (per curiam).

***

Nowhere is there any suggestion that Marquardt (or whomever made the posts) was impacted personally or professionally by the Rice shooting. To be sure, Marquardt was employed by the Cleveland EMS, and that unit had a role in responding to the Rice shooting. But there is no allegation that Marquardt was personally involved in that response. And even if the more extreme excerpts from the posts could somehow be construed as involving matters of personal interest, the 'public concern/private interest analysis does not require that a communication be utterly bereft of private observations or even expressions of private interest.' *Mosholder*, 679 F.3d at 450-51 (citing *Perry v. McGinnis*, 209 F.3d 597, 609 (6th Cir. 2000)); *see also Westmoreland v. Sutherland*, 662 F.3d 714, 719 (6th Cir. 2011) (holding that it is not 'necessary for the entire expression to address matters of public concern, as long as some portion of the speech does' (citation omitted)). Rather, the relevant question is whether the communication 'touches' upon matters *only* of personal interest.'" *Mosholder*, 679 F.3d at 450 (quoting *Connick*, 461 U.S. at 147). And here, the content is not so narrowly confined.

***

Albeit limited, the known context gives no indication that the speech concerned primarily a matter of Marquardt's personal interest. Whether the posts were spontaneous expressions or long-developed ideas, their substance still reflects matters of public concern because they relate to a 'matter of political, social, or other concern to the community.' *Connick*, 461 U.S. at 146. That fairly describes the circumstances surrounding the Rice shooting, which generated intense public debate and quickly became a matter of public discussion. As the posts touch on these same issues, they too address a matter of public concern."

Legal Lessons Learned: Social Media posts are resulting in terminations in the fire service; employers must carefully review whether the matter is of "public concern" before imposing discipline.