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Aug. 2023 – FIRE & EMS LAW NEWSLETTER

[NEWSLETTER IS NOT PROVIDING LEGAL ADVICE.]

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- **NEWSLETTERS:** If you would like to be added to UC Fire Science listserv, just send him an e-mail. View current and past newsletter via the Fire Science webpage.
- **TEXTBOOK:** Updating 18 chapters of my textbook (2018 to current). FIRE SERVICE LAW (SECOND EDITION), Jan. 2017: View textbook via Waveland site.

16 NEW CASES – added to ONLINE LIBRARY (case summaries 2018 - present):
View cases via Scholar@UC

File: Chap. 1, American Legal System; Arson

CA: BURN BARRELL WAS WASHING MACHINE CYLINDER – REFUSED PUT OUT - $500 FINE UPHELD – PHOTOS HELPFUL

On July 21, 2023, in Chuck Dunn v. Kern County, et al., the California Court of Appeals, Fifth District, held (3 to 0, unpublished opinion) held that the citation was proper. Mr. Dunn refused on June 5, 2017 to put out the fire, in a washing machine cylinder, flames two to four feet above the cylinder, and it was in an area of California where there had recently been a devastating wildland fire. He was not using the fire to cook food. Photos taken at the scene were reviewed in hearing before a Fire Captain, and then on appeal to Kern County Board of Supervisors on Dec. 5, 2017, and on appeal before Kern County Superior Court judge on February 15, 2022.

The Court held:

"Clearly, the fire prevention officials were especially concerned because an apparently devastating fire had damaged the region in the recent past. Notwithstanding the factual disputes present in this case and recognizing firepits and outdoor barbecues are in common use, the concerns of the authorities regarding what they regarded as unsafe burning based on particular conditions are significant. The fact that petitioner refused requests to extinguish what officials regarded as an unsafe fire cannot be ignored. Taking all of this into consideration and following the dictates of the law that require courts review administrative decisions with deference, we conclude there was sufficient evidence to justify the citation. For the reasons that follow, we affirm the trial court's judgment."

> "Petitioner conceded at the hearing he had a fire on the day in question, was told no citation would be issued if he extinguished the fire, and still refused to put the fire out.

> The report from the responding firefighter noted the flames extended two to four feet above the top of the washing machine cylinder being used as a burn barrel. The hearing officer also considered photographs of the scene showing piles of dead pine needles and leaves nearby, which petitioner conceded were accurate and with which petitioner had apparently started the fire. The responding firefighter's report placed those brush piles approximately 10 to 15 feet away from the fire. The report also noted ash fallout from the fire was landing on the brush piles, and other combustible items were even closer to the fire. Further, while petitioner maintains he started the fire for cooking, and local ordinances have an exception to the permitting process for cooking fires, the report notes petitioner 'had arranged the brush in his Washer tub in a fashion that would not allow for a grate to be placed over it to cook on. He had long sticks hanging out of the tub up to three feet and log [*sic*] stacked up over the top of the tub not allowing for cooking. The report also noted the firefighter did not see any food around the fire."

Legal Lesson Learned: The photographs taken by firefighters supported the citation; Courts review administrative decisions with deference.

File: Chap. 1, American Legal System, Arson

NC: BURNING BRUSH – NAT. FOREST 70 ACRE FIRE – NEW TRIAL - MAY TELL JURY THOUGHT WAS ON FAMILY LAND

On July 15, 2023, in United States of America v. Casey Lee Evans, a/k/a James Casey Lee Evans, the 4th Circuit Court of Appeals (Richmond, VA) held (3 to 0) that trial judge improperly excluded the defendant's preferred testimony that he thought he was burning brush on April 3, 2020 on his family property. The jury might have therefore found him not guilty since under federal statute the Government must prove he acted "willfully." He was sentenced in 2022 to "time served" in federal custody, plus two years of supervised release. The conviction is reversed, and he is now entitled to a new trial.

The Court held:

"To summarize, the Government does not have to prove that the defendant knew he was on federal land or intended to burn federal land to obtain a conviction under 18 U.S.C. § 1855. But the Government does have to prove that the defendant acted willfully, and a defendant may attempt to demonstrate an honest mistake of fact to negate the Government's proof on that score. *** Accordingly, we conclude that the district court made an error of law when it excluded Evans's proffered testimony on the ground that his 'subjective belief' about whether he was on his family's property when he set the fire was inadmissible for any purpose 'because it's not relevant to the issues in this case.' *** On this record, we cannot say the error was harmless. The excluded testimony was Evans's primary defense. If credited by the jury, the testimony would have squarely raised the issue of whether he made a factual mistake sufficient to cast a reasonable doubt on the willfulness of his actions in setting the fire. The jury, not this Court, must assess the credibility of the proffered testimony and weigh it against the Government's evidence to make that judgment… For these reasons, we vacate Evans's conviction under 18

U.S.C. § 1855. We remand the case to the district court for further proceedings consistent with this opinion."

> "Federal law makes it a crime to, 'willfully and without authority, set[] on fire any timber, underbrush, or grass or other inflammable material . . . upon any lands owned or leased by . . . the United States.' 18 U.S.C. § 1855. A jury convicted Casey Evans of violating this statute after he started a brush fire that burned 70 acres of the Nantahala National Forest in western North Carolina. Evans asserts his innocence, claiming he did not act with a culpable mental state because he thought he was setting the fire on his family's land, not on federal government property. His arguments require us to address the scope of Section 1855's *mens rea* requirement.
>
> ***
> At trial, Evans admitted that he made a brush pile, set it on fire, and did so without the federal government's permission. Fire investigators described how they found the fire's area of origin, and a professional surveyor gave expert testimony that he surveyed that area and concluded it was within the Nantahala National Forest, which the U.S. Forest Service owns.
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> Although Evans questioned the surveyor's evidence, the trial largely turned on whether the Government could prove that Evans acted willfully. A firefighter and several members of law enforcement testified that Evans voluntarily spoke to them on the day he set the fire and several occasions thereafter. According to their testimony, Evans told them he set the fire, recognized the fire was on government-owned land, and made several remarks that a factfinder could interpret as evincing a bad purpose or guilty conscience. But when Evans took the stand, he disputed their testimony, asserted they misunderstood him, and blamed his comments on being regularly intoxicated in the weeks after the fire. He denied saying he 'knew or believed that the property where [he] set the fire was on government land…'
>
> ***
> A portion of Evans's testimony, however, was excluded by the district court's earlier ruling. Outside the jury's presence, Evans proffered testimony that he believed he was on his family's land when he assembled the brush pile and set it on fire. Evans explained his family's long ownership of property abutting the Nantahala National Forest and his understanding of the boundary lines based on certain markers on the property. Relative to those boundaries, Evans proffered, he believed that he was on family land when he set the fire. The court excluded Evans's testimony about his belief as irrelevant because Section 1855's jurisdictional element contains no scienter requirement. The court also rejected Evans's attempt to offer testimony limited to the fact of certain boundary markers, which the court concluded would confuse the jury and impermissibly blur the lines between lay and expert testimony."

Legal Lesson Learned: Defendant was entitled to tell jury he believed he was burning brush pile on family land. Anticipating such a defense, it is very helpful to prosecutors if fire investigators have tape record their interviews, with subject's permission.

Note: See July 25, 2023 article, "Federal Appeals Court throws out conviction for burning of federal Nantahala forest."

See Jan. 6, 2022 DoJ Press Release: "Asheville Jury Convicts Franklin, N.C. Man Of Starting A Fire That Burned More Than 70 Acres Of Federal Land. Evans was convicted of willfully setting a fire on federal land, which carries a statutory maximum penalty of five years in prison and a $250,000 fine. Following the guilty verdict, Evans was remanded into federal custody. A sentencing date has not been set."

File: Chap. 1, American Legal System, Arson

OH: ARSON – CIRCUMSTANTIAL EVIDENCE SUFFICENT – ARSON REGISTRY STATUTE – JUDGE CAN SET LENGTH

On July 13, 2023, in State of Ohio v. Anthony D. Lochart, the Court of Appeals of Ohio, Fifth District, Richland, upheld the jury conviction on circumstantial evidence and the sentence of 8-12 years, but order that he been on lifetime arson registry must be re-sentenced. Judges must have discretion when imposing registration period; the Ohio statute to be unconstitutional breach of "separation of powers" because judges can only reduce the period of registration rom lifetime to not less than 10 years only if the judge "receives a request from the prosecutor and the investigating law enforcement agency to consider limiting the arson offender's registration period."

The Court held:

"Although the evidence was circumstantial, it is well settled that the state may rely on circumstantial evidence to prove an essential element of an offense because 'circumstantial evidence and direct evidence inherently possess the same probative value[.]' *Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 at paragraph one of the syllabus. Lockhart had both the opportunity and the means to set the fire and we find the jury did not lose its way in finding he did so.

***

Lockhart on appeal argues the fire could have been started by three D batteries discovered in the closet after the fire. "However, fire Captain Bob Dean, a firefighter and investigator with 28 years' experience and hundreds of fire investigations testified he discovered no circumstance which would lead him to conclude the fire started on its own. He observed melted clothing on the floor of the closet which fueled the fire. Dean further testified that it was highly unlikely that three D batteries would start a fire and that he has never investigated a fire which was started by batteries."

***

Returning to the issue at hand [period of time on arson registry], the Fourth District concluded that R.C. 2909.15(D)(2) violates the separation of powers. *State v. Dingus*, 2017-Ohio-2619, 81 N.E.3d 513, ¶ 31 (4th Dist.). The court expressed its conclusion as this: 'By depriving the trial court of the ability to act without the request of the prosecutor and the investigating law enforcement agency, the trial court's independence is compromised. The prosecutor and the

investigating law enforcement agency effectively decide which registration periods can be reviewed by the trial court; thus, the prosecutor and the investigating law enforcement agency have an "overruling influence" over the trial court….' We agree with the Fourth District that this statute violates the separation of powers doctrine."

> "Shelby City Police Officer David Barnhart was one of the first on the scene and immediately noticed smoke billowing out of the apartment. Upon entering apartment 1, Barnhart saw J.O. standing near the front door and Lockhart coming from the rear of the apartment where the fire was located. At the rear of the apartment Barnhart observed a vinyl door lying on the kitchen floor which appeared to have been removed from the hinges of a small closet in the kitchen. The closet was on fire and smoldering clothing was lying on the concrete patio outside the kitchen door. Barnhart proceeded to evacuate the residents of the upstairs apartment and the apartment next door.
>
> The fire department arrived and extinguished the fire which was contained to the closet and some surrounding trim. Fire Captain Bob Dean then investigated and discovered no reason the fire could have stared in the closet on its own. After noting some melted polyester clothing and the burn pattern, Captain Dean theorized fire was set to some clothing in the closet which then melted and dropped to the floor of the closet, fueling the fire.
>
> Further investigation by law enforcement and the fire department determined there were three people present in the apartment when the fire broke out; J.O who was in his bedroom asleep, J.S. who was in the living room watching television, and Lockhart, who was in his bedroom near the kitchen or in the kitchen.
>
> Lockhart was identified as the suspect and placed under arrest. Upon a search incident to arrest, a butane torch lighter was found on Lockhart's person."

Legal Lesson Learned: The defendant was properly convicted on circumstantial evidence, including testimony of FD arson investigator with 28 years of experience.

File: Chap. 1, American Legal System, Arson

MD: PLAINTIFF'S EXPERT WITNESSES CAN TESTIFY - BATTERIES IN MacPro LAPTOP LED TO LARGE CONDO FIRE

On July 7, 2023, in Philadelphia Indemnity Insurance Company, et al. v, Apple, Inc., U.S. District Court Judge Stephanie A. Gallaher, U.S. District Court for the District of Maryland, held that plaintiff may use three expert witnesses at trial – a memory export, and two battery fire experts. On Nov. 24, 2017, shortly after midnight a fire broke out in the bedroom of Ms. Ross in Severn House Condominiums in Annapolis, Maryland, that damage to her unit and surrounding units. She initially told FD that it might have been caused by her electric heating pad (12-18 inches under her back), but six weeks after the incident, Ms. Ross reviewed the fire department's report and learned that some remnants of the MacBook had been found on the remains of her

mattress…. At her deposition in 2021, she testified that after reviewing the fire department's report, she had many 'flashbacks' and 'bad dreams' that left her 'increasingly convinced' that the small flames she saw upon awakening were on the laptop at the foot of her bed. A memory expert will be allowed to testify. The laptop was recovered and examined – two battery experts will testify that batteries in the laptop likely caused the fire.
The Court held:

MEMORY EXPERT. "In this case, then, this Court will allow Dr. Weaver's proposed testimony to some extent. Specifically, he will be permitted to testify as to the process of encoding, particularly in a traumatic situation, memory reconstruction, suggestibility, and post-event information. An explanation of those general principles is relevant to the jury's consideration and weighing of Ms. Ross's testimony. Obviously, Dr. Weaver will not be permitted to opine on the ultimate issue of whether Ms. Ross's testimony is credible or incredible. But his inability to reach that issue does not mean his testimony about memory formation, retention, and alteration is irrelevant or useless to the jury… The evidence is helpful and will be permitted."

BATTERY EXPERTS. "Accordingly, Mr. Hoffmann will be permitted to testify that Ms. Ross's laptop was at a low state of charge, defined as less than fully charged, and that batteries at a low state of charge are less likely to produce enough energy to be a competent ignition source. He will not be permitted to testify more definitively that Ms. Ross's battery cell was at too low of a SoC to ignite the bedding material or cause the fire.

***
Michael Eskra is a battery expert retained by Plaintiffs. Apple does not challenge his expert qualifications. Instead, it contends that his methodology is unreliable because, in Apple's view, he simply looked at the CT scans of the battery cells to reach his conclusion. Because the fifth cell shows internal, localized damage to the electrode windings while the other four only have exterior damage, Mr. Eskra opines that the fifth cell shorted and caused the ignition… But because Plaintiffs are not relying on Mr. Eskra to establish conclusively the defect in the battery cell, his testimony is relevant and permissible."

> "The fire department suppressed the fire and then "overhauled" Ms. Ross's bedroom, which meant opening the walls, ceilings, and voids and removing debris to ensure that no hidden sources of smoldering would re-ignite the flames… During investigation after those steps had been taken, the Fire Marshal discovered some remains of a MacBook Pro, including four of its six battery cells, on the remnants of Ms. Ross's mattress…. However, the location of the laptop during the fire cannot be conclusively ascertained due to the intervening events…. Several other electrical items, including a heating pad, floor lamp, leg massager, and power strip, were found in the area of Ms. Ross's bed.
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> On the night of the fire, Ms. Ross told first responders 'that she thinks the fire started with her electric heating pad' which was 'under her back when she went to bed….' :7. She also told the fire investigator that she 'recalls unplugging her laptop computer and setting it on the left side of her sofa chair next to the bed' on the night of the fire…. However, according to the Fire Marshal's Incident Report, the fire marshal recalls her

> describing the laptop as ‘either on her bed by her feet or on the floor on the right side of the bed….’
>
> Six weeks after the incident, Ms. Ross reviewed the fire department's report and learned that some remnants of the MacBook had been found on the remains of her mattress…. At her deposition in 2021, she testified that after reviewing the fire department's report, she had many ‘flashbacks’ and ‘bad dreams’ that left her ‘increasingly convinced’ that the small flames she saw upon awakening were on the laptop at the foot of her bed…. She testified that she recalls placing the MacBook Pro on the foot of her bed before going to sleep and waking up to ‘little flames like candle flames . . . [o]n top of something whitish or silverish’ where the computer had been placed.”

Legal Lesson Learned: The U.S. Supreme Court has held that trial court judges must ensure prior to trial that proposed expert testimony “both rests on a reliable foundation and is relevant to the task at hand.” Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 597 (1993).

Chap. 2. Line Of Duty Death / Safety

Chap. 3. Homeland Security, incl. Active Shooter, Cybersecurity

Chap. 4. Incident Command, incl Training, Drones

Chap. 5. Emergency Vehicle Operations

File – Chap. 6, Employment Litigation

KY: RESIDENCY – PADUCAH FF MUST LIVE IN COUNTY - STATE LAW EXEMPTS ONLY EMS FIRST RESPONDERS

On July 28, 2023, in Natan Torain, representative of IAFF Local 168, et al. v. City of Paducah, KY, et al., the Court of Appeals of Kentucky held (3 to 0; unpublished decision), that trial court properly granted city summary judgment. While the city FF are required to have some level of medical training, and respond to many runs involving injuries, they do not meet the state law exempts from residency requirements - "publicly funded emergency medical service first response provider." The state statute concerning city police and fire departments has no prohibition on residency requirements.

The Court held:

“Appellant argues that the circuit court erred in failing to conclude that Kentucky Revised Statutes (‘KRS’) 311A.027(1) preempts a local ordinance requiring Paducah firefighters to live

in McCracken County or within 45 minutes of Station 4. After careful review, we find no error and affirm the order on appeal.

***

We find persuasive the circuit court's reasoning that the primary duty of Paducah firefighters is not emergency medical service, but rather fighting fires. This conclusion is supported by the record. While testimony was adduced that many runs made by Paducah firefighters involve automobile accidents or other incidents involving personal injury, and though Paducah firefighters have some level of medical training or certification in addition to their firefighting training, the record supports the circuit court's conclusion that the Paducah Fire Department is a firefighting department and not a medical service response provider per KRSA 311A.027(1). This conclusion is bolstered by the Legislature's enactment of KRS Chapter 95, titled 'City Police and Fire Departments,' which contains no prohibition against residency requirements for fire departments."

> "Paducah Ordinance §2-304 ("the ordinance") requires that as a condition of their employment, all members of the City of Paducah fire department hired after October 1, 1998, shall reside within McCracken County or within 45 minutes of Station 4 as measured by a recognized mapping program. Appellant is a City of Paducah firefighter and representative of the International Association of Fire Fighters, Local 168.
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> Appellant argued that City of Paducah firefighters qualify as employees of an emergency medical service first response provider because the firefighters are required to be certified and/or licensed by the Kentucky Board of Emergency Medical Services as emergency medical services personnel. Being so qualified, Appellant argued that KRS 311A.027(1) preempts the ordinance.
>
> ***
>
> KRS 311.027 states,
>
> > (1) No public agency, tax district, or other publicly funded emergency medical service first response provider or licensed ambulance service shall have a residence requirement for an employee of or volunteer for the organization.
> >
> > (2) The provisions of subsection (1) of this section shall not preclude an employer or agency specified in subsection (1) of this section from having a requirement for response to a specified location within a specified time limit for an employee or volunteer who is off duty but who is on call to respond for work."

Legal Lesson Learned: The IAFF Local 168 will need to lobby the state legislature to broaden the residency exemption.

> Note: In Ohio, the state legislation enacted an exemption for all firefighters, allowing them to reside in the county of the FD or a neighboring county. After several lawsuits by cities, the law was upheld by Ohio Supreme Court. See June 10, 2009 decision in Lima v. The State of Ohio.

See Ohio Revised Code Section 9.481 | Residency requirements prohibited for certain employees.

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

File: Chap. 6, Employment Litigation

AR: FF BRAIN CANCER 2020 – NEW STATE LAW IN 2021 STATUTORY PRESUMPTION – COVERED UNDER NEW LAW

On July 11, 2023, in Robert Vande Krol v. The Industrial Commission of Arizona, et al., the Court of Appeals of Arizona, First Division, held (3 to 0) that the Industrial Commission's Administrative Law Judge incorrectly applied 2017 statute where there was no statutory presumption. The firefighter (18 years on the job; age 50 when cancer was detected); when the ALJ held the 3-day hearing the new 2021 statutory presumption statute was in effect. The Court held this was a "procedural" change in law, and ALJ should have followed it. The FF is entitled to workers comp coverage unless the insurance company for the FD has clear and convincing evidence that cancer was not caused by the job.

The Court held:

"The 2021 statute contains a *procedural* presumption-the presumption is rebuttable and disappears with clear and convincing evidence of 'a specific cause of the cancer other than an occupational exposure to a carcinogen.' A.R.S. § 23-901.09(E). *** Arizona's workers' compensation system provides covered firefighters with benefits for workplace injuries. Yet not all firefighting injuries are alike. Physical injuries stemming from perceptible dangers (like burns or smoke inhalation from rushing into a burning building) are easily provable. Occupational diseases stemming from imperceptible dangers (like cancer from inhaling carcinogens or other noxious chemicals) are more difficult (if not impossible) to prove, particularly as to causation. *** We conclude the 2021 statute applies to Vande Krol's workers' compensation claim, and we, therefore, need not address whether the ALJ correctly interpreted the 2017 statute. Because the ALJ did not apply the 2021 statute, we set aside the award of non-compensation. The parties and the ALJ all correctly agreed Vande Krol satisfied the elements necessary to invoke the presumption in the 2021 statute. We remand to allow the ALJ to determine in the first instance whether Benchmark [Insurance Company] presented clear and convincing evidence to rebut the presumption. *** Distilled down, we apply a rather straightforward framework: applying a new procedural statute to a future procedure is not applying the statute retroactively and is generally permissible."

"Superstition Fire and Medical ('Superstition') employed petitioner Robert Vande Krol ('Vande Krol') as a firefighter and engineer. After eighteen years of service, at the age of fifty, he was diagnosed with oligodendroglioma, a rare form of brain cancer.

Vande Krol underwent brain surgery (a right craniotomy) on October 26, 2020, which successfully removed the tumor. Post-surgery, Vande Krol experienced headaches, memory problems, loss of some peripheral vision, and vertigo. In January 2021, Vande Krol submitted a worker's report of injury, listing his date of injury as October 28, 2020. Superstition's insurer, Benchmark Insurance Company ('Benchmark'), denied the claim. Vande Krol requested a hearing with an ALJ. The Industrial Commission obliged, appointing an ALJ who held an evidentiary hearing over three non-consecutive days beginning on October 5, 2021.

Following those hearings, the ALJ issued a written decision denying Vande Krol's workers' compensation claim. The ALJ concluded that because there was no provision in the 2021 statute stating the changes made therein apply retroactively, the 2021 statute applied only to injuries occurring after the 2021 statute's effective date. Then, applying the 2017 statute instead, the ALJ concluded Vande Krol failed to show he was exposed to known carcinogens causing his specific type of brain cancer. Vande Krol filed a Request for Review, after which the ALJ affirmed her original ruling."

Legal Lesson Learned: Great decision; firefighter is protected by the new "procedural" statutory presumption law.

File: Chap. 7, Sexual Harassment

KY: FF HAD SEX 17-YR-OLD – HE IS IN PRISON 35 YEARS – NO CASE AGAINST CITY / FD FOR "FAILURE TO SUPERVISE"

On July 25, 2023, in Emmalee Young v. City of Paris, et al., U.S. District Court Judge Karen K. Caldwell, U.S. District Court for Eastern District of Kentucky, Central Division (Lexington), granted motion for summary judgment on behalf of the City, Fire Chief, Battalion Chief and police officials. The only remaining defendant is former firefighter William Michael Fields, Jr., now serving 35 years in federal prison. A failure-to-supervise claim is a "rare" claim.

The Court held: "As to a failure-to-supervise claim, this is a 'rare' claim. *** Young could show the city was deliberately indifferent to the risk that its employees would have sexual intercourse with minors or other nonconsenting individuals with evidence of a pattern of similar constitutional violations, with a record of city employees 'going unpunished' for similar constitutional violations or other circumstances tending to show that the city was aware or could have been aware that Fields was prone to have sexual intercourse with minors or other nonconsenting individuals. *Id*. Young presents no such evidence. Accordingly, the Court will enter summary judgment in favor of the city of Paris, Kentucky on Young's constitutional claims. *** The issue on this motion is whether Young has presented sufficient facts to lead a reasonable juror to find that the city of Paris, Fields' supervisors at the fire department, or Paris law enforcement officers Royse and Boyer should also be liable for Fields' wrongful conduct.

*** Young does not allege, however, that any of the individual defendants other than Fields personally sexually harassed her or violated her bodily integrity. She does not allege that any of the other defendants even had substantial direct interactions with her. She asserts, however, that the other defendants should be held liable for Fields' actions. *** As to Chief Duffy and Battalion Chief Hensley, Young asserts that both are liable for Fields' conduct because they were his supervisors at the Paris Fire Department. *** Young has produced no evidence that Duffy or Hensley was aware that Fields had sexually harassed or violated the bodily integrity of Young or anyone else or that he intended to. Though the deposition testimony established that other members of the Fire Department were aware that Fields had engaged in multiple sexual encounters outside of his marriage, Young points to no evidence that any other employee was aware that any of Fields' sexual encounters involved nonconsenting women or minors or otherwise constituted sexual harassment or violations of bodily integrity. *** She presents evidence that fire department employees discussed sexual activities and shared nude images of females while on duty. She has also produced evidence that at least some fire department employees engaged in sexual activities with nonemployees at facilities used by the Paris Fire Department like Safety City. Young has pointed to no evidence, however, that any fire department employee other than Fields engaged in sexual behavior with an underage or otherwise nonconsenting individual, which is the kind of constitutional violation suffered by Young."

> "In early 2019, Plaintiff Emmalee Young was 17 years old and living in Cynthiana in Harrison County, Kentucky…. At that time, she was interested in a career in law enforcement or emergency medical services. Thus, she participated in the Cynthiana Police Explorers, a program run for young people interested in law enforcement and emergency service careers….
>
> At the time, defendant William Michael Fields, Jr. was a Harrison County Volunteer Fire Fighter and the Harrison County Constable. He was also employed as a fire fighter for the city of Paris, Kentucky, which is just about a 20-minute drive from Cynthiana…. He was 36 years old…. Fields and Young met at the Harrison County Volunteer Fire Department Oddville Station….Fields began contacting Young through text messages and Snapchat and going to the McDonalds where Young worked. At some point, he sent her a photograph of his penis via Snapchat…. Fields later had sexual intercourse with Young on two occasions."

Legal Lesson Learned: A "failure to supervise" claim must be backed up with facts showing management knowledge of improper conduct.

File: Chap. 7, Sexual Harassment

CA: SAN FRAN. FF – HARASSMENT, NASTY COMMENTS BY SUPERVISOR TO FF HUSBAND – LACTATION NOT PRIVATE

On July 13, 2023, in Sarah Perata v. City and County of San Francisco, U.S. Magistrate Judge Thomas S. Hixson, denied the City's motion for summary judgment on claims of gender discrimination, including lack of location with a lock for lactation. She was hired in 2018 as

EMT and was a training instructor at Treasure Island. In 2020 she received a promotion to Captain, subject to six-month probationary period and transferred to Station 49. Unfortunately, on Dec. 7, 2020, Fire Chief Janine Nicholson sent Plaintiff a letter revoking the promotion based on two investigations - text message incident and training binder incident. Text Message Incident – proposed 7-day suspension. Plaintiff's new supervisor at Station 49, Chief Niels Tangherlini, received a message from what appeared to be Plaintiff's phone number stating, "I fucking hate this place." Multiple other coworkers received texts from what appeared to be Plaintiff's phone number stating, "I hate you," or "Fuck you." Training Binder Incident – proposed 3-day suspension. On February 13, 2020, she and her husband went to Tresure Island to gather her belongings for transfer to Station 49, and apparently took training materials. That suspension was withdrawn when Plaintiff provided SFFD relevant materials.

The Magistrate Judge held:

HARASSMENT: "Although a close call, the Court finds Plaintiff has established material facts to preclude summary judgment on her harassment claims. Plaintiff testified that her supervisor, Payne [Nicholas Payne, Emergency Medical Services Training section chief for Treasure Island] and his supervisor, 'constantly' called Plaintiff and her fellow female coworkers 'minions,' and asked them to do the office administrative work. *** Defendant argues that many of the comments are not references to gender, but the Court finds there is sufficient evidence to infer gender bias. For example, Plaintiff's husband testified that Payne said Plaintiff "must give great head because I don't know why you are with her." *** There is also evidence that Payne and Tibbits [Zachary Tibbits, co-worker] would put Plaintiff's desk figurines in sexual positions."

LACTATION: "Plaintiff testified that after she was walked in on while using the captain's room she would occasionally go downstairs and ask to use another officer's room…. Drawing all inferences in Plaintiff's favor, it is reasonable to infer that if Plaintiff had access to a classroom that reasonably accommodated her lactation, she would not have sought out the officer's room and asked the officer to stand outside. In sum, the Court finds a sufficient factual dispute as to the reasonableness of the accommodations…. Cal. Code Regs. tit. 2, § 11035. 'An employer shall provide an employee with the use of a room or other location for the employee to express milk in private.... A lactation room or location shall not be a bathroom and shall be . . . shielded from view, and free from intrusion while the employee is expressing milk.' Cal. Lab. Code § 1031(a)-(b)."

> "Plaintiff testified that she felt she had to go to her male coworkers to get them to express her opinions because Payne would not listen if it was coming from Plaintiff…There is evidence that Payne treated her differently and more disparagingly than male coworkers when it came to discipline, such as when he threatened her with discipline for posting a photo with a recruit on Facebook, but then backtracked when Plaintiff's husband stated that he was the one who posted the photo…. Several times he told her she was an 'emotional female,' including when she came to him to complain that coworkers were calling her lazy and ditzy…. Payne often would imply to Plaintiff that her position was not permanent, and that she was 'acting' and could be removed, which Plaintiff took to be an ongoing threat…. Plaintiff indicated these comments about

needing to be careful as an acting officer were only directed toward her, and she was the only female acting officer during her pregnancy.

Plaintiff's coworker, Zachary Tibbits, 'constantly' made comments during Plaintiff's pregnancy in 2019 that she was lazy and ditzy….There was also a 'blowup' between Tibbits and Plaintiff where he yelled at her, calling her difficult and emotional, and Plaintiff reported the incident because it had gotten 'big,' but there is no indication that anything was done *** There is also evidence that Payne and Tibbits would put Plaintiff's desk figurines in sexual positions."

Legal Lesson Learned: Inappropriate comments by a supervisor to an employee, or to the employee's spouse, can be used as evidence in a harassment case. For lactating employees, provide a location with a lock on the door.

Note: See U.S. Department of Labor - Fact Sheet #73: FLSA Protections for Employees to Pump Breast Milk at Work. As of December 29, 2022, nearly all FLSA-covered employees have the right to take needed time and to access an appropriate space to express breast milk for a nursing child for up to one year after the child's birth.

PUMP FOR NURSING MOTHERS ACT. (a) IN GENERAL .—An employer shall provide—''(1) a reasonable break time for an employee to express breast milk for such employee's nursing child for 1 year after the child's birth each time such employee has need to express the milk; and ''(2) a place, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public, which may be used by an employee to express breast milk.

File: Chap. 8, Race Discrimination

OH: CINCINNATI CAPTAIN – ASIAN / BLACK – PROMOTION TEST IRREGULARITIES - DISCRIMINATION CLAIM PROCEED

On July 11, 2023, in Janos Roper v. City of Cincinnati, U.S. District Court Judge Mathew W. McFarland, U.S. District Court for Southern District of Ohio, Western Division, denied in part the City's motion to dismiss. His racial discrimination claim concerning testing irregularities may proceed; but his Ohio Whistleblower claim that he was ordered to speed is dismissed since he didn't orally report this. In 2019, he took a promotion test, and alleged technical issues with test caused him to lose points (ranked 16th on list; 11 promoted during the two years list was effective). He reported the issues by email to Erica Burks, a human resources employee, and addressed concerns about his income, falsely graded questions, and racial discrimination around the testing itself.

The Court held:

1. His racial discrimination claim may proceed. "The City claims that Roper has not laid out a prima facie case [of race discrimination]. This argument is premature. An 'employment

discrimination plaintiff need not plead a prima facie case of discrimination' to survive a motion to dismiss. *** The second problem with the City's argument is that it fails to address the fact that Roper attacks the integrity of the test itself. If the test was flawed, then so were the results of the eligible list. So the fact that he appears sixteenth on the list does not, at the Rule 12(b)(6) stage, absolve the City of liability."

2. Whistleblower claim dismissed. "He also made whistleblower complaints about [Battalion Chief Jason] Vollmer's instructions for him to break traffic laws and falsify government records. Not much came of these complaints. And, after he came back from a period of sick leave in September 2020, Vollmer treated him worse than before.*** [N]owhere nowhere does he allege any oral communication. He contacted Burks, once, through email. But the whistleblower statute requires him to first orally report a violation, then file a written report. R.C. § 4113.52(A)(1)(a)."

   "Roper's complaint contains seven counts: (1) hostile work environment on the basis of racial discrimination; (2) failure to promote based on racial discrimination; (3) hostile work environment on the basis of disability discrimination; (4) failure to promote based on disability discrimination; (5) retaliation; (6) violation of Ohio's whistleblower statute, R.C. § 4113.52; and (7) violation of public policy. Defendant City of Cincinnati moves to dismiss each count.

   ***

   In March 2020, Jason Vollmer, the district chief, evaluated Roper's performance. Roper had high ratings before that evaluation. But Vollmer rated him poorly. Roper also alleges that Vollmer told him to 'stop following traffic laws….' Vollmer raised his grade slightly after Roper objected, but it was still low. Roper believes Vollmer did not treat Caucasian firefighters the same way…. He tried to make things work with Vollmer and the Fire Department. But eventually he reported Vollmer's actions to Cincinnati's Civil Service Commission. He also made whistleblower complaints about Vollmer's instructions for him to break traffic laws and falsify government records. Not much came of these complaints. And, after he came back from a period of sick leave in September 2020, Vollmer treated him worse than before.

   The next spring, health issues kept Roper out of work for a month and a half. During this time away, he missed a training. After he came back, he received two reprimands. Early the next year, in January 2022, he was passed over for another promotion….He filed a second Charge of Discrimination with the EEOC and OCRC."

Legal Lesson Learned: Race discrimination lawsuits will generally not be subject to dismissal until all discovery has been completed.

Note: See Dec. 21, 2018 article, "Cincinnati Fire captain alleges sexual harassment after R-rated movie plays at station." A captain with the Cincinnati Fire Department claims in

> a lawsuit he was subjected to sexual harassment when an R-rated movie played on a station television last year. Capt. Janos Roper, an 18-year veteran of the Fire Department, filed the suit Friday in federal court. The suit alleges Roper's colleagues ignored his request to stop watching "Any Given Sunday," a sports film that includes nudity and profanity, in a shared eating area.

File: Chap. 9, ADA

MD: PRE-TRIAL DISCOVERY – EMT CLAIMS NOT PROMOTED BIPOLAR / DEPRESSION – MUST PROVIDE MEDICAL RECORDS

On July 10, 2023, in Matthew Schaeffer v. Mayor and City Council of Baltimore, U.S, Magistrate J. Mark Coulson, U.S. District Court for District of Maryland, held in a pre-trial discovery dispute that the City is entitled to the EMT's mental and other medical records for past seven years. The EMT has been with FD since 2015, and states FD has been aware of his diagnoses of bipolar disorder and depression. Plaintiff further alleges that he was not promoted in 2015, and in February 2022 he received written notice of promotion qualification after completing all assessments and a medical screening, but City "then improperly imposed additional medical clearance requirements at the last minute based on Plaintiff's mental health conditions, resulting in Defendant revoking the promotion." The City served plaintiff with written requests for records,

The Court held:

"Defendant seeks discovery regarding, *inter alia*, Plaintiff's mental health treatment. *** Interrogatory No. 6, reading, in pertinent part, 'If you have undergone treatment in the past seven (7) years for a mental illness or emotional condition . . . please state all details . . .including the nature of the illness/condition, dates of treatment, the circumstances surrounding its occurrence, and the names of health care providers involved in the examination, diagnosis or treatment of it.' *** Given that both damages and liability itself are premised on the nature and extent of Plaintiff's mental health diagnoses and treatment, Defendant should be allowed reasonable inquiry into such areas. Further, as noted above, given that the core claim in this case is that Defendant discriminated against Plaintiff because of Plaintiff's mental health diagnoses, the Court has no trouble concluding that those conditions are within the scope of discovery. Plaintiff's amended response is that he has not needed or undergone treatment for mental illness or emotional condition in the last seven years 'except as previously provided to the defendant…. The Court finds Plaintiff's response insufficient. Although Plaintiff may well have provided medical and mental health information as part of his employment, this does not excuse him from providing the narrative called for by this interrogatory, especially since Plaintiff has been a long-time employee of BCFD."

> "Plaintiff's lawsuit alleges disability discrimination and subsequent retaliation stemming from Defendant's failure to promote Plaintiff who is employed as an Emergency Medical Technician with the Baltimore City Fire Department 'BCFD')….From the time of Plaintiff's initial hiring in 2015, Defendant was aware of Plaintiff's diagnoses of bipolar disorder and depression….Plaintiff alleges that these diagnoses (1) did not affect his job

> performance and (2) seemingly were a non-issue for Defendant until Plaintiff applied for promotion in 2018….Plaintiff further alleges that although he received written notice of promotion qualification after completing all assessments and a medical screening, Defendant then improperly imposed additional medical clearance requirements at the last minute based on Plaintiff's mental health conditions, resulting in Defendant revoking the promotion…. Further, when Plaintiff filed a complaint with the Equal Employment Opportunity Commission ('EEOC') in response, Plaintiff alleges that Defendant retaliated against him by again denying him promotion in February of 2022.
>
> ***
>
> Plaintiff' judgment as to what may or may not be relevant within a category of requested documents; it is Plaintiff's responsibility to produce them if they are in his custody or control."

Legal Lesson Learned: In pre-trial discovery involving alleged discrimination based on employee's mental health, the City is entitled to plaintiff's medical records.

Chap. 10. Family Medical Leave Act, incl. Military Leave

Chap. 11. Fair Labor Standards Act

File: Chap. 12, Drug-Free Workplace

TX: OFF DUTY FF AT CITY HALL TO COPY EEOC DOCUMENT – APPEARED INTOXICATED – REFUSED BE TESTED – FIRED

On July 24, 2023, in Jason January v. City of Huntsville, the U.S. Court of Appeals for 5th Circuit (New Orleans), held (2 to 1) that the City was properly granted summary judgment since the FF could not prove City's explication for firing him was a pretext. According to secretary in City Hall, the FF boxed her in and blocked the copy room exit, and told her that "when all of this comes out, they're going to be sorry that they messed with me." Ms. Poe, feeling threatened, escaped past him when she could and ran to hide in the women's bathroom nearby. A video camera in the City Manager's office showed the City Manager, with several other officials, ordering him to stay until his wife could drive him home. He repeatedly refused to take a drug test (took test the following day).

The Court noted: "All told then, beyond temporal proximity, January produces no evidence that Lunsford's reasoning concerning his intoxication was false (such that he was not actually intoxicated at the time) or pretextual (such that January's protected activities were the real reason for his firing). *** [The City's explanation was as follows.] The City placed January on administrative leave and investigated. Two weeks later, it fired him. Director of Public Safety Kevin Lunsford, the decisionmaker, explained that January was fired because: 1) despite a drug

test taken the next day showing no intoxication, there remained a 'high probability' that January was impaired at City Hall; 2) January was insubordinate because he refused to leave City Hall when told to do so; 3) January's lack of cooperation and intoxication harmed the City's reputation; and 4) January was disrespectful in intimidating and scaring Poe. Given January's past warning that any further violation could end his employment, the City terminated him.

> "Almost a decade ago, Huntsville, Texas firefighter Jason January had gallbladder surgery. It did not go well, and ever since, January has needed medication and treatment for complications. And for years, both the City and its fire department accommodated him.
>
> But in 2016, not long after his surgery, the City caught January asking a fellow employee for his leftover prescription painkillers. Because such a request violated city policy, Huntsville placed January on probation, and warned that future violations could lead to his termination.
>
> Unrelatedly, in January 2018, January submitted-and then rescinded-a letter of resignation. The fire department accepted him back, but passed him over for open officer positions, and declined to reinstate him to a trainer position he'd previously held. January, incensed, met with City employees in November 2018. At that meeting, he accused the City of discriminating and retaliating against him on account of his age and disability in not selecting him as an officer and by removing him as a trainer. He also made clear that he was considering suing the City for discrimination. The City, with the help of outside counsel, began to investigate. After several months without resolution, January, in February 2019, told the City that he was going to complain to the EEOC.
>
> Then, a month later, January went to Huntsville's City Hall to make copies for his EEOC complaint. The parties tell different tales of how that visit went. Per the City, employees immediately suspected that January was somehow intoxicated. Employees reported that January slurred his words, was 'partially incoherent,' and seemed unlike himself. Despite that, Brenda Poe, the city secretary, helped January make his copies. But according to her, that did not go well-January, she said, boxed her in and blocked the copy room exit, stating all the while that 'when all of this comes out, they're going to be sorry that they messed with me.' Poe, feeling threatened, escaped past him when she could and ran to hide in the women's bathroom nearby."

Dissent:

> "As [secretary Ms.] Poe acknowledged, it was entirely normal for January to wait in the copy machine room with her while she was making copies. That is what most people do, so there is nothing to support the notion that he was threatening her by doing so. At some point January made his allegedly threatening statement, but, as Poe also admitted, she understood this statement to be directed *at Huntsville*, rather than *herself*. Put another way, he was threatening to sue the City, not to hurt her physically (or otherwise). If telling one of the employees of a company or city that you are going to sue their

employer is a threat that allows firing, that would be the opposite of the exact point of the retaliation clause: to preserve the protected activities of employees to file EEOC claims."

Legal Lesson Learned: The City officials had a reasonable basis to order a drug test; no retaliation for filing EEOC complaint was proven.

File: Chap. 13, EMS

PA: DIZZINESS / LIFT ASSIST – DIDN'T BRING IN MONITOR – REFUSED TRANSPORT, CARDIAC ARREST – NO GROSS NEG.

On July 28, 2023, in Frederick T. Fry. Administrator of Estate of Jean Ann Fry v. Montrose Minute Men, Inc., the Superior Court of Pennsylvania, held (3 to 0; non-precedential decision) that the trial court properly granted EMS summary judgment. There may have been negligence regarding not bringing in monitor, and subsequent actions at the scene (plaintiff's two expert witness medical doctors submitted reports finding breaches of protocol), but there was no proof of gross negligence. The expert witness for EMS, another medical doctor, in his report disagree and concluded, "The EMS providers on the scene responded admirably to a very difficult situation."

The Court held:

"The crew's failure to bring in diagnostic equipment when they arrived at the Fry residence hardly rises to an extreme departure from the standard of care or shows a conscious, voluntary omission in reckless disregard of a legal duty. At most, the failure of the crew to bring equipment when they first arrived at the Fry home may - or may not - rise to a level of ordinary negligence.

***

Distilled down, Fry argues that his expert reports, by themselves, create inherent issues of fact that are necessary for jury adjudication. However, other than citing two pieces of 'authority,' one from this Court and another from a trial-court level decision, even accepting everything contained within his expert reports as true, Fry has failed to show that the Minute Men, or its agents, engaged in any kind of behavior that could be considered grossly negligent or willful misconduct."

> "As background, [o]n January 15, 2019, the [']Minute Men crew[‘] was dispatched to the Fry residence for a complaint of dizziness which required lifting assistance. The crew arrived about a half hour after [Jean Ann Fry, the] [d]ecedent fell. The crew consisted of medical technician (EMT). Decedent was still on the floor in the kitchen when Frampton and Johnson entered the house. Decedent was conscious, alert, and oriented and reported no neck pain or dizziness to Frampton. Frampton palpated [d]ecedent's neck and back before lifting her. Fry pulled a dining room chair over and Frampton and Johnson lifted [d]ecedent onto the chair. Decedent refused to be transported to the hospital so Frampton sent Johnson out to the ambulance to bring in refusal paperwork and a heart monitor. A minute later, [d]ecedent's eyes rolled back in her head and she became semi-responsive

and then unresponsive. Frampton felt for a pulse and when he found no pulse, he moved her to the floor and started CPR on [d]ecedent. Johnson came back into the house and Frampton sent her back out to the ambulance to call for assistance because[d]ecedent was in cardiac arrest. A second crew from the Minute Men was dispatched. Johnson came back into the residence with equipment and helped Frampton with compressions. Frampton tried to start an intravenous line (IV) but was unsuccessful. He then successfully placed an intraosseous device (IO) in order to administer epinephrine to [d]ecedent. Two members of the Hop Bottom Hose Company were dispatched and arrived eight minutes later. The additional dispatched members of the Montrose Minute Men arrived, including James Krupinski and Robert Getz, and assisted with CPR then helped moved [d]ecedent to a backboard to transfer her to the ambulance. In the ambulance, Frampton and Getz continued performing CPR and Frampton administered additional doses of [e]pinephrine. Frampton tried to intubate [d]ecedent but there was [a] "peanut butter" like substance in her airway which he tried to suction out. He was unsuccessful. They arrived at the hospital and CPR was continued. Decedent was pronounced dead approximately 15 minutes later.

***

Finally, Dr. Mell disagreed with the opinions of Dr[s]. Freeman and McDonald that lack of documentation was a violation of the standard of care. He offered the following opinion:

> I can confidently state with medical certainty that: 1. The responding Montrose Minute Men (Paramedic Shawn Frampton, EMT Amy Johnson, EMT James Krupinski, and EMT Robert Getz) did not violate the standard of care expected of EMS providers during their treatment of [decedent] on January 15, 2019. The actions or inactions of Montrose Minute Men EMS [p]roviders did not lend, in any way, to the injuries suffered by the [decedent]; and 3. While tragic, the events that occurred were an almost immutable chain of events set into motion by a combination of [decedent's] pre-existing conditions, and her suffering a cardiac arrest geographically distant to an advanced medical center, and were possibly complicated by the fall she suffered immediately prior to her cardiac arrest. The EMS providers on the scene responded admirably to a very difficult situation."

Legal Lesson Learned: Bring in Monitor even if call is for lift assist.

File: Chap. 13, EMS

MI: CEREBAL PALSY PATIENT – FAMILY SAID SHE STILL BREATHING - ALIVE FUNERAL HOME - EMS QUAL. IMMUN.

On July 26, 2023, in Howard T. Linden, as Personal Representative of the Estate of Timesha Beauchamp v. City of Southfield, Michigan, et al., the U.S. Court of Appeals for 6th Circuit (Cincinnati) held (3 to 0) that the trial court judge properly dismissed the lawsuit, holding that that the paramedics enjoyed qualified immunity, and therefore the City is also not liable. On Aug. 23, 2020, EMS were called to home of a 20-year-old woman with cerebral palsy who was unresponsive. After CPR and ventilation with a bag valve mask, the family was told she had

died. However, on three occasions family members said she appeared to still be breathing and the monitor showed electrical activity. When at funeral home, the embalmer saw her chest rising; she died six weeks later. The Court rejected plaintiff's "state-created danger" theory since EMS did not expose the patient to "private acts of violence." The Court also rejected the "failure to train" liability for the City, since the lawsuit complaint contained no factual allegations about their EMS training.

The Court held:

Generally, there is no constitutional right to adequate medical care for individuals who are not in the custody of the state. See Jackson v. Schultz, 429 F.3d 586, 590 (6th Cir. 2005) ('It is not a constitutional violation for a state actor to render incompetent medical assistance or fail to rescue those in need." (citing DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 196 (1989))). However, there is an exception to that general principle where a state actor's 'affirmative act' either 'creates or increases a risk that the decedent would be exposed to 'private acts of violence…'

***

Qualified immunity "shields governmental officials from monetary damages as long as 'their actions did not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" Sumpter v. Wayne Cnty., 868 F.3d 473, 480 (6th Cir. 2017) (quoting Chappell v. City of Cleveland, 585 F.3d 901, 907 (6th Cir. 2009))…. So it is hard to see how it could be 'clearly established" that the First Responders exposed Beauchamp to a private act of violence when they mistakenly believed she was dead and left her in her family's care to be processed for routine funeral proceedings, which included the Funeral Home employee's act of putting Beauchamp's presumed-dead body into a body bag to transport her to a funeral home."

> "Minutes later, the four emergency medical personnel who are defendants-appellees in this case—Michael Storms, Scott Rickard, Phillip Mulligan, and Jake Kroll (collectively the 'First Responders')—arrived. Mulligan and Kroll attempted CPR and ventilation using a bag valve mask. After about half an hour, the First Responders discontinued efforts to resuscitate Beauchamp and declared her dead. They also called a doctor to obtain permission to stop trying to resuscitate Beauchamp, although they had already stopped resuscitative efforts more than five minutes before receiving such permission.
>
> However, numerous medical indicators still showed that Beauchamp was not dead—her capnography indicated continued respiration, her cardiac monitor showed electrical activity, and her breathing and pulse were perceptible to her family members. Beauchamp's family members informed the First Responders of their observations suggesting that Beauchamp was still alive.
>
> In response, Storms and Kroll took another look at Beauchamp. The medical device they
>
> used continued to show organized electrical activity suggesting that Beauchamp was alive. Nevertheless, Storms and Kroll stuck to their conclusion that Beauchamp was dead, explaining the signs of life as reactions to medication. As the First Responders were

leaving, City police officers, whom the First Responders had called once they concluded Beauchamp was dead, informed the First Responders that the family had seen Beauchamp gasp for air. So the First Responders returned a third time, repeated their explanation that Beauchamp's chest movement was a result of medication, and continued to insist that Beauchamp was dead.

***

A City police officer called the Oakland County Medical Examiner to inform them of Beauchamp's death. The officer instructed Lattimore to call a funeral home to pick up Beauchamp's body. Lattimore called the James H. Cole Funeral Home (the 'Funeral Home'). A Funeral Home employee who arrived to take Beauchamp's body asked Lattimore whether Beauchamp really was dead, as her chest was still visibly moving. Lattimore relayed the First Responders' explanation that Beauchamp's chest would still move due to medication but that Beauchamp was in fact dead. The employee wrapped Beauchamp in a sheet, placed her into a body bag, and removed Beauchamp from the home.

About fifteen minutes later, the body bag containing Beauchamp arrived at the Funeral Home, and the embalmer unzipped it. The embalmer saw Beauchamp gasping for air with her eyes open and her chest moving up and down. The embalmer called 911, and emergency medical personnel (not the First Responders) took Beauchamp to the hospital. At the hospital, doctors determined that Beauchamp was alive but had suffered an anoxic brain injury. Beauchamp remained on a ventilator in a vegetative state until she died about six weeks later."

Legal Lesson Learned: Terrible set of facts; review this case and your protocol on declaration of death with EMS personnel.

Note: See July 27, 2023 article, "Court rules first responders who wrongfully declared Michigan woman dead cannot be sued."

Dec. 10, 2020 article: "Paramedics in case of 'dead' woman alive can regain licenses."
"The state health department recently reached agreements with the men to drop the license suspensions. They will have multiple chances to pass written and practical exams for paramedics. Storms has additional work: He must write a paper on the protocols for determination of death and cardiac arrest. Storms must read a book, 'People Care: Perspective and Practices for Professional Caregivers,' and write a three-page paper. He will have three chances to achieve a passing grade on the papers."

File: Chap. 13, EMS

LA: TRIAGE NURSE GRABBED GURNEY – EMT SHOULDER INJURY - HOSPITAL LIABLE, JUDGE OVERTURNED JURY

On July 26, 2023, in Jenna Rougeau v. Hospital Service District No. 2 of Beauregard Parish, et al., the Court of Appeals of Louisiana, Third Circuit, held (3 to 0) that while the jury correctly found that Triage Nurse on June 25, 2016 was negligent in grabbing the gurney, as EMT was pulling a patient into ER and passed Room No. 6. However, the trial judge correctly overturned jury verdict that the nurses negligence did not cause EMT's injury to her shoulder and loss of work for two years. The EMT had arthroscopic surgery to repair her tom labrum and rotator cuff, but clearly could not pass Arcadia Ambulance requirement to dead lift 175 pounds, cany a large medic bag and monitor up a flight of stairs, and perform CPR for approximately one minute while maintaining a certain heart rate. The trial court properly awarded the EMT $42,626.48 in past medical expenses, $60,000.00 in past lost wages; and $261,000.00 in general damages ($160,000.00 in past pain and suffering; $25,000.00 in future pain and suffering; $40,000.00 in past mental anguish; and $36,000.00 in loss of enjoyment of life).

The Court held:

"Thus, under the facts at issue, we find that Nurse Harless had a duty to exercise reasonable care in the performance of his emergency room duties in order to avoid causing injury to others, including to EMTs acting in the performance of their duties…. Based on the video, Nurse Harless saw the EMTs walking towards him with the stretcher as he was getting linen from a blanket warmer located in the hallway. Instead of communicating the room assignment when he first saw them, he waited until Plaintiff had taken approximately twelve steps and the stretcher had passed him before grabbing the rear of the stretcher and pulling it to a stop.

***
Thus, we find that the juiy was manifestly erroneous in finding that this incident was not the cause-in-fact and legal cause of her shoulder injury."

> "On the night in question, Plaintiff testified she and her partner entered the emergency room and were proceeding with their patient towards the nurse's station. The incident at issue occurred when the stretcher stopped unexpectedly as she was towing it down the hallway with her right arm, which was outstretched behind her. The sudden stoppage of the stretcher pulled her arm backwards, and she heard a pop in her right shoulder and felt immediate pain. Plaintiff stated that she turned around and saw her partner talking to Nurse Harless, who her partner said had stopped the stretcher. She stated that her partner asked if she was okay and demonstrated what had happened, as evidenced by video footage of the incident. She said that her right shoulder was hurting when the video showed her using both arms to move the stretcher out of the middle of the hallway. Plaintiff testified that she was crying due to pain when the video showed her rubbing her eyes. While she agreed that Nurse Harless's act of stopping the stretcher was not aggressive or violent, she said that it felt hard and fast.
>
> ***
> Plaintiff said that shortly after the incident, the video showed her partner walk into room six with Nurse Harless and then walk back to the nurse's station. Nurse Harless also exited the room, then grabbed the stretcher and began pulling it into room six. She said that she guided the foot of the stretcher with her left arm. However, once she entered the

room, she noticed that the room was dirty, and the bed was unmade. Plaintiff testified that when her partner reentered the room, he noticed a yellow fluid on the floor. At that point, he determined that the room was not ready for the patient, and they moved the patient back to the hallway to await another room assignment. She stated that she also saw what appeared to be urine on the floor. They waited with the patient in the hallway for approximately thirty minutes while the room was cleaned. She claimed that the patient's transfer of care did not occur until the room was cleaned, and the patient was transferred to the room's bed.

Plaintiff testified that after she and her partner returned to the ambulance, he reported her injury to their supervisor. She said that the video of her exiting the emergency room showed her holding her right arm due to pain. It also showed her partner checking her arm and then grabbing the head of the stretcher as though to demonstrate how it was stopped. Since she was unable to finish her shift, her partner drove them back to their home station in Moss Bluff, where she reported her injury o her supervisor, Carl Gautreaux."

Legal Lesson Learned: Trial judge may set aside an erroneous jury verdict and award damages to injured EMT.

Note: The worker's comp. insurance provider for Arcadia Ambulance may then recover their expenses from the damage award.

File: Chap. 13, EMS

NV: COMBATIVE PATIENT – PD TAKEDOWN, EMS GAVE KETAMINE FOR 175 POUND (ONLY 155) - QUAL. IMMUNITY

On July 19, 2023, in Marc Galli v. Anthony Rush, et al., U.S. District Court Judge Andrew P. Gordon, U.S. District Court for District of Nevada, granted summary judgment to City of Henderson paramedics Anthony Rush and Edward Pickup, as well as two police officers who tackled the patient who had fled from the back of the ambulance. Paramedics administered 320 milligrams of ketamine based on patient's estimated weight of 175; his actual weight (155 pounds) called for 280 milligrams. At hospital he was intubated because of his altered mental state and intermittent combative behavior and was released six days later.

The Court held: "Regardless of their subjective motivation, Rush and Pickup were confronted with a patient who was crying, retching, claiming poisoning, and running away in the dark. From the perspective of a reasonable paramedic confronting the objective circumstances, they had at least a moderate interest in sedating Galli to ensure he received emergency medical care and caused no harm to himself or others. Weighing the significant application of force against the moderate government interest, a reasonable jury could find sedating Galli to be an excessive use of force. But Rush and Pickup are shielded by qualified immunity. First, Galli does not point to any authority for the proposition that as a paramedic, Pickup had a clearly established duty to intervene in Rush's purported constitutional violation. And more importantly, Galli points to no binding authority, nor have I found any, clearly establishing that a paramedic's administration of

a sedative under comparable circumstances constitutes excessive force under the Fourth Amendment."

> "Galli alleges that around 6:00 p.m. on September 24, 2020, he took an antibiotic for a nose infection…. An hour later, he began feeling sick, had difficulty breathing, and called 911 several times…. During the calls, Galli can be heard crying and retching, and he repeatedly stated his belief that he was dying and that his wife Doreen had poisoned him with the help of his prescribing doctor.
>
> ***
> Rush testified that he did not pull out his cell phone or demand Galli tell him everything, and Pickup testified that Rush did not come around to the driver's window to talk…. Instead, Rush testified that Galli said he had taken some THC and thought the paramedics were trying to kill him…. According to Rush, Galli saw Rush open the narcotics safe and then Galli jumped off the gurney and put up his hands to fight while the ambulance was still in motion…. Rush called out to Pickup to stop, and Rush and Pickup testified that Galli got out of the back of the ambulance and started running away.
>
> ***
> [After police had patient on the ground paramedic] Pickup held Galli's arm, Rush administered 320 milligrams of ketamine, a narcotic sedative…. Clark County emergency medical care protocols suggest a dose of 2-4 milligrams per patient's kilogram weight…. Rush estimated Galli's weight to be 175 pounds, or approximately 80 kilograms…. However, the hospital reported Galli's weight to be 155 pounds, making the maximum recommended dose closer to 280 milligrams…. Galli was restrained face down on the ground for two to three minutes as the ketamine took effect, and then was handcuffed, turned face up, and lifted onto a gurney…. He remained handcuffed until he was placed in the ambulance, then was given oxygen and transported to St. Rose hospital.
>
> Galli was intubated in the emergency room, although the parties dispute what caused the need for intubation. Galli points to evidence that it was because he received too much ketamine and was overly sedated…. The defendants point to evidence that Galli was breathing normally on arrival, and the emergency room physician decided to intubate '[b]ecause of [Galli's] trauma and altered mental status and intermittent combative behavior.'"

Legal Lesson Learned: Paramedics were shielded by qualified immunity; make sure you follow protocol for administering ketamine.

File: Chap. 16, Discipline

FL: B/C FIRED – NO WHISTLEBLOWER PROTECTION – REFUSED ORDER TO REPRIMAND FFs COVID VACCINATION

On July 25, 2023, in Stephen M. Davis v. Orange County, U.S. District Court Judge Paul G. Byron. for Middle District of Florida, Orlando Division, granted the County's motion to dismiss, holding that Florida Whistleblower Act only protects officers who refuse to follow an order that

would create a "substantial and specific danger to the public's health, safety, or welfare." On October 5, 2021, Assistant Chief Kimberly Buffkin gave an order to the Battalion Chiefs to issue written reprimands for those employees on a provided list for failure to comply with the vaccination policy [FF not facing further discipline]. Battalion Chief Davis thought some on his list had complied, and he met with Assistant Chief and when he refused to issue reprimands he was immediately suspended and later fired on Oct. 13, 2021 after a pre-determination hearing. The Battalion Chief had previously joined a lawsuit in State court challenging any discipline of firefighters who refused to get vaccinated. After his termination he went to arbitration and the arbitrator ruled against him.

The Court held:

"[N]o reasonable person in Plaintiff's position would have believed that Defendant would not wipe out this discipline from the records of its employees who did, in fact, comply with the policy after its human resource lists were accurately updated as Defendant, through Assistant Chief Buffkin, had reiterated would occur.

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What is more, the insinuation that such a bureaucratic snafu could have plausibly created a 'substantial and specific danger to the public's health, safety, or welfare' is not tenable. *Id.* Accordingly, Plaintiff fails to plausibly allege he engaged in protected activity under the FWA [Florida Whistleblower Act] and thus fails to state such a claim."

> Due to the Covid-19 pandemic, Defendant set forth a vaccination policy for its employees…. After some negotiation, the Orange County Fire Fighters Association Local 2057, the union representing Plaintiff and other Orange County firefighters, reached an agreement whereby its members were allowed to submit religious or health exemption accommodation requests in lieu of vaccination certifications by September 30, 2021…. Under the union agreement, an employee who did not submit an exemption request or vaccination certification on or before this date was subject to written reprimand only—no further disciplinary action could be taken under the vaccination policy…. Those employees who did not submit a vaccination certification—either due to an exemption request or lack of submission altogether—were required to undergo weekly testing or else be subject to further discipline beyond written reprimands…. Plaintiff timely submitted a religious exemption request and was not himself subject to discipline for failing to comply with the vaccination policy…. Plaintiff also joined a lawsuit seeking to strike down Defendant's vaccine policy as unlawful on October 1, 2021."

Legal Lesson Learned: The Florida whistleblower act allows refusal of an order only if following the order would have either created a "substantial and specific danger to the public's health, safety, or welfare" or constituted an "act or suspected act of gross mismanagement, malfeasance, misfeasance, gross waste of public funds, . . . or gross neglect of duty." FLA. STAT. § 112.3187(5).