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Oct. 2023 – FIRE & EMS LAW NEWSLETTER

[NEWSLETTER IS NOT PROVIDING LEGAL ADVICE.]

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NEWSLETTERS: If you would like to be added to UC Fire Science listserv, just send him an e-mail.

TEXTBOOK: Updating 18 chapters of my textbook (2018 to current). FIRE SERVICE LAW (SECOND EDITION), Jan. 2017. View textbook via Waveland site.

TRAINING OPPORTUNITES

- **EMERGENCY VEHICLE OPERATIONS** – Oct. 11, 2023, Paint Creek FD, Hillsboro, OH – with Battalion Chief Lou Ernstes, Blue Ash FD
- **ETHICS IN FIRE & EMS;** also session on **EMR REPORT WRITING** – March 27, 2024, Ohio BWC Safety Congress, Columbus – with Kenny Schroeder, Lieutenant / Paramedic (ret), Independence FD, Kentucky

16 RECENT CASES – added to ONLINE LIBRARY (case summaries 2018 - present).

File: Chap. 1 – American Legal System – Arson

AR: BLDG FIRE – OWNER REFUSED TALK TO ARSON INVESTIGATORS – SEARCH WARRANTS – QUAL. IMMUNITY

On Sept. 29, 2023 in Greg Moore and Patricia More, et al. v. Sean Garnand, Detective, Dain Salisbury, Sergeant, et al., the U.S. Court of Appeals for Ninth Circuit (San Francisco) held (3 to 0) that trial court judge improperly denied the City of Tucson arson investigator's motion to dismiss until completion of pre-trial discovery. They enjoy qualified immunity since there is no clearly established law prohibiting arson investigators from launching full investigation when person refuses to talk after June 8, 2017 arson fire in a building he owned. Investigators met at his office, and pursuant to search warrant seized his cell phone; they took him to jail where DNA was obtained. Five days later they executed a search warrant his office and home, and opening financial fraud investigation. He was never charged with arson or other offenses.

> "We have jurisdiction over the district court's denial of qualified immunity as to Plaintiffs' First Amendment claims because Defendants present a purely legal issue: whether, taking as true Plaintiffs' version of the facts, it was clearly established that Defendants' conduct violated Plaintiffs' First Amendment rights. Plaintiffs fail to show that Defendants' conduct violated clearly established law. Thus, Defendants are entitled to qualified immunity on the First Amendment claims, and we reverse the district court's denial of summary judgment as to the First Amendment claims.
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> We reasoned that jurisdiction was proper because '[f]orcing the defendant officers to undergo discovery, without the immunity to the burdens of discovery the officers might possess.' Id.; see also Behrens v. Pelletier, 516 U.S. 299, 308 (1996) (holding that qualified immunity gives government officials a right "not merely to avoid standing trial, but also to avoid the burdens of such pretrial matters as discovery" (internal quotation marks and emphasis omitted) (quoting Mitchell v. Forsyth, 472 U.S. 511, 526 (1985))); Moss v. U.S. Secret Serv., 572 F.3d 962, 973 (9th Cir. 2009). ('[A]n order clearing the way for burdensome pre-trial discovery obligations renders the denial of immunity effectively unreviewable on appeal from final judgment— immunity from suit is of no use at that late stage.')."

FACTS:

> "Defendants' investigation started on the afternoon of June 8, 2017, when a fire broke out at a building. The cause of the fire was determined to be arson. Mr. Moore arrived at the scene while the firefighters were still tending to the fire. He identified himself as being responsible for the property. Mr. Moore left the scene after an investigator from the fire department told him that he could leave. Later that night, a police officer called Mr. Moore and asked if he could meet to talk about the fire. Mr. Moore said that he could meet the next day at his office.
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> The next day, Defendants went to Mr. Moore's office with a search warrant that they had obtained on the night of the fire. Mr. Moore was in his office with an attorney. Officer Garnand identified himself and started to ask Mr. Moore questions. The attorney advised

Mr. Moore to remain silent. Officer Garnand then explained that he had a warrant to seize Mr. Moore's cell phone and evidence from his person. The attorney said that Mr. Moore would not give up his cell phone. At that point, Officer Garnand took a cell phone out of Mr. Moore's hand and handcuffed him. Mr. Moore refused to answer any questions, stating that he was invoking his right to remain silent. Mr. Moore was transported to the police station, where his DNA and fingerprints were taken. He was released soon after.

Five days after Mr. Moore's arrest, Defendants obtained a warrant to search Mr. Moore's office and the Moores' home. The warrant was supported by Officer Garnand's affidavit, which referenced a 2011 arson at a property connected to Mr. Moore and the recent June 8, 2017 arson. Officer Garnand led the search at the Moores' home. Mrs. Moore was home alone and, sometime during the search, Officer Garnand told her, 'You know we wouldn't be here if your husband had just talked to us.'
In November 2017, Defendants caused the Tucson
Police Department to open a criminal financial investigation against Plaintiffs. As part of the investigation, the police identified companies linked to Plaintiffs and obtained four subpoenas for the companies' financial records. These subpoenas were served on various banks. The investigation was closed on April 11, 2018, because there was no evidence that Plaintiffs had committed any crimes.

On August 13, 2018, Plaintiffs filed a § 1983 action in federal court against Officer Garnand. The suit alleged Fourth Amendment violations related to the search warrants. After learning about that suit, Defendants reopened the criminal investigation against Plaintiffs. Defendants questioned two witnesses—the last contractor and the last tenant present at the property before the fire—and seized the contractor's cell phone. Defendants also tried to induce the Internal Revenue Service ('IRS') to open a criminal investigation against Plaintiffs."

Legal Lesson Learned: The law provides qualified immunity for investigators who aggressively investigate; trial court should delay granting investigators' motion to dismiss while pre-trial discovery proceeds.

File: Chap. 1 – American Legal System, Arson

CA: ARSON - NO DEFENSE HE STARTED FIRE TO CLEAR TICKS IN PARK – WILLFULL / MALICE PRESUMED

On Sept. 25, 2023, in The People v. Souriya Danny Vongchanh, the California Court of Appeals, Third District, held (3 to 0; unpublished decision) that jury properly found him guilty of arson, and trial court judge properly imposed the added five years, for a total of 13 years in prison since second arson conviction in three years.

"Defendant's arson conviction is based on the first fire he set on the levee between the park and the tennis courts. Defendant contends there is insufficient evidence that he acted intentionally and maliciously in setting the fire.
Section 451's requirement that the act be done willfully and maliciously ensures that the fire was deliberate and intentional rather than accidental or unintentional…. Due to the

dangerous nature of such conduct, a general criminal intent to commit the act suffices to establish the requisite mental state….

Defendant's conduct satisfies this standard. He admitted lighting the fire to clear the white grass and rid the area of ticks or leeches. His act was intentional and was done without legal justification, therefore maliciousness is presumed or implied.

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The trial court declined to strike the enhancement, finding that dismissal of the enhancement would endanger public safety. (§ 1385, subd. (c)(2).) The trial court stated: 'I've considered the prior offense and current offense both involve setting fires unlawfully. Here the fire was set near the downtown Oroville area, near residences, and in a park area where the potential for danger, of which all of us in Butte County are acutely aware, is extremely high. And so I am finding that it would be a danger to public safety to strike that [section] 667 [subdivision] (a)(1) enhancement, and I'll decline to strike the enhancement under that section.'

Contrary to defendant's argument, this was not an abuse of discretion, given that defendant was twice convicted of arson within a span of three years and the current arson offense was committed near a residential neighborhood."

FACTS:

"A jury convicted defendant Souriya Danny Vongchanh of arson after he set a fire in Oroville. (Pen. Code, § 451, subd. (c).)[1] In a bifurcated proceeding, the trial court found that defendant had been previously convicted of arson in 2019, a serious felony offense within the meaning of the three strikes law (§§ 1170.12, 667, subd. (b)-(i)) and also qualifying him for an additional five-year term of imprisonment. (§ 667, subd. (a)(1).) The trial court sentenced defendant to serve an aggregate determinate prison term of 13 years.

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On April 11, 2022, at 9:41 a.m., Battalion Chief Isaac Ruiz of the Oroville Fire Department was dispatched to a fire at Bedrock Park in Oroville. Bedrock Park is situated along the Feather River with a residential community directly to the south. Immediately adjacent to the park are tennis courts, separated from the park and river by a levee.

As Chief Ruiz approached the park, he saw smoke coming from the lower part of the levee, just north of the tennis courts. When he got closer, he could see a small fire burning the short grass that was growing on the levee, as well as fallen leaves and other organic material. Defendant was standing in a blackened area. Chief Ruiz asked defendant what he was doing and defendant said he "lit the fire to clear the white grass" and rid the area of either ticks or leeches. Ruiz remembered defendant's response because he thought it was odd. Ruiz testified that fires are not allowed at the park, and wind could cause a fire to travel from the levee and threaten homes and property. Ruiz contacted law enforcement.

A fire engine arrived and Chief Ruiz told defendant to leave so his firefighters could put out the fire. Defendant said he would put the fire out himself, picked up a nearby concrete

block, and started slamming the block on the ground. Ruiz again asked defendant to leave and he eventually did so. After firefighters extinguished the fire, Ruiz canceled the request for law enforcement and returned to the fire house.

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Officer Isaac Herrera of the Oroville Police Department was initially dispatched to the park at 10:03 a.m. That request was canceled. About 20 minutes later, he was again dispatched to the park. The second call was prompted by another fire about 10 feet from the first fire. Officer Herrera received a description of a suspect seen walking away from the fire. Herrera detained defendant, who matched the description, about 300 yards from the park. Defendant made spontaneous statements about a volcano in Hawaii and "identifying an area as red and then having to burn it to turn white."

Chief Ruiz was also dispatched to the second fire. The fire was burning a little higher on the levee. A fire engine was already there to put out the fire. Ruiz was informed there was a suspect in custody a short distance away. He drove to where Officer Herrera had detained defendant and positively identified defendant as the person who started the first fire. According to Ruiz, he asked defendant whether he started the second fire and defendant said something like he still needed to clean it out."

Legal Lesson Learned: Intentionally setting a fire in a park is intentionally doing an act without justification, and "malice" is presumed.

File: Chap. 1 – American Legal System

TN: OFF-DUTY FD CAPTAIN – OBSERVED DRUNK DRIVER CRASH - ALLOWED TO TESTIFY ON ZOOM / SICK COVID

On Sept. 25, 2023, in State of Tennessee v. William Michael Bowers, the Court of Criminal Appeals of Tennessee at Nashville, held (3 to 1) that the evidence was sufficient for the jury to convict the defendant of vehicular homicide by intoxication and driving under the influence; the trial court judge was authorized to allow fire department captain to testify via ZOOM.

On August 21, 2020, Captain Phillip Marsh of Columbia Fire Department was off duty when he observed the defendant's F-150 truck cross over from the oncoming lanes and strike the victim's vehicle at her driver's side door; the defendant's air bags had deployed and he spoke rapidly "but nothing [was] making any sense." The Court refenced U.S. Supreme Court decision allowing testimony via closed-circuit TV.

"In *Maryland v. Craig*, however, the United States Supreme Court noted that it had 'never held . . . that the Confrontation Clause guarantees criminal defendants the absolute right to a face-to-face meeting with witnesses against them at trial.' 497 U.S. at 844 [1990] (emphasis in original). *Craig* involved a Confrontation Clause challenge to a Maryland law that allowed a child sexual assault victim to testify via one-way, closed circuit television if the trial judge determined 'that testimony by the child victim in the courtroom will result in the child suffering serious emotional distress such that the child cannot reasonably communicate.' Id. at 840-41 (quoting Md. Cts. & Jud. Proc. Code

Ann. § 9-102(a)(1)(ii) (1989)). If this determination is made, the Maryland law allowed for the child witness, prosecutor, and defense counsel to withdraw to a separate room where the
examination of the child would be transmitted to the courtroom for display to the judge, jury, and defendant. Id. at 841. During this time, the witness cannot see the Defendant. Id.

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[Captain] Mash was placed under oath and cross-examined by the Defendant, and the trial court ensured that, prior to his testimony, all jurors could see the screen displaying his image, thus allowing them to observe his demeanor while testifying. At the time of cross-examination, the Defendant possessed a prior written statement from Mr. Mash as well as a recording of his prior testimony at the preliminary hearing. The prosecutor had previously speculated that Mr. Mash would testify consistently with his prior statements in the case, and Mr. Mash explicitly stated during his cross-examination that he had so testified. While the attorneys in *Craig* were in the same room as the testifying witness, id. at 841, the record here reflects that Mr. Mash was able to see the attorneys during questioning through use of the 'Owl' device. Other than a 'little delay' in the video transmission, it does not appear that defense counsel's lack of physical presence during his questioning of Mr. Mash in any way hindered the effective cross-examination of the witness.

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As in *Craig,* we conclude that the practice employed here 'preserve[d] the essence of effective confrontation [,]' id. at 857, and thus ensured the reliability of Mr. Mash's testimony. Both prongs of Craig having been satisfied, the Defendant is not entitled to relief pursuant to the Sixth Amendment."

FACTS:

"Phillip Mash, who testified remotely via Zoom, was a captain with the Columbia Fire Department at the time of the crash. While not on duty, Mr. Mash happened to be following the victim's vehicle on Nashville Highway. He had been behind the victim's vehicle for about a half-mile when they both stopped to turn right onto James M. Campbell Boulevard. He noted that the victim used her turn signal, stayed in her lane, and was 'not driving fast at all.' After turning right, Mr. Mash saw the Defendant's F-150 truck cross over from the oncoming lanes and strike the victim's vehicle at her driver's side door. He stated that the wheels on the Defendant's truck were 'turned sharp' and that the Defendant drove 'right into the side of' the victim's vehicle.

Mr. Mash called 911 as he checked on the occupants of the vehicles. Mr. Mash opened the door to the Defendant's truck to find that his airbags had deployed and that the Defendant's hands were 'flailing' in the air. Mr. Mash asked the Defendant 'if he was okay[,]' but the Defendant was 'running off at the mouth[.]' Mr. Mash explained that the Defendant spoke rapidly 'but nothing [was] making any sense.' After attempting to render

aid to the victim, Mr. Mash returned to the Defendant, who was 'still just hollering and rambling[.]' The Defendant did not sound as though he was in pain, according to Mr. Mash, but continued speaking loudly."

Legal Lesson Learned: The Confrontation Clause of the Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." That confrontation can be by ZOOM if witness is ill and contagious.

File: Chap. 1 – American Legal System, Arson

CA: HIKER - YOSEMITE PARK – GOV'T SHUTDOWN, PARK OPEN - DIED ICY RIVER – RECREATIONAL & FED. IMMUNITY

On Sept. 22, 2023, in Deborah Nickles v. United States of America, U.S. Magistrate Judge, U.S. District Court for Eastern District of California, issued a Report and Recommendation, recommending a U.S. District Court judge dismiss this lawsuit based on the California recreational immunity statute (statute written to encourage landowners to allow others to hike and other recreation on their property) and federal immunity for discretionary executive decisions (such as keeping Park open during funding shutdown). During a government-wide shut down over Congressional funding dispute, on Christmas Day, Dec. 25, 2018, Joshua Conner and girlfriend walking dogs in Yosemite even though no dogs allowed; about 2:30 pm, he attempted to retrieve a dog, hit his head he fell into Merced River. Search and rescue team was immediately dispatched, arrived on foot at 3:25 pm but could not revive him. The plaintiff alleges that federal government is liable for Conner's death because they failed to close the National Park.

"The Court finds Defendant has sufficiently demonstrated that NPS [National Park Service] responded quickly and appropriately to Conner's emergency, sending medically trained law enforcement rangers to help him, and that the first responder team dispatched within minutes of receiving the 9-1-1 call…. Rangers hiked to Conner's location to render aid, working to resuscitate him. While Plaintiff alleges that Conner was deprived of the opportunity to be evacuated by the NPS 'exclusive use helicopter,' Defendant has established such service does not operate in December, regardless of whether a federal shutdown occurs. *** Based on the above discussion pertaining to the FTCA and California's recreational immunity statute as applied to the facts here, the Court recommends the Defendant's Rule 12(b)(1) motion to dismiss for lack of jurisdiction be granted."

FACTS:

"Plaintiff alleges that on December 25, 2018, Conner and his girlfriend along with their two dogs parked at Happy Ilse Trailhead in Yosemite National Park to go hiking. (Compl. ¶ 29.) *** At approximately 2:30 p.m., while on the Silver Apron in between Nevada Falls and Vernal Falls, Conner attempted to retrieve one of their dogs that had gone off the trail, and he and the dog slipped on icy conditions into the Merced River. (Compl. ¶ 34.) Although 911 and National Park Services Search and Rescue Service were

immediately notified, Search and Rescue Service did not arrive on-foot to aid Joshua Conner until almost an hour later at 3:25 p.m.

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In attending to Conner, NPS rangers found a small case attached to Conner's wrist that contained powder and capsules that appeared to be illicit drugs. (Mot. 18.) Thereafter, the Stanislaus County Coroner performed an autopsy that concluded Conner died of 'craniocerebral injuries sustained in a fall.' (*Id.*) The autopsy further opined that 'the contributory factor of death was cardiomyopathy. He had been consuming amphetamine prior to death.' (*Id.*) The coroner's toxicology screen came back positive for amphetamine and benzodiazepine."

Legal Lasson Learned: The California recreational immunity statute was enacted to encourage property owners to engage in hiking and other recreational activities.

Note: The California statute provides that: "An owner of any estate or any other interest in real property, whether possessory or nonpossessory, owes no duty of care to keep the premises safe for entry or use by others for any recreational purpose or to give any warning of hazardous conditions, uses of, structures, or activities on those premises to persons entering for a recreational purpose, except as provided in this section." Cal. Civ. Code § 846(a). California's recreational immunity statute "was enacted to encourage property owners to allow the general public to engage in recreational activities free of charge on privately owned property." Hubbard v. Brown, 50 Cal.3d 189, 193 (1990) (citations omitted).

File: Chap. 1 – American Legal System – Arson

CA: ARSON – BURNED DRY GRASS IN FIELD IN 2021 – JURY PROPERLY INFORMED 2014 INCIDENT PRIOR GRASS FIRE

On Sept. 20, 2023, in The People v. Alejandro Marin, the California Court of Appeals, First District, Fifth Division, held (3 to 0; unpublished decision) that defendant's conviction of arson for lighting dry grass near a river trail in Napa was affirmed; trial court properly allowed jury to learn of the prior incident [not charged] in 2014 where he lit a fire near base of tree and planned to sleep there.

"Appellant argues the 2014 incident had minimal probative value and was highly prejudicial. We find no abuse of discretion. First, the 2014 incident was probative of appellant's awareness of the substantial risk of causing a fire in a dry, grassy area, as relevant to the lesser included offense. The incident was also probative of whether appellant would be likely to be careless with a lit object such as a cigarette in a dry, grassy area, or whether any fire started by him was likely to be intentional. Appellant argues the 2014 incident was too dissimilar from the charged offense to be probative because he set the fire in 2014 to stay warm while he slept, while the charged event took place on a mild morning. 'In order to be relevant, the 'least degree of similarity (between

the uncharged act and the charged offense) is required in order to prove intent.' (*People v. Molano* (2019) 7 Cal.5th 620, 665.) In both incidents, appellant started a fire in a dry, grassy area; this similarity is sufficient for purposes of intent. Appellant also contends the evidence was cumulative because it is common knowledge that lighting things on fire leads to fire. Given that appellant claimed he threw a lit cigarette in dry grass, evidence that appellant was aware of the dangers of lit objects near dry grass was relevant."

FACTS:

"On June 9, 2021, about 10:30 a.m., Elaine P. was walking along a river trail in Napa. It was a sunny, windy day, around 70 degrees. As she was walking, she saw appellant biking towards the trail in an erratic manner. He was heading for her location on the trail, but did not seem aware of her. He stopped by the trail and began rummaging through his bag. Elaine P. kept walking, away from appellant. After two or three minutes, she looked back and saw appellant crouched down in dry grass, moving his hands in a fanning motion, next to a rapidly growing amount of smoke. There had been no smoke in the area before. Elaine P. could not tell if appellant was trying to fan or extinguish the fire. Elaine P. called 911 and firefighters quickly responded. As she was walking away from the fire, appellant biked by her with a "smirk on his face, like he was happy.'

Napa Firefighter Jeff Squibb was on the first fire engine at the scene. When Squibb arrived, the fire was 10 feet by 15 feet and growing. Appellant was standing in the middle of the smoke pounding the ground or fire with a handful of green weeds. Squibb initially thought appellant was trying to put out the fire and told him to leave for his own safety, but later thought appellant might have been trying to fan the flames. Firefighters investigating the scene after the fire was extinguished did not find cigarettes or any other source of ignition and were unable to determine how the fire started.

Police detained appellant and found a lighter and a small amount of methamphetamine in his pocket. In an interview with police, appellant said he had been smoking a cigarette, put it out on a road, fell asleep by a tree, and woke up choking on smoke. He tried to use branches to put out the fire. Police told appellant they had video footage showing otherwise, an investigative ruse. Appellant then said he thought he threw the cigarette in the dry grass and, though he stepped on it, 'maybe' that was what started the fire.

Napa Police Officer Kevin Skillings testified about a prior, uncharged offense involving appellant. On August 5, 2014, around 11:20 p.m. he saw appellant standing next to a fire at the base of a tree. The flames were about four feet high and, while the fire was immediately surrounded by dirt, dry grass leading to a field was only about five feet away from the fire. Appellant told Skillings he started the fire because he was cold and planned to sleep there. When Skillings asked if he thought it was a good idea to start a fire so close to dried grass, appellant relied, 'No, it was stupid.' Appellant pled to the infraction of unlawful camping in connection with the incident. The jury was instructed it could consider this evidence 'for the limited purpose of deciding whether the defendant acted willfully and maliciously or recklessly in this case, or that the defendant's alleged actions were not the result of a mistake or accident.'"

Legal Lesson Learned: Prior incident of starting fire in forest area showed he again acted willfully and recklessly.

File: Chap. 2 – Safety / LODD

CA: FOREST FIRE – BULLDOZER OPERATOR KILLED, TWO INJURED – EMPLOYED BY CONTRACTOR - CAN'T SUE STATE

On Sept. 27, 2023, in Connie Vandorien, et al. v. Department of Transportation, the Court of Appeal of State of California, Third Appellate District (Shasta), held (3 to 0; unpublished decision) that family of the deceased bulldoze operator (Don Smith) and two injured bulldoze operators (Donald Andrews and Terry Cummings) cannot sue California Department of Forestry And Fire Protection (CalFire) or Department of Transportation (Cal Tran) for failure to assess the fire risk in 2018 "Carr Fire" and failure to adequately maintain vegetation near State Route 299.

> "CalTrans successfully demurred to the SAC and the heirs' wrongful death claim on the basis that it was not liable under our Supreme Court's holding in Privette v. Superior Court (1993) 5 Cal.4th 689 (Privette) and its progeny, which generally prohibit an independent contractor or its employees from suing the hirer of the contractor for workplace injuries except where the hirer has negligently exercised retained control or concealed a preexisting hazard."

FACTS:

> "During the Carr Fire in 2018, the Department of Forestry and Fire Protection (CalFire) contracted with several private entities to assist with fire suppression efforts. Plaintiffs Donald Andrews and Terry Cummings, and decedent Don Smith, were bulldozer operators employed by three of these private entities, and they were instructed by CalFire to create containment lines intended to deprive the fire of additional fuel. In the course of their fire suppression efforts, the fire overtook their bulldozers, injuring Donald and Cummings and killing Smith.
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> The [Second Amended Complaint] alleged that Donald and Cummings were employed as bulldozer operators by private companies that had contracted with CalFire to assist CalFire's efforts to fight the Carr fire. They were injured while creating contingency lines when the fire overtook their bulldozers. CalFire did not control their work-related activities or their employers, other than to give 'mere suggestion of details or cooperation.' Instead, CalFire's role was simply to advise Donald and Cummings and their employers regarding work that needed to be done and to 'act as eyes and ears regarding the progression of the fire.' Their contractor-employers were required to obtain and maintain their own workers' compensation insurance for them, and workers' compensation insurance was not provided for them by any state agency."

Legal Lesson Learned: The bulldoze operators were employees to the independent contractor; their remedy is worker's comp through their employer.

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

File: Chap. 4 – Incident Command, Training

TX: "FAMILY NIGHT" - INSTRUCTOR SPRAYED STUDENTS 2½ HOSE – GOV'T IMMUNITY – ENGINE NOT USED VEHICLE

On Sept. 21, 2023, in Koby Rezac v. Navarro College, the Texas Tenth Court of Appeals, held (3 to 0) that trial court judge properly dismissed the lawsuit against the College. Under Texas Tort Claim law, governmental immunity is waved for injuries arising out of the "use" or "operation" of a motor vehicle. In this case the Court relied on the affidavit of the instructor – it was "family night" at the Junior College fire program, the program had concluded with students lined up in formation, the engine no longer running but still connected to the hydrant, when the instructor jokingly sprayed the students with the 2 ½ inch line.

> "In this instance, because the fire truck was parked and attached to the hydrant, under the facts as alleged by Rezac, whatever use of the fire truck that then occurred was not the use or operation of a motor-driven vehicle. At most, it was the use or operation of a pump, which under these facts would only potentially involve the use or operation of motor-driven equipment, for which immunity has not been waived because the college is a junior college district. See Ryder, 453 S.W.3d at 927 ('[T]he vehicle must have been used as a vehicle…'). We find that Rezac has not established a clear and unequivocal waiver of the college's governmental immunity under the Tort Claims Act.
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> In this instance, because the fire truck was parked and attached to the hydrant, under the facts as alleged by Rezac, whatever use of the fire truck that then occurred was not the use or operation of a motor-driven vehicle. At most, it was the use or operation of a pump, which under these facts would only potentially involve the use or operation of motor-driven equipment, for which immunity has not been waived because the college is a junior college district."

FACTS:

> "Rezac was a student at the college's fire academy. The college conducted a family night for students to demonstrate firefighting techniques they had learned. A fire truck was used during the demonstration. After the demonstration, the students posed for a photograph. Rezac was on the end of the row of students. An employee of the college sprayed the students with water from a hose connected to the fire truck. Rezac was hit directly in the side of the head with the water spray, knocking him over. Rezac began having trouble hearing and seeing, and later that night was bleeding from his ear. Rezac went to the emergency room suffering from concussion-like symptoms and was diagnosed with a ruptured eardrum, which required surgery to repair.
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> As used for the events of this day, the fire truck, after being driven to the event location, was parked and a hose was attached between the fire truck and a water hydrant. The fire truck's engine powers the pump by way of a device known as a power take-off, or PTO, which can either be engaged or turned on, thus running the pump to increase the water pressure, or remain turned off, which results in water flowing through

the hoses connected to the truck at the same pressure as if the hose was connected directly to the hydrant, in essence hydrant pressure.

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Rezac stated that he asked the instructor why he did that and alleged that the instructor said, 'Sorry, I didn't know the pressure was up that high.'

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Thus, the resolution of the issue is not as easy as it first appears. The factual question the parties focused their attention upon was whether the fire truck's motor was running. The college argues they conclusively proved it was not."

Legal Lesson Learned: A close case; under Texas law the plaintiff must prove by clear and unequivocal evidence that "use" of a government vehicle caused the injury.

KS: BLACK CAPTAIN – IC AT STRIP MALL FIRE – "SHIT SHOW" – CHIEF DOC. IN PERF. REVIEW - NO DISCRIM.

[also Chap. 4]

On Sept. 8, 2023, in Mark Jordan v. City of Wichita, Kansas, et al., U.S. District Court Judge Daniel D. Crabtree, U.S. District Court for the District of Kansas, granted the City's motion for summary judgment. The August 2019 strip mall fire went to two alarms; plaintiff arrived on seventh unit and took command because no one has yet become IC. Plaintiff admitted it didn't go well and in his words it was a "shit show." Fire Chief Tammy Snow arrived at scene and criticized the Acting Battalion Chief, who was on the second arriving unit, for not taking command. The Fire Chief ordered that the annual performance review of both the plaintiff and the Acting Battalion Chief document performance concerns at that strip mall fire.

> "In August 2019—before the Acting Battalion Chief debacle—a strip mall on south Seneca Street caught fire. Doc. 81 at 3 (Pretrial Order ¶ 2.a.x.). WFD Policy provides that the second fire engine to arrive at a scene should assume command…. Plaintiff was on the seventh unit to arrive at the fire, but no one had assumed command. Id. So, plaintiff assumed command of the Seneca Street fire…. With seven units already at the scene and assigned, plaintiff, as incident commander, had a lot of catching up to do….(After Action Report Tr.). Plaintiff described the scene as a 'shit show.' Doc. 86-7 at 49 (Pl. Dep. 200:6–13). Plaintiff acknowledged that he struggled at the scene but believes that anyone in the same situation would have struggled.
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> Here, Chief Snow asked Pavelski to review plaintiff's second evaluation 'for accuracy.' Doc. 86-19 (Snow, Aug. 11, 2020 Email). Chief Snow wanted Pavelski to add a 'note of Accountability' about plaintiff's performance at the Seneca Street Fire. Doc. 86-3 at 19 (Snow Dep. 58:4–11).

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And plaintiff acknowledged that the Seneca Street Fire was a 'shit show,' Doc. 86-7 at 49 (Pl. Dep. 200:6–13), and that he struggled at the scene, id. at 50 (Pl. Dep. 202:4–13). Defendants' reason for altering plaintiff's review is not facially prohibited—so, defendants have satisfied their burden at this step. Also, plaintiff doesn't argue that defendants have failed to proffer a legitimate, non-discriminatory reason for modifying his performance evaluation. See generally Doc. 91. Defendants simply wanted plaintiff's performance evaluation to include information about the Seneca Street Fire. This showing qualifies as a legitimate, nondiscriminatory reason satisfactory to discharge the City's burden at step two.

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The court concludes, instead, that plaintiff has failed to present triable issues of race discrimination and retaliation, so it declines to invoke its supplemental jurisdiction over the state law claims under 28 U.S.C.§ 1367(c)(3)."

FACTS:

"WFD performed an 'after action review' (AAR) of the Seneca Street Fire. Doc. 86-3 at 13 (Snow Dep. 43:9–12). In an AAR, WFD evaluates its strengths, weaknesses, and gaps at a given fire and develops areas of improvement for the next fire. Id. (Snow Dep. 43:13–25); Doc.

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Ultimately, plaintiff did not receive any discipline for his work at the Seneca Street Fire. Doc. 86-7 at 16 (Pl. Dep. 38:16–19). Nonetheless, in 2021, plaintiff wrote in his personal calendar that the Seneca Street Fire had ruined his career.

***

Chief Snow criticized Battalion Chief M.R., another firefighter, for not taking command of the Seneca Street Fire….Indeed, when Chief Snow arrived at the fire, she told M.R. that he should have taken command…. M.R.'s next performance evaluation mentioned that M.R. should have taken command.

***

On March 3, 2021, plaintiff filed a grievance through his union "over the fraudulent change in" his performance evaluation. Doc. 86-32 (Union Grievance). WFD denied the grievance—concluding that WFD had not violated any relevant contracts….. WFD, through Deputy Chief Pavelski, offered to discard plaintiff's disputed performance review and replace it with a new one…. Pavelski offered to include content to which all parties agreed…. Plaintiff and his union declined this offer."

Legal Lesson Learned: Fire Chief properly ordered the annual performance review include reference to IC issues at strip mall fire.

File: Chap. 5 - Emergency Vehicle Operations
File: Chap. 6, Employment Litigation

File: Chap. 7 – Sexual Harassment

CT: FEMALE BAT. CHIEF NOT PROMOTED A/C – JOB DESC. CHANGED - WRITTEN EXAM DROPPED – CASE PROCEED

On Aug. 14, 2023, in Eileen Parlato v. Town of East Haven and East Haven Fire Department, U.S. District Court Judge Sarala V. Nagala denied in part the Town's motion to dismiss, holding that the now-retired Battalion Chief, with 29 years on the Fire Department, may proceed with her equal protection / gender discrimination claim that she was not promoted to Assistant Fire Chief in November 2021 because the Fire Chief changed promotion process (including no written exam), she was never presented to the Board of Fire Commissioners, which selected another Battalion Chief with much less experience.

> The Judge held that the complaint identifies specific changes made by the Fire Chief. "The Court next concludes, however, that Plaintiff has plausibly alleged a *Monell* claim for gender discrimination under the theory that Marcarelli was a final policymaker with respect to the decisions he made that prevented Plaintiff from being considered by the Board of Fire Commissioners for the Assistant Chief position. Compl. ¶ 116.
>
> ***
>
> Specifically, the Assistant Chief job posting stated that an external candidate required ten years of supervisory experience, but that an internal candidate required only ten years with the EHFD, regardless of whether the candidate had any supervisory experience during that time. *Id.* In addition, [Fire Chief] Marcarelli changed the format of the Assistant Chief hiring process by setting only an oral exam and eliminating the typical written exam requirement, despite that Plaintiff had historically performed well on written exams. *Id.* ¶ 53. Marcarelli also selected the individuals who would comprise the panel of interviewers for the oral exam. *Id.* ¶ 54.
>
> ***
>
> Importantly, the complaint alleges that Marcarelli *drafted* the job description, *eliminated* the written exam requirement, and *hand-picked* the interviewers. Compl. ¶¶ 48, 53-54.[8] To the extent further discovery reveals that those decisions were reviewable by the Board of Fire Commissioners, or to the extent that further research demonstrates that the authority to make those decisions was vested in the Board or some other person or entity, Plaintiff may not ultimately prevail on this theory of her *Monell* claim."

FACTS:

> "Plaintiff was a firefighter for twelve years…. In 2005, she scored well on a written exam and was hired as the EHFD's first female Battalion Chief.… During the seventeen years Plaintiff held that position, she supervised a crew, conducted employee and volunteer trainings, and maintained dispatch certifications, Emergency Medical Services Instructor certification, CPR Instructor certification, and Emergency Medical Technician Practical Examiner qualifications.
>
> ***
>
> Many individuals, including the [internal] Male Candidate, Plaintiff, and several external candidates applied for the Assistant Chief position…. Plaintiff took the oral exam and felt

> that she was able to respond to all the interviewers' questions 'easily and comprehensively,' even though she did not know any of the interviewers.
>
> ***
>
> The next round of the interview process required the applicants to appear before the Board of Fire Commissioners….Before that round, however, Plaintiff received a letter informing her that she would not proceed to that round….The letter stated: 'This decision was based on overall accomplishments as delineated in the r[e]sum[e], fire department leadership experience and performance in the interview process.'"

Legal Lesson Learned: Lawsuit will now proceed with pre-trial discovery. Be very cautious in changing the promotion process.

File: Chap. 8 – Race Discrimination

KS: BLACK CAPTAIN – IC AT STRIP MALL FIRE – "SHIT SHOW" – CHIEF DOC. IN PERF. REVIEW - NO DISCRIM.

[see Chap. 4]

File: Chap. 9, Americans With Disabilities Act

PA: ADA – EMS CONVINCED COVID PATIENT REFUSE TRANSPORT - "REGARDED AS" DISABELED – CASE PROCEED

On Sept. 19, 2023, in Keisha Cappel, et al. v. Aston Township Fire Department, et al., U.S. District Court Judge John Frank Murphy, Eastern District of Pennsylvania, held that lawsuit may proceed to pre-trial discovery under Americans With Disabilities Act since the EMTs "regarded" the patient as having a disability. The Court held that while the allegations fail to state a claim under Fourteenth Amendment because the EMTs did not create a danger, the lawsuit may proceed on claim under Americans With Disability Act because they "regarded" the patient as having a disability. The Court focused on the EMTs comments prior to seeing the patient.

> "A Basic Life Support (BLS) unit and Advanced Life Support (ALS) unit were deployed in response…. On their way to Ms. Jones's house, the BLS unit — consisting of Eoin Marshall and Aaron Kisela (together, 'the EMT-Bs') — 'discussed' how Mr. Kisela would remain outside of the home, and how they would 'pressure' Ms. Jones into 'not go[ing] to the hospital regardless of her

FACTS:

> "The BLS unit arrived at Ms. Jones's house first…. Paramedic Brian Doherty — part of the ALS unit — arrived three minutes after. Id. ¶ 39. Mr. Marshall followed Ms. Cappel into the basement where Ms. Jones was…while Mr. Kisela 'stayed outside the front door….' Ms. Cappel explained Ms. Jones's condition to Mr. Marshall, including her low blood-oxygen level…. Mr. Marshall questioned whether Ms. Jones could actually have a

> 42% blood-oxygen level, saying it was 'impossible because if it were [42%] she would be dead…' Mr. Marshall then used his own oximeter on Ms. Jones, which showed a 35% blood-oxygen level… Nevertheless, he said that oximeters cannot be trusted because 'they never work….' Mr. Marshall did not check Ms. Jones's vital signs …until Ms. Cappel demanded that he do so… Mr. Marshall listened to Ms. Jones's lungs using a stethoscope and said they sounded clear…. And when Ms. Cappel asked Mr. Marshall 'why [Ms. Jones] was panting rapidly like a dog,' Mr. Marshall replied, '[t]hat's what Covid patients look like….' Mr. Marshall also told Ms. Jones that he 'could' take her to a hospital, but her best option was staying home because 'they will just bring you back home…' Ms. Jones asked Mr. Marshall what he would do under the circumstances, to which Mr. Marshall responded, 'I'd stay here. They are really wanting people to stay home. Your best chance is to stay here…. So, Ms. Jones remained in her basement.
>
> ***
>
> Ms. Jones's condition worsened. The next day, Ms. Jones's family called 911 again…. Unfortunately, this time, the first responders could not aid Ms. Jones, and she was pronounced dead…. Her 'primary cause of death was bilateral lobar pneumonia, with a secondary cause of 'probable Covid-19.'"

Legal Lesson Learned: If a patient is not going to be transported, then get a refusal document signed.

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

File: Chap. 11 – FLSA

NY: PRIVATE AMBULANCE CO. – CLASS ACTION BY 200 EMS – NOT PAID FOR PREP TIME – REQ. BUY THEIR UNIFORMS

On Sept. 15, 2023, in Tray Jackson, individually and on behalf of the proposed class v. Citywide Mobile Response Corp., Judge Fidel E. Gomez, New York Supreme Court, Bronx County, granted plaintiff's motion to certify class action against the non-emergency ambulance company that has been in business for over 40 years. Plaintiff EMT ($18 an hour in 2021 and 2022) alleges he would "clock in" prior to start of shift to check ambulance for supplies, and "clock out" after the schedule shift, but the company "rounded up" his start time and rounded down his end times. The company also deducted from his pay the cost of his uniforms and tech bag in amounts totaling $275-$400.

> "Here, with the affidavits by plaintiff, Alston and Lopez, which state that at the time of the alleged tortious practices on which the complaint is premised there were approximately 200 people employed by defendant, the record demonstrates that the size of the putative class is sufficient as a matter of law.
>
> ***

Here, the evidence demonstrates that there are three categories into which plaintiff's claims fit: whether defendant violated the law by failing to pay him appropriate wages; whether defendant violated the NYCRR by failing to reimburse plaintiff for uniform and equipment expenditures; and whether defendant violated the Labor Law by failing to provide him wage notices."

FACTS:

"In support of his motion, plaintiff submits an affidavit, wherein he states that he worked for defendant as an EMT between October 18, 2018 and December 28, 2018 and then again between August 17, 2021 and March 18,2022. When he started his employment, plaintiff and approximately 10-15 other drivers and EMTs attended an orientation led by defendant's head of training. While at the orientation he and the others were informed that they would be required to wear uniforms provided by defendant, and that they were required to own tech bags containing certain equipment and supplies. Because payment for the foregoing items would be deducted from his paychecks, plaintiff signed a form authorizing the same. Plaintiff states that he also reviewed defendant's employment handbook, which stated that 'only those uniforms pieces issued by the company, are acceptable,' and that any reference to uniform shirt therein meant the shirts provided by defendant. The employee handbook further stated that all employees were required to own personal equipment, which could be purchased by them or supplied by defendant. The latter option would result in the cost of the equipment being deducted from an employee's paycheck. Defendant neither laundered the uniforms nor provided any pay to maintain the same and the employees were solely responsible for uniform maintenance.

***

When plaintiff began working for defendant in 2018, his rate of pay was $13.50 per hour. As an EMT, plaintiff reported to 1624 for work, where he would prepare his ambulance to begin his shift. Plaintiff then waited for defendant's dispatchers to assign patients to him in order to provide them with medical assistance and/or transportation to a hospital. Plaintiff would routinely work shifts exceeding 10 hours. Between October 16, 2018 and October 23, 2018, for example, plaintiff's shifts exceeded 10 hours and ranged between 11.75 hours and 13.75 hours. Despite the foregoing, defendant never provided plaintiff spread of hours pay, which required an extra hour's pay. Plaintiff's pay stub, dated November 9, 2018, evinces that plaintiff worked 39.50 hours at $13.50 per hour and was paid a total of $533.25. However, pursuant to law, he should have been provided spread pay totaling $45 plus uniform pay totaling $16.20. This meant that instead of $533.25, plaintiff should have been paid $574.70 and for that week alone, there is a deficiency in the sum of $41.45. The same pay stub also reflects that plaintiff was deducted $62.50 for his uniform and tech bag. The $52.50 deduction for his tech bag was labeled as "CMR Outlay Reimb," and the $10 deduction for his uniform was labeled "Uniform No.2." Subsequent pay stubs also evince deductions for plaintiff's uniform and equipment ranging between $10 and $23.80. Plaintiff alleges that at the time he worked for defendant, there were at least 200 other people employed by defendant, who were either drivers, EMTs, or paramedics."

Legal Lesson Learned: This lawsuit will now proceed to pre-trial discovery.

File: Chap. 12, Drug-Free Workplace

File: Chap. 13 - EMS

OH: EMS TREATING HEAD INJURY OF DRUNK FEMALE – SHE RESISTED ARREST DRUNK BOYFRIEND – PATIENT CONV.

On Sept. 25, 2023, in State of Ohio v. Veronica Sepulveda, the Court of Appeals of Ohio, Third Appellate District, Auglaize County, held (3 to 0) that jury properly found her guilty of Resisting Arrest (sentenced 30 days in jail); jury found her not guilty of Obstructing Official Business. Police officer told boyfriend to allow medics to treat her; when he refused, she interfered with arrest of her boyfriend.

> "Sepulveda was convicted of Resisting Arrest in violation of R.C. 2921.33(A), which reads, 'No person, recklessly or by force, shall resist or interfere with a lawful arrest of the person or another.'
>
> [W]hile Sepulveda may have encouraged [her boyfriend, Tyler] Dunlap to comply with Lt. Place's orders when Dunlap refused to move away from Sepulveda on the ground, this did not stop Sepulveda from getting between Dunlap and Lt. Place when the arrest was taking place shortly thereafter. Sepulveda's action in getting between Lt. Place and Dunlap, combined with her action moving Lt. Place's Taser, led to her charges in this case."

FACTS:

> "On June 19, 2022, Sepulveda fell and injured her head. As a result of the injury, 911 was called and emergency services ('EMS') responded from the fire department. In addition, Lieutenant Shannon Place of the Wapakoneta police department responded to the scene, indicating that law enforcement generally responded to EMS calls to provide assistance.
>
> Once at the scene, a paramedic with the fire department made contact with Sepulveda and determined that she had a laceration on the back of her head. Sepulveda informed the paramedic that she had been drinking alcohol, and the paramedic believed she was intoxicated based on his experience.
>
> [Footnote 1: On the body cam footage introduced into evidence, Sepulveda can be heard stating that she had over six shots of whiskey.]
>
> The paramedic testified that he and his partner attempted to bandage Sepulveda's head but she pulled the bandage off. When the paramedic attempted to reapply the bandage while Sepulveda was standing, Sepulveda fell on the ground.
>
> As the paramedic attempted to assist Sepulveda while she was on the ground, Sepulveda's boyfriend, Tyler Dunlap, interfered. Dunlap, who was also intoxicated based on Lt. Place's testimony, sat on the ground behind Sepulveda's head and was holding her,

preventing EMS from treating her. EMS personnel, Sepulveda, and Lt. Place all repeatedly asked Dunlap to step away from Sepulveda so she could be treated. Dunlap, mostly silent, did not comply. At one point, Lt. Place was able to get Dunlap's attention and she asked him to move away from Sepulveda. In response, Dunlap glared at her 'in a manner that made [her] feel like he was going to either strike [her] or attempt to fight.' (Tr. at 109). Dunlap continued not to move despite all those at the scene attempting to get him to do so, including Sepulveda. Eventually Lt. Place advised Dunlap that she was going to detain him so he could be removed from the situation. At that point, Dunlap rapidly got up and told Lt. Place that she was not going to detain him.

Lt. Place told Dunlap that he was going to be placed under arrest. Dunlap continued not to comply so Lt. Place unholstered her Taser. Lt. Place testified, 'when I unholstered my Taser I had ahold of his hand and there's a slight jostling of our hands. He was able to manipulate my hand, grab mine and I felt a pop in my left ring finger."' (Tr. at 111). Dunlap had broken Lt. Place's ring finger on her left hand.

As Lt. Place was attempting to get Dunlap to comply with her orders, Sepulveda got up off of the ground and she came between Dunlap and Lt. Place. Sepulveda physically batted the Taser away so that it was not pointing at Dunlap. The interaction was recorded on Lt. Place's body camera."

Legal Lesson Learned: Intoxicated patient, intoxicated boyfriend, injured police officer – 30 days in jail seems like a light sentence.

File: Chap. 13 – EMS

MI: POLICE –HANDCUFFED, FACE DOWN PRISONER – DIED ASPHYXIA – EMS IN 3 MIN - NO PD QUAL. IMMUNITY

On Sept. 21, 2023, in Thomas E. Lunneen, personal representative of the estate of Jack C. Lunneen v. Village of Berrien Springs, Michigan, et al., the U.S. Court of Appeals for the Sixth Circuit (Cincinnati) held (2 to 1) that the trial court judge properly denied qualified immunity to the arresting police officers and the village. A jury will now decide if police used substantial force on the back of the handcuffed prisoner. EMS arrived three minutes after the arrest and will likely be called as witnesses for the plaintiff.

"Wyss [Officer James Wyss of the Village of Berrien Springs-Oronoko Township Police Department] argues that the district court erred because '[t]here is nothing unreasonable and unconstitutional about *merely holding onto the handcuffs* following the erratic behavior and extensive resistance displayed by Lunneen before he was detained.' Wyss Opening Br. at 33 (emphasis added). But Wyss's argument is based on his own version of the facts-that he was 'merely holding onto the handcuffs.' The video footage does not indisputably demonstrate this; Wyss's hand often appears to be in contact with Lunneen's back during this time and the amount of pressure he applies is not clear. And, as discussed above, Plaintiff's expert opined that Lunneen's autopsy revealed 'large areas of hemorrhage in the soft tissues and deep muscles of the mid and lower back bilaterally,

evidence of severe prone back pressure.' R. 57-3, PID # 389; *see also* R. 57-11 (report by Dr. Wohlgelernter, who concluded that Lunneen died from 'restraint/compressive asphyxia with mechanical obstruction of respiration, secondary to compressive force applied to his torso by the police officers with resultant respiratory compromise and subsequent development of hypoxia/hypoxemia causing asystole and PEA cardiac arrest)."

FACTS:

"Officer James Wyss of the Village of Berrien Springs-Oronoko Township Police Department and Sergeant Roger Johnson of the Berrien County Sheriff's Department were both on duty the night of October 22, 2018. The Departments share concurrent jurisdiction in the overlapping portions of the Village of Berrien Springs-Oronoko Township and Berrien County where the at-issue incident occurred. The incident was captured on both Officers' body cameras.

At approximately 1:15 a.m., Wyss first interacted with Lunneen when Lunneen rode his bicycle up to Wyss's patrol car and started talking to him. Wyss recognized that Lunneen was incoherent and agitated. At the time, Lunneen was fully dressed. Lunneen asked Wyss if he could speak with Johnson, an acquaintance of Lunneen's. After asking about Johnson, Lunneen rode off on his bicycle. Wyss followed Lunneen for a short amount of time and then lost sight of him. When Johnson subsequently drove by, Wyss flagged him down and described his interaction with Lunneen.

While talking with Johnson, Wyss got dispatched to the home of a local resident who reported a white, middle-aged, shirtless man running around outside of her home. The resident reported that the man had pushed her air-conditioner unit into her home, breaking her living room window. Upon arrival at the scene, Wyss spoke with the resident who further described the incident. Wyss told the resident that he thought the man who destroyed her property was the same man who came up to his car earlier 'spouting off a bunch of nonsense.' Wyss Body Camera Footage, at 10:27-10:34. While still talking with the resident, Wyss observed Lunneen running towards downtown. Wyss attempted to follow Lunneen on foot, but quickly lost sight of him. He radioed Johnson to let him know that Lunneen was on the move.

Johnson spotted Lunneen while surveilling the area. Lunneen approached Johnson's patrol car and wanted to get inside. Johnson exited his patrol car and ordered Lunneen to the front. Wyss then arrived on the scene. Wyss asked what was going on and Lunneen responded that he was an addict and currently climaxing. Lunneen also started shouting things like 'HELP! YES! CALL THEM, MY PEOPLE HERE TOO!' and told the Officers that he 'know[s] what['s] happening, and [you're] going to kill me.' At this point, Lunneen was shirtless, sweating profusely, and had blood on him. It was thirty degrees outside. Johnson requested a paramedic from dispatch, citing possible excited delirium.

Johnson asked Wyss if he had probable cause to arrest Lunneen, and Wyss responded that there was probable cause to arrest him for malicious destruction of property. The Officers then attempted to arrest Lunneen. First, Lunneen put his arms slightly behind his back and

appeared compliant. But this compliance was short-lived; Lunneen quickly started backing away from the Officers. The Officers repeatedly told him to get down on his knees and stay out of the road. Lunneen responded by yelling things like 'HELP,' 'PLEASE DON'T,' and 'I'M NOT THE ONE' as he moved towards the road while swinging his arms. Expert Transcript of Body Camera Footage, R. 57-15, PID # 569-70. After the Officers had been going back and forth with Lunneen for approximately one minute and thirty seconds-including three warnings from Johnson that he was going to use his taser-Johnson tased Lunneen. Lunneen briefly keeled over, and he proceeded to rip the taser probes out of his chest and run back into the street. The Officers continued their pursuit and warnings. Wyss then hit Lunneen with pepper spray, first on the side of his head and then directly in the face.

Attempting to get Lunneen on the ground so he could be handcuffed, Wyss successfully used a leg sweep to get Lunneen's feet out from under him. While Lunneen was on the ground, he grabbed Wyss's leg. Wyss told Lunneen to let go and then applied pressure to his mandibular nerve to force him to let go. Wyss reports that this tactic was successful because Lunneen then let go of his leg. The Officers' body camera footage also reveals that one of the Officers (Johnson, according to Plaintiff) had his hand on Lunneen's neck during this time. Further, the footage shows Johnson straddling Lunneen while Lunneen is on the ground.

After having Lunneen on the ground for approximately two minutes, the Officers were able to handcuff him, at which point Johnson immediately stepped away. Wyss, however, remained kneeling or standing beside Lunneen holding his handcuffs for almost two additional minutes. During this time Johnson pointed out that Lunneen was struggling to breathe and elevated his earlier request for a medic to a higher priority. The medic initially arrived where the Officers' patrol cars were parked, which, by this time, was approximately 100 yards away. The Officers attempted to flag down the medic and Johnson radioed dispatch to inform the medic of their new location. Once the medic arrived (approximately three minutes after Lunneen was handcuffed) the Officers assisted as requested in providing Lunneen medical care. However, they did not provide any medical care on their own before the medic arrived.

Lunneen was pronounced dead at 2:30 a.m. at a local hospital. His autopsy report detailed multiple blunt-force injuries to his head, trunk, and extremities; it also confirmed that there was methamphetamine in Lunneen's system. His cause of death was ruled excited delirium associated with methamphetamine use. But the manner of death was deemed 'indeterminate' based on the 'significant debate in the medical community regarding manner of death certification in excited delirium deaths associated with law enforcement intervention.' Postmortem Examination Rep., R. 81-6, PID # 900. Plaintiff provided reports from three medical experts who dispute the cause-of-death finding and believe that Lunneen died of asphyxiation."

Legal Lesson Learned: EMS who observe police holding face down a handcuffed prisoner can expect to testify if the prisoner dies or is seriously injured.

File: Chap. 14, Physical Fitness
File: Chap. 15 CISM, incl. Peer Support, Mental Health

File: Chap. 16 – Discipline, Social Media

TN: FD CAPT. DEMOTED - FACEBOOK POSTS GEORGE FLOYD RIOTS – CASE PROCEED / "BALACING TEST"

On Sept. 19, 2023, in Tracy R. Turner v. Metropolitan Government of Nashville And Davidson County, U.S. District Court Judge Eli Richardson, U.S. District Court for the Middle District of Tennessee, Nashville Division, denied the City's motion for summary judgment. The Captain was demoted to firefighter, ordered to attend "sensitivity" training and moved to another station. While there were several calls from citizens about the posts, there was little evidence that the Captain's posts had disruptive impact on the Fire Department.

> The Court held: "From May through July 2020, Plaintiff posted on Facebook his opinions on several topics of national interest. For example, Plaintiff referred to people reacting violently to the death of George Floyd as 'animals.' He made other posts referring to 'Anti-Fa and BLM thugs,' and other generally negative posts about protestors, BLM, and the 'Left agenda.'
>
> ***
> Defendant filed its motion for summary judgment and memoranda in support, arguing that (1) Plaintiff's speech does not receive the highest level of protection under the First Amendment and (2) under so-called Pickering balancing (as established in Pickering v. Bd. Of Ed. Of Tup. High Sch. Dist. 205, Will Cnty., 391 U.S. 563, 568 (1968) (establishing that the Court must weigh the interests of the state against those of the public official in commenting on matters of public concern)), the Fire Department's interest in public trust and efficiency outweigh Plaintiff's countervailing speech interests.
>
> ***
> And although Defendant relies on the testimony of Mark Young [president of the local firefighter union] and Summers [HR Director] to establish that NFD received many calls, their testimony fails to support that there was disruption to NFD's operations caused by Plaintiff's speech. Summers testified that to his understanding, there was no discernible disruption to NFD's 'workflow' as a result of that speech … and Young testified to having no knowledge of the existence of various circumstances (effect on NFD morale or close working relationships, unwillingness of NFD personnel to work with Plaintiff, impairment of Plaintiff's own performance as a firefighter, and undermining of NFD's mission) … that would be the kinds of things that would cause disruption; the Court does not see where his testimony leaves room for an inference of disruption to NFD operations. Thus, Defendant has not met its burden in showing that there is no genuine dispute of material fact regarding factor (c), and this factor weighs in favor of Plaintiff.…

For the reasons discussed herein, the Court will deny Defendant's motion for summary Judgment.

FACTS:

"Plaintiff Tracy R. Turner was a captain with the Nashville Fire Department (NFD). Plaintiff's duties included responding to emergencies, directing initial responses to fires, overseeing the upkeep and operation of a fire engine, leading a team of two to four firefighters, and interacting with the public.

***

Because of his social media activity, Turner received punishment with the following components: a) demotion from the position of Captain to the lowest ranked position within the NFD (firefighter); b) removal of his ability to bid for any favored positions within the NFD for a period of two years; c) an order to attend 'sensitivity' counseling; and d) relocation to a different fire hall—one in a less desirous location."

Legal Lesson Learned: The Pickering "balancing test" requires Court to examine the impact on FD of social media posts. FD officers must be particularly cautious about posts that might appear racial in nature.

Note: See Footnote 10 of the opinion:

> "The Court declines to opine on whether these comments were necessarily racially biased, in the sense of reflecting bias against Black members of the community, or whether instead they reflected a bias only against two kinds of individuals —rioters, and members and supporters of Black Lives Matter—that, to say the very least, obviously include persons who are not Black."

File: Chap. 16 – Discipline

NC: CHILD SEXUAL ASSAULTED BY FF AT FD – 24-30 YRS PRISON – VICTIM CAN NOW SUE WITHIN 2-YRS FF CONV.

On Sept. 12, 2023, in Michael Taylor v. The Piney Grove Volunteer Fire And Rescue Department, Inc., et al., the Court of Appeals of North Carolina held (2 to 1) that the State Legislature can lawfully expand the statute of limitation for juveniles to sue when they become adults for child sexual abuse under the Sexual Assault Fast Reporting And Enforcement Act ("SAFE Child Act"). The North Carolina legislature amended the law to give child victims the right to sue two years after the conviction of the assailant. Michael Taylor turned 18 in April 2000; under prior law he had three years to sue the assailant (April 2003). Under new statute, he could sue two years after the conviction of his assailant. The firefighter pled guilty in 2019 to multiple counts of sexual assault and is now serving 24-to-30-year sentence in state prison. The Court held that this lawsuit was timely filed on March 4, 2020.

"Because we agree with Appellants that the North Carolina Constitution does not prohibit the General Assembly from reviving Plaintiff's civil claims under the SAFE Child Act as set forth in McKinney, we reverse and remand the trial court's order for further proceedings not inconsistent with this opinion.

***

In the 2000s, 2010s, and early 2020s—and largely after Plaintiff's tort claims had expired—scientific research into childhood sexual trauma solidified around two key facts: (1) victims of childhood sexual abuse frequently delayed disclosure of their trauma well into adulthood; and (2) the abuse frequently resulted in lifelong injury…. Legislatures across the country responded to these scientific developments by, among other actions, enacting statutes reviving stale civil claims for child sexual abuse that had previously expired under the applicable statutes of limitation."

FACTS:

"Plaintiff met Defendant Michael Todd Pegram, a firefighter with Defendant Piney Grove Volunteer Fire and Rescue Department, Inc. ('PGFD'), when Plaintiff was a child enrolled in afterschool and summer camp programs with the Kernersville Family YMCA. Mr. Pegram used his position to manipulate Plaintiff and his family to gain their trust. Mr. Pegram then took Plaintiff to PGFD buildings to watch pornography together and, on at least two occasions, sexually assaulted Plaintiff.

Mr. Pegram's abuse caused Plaintiff to develop behavioral and psychological issues, resulting in a psychiatrist's recommendation that he be admitted to Charter Behavioral Health Hospital. Plaintiff suffered from substance abuse and posttraumatic stress disorder as a result of Mr. Pegram's unlawful acts. The illegality of Mr. Pegram's conduct was firmly established when he pleaded guilty on 26 June 2019 to five counts of first-degree sex offense, one count of attempted first-degree sex offense, one count of statutory sex offense with a child, and 21 counts of taking indecent liberties with a child."

Legal Lesson Learned: Many state legislatures have likewise expanded the statute of limitations for victims of sexual assault as children.

Note: See June 26, 2019 article, 'He stole my innocence, my childhood, my virginity:' Former YMCA counselor convicted of child sex abuse." A search warrant revealed at least eight possible victims, one of them who was 10 years old at the time.

File: Chap. 17 – Arbitration / Union Relations

OH: FIRE CHIEF "RETIRE / REHIRE" IMPROPER – CITY CIVIL SERVICE COMM. TO HOLD COMPETITVE PROMOTION EXAM

On Aug. 29, 2023, in State ex rel. Internatl. Assn. of Fire Fighters, Local 1536, AFL-CIO v. Sakacs, the Ohio Supreme Court held (7 to 0) that City of Wickliffe violated Ohio Rev. Code Section 124.48, Fire Department Vacancies, when it allowed Fire Chief James Powers to retire on January 6, 2020, and then rehired him the next day so he could collect both a pension and his salary (a practice known as "double dipping"). Court held that a "vacancy" occurred when the Fire Chief retired.

> The Court held: "We conclude that under the plain language of R.C. 124.48, a vacancy occurs when the incumbent in a promoted-rank position in a fire department retires and therefore the position must be filled through the process set forth in R.C. 124.48."
>
> > Section 124.48 provides:
> >
> > "Whenever a vacancy occurs in a promoted rank in a fire department and no eligible list for that rank exists, the appointing authority shall certify the fact to the civil service commission. The civil service commission, within sixty days of the vacancy, shall conduct a competitive promotional examination. After the examination has been held, an eligible list shall be established, and the civil service commission shall certify to the appointing authority the name of the person on the list receiving the highest grade. Upon the certification, the appointing authority shall appoint the person so certified within ten days. When an eligible list exists and a vacancy occurs in a position for which the list was established, the appointing authority shall certify the fact to the civil service commission. The person standing highest on the list shall be certified to the appointing authority, and that person shall be appointed within ten days."

FACTS:

> "Appellee James G. Powers is currently employed as the city's fire chief. He has been a member of the city's Division of Fire for over 30 years and was promoted to the rank of chief after 16 years of service…. The next day, January 7, the mayor rehired Powers to serve as the city's fire chief and swore him in to the position. The reason for Powers's retirement and his immediately being rehired was to allow him to receive pension benefits while remaining employed as the fire chief.
>
> On February 7, 2020, Local 1536 sent an email to appellee Wickliffe Civil Service Commission ("the commission") expressing its belief that Powers's retirement created a vacancy in the position of fire chief. The commission disagreed. In a responsive letter to Local 1536, the commission's chairman stated: 'Although the term 'retire/rehire' is commonly used in reference to this action, it is actually not the case. * * * There was no resignation from the City, or from the position of Chief. There is continuous service and no break in payroll administration, thus no vacancy was created.'
>
> ***

On January 6, 2020, the position of fire chief became vacant when Powers retired. The mayor rehired Powers on January 7, 2020. But a person cannot be rehired for a position that is not vacant.:

Legal Lesson Learned: This decision impacts all Ohio cities and other political subdivisions with fire officials in a classified civil service position.

Note: See Aug. 29, 2023 article, ‘Retire/Rehire’ Plan Violated Civil Service Law.”