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Oct. 2022 – FIRE & EMS LAW NEWSLETTER

[NEWSLETTER IS NOT PROVIDING LEGAL ADVICE.]

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THANK YOU:

1. **PET THERAPY SUPPORT TEAM / PET PARTNERS OF GREATER CINCINNATI: We now have 14 dogs and one large rabbit; the Team is visiting a different Fire Department once a month for stress relief. We have also responded to six (6) critical incidents in 2022. Check out the link for more details about the team!**

2. **NEWSLETTER LISTSERV: Now at over 2,200 on our listserv.**

13 RECENT CASES

- **ONLINE LIBRARY OF CASE SUMMARIES:** Click here for the list.
- **NEWSLETTERS:** If you would like to be added to UC Fire Science listserv, just send him an e-mail.
- **TEXTBOOK:** Updating 18 chapters of my textbook (2018 to current). FIRE SERVICE LAW (SECOND EDITION), Jan. 2017

File: Chap. 1 – American Legal System; Fire Codes, Investigations, Arson

MI: DRONE VIDEO OF JUNK YARD – NO ADMINISTRATIVE SEARCH WARRANT – MOTION TO SUPPRESS DENIED

On Sept. 15, 2022, in Long Lake Township v. Todd Maxon and Heather Maxon, the Court of Appeals of Michigan held (2 to1) that trial court judge properly denied the property owner's motion to suppress aerial photographs taken by Long Lake Township using a drone without the Maxons' permission, a warrant, or any other legal authorization.

> "The township relied on these photos to support a civil action against the Maxons for violating a zoning ordinance, creating a nuisance, and breaching a previous settlement agreement…. The exclusionary rule does not apply in this civil matter. Accordingly, even if the township violated the Maxons' constitutional rights, suppression was not supported. We affirm the lower court's order."

Facts:

> "Todd and Heather Maxon own a five-acre parcel in Long Lake Township. In 2007, the township brought a zoning action against Todd Maxon arising from his storage of junk cars on the property. That case settled in 2008 with an agreement that no further zoning action would be brought if Todd maintained the status quo-the same number of junked cars.
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> According to the township, neighboring property owners reported that the Maxons had expanded their junk yard. This allegation could not be confirmed from ground level because buildings and trees obstructed views of the landscape. The township hired Zero Gravity Aerial to take aerial photographs of the Maxons' property with a drone in 2010, 2016, 2017, and 2018. The photographs allegedly show that the dimensions of the Maxons' junkyard had swelled, contrary to the settlement agreement. The township filed a civil action against the Maxons seeking the abatement of the junkyard nuisance.
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> The Maxons moved to suppress the drone photos, invoking the Fourth Amendment. The trial court denied the motion, finding that the drone surveillance was not a search. *Id*. at 526-527. This Court granted the Maxons' application for leave to appeal on a single issue-whether the trial court erred when it held that the warrantless search of the Maxons' property with a drone did not violate their Fourth Amendment rights. *Long Lake Twp v Maxon*, unpublished order of the Court of Appeals, entered October 18, 2019 (Docket No. 349230). We then reversed the trial court's suppression denial, holding that 'drone surveillance of this nature intrudes into people's reasonable expectations of privacy, so such surveillance implicates the Fourth Amendment and is illegal without a warrant or a traditional exception to the warrant requirement.' *Long Lake I*, 336 Mich.App. at 538. The [Michigan] Supreme Court granted the township's application for leave to appeal and scheduled oral argument on the application, but subsequently vacated the Court of Appeals' judgment and remanded to this Court for consideration of whether the exclusionary rule applies to this dispute. See, e.g., *PA Bd of Probation & Parole v Scott*, 524 U.S. 357, 364; 118 S.Ct. 2014; 141 L.Ed.2d 344 (1998) (declining to extend the operation of the exclusionary rule beyond the criminal trial context); *Kivela v Dep't of*

Treasury, 449 Mich. 220; 536 N.W.2d 498 (1995) (declining to extend the exclusionary rule to a civil tax proceeding). [*Long Lake II*, 973 N.W.2d 615, 616 (2022).]"

Holding:

"The social cost of excluding evidence in a case such as this would be substantial, however, as a public nuisance would potentially remain unabated and incapable of its own remedy.

The exclusionary rule is an essential tool for enforcing the meaning of the Fourth Amendment and discouraging law enforcement officers from trampling on constitutional rights. The rule has been roundly criticized, but survives as demonstrated in the majority and dissenting opinions in *Utah v Strieff*, 579 U.S. 232; 136 S.Ct. 2056; 195 L.Ed.2d 400 (2016). Here, the object of the state officials who allegedly violated the Maxons' rights was not to penalize the Maxons, but to abate a nuisance through the operation of equitable remedies. The proceedings are remedial, not punitive. The exclusionary rule was not intended to operate in this arena, and serves no valuable function."

Dissent:

Kathleen Jansen, P.J. (dissenting)

"For the reasons that follow, I respectfully dissent. As I concluded in the previous appeal of this case, *Long Lake Twp v Maxon*, 336 Mich.App. 521, 525, 542; 970 N.W.2d 893 (2021) (*Long Lake I*), I would again reverse the trial court order denying defendants' motion to suppress the evidence, and remand for entry of an order suppressing the photographic evidence taken by a drone. I would conclude that because the drone surveillance conducted by plaintiff implicated the Fourth Amendment, as well as Const 1963, art 1, § 11, and was therefore unlawful because it was conducted without a warrant or a recognized exception to the warrant requirement, that the violation of our state Constitution calls for suppression of the evidence obtained."

Legal Lesson Learned: The use of drones to enforce nuisance ordinance is a hot topic. Avoid unnecessary litigation, get an administrative search warrant prior to flying drone over the nuisance property.

File: Chap. 2 – LODD / SAFETY

OH: LODD – ARSON DEFENDANT'S APPEAL DENIED – PROVIDED SIX WITNESS STATEMENTS BEFORE TRIAL

On Sept. 19, 2022, in State of Ohio v. William R. Tucker, the Court of Appeals of Ohio, Twelfth District (Butler County) held (3 to 0) that trial court did not err in denying Tucker's untimely postconviction relief petition.

"After reviewing the record, we find Tucker's assertions are without merit. Tucker does not demonstrate that he was unavoidably prevented from discovering the facts necessary for his claim of relief. Instead, the record shows that the six witness statements were initially provided to Tucker and his attorney during discovery. On January 21, 2017, nearly ten months before trial, the State answered Tucker's request for discovery.

Included in the response were items numbered 138, 140, 141, 147, 156, and 157, representing the witness statements of Sebastian, Hartford, Hatfield, Haynes, McAdams, and McDonald, respectively."

Facts:

"On January 6, 2017, Tucker was charged with first and second-degree aggravated arson and felony murder. The state alleged that Lester Parker, Tucker's uncle and codefendant, arranged for Tucker to set fire to Parker's home while Parker was away, in exchange for oxycodone pills. The fire resulted in the death of a firefighter, Patrick Wolterman.

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On November 7, 2017, after a nine-day trial, a jury found Tucker guilty on all counts. Tucker was sentenced to a term of 15 years to life in prison. On direct appeal, this court overruled all five of Tucker's assignments of error and affirmed the trial court's judgment. *State v. Tucker,* 12th Dist. Butler No. CA2017-12-172, 2019-Ohio-911.

***

Tucker asserts that he did not discover the witness statements of Cecil Sebastian, Teresa McAdams, Tkeyah McDonald, Joyce Haynes, Christy Hartford, and Daniel Hatfield until after his trial, when his mother mailed his discovery evidence to him at the Belmont Correctional Institution. He claims that each one of the witness statements demonstrates that Pat Brandenburg was the perpetrator of the crimes for which he was convicted, and that there is 'nothing in the record' to support a finding by the trial court that the witness statements were provided to the defense prior to trial."

Holding:

"After reviewing the record, we find Tucker's assertions are without merit. Tucker does `not demonstrate that he was unavoidably prevented from discovering the facts necessary for his claim of relief. Instead, the record shows that the six witness statements were initially provided to Tucker and his attorney during discovery. On January 21, 2017, nearly ten months before trial, the State answered Tucker's request for discovery. Included in the response were items numbered 138, 140, 141, 147, 156, and 157, representing the witness statements of Sebastian, Hartford, Hatfield, Haynes, McAdams, and McDonald, respectively."

Legal Lesson Learned: Defendant must remain in prison - 15 years to life.

File: Chap. 6 - Employment Litigation, incl. Work Comp., Disability, Vet Rights

NY: ON-THE-JOB FOOT INJURY / SHOULDER INJURY - NOT UNEPECTED "ACCIDENTS" – NO DISABILITY RETIREMENT

On Sept. 29, 2022, in Matter of Elaine R. Berman v. Thomas P. DiNapoli, State Comptroller, the Supreme Court of New York, Third Department, held (5 to 0) that souse of a deceased firefighter was not entitled to accidental disability payments. The Court agreed with the Hearing Officer

that the firefighter's foot injury and back injury occurred during the course of routine employment duties and were a risk inherent in the performance thereof.

> "Petitioner's burden was to demonstrate that decedent's disability arose out of an accident, which, for purposes of the Retirement and Social Security Law, is defined as 'a sudden, fortuitous mischance, unexpected, out of the ordinary, and injurious in impact.' *** His resulting injury was not caused by a sudden and unexpected event. As such, substantial evidence supports respondent's finding that the incident did not constitute an accident."

Facts:

> "Petitioner's deceased spouse (hereinafter decedent) was a firefighter who filed an application for accidental disability retirement benefits in October 2015 alleging that he was permanently disabled as a result of various injuries that he sustained in three incidents that occurred on May 4, 2009, February 16, 2014 and January 19, 2015. The New York State and Local Police and Fire Retirement System denied the application upon the ground that the incidents did not constitute accidents within the meaning of Retirement and Social Security Law § 363, and notice for the 2009 incident was not timely filed pursuant to Retirement and Social Security Law § 363 (c).
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> The evidence further established that the 2014 and 2015 incidents occurred while decedent was responding to active emergencies. With regard to the 2014 incident, petitioner offered no testimony or evidence and relied upon the employer's 2014 report, which reflected that, while decedent was responding to a fire alarm call and crossing the street to get supplies, he jumped off a snowbank and 'landed hard' on his left foot. During this event, decedent was actively engaged in the performance of his duties as a firefighter. His resulting injury was not caused by a sudden and unexpected event. As such, substantial evidence supports respondent's finding that the incident did not constitute an accident.
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> Finally, regarding the 2015 incident, the testimony of the employer's deputy chief established that decedent strained his shoulder while using a tool to shut off a gas-line valve, as directed by the deputy chief, at a residential fire to which they had been called to assist. The deputy chief recounted that turning off utilities including gas lines to minimize the attendant risks was a routine part of firefighter duties for which decedent received extensive training and carried the necessary tools."

Holding:

> "D]ecedent was engaged in an activity undertaken in the performance of his ordinary employment duties at the time he sustained injuries and there was no precipitating event that was not a risk of the work performed so as to support classifying this incident as an accident, as respondent correctly held (*see Matter of McGoey v DiNapoli*, 194 A.D.3d at 1299; *Matter of Sestito v DiNapoli*, 161 A.D.3d 1499, 1500 [3d Dept 2018]).
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> ***

> With regard to the May 2009 incident, as respondent correctly determined, decedent failed to file written notice thereof until October 2015, well in excess of the 90-day notice requirement…."

Legal Lesson Learned: In New York, accidental disability retirement benefits are only for on-the-job accidents that are "sudden, fortuitous mischance, unexpected, out of the ordinary, and injurious in impact."

File: Chap. 6

IL: FF KIDNEY CANCER – WINS WORKERS COMP – REBUTTABLE PRESUMPTION STATUTE, EXPERT OPINION

On Sept. 15, 2022, in City of Springfield v. The Illinois Workers' Compensation Commission et al. (Matt Wood), the Court of Appeals of Illinois, Fourth District (Workers; Compensation Commission Division) held (5 to 0) that the arbitrator and the Worker's Comp Commission properly held that the firefighter was entitled to workers comp under the Illinois "rebuttable presumption" statute.

> "[T]he Commission's finding that the claimant's kidney cancer arose out of and in the course of his employment was not against the manifest weight of the evidence. *** The arbitrator found that given the claimant [Matt Wood] was a firefighter for about 16 years on September 6, 2013, and he had kidney cancer that resulted in a disability, his kidney cancer shall be rebuttably presumed to (1) arise out of and in the course of his employment and (2) be causally connected to the hazards or exposures of the employment (820 ILCS 310/1(d) (West 2012))."

Facts:

> "On June 7, 2017, the claimant presented to Dr. Peter Orris for a section 12 independent medical examination (IME) (820 ILCS 305/12 (West 2012)). Dr. Orris is Chief of Occupational and Environmental Medicine at the University of Illinois Medical Center in Chicago and professor in environmental health and occupational health at the University of Illinois at Chicago's school of public health. In these capacities, he has studied and taught how to diagnose and treat diseases related to the environmental and occupational exposures as they relate to firefighters. Dr. Orris's examination included a history, record review, medical literature review, review of Dr. Eggener's report, and physical examination. He noted that the claimant was diagnosed in 2013, after 17 years of fire service, with kidney cancer. Dr. Orris opined that the claimant had no history or other possible risk factors for the development of renal malignancy, such as smoking, hypertension, diabetes, or family members with kidney cancer. Therefore, he believed it was more likely than not that the claimant's 17 years of firefighting contributed to the development of his cancer. Dr. Orris based this conclusion upon known exposures of firefighting and the literature that has evidence confirming the causative relationship between firefighters and kidney cancer on a more likely than not basis. He applied Sir Bradford Hill's classic list of characteristics of studies to judge how likely it was that the association observed was causative. Dr. Orris relied on studies published by the

Occupational Environmental Medicine and World Health Organization's International Agency for Research on Cancer, and a study of firefighters from San Francisco, Chicago, and Philadelphia that showed an association between firefighting and kidney cancer.

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The arbitrator found that given the claimant [Matt Wood] was a firefighter for about 16 years on September 6, 2013, and he had kidney cancer that resulted in a disability, his kidney cancer shall be rebuttably presumed to (1) arise out of and in the course of his employment and (2) be causally connected to the hazards or exposures of the employment (820 ILCS 310/1(d) (West 2012)).

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The City filed a petition to review the arbitrator's decision before the [Illinois Workers' Compensation] Commission. The Commission agreed with the arbitrator's ultimate determination but differed in analysis… the Commission found that the claimant still proved by a preponderance of the evidence that he suffered an occupational disease based on Dr. Orris's testimony and the record as a whole. The Commission otherwise affirmed and adopted the arbitrator's decision."

Holding:

"… Dr. Orris reviewed the same literature and concluded that the studies established *a connection* between firefighting and the development of kidney cancer. For instance, 9 of 13 of studies demonstrated an elevated risk. We reiterate that the Commission is tasked with resolving conflicts in the evidence presented, which includes medical testimony and evidence. See *Prairie Farms Dairy v. Industrial Comm'n*, 279 Ill.App.3d 546, 550-51 (1996). Moreover, as to the claimant specifically, Dr. Orris stated that the claimant had no history or other possible risk factors for the development of kidney cancer, such as smoking, hypertension, diabetes, or family members with kidney cancer. Though the City argues that Dr. Orris did not have certain medical history demonstrating that the claimant had a family history with other types of cancers, we fail to see how this alters Dr. Orris's opinion. He provided that a family history with *kidney cancer* was a possible risk factor. None of these supposed absent medical records contains evidence that the claimant has a family history of kidney cancer."

Legal Lesson Learned: Having an expert who has studied firefighter cancers is essential when presenting a workers' compensation claim.

Note: The Court cited Firefighter Matt Wood's testimony about changes in protocol in wearing SCBAs during overhaul and other cancer prevention SOGs.

"The claimant testified that his firefighting duties were the same while in all three positions, which included actively fighting fires. He stated that he responded to approximately four fires per month. The claimant responded to fires at residential homes, structural fires, building fires, and fires in cars, rubbish, and brush. When he responded to a fire, he wore his bunker gear, which consisted of a fire suit, pants, coat, helmet, gloves, hat, mask, and a self-contained breathing apparatus (SCBA), which is a backpack that

carries a cylinder holding air. The claimant testified that new procedures went into effect four years ago and now firefighters would keep their SCBA on until an on shift safety officer determined with a Lower Explosive Limit (LEL) monitor, that all gas levels were within normal range and it was safe to take the equipment off. He stated that this resulted in the firefighters' masks remaining on much longer while they were performing their overhaul duties. Other changes also went into effect at that time, such as the firefighters having a spare set of gear ready and wet wipes at the scene to clean their face, neck, and hands."

Illinois Rebuttable Presumption:

"Any condition or impairment of health of an employee employed as a firefighter, emergency medical technician (EMT), emergency medical technician-intermediate (EMT-I), advanced emergency medical technician (A-EMT), or paramedic which results directly or indirectly from any bloodborne pathogen, lung or respiratory disease or condition, heart or vascular disease or condition, hypertension, tuberculosis, or cancer resulting in any disability (temporary, permanent, total, or partial) to the employee shall be rebuttably presumed to arise out of and in the course of the employee's firefighting, EMT, EMT-I, A-EMT, or paramedic employment and, further, shall be rebuttably presumed to be causally connected to the hazards or exposures of the employment. This presumption shall also apply to any hernia or hearing loss suffered by an employee employed as a firefighter, EMT, EMT-I, A-EMT, or paramedic. However, this presumption shall not apply to any employee who has been employed as a firefighter, EMT, EMT-I, A-EMT, or paramedic for less than 5 years at the time he or she files an Application for Adjustment of Claim concerning this condition or impairment with the Illinois Workers' Compensation Commission."

File: Chap. 7 – Sexual Harassment, incl. Hostile Work Atmosphere, Pregnancy Discrimination, Gay Rights

NY: EMT WITH ANXIETY – CLAIMED 98% MALES HOSTILE – RETALIATION PROCEED - FIRED 1 MO. SHE FILED EEOC

On Sept. 30, 2022, in Malva M. Freckleton v. Ambulnz LLC, U.S. District Court Judge Ann M. Donnelly, U.S. District Court for Eastern District of New York, granted defense motion to dismiss most of the EMT's charges (race, age, disability)), but recognizing the plaintiff is proceeding pro se (no attorney), held that her "retaliation" claim may proceed to pre-trial discovery since she was fired within one month of her filing a complaint of discrimination with New York State Division of Human Rights and the federal EEOC.

"The plaintiff alleges that "98% [of] male employees harassed [her]…'and 'there is a conduct of hostility towards a gender which demonstrate the plaintiff is a female' and 'male co-workers treated [her] differently by bullying, intimidating, and sabotaging' her … and the defendant's adverse actions against are 'because of sex (male coworkers)….' These allegations are conclusory and insufficient, even giving the plaintiff the special solicitude that is due *pro se* litigants.

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The plaintiff filed her NYSDHR complaint on August 16, 2019, and was fired in September 2019. Recognizing that it is appropriate to take a 'generous view of retaliatory acts at the motion to dismiss stage,' *Ingrassia*, 130 F.Supp.3d at 723-24 (citing *Kelly v. Howard I. Shapiro & Assocs. Consulting Engineers, P.C.*, 716 F.3d 10, 17 (2d Cir. 2013)), and drawing all reasonable inferences in the plaintiff's favor, I conclude that she has adequately alleged causation based on temporal proximity…. Accordingly, the plaintiff sufficiently alleges a retaliation claim based on the filing of her NYSDHR complaint and her subsequent termination."

Facts:

"This case arises from the plaintiff's employment as an emergency medical technician ('EMT') by Ambulnz from March 2019 until she was terminated in September 2019…. The plaintiff, a 49 year-old African American woman who suffers from anxiety, claims that she was subjected to discrimination and retaliation because of her race, gender, age and disability…. According to the plaintiff, '98% [of] male employees harassed her,' creating a 'hostile environment…. ' She describes an incident in which a co-worker 'let out' oxygen from a tank and told her to put a patient on an empty oxygen tank…. She alleges that the defendant fired and rehired her, cut her hours 'drastically,' and docked her pay for a week after she 'complain[ed] about a male employee, who refuse[d] to give [her] direction from the PCR to travel to a patient who needed help…. The defendant moved her temporarily to a 'medical biller' position that paid $15 an hour, which she claims was less than what other co-workers received in the same job….
According to the plaintiff, 'no one did anything while [her] anxiety escalated…. She further alleges that the defendant 'brought' her to its Manhattan office, where she 'became anxious' because the defendant's lawyers 'intimidate[d] [her]' and because of the 'hostile environment….' She told the lawyer and her supervisor that she could not work in that environment and 'was not reporting back to work….' At that point, she says she was terminated."

Holding:

"The plaintiff alleges that "98% [of] male employees harassed [her]…'and 'there is a conduct of hostility towards a gender which demonstrate the plaintiff is a female' and 'male co-workers treated [her] differently by bullying, intimidating, and sabotaging' her … and the defendant's adverse actions against are 'because of sex (male coworkers)….' These allegations are conclusory and insufficient, even giving the plaintiff the special solicitude that is due *pro se* litigants.

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But the plaintiff filed a complaint with the NYSDHR and EEOC in August of 2019 alleging discrimination based on her age, race and conviction record … which constitutes protected activity…. The plaintiff also plausibly alleges an adverse employment action-that she was fired about a month after she filed the charge of discrimination with the EEOC and NYSDHR."

Legal Lesson Learned: Pro se [no attorney] plaintiff was given opportunity to try to prove retaliation in pre-trial discovery.

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

FL: DRUG OVERDOSE / 911 CALLED - GOOD SAMARITAN ACT DOES NOT PREVENT PD ARREST OUTSTANDING WARRANT

On Sept. 23, 2022, in State of Florida v. Anthony L. Waiters, the Florida Court of Appeals, Second District, held (3 to 0) that the trial court improperly dismissed the drug-related offenses under the 911 Good Samaritan Act, § 893.21(2), Fla. Stat. (2020).

> "[T]he legislature did not intend to immunize individuals seeking medical assistance for a drug overdose from arrest pursuant to an outstanding arrest warrant."

Facts:

> "Mr. Waiters used crack cocaine. He then began acting erratically, running around inside his sister's home, screaming, and grasping at his chest. Alarmed, his sister called 911. Emergency medical services (EMS) personnel arrived in response to a possible drug overdose. Later, law enforcement officers arrived and evaluated Mr. Waiters under the Marchman Act to determine whether he needed to be taken into protective custody. EMS concluded that Mr. Waiters could be released without hospitalization. In fact, Mr. Waiters signed a release declining further medical attention. Mr. Waiters provided his name and date of birth to the attending EMS personnel and law enforcement officers. Running this information through dispatch, the law enforcement officers learned that Mr. Waiters had an outstanding felony arrest warrant.
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> Upon concluding that Mr. Waiters did not meet the Marchman Act criteria, and after he had declined further medical attention, the law enforcement officers arrested him. Before patting down Mr. Waiters and putting him in the patrol car, the law enforcement officers asked if there was anything on his person that posed a danger of sticking/poking the officers. Mr. Waiters admitted having a broken crack pipe stem and a piece of crack rock in his pocket. Thereafter, the State charged Mr. Waiters with possession of a controlled substance and possession of drug paraphernalia. §§ 893.13(6)(a), .147(1), Fla. Stat. (2020)."

Holding:

> "Because the contraband was not obtained as a proximate, or direct, result of Mr. Waiter's seeking medical assistance, we reverse.
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> Apparently, the legislature did not intend to immunize individuals seeking medical assistance for a drug overdose from arrest pursuant to an outstanding arrest warrant. It would certainly be incongruous, then, for an individual to evade criminal liability under

section 893.21(2) for any contraband discovered pursuant to an arrest on an outstanding warrant.

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According to Mr. Waiters, an arresting officer must turn a blind eye to any contraband discovered pursuant to a search incident to arrest on an outstanding warrant because the series of events leading to that discovery began with Mr. Waiters' need for medical assistance for a suspected drug overdose. This is, indeed, a strained reading of the statute; it ignores the legislative intent reflected in section 893.21(2)'s staff analysis."

Legal Lesson Learned: Several states have enacted drug overdose "Good Samaritan Acts." In Florida, you are still subject to arrest for an outstanding warrant.

Note: See Court's Opinion, footnote 4:
"Other states have adopted similar laws; however, the statutory language in some is more explicit. *See*, *e.g.*, Ga. Code Ann. § 16-13-5(b) (West 2014) ('Any person who is experiencing a drug overdose and, in good faith, seeks medical assistance for himself or herself or is the subject of such a request shall not be arrested, charged, or prosecuted for a drug violation if the evidence for the arrest, charge, or prosecution of such drug violation *resulted solely from* seeking such medical assistance.' (emphasis added)); Md. Code Ann., Crim. Proc. § 1-210(b) (West 2016) ('A person who, in good faith, seeks, provides, or assists with the provision of medical assistance for a person reasonably believed to be experiencing a medical emergency after ingesting or using alcohol or drugs shall be immune from criminal arrest, charge, or prosecution for a violation of § 5-601, § 5-619, § 5-620, § 10-114, § 10-116, or § 10-117 of the Criminal Law Article if the evidence for the criminal arrest, charge, or prosecution was obtained *solely as a result* of the person's seeking, providing, or assisting with the provision of medical assistance.' (emphasis added)); N.H. Rev. Stat. Ann. § 318-B:28-b (2021) (creating a defense to enumerated drug possession charges 'if the evidence for the charge was gained as a *proximate result* of the request for medical assistance or the report to law enforcement' (emphasis added))."

File: Chap. 13 - EMS, incl. Community Paramedicine, Corona Virus

PA: FD LOSES MEDICARE BILLING – MOVED FD TO NEW LOCATION, NEVER TOLD EMS BILLING COMPANY OR CMS

On Sept. 30, 2022, in Aston Township Fire Department v. Arete Healthcare Services, LLC, the Superior Court of Pennsylvania, held (3 to 0) that trial court properly dismissed the FD's lawsuit against its EMS billing company.

"It was [Appellant's – Aston Township FD] failure to report their change in practice location that caused the injury in this case, and there is nothing in the record to support a shifting of the responsibility to [Arete]…. [I]n the instant case, the damages [Appellant] sustained would not have been incurred but for its own failure to report its change in

practice location. *** Thus, Appellant has not demonstrated that Arete had a contractual duty under the Agreement to submit a revalidation application to CMS."

Facts:

"Arete submitted a revalidation application to CMS on [Appellant's] behalf on February 7, 2018. This revalidation application listed 793 Mount Road, Aston Township, as the location of [Appellant]. However, [Appellant, without notice to Arete,] had moved to a new fire station at 2900 Dutton Mill Road, Aston Township, a few months prior to July 2017, when they sold the 793 Mount Road property. CMS revoked [Appellant's] billing privileges after a site inspection of [Appellant's] registered location - 793 Mount Road - revealed that the location was empty.

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[T]he site inspector's role was to inspect the practice location that [Appellant] had on file with CMS and not to investigate where [Appellant's] practice location might be after determining that [Appellant] was not operational at its practice location on file.

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Footnote 2: *See also* Deposition of Linda Pearce-Clark, EMS Director for Arete, 3/22/21, at 13, 26, 34 (discussing difficulties in getting Appellant to respond to requests, stating Appellant 'do[es] not follow up with me when things change,' and testifying that Appellant did not inform her it merged with another fire company and moved until after Arete submitted the revalidation)."

Holding:

In this case, [Appellant] has asserted claims against Arete for breach of contract and negligence, alleging that Arete failed to carry out a duty to properly submit the revalidation application to CMS. [Appellant] asserts that it suffered damages-a 'loss of income from being unable to bill Medicare and Medicaid[] patients' . as a result of Arete's conduct, under a breach of contract and negligence theory, and asks [the trial court] to award damages, including punitive damages.

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On March 23, 2022, the trial court granted Arete's motion for summary judgment.

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Here, the trial court opined:

[T]he [Agreement] attached to the Complaint, and upon which the breach of contract claim is expressly based ... does not impose on Arete any obligation related to the revalidation application to CMS. Indeed, neither 'CMS' nor the term 'revalidation application' appears in the [A]greement, which sets forth the services to be provided by Arete in terms of billing and collection services, office bookkeeping and payroll services, and consulting and support services. There is no evidence in the summary judgment record that the [A]greement was revised (in accordance with the terms of the [Agreement]) to include services related to a revalidation application. The express language of the [Agreement] ... contradicts and dispels the suggestion that Arete's

> ‘general duties under the contract between the parties’ included an undertaking by Arete ‘to correctly and properly submit the revalidation application to CMS.’ As such, the [trial court} finds there is no reasonable inference from the evidence in the summary judgment record to conclude that Arete had a contract-based duty to submit the revalidation application. The [trial c]ourt acknowledges [Appellant's] argument based on "detrimental reliance", but finds that any reliance by [Appellant] in the face of the express language of the [A]greement is unreliable and cannot support the claim for relief in this case under a contract theory.
> We agree.

Legal Lesson Learned: Inform your EMS billing company when you move locations.

File: Chap. 13 - EMS, incl. Community Paramedicine, Corona Virus

CA: MENTAL PATIENT JUMPS OUT MOVING AMBUL. - NO SHOULDER HARNESS, DOORS UNLOCKED – CASE PROCEED

On Sept. 29, 2022, in T.L., a Minor v. City Ambulance of Eureka, Inc., the California Court of Appeals, First District (First Division), held (3 to 0) that the trial court should not have granted summary judgment to the ambulance company and two EMS; lawsuit to proceed.

> “In short, as plaintiff has argued the case on appeal, and in light of the record on appeal, the only claims plaintiff has advanced that have any conceivable traction are that the gurney should have had shoulder harnesses which should have been used, and the rear door of the ambulance should have been locked. As we have observed, whether these claims have any merit was not addressed by the summary judgment motion.”

Facts:

> “In the fall of 2017, plaintiff's guardians brought her [otherwise healthy young lady] to the county Same-Day Services Department, where she was evaluated by a ‘Crisis Stabilization Unit’ clinician. She was subsequently admitted, on a voluntary basis, to the stabilization unit…. At the stabilization unit, plaintiff had been placed on a "section 5585" 72-hour mental health hold. (Welf. &Inst. Code, § 5585.) However, she was calm and cooperative while at the unit, was never diagnosed as being a danger to herself, and was transported by ambulance to and from a local hospital for a medical clearance, without incident. Her attending psychiatrist determined she was also stable for transport to the in-patient facility [4-hour drive], where she could receive a higher level of care than was available locally.
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> At [EMS] Schild's request, plaintiff got onto the gurney, which was in a partially upright position so she would be more comfortable during the trip, expected to be at least four hours. [EMS] Fan and Schild buckled her in with two safety belts. Schild rode in the back

of the ambulance with plaintiff and worked on the paperwork for her transport on his laptop.

Fifteen minutes into the transport-without warning and in a matter of seconds-plaintiff unbuckled both belts at the same time, moved to the back of the ambulance, opened the door, and stepped ‘ut. There had been ‘absolutely zero indication’ that she would do ‘something erratic." She ignored Schild's directives to stop. Fan had already begun pulling the ambulance to a stop, and they immediately provided plaintiff life-saving care and transported her to the local hospital.”

Holding:

“Thus, we have little trouble concluding that, as a provider of medical support services, defendants also have a special relationship with the patients they transport and therefore owe these patients a general duty of care.

***

Accordingly, the asserted ‘category of negligent conduct’ at issue here is broader than the use of restraints. It is negligent conduct in preparing and securing a patient for transport, the term ‘securing’ being used broadly to include any and all measures to prevent the patient from suffering injury during transport, such as safety belts, shoulder harnesses, or the position and locking of the gurney. Plaintiff has argued the gurney should have had shoulder harnesses which should have been used and that the rear doors of the ambulance should have been locked-both of which would have at least slowed her effort to exit the ambulance and allowed the EMT to restrain her. Whether these claims have any merit is a factual matter beyond the scope of the summary judgment motion.

***

In reaching this conclusion, we are not suggesting in any way that plaintiff will ultimately succeed on the merits of her negligence claim. Rather, we conclude only that plaintiff has managed to clear the relatively low hurdle posed by the general duty to take reasonable measures to safely transport patients.

Let us be clear-we are *not* holding that ambulance personnel have a duty to use restraints, either ‘soft’ or ‘hard,’ whenever a patient subject to a 5150 or 5585 hold (including a hold based on reported acts indicating a generalized risk of harm to others or self) is transported, regardless of all the other circumstances, including the attending physician's assessment of the patient's readiness for transport and decision not to order the use of restraints. Indeed, we expressly reject such a duty.”

Legal Lesson Learned: When transporting a psych patient, use shoulder harness and consider other restraints; lock back door of the ambulance.

GA: EMS CALLED BY PD – DEFENDANT FOAMING MOUTH, UNRESPONSIVE – NO TRANSPORT / DIED – CASE PROCEED

On Sept. 27, 2022, in Anthony Wilson, Kimberly Wilson, the parents of Martez Wilson, et al. v. EMT Sean Flack; Brian Porterfield, Paramedic; City of Douglasville, GA, et al., the U.S. Court of Appeals for the 11th Circuit (Atlanta), held (3 to 0)(unpublished decision) that the lawsuit shall be reinstated against the two EMS personnel.

> "It is undisputed that Defendants conducted a medical assessment of Wilson when they were called to the scene of his arrest. Specifically, they felt Wilson's skin, visually assessed his breathing by watching his chest movements, and used a ZOLL monitor to determine his pulse and oxygen levels. Based on their assessment, Defendants determined that no further assessment or treatment of Wilson was necessary. As discussed above, a jury might reasonably infer that this determination was so reckless that it amounted to a deliberate indifference to Wilson's obvious medical needs, particularly given the additional information Defendants received at the end of their assessment that Wilson was foaming at the mouth."

Facts:

> 'On March 3, 2015, Douglasville police officers Coylee Danley and Andrew Smith responded to a 911 call reporting a burglary in process at Freewheeling Motor Sports, a recreational vehicle dealership in Douglasville, Georgia. The officers were advised by dispatch that two male suspects had cut the fence at the dealership and were fleeing on foot into a nearby residential neighborhood. When they arrived at the scene, the officers canvassed the area and found an individual later identified as Martez Wilson lying face down in a driveway. Officer Danley approached Wilson in the driveway and directed him to put his hands behind his back, where-upon Wilson complied and was handcuffed. A second male suspect, Carlos Burroughs, subsequently appeared on the scene and was apprehended and handcuffed without incident.
>
> Wilson was limp when the officers found him in the driveway, and he complained that he was having trouble breathing. Officer Smith propped Wilson up against his knee so that he was sitting upright, and he testified that he felt Wilson make a coughing sound as he attempted to breathe. Smith radioed dispatch, reported that Wilson was complaining that he could not breathe, and requested EMS assistance at the scene.
>
> ***
>
> After speaking to the officers, Defendants approached the patrol car to evaluate Wilson. Wilson was sitting upright in the back of the car when Defendants first saw him, although Plaintiffs suggest that Wilson was already unconscious and being held upright by his seatbelt. Porterfield stated in a written report summarizing his assessment of Wilson that Wilson's eyes were open when he first saw him, but there is other evidence indicating that Wilson's eyes were closed the entire time Defendants were on the scene.
>
> The parties agree that Wilson was not responsive to any questions Defendants asked him, including Porterfield's question about whether Wilson wanted to go to the hospital. The parties dispute whether Wilson was unable to respond or just unwilling to respond. Porterfield apparently thought it was the latter because he testified that he had difficulty

obtaining Wilson's "consent" for further assessment or treatment. Nevertheless, Porterfield admitted in his deposition that he could not determine for certain whether Wilson was conscious and aware of his surroundings during his evaluation.

Despite Wilson's non-responsiveness, Defendants completed at least a cursory assessment of his condition. Porterfield stated that he felt Wilson's face and determined that his skin was 'warm and dry' and that he visually assessed Wilson's breathing by watching his chest movements. Porterfield then used a ZOLL monitor to determine Wilson's pulse and oxygen levels. Although Defendants testified that Wilson's pulse was in the 50s or 60s and that his oxygen level was 98 or 99%-both of which would have been considered normal-Officer Smith reported to the EMTs who treated Wilson at the jail later that evening that Wilson's pulse had been 110 and his blood oxygen level 92%. Accordingly, there is a disputed issue of fact concerning Wilson's pulse rate and oxygen level.

Near the end of Wilson's medical assessment, Douglas County Sheriff's Deputy Ryan Cadwell, who had arrived on the scene for backup, noticed that Wilson was foaming at the mouth. Cadwell reported that fact to Defendants, stating 'he's foaming at the mouth now, just so you know.' Cadwell's comment was captured on a dashcam video recording of the incident.

According to Defendants, because they were satisfied with Wilson's overall appearance, the ZOLL monitor readings, and a lack of observable respiratory issues, they believed his breathing complaints simply stemmed from overexertion after running from the police. They decided Wilson did not need further treatment, but offered to transport Wilson to the hospital if the officers thought that best. One officer commented, 'If he doesn't want to talk to you, he doesn't want to go to the hospital.' Defendants then terminated the assessment, after spending about seven minutes at the scene and four minutes actively evaluating Wilson. Porterfield admitted that he and Flack left the scene knowing they had not done a full assessment of Wilson, and still unsure about what had caused his breathing complaint.

***

When the officers [now at the Jail] returned to retrieve Wilson, he was not moving and his body was limp. The officers carried Wilson to a cell. Once they reached the cell, the officers realized that Wilson was no longer breathing and had no pulse. They summoned EMS again and a different paramedic crew arrived, but the responding paramedic was unable to resuscitate Wilson and he was pronounced dead at that time.

***

Wilson's cause of death was later determined by autopsy to be what is known as an ECAST (exercise collapse associated with sickle cell trait) event, a rare medical condition that is poorly understood but that is somewhat like exertional heat illness. As described by Plaintiffs, an ECAST is triggered by extreme exertion in an individual with sickle cell trait-which generally is asymptomatic and undiagnosed until after death-

causing systemic acidosis and dehydration that ultimately result in blood cell sickling, clotting and clumping of blood cells, and oxygen deprivation leading to death."

Holding:

"As discussed more fully below, Plaintiffs have presented enough evidence to raise a genuine issue of fact as to the essential elements of deliberate indifference in this case and, construing the evidence in the light most favorable to Plaintiffs, the clearly established prong of the qualified immunity analysis has been satisfied.

***

In addition to his critical pulse and blood oxygen levels, evidence in the record, when construed in favor of Plaintiffs, indicates that Wilson was non-responsive and perhaps unconscious when Defendants encountered him and during the entirety of his medical evaluation. For example, there is evidence that Wilson's eyes were closed when EMS arrived on the scene, and that they remained closed throughout the EMS assessment. Further, it is undisputed Wilson was non-responsive to any questions during the assessment. Defendants apparently concluded Wilson was unwilling rather than unable to respond, but it is not clear how they arrived at that conclusion. Defendants were advised prior to assessing Wilson that he had complained of difficulty breathing, which Porterfield agreed can cause a loss of oxygen to the brain and inability to respond. And Defendants were told just before they left the scene that Wilson was foaming at the mouth, another indicator that his non-responsiveness was involuntary, such that he needed further evaluation.

***

The district court concluded that, at the worst, Defendants were negligent in their treatment of Wilson, but reasonable minds could draw a different conclusion from this record."

Legal Lesson Learned: If a patient is unresponsive, transport to a hospital.

File: Chap. 13 - EMS, incl. Community Paramedicine, Corona Virus

AR: WHEELCHAIR PATIENT – ASKED NOT USE SHOULDER HARNESS – FELL OUT, LATER DIED - 75% LIABILITY

On Sept. 16, 2022, in Clementine Thomas v. United States of America, U.S. District Court Judge Dominie W. Lanza, U.S. District of Arizona, held that the Federal government, which had contracted with private ambulance company, is 75% liable in damages, not 100% since the patient was 25% at fault.

"Here, [Veronica] Stevens bears 25% of the fault in light of the fact that Parker failed to secure the shoulder belt at her request. None of the other passengers in the van suffered injury from the braking incident, which suggests that if Stevens had simply allowed Parker to belt her into place (as had been his practice until she instructed him to stop), she would have avoided injury, too."

Facts:

"On August 31, 2017, Veronica Stevens ('Stevens') - a 75-year-old wheelchair bound woman with an array of serious health conditions, including blindness, end-stage renal disease, diabetes, cirrhosis, and an amputated leg-fell out of her wheelchair while being driven in a medical transportation van to a dialysis appointment. Stevens fell because the van's driver, who is considered a federal employee for purposes of this lawsuit, declined to secure her seatbelt at the beginning of the trip at her request. The fall caused Stevens to suffer a fractured femur. In the days following the accident, Stevens began to experience other medical complications, including seizures. Finally, on September 9, 2017, Stevens died.

***

On August 31, 2017, Stevens had an appointment at a dialysis clinic in Show Low, Arizona…. Stevens's usual mode of transportation to her dialysis appointments was to obtain a ride from White Mountain Apache Tribe Patient Transportation Services, which provided medical transportation services pursuant to a so-called 638 contract with the United States…. Stevens's usual driver, and the driver on August 31, 2017, was Denny Parker ('Parker'), who is deemed a federal employee for FTCA purposes.
When Parker helped Stevens get into the van on August 31, 2017, he "strapped the wheelchair" to the ground to make sure the wheelchair was stationary…. However, Parker did not secure Stevens's shoulder belt.

***

While en route to the dialysis clinic, Parker applied his brakes at a yellow light…. Having considered the witness testimony and statements in the medical records concerning this aspect of the incident, the Court agrees with Plaintiff that Parker's manner of driving was itself negligent, separate and apart from his earlier failure to secure Stevens's shoulder belt….

The change in velocity arising from Parker's braking caused Stevens to fall out of her wheelchair and onto the floor of the van…. This fall, in turn, caused Stevens to 'sustain[] a left distal femur fracture and a left distal tibia/fibular fracture…. ' As a result, Parker simply placed Stevens back in her wheelchair and then completed the trip to the dialysis center…

Stevens did not receive dialysis upon arrival-instead, the clinic's employees arranged for her to be transported by emergency medical services ('EMS') personnel to the Summit Healthcare Regional Medical Center ('Summit Healthcare) in Show Low….

***

On the evening of September 9, 2017-the day after being discharged from Banner-Stevens was found 'apneic and pulseless' in her home by one of her daughters…. The daughter did not perform CPR, because Stevens had previously indicated that she did not wish to be resuscitated, but called EMS for assistance…. Upon arrival, EMS personnel noted that Stevens had '[n]o signs of trauma' and was 'initially PEA but soon became asystolic….' Stevens was pronounced dead at 8:16 pm."

Holding:

> "It is appropriate to assign some fault to Stevens under these circumstances. *See generally Law v. Superior Court*, 755 P.2d 1135, 1143 (Ariz. 1988) ('We reject those cases . . . that rely on the absence of 'duty' to reject the seat belt defense. . . . At least under the comparative fault statute, each person is under an obligation to act reasonably to minimize foreseeable injuries and damages. Thus, if a person chooses not to use an available, simple safety device, that person may be at 'fault.').
>
> After the 25% reduction, each child is awarded $18,750 in damages. The overall award is $131,250.
>
> Accordingly, **IT IS ORDERED** awarding damages in favor of Plaintiff and against Defendant United States of America in the following amounts: Clementine Thomas: $18,750; Aaron B. Kaytoggy: $18,750; Carmalinda Lavender: $18,750; Mitzi Classay: $18,750; Trevino DePaul Stevens: $18,750; Cindy Kaytoggy: $18,750; Lamonica Ann Taylor: $18,750."

Legal Lesson Learned: When transporting patient, use all the seat and harness belts, even if patient requests not use harness belts.

File: Chap. 13 - EMS, incl. Community Paramedicine, Corona Virus

MD: PD ASSAULTED - DURING EMS TRANSPORT DEF. SAID "WENT FOR THAT WEAPON" – ADMISSIBLE IN CRIM. CASE

On Aug. 31, 2022, in Stanley C. Butler, Jr. v. State of Maryland, the Court of Appeal Appeals of Maryland held (3 to 0) that the defendant's comments in the back of ambulance were admissible to the jury in his criminal trial for disarming a law-enforcement officer, assault on a law-enforcement officer, two counts of second-degree assault, and resisting arrest.

> "We reach the same conclusion as the circuit court in holding that [EMT] English was not a State agent. *** The [trial] court reasoned that EMTs are 'civilians, they are not commissioned police officers . . . They are independent,' and that Officer Kilgore did not ask Butler any questions or direct English to ask Butler any questions.

Facts:

> "On July 31, 2020, at approximately 9:00 am, two Easton police officers and a Talbot County Sheriff's deputy responded to a call regarding a car that had been parked for nearly a day in an Easton cemetery. Deputy Donald Johnson was asked to go to the scene with his K-9 partner, Cairo. On arrival at the cemetery, Deputy Johnson heard Easton Police dispatch confirm that there was an active arrest warrant for the car's driver, Stanley Butler. The Easton officers informed Butler of the warrant and requested that he exit his vehicle. Instead of complying, Butler drove off. [He was stopped and arrested after K-9 dog bit him.]
>
> ***

Butler was placed in an ambulance for transportation to Dorchester General Hospital along with EMT Keith English and Deputy Tracy Kilgore of the Talbot County Sheriff's Office, per police procedure for transporting someone in custody. Deputy Kilgore was wearing a uniform, duty belt, and firearm, and was present 'mainly more in an observatory role' and neither made 'any statement relative to the investigation' nor 'ask[ed Butler] any questions."'

EMT English, however, did ask Butler questions 'to build some rapport with the patient as [he] would with anybody regardless of what [he is] picking them up for.' English asked Butler: 'How did we get here? Tell me about your medical history. Do you have any history of respiratory distress, any other preexisting health conditions that I need to be aware of?' After Butler 'denied any serious medical history,' English asked, 'what's going on with the police, obviously there's a police chase,' and asked about Butler's 'pain in his extremities from the dog bites and also being kicked and tased. [English] said how did we get to that?' Butler replied, 'I guess I should not have went for that weapon." English responded, 'that's not really my concern, I'm here for you, to provide patient care and to make sure we're okay. That is the police's business, I'm here for your safety and well-being from the time you're in my care until I get you to the hospital.'

At Butler's remark about the weapon, Deputy Kilgore silently took out her cellphone and began recording. She never asked Butler any questions during the ambulance ride, about taking a weapon or about any other subject."

Holding:

"Based on this evidence the [trial] court found that Butler was in custody at the time of being taken in the ambulance, but that 'there's no indication that the EMT was a State actor,' and so 'there was no interrogation in the way that was contemplated by the law.' The court reasoned that EMTs are 'civilians, they are not commissioned police officers . . . They are independent,' and that Officer Kilgore did not ask Butler any questions or direct English to ask Butler any questions.

We reach the same conclusion as the circuit court in holding that [EMT] English was not a State agent. First, we review the circuit court's underlying factual findings for clear error. Viewing the evidence in the light most favorable to the State, it was not clear error for the suppression court to find that EMTs are not commissioned police officers, nor was it clear error for the court to have credited English's testimony that his question to Butler was aimed only at providing medical care. Nor was it clear error for the court to have found that Officer Kilgore was not involved in, nor did she direct or in some way influence, English's questioning. Butler's only argument below was that English could have had no purpose other than to elicit incriminating information from him in asking "how we got here," because, in Butler's view, English was already aware of the events that led to Butler's injuries. But Butler presented no evidence to support this contention. Indeed, English testified to the contrary. Consequently, the suppression court made a credibility determination about English's motivation. Under the circumstances, we cannot say that court's decision to credit English's testimony was clearly erroneous."

Legal Lesson Learned: EMS may ask patient [defendant] questions related to his medical condition during transport with police on board; spontaneous confessions are generally admissible in criminal case.

File: Chap. 16 - Discipline

OH: PRE-DISCIP. CONF. INADEQUATE – MEDIC FIRED UNAUTHORIZED BLOOD DRAW FOR PD – CASE PROCEED

On Sept. 26, 2022, in Mitchell Plunk v. Chester Township, U.S. District Court Judge James S. Gwin, U.S. District Court for Northern District of Ohio, denied the Township's motion for summary judgment in the paramedic's lawsuit, who was fired after 9 years with the Township, who sued for violating his procedural due process rights. The Medical Director apparently had concluded that the paramedic didn't complete EMS run report about the blood draw he performed at the Police Station because he wanted the Medical Director at his other FD to confirm this was authorized.

> "Before ending Plaintiff's long-held employment, Defendant gave Plunk a hearing. The hearing did not let Plaintiff challenge the medical director's decision…. Because Defendant Chester Township and the medical director acted in concert to remove Plaintiff Plunk without giving Plunk an opportunity to challenge their decision's basis, the Court **DENIES** Defendant's

Facts:

> "While acting as a Township-employed paramedic, Plaintiff Plunk performed an evidentiary blood draw on a DUI suspect. Because Township paramedics did not usually do blood draws, the Township and its privately employed medical director fired Plunk. The medical director pulled Plunk's permission to practice as a paramedic. The Township then fired Plunk because he needed some medical director's permission to do his job.
>
> ***
>
> Defendant Chester Township appointed Dr. Donald Spaner as its medical director.[University Hospitals' EMS Training & Disaster Preparedness Institute employs Dr. Spaner as its president. The University Hospital Institute supplies medical direction without charge to dozens of Ohio municipalities' EMS organizations. Spaner acts as the medical director for many unrelated EMS organizations. The Township does not employ Dr. Spaner or pay him.
>
> ***
>
> On August 8, 2020, police, and fire-department units, including Plaintiff Plunk's EMT team, arrived at a one-car crash. The driver refused medical treatment, so the EMT team left…. Police suspected the driver was intoxicated, but she refused field sobriety tests. In the late August 8 or early August 9 hours, investigating officers asked for and received a court-approved search warrant authorizing a blood draw from the woman driver. The investigating police officers called the Chester Township station house to seek assistance in carrying out the Court search warrant.

As the most senior officer on duty, Plaintiff Plunk responded, went to the police station, and took the blood sample directed by the Court search warrant. Plunk claims that he obtained the driver's verbal consent to the procedure.

***

After completing the draw, Plunk returned to the station and completed a second fire-incident report. He was unsure whether he should file a new medical run sheet or whether he should amend the team's run sheet from earlier, so he emailed his supervisor for guidance. Because the Township started the disciplinary process before Plunk could file or amend his run sheet, no run sheet documented the blood draw. Dr. [Daniel] Spaner [FD's Medical Director] later claimed that Plunk had not filed a run sheet to conceal the blood draw from his review.

***

On August 10, Assistant Fire Chief Karen Moleterno, told Dr. Spaner that Plunk had conducted the search warrant blood draw but that the draw had not received prior approval. Dr. Spaner then emailed Plaintiff's supervisor, Chief John Wargelin, and asked him to 'take [Plaintiff] off line immediately.' After that email, Chief Wargelin told Plaintiff he believed Plaintiff Plunk would be suspended for a week for withdrawing blood without the arrestee's consent.

***

Plunk informed his Russell Township [where he also ran as a Medic] supervisor, Chief Frazier, that Defendant Chester Township would likely suspend him. Chief Frazier said he would contact Russell's medical director, Dr. Sauto, to determine whether Plunk should report for his shifts at Russell Township while Chester Township considered suspending him.

***

Plunk then tried to relay his conversation with Frazier to Chief Wargelin. Apparently the two miscommunicated, and Chief Wargelin thought Plunk had claimed that Dr. Sauto had approved the blood draw. Chief Wargelin relayed that claim to Dr. Spaner, who contacted Dr. Sauto. Because Dr. Sauto denied authorizing the blood draw, Dr. Spaner believed that Plunk had lied to make the blood draw appear authorized.

***

On August 11, Chief Wargelin called Plaintiff and asked him to resign. The next day, Plaintiff called Chief Wargelin and informed him that he would not resign. Chief Wargelin then told Plaintiff he was fired.

On August 17, Chief Wargelin and Assistant Chief Moleterno conducted a prediscipline hearing with Plaintiff Plunk and his Firefighters Association representative. At the pre-discipline hearing, Chief Wargelin and Assistant Chief Moleterno gave Spaner's unwillingness to authorize Plunk to work under Spaner's certificate as the reason for the firing.

On August 19, Dr. Spaner sent a letter to Chief Wargelin explaining his reasons for rescinding Plaintiff's permission to work under Spaner. The letter said that:

- Plunk had attempted to circumvent Dr. Spaner's authority by consulting a different medical director;
- Dr. Spaner had previously reprimanded Plunk 34 times; [NOT TRUE]
- Plunk did not satisfy continuing-education requirements;
- Plunk had exceeded his practice's scope by performing an evidentiary blood draw; and
- Plunk had failed to file or falsified reports.

The pre-disciplinary hearing had not discussed any of these claims. A week after the pre-disciplinary hearing, Defendant Chester Township's Board of Trustees formally terminated Plaintiff Plunk."

Holding:

"Their joint decision [Fire Chief & Medical Director] to permanently remove Plaintiff is therefore subject to due-process requirements.

A contrary holding would vitiate a pre-disciplinary hearing's purpose as an 'initial check against mistaken decisions.' If a state EMS employer and its private medical director premise their joint disciplinary decision on mistaken facts, due process requires that the employee have an opportunity to correct the mistake.

***

Defendant failed to fully explain its grounds for removing Plaintiff. Although Township employees and Dr. Spaner had identified several grounds for terminating Plunk, the Township told Plunk that he was terminated solely because Dr. Spaner revoked Plaintiff's permission to practice. It appears that, given the chance, Plaintiff probably could have rebutted several of the firing justifications.

All told, Defendant Chester Township has not carried its burden to demonstrate that Plaintiff's pre-disciplinary hearing complied with procedural due process as a legal matter."

Legal Lesson Learned: Pre-disciplinary hearing should include full opportunity for the paramedic to tell his side of the story. If the Medical Director had attended the pre-disciplinary hearing in this case any misunderstandings may have been clarified.

File: Chap. 17 - Arbitrations

FL: FF INJURIES OVER 11 YRS – SHORT TERM DISABILITY BENEFITS BUT USED SICK LEAVE – WINS BACK SICK LEAVE

On Sept. 30, 2022, in Metro Dade Firefighters, IAFF Local 1403 v. Miami-Dade County, the Florida Court of Appeals, Third District, held (3 to 0) that the arbitrator did not exceed his

authority when awarding the restoration of sick leave to a firefighter for an eleven-year period [Oct. 2006 until Nov. 2017] preceding an award of long-term disability benefits. Per CBA and City Code, "an employee who suffers a service-connected disability shall not use or be charged sick leave if he is granted disability leave or disability payments."

> Because we find that the arbitrator did not exceed his powers, we are constrained to reverse the circuit court's order vacating the arbitration award. *** The arbitrator decided only the issue submitted to arbitration. He interpreted and applied Section 2-56.26, finding that the provision required the County to restore all of Mr. Calvo's leave time for the period of time from his first on-the-job injury through his retirement after a finding of long-term disability because all of this time was taken as a result of Mr. Calvo's various compensable injuries and the lingering effects of these injuries."

Facts:

> "The County employed Ramiro Calvo as a firefighter from October 2005 until his retirement on December 3, 2017. During his career, Mr. Calvo sustained several on-the-job injuries beginning in October 2006 that impacted his ability to work. Mr. Calvo was granted short term disability benefits for these various injuries. On October 17, 2017, Mr. Calvo filed a grievance asserting that he was entitled to have his entire annual, sick, and holiday time restored pursuant to Article 19.5 of the collective bargaining agreement and Section 2-56.26 of the Disability Program because he was forced to use his leave time due to his compensable on-the-job injuries. Mr. Calvo also applied for long term disability benefits, which were ultimately granted with an effective date of November 15, 2017.
>
> ***
>
> The County contended no further sick leave was required to be restored because Mr. Calvo did not use, nor was he charged for, any sick leave during the period from November 17, 2017, the effective date of his long-term disability benefits, through his last day of employment, December 3, 2017. The Union disagreed, however, and argued the appropriate time frame for consideration was between 'October 2006 and December 2017,' contending that the decision to grant long term disability was unrelated to the requirement that the County not charge sick leave when somebody received those disability payments.
>
> ***
>
> Mr. Calvo also identified Section 2-56.26 of the Miami-Dade County Code, which was incorporated into the CBA by Article 19.5, as part of his grievance. Section 2-56.26 provides: 'Sick leave. An employee who suffers a service-connected disability shall not use or be charged sick leave if he is granted disability leave or disability payments.'
>
> ***
>
> [County appealed.] The circuit court concluded that the arbitrator, in direct opposition to these parameters, impermissibly ignored the Disability Panel's determination and concluded that Mr. Calvo was entitled to sick leave restoration for an eleven-year period of disability, thereby essentially ignoring section 2-56.26 and extending coverage to Mr. Calvo for eleven years before the County Disability Panel actually granted Mr. Calvo

long-term disability payments. The circuit court thus ruled that '[n]either the CBA nor the County's Service- Connected Disability Program ordinance gave the arbitrator the authority to dispute or substitute the Disability Panel's award with his own determination that Calvo's long term disability began 11 years earlier.'"

Holding:

"Whether the arbitrator's decision was legally correct is irrelevant because '[a]n award of arbitration may not be reversed on the ground that the arbitrator made an error of law.' *Schnurmacher Holding, Inc.*, 542 So.2d at 1329. Thus, while the circuit court may have disagreed with the arbitrator's interpretation and application of Section 2-56.26, it was not free to vacate the arbitration award because the arbitrator did not exceed his power. We are similarly constrained and must reverse the circuit court's order."

Legal Lesson Learned: Grievances and arbitrations can be avoided if CBA is explicit about whether sick leave can be charged for an employee who suffers a service-connected disability.