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APRIL 2021 – FIRE & EMS LAW Newsletter

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Updating 18 Chapters in Prof. Bennett's textbook: FIRE SERVICE LAW (2017)

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NEWSLETTER - 16 RECENT CASES REVIEWED

File: Chap. 1, American Legal System

U.S. SUP. CT: WOMAN FLEEING POLICE IN CAR – 13 SHOTS BY PD – PLED "NO CONTEST" ASSAULT – CAN ALSO SUE PD

On March 25, 2021, Roxanne Torres v. Janice Madrid, et al., the U.S. Supreme Court (5 to 3) held that a female who fled from police in vehicle, after being shot in her left arm, who later pled no contest in state court to "assault on a police officer," "aggravated fleeing from an officer," and unlawful taking of a motor vehicle," may still proceed with her lawsuit against federal court against the police officers for violation of 4th Amendment protection against unreasonable seizures.

> MAJORITY: "The question in this case is whether a seizure occurs when an officer shoots someone who temporarily eludes capture after the shooting. The answer is yes: The application of physical force to the body of a person with intent to restrain is a seizure, even if the force does not succeed in subduing the person."
>
> DISSENT: "A fleeing suspect briefly touched by pursuing officers may have a claim. But a suspect who evades a hail of bullets unscathed, or one who endures a series of flash-bang grenades untouched, is out of luck. That distinction is no less 'artificial' than the one the law has recognized for centuries. And the majority's new rule promises such scarce relief that it can hardly claim more sensitivity to 'personal security' than the rule the Constitution has long enshrined.**"**

Facts.

> "At dawn on July 15, 2014, four New Mexico State Police officers arrived at an apartment complex in Albuquerque to execute an arrest warrant for a woman accused of white col-lar crimes, but also "suspected of having been involved in drug trafficking, murder, and other violent crimes." App.to Pet. for Cert. 11a. What happened next is hotly con-tested. We recount the facts in the light most favorable to petitioner Roxanne Torres because the court below granted summary judgment to Officers Janice Madrid and Richard Williamson, the two respondents here.
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> The officers observed Torres standing with another per-son near a Toyota FJ Cruiser in the parking lot of the com-plex. Officer Williamson concluded that neither Torres nor her companion was the target of the warrant. As the officers approached the vehicle, the companion departed, and Torres—at the time experiencing methamphetamine withdrawal—got into the driver's seat.
>
> The officers attempted to speak with her, but she did not notice their presence until one of them tried to open the door of her car. Although the officers wore tactical vests marked with police identification, Torres saw only that they had guns. She thought the officers were carjackers trying to steal her car, and she hit the gas to escape them. Neither Officer Madrid nor Officer Williamson, according to Torres, stood in the path of the vehicle, but both fired their service pistols to stop her. All told, the two officers fired 13 shots at Torres, striking her twice in the back and temporarily paralyzing her left arm. Steering with her right arm, Torres accelerated through the fusillade of bullets, exited the

apartment complex, drove a short distance, and stopped in a parking lot. After asking a bystander to report an attempted carjacking, Torres stole a Kia Soul that happened to be idling nearby and drove 75 miles to Grants, New Mexico. The good news for Torres was that the hospital in Grants was able to airlift her to another hospital where she could receive appropriate care. The bad news was that the hospital was back in Albuquerque, where the police arrested her the next day. She pleaded no contest to aggravated fleeing from a law enforcement officer, as-sault on a peace officer, and unlawfully taking a motor vehicle.

Torres later sought damages from Officers Madrid and Williamson under 42 U. S. C. §1983, which provides a cause of action for the deprivation of constitutional rights by per-sons acting under color of state law. She claimed that the officers applied excessive force, making the shooting an un-reasonable seizure under the Fourth Amendment. The District Court granted summary judgment to the officers, and the Court of Appeals for the Tenth Circuit affirmed on the ground that 'a suspect's continued flight after being shot by police negates a Fourth Amendment excessive-force claim.' 769 Fed. Appx. 654, 657 (2019).

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A seizure requires the use of force with intent to restrain. Accidental force will not qualify. See County of Sacramento v. Lewis, 523 U. S. 833, 844 (1998). Nor will force intentionally applied for some other purpose satisfy this rule. In this opinion, we consider only force used to apprehend. We do not accept the dissent's invitation to opine on matters not presented here—pepper spray, flash-bang grenades, lasers, and more."

Legal Lesson Learned: The Majority decision certainly opens up Federal courts to more lawsuits for alleged violation of Constitutional rights, including plaintiffs who have pled guilty or no contest to assaulting the police officers they are now suing.

Note: Case made national news.
"Supreme Court Dips Gingerly Into Roiling Police Misconduct Waters." (March 25, 2021).

"'Nothing subtle about a bullet': Supreme Court says police 'seizure' includes shots fired at fleeing suspect." (March 25, 2021).

"Supreme Court sides with New Mexico woman shot by police while fleeing." (March 25, 2021).

File: Chap. 1, American Legal System

WI: PROPERTY OWNER BURNING DEBRIS WITHOUT PERMIT - FOREST PROTECTION AREA – CITATION UPHELD

On March 4, 2021, in State of Wisconsin v. Greg D. Griswold, the State of Wisconsin Court of Appeals (District IV) held [one judge decision] that the trial court properly concluded the property owner did not show he was burning debris from his house, that had been destroyed by fire, for the purpose of warmth. The Appeals judge agreed with the trial judge – he was burning wood at 8 pm on May 4 not to keep warm; he was simply avoiding cost of taking debris to the dump.

> "Greg Griswold appeals pro se from a judgment of conviction of a civil forfeiture, which was entered after the circuit court found him guilty of violating WIS. STAT. § 26.12(5)(b). That statute prohibits setting unpermitted fires in certain areas of the state, but it contains an exception for fires that are set "for warming the person." Griswold contends that his fire fits within this exception, but I conclude that the trial evidence is sufficient to sustain the court's finding that it did not. Accordingly, I affirm."

Facts:

> "On May 4th, 2020, Griswold was clearing debris from a burned-down house located on his property. At approximately 8:00 p.m., he used some of the debris to start a fire. Shortly thereafter, Chief Jeff Hackl of the Muscoda Fire Department arrived at Griswold's property, informed Griswold that the fire was unlawful, and extinguished it. The incident was referred to a warden at the Wisconsin Department of Natural Resources, who cited Griswold for burning a fire without a permit in an extensive forest protection area contrary to WIS. STAT. § 26.12 (5)(b); *see also* WIS. ADMIN. CODE § NR 30.02 (through February 2021) (defining 'extensive forest fire control areas').
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> ***
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> Griswold entered a not guilty plea and represented himself at a trial before the circuit court. During the trial, Griswold admitted that he started a 'very small' fire to 'get[] warm that night,' and that he put an old mattress box spring on top of the fire to act as 'a spark arrester.' He argued that the fire he started fit within the statute's exception for warming fires.
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> ***
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> Chief Hackl also testified at the trial. According to Chief Hackl, on the night of the fire, '[Griswold] stated to me that he was going to get rid of some of the wood so he didn't have to take it to the town dump. He never said anything about warming by it or nothing that I recall.'
>
> ***
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> In closing, Griswold argued that his conduct fell within the exception because he was burning debris 'and getting warm at the same time.' The circuit court disagreed. In determining that the warming exception did not apply, it remarked that 'the exception only applies in law if it applies in fact,' and that 'telling the fire department that you were just burning up some stuff to not have to take it to the dump is different than, you know,

saying it's just to keep you warm.' The court also commented that 'usually when someone's working, they don't need a fire to keep them warm[.]' Therefore, the court concluded that the State had met its burden to prove Griswold violated the statute. Griswold appeals.

***

I do not agree with Griswold that this case turns on a matter of statutory interpretation or any question of law. WISCONSIN STAT. § 26.12(5)(b) provides in relevant part as follows:

> No person may set any fire except for warming the person or cooking food within the limits of any extensive forest protection area at any time during January through May except when the ground is snow-covered and during any other time of the year when so ordered by the department unless written permission has been received in advance from a duly appointed fire warden ....

***

Here, I conclude that there is credible evidence to support the circuit court's finding that Griswold did not set the fire to warm himself. First, the court reasonably credited the testimony from Chief Hackl that, on the night of the fire, Griswold 'never said anything about warming by [the fire]' and instead said he started the fire 'to get rid of some of the wood so he didn't have to take it to the town dump.' From this testimony, the circuit court inferred that the real reason Griswold started the fire was to save himself a trip to the dump, and that he only testified about warming after he learned about the warming exception in the statute. Second, the court also inferred that Griswold should not have needed a fire to stay warm at 8:00 p.m. in early May while performing manual labor."

Legal Lesson Learned: Citation upheld; good work by the Fire Chief and the Department of Natural Resources.

Note: "There was also testimony that, even if Griswold had had a permit, the fire would have violated the statewide burn ban that was in effect at the time due to the COVID-19 pandemic. We address this testimony no further, since neither the citation that was issued nor the circuit court's judgment of conviction were based on any statewide burn ban. Both were based on a violation of WIS. STAT. § 26.12(5)(b)."

File; Chap. 3, Homeland Security

NY: TERRORIST 1993 WORLD TRADE - HUNGER STRIKE FED. MAX PRISON, FORCED FEEDING – EMPLOYEE PRIVACY

Aviva Stahl v. Department of Justice and Federal Bureau of Prisons, U.S. District Court Judge Brian M. Cogan, U.S. District Court for the Eastern District of New York (Brooklyn), an investigative journalist, Aviva Stahl, filed a Freedom of Information Act lawsuit for the videotaped of the "forced feedings." Judge Cogan held that segments of the video are protected

from disclosure under FOIA, including the names / faces of the medical staff who participated in the procedures.

> "Convicted for his role in the 1993 terrorist attacks on the World Trade Center, Mohammad Salameh was incarcerated at the United States Penitentiary, Administrative Maximum Facility in Florence, Colorado ("Florence ADX"). During his time there, Salameh went on several hunger strikes. The last one ended in procedures whereby Salameh received food and rehydration through intravenous therapy and a nasogastric tube. An investigative journalist, plaintiff Aviva Stahl, now seeks access to those videos under the Freedom of Information Act. She has sued the Bureau of Prisons and the Department of Justice, and before me are the parties' cross-motions for summary judgment.
>
> I conclude that certain segments of the videos fall within FOIA exemptions. As to these segments, defendants' motion is granted and plaintiff's motion is denied. For the remainder of the videos, however, the record lacks sufficient information to show whether the exempt information is reasonably segregable from the non-exempt information. As to these segments, I reserve judgment on the parties' motions. The parties shall submit supplemental memoranda and evidence addressing the remaining portion of the videos as set forth below.
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> ***
> Although plaintiff stresses that defendants disclosed the names of the medical staff who participated in the procedures when defendants released Salameh's medical records, I conclude that the staff still have a privacy interest in the visual depictions of them performing the procedures."

Facts:

> "In 2015, Salameh began a hunger strike that would last thirty-four days. By early November, his health had deteriorated to such a state that the BOP determined that he required immediate medical attention. In two separate episodes, the BOP performed what it calls 'involuntary medical treatment' and a 'calculated use of force.' Plaintiff calls it 'force-feeding.'
>
> ***
> In the first episode, on November 4, BOP staff donned protective gear and went to Salameh's cell. Defendants claim that Salameh refused to leave his cell. Salameh denies this, claiming that he was too weak to come to his cell door. In any event, the staff placed Salameh in handcuffs and leg irons, extracted him from the cell, placed him in a wheelchair, and ferried him to another room.
>
> There, medical staff conducted a physical examination. Observing signs of severe dehydration, they determined that Salameh needed immediate liquid intake. He refused. An emergency medical technician ordered that Salameh undergo involuntary rehydration. Medical staff placed him on his back, adjusted his restraints, and inserted an IV into his arm. Once satisfied with his liquid intake, the BOP staff returned him to his cell.

The next week, on November 11, the BOP again determined that Salameh required immediate attention. Staff went to his cell, and this time, Salameh agreed to come to the door and submit to hand restraints. The staff brought him to another room. Medical staff weighed Salameh, took his vital signs, and conducted another physical examination. Then, they placed Salameh in what the BOP calls 'a specialized chair allowing an inmate to remain restrained while sitting upright.' Salameh refused to drink a liquid nutritional supplement, and a physician assistant determined that Salameh would receive the supplement without his consent. While medical staff held Salameh's head, the physician assistant inserted a nasogastric tube through Salameh's nose and into his stomach. Defendants report that Salameh resisted these efforts by 'deliberately regurgitating and vomiting the supplement.' Salameh maintains that the vomiting was involuntary. Once he received the nutritional supplement, the BOP staff returned him to his cell.

***

Defendants have identified thirteen videos in total. Six document the events of November 4, and seven document the events of November 11. To explain their contents, defendants submitted declarations from two administrators at the BOP regional office that oversees Florence ADX. The declarations explain that the videos generally follow the same format. They come from two different cameras, which filmed the events from two different angles. They document roughly an hour and fifteen minutes of each event. And generally speaking, the videos contain three different segments.

The first segment is an introduction. A BOP lieutenant and the two cameramen identify themselves by name and title. According to the declarations, the lieutenant 'describes the situation and the need for the calculated use of force.' He outlines 'the specific procedures that will be taking place during the calculated use of force, including the order in which specific security measures will be conducted.' Then, the staff members who perform the 'calculated use of force' identify themselves. They detail their job titles and their specific responsibilities, including what part of Salameh's body they have the responsibility to restrain. The staff members state that they are 'willing participant[s] in the calculated use of force.' Further, the medical staff 'discuss [Salameh's] medical condition, explain the need for involuntary treatment, and describe the procedures they intend to use.' The videos show their faces as well as their protective gear. The videos also reveal 'specific security equipment' and 'how some of the security equipment works.'

In the next segment, the videos document the events at issue. The staff travel to Salameh's cell, perform the "calculated use of force," and place Salameh in restraints. They bring Salameh to another room, and the medical staff conduct the procedure. Finally, the staff return Salameh to his cell.

The final segment is a debrief. From Salameh's cell, the staff travel to another location, where they again introduce themselves and outline their specific duties. The lieutenant 'describes the calculated use of force, including the specific actions that were taken by the staff to restrain [Salameh] in preparation for the medical treatment.' Each individual involved in the extraction describes 'the specific duties he was assigned,' 'how he carried

out those duties,' and 'whether he had any injuries following the incident.' Then, the medical staff describe 'the treatment they administered and [Salameh's] medical condition.' With that, the videos conclude.

***

In this case, defendants cite Exemptions 6 and 7. See 5 U.S.C. § 552(b)(6)-(7). Exemption 6 protects 'personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.' § 552(b)(6). Exemption 7 covers several categories of 'records or information compiled for law enforcement purposes.' § 552(b)(7). Three categories are relevant here. First, Exemption 7(C) covers information that 'could reasonably be expected to constitute an unwarranted invasion of personal privacy.' § 552(b)(7)(C). Next, Exemption 7(E) shields information that 'would disclose techniques and procedures for law enforcement investigations or prosecutions.' § 552(b)(7)(E). And last, Exemption 7(F) reaches information that 'could reasonably be expected to endanger the life or physical safety of any individual.' § 552(b)(7)(F). Defendants maintain that these exemptions cover every segment of the videos.

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I therefore hold that Exemption 7(F) covers the following segments: (1) the entire first segment, when the BOP staff identify themselves and detail their responsibilities; (2) the entire final segment, when the staff again identify themselves and debrief the events; and (3) the portion of the middle segment that shows the staff traveling to Salameh's cell, placing Salameh in restraints, and bringing him to another room. I further conclude that, for these segments, any non-exempt information is not 'reasonably segregable' from the exempt information. See 5 U.S.C. § 552(b). Without the information regarding the procedures or the staff members' identities and responsibilities, these segments 'will be of little or no value.' Zander, 885 F. Supp. 2d at 8. For these segments, therefore, defendants have met their burden under FOIA.

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The staff here face more than harassment and embarrassment - they face reprisals and retaliation. See Garcia, 181 F. Supp. 2d at 371. Once again, I cannot ignore the gravity of Salameh's crimes or his ties to international terrorism. See Manna v. Dep't of Just., 51 F.3d 1158, 1166 (3d Cir. 1995) (stating that the plaintiff's 'position in the hierarchy of a particularly influential and violent La Cosa Nostra family [was] highly material to the protection of individual privacy interests'); Garcia, 181 F. Supp. 2d at 373-74 (considering the requester's criminal history). Defendants have therefore established a privacy interest that weighs against disclosure.

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As the foregoing analysis shows, defendants have demonstrated that the remaining portion contains *some* exempt information, but their submissions leave open questions as to whether that information is 'reasonably segregable' from non-exempt information. 5 U.S.C. § 552(b). In these circumstances, I cannot make the segregability findings that would allow me to grant summary judgment in favor of plaintiff or defendants. I will

> therefore reserve judgment on the parties' motions to the extent they concern the remaining portion of the videos. The parties are directed to submit supplemental memoranda, with sufficiently detailed evidence, addressing only the remaining portion. See, e.g., Hum. Rts. Watch, 2015 WL 5459713, at *8 (reserving judgment as to one portion of a document and directing the government to provide a 'detailed, line-by-line segregability analysis').
>
> I will also give defendants the option to submit the videos for *in camera* review. See 5 U.S.C. § 552(a)(4)(B)."

Legal Lesson Learned: The privacy of Medical personnel participating in the videotaped "forced feedings" has been protected.

File: Chap. 3, Homeland Security

VA: 4th CIRCUIT UPHOLDS FBI TERRORIST "WATCHLIST" - DUE PROCESS, SEEK REMOVAL BY FBI OR GO TO COURT

On March 30, 2021, in Anas Elhady, et al. v. Charles H. Kable, Director of the Terrorist Screen Center, et al., the U.S. Court of Appeals for the 4th Circuit (Richmond, VA), held (3 to 0) that the Terrorist Screening Database provides adequate due process protection for those seeking to get removed from the list. There are 1,160,000 individuals currently on the list, including about 4,600 U.S. citizens. Plaintiffs are 23 individuals complaining about their disruptions at airports; none have been barred from taking flights [not therefore are on the No Fly List] or when crossing the border into Mexico or Canada. The Court reversed a U.S. District Court judge; two other Circuits have also upheld the watchlist due process procedures.

> "The term 'national security' is too often bandied loosely and carelessly about, but this is no program of marginal consequence. It lies at the very heart of our country's effort to identify those who would inflict upon the public irretrievable loss and irreparable mass harms. By bringing this across-the-board attack on a system vital to public safety—rather than more focused individual challenges to particular law enforcement actions—plaintiffs face a demanding legal standard. Procedural due process claims require showing that the government violated constitutionally protected liberty interests. Plaintiffs cannot meet that burden. The government has had authority to regulate travel and control the border since the beginning of the nation. Indeed, this authority is a core attribute of sovereignty. The delays and burdens experienced by plaintiffs at the border and in airports, although regrettable, do not mandate a complete overhaul of the TSDB."

Facts:

> "To protect against acts of terrorism, the government maintains the Terrorist Screening Database (TSDB). One of the chief uses of the TSDB is to screen travelers in airports and at the border. The plaintiffs, twenty-three individuals who allege they are in the TSDB,

object to the delays and inconveniences they have experienced in airports and at the border. They allege the TSDB program violates the Fifth Amendment's Due Process Clause by failing to include more procedural safeguards.

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The rise of international terrorism in the twenty-first century pushed the government to establish a national security apparatus to combat it. Created by executive order, the TSDB is the federal government's consolidated watchlist of known or suspected terrorists. The TSDB is maintained by the Terrorist Screening Center (TSC), a multi-agency center administered by the FBI. The FBI and TSC work in coordination with the National Counterterrorism Center and the Department of Homeland Security (DHS) and its components, including the Transportation Security Administration (TSA) and U.S. Customs and Border Protection (CBP).

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TSC considers a broad variety of factors in deciding whether to add someone to the list, including an individual's travel history, associates, business associations, international connections, financial transactions, and ethnic or religious affiliations. TSC receives around 113,000 nominations annually and around 99% are accepted.

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One of the most significant uses for the TSDB is in airports by the TSA, which relies on it to screen airline passengers. For purposes of air travel, the TSDB's entries are organized into important subcategories. The No Fly List is the most restrictive category; individuals in that category are prohibited from boarding commercial flights on U.S. carriers and flights through U.S. airspace. J.A. 378. Individuals on the Selectee List, by contrast, are permitted to board commercial flights after undergoing enhanced screening…. The TSA may also designate passengers for enhanced screening who meet the reasonable suspicion standard for TSDB inclusion and for whom the TSDB record contains a full name and date of birth. This is known as the 'Expanded Selectee List.' Individuals on the Expanded Selectee List are subject to the same enhanced screening as those on the Selectee List. J.A. 324 n.15. The difference between the Selectee List and the Expanded Selectee List is that the former requires 'additional substantive derogatory criteria.'

***

But Congress made the determination that additional procedural safeguards were needed. Congress directed DHS to develop a post-inclusion redress process for travelers who believe they have been delayed or prohibited from boarding a commercial aircraft because they have been wrongly identified as a threat. See 49 U.S.C. § 44926(a), (b)(1); 49 U.S.C. §§ 44903(j)(2)(C)(iii)(I), (j)(2)(G)(i). TSA administers the DHS Traveler Redress 10 Inquiry Program (DHS TRIP), through which individuals may request redress if they experienced travel-related difficulties at an airport or port of entry. 49 C.F.R. §§ 1560.3, 1560.205…. About thirty-five full-time employees handle these reviews. At the conclusion of the process, DHS TRIP sends the traveler a letter with the result of the

inquiry. However, the government does not disclose whether the petitioner was actually in the TSDB.

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The [U.S. District Court judge] found violations of plaintiffs' protected liberty interests under the Due Process Clause on two theories. Id. at 577–80. First, it found the TSDB harmed plaintiffs' 'movement-related interests' by deterring their travel and by burdening their travel through extra screening and searches. Id. at 577. Second, it reasoned that the TSDB implicated plaintiffs' reputational liberty interests under a 'stigma-plus' theory. Id. at 579–80. According to the district court, the TSDB stigmatized plaintiffs by labeling them as known or suspected terrorists, and the government then disseminated that TSDB information in various ways. Id. That dissemination could be expected, it asserted, to affect an individual with respect to "traffic stops, field interviews, house visits, municipal permit processes, firearm purchases, certain licensing applications, and other scenarios.'

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Before the district court could proceed to consider further remedial action, this court granted the government's petition for permission to appeal under 28 U.S.C. § 1292(b).

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The experiences alleged by plaintiffs do not rise to the level of constitutional concern. Most plaintiffs complain of minor delays in airports of an hour or less. These burdens are not dissimilar from what many travelers routinely face, whether in standard or enhanced screenings, particularly at busy airports. After all, most travelers who face lengthier enhanced screenings are not in the TSDB but are instead chosen randomly.

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But even if we accepted plaintiffs' assertions that these inconveniences have actually deterred them from flying, our analysis would stand firm. Many courts have held that individuals do not have a protected liberty interest to travel via a particular mode of transportation.

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The Sixth and Tenth Circuits recognized this reality in finding no protected liberty interest in similar cases.

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Our opinion, however, should not be read to suggest that law enforcement actions in airports or at the border are immune from judicial review. Litigants can proceed through other avenues, including Fourth Amendment claims. The Fourth Amendment exists to protect against unreasonable searches and seizures, including unreasonable uses of force by law enforcement. See, e.g., Graham v. Connor, 490 U.S. 386 (1989) (recognizing Fourth Amendment claim for excessive use of force by law enforcement). One great advantage of requiring litigants to proceed that way is that courts will be able to conduct the kind of individualized case-by-case analyses that are precluded in a facial due process challenge.

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Given the nation's need for unrelaxed vigilance against catastrophic threats, we can say with confidence only that the TSDB program matters and that it conforms to long-settled propositions of law. But saying that should be enough. Plaintiffs' procedural due process claims fail for the reasons set forth above. We thus reverse the district court's denial of the government's motion for summary judgment and remand this case with instructions to enter judgment in favor of the government."

Legal Lesson Learned: The 4th Circuit, like the 6th and 10th Circuits, has upheld the watchlist program to protect our nation's security.

File: Chap. 3, Homeland Security

U.S. SUPREME COURT: MEXICAN CITIZEN IN U.S. 25 YEARS – CAN BE DEPORTED – USED FAKE SOCIAL SECURITY CARD

On March 4, 2021, in Avelino Pereida v. Monty Wilkinson, Acting Attorney General, the U.S. Supreme Court held (5 to 3) that Mr. Pereida, a nonpermanent alien in the U.S. for 25 years, and he and his wife raised three children, sought to cancel a lawful removal order must prove that they have not been convicted of a disqualifying crime (crime of "moral turpitude"). In 2010, he was charge in Nebraska with the crime of using a false Social Security Card to get employment as a janitor, plead nolo contendere [no contest] and was fined $100.

> "Under the INA [Immigration and Nationality Act], certain nonpermanent aliens seeking to cancel a lawful removal order must prove that they have not been convicted of a disqualifying crime. The Eighth Circuit correctly held that Mr. Pereida failed to carry this burden. Its judgment is Affirmed."

Facts:

> [From Dissent Opinion by Justice Breyer.]
> "Mr. Pereida is a citizen of Mexico, not the United States. He has lived in the United States for roughly 25 years. In that time, he and his wife have raised three children. He helped support them by working in construction and cleaning. One child is a U. S. citizen. In 2009 the Department of Homeland Security issued a notice to appear that charged Mr. Pereida with removability because he was never lawfully admitted to the United States. Mr. Pereida conceded that he is removable. But he asked the Attorney General to cancel his removal. The Attorney General has discretion to cancel an order of removal if removal would result in extreme hardship to the noncitizen's U. S. citizen (or lawful-permanent-resident) spouse, parent, or child. 8 U. S. C. §1229b(b)(1)(D). A noncitizen is ineligible for this discretionary relief, however, if, among other things, he has 'been convicted of ' a 'crime involving moral turpitude.'§§1229b(b)(1)(C), 1182(a)(2)(A)(i)(I). Mr. Pereida, in 2010, pleaded nolo contendere to, and was found guilty of, having committed a Nebraska state crime, namely, attempt to commit criminal

impersonation in vio-lation of Neb. Rev. Stat. §28–608. See §28–608 (2008) (since amended and moved to §28–638 (2020)); §28–201(1)(b). The question here is whether this conviction was for a 'crime involving moral turpitude.'
[From Majority Opinion by Justice Gorsuch.]

Ultimately, Mr. Pereida was found guilty, and this conviction loomed large when his immigration proceedings resumed. Before the immigration judge, everyone accepted that Mr. Pereida's eligibility for discretionary relief depended on whether he could show he had not been convicted of certain crimes, including ones 'involving moral turpitude.' 8 U. S. C. §§1182(a)(2)(A)(i)(I), 1227(a)(2)(A)(i), 1229b(b)(1)(C). And whatever else one might say about that phrase, the parties took it as given that a crime involving 'fraud [as] an ingredient' qualifies as a crime involving 'moral turpitude.' Jordan v. De George, 341 U. S. 223, 227 (1951).

***

Mr. Pereida bore the burden of proving his eligibility for relief, so it was up to him to show that his crime of conviction did not involve moral turpitude. Because Mr. Pereida had not carried that burden, he was ineligible for discretionary relief all the same."

Legal Lesson Learned: This U.S. Supreme Court decision sets precedence for other deportation cases.

Note: See article – "Supreme Court Makes It Harder For Undocumented Immigrants To Fight Deportation," March 4, 2021.

File: Chap. 4, Incident Command / Drones

MI: TOWNSHIP DRONE – PHOTOS JUNKYARD ZONING VIOL - PHOTOS SUPPRESSED – NEED ADMIN. SEARCH WARRANT

On March 18, 2021, in Long Lake Township v. Todd Maxon and Heather Maxon, the State of Michigan Court of Appeals held (2 to 1) that the trial court should have granted the motion to suppress the photos taken by a drone, flying line-of-sight below the 400 foot FAA limit.

"We conclude that; much like the infrared imaging device discussed in *Kyllo [Kyllo v United States*, 533 US 27; 121 S Ct 2038; 150 L Ed 2d 94 (2001)*];* low-altitude, unmanned, specifically-targeted drone surveillance of a private individual's property is qualitatively different from the kinds of human-operated aircraft overflights permitted by *Ciraolo* [*California v Ciraolo*, 475 US 207; 106 S Ct 1809; 90 L Ed 2d 210 (1986)] and *Riley* [*Florida v Riley*, 488 US 445; 109 S Ct 693; 102 L Ed 2d 835 (1989)].

We conclude that drone surveillance of this nature intrudes into persons' 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.

***

We believe it would be unworkable and futile to try to craft a precise altitude test. Rather, we conclude that persons have a reasonable expectation of privacy in their property against drone surveillance, and therefore a governmental entity seeking to conduct drone surveillance must obtain a warrant or satisfy a traditional exception to the warrant requirement."

Facts:

"In 2008, the parties litigated an alleged violation of the Long Lake Township Ordinance by defendants. That proceeding culminated in a settlement agreement (the Agreement), in which plaintiff agreed to dismiss its zoning complaint against defendants with prejudice, plaintiff paid a portion of defendants' legal fees, and plaintiff agreed 'not to bring further zoning enforcement action against Defendant Maxon based upon the same facts and circumstances which were revealed during the course of discovery and based upon the Long Lake Township Ordinance as it exists on the date of the settlement agreement.' In 2018, plaintiff filed the instant civil action, alleging that defendants had 'significantly increased the scope of the junk cars and other junk material being kept on their property" since entering into the 2008 Agreement, and that such activity 'constitut[ed] an illegal salvage or junk yard' in violation of the Long Lake Township Zoning Ordinance. In support of these allegations, plaintiff attached aerial photographs taken in 2010, 2016, 2017, and 2018. These photographs showed a 'significant increase in the amount of junk being stored on [d]efendants' property.'

***

Plaintiff also submitted the affidavit of Dennis Winard, owner of Zero Gravity Aerial, who operated the drone that captured the photographs at issue, in response to defendants' claim that the drone was non-complaint with FAA regulations. Winard averred that the photographs at issue were taken on April 25, 2017, May 26, 2017, and May 5, 2018. On those dates, Winard 'maintained a constant visual line of sight on the drone and maintained an altitude of less than 400 feet in accordance with the FAA regulations.' Plaintiff went on to argue at the hearing on defendants' motion to suppress that defendants did not have a subjective reasonable expectation of privacy in this case.

***

Defendants moved to suppress the aerial photographs and 'all evidence obtained by [p]laintiff from its illegal search of their property.' Defendants argued that the aerial surveillance of their property, and the photographs taken by the drones of their property and the surrounding area, constituted an unlawful search in violation of the Fourth Amendment. Defendants argued that the instant case is distinguishable from precedent involving manned aerial surveillance because, unlike fixed wing aircraft and helicopters which 'routinely fly over a person's property,' drones are equipped with 'high power cameras' and do not operate at the same altitudes as airplanes and helicopters.

Additionally, defendants argued that a person can reasonably anticipate being observed from the air by a fixed wing aircraft, but aerial surveillance from a drone flying over private property and taking photographs is not a reasonable expectation.

***

The trial court denied defendants' motion to suppress the images, finding that defendants did not have a reasonable expectation of privacy. The trial court relied on *Florida v Riley*, 488 US 445; 109 S Ct 693; 102 L Ed 2d 835 (1989), where the United States Supreme Court noted that 'the visual observation of the defendant's premises from a helicopter did not constitute a search under the Fourth Amendment.'

***

We also observe that plaintiff's warrantless surveillance was totally unnecessary. The parties could easily have—and likely should have—included a monitoring or inspection provision in their settlement agreement. Aside from that, as the United States Supreme Court observed, the quantum of evidence necessary to establish probable cause to conduct an administrative inspection is more than 'none,' but is less than what might be required to execute a criminal search warrant. *Camara*, 387 US 528-539. By plaintiff's own account, it had concrete evidence, in the form of unrelated site inspection photographs and complaints from defendants' neighbors, that defendants were violating the settlement agreement, violating the zoning ordinance, and creating a nuisance. Our holding today is highly unlikely to preclude any legitimate governmental inspection or enforcement action short of outright 'fishing expeditions.' If a governmental entity has any kind of nontrivial and objective reason to believe there would be value in flying a drone over a person's property, as did plaintiff here, then we trust the entity will probably be able to persuade a court to grant a warrant or equivalent permission to conduct a search."

Legal Lesson Learned: There will undoubtedly be more litigation about use of drones; for fire code enforcement, when possible, first get a search or administrative warrant.

Note: The dissenting opinion by Justice Karen M. Fort Hood.

> "With all of the above in mind, again, there is no evidence that the drone in this case was flown in violation of the law or applicable regulations, nor that it contained equipment or was itself technology not readily available or generally used by the public. The fundamental principle from both *Ciraolo* and *Riley* is that the property observed in those cases was observable by commercial and public aircraft in the publicly navigable airspace, see *Ciraolo*, 476 US at 215; *Riley*, 488 US at 450, and the fundamental difference between those two cases and *Kyllo* was that the technology in *Kyllo* was not something that could be reasonably expected to be employed by members of the public, *Kyllo*, 533 US at 34, 40. On that basis, I would conclude that no Fourth-Amendment violation occurred in this case, and I would affirm the trial court's order denying defendants' motion to suppress."

File: Chap. 4, Incident Command / Training

WA: FF 18 YEARS MARINE SAFETY - "EXPERT WITNESS" UNDER *DAUBERT* STANDARD - BOAT FIRE, OWNER LIABLE

On March 18, 2021, in Michael Schladetzky v, John Doe, et al., U.S. District Court Judge James L. Robart held that firefighter Kurt Serwood, with 18 years as Chief of the Kitsap County FD Marine Division, is an "expert" under the U.S. Supreme Court's "Daubert standard" and Fed. Rules of Evidence: *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 589-91 (1993); Fed. R. Evid. 702. The Court relied on his expert opinion that the boat fire was caused by the owner's negligence in not repairing the diesel furnace on the boat which blew out thick black smoke and smelled of raw diesel fuel. Given this negligence, the Court held (1) the boat owner, Michael Schladetsky cannot under federal maritime law limit his liability to only the value of his vessel and cargo; and (2) two claimants who lost property in the boat house are entitled to summary judgment – Douglas McKenzie, owner of a neighboring boat ($23,360, personal property destroyed in boat house); and Jeffrey Bigsby ($12,537.75, personal property also stored in the same boat house).

> "[T]he court finds that Mr. Serwold is qualified as an expert in marine fires and their causes. Under Rule 702, an expert may be qualified by extensive or specialized experience. Fed. R. Evid. 702; *Kumho*, 526 U.S. at 156. Mr. Serwold is a fire fighter with over 20 years' experience, 18 of which he served as chief of the Kitsap County Fire Department's marine division. (Serwold Decl. at 1). During his time in the marine detachment, Mr. Serwold has received specialized training in the causes of marine fires and how to prevent them. (*Id.* at 1-2). Because of his considerable experience and specialized training, the court finds that Mr. Serwold is qualified to offer expert testimony on marine fires and their causes."

Facts:

> "During 2017 and 2018, Mr. Schladetzky and Mr. McKenzie kept their respective boats in berths next to each other at the Port of Everett Marina…. While his boat was docked next to Mr. Schladetzky, Mr. McKenzie spent time on and around Mr. Schladetzky's boat. (*Id.*) Mr. McKenzie noticed that the Dickinson diesel furnace on Mr. Schladetzky's boat blew out thick black smoke and smelled of raw diesel fuel. (*Id.* at 2-3.) Based on his experience, Mr. McKenzie recognized that Mr. Schladetzky's diesel furnace needed repairs and maintenance for safe and proper operation. (*Id.* at 3.) He also recognized that Mr. Schladetzky's furnace created a safety and fire hazard due to the pooling of fuel and the heat of the furnace. (*Id.*) Mr. McKenzie discussed the need for maintenance and repairs with Mr. Schladetzky on several occasions. (*Id.*) Mr. Schladetzky acknowledged the need for maintenance and repairs, but Mr. McKenzie did not observe that Mr. Schladetzky make any such repairs. (*See id.*)
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> ***
>
> On October 8, 2018, Mr. Schladetzky's boat burned at its slip, resulting in a total loss of the vessel and damage to the boathouse, including to Mr. McKenzie's slip and other adjoining slips."
>
> ***

The court finds that Mr. Serwold's expert opinion is admissible. For expert testimony to be admissible under Federal Rule of Evidence 702, it must satisfy three basic requirements: (1) the expert witness must be qualified; (2) the testimony must be reliable; and (3) the testimony must be relevant. *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 589-91 (1993); Fed. R. Evid. 702.

Daubert requires that the court make 'a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid,' and 'whether that reasoning or methodology properly can be applied to the facts in issue.' *Id*. at 592-93. Reliability 'requires that the expert's testimony have 'a reliable basis in the knowledge and experience of the relevant discipline.' *United States v. Ruvalcaba-Garcia*, 923 F.3d 1183, 1188-89 (9th Cir. 2019) (quoting *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 149 (1999)). For evidence or testimony to be relevant, it must assist the trier of fact in determining a fact in issue or understanding the evidence. *Daubert*, 509 U.S. at 591. Whether to admit expert testimony is within the court's discretion. *Kumho*, 526 U.S. at 152.

***

Mr. Serwold's testimony is undisputed, and the court accepts it as true for purposes of this motion. Mr. Serwold notes that heaters and furnaces on boats are the most common causes of fires on vessels. (*Id*.) Further, based on the smell of raw fuel and the billowing black smoke coming from Mr. Schladetzky's furnace, Mr. Serwold opines that the negligently maintained furnace more likely than not caused this particular fire. (*Id*.) Based on this undisputed opinion, the court finds that Claimants have established proximate causation."

Legal Lesson Learned: The U.S. Supreme Court's *Daubert* standard and the Federal Rules of Evidence allow federal judges to rely the opinion of "experts" who are qualified based on their knowledge, experience and training.

Note: See Rule 702. Federal Rules of Evidence:

Testimony by Expert Witnesses

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

(a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;

(b) the testimony is based on sufficient facts or data;

(c) the testimony is the product of reliable principles and methods; and

(d) the expert has reliably applied the principles and methods to the facts of the case.

Notes

(Pub. L. 93–595, §1, Jan. 2, 1975, 88 Stat. 1937; Apr. 17, 2000, eff. Dec. 1, 2000; Apr. 26, 2011, eff. Dec. 1, 2011.)

Chap. 6, Employment Litigation

IL: FF RETIRED AT MANADATORY AGE OF 65 – PENSION - CANNOT THEN ALSO RECEIVE UNEMPLOYMENT COMP

On March 16, 2021, in Prospect Heights Fire Protection District v. The Department of Employment Security (Robert J. Pyzyna), et al., the Appellate Court of Illinois, First Judicial District (Second Division) held (3 to 0), 2021 IL App (1st) 182525, that career firefighter Robert Pyzyna, who retired in Nov. 2017 when he reached mandatory retirement age 65, and began drawing a pension, should have not receive unemployment benefits since he was never "laid off." This is an important decision for Illinois fire service since it resolves an issue of "first impression." Note: His is current weekly income is $1,467.27; the unemployment benefit would have been $449. While an Illinois statute would normally prevent applicants to receive unemployment comp if they are already making is excess of that amount, the Court decision was issued so other FF will not pursue such claims.

> "Here, the issue raised in this appeal is one of first impression, and we find that resolving the issue would aid IDES officials in performing their duties and in properly applying the law. As such, we find that the second prong of the public interest exception is also satisfied. Finally, with respect to the third factor, given the large number of firefighters employed in this state, we believe that absent a ruling on this issue, questions about the interplay between the Fire Protection Act's mandatory retirement provision and the Unemployment Act are likely to reoccur.
>
> ***
>
> We conclude that an Illinois firefighter who leaves his or her place of employment upon reaching the mandatory retirement age of 65 does so voluntarily absent good cause attributable to the employer and is not eligible to seek unemployment benefits pursuant to the Unemployment Act. Accordingly, we affirm the circuit court judgment reversing the contrary conclusion reached by the Board in this case."

Facts:

> "Career firefighter Robert Pyzyna was employed by plaintiff, Prospect Heights Fire Protection District (District), from June 2005 until his retirement in October 2017. Pyzy"na's final day of work was October 28, 2017, and his official date of retirement was October 31, 2017. Pyzyna's retirement was predicated on his reaching the age of 65, the mandatory retirement age for active firefighters, according to the Fire Protection District Act (Fire Protection Act). See 70 ILCS 705/16.13b (West 2016) ('The age for mandatory retirement of firemen in the service of any department *** is 65 years ***.'. Pyzyna retired with a defined benefit pension plan under the Illinois Pension Code. See 40 ILCS 5/4-101 *et seq*. (West 2016) (setting forth the Illinois Firefighters' Pension Fund). He began receiving pension benefits in accordance with that plan in November 2017. That same month, Pyzyna also filed a claim for unemployment benefits in accordance with the Unemployment Insurance Act (Unemployment Act) (820 ILCS 405/100 *et seq*. (West 2016)). In his claim for unemployment benefits, Pyzyna indicated that he sought those benefits because he had been 'laid off' from his place of employment. Pyzyna was subsequently sent a questionnaire to assess his eligibility for unemployment benefits. In

the questionnaire, Pyzyna acknowledged that he was receiving monthly pension benefits in accordance with the provisions of his defined benefit plan.

***

Following the District's protest, IDES [Illinois Department of Employment Security] scheduled an interview with Pyzyna to resolve his eligibility for unemployment benefits. Following that interview, IDES issued a written decision in which it found that Pyzyna was eligible for unemployment benefits because there was no evidence that he was discharged due to any misconduct; rather, IDES found that '[t]he evidence shows claimant was separated from [the District] due to lack of work. The claimant met the maximum age requirement to work. The reason for separation cannot be made the basis for disqualification and the claimant in not ineligible for benefits *** in regard to this issue.'

***

Following the ALJ's decision, the District appealed to the Board. After conducting its own review of the hearing testimony and documentary evidence, the Board affirmed the ALJ's decision.

***

After the Board issued its decision, the District filed a complaint for administrative review in the circuit court (735 ILCS 5/3-101 *et seq*. (West 2016)), challenging the Board's finding that Pyzyna was eligible for unemployment benefits…. After considering the arguments advanced by the parties, the circuit court ultimately entered a written order reversing the decision of the Board.

***

Following our review of the case law and the rationales expounded therein, we believe that the better approach is the one adopted by courts finding that employees who leave their places of employ due to a mandatory retirement policy or provision do so voluntarily absent good cause attributable to their employers.

***

We conclude that an Illinois firefighter who leaves his or her place of employment upon reaching the mandatory retirement age of 65 does so voluntarily absent good cause attributable to the employer and is not eligible to seek unemployment benefits pursuant to the Unemployment Act. Accordingly, we affirm the circuit court judgment reversing the contrary conclusion reached by the Board in this case."

Legal Lesson Learned: Excellent court decision that hopefully will prevent other Illinois firefighters from pursuing unemployment claims after their retirement at age 65.

Note – Mandatory Retirement:

"After Congress in 1996 permitted age caps for police and fire personnel, Chicago restored its mandatory retirement age of 63 for firefighters. Having lost on their ADEA claim, they asserted that their forced retirements violated due process. The appellate

panel held that an involuntary retirement is not a discharge and the bargaining agreement did not give firefighters a protected property interest in continued employment regardless of their age. Minch v. City of Chicago, #05-2702, 2007 U.S. App. Lexis 11260, 181 LRRM (BNA) 3089 (7th Cir.)."

***

U.S. Department of Interior firefighters, Mandatory Retirement: "The mandatory retirement age, with 20 years covered service is: Firefighters and Law Enforcement Officers - age 57, or any time after age 57, upon reaching 20 years covered service."

***

March 6, 2012, Mandatory Retirement: "Many states made changes to retirement benefits for uniformed personnel in the wake of the recession. Table 2 shows changes made in 12 states from 2010 to 2011. Some moved to 25 and out plans; new uniformed hires in various classes of employment in Arizona, Connecticut, Hawaii, Maryland, New Jersey, and Rhode Island were placed in 25 and out plans. In 2010 new hazardous duty personnel in Louisiana began in a 25 and out plan, as well. Six other states set higher retirement ages and/or service requirements for some uniformed personnel. Florida, for example, adopted a 60/30 plan for its new special risk class employees and Massachusetts increased retirement ages for three out of four types of law enforcement employees to 50 and 55. In Illinois new uniformed employees of Downstate and Chicago will be required to reach the age of 55 and have at least 10 years service to claim a pension."

***

March 2, 2002, Mandatory Retirement: Federal firefighters have a mandatory retirement age of 57. In California the age is 60 and in Chicago, it's 63. Connecticut state law puts the issue under local control.

***

Aug. 3, 2001, Mandatory Retirement: "Federal firefighters will be able to stay on the job until they are 57, under a law President Bush signed on Monday. Under a previous law, the mandatory retirement age for firefighters was 55. Firefighters must serve for 20 years to receive full retirement benefits."

File: Chap. 6, Employment Litigation

PA: INDEMNIFICATION DENIED – OFF DUTY PD CHASED & PUNCHED 16-YR-OLD SMASHED PUMPKINS AT PD HOME

On March 10, 2021, in Shane McGuire, on behalf of Colby Neidig v. City of Pittsburg, the Commonwealth Court of Pennsylvania, held (3 to 0) that an off-duty police officer (Neidig) was not entitled to indemnification by the City since he was not acting "within the score of his office or duties when he chased a 16-year-old juvenile (McGuire) who had smashed pumpkins on the officer's front porch, punched the juvenile in the face, and held him until police arrived. The

lawsuit proceeded in Federal court for violation of juvenile's federal constitutional rights under 42 U.S.C. 1983 and the jury "specifically concluded that Neidig acted under color of state law." The juvenile then sued City of Pittsburg (with officer's permission) in state court to pay the judgment, but after a 4-day jury trial, the jury found City had no obligation to indemnify the officer, "concluding that Neidig had not acted within the scope of his duties when he struck McGuire."

"This Court emphasizes that under Section 8548(a) of the [PA] Tort Claims Act, a municipality need only indemnify an employee if that employee was acting within the scope of his office or duties at the time the employee caused the injury. Because the jury properly determined that Neidig acted beyond the scope of his employment, and the jury did not reach the willful misconduct issue, this Court need not address McGuire's willful misconduct arguments…. For all of the above reasons, the trial court's order is affirmed."

Facts:
"On November 2, 2012, 16-year-old McGuire and a group of teenagers vandalized residences in McGuire's neighborhood. McGuire and his friends went to Neidig's home, smashed pumpkins and stacked bricks in an area close to the front door. Neidig, his wife and child arrived home while McGuire and his friends were still at the property. While the Neidigs took groceries into their house, McGuire and his friends observed the Neidigs' reaction to the vandalism. Thereafter, McGuire banged on the Neidigs' front door and then attempted to flee, but stumbled and fell over the stacked bricks. Upon hearing the banging, Neidig's wife screamed and Neidig observed McGuire trying to flee. Neidig gave chase and ultimately caught McGuire approximately one-half mile away, at which time Neidig knocked McGuire down and punched him in the face. At that time, Neidig was not wearing his police uniform and he did not identify himself to McGuire as a police officer. Neidig called 911 and restrained McGuire until City police officer David Blatt (Officer Blatt) arrived.

***
On November 7, 2014, McGuire filed an action in federal district court (Federal Court Action) against Neidig in his individual capacity as a police officer, Officer Blatt, and the City, asserting counts of, inter alia, use of excessive force in violation of Section 1983 of the United States Code, 42 U.S.C. § 1983 (Section 1983), and state law assault and battery claims. On November 3, 2016, the federal district court granted summary judgment in Officer Blatt's and the City's favor and dismissed them from the case. On March 2, 2017, after a jury trial, judgment was entered in McGuire's favor and against Neidig, finding a violation of McGuire's constitutional rights under Section 1983 and awarding McGuire damages for assault and battery. The jury specifically concluded that Neidig acted under color of state law when he injured McGuire.

***
The jury specifically concluded that Neidig acted under color of state law when he injured McGuire. The jury awarded $75,000.00 in damages for economic loss, physical and/or emotional pain, suffering, inconvenience, mental anguish or loss of enjoyment of life. The jury also awarded $50,093.21 in compensatory damages. The awards were molded into one award of $75,000.00 on the civil rights violation. The federal district court awarded McGuire attorney's fees in the amount of $160,575.00, and molded the total award to $235,575.00.

***
On June 12, 2017, Neidig assigned to McGuire 'his entire right to bring legal action against the [City]for indemnity under the Political Subdivision Tort Claims Act, [42 Pa.C.S. §§8541-8542(Tort Claims Act),]or under any other theory, for the [City's]failure to indemnify[Neidig]from the judgment entered against him in [the Federal Court Action.]'

***
On July 7, 2017, McGuire filed the instant action for declaratory judgment in the trial court, alleging that the City failed to comply with its statutory obligations under the Tort Claims Act to indemnify Neidig following the federal district court's award. On November 21, 2017, McGuire filed a summary judgment motion, arguing that the federal jury specifically and affirmatively answered that Neidig was acting under color of state law at the time he assaulted McGuire, and, thus, the City was obligated to pay the federal jury award.

***
On March 8, 2018, the trial court denied McGuire's motion. The trial court held a jury trial from August 12, 2019 to August 15, 2019, at the conclusion of which the jury found in the City's favor and against McGuire, concluding that Neidig had not acted within the scope of his duties when he struck McGuire. The jury did not reach a decision on the City's alternative argument that, had Neidig been acting in the scope of his employment, his conduct would have amounted to willful misconduct, and the City would have no duty to indemnify him.

***
Because the jury properly determined that Neidig acted beyond the scope of his employment, and the jury did not reach the willful misconduct issue, this Court need not address McGuire's willful misconduct arguments."

Legal Lesson Learned: Indemnification is important for emergency responders, including Fire & EMS. This decision was reportedly a matter of "first-impression" in PA; in Ohio, the Ohio Supreme Court held that individuals who successfully sue police officers may not then sue the officer's city to collect the judgment, only the officers may sue. Ayers v. Cleveland, 160 Ohio St.3d 288, 2020-Ohio-1047 (March 25, 2020).

> Note:
> On Dec. 16, 2020, the City of Cincinnati confirmed it will indemnify Dispatchers and Police sued in death of high school students who called 911 when back seat of minivan trapped him. "Kyle Plush wrongful death lawsuit can proceed against 5 Cincinnati employees, appeals court says."
>
> "The city indemnifies employees in their official capacities, meaning the city would be liable for any judgment or settlement involving the employees in their official capacities."
>
> See Ohio Supreme Court decision in Ayers v. Cleveland, 160 Ohio St.3d 288, 2020-Ohio-1047 (March 25, 2020), holding that only employees can sue for indemnification;

they cannot assign that right to the person who won a judgment against the employee [in this case, David Ayers, who after a decade in prison was released on a federal habeas corpus claim in 2011].

> "After a trial that involved only claims against [Detectives] Cipo and Kovach, the jury returned a verdict in Ayers's favor finding that Cipo and Kovach had violated Ayers's federal constitutional rights. The district court entered a judgment against the detectives in the amount of $13,210,000 and later increased the amount by awarding costs and attorney fees. The detectives twice offered to assign to Ayers any indemnification claims that they might have against the city in exchange for an agreement by Ayers to forgo collection efforts against the detectives personally. Ayers rejected each offer. *** [Ayers filed lawsuit in Ohio. The common pleas court granted Ayers's motion for summary judgment after concluding that R.C. 2744.07(A)(2) requires Cleveland to indemnify the officers and pay the judgment. *** The Eighth District Court of Appeals reversed in a two-to-one decision. 2017-Ohio-8571, 99 N.E.3d 1269, ¶ 50. The majority concluded that Ayers, as a judgment creditor, does not have standing to bring a private cause of action against the city to enforce the city's obligations to its employees. *** [Ohio Supreme Court held] Based on the unambiguous language of the statute, which serves only to indemnify an employee and does not vest any rights in third parties connected to the employee, we conclude that R.C. 2744.07(A)(2) does not permit a judgment creditor to proceed directly against an indemnitor."

See also Ohio Revised Code 2744.07(A)(2) - Defending and indemnifying employees:

(A)
(1) Except as otherwise provided in division (A)(2) of this section, a political subdivision shall provide for the defense of an employee, in any state or federal court, in any civil action or proceeding which contains an allegation for damages for injury, death, or loss to person or property caused by an act or omission of the employee in connection with a governmental or proprietary function. Amounts expended by a political subdivision in the defense of its employees shall be from funds appropriated for this purpose or from proceeds of insurance.
(2) A political subdivision does not have the duty to provide for the defense of an employee under division (A)(1) of this section if any of the following apply:
(a) The act or omission occurred while the employee was not acting in good faith.
(b) The act or omission occurred while the employee was acting manifestly outside the scope of the employee's employment or official responsibilities.

See also: Ohio Revised Code 9.87 - Indemnification of public officers and employees.

> "(B) The state shall not indemnify an officer or employee under any of the following circumstances:
> (2) When the officer or employee acts manifestly outside the scope of the officer's or employee's employment or official responsibilities, with malicious purpose, in

bad faith, or in a wanton or reckless manner, as determined by the employer of the officer or employee or by the attorney general."

File: Chap. 7, Sexual Harassment

NJ: FEMALE FF ALLEGED ACADEMY INSTRUCTOR "RAPED AND TORTURED" HER – ACADEMY DISMISSED FROM CASE

On March 26, 2021, in A.S. v. Ocean County Fire Academy, et al., U.S. District Court Judge Michael A. Shipp, U.S. District Court of New Jersey (decision Not For Publication) granted the Fire Academy's motion to dismiss, and declined to keep jurisdiction over state law claims (lawsuit against Instructor can proceed in state court). Plaintiff completed her required hours at the Training Center in April 2018 and became an active firefighter with the Seaside Heights Fire Department. According to the Plaintiff, she and the Instructor [John Syers] had a "brief romantic encounter" in April, "had on again/off again conversations" until September 26, 2018, when she alleges that she was "rape[d], torture[d,] and sexually abuse[d]."

> "As the Ocean County Defendants correctly observe, however, the Complaint fails to allege any facts that would support Plaintiff's assertions that a custom or policy deprived her of a constitutional right. (Defs.' Moving Br. 11.) Aside from one conclusory allegation that Fire Academy and Training Center employees 'refus[ed] to respond to Plaintiff's sexual assault on academy premises[,]' (Compl. 32, ¶ 47), Plaintiff fails to provide any facts demonstrating that the Ocean County Defendants were aware of the rape, (*see generally id*.; *see also* Defs.' Moving Br. 11 ('The [C]omplaint does not assert that Plaintiff filed any type of grievance or report of alleged harassment, discrimination[,] or 'hostile work environment' during her tenure . . . . Moreover, the voluminous [C]omplaint is devoid of any allegations stating that Plaintiff provided notification . . . with regard to any issues concerning . . . employees or volunteer instructors[.]")). Without such factual allegations, the Court cannot find that Plaintiff has a plausible claim for relief stemming from the Ocean County Defendants' alleged failure to investigate and respond to Sayer's conduct or train its employees to respond to sexual discrimination, harassment, or violence.
>
> ***
>
> The Court, therefore, will decline to exercise supplemental jurisdiction over the state law claims of the Complaint."

Facts:

> "In August 2017, Plaintiff entered the Training Center to become a member of the Seaside Heights Fire Department…. John Sayers was Plaintiff's instructor at the Training Center for 'the portion of class for learning how to utilize ropes and knots in firefighting….' Sayers made a comment to Plaintiff 'with sexual implications that you are to use 'restrictor' knots on people for reasons other than firefighting….' Plaintiff interpreted this comment as a sexual reference and subsequently 'confided in another

student that Sayers had made inappropriate sexual comments that made Plaintiff feel uncomfortable….'Plaintiff ultimately completed her requisite hours at the Training Center in April 2018 and became an active firefighter with the Seaside Heights Fire Department…..

In April 2018, Plaintiff and Sayers had a brief romantic encounter, and through September 2018 'had on again/off again conversations…. On September 26, 2018, S…. 'rape[d], torture[d,] and sexually abuse[d] Plaintiff….' Sayers was an instructor at the Fire Academy and Training Center during this time….

> Footnote 4: In opposition. Plaintiff asserts that after she reported her rape and torture, she was told by a government attorney 'not to return to the' Training Center and was 'reprimanded by employees and instructors alike[.]' (Pl.'s Opp'n Br. 25-26, ECF No. 50.) Moreover, Plaintiff maintains she was enrolled 'at the [T]raining [C]enter as an apprentice/trainee and thus was not notified of the EEOC Rights and Requirements as a traditional employee would be.' (*Id*. at 26.) Finally, Plaintiff argues that 'given the reprehensible way [she] was treated after reporting her rape and torture by Defendant Sayers, it is evident that she would have been dissuaded from filing any complaint against Ocean County as an employee.'(*Id*.) Even assuming such facts permit Counts Two and Four to proceed beyond the motion to dismiss stage, Plaintiff may not amend her Complaint through her opposition briefing. *See Pa. ex rel. Zimmerman v. PepsiCo, Inc*., 836 F.2d 173, 181 (3d Cir. 1988).

***

A. Counts Two and Four: Title VII

> The Ocean County Defendants argue that Counts Two and Four should be dismissed because Plaintiff fails to plead any facts demonstrating that she exhausted the administrative remedies required before filing a Title VII claim. (Defs.' Moving Br. 7-8, ECF No. 49-1.) The Court agrees…. In fact, [p]laintiff concedes in his opposition that he was not able to file a complaint with the EEOC during the limitation period.").

***

B. Counts Five and Six: Section 1983

> 'To prevail on a [Section] 1983 claim, [the plaintiff must] show, first, that she was deprived of a constitutional right and, second, that the alleged deprivation was committed by a person acting under color of state law.' *Harvey v. Plains Twp. Police Dep't*, 635 F.3d 606, 609 (3d Cir. 2011) (internal quotation marks and citation omitted). '[A] local government[, however,] may not be sued under [Section] 1983 for an injury inflicted solely by its employees or agents, instead, it is when execution of a government's policy or custom . . . inflicts the injury that the government as an entity is responsible under [Section] 1983.' *Monell v. Dep't of Soc. Servs. of N.Y.C*., 436 U.S. 658, 694 (1978).

***

> As the Ocean County Defendants correctly observe, however, the Complaint fails to allege any facts that would support Plaintiff's assertions that a custom or policy deprived her of a constitutional right. (Defs.' Moving Br. 11.) Aside from one conclusory allegation that Fire Academy and Training Center employees "refus[ed] to respond to Plaintiff's sexual assault on academy premises[,]" (Compl. 32, ¶ 47), Plaintiff fails to provide any facts demonstrating that the Ocean County Defendants were aware of the rape, (*see generally id*.; *see also* Defs.' Moving Br. 11 ("The [C]omplaint does not assert that Plaintiff filed any type of grievance or report of alleged harassment, discrimination[,] or 'hostile work environment' during her tenure . . . . Moreover, the voluminous [C]omplaint is devoid of any allegations stating that Plaintiff provided notification . . . with regard to any issues concerning . . . employees or volunteer instructors[.]")). Without such factual allegations, the Court cannot find that Plaintiff has a plausible claim for relief stemming from the Ocean County Defendants' alleged failure to investigate and respond to S…. 's conduct or train its employees to respond to sexual discrimination, harassment, or violence."

Legal Lesson Learned: Plaintiff failed to provide any proof she informed the Training Academy of being raped. It is a "best practice" for Training Academies and Fire & EMS Departments to provide all recruits with written procedure on how to file a complaint.

File: Chap. 7, Sexual Harassment

AR: FEMALE FF ALLEGEDLY RAPED TWICE BY BATTALION CHIEF - MALE HIT ANTENNA – CASE PROCEED FD & CHIEF

On March 17, 2021, in Rene Mendoza & Lani Salazar, et al. v. Rio Rico Medical & Fire District, et al., U.S. District Court Judge Cindy K. Jorgenson, U.S. District Court for the District of Arizona, issued a pre-trial order; lawsuit against FD and the Battalion Chief will proceed to trial. The trial judge issued her order with this understatement. "In 2016 and 2017, there was a fair amount of questionable activity unrelated to firefighting happening at the Rio Rico Medical & Fire District ('District')."

> "Beginning in July 2016, Flores began sexually harassing [Mrs. Lani] Salazar, whose promotion he had recently recommended. What started out as unwelcomed sexual advances soon escalated to alleged incidents of rape, the last of which occurred around the 2017 holiday season. A month earlier, Ibarra had struck rookie firefighter [Mr. Rene] Mendoza in the testicles with a radio antenna, laughed, and ran away. Mendoza was also inundated with countless sexually suggestive images sent to him by a fellow firefighter, who frequently referred to Mendoza using sexually offensive slang terms. Two other firefighters exposed themselves to Mendoza, and when he complained of the harassing behavior to a superior, he was half-heartedly instructed to 'write an email about it.'
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> ***

Mendoza's Title VII hostile work environment claim against the District, Salazar's Title VII hostile work environment claim against the District, Salazar's Title VII retaliation claim against the District, Mendoza's common law battery claim against Ibarra and the District, Salazar's common law battery claim against Flores and the District, Mendoza's common law assault claim against Ibarra and the District, Salazar's common law assault claim against Flores and the District, Salazar's IIED claim against Flores and the District, and Mr. Salazar's loss of consortium claim against Flores and the District will proceed to trial."

Facts:

"In 2016 and 2017, there was a fair amount of questionable activity unrelated to firefighting happening at the Rio Rico Medical & Fire District ('District'). That activity involved two of the Plaintiffs in this case, Rene Mendoza ('Mendoza') and Lani Salazar ('Salazar'), and two of the Defendants, Albert Ibarra ('Ibarra') and Al Flores ('Flores'). At the time, Mendoza was a newly hired full-time firefighter and emergency medical technician and Salazar was a recently promoted Fire Captain. Flores was the Battalion Chief, and Salazar's immediate supervisor, and Ibarra was a Fire Captain, and Mendoza's immediate supervisor.

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In November 2017, Mendoza was released from the District for failing to successfully complete his probationary period. In January 2018, Salazar came forward with complaints that Flores had raped her while she was on duty. The District Board placed Flores and Salazar on administrative leave and hired an outside investigator to investigate Salazar's allegations. In April 2018, facing termination, Flores submitted his letter of resignation. One month later, Salazar was fired. In September 2018, Plaintiffs brought the suit at hand.

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The Salazars assert that Flores sexually harassed and raped Mrs. Salazar in 2016 and 2017, while working on District premises. Mr. Salazar offered the following testimony concerning the impact the sexual assaults had on his marriage:

> She goes in the closet, hides in there and closes the door and cries. . . . It's been not just the closet . . . . She'll start breaking out into crying out of the clear blue. She's scared to be out in public by herself . . . she's scared to be around men in public, if she sees a guy somewhere, she's scared to be there. Me or the kids have to go with her . . . . So yes, it has affected us, still affecting us to this day. . . . Every now and then . . . we get into arguments. It's affected us since the beginning. . . . [Our marital relationship is] not exactly the same . . . . because of the fact when she goes out in public, I have got to go with her everywhere. . . . she's in a panic to go to the store. She's in a panic to go places. Where before she was never in a panic. She is an independent type of woman. . . . She'll wake up in the middle of the night with a nightmare going. She'll go close herself in the closet. . . It affects me to see my wife in the closet crying again. And then I got to tell my children why she's in there, or make up an excuse because I don't want to tell them - make up an excuse why mommy's in the closet . . . . So, yes, it affects our relationship on a day-to-day basis.

> There is sufficient evidence in the record, construed in the light most favorable to Plaintiffs, to satisfy the elements of a loss of consortium claim. Additionally, it is a factual matter left to the determination of a jury whether the Salazars' marriage has been sufficiently harmed to warrant damages on Mr. Salazar's loss of consortium claim.
>
> Accordingly, Defendants' motion for partial summary judgment on this claim is denied, and Plaintiffs' loss of consortium claim will proceed to trial."

Legal Lessons Learned: Judge's comment about FD's "questionable activity" is an understatement; terrible alleged facts will now go before a jury; FDs must promptly investigate claims of workplace harassment.

File: Chap. 13, EMS

OH: BATTALION CHIEF FAILED TO REPORT THAT EMT-B STARTED "IO" ON PATIENT – 60-DAY SUSPENSION UPHELD

On March 26, 2021, in Mark W. Stahl v. Allen-Clay Joint Fire District, the Court of Appeals of Ohio, Sixth Appellate District (Ottawa County), held (3 to 0), 2021 Ohio 986, that the Fire District Board had sufficient evidence to impose the discipline on the Battalion Chief, for not reporting to the FD and the Ohio Division of Emergency Medical Services that an EMT-B had exceeded his scope of practice by inserting an intraosseous infusion ("IO") into tibia bone of a cardiac patient. Note: The EMS run report was completed by a Medic on the run; she incorrectly listed herself as inserting the IO.

> "The board had before it evidence that Stahl was obligated to supervise firefighters and EMTs at an emergency scene and that he was required to report improper conduct to his superior and to the State Board of Emergency Medical Services and the Northwest Ohio EMS Consortium. Although contested, there was reliable, probative, and substantial evidence that Stahl knew or should have known that improper conduct took place at the scene of an emergency, and he failed to report that conduct. We affirm the June 1, 2020 judgment of the Ottawa County Court of Common Pleas. Stahl is ordered to pay the costs of this appeal under App.R. 24."

Facts:

> "On August 9, 2018, the Allen-Clay Joint Fire District was dispatched to a home in Williston, Ohio, where an elderly man was reportedly unresponsive and not breathing. Appellant, Battalion Chief Mark W. Stahl, responded to the call along with one paramedic and six emergency medical technicians ('EMTs'). They arrived to find the patient slouched in his recliner. His pulse was weak and he did not respond to sternal rubbing. The responders soon observed agonal breathing, then the patient stopped breathing entirely. He was in cardiac arrest.

The patient was moved to the floor and the team began resuscitative efforts. Paramedic C.O. situated herself at the head of the patient so that she could intubate him. Stahl situated himself at the patient's left arm to start an IV. Other technicians performed chest compressions and bag-valve mask ventilation.

C.O. was experiencing difficulty intubating the patient and Stahl was having problems placing the IV. Because the IV had not been placed, it was quickly recognized that an intraosseous infusion ('IO') would be needed to administer medications to the patient. IO is an invasive procedure that involves drilling through the patient's tibia bone in order to inject fluids and medication into the patient's bone marrow. Of the eight emergency responders who were present, only two of them carried the necessary certification required to perform the procedure—C.O. and Stahl, who was an EMT-intermediate. Notwithstanding this fact, the procedure was performed, successfully, by EMT-basic, J.F. Medications were administered through the IO, and the patient was placed on a board and transported to the hospital via ambulance. The patient did not survive, but there is no suggestion that his death was attributable to the care rendered by the first responders.

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As is required after emergency medical services are rendered, C.O. prepared a patient care report. The report identifies the treatment provided and the provider who administered the treatment. C.O. listed herself as the provider who performed the IO.

***

It eventually came to the attention of District Captain Matt Toflinski—who was responsible for quality assurance—that J.F. had performed the IO. Captain Toflinski reported this to his superior, District Fire Chief Michael Musolf, and an investigation ensued. David Comstock, Jr., an attorney and fire chief of the Western Reserve Joint Fire District in Mahoning County, was appointed to investigate the matter and provide findings and recommendations.

***

Comstock reviewed written statements and conducted oral examinations of the personnel present for the August 9, 2018 run. J.F. reported that Stahl ordered him to perform the IO, so he did. He said that he believed that because he was following the order of a superior who himself possessed the certification required to perform the procedure, this excused his conduct in acting outside the scope of his certification. J.F. also said that after the run, he thanked Stahl for allowing him to perform the procedure; Stahl said nothing in response.

Two other EMTs reported hearing Stahl order J.F. to perform the IO. The paramedic and the remaining EMTs reported either that they did not know who gave the order or that they heard Stahl say "drill him," but did not hear him direct this order to J.F. Stahl denied ordering J.F. to perform the IO and denied even knowing that J.F. had performed the IO; he claimed that he was focused too intently on establishing IV access to notice and did not review the patient care report.

After concluding his investigation, Comstock submitted a written report finding J.F., C.O., and Stahl guilty of misfeasance and misconduct by nonfeasance. With respect to Stahl, he stated:

> Mark Stahl committed misfeasance by ordering a non-certified person (anyone else other than C.O.) to perform the IO procedure, knowing that only non-certified persons were operating on the call. However, even if Chief Stahl was not aware that there were not any certified persons available to perform the procedure, Chief Stahl committed non-feasance by his failure to administratively address this issue following the termination of the incident. Chief Stahl failed to report this incident as required by Ohio Administrative Code §4765-9-01(G).

***

Following Comstock's findings, Stahl requested a hearing before the Board of Trustees of the Allen-Clay Joint Fire District ('the board'), which was conducted on August 29, 2019. After the hearing, the board issued a decision. With respect to the charge of misfeasance, the board found Stahl not guilty. It concluded that 'the evidence does not support a finding Battalion Chief Stahl ordered or knowingly permitted EMT-BASIC [J.F.] to perform and [sic] I/O medical procedure in violation of his EMT Certification Authority and District Protocol.'

The board found Stahl guilty of misconduct in office, however. It found:

> [E]vidence supports a finding that Battalion Chief Mark Stahl is guilty of misconduct in office by reason of nonfeasance, failing to administratively address the issue of EMT-BASIC [J.F.] performing an I/O medical procedure in violation of his EMT-BASIC Certification Authority and District Protocol when Battalion Chief, Mark Stahl knew or should have known of the occurrence of EMT-BASIC [J.F.] performing an I/O medical procedure in violation of his certification authority and district protocol and Battalion Chief Mark Stahl's failure to properly report the violation.
>
> The fact that Battalion Chief Mark Stahl may not have directly observed the I/O procedure being performed by EMT-BASIC [J.F.] with knowledge of [J.F.'s] Certification Authority and District Protocol as Battalion Chief Mark Stahl alleges, does not relieve him of his duty to report the violation as soon as the same became known to him, which he did not.

The board imposed sanctions and penalties including (1) a 60-day unpaid suspension; (2) one year of probation subject to Stahl's removal without cause; and (3) attendance at and successful completion of the Maxwell Leadership Educational Course. The board's decision provided for the eventual removal of the disciplinary action from Stahl's personnel file.

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Stahl appealed the board's decision to the Huron County Court of Common Pleas…. The trial court concluded—and the board conceded—that the removal-without-cause sanction was improper. It remanded the matter to the board to modify this term of Stahl's probation. But it affirmed the board's decision finding him guilty of misconduct by reason of nonfeasance.

***

Turning to the misconduct charge, the court found that it was undisputed that Stahl, as battalion chief, was the officer in charge of all the personnel on the scene, Stahl knew that only he and C.O. were certified to perform the IO, J.F. performed the IO despite not being certified, and Stahl did not administratively address the issue of J.F. performing the procedure or report the violation to his supervisors.

***

Stahl appealed. He assigns the following error for our review:

> The Common Pleas Court abused its discretion in affirming the decision of appellee's Board of Trustees which found appellant guilty of misconduct in office in failing to report that an EMT-Basic had performed a procedure for which he lacked certification where the Board found that appellant knew or should have known of the occurrence.

Here, there is no dispute that J.F. exceeded the scope of his certificate to practice as an EMT- basic, and his conduct was, therefore, improper. The testimony before the board demonstrates that as a battalion chief, Stahl was responsible for supervising the scene, regardless of whether it was a fire or an EMS scene. As the highest ranking officer on the scene, Stahl's superior expected him to report improper activity. Additionally, Ohio Adm.Code 4765-9-01(G) requires a certified EMT to report knowledge of a violation of R.C. Chapter 4765 or Ohio Adm. Code Chapters 4765-1 to 4765-10 or 4765-12 to 4765-19.

***

The board's decision did not turn on whether Stahl "personally witnessed" J.F. perform the procedure—it turned on whether he knew or should have known. Although disputed, there is evidence to support the board's finding that Stahl knew or should have known that J.F. performed the IO, either by process of elimination or because J.F. specifically mentioned it to him.

***

We affirm the June 1, 2020 judgment of the Ottawa County Court of Common Pleas."

Legal Lesson Learned: The Officer-In-Charge on an EMS run should ensure that an apparent violation of EMS certificate of practice has been promptly reported to the FD, and to the State EMS Board. The EMS Run Report should also be corrected to accurately report who started the IO.

Note: Ohio Administrative Code 4765-9-01, 4765-9-01, Professional standards of conduct for a holder of a certificate to practice.

> "(G) A person issued a certificate to practice shall report to the division as soon as practicable any knowledge of a violation of Chapter 4765. of the Revised Code or Chapters 4765-1 to 4765-10 or 4765-12 to 4765-19 of the Administrative Code."

File: Chap. 13, EMS

WA: DEAD BODY BROUGHT TO FD - INTUBATION 15 TIMES – BROTHER STANDING SUE FEDERAL COURT [AS DOES WIFE]

On March 18, 2021, in Robert Fox v. City of Bellingham, the Supreme Court of the State of Washington, held (6 to 3) in response to a question by U.S. District Court judge, that Washington Supreme Court advised the federal judge that under state law the brother of the deceased, who lives in California, does have standing to sue for tortious interference with a corpse. The City has already paid $75,000 to the two adult children of the deceased, and is being sued by the wife of the deceased. The Washington Supreme Court rejected the City's moved for summary judgment asserting that Robert Fox lacks standing because he is not the designated custodian of his brother's remains under RCW 68.50.160 (the deceased's wife has care of her husband's remains). [Note: Court didn't explain why different last names of two brothers.]

> "Mr. Fox lived with his brother during his adult life, and the two spoke to each other weekly. Mr. Fox took part in preparing his brother's end of life celebration. Based on these facts, Mr. Fox has put forth sufficient evidence that he is a 'close relative' of his brother and, therefore, has standing to bring suit."

Facts:

> "Mr. Fox is the brother of the decedent, Mr. Bradley Ginn Sr. Mr. Fox and his brother previously lived together and spoke to each other weekly. Mr. Ginn passed away in 2018. When the hospital in Bellingham did not have space to store his body, the fire department brought Mr. Ginn's body to the station.
> After relocating Mr. Ginn, the fire department, without obtaining permission from Mr. Ginn's family, used Mr. Ginn's body for a training exercise. Fire department employees took turns intubating Mr. Ginn's deceased body—approximately 15 times. Mr. Fox claims that he experienced severe emotional distress upon learning of these events. Thereafter, Mr. Fox participated in planning his brother's end of life celebration."
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> ***
>
> As a result of these events, Mr. Fox brings a claim of tortious interference with a corpse against the City in federal court. The City moved for summary judgment, asserting that Mr. Fox lacks standing because he is not the designated custodian of his brother's remains under RCW 68.50.160. Under this statute, Mr. Ginn's wife is charged with the care of Mr. Ginn's remains. [She brought a separate action in federal court].

***

Accordingly, we answer the federal court's certified questions as follows: (1) RCW 68.50.160 does not govern standing for tortious interference with a corpse and (2) Mr. Fox is in the class of foreseeable plaintiffs with standing to bring suit for tortious interference with a corpse."

Legal Lesson Learned: Do not use bodies for training without written permission of spouse or other immediate family members.

Note: This incident has been in the press.

"Wash. Fire Dept. Faces Fourth Lawsuit for Intubating Dead Patient," July 17, 2019:

"The city already has paid $75,000 each to two adult children of Bradley Ginn Sr., and is facing a $15 million claim filed by Ginn's widow, Jai Ginn, according to the city attorney's office. Now, his brother, Robert Fox, who lives in California, has filed a federal lawsuit against the city alleging 'tortuous interference with a corpse' after 11 Bellingham Fire Department employees, including an account manager and an office secretary, practiced inserting endotracheal tubes into the body 15 times after placing Ginn's corpse in a body bag on the floor of a firehouse."

"WA 'Intubation' Probe Targets Nine FFs," Oct. 4, 2018 – "Washington's Department of Health is investigating nine Bellingham firefighters after it was revealed that intubations were performed on a dead man.

File: Chap. 13, EMS

ND: AIR AMBULANCES – FED. STATUTE PROHIBITS STATE FROM REGULATING PRICES OR SELLING SUBSCRIPTIONS

On March 17, 2021, in Guardian Flight LLC v. Jon Godfread, in his capacity as North Dakota Insurance Commissioner, and Wayne Stenehjem, in his capacity as North Dakota Attorney General, et al., the U.S. Court of Appeals for the 8th Circuit (St. Louis, MO) held (3 to 0) in favor of Guardian Flight, holding that Nebraska's 2017 statute seeking to control the price of air ambulance transports, and lawsuits to collect those bills, violates Federal Airlines Deregulation Act. The federal statute preempts the State of Nebraska's attempt to control pricing, in response to about 40 complaints (2014 and early 2018), where privately insured patients often were billed more than $20,000 for air ambulance transport—and sometimes more than $40,000—which represented the balances remaining after the insurers paid their portions.

"The ADA [Airlines Deregulation Act] expressly preempts states from 'enact[ing] or enforce[ing] a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier.' 49 U.S.C. § 41713(b).

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We thus conclude that the ADA … preempts both the payment provision and the subscription provision. See id. at 769-70; Bailey v. Rocky Mountain Holdings, LLC, 889 F.3d 1259, 1272 (11th Cir. 2018) (holding that the ADA preempts the enforcement of a state statute prohibiting an air ambulance provider's balance billing); EagleMed LLC v. Cox, 868 F.3d 893, 902-04 (10th Cir. 2017) (holding that the ADA preempted a state statute that 'expressly establish[ed] a mandatory fixed maximum rate that [would] be paid by the State for air-ambulance services provided to injured workers covered by the Worker's Compensation Act').

Because North Dakota's subscription provision seeks to regulate the relationship between only a consumer and an air ambulance company, it cannot be said that it was enacted for the purpose of regulating the business of insurance. See Nat'l Sec., Inc., 393 U.S. at 460; Fabe, 508 U.S. at 505; Taylor, 907 F.2d at 779-80. The McCarran-Ferguson Act thus does not save the subscription agreement from ADA preemption."

Facts:

"Guardian Flight is a federally licensed air carrier that provides air ambulance services in North Dakota. Air ambulances transport critically ill or injured patients to hospitals that are able to provide the level of care that the patients require. First responders, attending physicians, and hospital emergency departments may call on air ambulances to transport patients and to provide in-flight medical care. Because air ambulances are used in emergencies, patients usually do not choose the provider.

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Several privately insured individuals complained to the North Dakota Insurance Department regarding unexpected bills from air ambulance providers. According to the forty-some complaints received between 2014 and early 2018, insureds often were billed more than $20,000 for air ambulance transport—and sometimes more than $40,000—which represented the balances remaining after the insurers paid their portions. The North Dakota Legislative Assembly attempted to address balance billing in 2015, but the district court enjoined enforcement of the legislation. See Valley Med Flight, Inc. v. Dwelle, 171 F. Supp. 3d 930 (D.N.D. 2016). As set forth more fully below, SB 2231 represents North Dakota's second attempt to address the practice.

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Before the 2017 enactment of SB 2231, Guardian Flight offered a subscription membership program in North Dakota as part of the AirMedCare Network, an affiliation of four air ambulance providers owned by the same parent company. The program cost subscribers less than $100 per year and guaranteed that if an AirMedCare Network ambulance provided transportation, the enrollee would have "no out-of-pocket flight expenses." Guardian Flight would instead deem prepaid any air ambulance costs beyond those covered by insurance, other benefits, or third parties. The subscription agreement did not guarantee that Guardian Flight or an affiliated provider would be dispatched to transport an ill or injured subscriber, however, and Guardian Flight would not pay for any services provided by an unaffiliated air ambulance.

> SB 2231's payment provision prohibits air ambulance providers from balance billing and deems payment by the insurer to be full and final payment. It provides: For purposes of settling a claim made by the insured for air ambulance services, a payment made by an insurer under the plan in compliance with this section is deemed to be the same as an in-network payment and is considered a full and final payment by the insured for out-of-network air ambulance services billed to the insured.
>
> N.D. Cent. Code § 26.1-47-09(3).

The subscription provision prohibits air ambulance subscription agreements and authorizes a civil fine of up to $10,000 for violations. It states, in relevant part:

> An air ambulance provider, or an agent of an air ambulance provider, may not sell, solicit, or negotiate a subscription agreement or contract relating to services or the billing of services provided by an air ambulance provider.
> N.D. Cent. Code § 26.1-47-08.

Guardian Flight filed suit in January 2018, seeking a permanent injunction prohibiting the defendants from enforcing the provisions…. The [U.S. District Court judge held that the] defendants were permanently enjoined from enforcing or seeking to enforce the payment provision, with the subscription provision being allowed to remain in effect.

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B. ADA Preemption

The ADA expressly preempts states from 'enact[ing] or enforc[ing] a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier.' 49 U.S.C. § 41713(b). The Supreme Court has defined the phrase "related to' to give effect to the statute's "broad pre-emptive purpose." Morales v. Trans World Airlines, Inc., 504 U.S. 374, 383 (1992). Accordingly, a state law is preempted by the ADA if it ha[s] a connection with or reference to' an air carrier's price, route, or service. Id. at 384.

***

Godfread and Stenehjem argue that the ADA does not preempt the payment and subscription provisions, contending that the provisions are "too tenuously related to airline rates to be preempted." Appellees' Br. 41. The payment provision effectively caps certain air ambulance prices, however, by mandating the acceptance by an out-of-network provider of the insurer's payment and prohibiting the provider from billing the insured for any remaining balance. The insurer must reimburse out-of-network providers at a rate 'equal to the average of the insurer's in-network rates for air ambulance providers,' N.D. Cent. Code § 26.1-47-09(1), with the air ambulance service provider being required to accept that rate.

Similarly, the subscription provision prohibits air ambulance providers from entering into price-establishing subscription agreements with consumers. These two provisions are clearly 'related to' and 'hav[e] a connection with' the price that air ambulance providers charge for their services. See Air Evac EMS, Inc. v. Cheatham, 910 F.3d 751, 767 (4th

Cir. 2018) (holding that state statutes establishing state-paid maximum amounts to air ambulance providers and limiting the providers' ability to seek recovery from anyone else 'clearly have a connection to air ambulance prices').

We thus conclude that the ADA preempts both the payment provision and the subscription provision. See id. at 769-70; Bailey v. Rocky Mountain Holdings, LLC, 889 F.3d 1259, 1272 (11th Cir. 2018) (holding that the ADA preempts the enforcement of a state statute prohibiting an air ambulance provider's balance billing); EagleMed LLC v. Cox, 868 F.3d 893, 902-04 (10th Cir. 2017) (holding that the ADA preempted a state statute that 'expressly establish[ed] a mandatory fixed maximum rate that [would] be paid by the State for air-ambulance services provided to injured workers covered by the Worker's Compensation Act').

***

Because North Dakota's subscription provision seeks to regulate the relationship between only a consumer and an air ambulance company, it cannot be said that it was enacted for the purpose of regulating the business of insurance. See Nat'l Sec., Inc., 393 U.S. at 460; Fabe, 508 U.S. at 505; Taylor, 907 F.2d at 779-80. The McCarran-Ferguson Act thus does not save the subscription agreement from ADA preemption."

Legal Lesson Learned: Air care ambulances, and the airline industry, has strong Federal statutory protection from regulation by States concerning "price, route, or service."

File: Chap. 13, EMS

NM: PREGNANT / INMATE - 30 HRS IN LABOR, CHILD DIED – JAIL EMS NOT GOV'T EMPLOYEES, NO GOV'T IMMUNITY

On March 2, 2021, in Shawna Tanner, et al., v, Timothy I. McMurray, et al, the U.S. Court of Appeals for the 10th Circuit (Denver, CO) held (3 to 0) that the Medical Doctor and RNs are employed full time with Correct Care Solutions, LLC, which provides medical care in 200 jails in 38 states, do not enjoy governmental immunity; case remanded to U.S. District Court judge in New Mexico for trial.

"Tanner was approximately 35 weeks pregnant and in custody at the Metropolitan Detention Center in Bernalillo County, New Mexico.

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When paramedics arrived, they found Tanner in clear pain, laying on a table in the medical unit, appearing to be in labor. Tanner was "obviously having contractions." Several medical personnel were around Tanner when the paramedics arrived. McMurray was standing alone in the back of the room. When it was suggested that it was McMurray's responsibility to deliver the baby, the doctor shook his head in the negative,

threw up his hands, and did not move from the corner. Instead, the paramedics delivered Tanner's child. He was born with his umbilical cord wrapped around his neck. There was no pulse. He was not breathing. McMurray remained silent in the back of the room as a paramedic used a bulb syringe to clear the baby's airway. It was too late. The thirty-hour childbirth ordeal was over. The baby was dead.

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Neither historical justifications of special government immunity nor modern policy considerations support the extension of a qualified immunity defense to Appellees—private medical professionals employed full-time by a multi-state, for-profit corporation systematically organized to provide medical care in correctional facilities."

Facts:

This appeal considers whether full-time employees of a for-profit, multi-state corporation organized to provide contract medical care in detention facilities may assert a qualified immunity defense to shield themselves from 42 U.S.C. § 1983 liability. Shawna Tanner, the plaintiff below, appeals an adverse ruling on summary judgment.

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Tanner was approximately 35 weeks pregnant and in custody at the Metropolitan Detention Center in Bernalillo County, New Mexico when she went into the final stages of her pregnancy. Over the ensuing thirty hours, commencing with the point at which her water broke, Appellees—employees of a nationwide private medical contractor—ignored and minimized her symptoms, refused to transport her to a hospital, and failed to conduct even a cursory pelvic examination. Only minimal attention was given to her: water, Tylenol, and sanitary pads. After thirty hours of pain and trauma, Tanner gave birth to her son. The child was born with his umbilical cord wrapped around his neck. He was not breathing. He had no pulse.

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Appellee McMurray, the Medical Director at the MDC site, was the 'ultimate decision maker' for clinical issues. He was responsible for all decisions related to the care of patients at the MDC. The County was not required to be involved. McMurray had the ultimate authority to refer incarcerated individuals for offsite treatment. Other CCS employees, including Appellees Luna and Sanchez, were given the authority to refer a patient for offsite emergency care.

***

All available authorities thus point to the historical availability of tort remedies against physicians regardless of whether they were employed by a government entity. Availability of tort remedies against private correctional employees led the Supreme Court to deny qualified immunity in Richardson. 521 U.S. at 405 [Richardson v. McKnight, 521 U.S. 399 (1997).

> "Respondent McKnight, a prisoner at a Tennessee correctional center whose management had been privatized, filed this constitutional tort action under 42

U.S.C. § 1983 for physical injuries inflicted by petitioner prison guards. The District Court denied petitioners' motion to dismiss, finding that, since they were employed by a private prison management firm, they were not entitled to qualified immunity from §1983 lawsuits."

Shawna Tanner was arrested and booked into the MDC facility on October 4, 2016. During intake screening, she informed staff that she was pregnant. Twelve days later, during the morning of October 16, Tanner's water broke. She first felt wetness and a small amount of mucous discharge, then a large amount of clear fluid 'began gushing' from her body. She also felt discomfort and cramping. At roughly 7:36 a.m., Tanner informed an MDC staff officer of those events and asked to be seen by medical personnel. Appellee Luna, a CCS nurse, reported that she was 'busy' and did not attend to Tanner's pleas for approximately an hour and a half. At approximately 9:00 a.m., Luna examined Tanner for five minutes. Tanner reported that she could feel the baby moving at this time. During the examination, Luna did not test the discharge for the presence of amniotic fluid, did not otherwise examine Tanner, and did not call McMurray. Instead, after the brief examination, Luna sent Tanner back to her cell with sanitary pads and instructions to drink water. Tanner slowly made her way back to her cell, paused multiple times to lean against walls, and complained of significant pain and 'pressure down there.'

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[Doctor] McMurray arrived at the jail the next morning and saw Tanner in the SHU. Tanner informed McMurray that she was in pain, that she was experiencing contractions, and that she feared the cause was her child; she asked McMurray to examine her. McMurray refused and said he would see her along with the other pregnant women the next day. In the interim, he cleared Tanner to leave the SHU and return to her housing pod.

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After returning to her housing pod, Tanner continued to experience contractions and 'excruciating pain.' She noticed a large blood clot had passed, and her pants were soaked in blood. She could not feel the baby moving. Tanner was then taken, yet again, to the medical unit. Two nurses attempted to detect the child's heartbeat, but both failed. One of the nurses told McMurray, who was sitting in his office, that Tanner was saturating sanitary pads with blood and that two nurses could not find the baby's heartbeat. Only then, approximately thirty hours into labor, did McMurray authorize a call for an ambulance."

Legal Lesson Learned: EMS working for private ambulance or other private employer must confirm the employer has insurance to defend and indemnify EMS employees.

Note: Part-time or contract personnel performing services for a Government employer may enjoy governmental immunity. The U.S. Supreme Court is Filarsky v. Delia, 566 U.S. 377 (2012), held (9 to 0) that an attorney retained by a Fire Department to conduct an investigation of a firefighter off work on injury leave while allegedly doing heavy repairs of on his home [he brought out to his

front lawn four rolls of insulation] has governmental immunity. "[I]mmunity under §1983 should not vary depending on whether an individual working for the government does so as a full-time employee, or on some other basis."

In Ohio, Medical Directors also enjoy immunity:
4765.49 (A): "Medical directors and members of cooperating physician advisory boards of emergency medical service organizations are not liable in damages in a civil action for injury, death, or loss to person or property resulting from their acts or omissions in the performance of their duties, unless the act or omission constitutes willful or wanton misconduct."

In addition, in Ohio a private ambulance company rendering 911 services to the public under a contract with a government enjoy immunity:
4765.49(B): "A political subdivision, joint ambulance district, joint emergency medical services district, or other public agency, and any officer or employee of a public agency or of a private organization operating under contract or in joint agreement with one or more political subdivisions, that provides emergency medical services, or that enters into a joint agreement or a contract with the state, any political subdivision, joint ambulance district, or joint emergency medical services district for the provision of emergency medical services, is not liable in damages in a civil action for injury, death, or loss to person or property arising out of any actions taken by a first responder, EMT-basic, EMT-I, or paramedic working under the officer's or employee's jurisdiction, or for injury, death, or loss to person or property arising out of any actions of licensed medical personnel advising or assisting the first responder, EMT-basic, EMT-I, or paramedic, unless the services are provided in a manner that constitutes willful or wanton misconduct."

File: Chap. 16, Discipline

OH: ALLEGED TREATENING COMMENTS FIRE CHIEF – CITY LAW NO VIOL - UNION NO RIGHT 3rd PARTY INVESTIGATOR

On Feb. 23, 2021, in State Ex Rel. Youngstown Professional Firefighters IAFF Local 312, et al. v. City of Youngstown, the Court of Appeals of Ohio, Seventh Appellate District (Mahoning County), 2021 Ohio 539, held (3 to 0) that the union has no clear legal right to the appointment of an independent, neutral investigator, and therefore the Court dismissed the union's original action [did not go to a trial court] seeking a "Writ of Mandamus." The Fire Chief at a FD meeting announced the City was reducing Battalion Chiefs from six to four, and a firefighter shouted, "My mom knows every judge and every attorney and if I get hurt I'm going to own you, the fucking Mayor and the fucking City." The firefighter asked next day to meet with the Chief to apologize. The Chief declined, and later explained at the firefighter's predisciplinary meeting that he declined to meet since he was upset and might "put him through a wall."

"In summary, Relators do not have a clear legal right pursuant to section 163.63 of the Youngstown Codified Ordinances ('YCO') to the appointment of an independent, neutral investigator, and the City does not have a clear legal duty pursuant to YCO 163.63 to appoint such an investigator. Accordingly, the writ, to the extent that it is predicated upon the appointment of an independent, neutral investigator, is dismissed."

Facts:

"At a Fire Department 'B turn' meeting at the Youngstown Fire Department on October 16, 2019, Chief [Barry] Finley announced a measure passed by the Safety Committee reducing the number of Battalion Chiefs from six to four. Chief Finley explained that the Mayor had agreed to the measure and City Council had voted to implement the reduction.

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According to Chief Finley, the firefighters in attendance reacted disrespectfully to the announcement…. At some point, Holcomb raised his hand, in order to attract Chief Finday's attention, then stated, 'My mom knows every judge and every attorney and if I get hurt I'm going to own you, the fucking Mayor and the fucking City.'

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Holcomb attempted to meet with Chief Finley the day after the meeting, ostensibly to apologize, however, the Chief refused to speak with him. (Holcomb Interview, ¶ 3.) Based on Holcomb's behavior at the B turn meeting, Chief Finley charged Holcomb with insubordination.

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Chief Finley, Holcomb, Battalion Chief Fred Beehler, and Smith attended the predisciplinary meeting on the insubordination charge held on October 28, 2019. Chief Finley expressed disappointment in Holcomb's outburst based on their professional and personal relationships. Holcomb was one of Chief Finley's firefighters before Finley was appointed to Chief, and Finley had also worked with Holcomb's father and knew the family. Chief Finley acknowledged that Holcomb was a good person and a good firefighter despite his outburst at the B turn meeting….

Smith lobbied Chief Finley to impose a verbal rather than a written discipline, citing Holcomb's effort to apologize the day after the meeting. Smith reasoned that the matter could have been resolved but for the Chief's refusal to speak with Holcomb. Chief Finley responded to Smith that if he had talked with Holcomb the day after the B Turn meeting, he would have 'put him through a wall….'

Chief Finley's response relates back to an incident in February of 2012, when then-Captain Finley entered into an agreed discipline after he assaulted a subordinate, by physically removing the subordinate from a chair and throwing him into a wall. The force employed by Finley was so great that the subordinate ricocheted off one wall then perforated the drywall of another. (Am. Verified Complt., ¶ 9.) The agreed discipline reads, in pertinent part, '[Finley] is subject to termination for any aggressive conduct (including but not limited to hostile physical contact, threat, threatening behavior or

intimidating words or acts) engaged in by him against co-workers, employees or the public over the next ten years.' (3/14/12 Agreed Discipline, p. 2.)

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According to Chief Finley, the expression "putting someone through a wall" has been parodied at the fire department in the years following the 2012 discipline. For instance, when Chief Finley installed an air conditioner for Holcomb, Holcomb joked that the Chief would "put him through a wall" if Holcomb did not compensate him….

Battalion Chief Beehler concurred with Chief Finley's characterization of the phrase, citing a previous interaction between Finley and another member of the fire department where the phrase was invoked in jest. Beehler further stated that Finley's statement at the predisciplinary meeting did not sound threatening….

Holcomb ultimately agreed to a written reprimand…. Chief Finley and Holcomb shook hands at the conclusion of the predisciplinary meeting, and Chief Finley said, 'fuck you,' which Holcomb interpreted to mean 'something like "you know better."' Holcomb believed that the matter had been resolved….

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On December 4, 2019, December 30, 2019, and January 17, 2020, the Union sent written requests to the City for a neutral third-party investigation of the events of October 28, 2019.

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On January 24, 2020, City Law Director Jeffrey Limbian appointed Assistant City Law Director Terry Grenga to conduct the investigation. Grenga administered the investigation within the framework codified in YCO 163.63, captioned, "Violence and Bullying in the Workplace Policy…'

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After the Union and the City exchanged a series of letters addressing the subject, Holcomb appeared without union representation at an interview conducted on February 11, 2020. Chief Finley was interviewed on January 29, 2020, Captain Cook was interviewed on February 20, 2020, with the interviews of Smith, and Battalion Chief Beehler (by telephone) conducted on February 24, 2020 and March 3, 2020, respectively.

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The investigative report was issued on May 30, 2020. Grenga recommended dismissal of Holcomb's complaint, as she opined that Chief Finley did not violate YCO 163.63.

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Relators' sole contention is that they have a clear legal right to the appointment of an independent, neutral investigator. Relators argue in the amended verified complaint that Grenga's investigation 'was not a true or fair investigation, as evidenced by the investigative report.' (Am. Verified Compl., ¶ 50.) The amended verified complaint

continues, 'Without an independent, neutral investigator, the City cannot adhere to requirements established in [YCO] 163.63.' (*Id*., ¶ 52.)

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In summary, Relators do not have a clear legal right pursuant to section 163.63 of the Youngstown Codified Ordinances ('YCO') to the appointment of an independent, neutral investigator, and the City does not have a clear legal duty pursuant to YCO 163.63 to appoint such an investigator. Accordingly, the writ, to the extent that it is predicated upon the appointment of an independent, neutral investigator, is dismissed."

Legal Lesson Learned: Chief officers must be careful to avoid using any terms that could be perceived as threatening.

Note: See article about this case. "Appeals court rules in favor of city of Youngstown in firefighters' union dispute." (March 3, 2021)