UNIVERSITY OF Cincinnati

College of Engineering & Applied Science

Open Learning Fire Service Program
2850 Campus Way Drive
745 Baldwin Hall
Cincinnati OH 45221-0071

Phone (513) 556-6583

MAY 2022 – FIRE & EMS LAW NEWSLETTER

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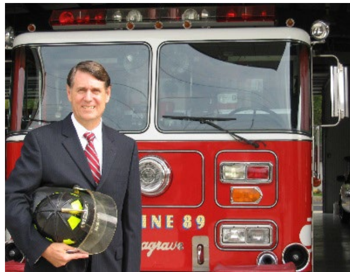
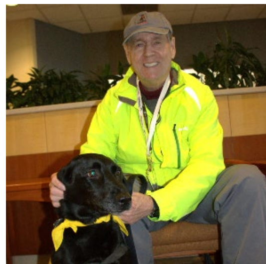


Lawrence T. Bennett, Esq.
Professor-Educator Emeritus
Program Chair, Fire Science & Emergency Management
Cell 513-470-2744
Lawrence.bennett@uc.edu

- **2022: FIRE & EMS LAW – RECENT CASE SUMMARIES / LEGAL LESSONS LEARNED**: Case summaries since 2018 from monthly newsletters
- **2022: FIRE & EMS OFFICER DEVELOPMENT / LEGAL LESSONS LEARNED / AMERICAN HISTORY**
- **PET THERAPY RESPONSE TEAM: Check out our team. Now at 11 dogs, one large rabbit**



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File: Chap. 1, American Legal System; Arson

IL: AGGRAVATED ARSON - OCCUPIED APARTMENTS - PLED GUILTY - 24 YEARS IN PRISON – SENTENCE UPHELD

On May 5, 2022, in The People of the State of Illinois v. Bryan T. Griffin, the Court of Appeals of Illinois, Fourth Division, held (3 to 0) that the trial court judge properly rejected the defense suggested 12-year sentence and imposed 24 years which was within the sentencing range of 6 to 30 years (prosecutors recommended 30 years). The defendant set fire to a building where once was a tenant in apartments above Mother's Bar. There were nine people in the building when the fire was started with gasoline, and the fire department had to rescue two from the roof. The trial court judge held a hearing prior to imposing the sentence, where numerous witnesses testified about the potential loss of life from the fire that destroyed the bar and the apartments above it.

> "We find the trial court did not abuse its discretion when it sentenced defendant to 24 years in prison because the sentence fell within the statutory range and was not disproportionate to the nature of the offense. The court at sentencing considered and weighed the relevant factors in mitigation. Where the court ultimately found the aggravating factors outweighed any mitigating factors, we cannot say the court abused its discretion by sentencing defendant to 24 years in prison. Accordingly, where defendant fails to demonstrate a clear or obvious error occurred, we reject his contention of plain error.
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> Steve Bennett, Fire Chief of the Charleston Fire Department, testified that in the early morning hours of February 16, 2018, he reported to a fire at 506 Monroe in Charleston. Chief Bennett stated two individuals had to be rescued from the roof of the building. Chief Bennett identified the two individuals rescued from the roof as Luther Holden and Karley Carter. Chief Bennett indicated nine people were in the building when the fire occurred. Other than minor smoke inhalation, none of the nine occupants suffered any medical injuries. Chief Bennett also testified the fire eventually went up to a third alarm fire and that in his career, he had only experienced a fire to that degree 'probably three or four times.'
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> Anthony West, chief of investigations for the Charleston Police Department, testified he investigated and processed the scene of the fire the day after the blaze and interviewed several witnesses. West testified that through another officer's investigation into the circumstances surrounding the fire, defendant was identified as a suspect. West stated he learned the occupant of apartment three, above Mother's Bar, was Luther Holden, whose sister, Willa Griffin, was in a relationship with defendant. On February 15, 2018, defendant and Willa's father, Willie Grady, got into an altercation as Grady tried to help Willa move out of her and defendant's shared residence.
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> ***
>
> Haley Peterson testified that on February 16, 2018, she lived in an apartment above Mother's Bar with her two children, ages five years old and two months old. In the early

morning hours of February 16, 2018, Peterson woke up to smoke in her apartment. Peterson grabbed her two children and exited the building and called the owners to notify them about the fire. Peterson testified she lost everything in the fire except the clothes she was wearing. Peterson also testified that since the fire, her two-month-old daughter had experienced lung issues and had a constant cough from the smoke."

Legal Lesson Learned: The trial court properly considered the seriousness of the arsonist's conduct in imposing the sentence.

File: Chap. 1, American Legal System

U.S. SUP. CT: BOSTON CITY HALL - FLAGPOLE - EMS WORKERS & OTHERS – MUST ALLOW "CHRISTIAN" FLAG

On May 2, 2022, in Shurtleff, et al. v. City of Boston, the U.S. Supreme Court unanimously held (9 to 0) that the City of Boston has three flag poles at City Hall and has allowed the third pole to be used by wide variety of groups; refusal of a group to raise a "Christian flag" violated First Amendment's Free Speech clause.

> "For years, since at least 2005, the city has allowed groups to hold flag-raising ceremonies on the plaza. Participants may hoist a flag of their choosing on the third flagpole (in place of the city's flag) and fly it for the duration of the event, typically a couple of hours. Most ceremonies have involved the flags of other countries—from Albania to Venezuela—marking the national holidays of Bostonians' many countries of origin. But several flag raisings have been associated with other kinds of groups or causes, such as Pride Week, emergency medical service workers, and a community bank. All told, between 2005 and 2017, Boston approved about 50 unique flags, raised at 284 ceremonies. Boston has no record of refusing a request before the events that gave rise to this case. *** In July 2017, Harold Shurtleff, the director of an organization called Camp Constitution, asked to hold a flag-raising event that September on City Hall Plaza. The event would 'commemorate the civic and social contributions of the Christian community' and feature remarks by local clergy…. As part of the ceremony, the organization wished to raise what it described as the 'Christian flag….' To the event application, Shurtleff attached a photo of the proposed flag: a red cross on a blue field against a white background. The commissioner of Boston's Property Management Department said no. *** The commissioner worried that flying a religious flag at City Hall could violate the Constitution's Establishment Clause and found no record of Boston ever having raised such a flag. He told Shurtleff that Camp Constitution could proceed with the event if they would raise a different flag. Needless to say, they did not want to do so. *** Boston could easily have done more to make clear it wished to speak for itself by raising flags. Other cities' flag-flying policies support our conclusion. The City of San Jose, California, for example, provides in writing that its 'flag-poles are not intended to serve as a forum for free expression by the public,' and lists approved flags that may be flown 'as an expression of the City's official sentiments.' *** For the foregoing reasons, we conclude that Boston's flag-raising program does not express government speech. As

> a result, the city's refusal to let Shurtleff and Camp Constitution fly their flag based on its religious viewpoint violated the Free Speech Clause of the First Amendment."

Legal Lesson Learned: Fire & EMS Departments that have flag poles should adopt policy restricting use to official activities only.

Chap. 1, American Legal System, Arson

VA: HOMEOWNER CONV. ARSON UPHELD - FOUR SEPARATE FIRES – DEF. EXPERT NEVER TALKED FF WHO WERE THERE

On April 26, 2022, in [Maria Goodman v. Commonwealth of Virginia](), the Court of Appeals of Virginia held (3 to 0) that the jury properly found the homeowner guilty of arson. The defense expert speculated fire might have started in attic and then ignited for locations in house but the bedroom doors were shut and he never interviewed any of the firefighters. The jury recommended five years incarceration, but trial judge suspended four years.

> "Hanover County Fire Marshal Steven Phillips ('Fire Marshal Phillips') investigated the incident and determined that there were four separate origins of fire inside the house. Testifying as an expert in fire investigations and the origins and causes of fires, Fire Marshal Phillips opined that there were two points of origin in the back bedroom: the first was a box of clothing, papers, and other combustibles beneath a window, and the second was a dresser which showed significant fire damage. In the front bedroom, Fire Marshal Phillips found burnt paper, plastic, and clothing on the carpet and determined they were the source of the fire in that room. Finally, the fourth point of origin was in the kitchen next to the pantry.
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> ***
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> Dr. Craig Beyler ('Dr. Beyler'), an engineer who mostly worked with 'fire issues,' testified for the defense. He opined that an accidental fire which started in the attic could not be eliminated as a causal factor of the three points of origin found in other areas of the house. On cross-examination, Dr. Beyler acknowledged that he had not interviewed the firefighters who had been at the scene and conceded that if the bedroom doors were closed during the fire, his hypothesis that burning embers from the attic could have started the fires in the bedrooms would be faulty.
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> ***
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> Although it is unclear why Goodman set fire to her home, we cannot disturb the jury's conclusion that she intended to do so. The evidence justified the jury in finding that the Commonwealth met its burden to prove that Goodman acted with malice."

Legal Lesson Learned: Defense expert testimony shown to be unreliable on cross examination.

File: Chap. 1, American Legal System

TX: NO INJURY MVA – INSURANCE CO. PHOTOS HELPFUL – HUSBAND KILLED TAKING PICTURES – CAN'T SUE CO.

On April 22, 2022, in Elephant Insurance Company, LLC v. Lorraine Kenyon, Individually and Executrix of Estate of Theodore Kenyon, the Supreme Court of Texas held (3 to 0) that the Insurance Company did not breach a duty of care, and the trial court properly granted summary judgment to the company. Mrs. Kenyon lost control of her car on a rain-slick road, striking a guardrail. She called the Insurance Company's call center in Virginia and was advised:

> *Kenyon*: Do you want us to take pictures?
>
> *Elephant*: Yes, ma'am. Go ahead and take pictures. And - And we always recommend that you get the police involved but it's up to you whether you call them or not. Is your vehicle drivable?

Her husband arrived at the scene and was taking photos when another motorist struck slid on the highway, struck and killed him.

> "After an insured motorist was involved in a single-car accident, the motorist's spouse arrived at the accident scene and began taking photos. While the spouse was on the side of the road engaging in that activity, he was struck by another vehicle and killed. The motorist alleges her automobile insurer had "instructed" her to take photos; she had relayed that instruction to her spouse, who was complying when the other driver hit him; and the insurer's negligence in issuing such an instruction proximately caused her spouse's death. The issue of first impression in this wrongful-death and survival action is whether the automobile insurer owed the motorist and her husband a duty to process a single-vehicle accident claim without requesting that the insured take photographs or to issue a safety warning along with any such request. Balancing the factors relevant to 'determining the existence, scope, and elements of legal duties,' we agree with the trial court that the insurer bore no such duty. We therefore reverse the court of appeals' judgment and render judgment for the insurer."

Legal Lesson Learned: Taking photos at MVA scene can be high risk not only for civilians but also for emergency responders; it's a shame the driver didn't call for a police officer to arrive and further protect the scene.

File: Chap. 2, LODD, SAFETY

IN: FF DIED CANCER – 4 DAYS PRIOR HE MARRIED FEMALE FF – $1.6M PENSION - SON LOSES ATTEMPT TO ANNUL

On April 18, 2002, in The Estate of Michael David Estridge, Sr. v. Lana Ann Taylor, the Court of Appeals of Indiana held (3 to 0) that the trial court judge, after a two-day bench trial, properly

denied the petition to annul the marriage. Estridge and Taylor, both firefighters and EMT/paramedics, first met in 2011 while employed at the same fire station. Estridge was diagnosed with cancer in 2015, and Taylor was informed of this diagnosis together with other co-workers and mutual friends. In the fall of 2016, Estridge and Taylor started dating and near the end of that year, Estridge first broached the subject of marriage. In the beginning of 2017, the relationship became sexual and toward the end of the year, Estridge proposed to Taylor but she was hesitant to commit. After another marriage proposal in early 2018, Taylor agreed and accepted Estridge's ring. They were married on May 2, 2019 in a courthouse, videotaped with fellow firefighters attending, without informing the firefighter's children because they might object (36-year-age difference), and he died four days later on May 6, 2019. The trial judge noted that Estridge had always intended Taylor to have his firefighter's pension, because, if he died unmarried, it would go 'back into the till' and he 'didn't want to work that long for nothing[,]' so Estridge also signed a pension benefits beneficiary designation, listing Taylor as his spousal beneficiary. (Transcript Vol. II, p. 234). She will now receive $2,711.34 per month, or approximately $1,6 million over her lifetime. In the absence of the marriage, Estridge's estate would have received only the value of his contributions to the pension plan, which would have amounted to approximately $170, 000.

> "[The plaintiff son] ignores a large part of Dr. Rodgers' testimony which discussed his review of the palliative care physician's observation that Estridge was alert and able to make complicated decisions on the morning of May 2, 2019. Dr. Rodgers also discussed his review of the depositions of persons with Estridge immediately prior to and during the wedding ceremony, as well as his review of the videorecording of the actual wedding. Dr. Rodgers explained that he reviewed the depositions because he wanted to know Estridge's mental status during the four-or-five-hour period of the drive between Chicago and home. As the depositions indicated that Estridge was laughing and interacting over photographs and stories, Dr. Rodgers concluded that 'number one, that [Estridge] probably didn't take anymore narcotics. And number two, that he was -- in terms of what you would expect. His behavior was appropriate. And that's the way they -- people who know him, assessed it.' (Tr. Vol. II, pp. 190-91). Dr. Rodgers' viewing of the videorecording of the wedding elicited the following testimony:
>
> > His voice is weak, but he participates. And at the end he gives his bride a nice hug and a squeeze. And if you watch his hand on the back, he's giving her a pat. I don't see anything in that, that would make me think that he was somehow coerced into a wedding. Granted I wasn't there, but those are the things that I looked at in making my decision that I think this man was competent to make his decision to marry[.] (Tr. Vol. II, p. 186).
>
> ***
>
> Bernie Mickler (Mickler), one of Estridge's long-time firefighter friends who accompanied him from Chicago to Indianapolis on May 2, 2019, and who was present at the wedding, testified that Estridge told him in the car that day that he wanted to marry Taylor. He described that, during the ceremony, Estridge stood next to the car and, at times, would hold on to the car to support himself. Scott Huff (Huff), who attended the wedding ceremony, opined that he 'didn't think [Estridge] was brainwashed into marrying [Taylor].' (Appellant's App. Vol. V, p. 236). Huff described Estridge as

> 'look[ing] frail, like a person should look that [is] in his last days.' (Appellant's App. Vol. V, p. 244). In response as to whether he had any concerns that maybe the wedding was not what Estridge wanted, Huff answered, 'No. I truly think that's what he wanted.' (Appellant's App. Vol. V, p. 247).
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> ***
>
> Although the legislature statutorily encapsulated the rules for the firefighters' pension funds, it did not include any limitation on who can be a spouse or the length of time of marriage. *See* I.C. § 36-8-8-13.8. Therefore, in the absence of any statutory guidelines to analyze a marriage for quality and quantity attributes such as love, companionship, and length of time, we decline the Estate's invitation to impose any jurisprudentially."

Legal Lesson Learned: They wisely videotaped the wedding.

File: Chap. 2, LODD, Safety

NM: BORDER PATROL RECRUIT DIED – TIMED RUN / WARM / ALTITUDE – SICLE CELL - DEATH BENEFITS NEW REVIEW

On April 15, 2022, in [Lisa Afolayan, Widow of Nathaniel Afolayan v. U.S. Department of Justice](), the U.S. Court of Appeals for Federal Circuit (D.C.), held (3 to 0) that the denial of death benefits is vacated, and case remanded for further review. The recruit died after a one-and-a-half mile run on April 30, 2019, to be completed in thirteen minutes or less; at approximately 3, 400 feet above sea level, with the temperature at approximately 88 degrees Fahrenheit and relative humidity between six and seven percent. The death certificate listed "Heath Illness" as cause of death. The Court found that the DoJ Bureau of Justice Assistance failed to determine whether the climatic conditions surrounding Agent Afolayan's death were a "direct and proximate cause" of his injuries, and if climatic conditions were a cause, whether Agent Afolayan's sickle cell trait could properly be considered in evaluating alternate causation.

> "In September 2020, the Acting Director of the Bureau [of Justice Assistance] denied Ms. Afolayan's appeal, concluding from the medical evidence in the record that 'Agent Afolayan died-not from a wound or condition shown to have itself been 'the direct and proximate result' of climatic conditions, such as heat, or another external force/factor cognizable as an 'injury' under PSOB[A] regulations-but, rather, as a result of several factors acting together, including physical exertion, sickle cell trait, heat, altitude, and dehydration.' J.A. 1. As a consequence, the Acting Director concluded that Ms. Afolayan failed to 'establish[] that Agent Afolayan suffered an 'injury' within the meaning of [the Benefits Act] and its implementing regulations.' J.A. 21. Ms. Afolayan appeals. We have jurisdiction under 34 U.S.C. § 10287.
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> ***
>
> The regulation, read in light of its history and the statute as a whole, requires a finding of nonroutine or out-of-the-ordinary climatic conditions for compensation. Although the

> Bureau noted the altitude and weather in which Agent Afolayan completed the training run and collapsed, it never determined whether the prevailing conditions were the type of unusual or out-of-the-ordinary climatic conditions that would qualify for compensation under the regulations. This was error.
> If the Bureau determines that Agent Afolayan's death was the 'direct and proximate result' of an injury caused by 'climatic conditions,' then it must consider a second issue, which is whether sickle cell trait is appropriately considered in determining whether another 'factor . . . contributed to the death . . . to so great a degree' as unusual climatic conditions. 28 C.F.R. § 32.3."

Legal Lesson Learned: Climate conditions can qualify as a "direct and proximate cause" of death.

File: Chap. 3, Homeland Security, incl. Active Shooter, Cybersecurity, Immigration

File: Chap. 4, Incident Command

IL: STRUCTURE FIRE – MOTHER DEAD, TWO KIDS STILL TRAPPED – POLICE TACKLED MAN TRYING ENTER HOUSE

On May 6, 2022, in William F. Moss v. Gabe Schimp, et al., U.S. Magistrate Judge Mark A. Beatty, U.S. District Court for Southern District of Illinois, held that the police officers who tackled the plaintiff to prevent him from entering the burning house enjoy qualified immunity. The plaintiff intentionally ignored the yellow scene tapes and the police officers command to stop. It is unfortunate that the police tackle led to a quadriceps tendon tear in Moss's left knee, a rupture of his right patellar tendon, and a rupture of his left quadriceps tendon, but the officers did not use excessive force.

> "This was a tense and fluid scene. It was the early morning hours of January 31, 2018. A house fire was raging. One person had already perished in the fire and her body lay in the front yard. The firefighters were still searching for two children inside the burning home. There was a propane tank near the burning house that could have made matters worse in an instant. The crowd that had gathered was not exactly compliant as some members of the crowd had already attempted to run inside the burning home. So it is with this backdrop that Moss comes into the picture. He disregarded yellow police tape, ignored a command to stop, and ran towards a line of police officers who had formed a perimeter. In addition to the search and rescue effort that was ongoing inside the burning home, the firefighters were also working to suppress the fire and preserve the scene for investigation, which must be done anytime there is a death. A reasonable officer could have believed Moss was attempting to run into the burning house. If Moss had gotten past

> the officers and into the house or even close to the house, his own life and safety would have been in jeopardy. Moreover, if Moss had gotten past the Defendants and into the house, this could have jeopardized the safety of the firefighters. Moss could have also disrupted their search efforts for the two kids and their work in trying to put the fire out. If Moss had gotten past the officers and inside the home, this would have added yet another person for the firefighters to search for and remove from the burning home. Moss's behavior also risked compromising the integrity of the scene inside, where a subsequent investigation would be required as a result of the deaths caused by the fire. The Defendants were faced with an incredibly dangerous situation that called for a quick decision. In response, Defendants utilized a takedown maneuver.
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> ***
>
> Moss was not under control and had already ignored both yellow police tape and a verbal command to stop. Under the totality of the circumstances, Defendants did not use unconstitutionally excessive force when they brought Moss to the ground."

Legal Lesson Learned: The police officers acted reasonably to protect the structure fire scene and are entitled to qualified immunity.

File: Chap. 4, Incident Command

ME: MENTAL RUNS INTO ICY WATER – DROWNED – PD WAITED FD BOAT - FF "KICK HIS ASS" – NO IMMUNITY

On May 4, 2022, in John Cohen v. City of Portland, et al., U.S. District Court Judge Nancy Torresen, U.S. District Court for District of Maine, dismissed all the police officers who waited for a fire boat to assist in rescue of Eric Cohen, 25 (mental issues) who ran naked into the frigid, shallow waters of Back Cover and drowned after 25 minutes, but lawsuit may continue against the City for failure to train when responding to mental patient, and also against firefighter Ronald Giroux. According to the Complaint, Giroux shouted from the shore, "I will kick his ass if he comes out of the water." Compl. ¶ 26. Giroux's affirmative act, yelling a threat, enhanced the danger to Cohen and may have contributed to his refusal to come out of the water.

> **"**Though the Complaint is scarce on details regarding the deficiencies of the City's training program, it alleges sufficient facts to support a plausible claim for municipal liability on a failure-to-train theory. The Complaint alleges that the Portland Police Department was informed that Cohen was experiencing a mental health crisis and that officers chased him into the frigid waters of the Back Cove. Ultimately, nine officers and fire-rescue personnel and a police dog lined the shore and watched Cohen, about thirty feet offshore, flounder in the water…. The officers were aware that if Cohen remained in the water, he had a very limited time to live, yet they made no attempts to coax Cohen out of the waist-deep water or to rescue him using available equipment, such as a rope or ring…. Rather, compounding the tension, one officer stood at the shore with a K-9 unit; another officer stood with a weapon drawn…. Although Cohen was in the water for approximately twenty-four minutes, no ambulance was summoned until moments before

Cohen was removed from the water…. Once Cohen was brought to shore, there was no equipment available to attend to him, not even a blanket to warm him up…. Cohen remained naked for several minutes, until a Portland Firefighter removed his jacket and placed it over Cohen's upper body…. Resuscitation efforts were not made until an ambulance arrived on the scene, four minutes after Cohen was brought to shore."

***

Here, [Police Sergeants] Gervais and Rand [who told PD to not enter the water] are entitled to discretionary function immunity. 'Actions taken by a law enforcement officer in response to an emergency implicate the discretionary judgment of the officer and the immunity protecting governmental entities and their employees extends to those actions.' *Norton v. Hall*, 2003 ME 118, ¶ 9, 834 A.2d 928. Immunity extends to both the decisions '*whether* to respond' and '*how* to respond' to an emergency. *Id.* Moreover, the Plaintiff does not allege that the Police Department lacked the requisite authority to make the challenged decisions.

***

The facts alleged in the Complaint are minimally sufficient to support the due process claim against [firefighter] Giroux. According to the Complaint, Giroux shouted from the shore, "I will kick his ass if he comes out of the water." Compl. ¶ 26. The Defendants levy two attacks on the due process claim against Giroux, but I do not find either convincing. First, the Defendants argue that '[t]here is no allegation that Mr. Cohen even heard [Giroux's] comment.' MTD 10. While the Complaint does not specifically allege that Mr. Cohen heard this comment, at the motion to dismiss stage, I must make all reasonable inferences in the Plaintiff's favor. Here, I can infer that Cohen heard Giroux's comment.

***

Second, the Defendants assert that [firefighter] "Mr. Giroux cannot be held liable for simply being present.' MTD 10. But the Plaintiff is not seeking to hold Giroux liable for simply being present; rather, he has alleged facts demonstrating that Giroux's affirmative act, yelling a threat, enhanced the danger to Cohen. Moreover, this affirmative act is at least arguably conscience-shocking, particularly since it was made when Cohen was about to drown."

Legal Lesson Learned: Terrible loss of life and the firefighter's conduct is unacceptable.

See negative press: (May 5, 2022) "Federal judge says wrongful death lawsuit against Portland firefighter can move forward."

Chap. 4, Incident Command

CA: U.S. FOREST SERVICE – KINGS CANYON LODGE – IC DISCRETION ON RESOURCES - GOVERNMENTAL IMMUNITY

On April 12, 2022, in Lewis D. Evans and Carla S. Evans v. United States, U.S. District Court Judge, Eastern District of California (Fresno), granted defense motion for summary judgment since under the Federal Tort Claims Act the government enjoys immunity for discretionary decisions that implicate public policy concerns, including incident command decisions when fighting forest fires. The Rough Fire started in July 2015 in the Sierra National Forest; plaintiffs owned the Kings Canyon Lodge in the Sierra National Forest, located at a bend in Highway 180, near the 10-Mile Creek; the fire burned more than 140, 000 acres before it was contained in September 2015.

> "Each of the negligent acts alleged by Plaintiffs are based on the performance of fire suppression activities and implicate public policy concerns. First, the alleged failure to construct proper fire lines, hand lines, and bulldozer lines are all techniques for suppressing a fire…. Determining how and where to construct the lines implicates some scientific and professional judgment to evaluate the vegetation in the area, the proximity of the fire, and the amount of time it takes to complete the task…. Decisions regarding the number of Forest Service personnel and which equipment to allocate and where, trigger the traditional policy implications associated with fire suppression operations. (Doc. 31 at ¶ 51); *see also Kimball v. United States*, 2014 WL 683702, at **6-7 (D. Idaho Feb. 20, 2014) (finding the balancing of factors such as the "cost, terrain, air support, equipment, water availability, demands of other fires, [and] timing out of firefighters are policy considerations" required discretion to allocate resources).
>
> Second, the same analysis applies to the judgment involved in prepping buildings. Prepping buildings inherently includes some level of professional judgment such as to evaluate time needed to complete the tasks, the equipment needed to accomplish the task, and how to identify escape routes while working to protect the structures…. However, like with fire lines, the decision as to which buildings to prep, the personnel and equipment to assign to the buildings, and the time to spend on these tasks raise questions of community safety and allocation of resources…. *United States*, 140 F.3d 1238, 1243 (9th Cir. 2017) (finding decisions about what equipment to maintain at certain stations throughout the national park implicate policy concerns).
>
> Likewise, the allegedly negligent act of not requesting aerial support from a nearby helicopter is also based on the performance of fire suppression activities. In fact, the Wildland Incident Management Field Guide (PMS 210) expressly instructs firefighters to 'conserve water' and 'avoid wetting down an area….' The decision of where and when to deploy water suppression resources, therefore, necessarily arises from policy objectives regarding conservation of resources.
>
> Finally, the decision not to call Cal-Fire for assistance is also based on the performance of fire suppression activities. The decision to enlist help from a state agency as part of the Forest Service's overall design to combat the Rough Fire occurred 'during the course of preparing to deploy fire defensive measures.' *See Esquivel,* 21 F.4th at 575. As such, the Court will not disturb the policy judgment of the Forest Service."

Legal Lesson Learned: U.S. Government and Forest Service incident commanders enjoy immunity for discretionary decisions.

Chap. 5, Emergency Vehicle Operations

IL: DISPATCH REFUSES SEND PD WITHOUT SPECIFIC ADDRESS – WIFE IS DRIVING DRUNK, DIES - NO CASE

On April 21, 2022, in Larry E. Schultz, Special Administrator of Estate of Laurene T. Schultz, Deceased v. St. Clair County, et al., the Supreme Court of Illinois held (6 to 1) that the lawsuit was properly dismissed since "the decedent's decision to drive while intoxicated was the sole proximate cause of her injuries and death." The Court also held that the dispatcher does not enjoy absolute immunity; under 2015 amendment of the state's Tort Immunity Act, a dispatcher and her employer can be sued if their conduct constitutes "gross negligence, recklessness, or intentional misconduct."

> "Plaintiff specifically alleged that on October 22, 2017, he made multiple calls to 911, seeking a police dispatch to prevent his wife from driving away in her vehicle. He believed she was under the influence of alcohol at the time. According to the complaint, police were initially dispatched to the wrong location, and plaintiffs wife drove away. Plaintiff then made a second request for 911 assistance. He told the 911 dispatcher that his wife was at a local convenience store, provided the name of the store, and indicated that it was near the high school on State Street in Mascoutah, Illinois. Plaintiff alleged that the 911 dispatcher repeatedly advised plaintiff that police would not be dispatched without an exact address and that he should call back when he had it. While plaintiff attempted to locate an exact address, his wife drove away from the convenience store. Shortly thereafter, she drove her vehicle off the road and died from her injuries.
>
> ***
>
> In 2015, section 15.1 was amended, broadening the scope of its immunity. See Pub. Act 89-403, § 5 (eff. Jan. 1, 2016). The amended statute provides:
>
> > "[i]n no event shall a public agency, *** public safety answering point, *** or its *** employees *** be liable for any civil damages *** that directly or indirectly results from, or is caused by, any act or omission in the development, design, installation, operation, maintenance, *performance, or provision of 9-1-1 service required by this Act, unless the act or omission constitutes gross negligence, recklessness, or intentional misconduct*." (Emphasis added.) 50 ILCS 750/15.1(a) (West 2016).
>
> ***
>
> In sum, based on the plain language of the ETS Act and its purpose, comprehensive scheme, and structure, section 15.1(a) of the Act provides limited immunity for a PSAP employee's breach of duties related to the performance or provision of 911 services required by the Act. Accordingly, an allegation that a PSAP employee intentionally or recklessly refuses to dispatch vital emergency services implicates the limited immunity

provided by section 15.1(a) rather than the absolute immunity provided by section 4-102 of the Tort Immunity Act.
***
The decedent's decision to drive while intoxicated was the sole proximate cause of her injuries and death. Because we find the trial court properly dismissed plaintiffs complaint as a matter of law, we need not consider the other alternate basis for dismissal raised by defendants." https://casetext.com/case/schultz-v-st-clair-cnty-2

Legal Lesson Learned: Dispatchers should be trained to alert police to a drunk driver, even if the exact current location of the driver is not known.

Chap. 5, Emergency Vehicle Operations

VA: VOL. FF – NOT ALLOWED DRIVE ENGINE, SHEARED OFF COMPARTMENT DOOR – CONVICTED "UNAUTHORIZED USE"

On April 12, 2022, in Charles Raymond Arrington v. Commonwealth of Virginia, the Court of Appeals of Virginia, held (3 to 0) that the volunteer firefighter, who sheared off a compartment door left open on the engine as he backed out of station, was properly convicted of unauthorized use. Arrington was indicted for the unauthorized use of a vehicle belonging to the Clifton Forge Fire Department, in violation of Code § 18.2-102. If the vehicle is worth $1, 000 or more, the crime is a Class 6 felony. At his bench trial, Arrington moved to strike the evidence, arguing that the Commonwealth failed to prove "any kind of deprivation" of possession or that Arrington had "the intent to deprive" the department of possession. The court denied the motion and found Arrington guilty as charged. The court sentenced him to twelve months' incarceration, all suspended, plus two years of unsupervised probation. Arrington was also ordered to pay $21, 947.64 in restitution to the two insurance companies that had paid the department's property-damage claims.

"By all accounts, appellant Charles Raymond Arrington was a dedicated volunteer firefighter. But he knew he was not allowed to drive emergency vehicles unless expressly authorized. Which he was not. One day, an emergency call went out, and the fire chief had already left for the scene. Eager to assist, Arrington jumped into the driver's seat of another fire truck and started it up; two other volunteers hopped in. But after backing up only a few feet, Arrington sheared off a compartment door that had been inadvertently left open, causing $21, 000 in damage to the truck. Arrington's eagerness to help proved for naught, as the emergency call was immediately canceled. And the fire department did not view Arrington's efforts as a failed good deed. To the contrary, Arrington was charged and convicted at a bench trial of the unauthorized use of the fire truck, in violation of Code § 18.2-102.

Arrington's main argument on appeal cannot win him reversal because he knew he was not allowed to drive the truck. The trial court thus committed no error in concluding that Arrington drove the truck "without the consent of the owner." Code § 18.2-102.

Arrington's fallback argument has more force—that he lacked the intent under the statute to 'temporarily . . . deprive the owner' of possession. *Id.* After all, Arrington maintains,

he intended to *help* the fire department respond to the call, not steal the fire truck or take it for a joyride. We cannot reach that question, however, because it is not fairly presented in the assignment of error. So we must affirm his conviction."

Legal Lesson Learned: Do not drive emergency vehicles until authorized by your FD.

File: Chap. 6, Employment Litigation, including Workers Comp.

ID: FF DIED LEUKEMIA – WIDOW WINS WORKER COMP APPEAL - STATE SUP. CT. STAUTORY PRESUMPTION

On April 29, 2022, in Richard Nelson v. City of Pocatello, the Supreme Court of Idaho held (5 to 0) that the 2016 statutory presumption statute is constitutional and the Industrial Commission properly held that the City failed to present "substantial evidence" to rebut that presumption. Richard Nelson served 21-years as a career firefighter, retired in 2014 and in 2018 was diagnosed with early-stage chronic lymphocytic leukemia ("CLL").

> "Here, the challenged legislation is a statute that protects firefighters who develop cancer by providing a presumption of causation for the enumerated occupational disease, making it easier for them to qualify for workers' compensation benefits. The 2016 Legislature amended Idaho's occupational-disease laws after hearing considerable evidence that firefighters have an increased risk in contracting certain types of cancer and a difficult burden to prove causation for workers' compensation under the then-existing laws. This evidence consisted of: medical studies indicating a correlation between firefighting and cancer; testimony regarding the complex chemicals and known carcinogens firefighters are regularly and often unknowingly exposed to as they respond to fires in wild, rural, urban, and industrial settings; testimony from a physician and an epidemiologist on the medical studies and statistics; the prior status of the workers' compensation laws and difficulties firefighters face in trying to prove causation for occupational-disease compensation; and the unlikelihood that the legislation would raise workers' compensation costs. We conclude that there is ample evidence and facts in the legislative record to support the legislation's purpose and will not second-guess the Legislature's policy choices.
>
> Therefore, we conclude that the rational basis test applies and is satisfied by the facts of this case. Accordingly, Idaho Code section 72-438(14)(c) does not violate the City of Pocatello's equal-protection rights.
>
> ***
>
> Here, the City presented evidence from Dr. Burdick, an oncologist and medical expert who opined that Nelson's cancer was not caused by firefighting. However, Dr. Burdick's foundation for his report was solely based on evidence that firefighting, in general, does not significantly increase the risk of cancer on a more-probable-than-not basis. In other words, Dr. Burdick's report sought to rebut the presumption not by showing an *alternate*

> *cause* for Nelson's CLL, but by attacking *the evidentiary foundation for the underlying the presumption contained in the statute*.
>
> ***
>
> Even if Dr. Burdick disagrees with the Legislature's conclusion that medical studies support a causal connection between firefighting and cancer, an expert witness cannot unilaterally overcome a legislatively enacted presumption simply by offering a contrary opinion. To do so would essentially permit Dr. Burdick, through his testimony, to strike down a legislative enactment on evidentiary grounds. Instead, Dr. Burdick should have directed his research and testimony towards Nelson's CLL and offered proof of an alternative cause for it. Ultimately, the City's evidence appears to only challenge the statutory presumption itself, rather than rebut the presumption that Nelson's cancer was caused by his employment. Although Dr. Burdick's report generally disputes the validity of the legislatively enacted premise that firefighting increases the risk of developing cancer, he failed to establish that Nelson's cancer was caused by something other than firefighting."

Legal Lesson Learned: Excellent decision; Court also cited IAFF brief listing numerous decisions in other states upholding firefighter cancer statutory presumptions.

File: Chap. 6, Employment litigation including Workers Comp.

NV: FF RE-INJURED SHOULDER – CAN RE-OPEN WORKERS COMP CLAIM BECAUSE HE LOST INCOME FIRST INJURY

On April 20, 2022, in City of Henderson, et al. v. Jason Law, the Court of Appeals of Nevada, held (3 to 0), unpublished decision, that the firefighter under state law was entitled to re-open his claim for "lifetime" since he lost wage during the first injury – overtime pay while on light duty. The firefighter injured his left shoulder on duty in 2021, and for two months while on light duty he was not eligible for overtime; in Aug. 2016 he reinjured it in a firefighters versus police officers football game.

> "The City argues that Law cannot reopen his workers' compensation claim under NRS 616C.390(1) because, while he was on modified duty, he was still able to earn his full wages. Thus, it is the City's position that Law does not meet the minimum duration of incapacity for lifetime reopening rights. Law asserts the City's interpretation of the statute is incorrect. It is Law's position that his claim meets the minimum duration of incapacity for lifetime reopening rights because he: (1) regularly worked overtime prior to his work-related injury, (2) was unable to work overtime while on modified duty, and (3) was therefore prevented from earning his full wages while on modified duty. We agree with Law.
>
> NRS 616C.390(1) states that an insurer must reopen a claim more than one year after its closure if: (a) A change of circumstances warrants an increase or rearrangement of compensation during the life of the claimant; (b) The primary cause of the change of circumstances is the injury for which the claim was originally made; and (c) The

application is accompanied by the certificate of a physician or a chiropractor showing a change of circumstances which would warrant an increase or rearrangement of compensation.

***

Thus, if an employee suffers a workplace injury that makes him unable to earn full wages, including overtime, for five consecutive day or five cumulative days in a twenty-day period, he is entitled to lifetime reopening rights under NRS 616C.390(1)."

Legal Lesson Learned: Under this decision, loss wages includes loss of overtime pay.

Note: To avoid workers comp liability for personnel playing in off-duty sporting events, some employers will require employee to sign a waiver. See Ohio BWC: "It's BWC's policy that an injury or disability incurred during voluntary participation in an employer sponsored recreation or fitness activity is **not** compensable **if** the injured worker signed a waiver of the right to workers' compensation benefits prior to engaging in the recreation or fitness activity."

File; Chap. 7, Sexual Harassment

GA: TRANSGENDER FIRE CHIEF – FIRED 18 MONTHS AFTER CHANGE - "AT WILL" - NO PROPERTY INTEREST IN JOB

On April 18, 2022, in Rachel Mosby v. City of Bryson, Georgia, the U.S. Court of Appeals for the 11th Circuit (Atlanta) held (3 to 0; unpublished decision) that the U.S. District Court properly granted summary judgment to the City on her claim of violation of Title VII and ADA [she alleged the City fired her for be transgender; fired 18 months after coming to work dressed as a female]. Mosby was the City of Byron's fire chief for eleven years before being terminated in 2019. Her initial complaint to EEOC on June 28, 2019 failed include a sworn statement or notarized affirmation, and U.S. District Court Judge Tilman E. Self III dismissed the lawsuit on that basis. On appeal the 11 Circuit also rejected her claim that Mosby had a property interest in continued employment as the City's fire chief based on a "long-standing personnel policy" allowing department heads to appeal adverse employment actions.

> "We have held that 'in Georgia, an at-will employee typically does not have a reasonable expectation of continued employment sufficient to form a protectable property interest.' *Wofford v. Glynn Brunswick Mem'l Hosp.*, 864 F.2d 117, 119 (11th Cir. 1989); O.C.G.A. § 34-7-1 ('An indefinite hiring may be terminated at will by either party.'); *see also Wilson v. City of Sardis*, 590 S.E.2d 383, 385 (Ga.Ct.App. 2003) (holding that 'at will employees have no legitimate claim of entitlement to continued employment and, thus, no property interest protected by the due process clause').
>
> Public employees, however, have a property interest in continued employment under a civil service system if they are terminable only for cause based on "[a]n explicit contractual provision, rules, or common understandings." *De-Clue v. City of Clayton,* 540 S.E.2d 675, 677 (Ga.Ct.App. 2000); *see also Brett v. Jefferson Cnty.*, 123 F.3d 1429, 1433-34 (11th Cir. 1997).

> ***
> Mosby cites the City's ‘long-standing personnel policy’ as the root of her property interest in continued employment. But the personnel policies cited in Mosby's pleadings placed her under the authority of the City Administrator and made her position terminable at will. Specifically, Section 8.1(K) of the City's personnel policy, as effective on the date of Mosby's firing and pursuant to the City's 2018 amended Charter, expressly provided that ‘all appointive officers and director shall be employees at-will and subject to removal or suspension at any time by the appointing authority unless otherwise provided by law or ordinance.’ Similarly, other sections of the Charter, as amended in 2018, provided that ‘[a]ll appointive officers and directors shall be employees at-will and subject to removal or suspension at any time by the city administrator unless otherwise provided by law or ordinance.’ Because she was an at-will employee, Mosby had no property interest in continued employment under Georgia law. *DeClue*, 540 S.E.2d at 677.”

Legal Lesson Learned: “At will” employee, unless protected by “whistleblower” or other statute.

> Note: See this article: See this article (Feb. 18, 2021): “Judge dismisses Georgia lawsuit by transgender fire chief.”

File: Chap. 8, Race Discrimination

OH: AFRICAN AMERICAN NOT HIRED CINCINNATI FD – FELON - 2005 WHEN FF/EMT CONV. DRUG TRAFFICKING

On May 7, 2022, in Layne Rice v. City of Cincinnati, 538 F. Supp.3d 800, U.S. District Court Judge William O. Bertelsmann, U.S. District Court for Southern District of Ohio (Western Division) granted the City’s motion for summary judgment. Rice only challenges the felony-no-hire-policy for the 2015 and 2018 application periods because that is when he passed all portions of the exam to qualify as a candidate and had his felony conviction. In 1999, Rice was not hired, even before his felony conviction. Rice also concedes that he did not pass all portions of the exam in 2012. The Court held that “Rice cannot establish a prima facie case of disparate impact…. In sum, Rice has not presented a statistical analysis regarding the racial impact of the City's felony disqualification policy. The Court thus concludes that Rice has failed to establish a prima facie case of disparate impact discrimination.”

> “Rice relies on his attorney, not an expert, to establish causation from his statistical analysis for his disparate impact claim. Rice relies broadly on statistics showing that African Americans are disproportionately impacted more than Caucasians when it comes to criminal-records-based hiring disqualifications, and the City concedes this point…. The issue, the City argues, is this data is irrelevant because Rice has presented no evidence connecting the national statistics to the City's policy.

> ***
> From these numbers, Rice opines that African Americans are disparately impacted because only 25% of Caucasians (out of the 68% total applicants and 80% of the final applicants in 2015) were affected in general by the felony disqualification policy, compared to 75% of African Americans generally affected.
>
> ***
> Yet, over a period of seventeen years, only five African Americans have been disqualified by this policy. Unlike the policy in *Green* that disqualified applicants at the outset, candidates are only disqualified for felony matters in this case after they pass all three portions of the examinations.
>
> ***
> Rice concedes that he did not employ an expert, but he argues that it is unnecessary to hire an expert when lay people can understand the information, and the City can cross-examine its own witnesses that compiled the data sources used. (Doc. 32 at 5-7). However, because Rice's data is incomplete to establish his prima facie case, it was improper to proceed without an expert."

Legal Lesson Learned: Plaintiff failed to hire an expert to prove disparate impact.

> Note: ORC § 737.081 was promulgated in 2003. ORC § 737.081(C)(1)(a) provides that a person with a felony is not permitted to be appointed as a permanent, full-time freighter or volunteer firefighter…. However, ORC § 737.081(C)(2) provides that 'an appointing authority may appoint or employ a person as a permanent, full-time paid firefighter or a volunteer firefighter if' (1) the fire chief requests a criminal record check; (2) the records show the candidate is guilty of an offense in (C)(1); and (3) the person meets the rehabilitation standards in ORC § 737.081(E).

File: Chap. 8, Race Discrimination

AL: AFRICAN AMERICAN ON LIGHT DUTY - BACK INJURIES ARMY RESERVE – FIRE CHIEF FIT FOR FULL DUTY POLICY

On April 15, 2022, in Deatri J. Larry v. City of Mobile, Alabama, U.S. District Court Judge Terry F. Moorer granted the City's motion for summary judgment. Fire Chief Mark Sealy was selected as Chief of the Mobile Fire Rescue Department in May, 2017, and implemented his promised strategic plan, where all personnel would be required to maintain the fitness and physical standards required to perform the full scope of a firefighter's duties. When plaintiff (African American) returned from military service in Army Reserves in February 2017, his fitness for duty evaluation revealed that his back injuries prevented him from being a Fire Service Driver & Paramedic. As a result, the MFRD put him in an administrative position (EMS Staff; no longer eligible for 20% paramedic pay). When Chief Sealy was appointed in 2017, several members of the FD were identified as unfit for full firefighter duties, including the plaintiff, and were informed of their options to apply for disability retirement, transfer to another job with the City, or be terminated from the position as a firefighter (he was terminated). Court held there was no violation of Title VII (race discrimination) or Uniformed Services

Employment and Reemployment Rights Act ("USERRA") since the Fire Chief's fitness for full duty requirements were imposed on white firefighters, and those with no military service.

> "The three other individuals (Shobe, McMillian, and Pettway) did not have military service and received the same notification and options. *See* Doc. 47 at 8. Therefore, Defendant has met its burden to show by a preponderance of the evidence that that the legitimate reason, standing alone, would have resulted in the same adverse action. That legitimate reason was that all positions would be required to perform every aspect of being a firefighter which would aid in manpower shortages and better permit the MFRD to attend public safety. This shifts the burden back to show that the reason is pretext.
>
> ***
>
> Plaintiff does not dispute that he was unable to perform certain firefighter duties, but argues that a Captain does not need to perform those duties and is primarily a managerial, administrative, leadership role. Plaintiff's belief that based on the history of the position that he should have been accommodated does not simply make it so. The restructuring of the department is a valid nondiscriminatory reason which not only applied to Plaintiff, but other non-military personnel who were presented with the same options. Simply put, Larry fails to offer concrete evidence beyond his own opinion that positions could still be administrative which would have offered him the ability to be promoted and retained."

Legal Lesson Learned: The new "fit for full duty" policy applied to all FF.

File: Chap. 9, American with Disabilities Act

File: Chap. 10, FMLA

TX: HOSPITAL PARAMEDIC FIRED - 12 WEEKS FMLA LEAVE EXPIRED - JOB POSTED – TURNED DOWN NEW SHIFT

On April 20, 2022, in Maria Jochims v. Houston Methodist Sugar Land Hospital, U.S. Magistrate Judge Andrew M. Edison issued a memorandum recommending that U.S. District Court judge dismiss the plaintiff's sex and pregnancy discrimination claim. The plaintiff worked as a Paramedic in the Emergency Services Department since 2013, and because of difficult pregnancy in Aug. 2016, she had used up her 12-weeks of "job protected" FMLA leave on Feb. 15, 2017. The hospital needed the position filled ASAP, and the next day the job was posted (11 am – 11 pm shift) and quickly filled by a male Paramedic. The hospital then offered the plaintiff a new shift (7 pm – 7 am), which she declined. Jochims failed to obtain a suitable position within 30 days. Houston Methodist gave Jochims an extension to locate and obtain an alternative position, but she failed to secure a new position within the extended time. Plaintiff was terminated effective April 25, 2017, under Houston Methodist's HR29 Policy.

> "Moreover, with respect to Houston Methodist's statement concerning increasing work demands, Jochims mischaracterizes Houston Methodist's position. Houston Methodist specifically stated: 'Because Houston Methodist faced uncertainty about when, if ever [Jochims] would return, as well as increasing work demands of the Emergency Department, Houston Methodist posted [Jochims's] position on February 6, 2021.' Dkt. 49 at 16 (cleaned up). This statement speaks to the circumstances that caused Houston Methodist to post the position. Jochims has neither explained how this renders Houston Methodist's legitimate, nondiscriminatory reason false or unworthy of credence, nor has she explained how this demonstrates that discrimination lay at the heart of Houston Methodist's decision to terminate her employment.
>
> ***
> In sum, the sex and pregnancy discrimination claim fails because Jochims cannot show that Houston Methodist's legitimate, nondiscriminatory reason for her termination is pretextual.

Legal Lesson Learned: Fire & EMS Departments should have a written FMLA policy.

File: Chap. 11, Fair Labor Standards Act

File: Chap. 12, Drug- Free Workplace, inc. Recover

File: Chap. 13, EMS

OH: SEVERE ASTHMA ATTACK – EMS WRONG ADDRESS, SLOOPY DISPATCH - "RECKLESSNESS" – CASE PROCEED

On May 5, 2022, in Boris Morrison v. City of Warrensville Heights, et al., the Court of Appeals of Ohio, Eighth District (Cuyahoga County), held (3 to 0), 2022-Ohio-1489, that the trial court properly denied summary judgment for dispatch and fire / EMS since there appears to be a history of "recklessness" in confirm addresses, and inaccurate arrival times on run reports. Squad 1 responded to 19419 Lanbury, instead of 19219 Lanbury, and when they eventually got the correct address the patient was in full cardiac arrest. The City asked the County Sheriff's office to investigate and their report reflected a history of sloppy procedures on confirming run addresses and inaccurate run times. The Court of Appeals noted: "Both the run report and the dispatch report show that Ms. Morrison's 911 call was received at 9:40 a.m. However, the 911 call was actually received at 9:37 a.m. This change makes it appear that EMS was dispatched as soon as the call was received. They both also show that EMS arrived at Ms. Morrison's home at

9:44 a.m. making it appear that Ms. Morrison received services three minutes earlier than she actually did.”

> “On September 5, 2017, 71-year-old Betty L. Morrison ("Ms. Morrison") had a severe asthma attack. Ms. Morrison, a long-time resident of the City, called 911 and requested assistance. By the time EMS arrived, Ms. Morrison was unconscious and not breathing. Attempts to revive Ms. Morrison were ultimately unsuccessful. She was eventually transported to South Pointe Hospital where she was pronounced dead.
>
> ***
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> [Cuyahoga County Sheriffs Department Deputy Courtney K. Sheehy conducted an investigation.] Sheehy summarized "Systemic Failures at Warrensville Heights" as follows:
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>> Lack of training, equipment and policies and procedures. Lack of properly functioning equipment from speakers inside Station 1 to no computers or linked GPS units inside any Engine, ladder or Squad. [Firefighters] have to hope that Speakers are working to hear the address of a call they are being dispatched to. There is no system of checks and balance [sic]. If an address is communicated incorrectly by dispatch or writing [sic] down incorrectly by firefighters there is no other written or electronic check on that address. There is a check when [firefighters] radio to dispatch they are enroute to a call but if dispatch does not hear this traffic and does not respond or doesn't make the correction to an incorrect address being stated then the same error will be made.

***

> City dispatchers had multiple responsibilities, and it was well known that dispatchers were overwhelmed. The record before us displays that there were occasions where dispatchers were unavailable due to addressing other primary responsibilities. However, there was no evidence in the record that dispatchers perversely disregarded their responsibilities. Moreover, there is no evidence in this record that [dispatcher] Hamilton perversely disregarded her duties with respect to Ms. Morrison's call.
>
> ***
>
> We conclude the trial court correctly found that there remained a genuine issue of material fact as to whether the Emergency Service Employees' conduct was reckless. It was well known in the City that the emergency services department had antiquated equipment, and as such, the importance of relaying and notating accurate information was obvious. Errors due to failure to verify addresses were a known issue. It was also well known that dispatchers, due to other duties, would not always be available on the radio. Firefighters were aware that they could not count on dispatch to be available during the course of a call, to verify addresses, or to hear other pertinent information. And further still, firefighters were aware of simple address verification techniques used by other departments that were not utilized by the City. For instance, [firefighter] Kaminsky testified about haloing, the simple act of repeating the address to verify it was heard correctly. Kaminsky testified that the City did not use the haloing technique.

> Furthermore, none of the Emergency Service Employees utilized haloing during the course of this incident."

Legal Lesson Learned: The City would be wise to settle this lawsuit, and promptly correct these identified deficiencies in both dispatch and fire/EMS.

File: Chap. 13, EMS

NY: 350 POUND SEIZURE PATIENT - FLAILING AROUND – VERSED – DIED – PLAINTIFF 3 EXPERTS – CASE PROCEED

On May 2, 2022, in Linda Artemiou, Estate of Peter C. Artemiou, Deceased v. City of New York, et al., the Supreme Court, New York County, held Justice Judith McMahon held that while the medical doctor on the NYC Telemetry Unit who authorized the Versed enjoys governmental immunity, as does the City of New York, the lawsuit against the medics, employed by New York-Presbyterian Hospital will not dismissed. Co-workers of the patient described the decedent on the morning of the emergency as "foaming at the mouth," speaking incoherently and calling for his mother, standing up, falling down, flailing around the room and appearing 'very agitated. Dr. Schneitzer, who was physically at an FDNY 'online medical control' office in Maspeth, Queens when the paramedic's call was transferred to her, claims that she instructed the paramedics according to the information they provided her (*i.e.,* their inability to get close enough to decedent to obtain his vital signs, inability to ascertain decedent's medical history, etc.Court declined to dismiss the medics from the lawsuit, based on plaintiff's three medical experts: (1) certified paramedic; (2) a critical care physician; and (3) and an internist with experience in the field of emergency medicine who claim the medics failed to recognize decedent's postictal state (*i.e.,* the state immediately following a seizure), which commonly involves medical risks including an impaired ability to oxygenate.

> "While evidence of injury alone does not mean that defendant was negligent (*see Landau v. Rappaport*, 306 A.D.2d 446 [1st Dept. 2003]), the facts in this record together with plaintiff's three expert opinions outlining the paramedics' departures from good and accepted medical practice, call for a jury's analysis as to defendant's conduct and whether it was a proximate cause of decedent's alleged injuries and wrongful death.
>
> ***
>
> This matter arises out of the alleged medical malpractice resulting in the wrongful death of 52-year-old Peter Artemiou who, according to his co-workers, suffered a 'seizure' at his midtown Manhattan office on February 11, 2014. Paramedics Michael Kremenizer and Scott Strong, both employed by NYPH, responded to the 911 call.
>
> ***
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> At 8:49 a.m., Kremenizer telephoned the NYC Telemetry Unit, stating that he was 'fighting a patient right now' (*see* CD Recording of Telemetry Call; NYSCEF Doc. No. 189). The call was transferred to Dr. Schneitzer, a board-certified emergency physician, for her authorization to give decedent Versed. The call lasted 1 minute and 43 seconds, with Kremenizer informing Dr. Schneitzer that he has 'a 52-year-old male in an office

building, he is about 6'2" 350 pounds and extremely, extremely violent and might hurt himself or other people so I need to sedate him we are sitting on top of him, otherwise he will hurt himself' (*see* NYSCEF Doc. No. 189). Dr. Schneitzer asked Kremenizer if 'anyone knew anything about [decedent] medically' and if he 'could get close to [decedent].' After stating that he could not even get close enough to obtain a finger-stick, Kremenizer repeated three times that decedent was "6'2" tall, 350 pounds and very very violent." Dr. Schneitzer authorized the use of 10 mg. Versed intramuscularly, directed Kremenizer to read back the order, and wished him luck (*see* NYSCEF Doc. No. 189). The call ended at 8:51:31 a.m. but contrarily, the PCR reflects that Kremenizer injected Versed at 8:49 a.m.

***

It is undisputed that decedent became asystole (*i.e.,* 'flatlined') within fifteen seconds of paramedic Kremenizer injecting him with the sedative, Versed, 10 mg. of which were authorized over the phone by Dr. Leila Schneitzer, the physician employed by the City's Telemetry Unit of the FDNY. Resuscitation efforts undertaken by the paramedics include use of a bag valve mask, CPR, intubation, placement of an IV, and administration of vasopressors and epinephrine. Decedent was transported to NYPH but was unable to recover full consciousness or the ability to breathe outside of mechanical support during his 29-day stay. Mr. Artemiou died on March 10, 2014, leaving behind his wife, the plaintiff Linda U. Artemiou, and the couple's three teen-age children.

***

In opposition to the motion plaintiff submits *, inter alia,* the redacted expert affidavits of a certified paramedic (*see* NYSCEF Doc. No. 190), a critical care physician (*see* NYSCEF Doc. No. 195) and an internist with experience in the field of emergency medicine (*see* NYSCEF Doc. No. 196). These experts concur that the paramedics and Dr. Schneitzer failed to recognize decedent's postictal state (*i.e.,* the state immediately following a seizure), which commonly involves medical risks including an impaired ability to oxygenate.

***

Plaintiff's expert paramedic opines that Kremenizer and Strong departed from accepted standards of paramedic care in failing to: (1) 'properly treat and in fact exacerbate [decedent's] readily evident breathing problems' which should have been immediately considered based upon the call to 911 reporting a 'seizure' (*see* NYSCEF Doc. Nos. 175, 155); (2) properly restrain decedent while in the postictal state; (3) perform a 'modified jaw thrust' to ensure that the tongue is not blocking the back of the throat and (4) contacting the New York City Police Department if decedent was so violent that they could not get close enough to attend to his airway. Plaintiff's expert concludes, 'based upon decades of experience, [that] it defies logic that [decedent] would have remained so violent that the paramedics could not secure his airway, while within about 30 seconds or so, he became so hypoxic (or, as defendants now allege, suffered from such profound acidosis) that he flatlined almost immediately thereafter' (*see* NYSCEF Doc. No. 190, para 55).

> ***
> In opposition, plaintiff has successfully raised triable issues of fact sufficient to defeat summary judgment through, *e.g.,* the telemetry call records and deposition testimony of the paramedics and John MacDonald as to the time that Versed was administered. While evidence of injury alone does not mean that defendant was negligent (*see Landau v. Rappaport*, 306 A.D.2d 446 [1st Dept. 2003]), the facts in this record together with plaintiff's three expert opinions outlining the paramedics' departures from good and accepted medical practice, call for a jury's analysis as to defendant's conduct and whether it was a proximate cause of decedent's alleged injuries and wrongful death."

Legal Lesson Learned: The trial court judge has referenced three plaintiff experts in ordering the case to trial.

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

File: Chap. 15, CISM, incl. Peer Support, Employee Assistance, Suicide

File: Chap. 16, Discipline

TN: NEW WIFE MAY HAVE ALTERED WILL OF DECEASED FF – BATT. CHIEF ONLY SIGNED AS WIT. ORIGINAL - REHIRED

On April 26, 2022, in City of Memphis v. Beverly Prye, the Court of Appeals of Tennessee in Jackson held (3 to 0) that the City failed to prove that Battalion Chief Prye, a 21-year member of the Memphis FD, knew that the Will of late Ulysses Jones, Jr. was a forgery. Mr. Jones was also employed with Memphis FD until his death in Nov. 2010, and told Ms. Prye of his intentions to marry his girlfriend, Ms. Sandra Richards. The Court raised the possibility that the Will that was submitted to Probate Court by Ms. Richards, leaving all his estate to her, might not have been the document witnessed by the Battalion Chief.

> "Afterward, an administrative investigation was opened by the Memphis Police Department ('the MPD') pertaining to the submission of the Will in which Ms. Prye was listed as a suspect. Upon conclusion of the investigation, the report was forwarded to the Division of Fire Services ('the Division') for administrative review. Ms. Richards, Ms. Langford-Brannon [also signed Will as witness], and Ms. Prye were arrested in December 2011 for their involvement in the Will. Ms. Prye was charged with fabricating/tampering with evidence, two counts of forgery, and five counts of aggravated perjury. Several media outlets broadcasted stories regarding the arrests, which brought embarrassment and shame to the City and the MFD. However, all charges against Ms. Prye were eventually expunged from her record.

> ***
> The [Civil Service] Commission's finding that the Will left all of Mr. Jones'[s] property and estate to Sandra E. Richards shows that there is another reasonable possibility that was not considered by the Commission - that Sandra E. Richards altered the original will and kept the original attestation signatures of the original Last Will and Testament, which unfortunately, is commonplace with a high-profiled individual like Decedent was.
>
> ***
> Footnote 1: We note, and will discuss further *infra*, there is no proof in the record that the document which Ms. Prye witnessed was the same document ultimately offered for probate by Ms. Richards. Additionally, the record shows that the page bearing Ms. Prye's signature was on a different page than that of Mr. Jones."

Legal Lesson Learned: Employee reinstated with full back pay and benefits.

File: Chap. 16, Discipline

GA: FIRE CHIEF FIRED – AFFAIR – 1st AMEND. RIGHT TO SPEAK – "SHOP WITH A HERO" SHOULD BE PRIVATE $

On April 13, 2022, in William Owens v. Logan Propes, R,V, Watts and the City of Monroe, U.S. District Court Judge Clay D. Land, U.S. District Court for the Middle District of Georgia (Athens Division), held that the former Fire Chief's claim of breach of his 1st Amendment right of free speech may proceed. In May, 2020 (about same time as the public comments), Police Chief R.V. Watts and City Administrator Logan Propes learned that the Fire Chief William Owens was having a relationship with K.I. (her son saw exchanges on her Apple watch), and Propes demanded that Owens resign and threatened that if he did not, Owens would be terminated for "conduct unbecoming" based on his relationship with K.I. Owens advised the City of the actions taken by Watts and Propes with regard to K.I.'s Apple watch. Soon after that, Owens was terminated from his job as fire chief. Owens alleges that his comments at a public meeting that the "Shop With A Hero" police and firefighter program should be funded by a private not-for-profit organization. The program had been proposed by realtors, was administered by the City Administrator, and there were questions from members of the public about missing funds. The trial judge held that the Fire Chiefs comments may have been a motivating factor in the City's decision to terminate him. Under the U.S. Supreme Court's "balancing test" in Pickering v. Board of Education, 391 U.S. 563 (1968), the Fire Chief was speaking as a private citizen, not a public official. The judge referenced, *Garcetti v. Ceballos*, 547 U.S. 410, 417 (2006), where U.S. Supreme Court held the First Amendment still provides some protection for a public employee who speaks (1) "as a citizen" (2) "addressing matters of public concern." *Id.* If the employee speaks as a citizen.

> "William Owens was the City of Monroe's fire chief. Logan Propes is Monroe's city administrator, and R.V. Watts is the City's police chief. The City offered a program called 'Shop with a Hero,' which was started by a group of local realtors but was under Propes's control. Am. Compl. ¶¶ 39, 42, ECF No. 14. The program included fire department personnel and other first responders. In light of citizen inquiries about how program funds were used, Owens publicly suggested that the program be run by a private non-profit organization, not the City…. After Owens made these comments, Propes, who

was Owens's direct supervisor, recommended that the City terminate Owens from his position as fire chief, and the City did so…. Owens alleges that his public comments about the 'Shop with a Hero' program were a motivating factor behind this decision.

***

Owens's complaint also makes no allegation that he learned about funding issues regarding the program in his capacity as fire chief but that citizen inquiries regarding the program's finances led him to recommend that the program be administered by someone other than the City administrator. Taking the allegations of the complaint as true and drawing all reasonable inferences in Owens's favor, as the Court must do at this stage in the litigation, Owens adequately alleges that the purpose of his speech was to raise issues of public concern, not to air a private employee grievance. Thus, Owens sufficiently alleged that he spoke as a "citizen" and that his speech was eligible for constitutional protection.

***

Finally, Owens makes a claim against the City under the Georgia Whistleblower Act, O.C.G.A. § 45-1-4(d)(2). That statute prohibits a public employer from retaliating 'against a public employee for disclosing a violation of or noncompliance with a law, rule, or regulation to either a supervisor or a government agency, unless the disclosure was made with knowledge that the disclosure was false or with reckless disregard for its truth or falsity.' O.C.G.A. § 45-1-4(d)(2). Owens alleges that he, "personally and through his attorney, disclosed to the City a violation of O.C.G.A. § 16-11-64" by Watts and Propes. Am. Compl. ¶ 32. He further alleges that he was terminated from his position as fire chief in retaliation for this disclosure."

Legal Lesson Learned: Public officials, including fire chiefs and firefighters have only limited 1st Amendment rights under the *Pickering* "balancing test" when discussing official activities; here the trial court found that the Fire Chief was speaking as a private citizen.

Note: See article (July 6, 2021): "Owens refused to resign; Fire chief's alleged relationship, financial management lead to firing."

File: Chap. 16, Discipline

FL: NAVAL FIRE TRAINING OFFICER FIRED - TOLD UPDATE TRAINING RECORDS – NO WHISTLEBLOWER RETALIATION

On April 1, 2022, in David A, Rickel v. Department of the Navy, the U.S. Court of Appeals for Federal Circuit (D.C.) held (3 to 0) that there was substantial evidence to support the decision of Merit Systems Protection Board, which upheld the termination decision by Captain Brian Weiss, Executive Officer of Naval Air Station Jacksonville. The plaintiff was the only employee in the Fire Service training office. In late 2016, he applied for Deputy Fire Chief, but position went to the current Assistant Chief of Operations. The plaintiff sent an e-mail to Fire Chief, challenging the Assistant Chief's "candor in his application" and further alleging there have been at least 5 other promotions who lacked credentials and therefore posed a "life safety risk" to the Navy. He

was fired June 8, 2019 for repeated failure to update training records, including being ordered to do so on June 15, 2017; Dec. 2018; and in March 2019 the Deputy Chief took between March 5 and March 25 to update the records, noting that it only took about 16.5 hours to "get the folders done and inspection ready."

> "The [Merit Systems Personnel] Board also found that Mr. Rickel had established that he had engaged in protected whistleblowing activity and that such activity was a contributing factor in the decision to remove him. But, according to the Board, the agency had proven 'by clear and convincing evidence that it would have removed [Mr. Rickel] even in the absence of his protected activity….' In making this last finding, the Board considered the three *Carr* factors [*Carr v. Soc. Sec. Admin.*, 185 F.3d 1318, 1323 (Fed. Cir. 1999)]. (1) the strength of the agency's evidence in support of its action; (2) the existence and strength of any motive to retaliate on the part of the agency's officials who were involved in the decision; and (3) any evidence that the agency takes similar action against employees who did not engage in protected activity but who are otherwise similarly situated.
>
> ***
> It is not for this court to reweigh evidence on appeal. Substantial evidence supports the Board's conclusion that the agency met its clear and convincing burden, particularly when 'considering the evidence in the aggregate, including the strength of *Carr* factor one.' *Robinson*, 923 F.3d at 1020."

Legal Lesson Learned: "Whistleblower" claims can be defeated with detailed records proving refusal to follow orders.

File: Chap. 17, Arbitration, incl. Mediation, Labor Relation

File: Chap. 18, Legislation