**RECENT COURT DECISIONS SUPPLEMENT PROF. BENNETT'S FREE, ONLINE EMS LAW TEXTBOOK. SEND HIM E-MAIL IF WISH TO RECEIVE NEW CASES IN HIS FIRE & EMS LAW NEWSLETTERS: lawrence.bennett@uc.edu**

**TEXTBOOK: EMS LAW (Second Edition (**2018); FREE ONLINE TEXTBOOK: (ISBN: 978-1-949104-03-5); https://scholar.uc.edu/concern/generic_works/6m311p85h (First Edition, 2012, MBS Direct, Columbia, MO).

**NOT PROVIDING LEGAL ADVICE.**

# Chap. 13 EMS, including Community Paramedicine, Corona Virus

## 13-52
## NM: CORONA VIRUS – MEGA CHURCH CHALLENGED LIMIT OF 5 PEOPLE – DENIED TEMPORARY RESTRAINING ORDER

On April 17, 2020, in Legacy Church, Inc. v. Kathyleen M. Kunkel and State of New Mexico, U.S. District Court Judge James O/ Browning denied the church's motion for temporary restraining order. Legacy Church has nearly 20,000 members, with church services held in four locations in Albuquerque. Kathyleen M. Kunkel is New Mexico's Secretary of Health Department; on March 24, 2020, Secretary Kunkel issued the Public Health Order, which ordered all non-essential businesses to close, ordered all of the state's non-essential workforce to work from home, and ordered New Mexico citizens to 'stay at home and undertake only those outings absolutely necessary for their health, safety, or welfare.'

> "The Court denies the Motion. The Court concludes, first, that the Eleventh Amendment prohibits Legacy Church's suit insofar as it seeks relief against the state of New Mexico. Second, the Court concludes that Legacy Church is not substantially likely to succeed on the merits of its Free Exercise claim. Specifically, the April 11 Order is both neutral and generally applicable, and there is no evidence of animus against Christianity in particular or against religion in general. Accordingly, the April 11 Order is subject to rational basis review, which it satisfies. Third, the Court concludes that Legacy Church is not likely to succeed on its assembly claim, because the April 11 Order not only is narrowly tailored with sufficient alternatives for Legacy Church to assemble and mitigating a state pandemic is a compelling interest. Fourth, the Court concludes that Legacy Church has not demonstrated that it will suffer irreparable harm in a TRO's absence, it has not demonstrated that the equities weigh in a TRO's favor, and it has not demonstrated that a TRO is in the public interest. Accordingly, the Court denies the TRO. … Footnote 16: The Court does not want its Memorandum Opinion to be read to minimize the importance of faith in people's lives. Certainly religion is the centerpiece of many people's lives, and many individuals may feel as if religion saved their life. But essential services focus on the public as a whole -- essential businesses are essential for the lives of everyone, because they are necessary to ensure public health and welfare."

**Legal Lessons Learned: Public health and welfare prevails over a church's desire to hold large gatherings.**

**Note: See this April 26, 2020 article, "Breaking: Church, Louisville, KY Mayor Reach Agreement in Dispute Over Drive-in Church Services."**

## 13-51

## NJ: RETALIATION - EMS SUPERVISOR FIRED – WOULD NOT GIVE FALSE INFO ON EMT SUING HOSP. FOR SEX HAR.

On April 14, 2020, in Emiliano Rio v. Meadowlands Hospital Medical Center, the Superior Court of New Jersey, Appellative Division, held (3 to 0) that the trial court judge improperly granted the hospital's motion for summary judgement; the EMS Supervisor's retaliation lawsuit may now proceed to trial.

> "Based on our review of the record, we are convinced the motion court erred in its determination plaintiff did not present sufficient evidence establishing the good faith and reasonable basis prerequisite for a LAD retaliatory discharge claim established by our Supreme Court in Carmona v. Resorts International Hotel, Inc., 189 N.J. 354, 372 (2007), and we reverse and remand for further proceedings….The facts proffered by plaintiff, which we accept as true for our analysis of the court's disposition of the summary judgment motion, show defendant attempted to retaliate against Bailey for the filing of her LAD complaint. Following the filing of [Ms.] Bailey's [sexual harassment] complaint, defendant requested plaintiff file a baseless complaint for a restraining order against Bailey; conjure up false complaints about Bailey; and make false statements about her. Those requests constitute an attempt by defendant to commit 'an unlawful employment practice' in violation of N.J.S.A. 10:5-12(d)—retaliation against Bailey for her filing of a sexual harassment complaint."

**Legal Lessons Learned: Employers sued for sexual harassment must be extremely careful in discussions with employees about their dealings with the plaintiff. It is often best to leave this to legal counsel.**

## 13-50

## PA: CORONA VIRUS – POL. CANDIDATE, REAL ESTATE AGENT, GOLF COURSE SHUT DOWN - TRO DENIED

On April 13, 2020, in Friends of Danny Devito, et al. v. Tom Wolf, Governor, Supreme Court of Pennsylvania, Middle District, the Court held (4 to 3), that Governor lawfully declared an Emergency, and he could shut down their businesses: Candidate for PA House of Representatives; real estate agent; public golf course and restaurant.

"Petitioners are four Pennsylvania businesses and one individual seeking extraordinary relief from Governor Wolf's March 19, 2020 order (the 'Executive Order') compelling the closure of the physical operations of all non-life-sustaining business to reduce the spread of the novel coronavirus disease ('COVID-19').The businesses of the Petitioners were classified as non-life-sustaining…. Petitioners suggest that the public interest would best be served by keeping businesses open to maintain the free flow of business. Although they cite to none, we are certain that there are some economists and social scientists who support that policy position. But the policy choice in this emergency was for the Governor and the Secretary to make and so long as the means chosen to meet the emergency are reasonably necessary for the purpose of combating the ravages of COVID-19, it is supported by the police power. The choice made by the Respondents was tailored to the nature of the emergency and utilized a recognized tool, business closures, to enforce social distancing to mitigate and suppress the continued spread of COVID-19.

**Legal Lessons Learned: Governor has broad emergency powers under State statutes.**

Note: See newspaper article on the decision: "Split Pa. Supreme Court rejects latest challenge to Gov. Wolf's coronavirus business shutdown order,"

## 13-49

## KS: CORONA VIRUS – STATE LEGISLATIVE COMMITTEE CAN'T OVERRULE GOVERNOR'S LIMITS 10 PEOPLE

On April 11, 2020, in Governor Laura Kelly v. Legislative Coordinating Council, Kansas House of Representatives, and Kansas Senate, the Kansas Supreme Court held (7 to 0) that the Legislative Council cannot revoke an Executive Order of the Governor. On April 8, the LCC convened pursuant to HCR5025. By 5-to-2vote, it revoked Executive Order 20-18.

"On April 7, Governor Kelly used her K.S.A. 2019 Supp. 48-925(b) powers to issue Executive Order 20-18, relating to her March 12 emergency proclamation. Among other things, it temporarily prohibited, subject to several exemptions, 'mass gatherings,' defined as 'any planned or spontaneous, public or private event[s] or convening[s] that will bring together or [are] likely to bring together more than 10 people in a confined or enclosed space at the same time.' Executive Order 20-18 rescinded and replaced an earlier, substantially similar executive order. But Executive Order 20-18 differed in that it removed '[r]eligious gatherings' and '[f]unreal or memorial services or ceremonies' from the list of 'activities or facilities' exempt from the temporary prohibition of mass gatherings…. The Court has considered and grants in part the Governor's Petition in Quo Warranto. The LCC's purported revocation of Executive Order20-18 on April 8 was a nullity, because the LCC lacked authority do so under HCR5025's terms."

**Legal Lessons Learned: A Legislative Committee does not have power to overturn Governor.**

Note: See the April 12, 2020 article about this decision: **"**Kansas Supreme Court Upholds Governor's Order Limiting The Size Of Easter Services."

## 13-48

# TX: EMS CHECKED OUT OVERDOSE PATIENT AT SCENE – HIT HIS HEAD 40+ POLICE CRUISER GOING JAIL – DIED - EMS IMMUNITY, NOT PD

On April 9, 2020, in Kathy Dyer & Robert Dyer v. Richard Houston, et al., the U.S. Court of Appeals for the 5th Circuit (New Orleans), held (3 to 0) that the U.S. District Court judge properly granted the paramedics' motion to dismiss on the basis of qualified immunity; there was no proof of "deliberate indifference." Court, however, reinstated the lawsuit against the police officers since patient hit his head over 40 times in the back seat of a police cruiser.

> "We agree with the district court that the Dyers' complaint fails to allege facts that plausibly show the Paramedics' deliberate indifference. The thrust of the complaint is that, after examining Graham [Dyer] and observing his head injury and drug-induced behavior, the Paramedics should have provided additional care—such as sending Graham to the hospital, accompanying him to jail, providing 'further assessment or monitoring,' or sedating him. At most, these are allegations that the Paramedics acted with negligence in not taking further steps to treat Graham after examining him. Our cases have consistently recognized, however, that 'deliberate indifference cannot be inferred merely from a negligent or even a grossly negligent response to a substantial risk of serious harm.'"

**Legal Lessons Learned: Qualified immunity is an important legal protection for emergency responders, but it is not "absolute" immunity.**

> Note: Lawsuit against police officers will proceed. Court wrote: "By contrast, in this case a reasonable jury could find that (1) Graham violently bashed his head against the interior of Officer Heidelburg's patrol car over 40 times while en route to jail; (2) Officers Heidelburg, Gafford, and Scott were fully aware of Graham's actions and of their serious danger; (3) the Officers sought no medical attention for Graham; and (4) upon arriving at jail, the Officers failed to inform jail officials what Graham had done to himself, telling them only that Graham had been 'medically cleared' at the scene. From this evidence, a reasonable jury could conclude that the Officers 'were either aware or should have been aware, because it was so obvious, of an unjustifiably high risk to [Graham's] health,' did nothing to seek medical attention, and even misstated the severity of Graham's condition to those who could have sought help."

## 13-47

# CA: CORONA VIRUS – LOS ANGELES MAYOR SHUTS DOWN GUN SHOPS – GOVERNOR / SHERIFF HAD NOT - TRO DENIED

On April 6, 2020, in Adam Brandy v. Alex Villanueva, et al., U.S. District Court Judge Andrew Birotte, Jr. held that Los Angeles Mayor Eric Garcetti has the power to shut down gun stores as non-essential businesses in the city. The Governor on March 19, 2020 had issued an order that

left the decision on gun shops to County Sheriffs. On March 24, 2020, Sheriff Villanueva of LA County ordered all gun shops closed, but he later changed his opinion and declared them an essential business. Federal judge denied gun shop owners' motion for a Temporary Restraining Order.

> "Moreover, because this disease spreads '[a]n affects person coughs, sneezes or otherwise expels aerosolized droplets containing the virus,'… the closure on non-essential businesses, including firearms and ammunition retailers, reasonably fits the City's and County's stated objective of reducing the spread of this disease. Plaintiffs fail to demonstrate a likelihood of success on the merits of the Second Amendment claim against the County and City orders."

**Legal Lessons Learned: TRO denied since Mayor's orders are based on emergency.**

Note: See April 14, 2020 article on LA Superior Court judge's decision, forcing gun stores to remain closed, "Coronavirus: Judge upholds LA city order to close gun stores."

## 13-46

## FL: DEPUTY SHERIFF ORDERED CPR STOPPED – HANGING - LAWSUIT TO CONTINUE, NO QUALIFIED IMMUNITY

On March 25, 2020, in Jolene Waldron v. Gregory Spicher, Deputy, the U.S. Court of Appeals for Eleventh Circuit (Atlanta), held (3 to 0) that the trial court properly denied Deputy Sheriff's motion to dismiss the case based on qualified immunity. The lawsuit may proceed, but mother of the deceased has very difficult burden to proving to a jury that the Deputy was not only reckless, but that he intended to cause death of her son.

> "Several minutes later, a fire truck and an ambulance arrived. Three paramedics—later identified as David Warren, Christensen, and Grisales—attempted to attend to Ybarra, but Spicher only allowed Warren to do so to 'confirm the patient's status.' Warren testified that Spicher told him to 'not touch the patient very much because this was . . . a crime scene.' Warren noted that Ybarra was 'severely cyanotic and unresponsive' and his neck was elongated. He assessed Ybarra with a Glasgow Coma Score of one in eyes, verbal, and motor, which was consistent with a deceased person's score. Warren hooked up Ybarra to a heart monitor and noted a heart rate of 24 beats per minute, which he testified indicated organized electrical activity in the heart inconsistent with death. Warren called for Spicher to retrieve Lieutenant Christensen, but Spicher was on the phone and did not hear him, so Warren shouted louder, which finally brought Christiansen over. The two immediately recontinued CPR and began 'manual C-spine immobilization,' which was meant to hold Ybarra's spine in line. Ybarra was then transported to the hospital, where he died a week later.
>
> ***
>
> In this opinion, we have held that…Waldron cannot demonstrate that Spicher violated clearly established substantive due process rights without proving more than that Spicher acted with deliberate indifference or recklessness. But we have also held that, if the jury should find that Spicher acted for the purpose of causing harm to Ybarra, Waldron would have proved a violation of clearly established substantive due process rights."

**Legal Lessons Learned: Terrible conduct by Deputy Sheriff, but plaintiff must now prove Deputy intended to harm the victim. Hopefully this case settles prior to jury trial.**

## 13-45

## IL: OFF-DUTY PARAMEDIC - IN HOT TUB WITH FEMALE - SHE INJURED HEAD WHEN SLIPPED BATHROOM – CANNOT SUE CITY

On Feb. 28, 2020, in Kylie Didonato v. Tim Panatera and City of Chicago, U.S. District Court Judge Virginia M. Kendall, Northern District of Illinois (Eastern Division), granted the motions to dismiss by the paramedic and the city.

> "As this Court noted before, DiDonato's claim is that Panatera failed to do anything more than wrap her head in a towel and that he denied her proper medical care by failing to call 911 or taking her to a hospital for emergency care. (Dkt. 37 at 10; Dkt. 51 at 4; Dkt. 52 at 3). This inaction, as DiDonato has alleged it, relates more to Panatera's role as a bystander than a paramedic, and actions unrelated to a state actor's official duties are not taken under color of law."

**Legal Lessons Learned: The Court had previously given plaintiff and opportunity to file an amended complaint: Aug. 20, 2019. The case may now go back to State court on her claims against the paramedic (not the city) for negligence, assault, battery, and willful and wanton misconduct.**

## 13-44

## NC: PARAMEDIC FIRED – ET TUBE PLACEMENT, MEDS – EMS BOARD REDUCED TO EMT-B – NOT RACE DISCRIMINATION

On Feb. 11, 2020, in Danny Cade v. County of Bladen, U.S. District Court Judge Louise W. Flannigan, Eastern District of North Carolina (Western Division), granted the County's motion for summary judgment, dismissing the race-discrimination lawsuit.

> "Defendant meets its burden by coming forward with legitimate nondiscriminatory reasons for plaintiff's suspension and termination. Bowman testified that, on January 27, 2017, plaintiff failed properly to use an endotracheal tube to help the patient breathe. (Bowman Dep. (DE 40-3, 43-3) 41:5-43:15, 48:16-49:10, 52:6-25). Bowman asked if any medication had been given, plaintiff responded he had administered two epinephrine pills, though all the epinephrine pills were still in the bag. (Bowman Dep. (DE 40-3, 43-3)

> 43:16-44:4, 48:9-15). Bowman testified that plaintiff failed properly to take a diagnostic of the patient's heart. (Bowman Dep. (DE 40-3, 43-3) 46:14-22, 59:1-11). Singletary, who was also on the call with plaintiff, and Bowman both filed reports identifying deficiencies in the care administered by plaintiff to the patient. (Cade Dep. (DE 40-2) Ex. 12, 13). *** A peer review committee was convened to review the call and determined that a state investigation was necessary regarding whether plaintiff failed to follow proper treatment protocol, negligently performed his duties, and falsified patient records. (Cade Dep. (DE 40-2) Ex. 15). Defendant suspended plaintiff without pay pending investigation of these issues by the state, and it explained that plaintiff's continued employed with the state would be contingent on the state findings of investigation. (Cade Dep. (DE 40-2) Ex. 15, 16). The state investigation [by North Carolina Office of Emergency Medical Services] found numerous deficiencies in plaintiff's performance on the job, determined that plaintiff falsified details of the call, and revoked plaintiff's EMT-P credential. (Cade Dep. (DE 40-2) Ex. 20). Relying on the same factual findings as the state, defendant terminated plaintiff's employment for violating county policy. (Cade Dep. (DE 40-2) Ex. 21, 22)."

**Legal Lessons Learned: The EMS Department properly notified State EMS Board of serious violations of protocol; suspended Medic and awaited state investigation before terminating the Medic.**

## 13-43

## TN: COMBATIVE PATIENT – PD RESTRAINED PATIENT - EMS USED SUCCINYLCHOLINE – QUALIFIED IMMUNITY, FOLLOWED PROTOCOL

On Jan. 21, 2020, in Estate of Dustin Barnwell v. Mitchell Grigsby, et al., the U.S. Court of Appeals for the Sixth Circuit (Cincinnati, OH) held 3 to 0 that the U.S. District Court judge, after three days of trial before a jury, properly dismissed the lawsuit against police and paramedics.

> "After three days of trial, the district court found that the defendants' entitlement to qualified immunity resolved the ultimate issue in the case: whether administration of succinylcholine to Barnwell constituted constitutionally-impermissible excessive force. The district court properly viewed the evidence in the light most favorable to Gilmore and found that there was no legally sufficient basis fora reasonable jury to find for Gilmore on the ultimate issue in the case."

**Legal Lessons Learned: Thoroughly document details about the combative patient, and protocol on meds administered was followed.**

## 13-42

## GA: EMT – OBJECTED WHEN TOLD TO FALSIFY PATIENTS CAN'T WALK – LATER FIRED, DIDN'T INFORM DIR. 2nd EMS JOB – NO RETALIATION

On Jan. 3, 2020, in Jamie Nesbitt v. Chandler County, GA, d.b.a. Chandler County Ambulance Service, the U.S. Court of Appeals for the 11th Circuit (Atlanta) held 3 to 0 that the U.S. District Court judge properly dismissed the EMT's False Claims Act lawsuit claiming retaliation. He was fired for having an undisclosed second job working for a private ambulance company; no proof that "but for" his being a whistleblower he would have been fired.

> "According to Nesbitt, when Greer became the deputy director he started pressuring the EMTs to write in their report narratives that patients were unable to walk, even if they could. That way Medicare would pay for more trips. Nesbitt believed that Greer was asking him to commit fraud, so he began complaining to Greer himself and other County officials. *** The County had a policy prohibiting EMTs from working side jobs without the approval of the ambulance service director. Greer was not the director, David Moore was. Nesbitt assumed that Moore somehow knew about his other job, but there's no evidence that Moore did know about it, much less that he approved it."

## 13-41

## FL: HIGH SCHOOL FOOTBALL – HEAT EXHAUSTION / DIED - COACH DELAYED CALLING 911 – NO LIABILITY, LACK REQUISITE CONTROL

On Jan. 2, 2019, in Laurie Alice Giordano v. The School Board of Lee County, Florida and James Delgado, U.S. District Court Judge John E. Steele, U.S. District Court, Middle District of Florida (Fort Myers Division), granted defendants motion to dismiss.

> "Mere compulsory attendance at a public school does not give rise to a constitutional duty of protection under the Due Process Clause because public schools generally lack the requisite control over children to impose such a duty of care upon these institutions."

**Legal Lesson Learned: Football and other athletic coaches need training in signs of serious illness, and need to promptly call 911.**

## 13-40

## TX: POTHOLE - MOTORCYCLIST INJURED – DIDN'T INFORM CITY OF POTHOLE - EMS RUN RPT. NOT "ACTUAL NOTICE" – CASE DISMISSED

On Dec. 31, 2019, in City of Houston v. Elvin D. Miller, the Court of Appeals for the First District of Texas, held (3 to 0) that the trial judge should have dismissed this lawsuit.

> "Accordingly, we hold that Miller has not demonstrated that the City was subjectively aware of its fault in producing or causing his injuries such that it had actual notice of his claims prior to the jurisdictional deadline for giving notice of his claims."

**Legal Lessons Learned: If EMS respond to serious accident and patient advises it was caused by pothole, notify the city immediately of the pothole so it can be filled and similar injuries avoided.**

## 13-39

## LA: PARAMEDIC LETTER TO BOARD – NEED POLICY CHANGES – FIRED 19 MOS. LATER – FALSIFYING TRAINING RECORDS – NO RETALIATION

On Dec. 17, 2019, in Patrick A. Benefield; Brian Scott Warren v. Joe D. Magee, the U.S. Court of Appeals for the 5th Circuit (New Orleans) held (3 to 0) that Benefield's "Free Speech" claim may proceed in U.S. District Court in Louisiana.

> "The issues, therefore, are (1) whether Warren's speech was on a matter of public concern and (2) whether his June 2015 letter was a substantial or motivating factor for his firing. We agree with Magee [EMS Manager] that Warren failed to allege a sufficient causal connection between his letter and his firing…. Warren sent his letter in June 2015 and was fired in January 2017—a 19-month gap…. Thus, the timing, by itself, between Warren's speech and his firing is not close enough to permit a plausible inference that Warren's firing was causally connected to his speech."

**Legal Lessons Learned: While the EMS Manager won his appeal and he is now dismissed from the lawsuit by Warren, the lawsuit by Benefield may now proceed.**

## 13-38

## WV: DRAG RACING / SON EJECTED – MOTHER RN / FLIGHT NURSE - PD STOPS HER CARE SON; MEDICS DIDN'T TAKE PULSE – CASE PROCEED

On Dec. 5, 2019, in Amy Brown, individually and Administratrix of the Estate of James Brady Leonard v. Mason County Commission, Gallia County Board of Commissioners, et al., U.S. District Court Judge Robert Chambers, Southern District of West Virginia (Huntington Division), the lawsuit against the Deputy Sheriff may proceed.

> "Taken as true, the conduct [by County Deputy Sheriff] alleged here is certainly more than 'merely annoying' or 'uncivil.' A jury could very well determine that physically restraining a mother attempting to provide medical assistance to her son is utterly intolerable in a civilized community. *See Travis*, 504 S.E.2d at 425. It would be similarly

> reasonable for a jury to determine that Bryant acted recklessly, that his actions caused Plaintiff to suffer emotional distress, and that her distress was so severe that no reasonable person could be expected to endure it. It follows that Plaintiff has pleaded sufficient facts to state a claim for relief under an [Intentional Infliction of Emotional Distress] theory.
> ***
> Gallia County EMS is not entitled to dismissal. As discussed in the preceding section, Plaintiff alleges that Elliott and Turner—both Gallia County EMS responders—did not check Leonard's pulse, his breathing, or his body for injuries, and that they pronounced him dead without following proper procedures."

**Legal Lessons Learned: The lawsuit will now proceed; hopefully the EMS run report by the two Gallia County EMS reflects they followed their protocol prior to deciding the victim was dead at the scene.**

## 13-37

## OH: EMS RUN REPORT – DRIVER ADMITTED DRINKING WINE – TWO MEDICS TESTIFIED IN VEHICULAR HOMICIDE TRIAL

On Nov. 15, 2019, in State of Ohio v. Kathy J. Smith, the Court of Appeals of Ohio, Second Appellate District (Greene County) held (3 to 0) that defendant's appeal is denied, and she must continue to serve her seven-year sentence for aggravated vehicular homicide.

> "On appeal, Smith argues that her statements to the paramedics about drinking were analogous to the written record of those statements in the EMS run sheet. But regardless of whether the run sheet itself might or might not qualify by statute as a 'medical record,' we are unpersuaded that the Fourth Amendment precluded Meadows from speaking to the paramedics without a warrant and hearing what Smith told them about consuming alcohol. The trial court correctly found that Smith was not in law-enforcement custody when she made her voluntary statements in response to the paramedics' questions. We note too that Smith's statements were not entitled to a statutory privilege."

**Legal Lessons Learned: EMS should record on EMS Run Report comments by patients about drinking alcohol prior to the accident, and other culpable admissions.**

## 13-36

## IN: OPERATOR PRIVATE AMBUL. CO. INDICTED – DIALYSIS PATIENT TRANSPORTS – IMPROPERLY BILLED MEDICARE

On Nov. 15, 2019, in United States v. Basil Ubanwa, U.S. District Court of Northern District of Indiana, Chief Judge Theresa L. Springmann denied defense motion to dismiss the indictment.

> "[FBI] Agent Pawelko testified as follows: Based on—based on the people we had spoken to and the things we've reviewed, it does appear that, number one, the majority of

people that Northwest was transporting during the time of our investigation were patients being transported to and from dialysis, which is a form of - it's a nonemergency transportation. And so far, what we've seen does support the allegation that they are transporting patients who do not qualify for this type of transportation. There's many indicators that these patients are capable of being transported to dialysis and other places by different means.

***

Carlos Trevino, an Emergency Medical Technician and employee of Northwest Ambulance, was then called to testify before the Grand Jury. Ex. C, pp. 2, 5-6, ECF No. 25-3. In essence, Trevino testified that the Defendant directed his employees to alter and fabricate documents so that Medicare would reimburse Northwest Ambulance for transporting patients who did not qualify for ambulance transportation. *See*, *e.g.*, *id*. at 12, 24-27, 44-45, 52. The Prosecutor also discussed various patients that Northwest Ambulance had transported, and Trevino offered his opinion on whether those patients qualified for transport under the applicable Medicare regulations. *Id*. at 29, 31, 34. The Prosecutor also asked Trevino the following question: "how many millions of dollars was paid out by Medicaid for the transportation of [the] patients?" *Id*. at 54. Trevino responded that he did not know. *Id*. The Prosecutor then asked a follow up question: "Would it surprise you to know it's 3 or 4 million dollars?" *Id*. Trevino answered, "That is surprising, yes." *Id*.

**Legal Lessons Learned: Federal government continues widespread investigation of Medicare fraud. "First established in March 2007, Strike Force teams currently operate in the following areas: Miami, Florida; Los Angeles, California; Detroit, Michigan; Houston, Texas; Brooklyn, New York; Baton Rouge and New Orleans, Louisiana; Tampa and Orlando, Florida; Chicago, Illinois; Dallas, Texas; Washington, D.C.; Newark, New Jersey/Philadelphia, Pennsylvania; and the Appalachian Region."**

## 13-35

## NY: UNCONSCIOUS PATIENT – 37 MIN. DELAY - PD RE-DIRECTED TO ANOTHER PATIENT – PATIENT DIED - LAWSUIT MAY PROCEED

On Nov. 7, 2019, in Michael Mannino, as Administrator of the Estate of Carmen Mannino v. The City of New York, Supreme Court of New York, New York County (Part 5), Justice Verna L. Saunders, denied the City's motion for summary judgment.

"Moreover, it is clear from the facts presented that reasonable minds may differ as to whether the dispatcher made the appropriate inquires in order to dispatch the most suitable unit to plaintiff's home; whether the thirty-seven minutes that elapsed between Mr. Mannino's first 911 call and FDNY's ultimate arrival to his home constitutes a breach of duty where Mr. Mannino called 911 three times and was never informed that there was a delay due to the initial ambulance being stopped by NYPD; and finally, whether plaintiff's reliance on the statements of the dispatcher was reasonable where on three separate occasions he informed the 911 of dispatch of his wife's condition and each

> time was told that 'they will take care of it.' The City's assertion in reply, that plaintiff did not report to the dispatcher his wife's "deteriorating" condition is without merit as it is the dispatcher who elicits relevant information through questioning. Furthermore, the information provided to the dispatcher over the course of the multiple 911 calls resulted in plaintiff's priority increasing with each call, with the final call being given top priority and an ALS unit assignment.

**Legal Lessons Learned: If an ambulance is re-directed on another run, dispatch should inform the 911 caller of the delay.**

## 13-34

## MD: CARDIAC RUN - PATIENT WALKED TO AMBULANCE, TO WHEELCHAIR - $3.7M JURY REVERSED - NOT "GROSS NEGLIENCE"

On Aug. 16, 2019, in Joseph Strackle, et al. v. Estate of Kerry Butler, Jr., the Maryland Court of Appeals (4 to 3), reversed the Court of Special Appeals, and agreed with the trial judge that the paramedics were not grossly negligent. Plaintiff alleged breach of City of Baltimore FD protocol when the patient walked from his home to the ambulance, and upon arrival at hospital walked from ambulance to wheelchair. The jury verdict of $3,707,000 was set aside by the trial judge, but reinstated by the Special Court of Appeals; the paramedics appealed to Maryland Court of Appeals, which set aside the jury verdict.

> "Petitioners [paramedics] assessed the patient, took his vitals, and promptly transported him to the nearest hospital within approximately seven minutes of first arriving on the scene. Based on the evidence presented at trial, the jury could not have found that Petitioners were grossly negligent by a preponderance of the evidence. We further conclude that Cts. & Jud. Proc. § 5-604(a) unambiguously confers immunity upon municipal fire departments in simple negligence claims. *** Finally, the practical implications of holding otherwise cannot be overstated. Concluding that Petitioners were grossly negligent would have a negative impact on not only the number of individuals who seek employment as first responders in the future, but would create a chilling effect on their conduct. First responders must have broad discretion to proceed in their assessment and treatment of patients without the fear of liability. *** We conclude that there was not sufficient evidence to establish that Petitioners [paramedics] committed gross negligence. The mere fact that Petitioners inaccurately diagnosed and treated their patient does not elevate their conduct to gross negligence.

**Legal Lessons Learned: Follow your Protocols, and on cardiac run if the patient will not wait to get on the cot, or upon arrival at hospital insists on walking out of the ambulance to the wheelchair, thoroughly document the facts.**

## 13-33

## LA: BLACK EMS CAPT. – NITROGLYCERIN WAS FOR MOUTH, NOT CHEST – SUSPENSION / REMEDIATION PROPER - NOT RACE / GENDER

On Sept. 17, 2019, in Deborah Mills v. City of Shreveport, U.S. District Court Judge Terry A. Doughty, U.S. District Court of Louisiana, Western District, Shreveport Division, dismissed her claim of "hostile work atmosphere." He had previously dismissed her race and gender discrimination claims.

> "While Mills may subjectively believe that she has been treated differently and more harshly because of her race and/or gender, neither her subjective belief or that of others is enough to present this case to a jury. The Court finds that Mills has presented no genuine issue of material fact regarding whether she was subjected to harassment based on race or gender, and therefore she has failed to present a *prima facie* case for a hostile work environment under Title VII. Therefore, the Court GRANTS the City's Motion for Summary Judgment on this remaining claim."

On June 21, 2019, here other claims of race and gender discrimination were dismissed.

**Legal Lessons Learned: EMS protocols must be followed, and suspension / remediation training is an appropriate corrective action. [Also filed, Chap. 8, Race Discrimination.]**

## 13-32

## OK: EMS HELD BACK FROM PD SHOOTING FOR 12 MINUTES – CONFIRM SCENE SECURE - QUALIFIED IMMUNITY

On Sept. 6, 2019, in Briena Crittenden, as personal representative of estate of Joshua P. Crittenden v. City of Tahlequah, Officer Randy Tanner, et al., the U.S. Court of Appeals for the 10th District (Denver) held (3 to 0) that U.S. District Court judge properly granted summary judgment to the police officers and the City.

Circuit Judge Michael R, Murphy wrote:

> "There is no precedent supporting the notion that police officers have an affirmative duty to provide immediate medical care in situations such as the instant case. See Wilson v. Meeks, 52 F.3d1547, 1556 (10thCir.1995), abrogated on other grounds by Saucier v. Katz, 533 U.S.194 (2001). In Wilson, after a police officer shot a man holding a gun, other officers handcuffed the victim before medical help arrived. Id. The officers did not provide medical care or first aid before EMS arrived. Id. The victim's estate alleged the officers interfered with EMS by refusing to remove the handcuffs upon request.Id. This court, applying the Fourteenth Amendment deliberate indifference standard, held that neither the handcuffing nor the refusal to remove the handcuffs amounted to a constitutional violation. Id. Further, Wilson refused to hold that the Due Process Clause establishes an affirmative duty on police officers to provide medical care (even something as basic as CPR), in any and all circumstances, or to render first aid."

**Legal Lessons Learned: Police enjoy qualified immunity, particularly where EMS is held back while scene is secured. EMS should document reasons for delay, and subsequent medical care provided.**

See my case analysis in the September 2019 Fire & EMS Newsletter on Oklahoma's EMS worker at a shooting crime scene.

## 13-31

## GA: SOFT RESTRAINTS - MANIC EPISODE - POLICE VIDEOS SHOW NEED FOR RESTRAINTS - QUALIFIED IMMUNITY

On Aug. 29, 2019, in Kimberly Ellison v. Kenneth Hobbs, et al., the U.S. Court of Appeals for the 11th District (Atlanta), held (3 to 0) in an unpublished decision, that U.S. District Court judge had properly granted summary judgment to all EMS and Police.

> The court held:
> "[C]ontrary to Ellison's contentions, the use of soft restraints is a tool available to Paramedic Gasaway and EMT Howard in performing their job-related functions. See Davenport, 906 F.3d at 940. Thus, because Paramedic Gasaway's and EMT Howard's actions were not outside their 'arsenal' of powers, they acted within their discretionary authority."

**Legal Lessons Learned: Thanks to officer's video cameras, both the U.S. District Court judge, and the Court of Appeals, had a "minute by minute" view of what occurred in getting this patient [who is a practicing attorney] out of her apartment and to the hospital.**

See my case analysis in the September 2019 Fire & EMS Newsletter regarding the Georgia Court of Appeals decision concerning the use of soft restraints.

## 13-30

## IL: STROKE PATIENT WHO RAN OUT HOME – EMS TACKLED ON DRIVEWAY - LAWSUIT PROCEED, FACTS IN DISPUTE

On Aug. 28, 2019, in Douglas Johnson v. City of East Peoria, et al., U.S. District Court judge James E. Shadid, Central District of Illinois, Case No. 17-cv-1212-JES-JEH, denied motion for summary judgment by the City and several paramedics; pre-trial discovery may now proceed unless they take an immediate appeal.

> Judge Shadid wrote:
>
> > "Between the bottom of the stairs and the front door, Plaintiff's pants began to fall down and Defendant Sauder attempted to pull them up. (Docs. 37 at 8, 42 at 10). Plaintiff turned at least the top half of his body in a manner Defendants Riggenbach and Sauder state they found aggressive. (Docs. 37 at 8, 42 at 10). He then ran out the front door, down the front steps, and into the driveway, falling

three times as he ran. *** What happened next is disputed in large part, but the parties agree that Defendant Sauder bear-hugged Plaintiff, both Defendant Sauder and Plaintiff ended up on the ground, and Defendants Duckworth, Riggenbach, and Sauder, along with Knaus, restrained Plaintiff on the ground.

***

However, Plaintiff is correct that the state-created danger theory is not duplicative of his other claims. See Monfils v. Taylor, 165 F.3d 511, 515–517 (7th Cir. 1998) (recognizing the existence of a substantive due process claim for a state-created danger)….Therefore, Plaintiff's due process claim survives summary judgment on the state-created danger theory alone."

**Legal Lessons Learned: On an EMS run where there is a struggle with the patient, thoroughly documents on EMS run report the actions taken by each medic. This will help avoid "facts in dispute" in any subsequent civil lawsuit, and any prosecution for assault.**

## 13-29

## MI: GURNEY TIPPED – LAWSUIT TO PROCEED - EMS DIDN'T TELL HOSPITAL OR DOCUMENT – X-RAYS SHOWED NECK FRACTURES

On Aug. 27, 2019, in Estate of Ralph Brown, by Victoria Brown, Personal Representative v. Sean Wolan and Jeffrey Vescio, the Michigan Court of Appeals, held (2 to 1) in an unpublished opinion, that the trial court judge properly denied the two paramedics' governmental immunity motion to dismiss.

The 2-judge majority held:

"The failure to report the incident has additional import on the issue of whether the conduct of the defendants was grossly negligent. They had an undisputed duty to make such a report. Indeed, Vescio acknowledged in his deposition that the incident should have been reported. Vescio testified that Wolan was responsible for documenting the ambulance run and communicating information to the ER staff. Wolan explained that he did not report or document the incident because he did not believe the decedent had been injured. To the contrary, Everlove [expert witness] testified that the reporting of the incident, regardless of the paramedics' assessment of injury, was crucial to patient care at the hospital. Additionally, the veracity of Wolan's testimony regarding his belief that there was no injury is belied by his partner Vescio's description of the incident in his e-mail to his supervisors where he reported that, 'the patient [was] hanging sideways reaching out while remaining belted onto the stretcher.' A rational juror thus could believe that the EMTs did not assess the patient and failed to even report the indecent to those charged with the patient's medical care or record the incident in the transport record that would have been used by the hospital staff to inform patient care decisions. On this record, a reasonable juror could determine that the EMTs showed 'a substantial lack of concern for whether an injury results.' Defendants' failure in regards to reporting cannot be considered accidental."

**Legal Lessons Learned:** **When "things go bad" on a run, inform hospital and supervisors and document on EMS run report.**

## 13-28

## IN: UNRESP. DRIVER – DRIVES OFF WHEN MEDIC SEES REVOLVER – CONV. WITHOUT GUN FOUND – MEDIC'S FIREARM KNOWLEDGE

On July 15, 2019, in Evan Michael Sapp v. State of Indiana, the Court of Appeals (3 to 0) upheld the jury's conviction, even though no firearm was ever recovered. He received 12-year sentence as a serious violent felon, based on prior burglary conviction.

> "We likewise reject Sapp's broader argument that no reasonable trier of fact could have found from the evidence presented that what Osborne saw was a firearm (i.e., not a toy). Osborne, who had decades of experience with guns, testified in considerable detail about the gun that he saw, including its color, that it was a revolver, similar to one he owned, and had a 'trap door' feature consistent with small caliber pistols. Transcript Vol. II at 232, 235. He also said that, when he saw it, he did not think it was a toy and, in fact, was afraid for his safety when Sapp appeared to be reaching for it."

**Legal Lessons Learned: Paramedic's long experience with firearms, and his written report to police shortly after the EMS run, were powerful evidence.**

> Note: Under prior Indiana case law, a firearm does not need to be recovered to convict for unlawful possession.
>
> > "Sapp acknowledges that our courts have sustained a conviction in circumstances when the firearm was not located after the defendant's arrest but urges that, unlike where a defendant displayed or used a weapon, he did nothing "to signify or imply that the item [in his truck]was a 'firearm.'" Id. at 5. We disagree… Footnote 1: See e.g., Gray v. State, 903 N.E.2d 940, 943 (Ind. 2009).

## 13-27

## CA: FLIGHT PARAM. KILLED HELICOPTER CRASH – ONLY WORKERS COMP - CAN'T SUE HELICOPTER CO. - "SPECIAL EMPLOYEE"

On May 24, 2019, in Brooke Juarez v. Rogers Helicopters, Inc., et al., the Court of Appeals for California, Fifth Appellate District, held (3 to 0) in an unpublished decision, the trial court properly granted summary judgment to the helicopter company; the deceased paramedic was a "general employee" of American Airborne company, and a "special employee" of Rogers Helicopter, and therefore workers compensation was the sole remedy for the wife of the deceased paramedic.

> "In sum, based on the facts and circumstances of this case, since SkyLife was Juarez's special employer, SkyLife's general partners, American Airborne and Rogers Helicopters, are also Juarez's special employers. As such, respondents are all immune from tort liability and the trial court properly granted summary judgment in their favor."

**Legal Lessons Learned: Flight paramedics may be considered "dual employees" in many states; and workers comp. is their sole remedy for injury or death in those states.**

See article on the 2017 helicopter crash in Fresno County, California.

See trial court's 2017 summary judgment decision regarding the helicopter crash.

See this article about air care helicopter crashes, "EMS Helicopter Crashes Raise Complex Liability Issues":

> "Of course, if the crash was caused by a defect in the helicopter, the crew case may proceed against the helicopter manufacturer. But there are legal challenges to be overcome there as well. A federal statute of repose known as the General Aviation Revitalization Act, or GARA, bars claims against the manufacturer if the helicopter is older than 18 years. And beneath their shiny paint, most of the helicopters now in service date back to the 1970s. (In case you're wondering, GARA protects not just US helicopter manufacturers, but foreign helicopter manufacturers too.)"

See my case analysis in the June 2019 Fire & EMS Newsletter regarding the Fresno County EMS helicopter death.

## 13-26

## KY: DRIVER / POSS. STROKE - REFUSED TREATMENT - PD TOOK HIM TO McDonalds – KILLED WALKING HWY – QUALIF. IMMUNITY

On May 24, 2019, in Lisa K. Williams v. City of Georgetown, KY, et al., the U.S. Court of Appeals for 6th Circuit, in an unpublished opinion, held (2 to 1).

> "This case presents tragic facts without a legal remedy. *** Although it is true that 'an officer's duty exists even after the custodial relationship has ended,' Davis, 143 F.3d at1025, it does not extend in perpetuity. Plaintiff admits that the officers concluded Burns was not a danger to himself or others. Calling an ambulance and giving Burns a ride to McDonald's does not strike us as the deliberate indifference described in Davis. 143 F.3d at1027; see also Salyers, 534 F. App'x at 460. There was no constitutional violation."

**Legal Lessons Learned: Fire & EMS Departments should have a written policy about patient refusals that includes handling situations where the individual can not be safely left at the scene (such as MVA, with no ride home).**

See the link to the Policy on "High Risk" and "Low Risk" refusals.

## 13-25

## CA: CHILD CHOKING, MOTHER CALLED 911 - ONLY SPOKE SPANISH – IMMUNITY - NO REQ. THAT DISPATCHERS MUST SPEAK SPANISH

On May 20, 2019, in Dylan Tellez v. City of Pomona, the Court Of Appeal of California, Second Appellate District / Division One held (3 to 0) in an unpublished decision, that the lawsuit against the City of Pomona was properly dismissed by the trial court.

> "That one person fails on an occasion to understand another is an everyday occurrence between even the best intentioned. And it appears from Dylan's allegations that the police officers' decision not to wait for an ambulance saved his life. A city cannot be held liable simply for failure to provide translators in its 911 call centers…."

**Legal Lessons Learned: 911 Centers do not have to employee Spanish-speaking dispatchers. There are translation services available for dispatch centers.**

> See for example: "How to Break the 9-1-1 Language Barrier."
> "According to Gallegos, the LanguageLine system is built into the CAD system, so the ECO just has to push a button to be connected. The LanguageLine is used in call centers statewide and falls under the New Mexico Department of Finance and Administration."

## 13-24

## NY: EMT SUING RESTAURANT - SLIP & FALL ICY SIDEWALK, HELPING PATIENT WHO FELL – MUST PROVE RESTAURANT KNEW ABOUT ICE

On April 5, 2019, in Michael Benny v. Concord Partners 46Stree LLC, Supreme Court of New York, Part 63, 2019 NY Slip Op 30983(U), Judge Tanya R. Kennedy denied the EMT's motion for summary judgment. "Here, the testimony raises factual issues as to the length of time the alleged condition existed and whether the defendants knew about the condition in enough time to remedy the situation. Plaintiff testified that he did not observe any ice prior to his accident, and it is unknown whether the condition was visible and apparent to the defendants."

**Legal Lessons Learned: Lawsuit will now be tried. The "danger invites rescue" doctrine is applicable only in extreme emergency, helping another avoid serious injury or death.**

## 13-23

# MI: PRIVATE AMBULANCES – COUNTY ORDINANCE THAT CO. MUST GET THEIR APPROVAL – FED. JUDGE WILL NOT DECLARE THIS LAWFUL

On March 25, 2019, in Saginaw County v. State Emergency Medical Service, Inc., U.S. District Court Judge Terrence B. Berg, again denied the County's request for a declaratory judgment that its ordinance is lawful and not a restraint of trade under Sherman Antitrust Act. "Plaintiff sought a declaration that their ambulance plan was legal and not in violation of the Sherman Act, among other statutes. But they did not plead adequate facts to show that this is true. The Court made no finding whatever on the question of whether Saginaw County's plan ran afoul of the Sherman Act, it simply concluded that, on the facts as alleged, the Court could not declare as a matter of law that the plan does not violate the Act."

> See also article on this decision in Antitrust News regarding the Saginaw County v. State EMS, Inc.

**Legal Lessons Learned: Competition among private ambulance companies is generally good for patients.**

## 13-22

# HHS OPINION: CLINIC PROVIDE FREE HOME VISITS – CHF / COPD PATIENTS – NOT FED. ANTI-KICKBACK

On March 6, 2019, the HHS Office of Inspector General issued Advisory Opinion No. 19-03.

> "Requestor [clinic] has developed a program to provide free, in-home follow-up care to certain patients who it certifies are at higher risk of admission or readmission to a hospital. Under the Current Arrangement, Requestor offers in-home care to patients with congestive heart failure ('CHF') who qualify for participation, and under the Proposed Arrangement, Requestor would expand the program to qualifying patients with chronic obstructive pulmonary disease ('COPD'). According to Requestor, the goals of both Arrangements are to increase patient compliance with discharge plans, improve patient health, and reduce hospital inpatient admissions and readmissions.

**Legal Lessons Learned: Community Paramedicine programs are rapidly expanding throughout the Nation.**

## 13-21

## PA: ATTEMPTED MURDER CONV. UPHELD - EMT TESTIFIED ABOUT VICTIM'S COMMENTS ABOUT WHO SHOT HIM

On Feb. 22, 2019, in Commonwealth of Pennsylvania v. Gregory Mack, the Superior Court of PA held (3 to 0) that the jury conviction is affirmed. One of the issues on appeal was veracity of the EMT who testified at the criminal trial:

> "Moreover, at trial, the emergency medical technician (EMT) who transported the victim to the hospital testified that the victim told him that his friend shot him; on appeal, Appellant claims the testimony was invalid and lacked veracity because the EMT did not make a record of the conversation or subsequently inform the police of it."

**Legal Lessons Learned: EMS should document a victim's statement concerning who shot him, either on the EMS run report or on a supplemental report. This helps avoid issues on appeal.**

## 13-20

## OH: DUI - BLOOD DRAW BY NURSE UNCONSCIOUS DRIVER LAWFUL - PD NO TIME FOR SEARCH WARRANT

On Feb. 12, 2019 in State of Ohio v. Richard Barnhart, Jr., Court of Appeals of Ohio, Fourth Appellate District – Meigs County, held (3 to 0) that trial court properly allowed into evidence the results of the blood draw. The Court write:

> "[B]ased upon the totality of the circumstances, we conclude that the blood sample obtained from Appellant, which was taken while he was unconscious at the hospital and being prepared for transfer to another facility, was both lawful and constitutionally valid pursuant to Ohio's Implied Consent statute, as well as both the consent and exigent circumstances exceptions to the warrant requirement."

**Legal Lessons Learned: Implied consent statutes are an important part of highway safety.**

## 13-19

## WA: PATIENT WITH CHEST PAIN REFUSED TRANSPORT - FORCIBLY TAKEN TO HOSPITAL – NO QUALIFIED IMMUNITY

On Jan. 11, 2019, in El-Fatih P. Nowell v. Trimmed Ambulance, LLLC, et al, U.S. District Court Judge Robert S. Lasnik (Seattle, WA), denied EMS defendants' motion for summary judgments on most of the allegations of "involuntary detention and transport to a medical facility."

**Legal Lessons Learned: When EMS are faced with the difficult decision on whether to forcibly transport a patient, consider first calling the hospital emergency department and getting medical clearance to transport.**

## 13-18

## OH: 911 DISPATCHES FOR DRUG OVERDOSES –NOT HIPPA PROTECTED UNLESS DISCLOSES PHI

On Dec. 14, 2018, in Rachel L. Dissell v. City of Cleveland, the Ohio Court of Claims appointed a Special Master to advise the Court on request for records by a reporter for the The Plain Dealer newspaper. The Special Master concluded that Computer Aided Dispatch records, including addresses where EMS responded, be released under Ohio Public Records Act. "Upon consideration of the pleadings and attachments, I recommend that the court order respondent to provide requester with a copy of the EMS/Fire CAD event summary records, as submitted under seal."

**Legal Lessons Learned: In producing CAD or other records on EMS calls, be very careful to exclude any "Protected Health Information." If in doubt, advise requester that info is HIPAA protected and will only be revealed to Court under seal.**

## 13-17

## PA: HOSPITAL EMPLOYEE RECORDS HACKED; EMPLOYEES MAY SUE HOSPITAL [also filed, Chap. 6]

On Nov. 21, 2018, in Barbara A. Dittman, et al. v. UPMC d/b/a The University of Pittsburgh Medical Center, et al., the PA Supreme Court ruled (4 to 3), the lawsuit was reinstated against the hospital. "We hold that an employer has a legal duty to exercise reasonable care to safeguard its employees' sensitive personal information stored by the employer on an internet-accessible computer system."

**Legal Lessons Learned: This is an important decision that will now proceed to trial or settlement. Hopefully this decision will prompt employers in PA, and other states, including Fire & EMS agencies, to review their electronic data safeguards with IT experts**.

Note: Ohio has enacted the Ohio Data Protection Act, effective Nov. 2, 2018 (to be in Ohio Revised Code 1354.01-05), which provides companies with an affirmative defense to lawsuits involving release of personal information, if the company has a written cybersecurity program that conforms to the NIST Cybersecurity Framework.

See Sept. 20, 2018 article, "New Ohio law incentivizes businesses that comply with cybersecurity programs."

## 13-16

## OH: PUBLIC RECORDS REQUEST – INCLUDING EMS INJURED ON JOB – CITY'S DELAY UNREASONABLE, PAY $8,812 ATTORNEY FEES

On Nov. 14, 2018, in Cleveland Association Of Rescue Employees – Local 1975 v. City of Cleveland, the Ohio Court of Appeals for Cuyahoga County, held (3 to 0) held that the City must reimburse CARE $8,812.50 in attorney fees.

> "This court finds that the city's failure to respond to the records request by releasing the requested records in this case was unreasonable. The city's two-month delay in producing some of the records and more than five-month delay in producing all the requested records constitutes a failure to respond within a reasonable time."

**Legal Lessons Learned: Public records act statutes require prompt response; political subdivision should promptly produce readily available records, such Fire & EMS job descriptions and certifications.**

## 13-15

## KY: STERNUM RUB ON PATIENT WHO HAD BECOME UNRESPONSIVE – CAN'T SUE EMS FOR ASSAULT

On Oct. 9, 2018, in Troy K. Scheffler v. Alex Lee, et al., the U.S. Court of Appeals flor 6th Circuit (Cincinnati, OH) held (3 to 0) that the U.S. District Court had properly granted summary judgment and dismissed the lawsuit against EMT Michael Carroll.

> "Scheffler consented to medical care by asking to be taken to the hospital and by willingly entering the ambulance with the EMTs, and there is no indication that Scheffler withdrew or limited that consent. Carroll performed the sternum rub as part of that care."

**Legal Lessons Learned: Thoroughly document reasons for a sternum rub, or other medical procedures.**

## 13-14

## NY: FF FELL WHEN AMBUL. BACK STEP NOT LOWERED – ACCIDENTAL DISAB. CLAIM UPHELD [also filed, Chap. 6]

On Sept. 6, 2018, In The Matter Of Gregg A. Loia v. Thomas P. Di Napoli, State Comptroller, the NY Supreme Court, Appellate Division (Third Judicial Department) held (3 to 0) the injured firefighter is entitled to accidental retirement benefits since the back step of the ambulance had not been lowered by EMS personnel, and he suffered an "accident" on the "malfunctioning piece of equipment that was designed, under normal circumstances, to promote safety."

**Legal Lessons Learned: Fire & EMS personnel should document any on the job injury (including, in this case, photos of the ambulance step) and obtain statements from others on the scene. It is unfortunate that a dispute over disability retirement benefits has been in litigation since 2012.**

## 13-13

## NJ: PARAMEDIC STUDENT WAS GIVEN 6-MONTH EXTENSION TO COMPLETE CLINICALS – NO FURTHER EXTENSIONS

On Sept. 4, 2018, in The Matter Of Denial Of Waiver For Alberto Sanchez, the Superior Court of New Jersey, Appellate Division, held (2 to 0 in unpublished opinion) that State EMS Board properly refused to grant an extension of total training time. "Despite obtaining an extension [of six months to complete clinicals], Sanchez failed to timely complete his clinical training by not participating in at least five cardiac arrest resuscitations and not successfully performing at least five defibrillations and synchronized cardioversions. N.J.A.C. 8:41A-2.6(a)(9) and (10). He only participated in three cardiac arrests, and failed to complete any defibrillations or cardioversions. *** The OEMS denied the waiver [of 36-month total training time] request on March 6, 2017, because under N.J.A.C. 8:41A -2.4, his training could not be extended beyond February 6, 2017– thirty-six months of his starting date – and there were public health concerns if he was allowed more time."

**Legal Lesson Learned: Courts are generally very reluctant to overturn decisions of State agencies, such as EMS Boards, regarding the protection of health of the public.**

## 13-12

## OK: VERY EXPENSIVE TRANSPORT BY HELICOPTER – PATIENTS CAN'T SUE, FED. STATUTE

On Aug. 31, 2018, in Susan Schenberger, Lacy Stidman and Johnny Trent v. Air Evac EMS, Inc.and Air Evac EMS, Inc., the U.S. Court of Appeals for the 10th Circuit, held (3 to 0) that the lawsuit was properly dismissed:

> "Like the district court in this case, we have previously recognized that [Airline Deregulation Act] preemption may sometimes produce harsh results for potential plaintiffs seeking redress for perceived unfair treatment by air-ambulance carriers. *See Cox,* 868 F.3d at 906-07. Yet, we felt constrained to observe that '[s]uch policy considerations . . . are beyond the purview of [the courts]' and 'must be addressed to Congress.' *Id.*; *see also Ferrell v. Air EVAC EMS, Inc.,* ___ F.3d ___, No. 17-2554, 2018 WL 3886688, at *3 (8th Cir. Aug. 16, 2018) ('We may not refuse to apply ADA preemption merely because we do not believe it would be sound public policy to enforce the statute Congress enacted.')."

**Legal Lessons Learned: Air ambulance rates, like many other medical charges, can indeed be very expensive, but the remedy is with Congress.**

## 13-11

## NY: ALLERGIC REACTION TO DOG BITE – PATIENT DIED – EMD PROTOCOL WAS NOT FOLLOWED, NO GOV'T IMMUNITY

On August 16, 2018, in Christine Lynch v. Town of Greenburg and Greenburg Police Department Emergency Medical Service, the NY Supreme Court, County of Westchester (Judge Lawrence E. Ecker), denied the defendants' motion for summary judgment. "In fact, despite being told that the decedent was having an allergic reaction to the dog, Marcello acknowledged that he did not consider whether the attack was an allergic attack, verses another form of asthma incident. He also specifically stated that he never considered giving the decedent any medication to address an allergic reaction." The Court also noted poor affidavit from EMS Supervisor:

> "Despite acknowledging that 'this action sounds in medical malpractice' …, defendants do not submit a physician's or EMT expert affirmation specifically addressing the precise medical treatment rendered to the decedent. Instead, defendants rely upon the affidavit of an EMT Supervisor who offers generalized, conclusory statements to the effect that EMS protocols permit EMTs to exercise discretion, without ever addressing any of the specifics of defendants' actions in this case. In fact, the specific protocols are not discussed or explained, the actual medical actions taken by the first responders are not delineated or compared to protocols, specific examples of acts of discretion by the first responders are not provided, and there is no express support for the medical care that was given."

**Legal Lessons Learned: Follow EMS protocol, or explain on EMS run report why the protocol was not followed.**

## 13-10

## IN: SEDATIVE FOR NAKED PATIENT RUNNING IN STREET – DIED -QUALIFIED IMMUNITY FOR EMS

On Aug. 14, 2018, in Billie Thompson v. Lance Cope , 7th Circuit, the Court held (3 to 0),

> "The paramedic is entitled to qualified immunity on the excessive force claim. Case law did not (and does not) clearly establish that a paramedic can violate a patient-arrestee's Fourth Amendment rights by exercising medical judgment to administer a sedative in a medical emergency." Indianapolis police called EMS to help with person found naked, running in street, high on amphetamines, and combative. EMS administered a sedative; patient died 8-days later.

**Legal Lessons Learned: Qualified Immunity protects police, fire, EMS personnel from personal liability.**

See also U.S. Supreme Court's Jan. 7, 2019 decision, in City of Escondido, California v. Mart Emmons, (9 to 0), in a per curiam decision [not authored by a specific Justice], reversed the 9th Circuit without the need to even hear oral argument. The Court held: "As to Officer Craig, the Ninth Circuit also erred. As we have explained many times: 'Qualified immunity attaches when an official's conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'"

## 13-9

## OH: DYING DECLARATION BY VICTIM IN BACK OF AMBULANCE ADMISSIBLE IN MURDER TRIAL [also filed Chap. 1]

On July 25, 2018, in State v. Fred Taylor, 2018-Ohio-2921, the Ohio Court of Appeals for Summit County, upheld (3 to 0) his conviction of felony murder of Javon Knaff.

> "Mr. Knaff's repeated statements concerning the fact that he was dying, coupled with the severity of his condition, demonstrate his awareness of his impending death at the time that he stated, 'Fred shot [me].' Consequently, this statement was admissible as a dying declaration."

**Legal Lessons Learned: Document on your EMS run report the actual words spoken by the patient; a "dying declaration" is admissible in evidence. Recording the comments on your run report can help prosecution reach a plea agreement.**

## 13-8

## LA: FREE SPEECH CASE NOT DISMISSED - TWO PARAMEDICS FIRED AFTER LETTER TO BOARD ABOUT MGT

[also filed, Chap. 6]

On July 18, 2018, in Patrick Alan Benfield & Brian Warren v. Joe Magee, et al., U.S. District Court Judge Elizabeth Foote, Western District of Louisiana, held that a lawsuit by two paramedics fired by Desoto Parish EMS may proceed to trial. They were fired after Warren wrote a letter to a member of the Desoto Parish Police Jury (they appoint the Board of Commissioners of the Desoto Parish EMS). The Judge ruled:

> "The motion [to dismiss] is DENIED as to Warren's free speech claim because the facts alleged establish that his letter was protected speech."

**Legal Lessons Learned: First Amendment free speech cases are increasing being permitted to go to the jury. Fire & EMS Departments should thoroughly document reasons for termination, including employees who serve "at will."**

## 13-7

# KY: EMT WHISTLEBLOWER – ALLEGED TRANSPORTS NOT MEDICALLY NECESSARY – BUT FAILED TO PROVIDE SPECIFICS

On June 21, 2018 in United States of America ex rel. Jessica N. Stripe v. Powell County Fiscal Court, U.S. District Court Judge Karen Caldwell, Lexington, Kentucky, dismissed a "whistleblower" lawsuit by an EMS employee.

> "Stipe was employed in a care provider role as an EMT and she does not allege that her job involved any work related to billing or that it gave her detailed or specialized knowledge of PCFC's billing practices…. Accordingly, Stipe lacks the specialized knowledge necessary to invoke the exception to Rule 9(b)."

**Legal Lessons Learned: Whistleblowers alleging fraudulent "up charging" must include in their complaint specific information about particular EMS runs where Medicare was overbilled. With specifics, the U.S. Attorney can launch an investigation of the complaint that has been filed under seal.**

> See U.S. Department of Justice report: "Of the $3.7 billion in settlements and judgments reported by the government in fiscal year 2017, $3.4 billion related to lawsuits filed under the qui tam provisions of the False Claims Act. During the same period, the government paid out $392 million to the individuals who exposed fraud and false claims by filing a qui tam complaint."

## 13-6

# VA: AMMONIA CAPSULES FOUND IN NOSE OF DECEASED JAIL INMATE - LAWSUIT AGAINST NURSE, OTHERS MAY PROCEED

On May 31, 2018, in Benjamin M. Andrews, Administrator of Estate of Zachary Tuggle v. Sheriff C.T. Woody, et al., a U.S. District Court Judge for Eastern District of Virginia (Richmond Division), issued two memorandum, holding (1) jail nurse and other jail personnel will not be granted summary judgment; and (2) that defense expert report of Dr. William J. Brady will not be admitted.

**Legal Lessons Learned: EMS in this case properly documented to unusual conditions they observed.**

> The U.S. Supreme Court has instructed judges to carefully screen reports of proposed "experts." Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579 (1993); Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999). Federal Rules of Evidence were adopted to further clarify review of proposed expert written reports:
>
> (B) *Witnesses Who Must Provide a Written Report.* Unless otherwise stipulated or ordered by the court, this disclosure must be accompanied by a written report—prepared and signed by the witness—if the witness is one retained or specially employed to

provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony. The report must contain:
(i) a complete statement of all opinions the witness will express and the basis and reasons for them;
(ii) the facts or data considered by the witness in forming them;
(iii) any exhibits that will be used to summarize or support them;(iv) the witness's qualifications, including a list of all publications authored in the previous 10 years;
(v) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and
(vi) a statement of the compensation to be paid for the study and testimony in the case.

## 13-5

## OH: 911 "GOOD SAMARITAN" LAW – DRUG OVERDOSE, CAN AVOID PROSECUTION IF CALL 911, GET TREATMENT [also filed, Chap. 18]

On May 18, 2018, in State of Ohio v. Andrew Melms, the Court of Appeals For Second District (Montgomery County), held (3 to 0) that an overdose victim, arrested with six gel caps of fentanyl, was not eligible for immunity; he was in jail and did not enroll in treatment within the 30-day limit set under the new Ohio statute enacted in 2016. The Court urged the Ohio General Assembly to modify the law: "Granted Melms seemingly was an ideal candidate for immunity, but for the clear and unambiguous 30-day window set forth by the legislature. The remedy lies with the legislature to either eliminate the 30-day restriction or to provide for the exercise of judicial discretion, particularly in those cases of the most vulnerable, often indigent, incarcerated individuals who are unaware of the time limit until after counsel is appointed on the drug offense. In our view, an immediate legislative fix is warranted so that this legislation achieves its laudable goals."

**Legal Lessons Learned: The "911 Good Samaritan" immunity statute is to encourage drug users and their associates to call 911 for an overdose, and to promptly seek treatment (can receive immunity only twice).**

Note: 911 Dispatchers ae required to inform overdose patients about the new law:
R.C. 128.04 provides as follows:
(A) Public safety answering point personnel who are certified as emergency service telecommunicators under section 4742.03 of the Revised Code shall receive training in informing individuals who call about an apparent drug overdose about the immunity from prosecution for a minor drug possession offense created by section 2925.11 of the Revised Code.
(B) Public safety answering point personnel who receive a call about an apparent drug overdose shall make reasonable efforts, upon the caller's inquiry, to inform the caller about the immunity from prosecution for a minor drug possession offense created by section 2925.11 of the Revised Code.

## 13-4

## MI: DYING DECLARATION BY VICTIM TO PARAMEDIC – ADMISSIBLE IN MURDER TRIAL

On April 19, 2018, in State of Michigan v. Christopher Tank, the State of Michigan Court of Appeals, upheld the jury conviction (3 to 0), holding "there was no plain error in admitting the victim's dying declaration identifying defendant as his assailant."

**Legal Lessons Learned: Dying declarations are admissible; include victim's exact words in "quotes" in the EMS run report.**

## 13-3

## MI: CPR – NO NEED TO PERFORM WHEN PATIENT CLEARLY DEAD - LIVIDITY, NO PULSE

On April 12, 2018, in Eusebio Saldana v. Nathan Smith and Sanilac County Sheriff's Office, the State of Michigan Court of Appeals held (3 to 0; unpublished decision) that the police officer "exercised his discretion based on his experience and training in identifying Michael's condition and acting according to those conclusions."

**Legal Lessons Learned: Michigan statues protect police & EMS from liability, unless proof of gross negligence.**

## 13-2

## OH: DRUNK DRIVER - URINE / BLOOD TESTS IN EMERGENCY ROOM BY ORDERS OF PHYSICIAN - NO 4TH AMENDMENT VIOL. BY PD

On March 26, 2018, in John W. Gold v. City of Sandusky, et al., U.S. Magistrate Judge for the U.S. District Court, Northern, OH, issued a Memorandum Opinion and Order dismissing the civil rights lawsuit filed against the City, police officers, and ER medical staff, holding: "To the extent Plaintiff argues the officers violated his Fourth Amendment rights in the insertion of the catheter or in taking his blood, such a claim fails for the reasons stated above. That is, there is no evidence the catheter was placed, or blood drawn, at the request of the police. Rather, it was medical personnel who made the decision and performed the action."

**LEGAL LESSONS LEARNED: Blood and urine may be obtained in ER for medical reasons, without patient consent; police may obtain a search warrant for use in criminal case.**

## 13-1

## OH: AMBULANCE IN MVA – EMT DRIVER SPEEDING, PASSING IN NO PASSING ZONE, NO LIGHTS & SIREN [also filed, Chap. 5]

On Jan. 2, 2018, in Folmer v. Meigs County Commissioners, et al., 2018-Ohio- 31, 4th Appellate District (Meigs County), the Court held that the EMS driver may have been negligent when transporting a patient traveling over 20 mph above posted speed limit, with no lights or siren, and attempted to pass vehicle in no passing lane, hitting oncoming vehicle. While the lawsuit may proceed against Meigs County EMS, the EMS driver enjoys immunity from personal liability since plaintiff did not alleged he "acted with malicious purpose, bad faith, or recklessness under R.C. 2744.03(A)(6)(b)."

**Legal Lessons Learned: If transporting without lights and siren, then EMS driver must obey speed limit and no passing zone. The EMS driver was fortunate the plaintiff did not allege he was driving in "wanton or reckless manner.**