# OCTOBER 2024 – FIRE & EMS LAW NEWSLETTER

[NEWSLETTER IS NOT PROVIDING LEGAL ADVICE.]

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- 2024: FIRE & EMS LAW – **MONTHLY NEWSLETTERS**: monthly review of recent court decisions [send e-mail if wish to be added to our free listserv]
- **2024: FIRE & EMS LAW – RECENT CASE SUMMARIES / LEGAL LESSONS LEARNED**: Case summaries since 2018 from monthly newsletters
- 2024: FIRE & EMS LAW – **CURRENT EVENTS**
- **TEXTBOOK:** Updating 18 chapters of my textbook (2018 to current). FIRE SERVICE LAW (SECOND EDITION), Jan. 2017

## 17 RECENT CASES

File: Chap. 1, American Legal System

## IL: ARSON CONVICTION REVERSED – FD INVESTIGATOR / PD NO "MIRANDA" WARNING – CUSTODIAL INTERROGATION

On Oct. 1, 2024, in The People of the State of Illinois v. Adriane L. Parke, the Court of Appeals of Illinois, Fifth District, held (3 to 0) that the confession by the housekeeper (also volunteer firefighter) started the fire in a room at the Drury Inn must be suppressed; jury conviction set aside but State can re-try her. The Court wrote: "Defendant argues no reasonable, innocent person in her shoes would have felt free to stop answering [Fire Investigator Shane] Emrich's and [Mount Vernon Police Officer Nathan] Franklin's questions during the interrogation. The question before this court is whether a custodial interrogation, requiring *Miranda*, took place. We believe one did. *** After considering the relevant factors and the circumstances of this case, we find that defendant was subjected to a custodial interrogation, requiring Miranda, when defendant confessed to starting the fire at the Drury Inn on December 2, 2015."

THE COURT HELD:

> "The [interrogation room] video shows that Emrich stated at least 10 times that he did not believe defendant's version of events and accused her of lying and withholding the truth. Similarly, Franklin interjected halfway through the interview, informing defendant that he was trained to listen to people talk. Franklin then proceeded to state to defendant at least two times that she was not telling the truth. Franklin also claimed that he and Emrich knew that defendant "intentionally" started the fire in room 603. The trial court made no mention of these facts when it denied defendant's motion to suppress.
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> Defendant, however, testified that she encountered Franklin, a police officer wearing a badge with his gun holstered, when she first walked into the room. According to defendant, she saw Franklin for the first time 'sitting out behind his desk with his legs propped up on the desk.' Regardless, neither Emrich nor defendant testified that defendant knew Franklin would be present when she agreed to speak with Emrich at the fire department.
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> Defendant, instead, agreed to speak with Emrich in the presence of her husband. Importantly, defendant testified at the suppression hearing that she specifically asked Emrich on the phone—at the time she agreed to meet with Emrich—to have her husband

present during the interview, stating: 'I can't talk—I don't understand a lot of things and he helps me.' Despite this, Emrich offered Jeremy a seat downstairs, indicating that Jeremy was not welcome in the interview. As such, the absence of defendant's husband and the presence of Franklin during the interview weigh in favor of a determination that a custodial interrogation took place.

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Defendant underwent a fitness evaluation prior to trial, and Dr. Stanislaus concluded that defendant had borderline intellectual functioning. In her report, Dr. Stanislaus's indicated that defendant's 'younger sister helps her with things if she cannot understand something.' *** Based on the above reasoning, in our view, defendant's intelligence and mental makeup weigh in favor of a finding of custodial interrogation."

FACTS:

"Emrich testified that on or about December 15, 2015, a security officer at the Drury Inn informed him that defendant, a housekeeper at the hotel, may have been involved in starting the December 2, 2015, fire. Emrich also received an internal investigation report from the Drury Inn on December 15, 2015. As such, Emrich believed defendant may be a suspect. Sometime between December 15 and December 19, 2015, Emrich contacted defendant via phone to set up an interview. On the phone, Emrich and defendant scheduled the interview for December 23, 2015, agreeing that 'the fire station would be [a] convenient' place to meet. Defendant asked if her husband, Jeremy Parke, could be present during the interview. Emrich, who knew Jeremy from work, agreed to defendant's request. Emrich confirmed that he provided defendant with the choice of when and where to meet.

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Defendant stated, again, that the candle was 'already burning' when she entered room 603 the first time. She stated that she tried to put out the fire with the washcloth, but the washcloth 'caught the whole thing on fire.' Defendant agreed with Franklin that she noticed the candle in room 603 before she went to another room to clean. While cleaning another room, she decided to go back into room 603 and throw a washcloth on the candle, giving her an opportunity to be a hero and 'to shine.' She left room 603. Upon returning to room 603, she noticed a big fire. Emrich responded, 'that makes sense.' Defendant said that the washcloth caught on fire, and the fire got too big for her to put out. Defendant admitted that she lit the fire, so she could put out the fire herself."

**Legal Lesson Learned: Fire Investigators and police, when conducting interview of a prime suspect, should carefully consider a *Miranda* warning.**

File: Chap. 1, American Legal System

## NY: YONKRS FIRE INSPECTION FEES - LAWFUL - MULTI-FAMILY OWNERS MUST PAY UP TO $1,250 PER YEAR

On Sept. 18, 2024, in WMC Realty Cop. and T.A.C. Realty Corp. v. City of Yonkers, Judge William J. Giacomo, Justice of the West Chester County Supreme Court, granted the City's motion for summary judgment. The Court wrote: "The record indicates that the total budget for the Yonkers Fire Department for Fiscal Year 2021 was $74,369,758….. the [Fire Inspection] Program cost approximately $5.8 million and that only $3.2 million in fees were collected. These mathematical figures were verified by an independent accountants' report. Thus, defendants have demonstrated that the Program fees collected far exceeded the cost of administering the Program. *** Accordingly, defendants established prima facie that the Program Fees imposed pursuant to Section 55-7 of the Yonkers Fire Code are a permissible fee rather than an unconstitutional tax and their motion for summary judgment is granted. In opposition, plaintiffs failed to raise a triable issue of fact and also fail to support their own motion for summary judgment."

THE COURT HELD:

> "On or about October 3, 2017, plaintiffs filed a class action complaint on their own behalf and on behalf of similarly situated plaintiffs, and a demand for declaratory judgment against defendants. The complaint alleges that the City of Yonkers created a 'Yonkers Fire and Building Safety Inspection Program,' in order to provide fire and safety inspections for all multi-family dwelling units within the City. The Inspection Program was established pursuant to Article 18 of the Executive Law, entitled the New York State Uniform Fire Prevention and Building Code Act [*3](Uniform Act), as codified in Executive Law § 370 et seq. and the Yonkers Fire and Building Code (*see* Yonkers Fire and Building Code § 55-1 et seq.). Section 55-7 of the Yonkers Fire and Building Code, entitled Fees for Fire and Building Safety Inspection Program, sets forth the following:
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> > 'A. In order to pay for the City of Yonkers Fire and Building Safety Inspection Program, pursuant to which authorized officers and employees of the City of Yonkers inspect residential and business and commercial properties to ensure compliance with applicable codes, including but not limited to the New York State Uniform Fire Prevention and Building Code, the Yonkers Fire and Building Code, the Yonkers Fire Prevention Code, the Multiple Residence Law and other applicable provisions of law, a schedule of fees for classes of occupancies inspected by such program is hereby established.'
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> > Properties are required to be inspected at least once every 36 months and owners are expected to pay annual fees ranging from $250 to $1,250. The Program fees are paid by owners of real property other than one and two family dwellings and not-for-profit buildings.
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> > Finally, it is well established that "[l]egislative enactments enjoy a strong presumption of constitutionality. While the presumption is not irrefutable, parties challenging a duly enacted [*8]statute face the initial burden of demonstrating the statute's invalidity "beyond a reasonable doubt'. *Lavalle v Hayden*, 98 NY2d 155, 161 (2002) (internal quotation marks and citations omitted).Plaintiffs also claim the statute is "invalid" because they allegedly never received an inspection. To the

extent that plaintiffs could even maintain this argument separate from claiming a private cause of action, plaintiffs have not met their burden to demonstrate the statute's invalidity beyond a reasonable doubt. First, thousands of properties are subject to inspection, and it is undisputed that there are some written records for inspections. As a result, the alleged failure to inspect one property would not render a statute unconstitutional. Next, the record indicates that plaintiffs' properties were visited and inspected. The owner of the properties, an absentee landlord, testified that he was unaware of any visits by the Fire Department and testified that his tenants do not usually tell him if the Fire Department has visited. Therefore, plaintiffs have failed to prove beyond a reasonable doubt that there were missed inspections. Although there does not appear to be a uniform way the different City Fire Departments document violations and inspections, a motion for summary judgment is not the proper way to challenge a lack of systemic protocols."

FACTS:

"In support of the motion, defendants submit the affirmation of John Jacobson, Budget Director for the City of Yonkers. Jacobson affirmed that 'the cost of the Yonkers Fire and Building Safety Inspection Program includes the expenses incurred by Yonkers Fire Prevention as well as inspections conducted by the Yonkers Buildings Department.' Further, the 'Yonkers Fire Prevention expenses include the costs of the Yonkers Fire Prevention Department, Apparatus Field Inspections, wages and employee benefits for the same, fire vehicle costs, and administrative/office expenses.' For instance, the City of Yonkers 'conducts Apparatus Field inspections every week day.'

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In support of these assertions, defendants submit the testimony of Christopher DeSantis, Deputy Chief of the Yonkers Fire Department. DeSantis testified that the objective of the Fire [*5]Prevention Program is to ensure all of the multifamily buildings within the City of Yonkers have a safety inspection every year. DeSantis testified that the Program is a 'combination of the apparatus field inspections, the hydrant inspections, vacant building inspections, yearly and triannual inspections. The program, as a whole, encompasses these components.' DeSantis also submitted an affirmation, affirming that he 'assisted Mr. Jacobson in preparing the estimate and provided information specifically relevant to apparatus field inspections and vehicle costs.'"

**Legal Lesson Learned: State law requiring payment of annual fire inspection fee is lawful.**

File: Chap. 1, American Legal System

## TN: FIREWORKS – CITY MGR / FIRE CHIEF - CANCELLED DUE TO P's LAWSUIT – FRIVOLOUS CASES - Ps ATTY PAY $19,739

On July 25, 2024, in Glenn Whiting v. City of Athens, Tennessee, et al., the U.S. Court of Appeals for the 6th Circuit (Cincinnati) held (3 to 0; unpublished decision) that U.S. District

Court properly granted the defense motion to dismiss the three lawsuits filed by resident. The 6th Circuit wrote: "The district court correctly determined that Keith's conduct was not sufficiently severe to support Whiting's retaliation claim. Whiting alleged that Keith informed local news organizations that Whiting's lawsuit related to the fireworks show was the reason that the 2023 display was canceled. We have repeatedly held that statements made regarding publicly available information do not constitute adverse actions."

> On September 24, 2024, the U.S. District Court judge in Knoxville then granted City's motion for attorney fees and ordered resident's attorney to personally pay $19,739.80 for filing frivolous lawsuits. The Court wrote: "According to Plaintiff, ABC obtained this information on May 18, 2023, from Defendant Mike Keith, who served as interim City Manager at the time. (Id. at 1, 3–4.) Before speaking with ABC, Keith had met with Defendant Brandon Ainsworth, then the City Fire Chief, who allegedly 'informed Keith that he did not want to . . . order [City] firefighters to provided [sic] emergency protection at the 2023 Independence Day event. (Id. at 2, 4.) Plaintiff's suit over the Event included City firefighters as defendants."

THE 6th CIRCUIT HELD:

> "The allegations in this case are based on events occurring several months after Whiting filed his initial lawsuit. In May 2023, local news organizations reported that the City planned to cancel its fireworks show because of '[a] man's pending lawsuit against several city officials over what happened at last year's event.' Id., PageID 4. One news organization, ABC Channel 9, included a link to Whiting's Complaint in the original action in its report. Keith was cited as the source of the information. After news of the litigation was publicized, Whiting claimed that members of the Athens community began pressuring him to drop the lawsuit. He claimed that he was contacted directly by Athens citizens and business owners, and that other community members posted on social media 'blaming [him] for the cancellation and urging him to dismiss his cases.' Id., PageID 4–5. He alleged that the public's response to news of his lawsuits 'impaired [his] reputation and standing in the community' and caused him 'personal humiliation.' Id., PageID 19.
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> Whiting filed a third lawsuit several weeks later (No. 3:23-CV-221), claiming that the City Mayor lied about settlement negotiations between Whiting and the City. The district court granted the defendants' motion to dismiss all claims in Case No. 3:23-CV-221 in November 2023.
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> The court dismissed Whiting's retaliation claim because he did not show that Keith's statements to the media constituted an adverse action that would deter an average person from continuing to exercise his First Amendment rights.
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> The district court correctly determined that Keith's conduct was not sufficiently severe to

support Whiting's retaliation claim. Whiting alleged that Keith informed local news organizations that Whiting's lawsuit related to the fireworks show was the reason that the 2023 display was canceled. We have repeatedly held that statements made regarding publicly available information do not constitute adverse actions. See, e.g., McComas v. Bd. of Educ., Rock Hill Loc. Sch. Dist., 422 F. App'x 462, 469 (6th Cir. 2011) (superintendent's statement at School Board meeting regarding the plaintiff's role in a fight at school was not an adverse action); Mezibov v. Allen, 411 F.3d 712, 722–23 (6th Cir. 2005) (prosecutor's statements to local news media that the plaintiff "is a bad attorney, that he is inexperienced, and that he was putting his own interests before those of his client" are insufficiently adverse); Mattox v. City of Forest Park, 183 F.3d 515, 522–23 (6th Cir. 1999) (publishing a report detailing plaintiffs' efforts at investigating the City's Fire Department, which included "revealing personal statements," was not an adverse action)."

FACTS:

[From U.S. District Court September 24, 2024 order.]

"Every Fourth of July, the City of Athens, Tennessee ('the City') puts on a fireworks show for the public to enjoy. (Doc. 1, at 2–4.) But when the City elected to limit the show's ('the Event') attendance to City employees and guests in 2022, Plaintiff Glenn Whiting set out to 'video record the event so that [] excluded [] citizens could know what their City employees were doing in the closed park.' (Id. at 6.) Plaintiff's presence at the Event did not go unnoticed; at least half a dozen City employees or guests confronted him and asked him to stop filming children at the Event. (Id. at 7–11.) On January 3, 2023, Plaintiff filed suit against the City and various City employees (including firefighters), alleging multiple causes of action relating to his experience at the Event. (See Case No. 3:23-cv-2.)

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Over four months after Plaintiff filed the lawsuit and nearly a year after the Event, local news outlets reported that the City would not be holding its annual fireworks show in 2023 due to Plaintiff's pending case. (Doc. 1, at 4.) Specifically, ABC Channel 9 News ('ABC') reported:

> There won't be any fireworks at the Athens Regional Park on July 4th this year, and we now know the reason why. A man's pending lawsuit against several city officials over what happened at last year's event is cited as the reason. We obtained that lawsuit on Wednesday, which you can read in full below.
> (Id.)

The online article ('Announcement') features a link to the original complaint filed in Case No. 3:23-cv-2. (Id.)

According to Plaintiff, ABC obtained this information on May 18, 2023, from Defendant Mike Keith, who served as interim City Manager at the time. (Id. at 1, 3–4.) Before speaking with ABC, Keith had met with Defendant Brandon Ainsworth, then the City Fire Chief, who allegedly 'informed Keith that he did not want to . . . order [City]

> firefighters to provided [sic] emergency protection at the 2023 Independence Day event.' (Id. at 2, 4.) Plaintiff's suit over the Event included City firefighters as defendants. (See Case No. 3:23-cv-2.)."

**Legal Lesson Learned: The City Manager can lawfully inform the Press why the fireworks were cancelled.**

File: Chap. 2, Safety, LODD

## CA: FEDERAL GOV'T SUES MANUF. OF SMOKE BOMBS – EXCESSIVE SPARKS – FOREST FIRE / LODD / $41M

On September 27, 2024, in United States of America v. Wholesale Fireworks Corporation, et al., United States District Court Judge Maame Ewusi-Mensah Frimpong, U.S. District Court for Central District of California, denied Wholesale Firework Corporation's (Hubard, Ohio) motion to dismiss; lawsuit to proceed against that corporation, as well as their distributor (American Fireworks Warehouse) and family that set off the two smoke bombs. On Sept. 5, 2020, defendants Refugio and Angelina Jimenz set off two smoke bombs at a "gender reveal" party near the National Forest in San Bernadino; the fire destroyed 22,744 acres, damaged or destroyed 24 buildings, resulted in line-of-duty death of Charles Morton, and cost $41 million in fire suppression cost. The Court wrote: "[t] the United States alleges Wholesale Fireworks' failure to properly design and manufacture the gender reveal smoke bombs resulted in the emission of excessive sparks, flames, and molten materials…. The FAC [First Amended Complaint] also alleges that Wholesale Fireworks failed to adequately provide labeling to warn of dangers or instruct on the safe use of the gender reveal smoke bombs…. Additionally, the gender reveal smoke bombs failed to bear the California State Fire Marshall Registration Seal, rendering them illegal in California…. Accordingly, the Court finds that the United States has plausibly alleged that Wholesale Fireworks breached the duty of care imposed by California and federal law."

THE COURT HELD:

> "T]he Court finds that it is plausible that Wholesale Fireworks allowed the fire to occur. If an entity knows or has reason to know of the risks that may result from the defective labeling or design of its product, yet fails to adequately provide such labeling, it follows that the entity consequently allowed for that danger to ensue. Wholesale Fireworks knew or had reason to know of the risks of fire that may result from the defective labeling or design of the gender reveal smoke bombs given its training in the industry. Wholesale Fireworks failed to adequately provide warnings of the risk of fire that may ensue from the misuse of its product, despite knowing or having reason to know of the risks of such danger. Further, this failure was in violation of the law. Therefore, Wholesale Fireworks, in essence, allowed the fire to occur."

FACTS:

> "Defendants Refugio Jimenez and Angelina Jimenez (collectively, the 'Jimenezes') were individuals that both resided in San Bernardino County, California. Id. ¶ 5. On September 5, 2020 the Jimenezes used two gender-reveal smoke bombs, which they had purchased from GRC [Gender Reveal Celebrations web site]…. The gender-reveal smoke bombs

used by the Jimenezes ignited a fire in El Dorado Ranch Park (the 'El Dorado Fire'), which subsequently spread to federal land, including the National Forest in San Bernardino County…. The El Dorado Fire destroyed approximately 22,744 acres of land, damaged or destroyed twenty-four building structures, resulted in $41,326,609 in fire suppression costs and resulted in the death of Forest Service firefighter, Charles Morton."

**Legal Lesson Learned: The manufacturer of smoke bombs has a duty to warn users about the risks of excessive sparks, flames, and molten materials.**

Note: National Fallen Firefighter Foundation: "Charles Morton, squad boss on the Big Bear Interagency Hotshot Crew, died during interagency fire suppression activities on the El Dorado Fire in the San Bernardino National Forest in California on September 17, 2020. He had been a firefighter for 18 years, 14 of those with the U.S. Forest Service."

File: Chap. 2, Safety

## TX: PATIENT FIRES 2 SHOTS / THEN PULLS KNIFE ON EMS DURING TRANSPORT – SENTENCED LIFE IMPRISONMENT

On September 19, 2024, in Michael McMillian v. The State of Texas, the Court of Appeals of Texas, Eleventh District, held (3 to 0; unpublished decision) that jury properly convicted defendant of two separate offenses against same victim – aggravated assault with gun, and aggravated assault with knife against EMT Tahnee Marks. The Court wrote: "The jury found Appellant guilty of all six counts and the trial court assessed punishment at confinement in the Institutional Division of the Texas Department of Criminal Justice for terms ranging from forty years to life—all to run concurrently. *** Here, Appellant was charged with, convicted of, and punished for two separate violations of a single statutory offense. Therefore, the double jeopardy protections are not implicated here."

THE COURT HELD:

"The testimony shows there was a separation—though short—between the first time Appellant threatened Meeks with a gun, and the second time Appellant threatened Meeks with a knife. Meeks described the time in which she was not in the ambulance and was not in a direct struggle with Appellant. Meeks additionally was able to radio for help two times, once at the end of the first threat, and again right before the second threat. Double jeopardy defines the "same offense" as identical criminal acts—not merely the same offense by name. See Ex parte Goodbread, 967 S.W.2d 859, 860 (Tex. Crim. App. 1998) (citing Luna v. State, 439 S.W.2d 854, 855 (Tex. Crim. App. 1973))."

FACTS:

"On April 15, 2021, Tahnee Meeks, an emergency medical technician (EMT), and her partner Zach Bangert, a paramedic, responded to a wellness check involving Appellant. Before Meeks and Bangert were called, the police and a critical response team (CRT) responded. The CRT unit believed Appellant had a chemical imbalance and wanted Appellant transported to the hospital—Meeks and Bangert responded to that call. After

getting Appellant into the ambulance, Appellant's jacket was removed, and Meeks checked his vitals. Following his vitals check, Meeks had Appellant move onto the gurney in the ambulance. Appellant was then transported to the hospital, with Meeks driving and Bangert sitting in the back of the ambulance with Appellant. While the ambulance was stopped at a red light, Appellant got up from the gurney and reached for his jacket. Both Meeks and Bangert asked Appellant to sit back down, but Appellant refused. Bangert got up to move Appellant back onto the gurney, but then Appellant pulled a gun and pointed it at him. Bangert held up his hands and backed away and attempted to use the radio. Appellant told Bangert not to use the radio, and Meeks attempted to switch the channels on the radio from the hospital channel to the Metro channel. Appellant told Meeks to stop what she was doing and then pointed the gun at her.

While Appellant was focused on Meeks, Bangert was able to jump up and push the gun away. During the confrontation, two shots were fired. Meeks testified that the first shot occurred while she was still in the driver's seat, and the second was after she got out of the ambulance and moved toward the back doors of the ambulance. Meeks hesitated in opening the back doors because she could not see what was happening. When the second shot was fired, Meeks moved back to the driver's seat to call in that a 'second shot [was] fired,' and to get a better look at what was happening. After that, Bangert called out for Meeks to 'open the back doors.'

When Meeks opened the back doors, she saw Appellant and Bangert still struggling. Appellant was holding a knife and making stabbing motions. Bangert was injured from the knife. Meeks told the jury that she jumped into the ambulance to grab Appellant's arm and force the knife away from Bangert. When she did this, Appellant repositioned the knife and pointed it at Meeks. Meeks was eventually able to get the knife away from Appellant, and she and Bangert were able to restrain Appellant until law enforcement arrived."

**Legal Lesson Learned: No double jeopardy for two offenses against same victim. EMS should check patient clothing for weapons prior to transport.**

File: Chap. 3, Homeland Security

File: Chap. 4, Incident Command

## UT: FOREST SERVICE CONTROL BURN – 18,000 ACRES – FAMILY CABIN - NO LIAB. – "DISCRETIONARY- FUNCTION"

On September 25, 2024, in Michael and Sarah Johnson v. United States of America, United States District Court Magistrate Judge Cecilia M. Romero, U.S. District Court for the District of Utah, granted the U.S. Government's motion for summary judgment. The Court rejected Plaintiffs argument that Forest Service is liable because they did not inform them that fire had

escaped containment. The Court wrote: "The discretionary-function exception provides that the United States may not be held liable for claims "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).

THE COURT HELD:

> "The court agrees with Defendant that Plaintiffs have failed to meet their burden to identify a federal statute, regulation, or policy prescribing a specific course of action for the Forest Service to follow in deciding who to notify of the burn. As conceded by Plaintiffs, the term 'adjacent landowners" is not defined by the PMS 484 Guide. Although notification is mandatory, the decision of which landowners are adjacent is thus discretionary. Even if the Forest Service was negligent in deciding which landowners to notify of the prescribed burn, the discretionary-function exception nonetheless protects this discretionary conduct.
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> The court also agrees that the Forest Service's management of the Trail Mountain Fire was based on considerations of public policy. Fire management is inherently policy-based because 'the balancing of the needs to protect private property, ensure firefighter safety, reduce fuel levels, and encourage natural ecological development . . . are precisely the kind of social, economic, and political concerns the discretionary function exception was designed to shield from 'judicial second guessing.' Hardscrabble Ranch, 840 F.3d at 1222–23 (quoting Berkovitz, 486 U.S. at 536–37)."

FACTS:

> "On June 4, 2018, the Trail Mountain Fire was ignited by the Forest Service. On June 6, 2018, the Trail Mountain Fire escaped containment and was declared a wildfire. The Forest Service posted about the Trail Mountain Fire on Facebook on June 4, and 6–7, 2018, both before and after it escaped containment. Information about the Trail Mountain Fire was posted on utahfireinfo.gov on June 5, 7, and 8, 2018.
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> The Forest Service posted about the Trail Mountain Fire on Facebook on June 4, and 6–7, 2018, both before and after it escaped containment. Information about the Trail Mountain Fire was posted on utahfireinfo.gov on June 5, 7, and 8, 2018. Information was also posted on InciWeb, an interagency information management system available to the public, and InciWeb also posted on Twitter on June 8 and 10, 2018. After the fire escaped, a Wildland Fire Decision Support System (WFDSS) Incident Decision was published on June 9, 2018.
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> Plaintiffs did not learn of the Trail Mountain Fire until June 10, 2018, after it had escaped containment. On June 10, 2018, the Emery County sheriff called Mr. Johnson's work cell phone to let him know that there was a fire near his property. On the morning of June 11,

2018, Mr. Johnson attended a Forest Service wildfire briefing. After this briefing, Mr. Johnson drove to the Property and saw that the fire was actively burning on the Property. Plaintiffs' family cabin, heirlooms, belongings, and many acres of the Property and fencing were destroyed in the fire. The Trail Mountain Fire grew to 18,080 acres, was declared contained on June 27, 2018, and was declared out on July 28, 2018."

**Legal Lesson Learned: Federal government not liable for fire damage caused by discretionary decisions of the Forest Service.**

File: Chap. 5, Emergency Vehicle Operations

File: Chap. 6, Employment Litigation

## IL: CAPTAIN WITH NECK CANCER – DENIED "LINE-OF-DUTY" PENSION – NO PROOF THAT SMOKE WAS CAUSE

On September 30, 2024, in Edward G. Sobczyk v. Board of Trustees of the Rockford Firefighters' Pension Fund, the Court of Appeals of Illinois, Fourth District, held (3 to 0) that the Board properly denied the Captain's application for line-of-duty pensions. The Court wrote: "And even though plaintiff asserted 'that smoke 'could be a cause or factor in the development' of his cancer,' the Board determined plaintiff failed to 'come forward with sufficient evidence that smoke was a cause in his cancer.'"

THE COURT HELD:

> "The Board also received the reports and testimony of four doctors. Plaintiff called Dr. Peter Orris, a physician trained in occupational and internal medicine, as a retained expert. The other three doctors—Dr. Nicholas Campbell, Dr. Daniel Samo, and Dr. Elliot Lieberman— served as the Board's IMEs.
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> In February 2023, the Board issued its written decision and order. In relevant part, the Board determined plaintiff failed to show 'that his act or acts of duty, or the cumulative effects thereof, caused or contributed to his disability,' and he further failed to show 'that his cancer was related to his service as a firefighter.' In coming to its conclusion, the Board acknowledged the differences of opinion between the IMEs and Dr. Orris but afforded 'paramount weight to the opinion of Dr. Campbell' because he was 'a board-certified oncologist and therefore in the best position to opine on the cause of the [plaintiff's] cancer.'
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> Dr. Nicholas Campbell is a board-certified oncologist specializing in thoracic, head, and neck malignancies. Dr. Campbell ruled out plaintiff's firefighting duties as a contributing cause of plaintiff's cancer based on the type of cancer plaintiff had. According to Dr. Campbell, 'p16 is a well-known and highly reproducible molecule for which pathologists

routinely test head [and] neck cancers.' Plaintiff's tumors tested 'strongly positive for this molecule,' and Dr. Campbell concluded plaintiff's cancer 'was not caused by heat, radiation, or a known carcinogen that he would have been exposed to at work.' Dr. Campbell explained, 'p16 positivity, especially when diffusely positive on a specimen as [plaintiff's] samples were, is pathognomonic for a cancer caused by HPV. Other cancers that are not HPV related in the head [and] neck can rarely be seen to be p16 positive, but usually have a primary lesion that is found.' Dr. Campbell also explained why the negative results of plaintiff's metastasized samples for the HPV 16 and 18 genotypes did not change his opinion. According to Dr. Campbell, 'when cancers spread and metastasize, they become more deranged" and "will oftentimes lose the HPV positivity.' And because plaintiff's initial biopsy samples were diffusely positive for the p16 molecule, Dr. Campbell reasoned that '[t]his would be sort of the one tumor type to get that you can't really pin on anything else,' other than HPV."

FACTS:

"Plaintiff started working as a firefighter for defendant, the City of Rockford, in March 1995, eventually rising to the rank of captain. In April 2021, plaintiff noticed an enlarged lymph node on the left side of his neck that was biopsied and returned as a p16-positive squamous cell carcinoma with no primary cancer site. Plaintiff then underwent surgery, chemotherapy and radiation treatment, which he completed in August 2021. However, a follow-up medical scan showed plaintiff's cancer had metastasized and spread to other lymph nodes. Biopsies of those nodes confirmed a p16-positive squamous cell cancer, but further testing of those samples for the human papillomavirus (HPV) 16 and 18 genotypes returned negative results.

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When responding to fires, plaintiff wore all the department-issued protective gear and a self-contained breathing apparatus. However, he routinely removed his gear when removing smoldering debris and occasionally wore an N95 mask when "there was too much dust or things like that."

**Legal Lesson Learned: Another case involving "battle of experts" where Pension Board relied on their experts. Where SCBA during overhaul if smoky environment.**

File: Chap. 6, Employment Litigation

## CT: FIRE CHIEF – CITY CHARTER "PENSION OFFSET" - 75% DISABILITY PENSION OFFSET / WIFE NO MORE WORK COMP

On Sept. 24, 2024, in City of Waterbury v. Janet Brennan, et al., the Connecticut Appellant Court held (9 to 0) that the trial court properly granted summary judgment to the city. Fire Chief Thomas Brennan had a heart attack in 1993 and was awarded worker's comp; he retired on disability pension in 1995 (75%). He died in 2006, having received monthly pension payments and also two worker's comp lump sum payments in 1997 and 1999. The City in 2005 asked Court to confirm no further worker's comp payments were due to his widow. The City Charter provides that worker's comp. obligations are to be "offset" by pension payments paid to the

retiree. The Court wrote: "As our Supreme Court observed in Russo v. Waterbury, 304 Conn. 710, 714, 41 A.3d 1033 (2012), § 2761 of the city charter "allows the city to offset the . . . pension benefits [of municipal employees] based on their heart and hypertension benefits" under § 7-433c."

THE COURT HELD:

"In this action for declaratory relief, the defendant Janet Brennan appeals from the judgment of the trial court rendered in favor of the plaintiff, the city of Waterbury (city). On appeal, the defendant claims that the court improperly denied her motion for summary judgment and, relatedly, that it improperly granted the motion for summary judgment filed by the city. We affirm the judgment of the trial court.

***

The city commenced the present action by service of process on December 24, 2015. The gist of its complaint was that, due to a pension offset provision in the 1967 Waterbury city charter (city charter), no further heart and hypertension payments were due to the defendant.

***

Section 2761 of the city charter provides: ''No payments of retirement, disability or death benefits shall be allowed or paid under the provisions of this act so long or for such period as payments are being made by [the city] under the provisions of the General Statutes relating to workers' compensation except when such payments would exceed the payments made under the provisions of the Workers' Compensation Act. In such cases the pensioner shall receive, in addition to his payments under the Workers' Compensation Act the difference between that amount and the amount which he would have received under the provisions of this act." In Russo v. Waterbury, supra, 304 Conn. 714, our Supreme Court concluded that § 2761 of the city charter 'allows the city to offset the . . . pension benefits [of municipal employees] based on their heart and hypertension benefits'' under § 7-433c.'"

FACTS:

"The city hired the decedent, Thomas Brennan, as its fire chief on November 8, 1991…. Following a heart attack in 1993, the decedent filed a claim for heart and hypertension benefits pursuant to General Statutes § 7-433c…. In December, 1993, the workers' compensation commissioner (commissioner) issued a finding and award, concluding that the decedent had sustained a compensable injury and ordering the city to pay all benefits to which he " 'is or may become entitled.' "

The city and the decedent thereafter attempted to no avail to reach an agreement on the payment of benefits. Id. While those negotiations were ongoing, the decedent elected to take disability retirement in December, 1995; id.; and the city's retirement board (board) authorized a 75 percent disability pension. [Footnote 3] 677 n.4. Although the city made payments to the decedent pursuant to § 7-433c in July, 1997, and June, 1999, [Footnote 4] the decedent and the city never entered into a full and final settlement of the heart and hypertension claim.

Footnote 3: In its response to the defendant's requests for admission, the city admitted that ''the annual pay of [the decedent] at the time of his retirement was $86,690.78'' and that ''[t]he disability pension granted to [the decedent] was in the amount of $65,018.04.'' It is undisputed that the decedent received monthly pension payments in the amount of $5418.17 from the time of his retirement on December 30, 1995, until his death on April 20, 2006.

Footnote 4: The record before us indicates that the city made lump sum payments toward the decedent's § 7-433c claim in the amounts of $59,200.20 in 1997 and $17,982.12 in 1999."

**Legal Lesson Learned: A City Charter can provide for "offset" so the city will not be required to pay both workers comp and pension.**

File: Chap. 7, Sexual Harassment

## NM: DEPUTY CHIEF FIRED – OFFENSIVE COMMENTS FEMALE CADET: "BEAUTIFUL WOMAN IN HER UNDERWEAR"

On September 30, 2024, in Eric Tafoya v. City of Espanola, the Court of Appeals of New Mexico (3 to 0; unpublished decision) upheld the City's termination of the Deputy Fire Chief; he made comments to female Cadet who needed smaller fire boots (in front of her female Lieutenant), about his liking her small feet and male firefighters will not complain about working with her - "I don't know why they'd complain about seeing a beautiful woman in her underwear." The City's Civil Service Commission hearing officer reversed the termination because the inappropriate comments did not create a "hostile work environment." The City appealed to state District Court judge, who upheld the termination; the Court of Appeals agreed. The Court wrote: "[T]he hearing officer appears to have relied on cases involving claims of sexual harassment under the New Mexico Human Rights Act, NMSA 1978, §§ 28-1-1 to -14 (1969, as amended through 2024), when reaching its decision that Tafoya did not violate the City's sexual harassment policy. Using those cases, Tafoya argued that New Mexico only recognizes 'hostile work environment' and 'quid pro quo' sexual harassment claims. *** In that regard, we note that the City's policy is much broader than Tafoya argues. It provides discipline for sexually harassing conduct that had 'the effect of creating an offensive, intimidating, degrading or hostile work environment.' Personnel Policy § 1.4.1(B) at 5 (emphasis added)."

THE COURT HELD:

"The record supports the district court's determination that Tafoya's comments, detailed above, constitute sexual flirtation, verbal comments of a sexual nature, or suggestive comments about Cadet Hart's body, in violation of the City's sexual harassment policy.

***

The hearing officer made the following findings, which were adopted by the district court: (1) in response to Lieutenant Martinez's statement that Tafoya's boots would not fit Cadet Hart because she has 'tiny feet,' Tafoya stated that he 'loves tiny feet'; (2) in

response to Cadet Hart's statement that 'my feet are tiny because I have high arches,' Tafoya stated that he 'loves high arches and flat feet were ugly'; (3) Tafoya instructed Cadet Hart to try on his turnout gear, and Lieutenant Martinez stated it was okay to do so; (4) Tafoya stated, 'Oh, good, now we get to see her feet'; and (5) when male firefighters were questioning sharing space with a female and seeing her in her underwear, Tafoya interjected, 'I don't know why they'd complain about seeing a beautiful woman in her underwear,' which Cadet Hart perceived as having sexual connotations and made her feel uncomfortable. These findings are supported by the affidavits of both Lieutenant Martinez and Cadet Hart."

FACTS:

"As to the first, the record contains a signed memorandum from Cadet Hart to both Fire Chief Padilla and Lieutenant Martinez wherein she reported Tafoya's alleged statements. Further, Lieutenant Martinez's affidavit mentions a discussion with Cadet Hart about the incident. As to the second, the record contains a copy of the City's sexual harassment policy; excerpts of the City's training on that policy; documentation that Tafoya was trained on the policy; and examples of Tafoya's use of the policy to discipline other employees. The foregoing evidence provided substantial evidence in support of the findings challenged by Tafoya."

**Legal Lesson Learned: Avoid offensive or degrading comments.**

File: Chap. 8, Race Discrimination

## NY: FDNY - CLASS ACTION APPROVED IN LAWSUIT BY 4,500 – 5,000 EMS - 55% NON-WHITE, 24% FEMALE

On September 24, 2024, in Local 2507, Uniformed EMTs, Paramedics & Fire Inspectors, et al. v. City of New York, United States District Court Judge Analisa Torrres, U..S. District Court for the Southern District of New York, granted the plaintiffs' motion for class certification and legal counsel for the class. The lawsuit was filed in 2022, and pre-trial discovery has produced sufficient evidence for case to proceed as a class action. The Court wrote: "Plaintiffs claim that the differences in compensation result from 'the pronounced difference in demographics' between EMS and Fire First Responders: While EMS First Responders are 'at least 55% non-white and approximately 24% female,' only '14% of Fire First Responders are non-white' and 'less than 1%' are female. Id. ¶¶ 56, 99."

THE COURT HELD:

"In support of their disparate impact claims, Plaintiffs offer statistical evidence of racial, sex/gender, and compensation disparities among EMS and Fire First Responders. See Landis Report at 3. The City does not dispute the statistical evidence.

***

Plaintiffs have also offered substantial proof that the significantly less diverse Fire First Responders are the appropriate comparator to substantiate an inference of discriminatory intent.

***

In short, Plaintiffs offer significant proof that the City has 'operated under a general policy of discrimination.' Dukes, 564 U.S. at 353 [Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338 (2011); https://supreme.justia.com/cases/federal/us/564/338/ ]. That includes substantial (and in some cases unrebutted) evidence of common policies that disparately impact the Class and Subclasses; statistical analyses showing that the EMS First Responders are more diverse by race and sex/gender than Fire First Responders and are paid significantly less; and expert analyses showing that EMS and Fire First Responders perform similar jobs and that no job-relevant rationale explains the difference in compensation. Such 'generalized proof,' Moore, 306 F.3d at 1252, is more than 'capable of generating common answers' to issues 'central' to the parties' dispute, Dukes, 564 U.S. at 350."

FACTS:

"In 1996, the City, by executive order, transferred ambulance and pre-hospital emergency medical services 'to the FDNY to create an integrated municipal agency of first responders.'Compl. ¶ 49. Since then, the FDNY has 'functioned as an integrated [d]epartment maintaining two Bureaus of first responders—EMS[] and Fire."'Id. The Fire Bureau employs firefighters, their supervisors, and their commanding officers, collectively referred to as 'Fire First Responders.' The EMS Bureau employs emergency medical technicians ('EMTs') and paramedics, as well as their supervisors and commanding officers, collectively referred to as 'EMS First Responders.'"

**Legal Lesson Learned: This is a massive class action lawsuit that could result in significant damages.**

File: Chap. 9, ADA

## U.S. SUP. CT: WILL HEAR APPEAL - FF WITH PARKINSON'S – RETIRED LESS 25 YRS - CITY INSUR. SUDSIDY ONLY 2 YRS

On June 24, 2024, in Karyn Stanley v. City of Sanford, Florida, the U.S. Supreme Court agreed to hear the appeal of the retired firefighter (this required votes of at least 4 of 9 Justices). In 2003 the City in order to save money stopped paying retirees health insurance subsidy until age 65, unless the employee had 25 years of service, but if retired on disability they would pay for two years ($24,000 paid to plaintiff). Under former City ordinance when she was hired in 1999, she would have received $216,000 in subsidy. The plaintiff loss in U.S. District Court and in the 11th Circuit, but U.S. Supreme Court may seek to resolve issue of whether a "former" employee is a "qualified individual" under ADA for loss of benefits (NO in 6th, 7th, 9th, 11th Circuits; Yes in 2nd and 3rd Circuits).

"In *Stanley v. City of Sanford, Fla.*, the justices will consider a question arising under the Americans with Disabilities Act: Does a former employee lose her right to sue over discrimination in the provision of benefits that she earned while she was employed? The question comes to the court in the case of Karyn Stanley, who worked as a firefighter for the city of

Sanford, Fla., for more than two decades before Parkinson's disease forced her to retire. She filed a lawsuit under the ADA alleging that the city's benefits policy discriminated against disabled retirees, but the U.S. Court of Appeals for the 11th Circuit ruled that she was not a 'qualified individual' protected by the ADA because she was not currently employed by the city."

THE 11TH CIRCUIT DECISION (Oct. 11, 2023):
**"**When Stanley retired, she continued to receive free health insurance through the City. Under a policy in effect when Stanley first joined the fire department, employees retiring for qualifying disability reasons, such as Stanley's Parkinson's disease, received free health insurance until the age of 65. But, unbeknownst to Stanley, the City changed its benefits plan in 2003. Under the new plan, disability retirees such as Stanley are entitled to the health insurance subsidy for only twenty-four months after retiring. Stanley was thus set to become responsible for her own health insurance premiums beginning on December 1, 2020. She filed this suit in April 2020, seeking to establish her entitlement to the long-term healthcare subsidy.

***
The district court entered judgment for the City. On a motion to dismiss, the district court concluded that Stanley's claims under the ADA, the Rehab Act, and the Florida Civil Rights Act were insufficiently pleaded. Relying on our decision in Gonzales, the district court reasoned that Stanley could not state a plausible disability discrimination claim because the discriminatory act alleged—the cessation of the health insurance premium payments—would occur while Stanley was no longer employed by the City.

***
The City's benefits plan advances the legitimate governmental purpose of conserving funds. And its chosen method—decreasing the number of employees for whom the City subsidizes health insurance—is rationally related to that legitimate purpose. So there is no equal protection problem here."

FACTS:
Here are some facts from City's brief:

> She was hired in 1999, and the City at the time provided all retirees who served 25 years a health insurance subsidy until age 65. In 2003, the City passed an ordinance to save money; those who retired with less than 25 years received no subsidy, but if disabled then receive two years of insurance. She took disability retirement Nov. 1, 2018, with 20 years of service, at age 47; and received two years insurance subsidy ($24,000 subsidy). If she had worked for 25 years, she would have received subsidy until age 65 ($216,000 subsidy).

**Legal Lesson Learned: The U.S. Supreme Court can resolve the dispute among the Federal Circuit Courts, or Congress can pass clarifying amendment to ADA.**

Note: See briefs by IAFF, and AFL-CIO and others.

File: Chap. 10 – Family Medical Leave Act, incl. Military Leave

File: Chap. 11, Fair Labor Standards Act

File: Chap. 12 – Drug-Free Workplace, inc. Recovery

File: Chap. 13, EMS

## KY: CITY'S DONUT EATING CONTEST – CHOKING / DIED - CASE PROCEED - "WILLFUL OR WANTON" NOT IN WAIVER

On Sept. 27, 2024, in Laura Helmbrecht, in her individual capacity and as administrator of the estate of Cesar E. Marquez Chavez v. Baley Jayne Bakery and Café LLC and the City of Walton, the Court of Appeals of Kentucky held (3 to 0) that trial court improperly granted summary judgment to the City, holding that claims of "willful or wanton" negligence were never in the waiver document signed by the release. The Court wrote: "Because Chavez did not waive his estate's claim of willful or wanton negligence, that tort claim remains viable."

THE COURT HELD:

> "Helmbrecht alleges that during the contest, Chavez began choking, lost consciousness, and went into cardiac arrest. She further alleges that because the 'Appellees failed to organize and provide any emergency medical services at the contest, he received untimely medical treatment for his airway obstruction.' Appellant's Br. at 3. Helmbrecht alleges that when paramedics finally arrived, Chavez was unresponsive, and he was transported to St. Elizabeth Edgewood Hospital, where he died from 'asphyxia due to food bolus.' Ibid. The Appellees affirm these basic facts, but contest there is any support in the record as to Chavez's cause of death.
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> ***
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> With respect to whether the waiver bars Helmbrecht's claim of negligence, the waiver is enforceable…. As we conclude the waiver's employment of 'negligence' encompassed both ordinary and gross negligence, for the same reasons discussed above in addressing Helmbrecht's claim of negligence, the waiver is enforceable as a bar to her claim of gross negligence.
>
> ***
>
> By its nature, such a waiver benefits only the releasee. The releasor gains nothing from the waiver itself; his benefit is the privilege of participating in the risked activity. Consequently, the waiver itself cannot logically serve as evidence of care toward the releasor; it is quite the opposite. Finding otherwise, as the circuit court did here, is effectively abolishing the Supreme Court's holding that exculpatory contracts are unenforceable as to claims of willful or wanton negligence. Id. at 654. Finding otherwise is equivalent to saying, 'You cannot sue the releasee because he warned you that he might harm you willfully or wantonly – that is, intentionally or with utter indifference to your safety or life.' Poindexter v. Commonwealth, 389 S.W.3d 112, 117 (Ky. 2012) ('[Willfulness] 'means with intent or intention.') (internal quotation marks and citations omitted); Holbrook v. Ky. Unemployment Ins. Comm'n, 290 S.W.3d 81, 87 (Ky. App. 2009) (defining wanton conduct as '[u]nreasonably or maliciously risking harm while

being utterly indifferent to the consequences').

***

Because Chavez did not waive his estate's claim of willful or wanton negligence, that tort claim remains viable."

FACTS:

"In September of 2021, Appellant City of Walton held its annual 'Old Fashion Day' festival. Helmbrecht and her husband, decedent Chavez, were in attendance, and Chavez entered the donut eating contest. Chavez was required to sign a waiver to participate."

**Legal Lesson Learned: If City is holding a donut or other "eating contest" should include in waiver "willful or wanton" negligence and have EMS standing nearby.**

File: Chap. 13, EMS

## NJ: CARDIAC – QUICK RESPONSE VEHICLE NOT ALS - MEDIC STUDENT TRIED TO INTUBATE – IMMUNITY

On October 1, 2024, in Tonyelle R. Jamison, administrator of the estate of Ruby Nell King v. Jersey City Medical Center, et al., the Superior Court of New Jersey, Appellate Division, held (unpublished decision) that trial court properly granted summary judgement to the Medical Center and all the EMS. The Court wrote: "The [trial] court rejected plaintiff's claim that failing to equip the QRV with ALS supplies was a deviation from the applicable standard of care because dispatching 'a single BLS and a single ALS unit on the scene would have met the standard of care.' Because 'the BLS unit and ALS unit were dispatched along with [Isidro's] unit and dispatching [Isidro's] unit did not affect the arrival of the other units, [Isidro's] attendance was not required at the scene.' *** Specifically, plaintiff contends, given King's unstable condition, it was not appropriate to permit Molineros to attempt the intubation, and DiMarco took too long to intubate King after the initial unsuccessful attempt. We are not persuaded. Here, plaintiff's claim is based solely on Dr. Brown's opinion that it was 'horrible' judgment and 'reckless and dangerous' for DiMarco and Valles to permit Molineros to attempt the intubation. Dr. Brown, however, conceded at his deposition Molineros was, as a paramedic student, expressly permitted pursuant to N.J.A.C. 8:41-12.1(c)(7), to intubate patients in the field. In addition, Dr. Brown did not know how many times Molineros intubated patients before March 30, 2018. Dr. Brown testified he did not know why her intubation attempt failed and did not believe Molineros 'deviated from what a student would do.'"

THE COURT HELD:

"At best, plaintiff sets forth a viable claim of negligence. Plaintiff does not offer any evidence to support a finding that DiMarco and Valles did not act in good faith. We are satisfied, based on the facts and circumstances of this case, the court correctly determined DiMarco and Valles demonstrated their actions "were objectively reasonable or that they performed them with subjective good faith." Canico, 144 N.J. at 365. Summary judgment, therefore, was properly granted on the issue of good faith.

***

We are satisfied the court correctly determined defendants are entitled to immunity pursuant to N.J.S.A. 26:2K-14, which provides, in relevant part:

> No mobile intensive care paramedic, . . . hospital . . . first aid, ambulance or rescue squad, … shall be liable for any civil damages as the result of an act or the omission of an act committed while in training for or in the rendering of . . . advanced life support services in good faith and in accordance with this act."

FACTS:

"Shortly after 2:00 p.m. on March 30, 2018, sixty-one-year-old Ruby Nell King collapsed while visiting friends and family in Jersey City. At 2:04 p.m., a friend who was with King called 9-1-1 and reached a Hudson County Emergency Network dispatcher. At 2:05 p.m., a JCMC basic life support (BLS) unit operated by two emergency medical technicians (EMT) was dispatched and was enroute at 2:06 p.m. At 2:06 p.m., JCMC supervisor Melissa Isidro was dispatched in a quick response vehicle (QRV) to '[a]ssist [o]nly.'

***

At 2:08 p.m., after the dispatcher obtained information necessary to determine ALS services were needed, ALS unit 454 was dispatched. At 2:09 p.m., Isidro arrived on scene in the QRV. King was unresponsive with no pupil reaction, breathing, or pulse. Isidro began cardiopulmonary resuscitation (CPR) and attached an automated external defibrillator (AED) to the patient. The AED identified a "shockable rhythm," either ventricular fibrillation or ventricular tachycardia, and indicated defibrillation was appropriate. Isidro continued CPR and administered two shocks using the AED. At 2:13 p.m., the BLS unit arrived and the EMTs continued CPR and began administering oxygen using bag-[valve] mask (BVM) ventilation.

***

Unit 452 arrived on scene at 2:21 p.m., operated by mobile intensive care paramedics DiMarco and Valles, and paramedic student Molineros.[Footnote 8.]

> [Footnote 8.] Molineros was certified as an EMT and was in the last four months of her two-year paramedic training, having already completed classroom and clinical training in intubation.

***

At 2:30 p.m., Molineros attempted to intubate King, but she was not successful. The crew continued BVM ventilation and at 2:34 p.m. King's oxygen saturation was stabilizing even though she had not yet been successfully intubated. At 2:35, DiMarco successfully intubated King and she was transported to JCMC."

**Legal Lesson Learned: Statutory immunity protects both Paramedics and EMS students trained in intubation from liability**.

File: Chap. 13, EMS

# NM: FLIGHT PARAMEDIC TERMINATED – "ABANDONED" OB PATIENT - FETAL MONITOR REMOVED, PILOT RETURN BASE

On September 3, 2024, in Daniel Kuhler v. PHI Health, LLC d/b/a Phi Air Medical, United States District Court Chief Judge William P. Johnson, U.S. District Court, District of New Mexico, granted summary judgment to the employer, Phi Air Medical; there was no proof of employer making termination decision as a failure to accommodate his request for leave for ear surgery. Regarding the medical flight on Oct. 10, 2019, the Court wrote: "Disconnecting the equipment from the patient, leaving her with the ground ambulance crew, and flying back to base is why he was terminated. *** Here, the undisputed facts show that: (1) Kuhler was dispatched on October 10, 2019, for a high-risk OB patient; (2) the flight crew 'interacted with, assessed and placed a PHI-owned fetal monitor on the patient'; (3) Kuhler did not call PHI personnel or any physician; (4) Kuhler then left the scene…. This constitutes abandonment-or is at least close enough that the Court will not play the role of a Monday morning quarterback and second-guess this decision."

THE COURT HELD:

> "After the internal investigation was completed, the Yslas Report found that Kuhler (and the flight nurse) had abandoned a patient and were dishonest in their statements…. Based on these findings, the Yslas Report recommended termination of both employees. *Id.* Yslas presented the report to PHI's Chief Human Resources Officer ("CHRO")…. After reviewing the Yslas Report, and accompanying PHI policies, the CHRO accepted the recommendation-and approved the termination of Kuhler and the flight nurse….
>
> Neither Yslas nor the CHRO knew of Kuhler's request for an accommodation….
>
> ***
>
> In January 2019, Kuhler requested (and PHI granted) leave under the Family and Medical Leave Act ('FMLA') for an eye condition,,,, Specifically, Kuhler received treatment for optic neuritis. *Ibid.* By the end of the month, Kuhler returned to work at 'full-duty status….' A few months later, in early October 2019, Kuhler informed his supervisor that he would need time off for an ear surgery…. The supervisor told Kuhler to contact PHI's occupational health nurse to discuss the leave associated with the surgery. *Ibid.* Specifically, PHI needed more information to determine 'the type' of leave…. But, for one reason or another, Kuhler did not "contact" the occupational health nurse once the surgery was scheduled. Nor did he 'submit any paperwork' requesting time off for the surgery… And this ear surgery is the only 'accommodation' at issue in this lawsuit."

FACTS:

> "On October 10, 2019, Kuhler's flight crew was dispatched for an emergency medical transport…. Specifically, this flight request was for a high-risk pregnant patient, *ibid.*, out of Lincoln County Medical Center. The flight crew was dispatched to meet a ground ambulance at the Ruidoso-Sierra Blanca Regional airport. *Id.* Upon arrival, however, the pilot could not transport the patient-due to concerns over exceeding the maximum authorized flight hours…. Nevertheless, the PHI flight crew 'interacted with, assessed

and placed a PHI-owned fetal monitor on the patient….' Ultimately, the crew was not able to transport the patient … and another helicopter was dispatched.

***

Neither Kuhler nor the flight nurse offered to accompany the patient to the new rendezvous point (at the Carrizozo airport)…. Neither Kuhler nor the flight nurse called the transferring physician, receiving physician, or PHI to coordinate another transfer.

***

Later, PHI received a complaint from Lincoln County EMS about Kuhler and the flight nurse."

**Legal Lesson Learned: Follow your protocol on passing care of patient to others.**

File: Chap. 14 – Physical Fitness, incl. Heart Health

Chap. 15, Mental Health

## AR: FF WITH PTSD – DENIED WORKER'S COMP – NO PROOF WAS DUE TO "LONG COVID" OR THAT GOT COVID AT WORK

On September 26, 2024, in Jerald Franzmeier v. Industrial Commission of Arizona; City of Tolleson, the Court of Appeals of Arizona, First Division, held (3 to 0) that the firefighter was properly denied workers comp. While fighting a fire in November 2021, Franzmeier experienced a "sudden alteration in [his] mental status" that left him confused and disorientated, and caused him to hallucinate; he was diagnosed by a psychiatrist with PTSD. In May. 2022 he filed a worker's comp claim that alleged he got COVID from fellow firefighter on Aug. 21, 2020 [a week after he had flow to Maryland wearing mask and gloves on the plane] and that "long COVID" was the cause of his PTSD. The Court wrote: "However, Franzmeier offered no competent evidence showing, with a reasonable degree of medical probability, that his COVID-19 infection contributed to his mental injury."

THE COURT HELD:

"Thus, Franzmeier needed to offer medical expert opinion evidence linking his mental injury to his employment, but he offered none. Instead, he testified to what his doctors told him, that there was 'the possibility of a COVID claim,' but his testimony made clear that these opinions were speculative. The Respondents presented the only competent medical evidence on causation through Dr. Lee, who opined that Franzmeier was probably infected during his cross-country trip.

***

Meanwhile, in preparation for the February 2023 hearing [before Worker's Comp. Administrative Law Judge] , neurologist Dr. Leo Kahn performed an independent

medical examination of Franzmeier at the Respondents' request. Dr. Kahn physically examined Franzmeier and reviewed the available records, including medical records. Dr. Kahn acknowledged Franzmeier's underlying psychological condition but concluded that no objective evidence supported Franzmeier's claim that he sustained a neurological injury from contracting COVID-19 in 2020."

FACTS:

"For nearly two decades, Franzmeier worked as a paramedic and firefighter for the City of Tolleson ('City'). On August 18, 2020, he flew home to Arizona after visiting family in Maryland. The next day, he returned to work for a 48-hour shift, working closely with others at the fire station. On August 21, a co-worker tested positive for COVID-19. Five days later, Franzmeier tested positive. For the next ten days, Franzmeier quarantined at home before returning to work without incident. He experienced mild symptoms but never sought medical attention.

***

More than a year later, while fighting a fire in November 2021, Franzmeier experienced a "sudden alteration in [his] mental status" that left him confused and disorientated, and caused him to hallucinate. He was taken off duty and evaluated by a psychiatrist, who diagnosed him with post-traumatic stress disorder ('PTSD'). Franzmeier believed his PTSD and other mental health symptoms resulted from 'long COVID' or a post-COVID condition. He also believed he contracted the COVID-19 virus in August 2020 while at work and not during his earlier travels to and from Maryland.

***

The week before the scheduled hearing (Nov. 2022), Franzmeier's wife checked him into an inpatient care facility for PTSD. Consequently, the ICA hearing was postponed to February 2023.

***

Franzmeier represented himself and, outside of his own testimony, called no witnesses. When asked why he had not requested a medical expert to testify on his behalf, Franzmeier responded, 'I believe that the -- the incident speaks for itself as -- as far as -- as mathematical possibilities.' Franzmeier then testified that he believed he contracted the virus in August 2020 while at work, not while traveling to or from Maryland. In describing the injury he suffered, he recounted his PTSD symptoms and other cognitive events experienced in November 2021 and the months that followed. The ALJ asked Franzmeier whether he was asserting a claim that COVID-19 caused his mental health issues. Franzmeier testified that he had undergone an MRI that suggested 'the possibility of a COVID claim because of COVID exposures,' and further stated that the flashback he experienced in November 2021 'could be an exacerbation of COVID.' But when the ALJ pressed whether any doctor had opined that COVID-19 caused his PTSD symptoms, Franzmeier admitted that none had. Franzmeier concluded his testimony by asserting that during the relevant '14-day incubation period,' he had worked and slept for 304 hours (out of the 336 total hours), which he claimed established only a 10% probability that he became infected outside of work."

**Legal Lesson Learned: The firefighter never offered any expert testimony or other proof that his PTSD was caused by exposure to COVID-19.**

File: Chap. 15, Mental Health

## IL: FEMALE FF / MEDIC – PTSD AFTER FATHER'S DEATH – NO "LINE-OF-DUTY" PENSION – RECEIVES NON-DUTY PENSION

On September 25, 2024, in Cheryl Mayer v. The Board of Trustees of the Calumet City Firefighters Pension, the Court of Appeals of Illinois, First District, Third Division, held (3 to 0) that the Board correctly denied her a "line-of-duty" pension based on findings of four independent medical evaluators, and the fact that prior to her father's death in April, 2020, she could handle difficult EMS and other runs, including 2015 (active shooter scene), 2018 (suicide by hanging), and 2019 (suicide by self-inflicted gunshot wound). The Court wrote: "Contrary to plaintiff's contentions, the record reveals that the Board did not solely rely on the independent medical evaluators' opinions as to the cause of her medical condition. The Board also relied on plaintiff's own testimony, where she acknowledged that she did not abuse alcohol or suffer from depression or PTSD, until after her father's death."

THE COURT HELD:

> "To be entitled to a line-of-duty disability pension, a claimant is required to establish a causal connection between the claimant's disability and an act of duty.
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> ***
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> Here, the independent medical evaluators all agreed that plaintiff suffered from preexisting mental and emotional issues that contributed to her disability, namely, depression, anxiety disorder, and PTSD. The issue is whether plaintiff's preexisting conditions were aggravated by her duties as a firefighter/paramedic, thereby establishing a causal connection between her disability and service as a firefighter/paramedic.
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> ***
>
> Contrary to plaintiff's contentions, the record reveals that the Board did not solely rely on the independent medical evaluators' opinions as to the cause of her medical condition. The Board also relied on plaintiff's own testimony, where she acknowledged that she did not abuse alcohol or suffer from depression or PTSD, until after her father's death. The documentary evidence and testimony presented at the administrative hearing gave rise to a factual issue concerning whether plaintiff's preexisting conditions were aggravated by her duties as a firefighter/paramedic.
>
> ***
>
> The Board made a factual finding that plaintiff failed to meet her burden of establishing a causal connection between her preexisting conditions and her duties as a firefighter/paramedic. In light of the record before us, and the deference we must afford to a board's credibility determinations and factual findings, we cannot say that the Board's finding that plaintiff failed to meet her burden of proof was against the manifest

weight of the evidence. We find that the Board's finding was supported by competent evidence."

FACTS:

"Plaintiff was 46 years old at the time of the hearing and the married mother of two sons, both over twenty-one years of age. Plaintiff's background included instances of domestic conflict between her mother and father; the murder of her older brother when she was nine years old; sexual molestation by a neighbor's teenaged son when she was ten and eleven years old; and verbal and physical abuse by her mother, until she left home at eighteen. In 1998, plaintiff was successfully treated with Zoloft for post-partum depression after the birth of her second son.

***

Plaintiff joined the Calumet Fire Department as a firefighter/paramedic on March 1, 2009. Before she was hired, plaintiff underwent and passed physical and psychological examinations. She was neither diagnosed with nor receiving treatment for any psychiatric conditions.

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In July 2020, plaintiff began receiving psychological counseling from Dr. Katie Johnson, a licensed clinical professional counselor. On August 14, 2020, plaintiff reported to Johnson that she had suicidal ideations and had posted to Facebook that she put a firearm to her head and contemplated committing suicide. Plaintiff was eventually referred to Dr. Kelsey Oster, for a neuropsychological evaluation. She was admitted into a 28-day inpatient substance-abuse program at Advanced Recovery Systems in Orlando, Florida. Plaintiff testified that the program helped her stop drinking. After her discharge from the program, plaintiff continued working full duty without restrictions. At the time of the hearing, plaintiff was still seeing Dr. Johnson 'every week to two weeks.'

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On February 12, 2021, plaintiff responded to a call involving a man in full cardiac arrest. As plaintiff was attempting resuscitation efforts, a female family member, who did not have a 'do-not-resuscitate' order or a power of attorney, started yelling not to touch him. When plaintiff's supervisor instructed emergency personnel to honor the woman's wishes, plaintiff became upset and asked why they were not following the pandemic protocols. Plaintiff left the house and began complaining and swearing to a nearby police officer. Plaintiff returned to the station, but did not finish her shift, claiming she was sick and needed to go home. That was the last day plaintiff worked in a full and unrestricted capacity as a firefighter/paramedic for the Calumet Fire Department."

**Legal Lesson Learned: The Board's independent medical experts found that she could perform her duties as firefighter / medic, despite her anxiety and depression, until death of her father.**

Note: Dr. Ganellen noted that plaintiff's medical records revealed she was being treated for anxiety and depression as early as 2018, but that these conditions "markedly" worsened after the death of her father in April 2020.

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Dr. Conroe noted that plaintiff exhibited symptoms of anxiety and depression prior to her father's death, but that 'they were moderate and did not interfere with her functioning at work.' According to the doctor, the death of plaintiff's father 'lessened her stress tolerance and affected her ability to respond appropriately to similar subsequent emergencies.' Dr. Conroe determined that work events 'were not the cause of [plaintiff's] disability, but rather her father's death and the surrounding circumstances fueled her emotional reactions to these demanding situations.'"

File: Chap. 16, Discipline

File: Chap. 17, Arbitration, Labor Relations

File: Chap. 18, Legislation

## MI: FIREWORKS – CITY CAN'T REQ. SAFETY FLYERS - MI SUP. CT. CHIEF JUSTICE / STATE LAW SHOULD REQUIRE

On September 27, 2024, in People of the City of Sterling Heights v. Robert Bahnke, the Michigan Supreme Court declined to hear the City's appeal which sought to fine the manager of the fireworks store $150 for not handing out safety flyer required by City code; the Court of Appeals struck down the ordinance since it conflicted with state's fireworks statute. Chief Justice Elizabeth Clement of the Michigan Supreme Court wrote in her concurring opinion: "The city ordinance here is a relatively small burden on fireworks vendors and provides useful information to purchasers regarding relevant laws."

THE CHIEF JUSTICE'S CONCURRING OPINION:
"In this case, defendant, Robert Bahnke, was ticketed for violating the city code because he had not handed out the required flyers when he sold fireworks. The district court and the circuit court affirmed the $150 fine that the magistrate had ordered. But the Court of Appeals reversed in a published opinion, holding that Sterling Heights Code, § 20-115(I) was preempted by MCL 28.457.

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But I question whether invalidating city ordinances such as the one at issue here is truly what the Legislature intended when it passed MCL 28.457. While I understand that the Legislature may have reasonably sought to prohibit local units of government from passing more substantive regulations of the sale of fireworks, it is difficult for me to imagine that the Legislature intended to prohibit cities from ensuring that fireworks

purchasers are adequately advised of applicable laws. The city ordinance here is a relatively small burden on fireworks vendors and provides useful information to purchasers regarding relevant laws. For these reasons, I question whether the text of MCL 28.457 is achieving the result the Legislature intended, and I encourage the Legislature to review the statutory language."

FACTS:

[From Feb. 15, 2024 Court of Appeals decision.]

"This case arises out of a citation issued by plaintiff to defendant for violating a city ordinance on July 13, 2020. The ordinance, Sterling Heights Code, § 20-115, requires fireworks vendors to hand out a flyer to purchasers and display signs that provide notice to customers of city and state laws regarding fireworks usage. Defendant, who manages the store Pro Fireworks, did not hand out the required flyers and was issued a citation for failing to comply with the ordinance. Defendant appeared before a magistrate, who found defendant responsible for violating the ordinance and ordered a fine of $150. Defendant appealed to the district court, arguing that the ordinance was preempted by state law. The district court affirmed the magistrate's ruling and held that the ordinance was not preempted by state law because there was neither a direct conflict between the state statute and the ordinance or field preemption in the area of fireworks regulation. Defendant filed a claim of appeal with the circuit court. The circuit court affirmed the district court's order and determined that the ordinance was not preempted by state law for the same reasons stated by the district court. Defendant was granted leave to appeal by this Court."

**Legal Lesson Learned: Hopefully the state Legislature will amend its fireworks statute to include a safety flyer requirement.**