



FIRE, EMS & SAFETY NEWSLETTER

[NEWSLETTER IS NOT PROVIDING LEGAL ADVICE].

Sign up to receive free: <http://aerospace.ceas.uc.edu/FireScience> – ONLINE BENNETT

Larry Bennett is Program Chair, Fire Science & Emergency Management at the University of Cincinnati. He has been an attorney since 1970, and certified as firefighter (FF II) and emergency medical technician (EMT-B) since 1980. These case summaries update the 18 chapters in his textbook, *Fire Service Law*, Prentice Hall/Brady (2008), which is used in the National Fire Academy's "degrees at a distance" course, Political and Legal Foundations of Fire Protection.

Questions / comments: lawrence.bennett@uc.edu; Cell 513-470-2744.

UC GRAD. CERT. IN EMERGENCY MANAGEMENT - STARTS AUG. 27, 2012 - "DRY RUN" ON JUNE 12, 2012 (FREE CE)

Our Graduate Certificate in Emergency Management starts on August 27, 2012: take 5 of 7 courses, over 30 professors "team teaching." Courses / professor videos posted at <http://aerospace.ceas.uc.edu/FireScience> – GRADUATE CERTIFICATE.

We are holding a "Dry Run" on June 12, 2012, 9 am – 3 pm, UC Auditorium, behind 2220 Victory Parkway, Cincinnati, OH 45206 (free; will issue Continuing Education certificates). <http://aerospace.ceas.uc.edu/FireScience> – DRY RUN.

If you would like to join us, and provide feedback, please send e-mail to lawrence.bennett@uc.edu.

File: Chapter 1 – American Legal System

MICHIGAN: WATER FLOWING FROM APARTMENT - FIREFIGHTERS MAY ENTER PROPERTY WITHOUT SEARCH WARRANT - COMMUNITY CARETAKING EXCEPTION TO 4th AMENDMENT - MARIJUANA PLANTS AND GROW LIGHTS ADMISSIBLE

On July 1, 2011, in Michigan v. Mark Slaughter, Supreme Court of Michigan, 2011 Mich. LEXIS 1175, the Court held “We also conclude that the firefighter’s actions in this case were reasonable, thus satisfying the community caretaking exception to the warrant requirement.” Full decision can be read: <http://courts.michigan.gov/supremecourt/Clerk/10-11-Term-Opinions/141009.pdf>.

“Defendant, Mark Slaughter, resided in a townhouse in Royal Oak, Michigan. In May 2007, defendant’s neighbor, Kathleen Tunner, saw water running down her basement wall and over her electrical box. She also heard water flowing behind that wall, which adjoined defendant’s townhouse. [Footnote 2: Defendant’s and Tunner’s townhouses are adjoining units in a single structure containing approximately 12 individual units.]

Tunner attempted to locate defendant by knocking on his door, but he was not home. She then called her townhouse management company in a further attempt to locate defendant. After this attempt failed, Tunner dialed 911. The city of Royal Oak dispatched several firefighters to the townhouse, including Lieutenant Michael Schunck. After consulting with Tunner about her emergency call, Schunck entered defendant’s residence. When he went to the basement to shut off defendant’s water and to assess whether any additional measures needed to be taken to prevent a fire, Schunck observed, in plain view, grow lights and several dozen plants that appeared to be marijuana. He then reported what he saw to the Royal Oak police.

The Royal Oak Police Department dispatched an officer to secure defendant’s townhouse while another officer procured a search warrant. After entering defendant’s townhouse, officers seized 48 marijuana plants, grow lights, a watering system, defendant’s state identification card, books on marijuana horticulture, packaging material, and other drug paraphernalia.”

Trial judge granted defendant’s motion to dismiss.

“After hearing testimony and oral argument, the court granted the motion in a written opinion and order. The circuit court concluded that Lieutenant Schunck ‘did not attempt to hear or see for himself what was causing the problem [that led Tunner to dial 911], nor did he attempt to verify the existence of running water in the wall prior to entering the defendant’s home.’

The [trial judge] also observed that Schunck had indicated that ‘he would have entered the apartment even if he had shut off the water and/or electrical from the outside’ because ‘he has to investigate the [911] calls to the fullest extent possible....’ ”

The Court of Appeals agreed with the trial court that the evidence should be suppressed. The State of Michigan appealed to the Michigan Supreme Court, which reversed both lower courts.

“The United States Supreme Court first recognized the community caretaking exception to the warrant requirement in *Cady v Dombrowski* [413 U.S. 433 (1973)] which involved the constitutionality of the search of the trunk of an out-of-town police officer’s automobile. The police officer was hospitalized after a serious automobile accident, and local police officers arriving on the scene of the accident directed that the injured officer’s vehicle be towed to a private garage. Because the private garage was unsecured, local police sought to locate and safeguard the injured officer’s service revolver. After failing to find the revolver on the officer’s person or in the glove

compartment of the vehicle, officers searched the vehicle's trunk and discovered the revolver, along with evidence of a murder.

[The Supreme] Court held that the warrantless search was a reasonable exercise of the officers' community caretaking functions and concluded that their search of the vehicle did not violate the Fourth Amendment:

'Where, as here, the trunk of an automobile, which the officer reasonably believed to contain a gun, was vulnerable to intrusion by vandals, we hold that the search was not 'unreasonable' within the meaning of the Fourth and Fourteenth Amendments.'"

Community caretaking exception applies to fire department.

"We conclude that the community caretaking exception to the warrant requirement applies when a firefighter, responding to an emergency call involving a threat to life or property, reasonably enters a private residence in order to abate what is reasonably believed to be an imminent threat of fire inside. Therefore, once it is determined that a firefighter's entry into a private residence was an exercise of community caretaking functions, and not an exercise of investigative functions, we must consider the reasonableness of the entry within the context of that community caretaking purpose.

United States Supreme Court case law specifically pertaining to firefighters supports this conclusion. In *Michigan v Tyler*, [436 US 499 (1978)] the Court concluded that 'the Fourth Amendment extends beyond the paradigmatic entry into a private dwelling by a law enforcement officer in search of the fruits or instrumentalities of crime.' Indeed, 'there is no diminution in a person's reasonable expectation of privacy nor in the protection of the Fourth Amendment simply because the official conducting the search wears the uniform of a firefighter rather than a policeman"

Entry of the apartment by Lt. was reasonable.

"It is clear from Schunck's testimony that he acted in good faith. There is no indication that his entry into defendant's residence was pretextual, and only upon entering defendant's basement to shut off the water to defendant's residence did Schunck see what appeared to be contraband in plain view.

Nevertheless, Tunner's report of water leakage next to her electrical box was specific and articulable evidence supporting Schunck's conclusion that his imminent action was necessary to abate a condition inside defendant's residence that he reasonably believed was a threat to persons or property. Furthermore, the fact that the townhouse complex contained several units attached to each other elevated the imminence of the potential hazard. Schunck explained that the attached units were 'real close together' and that they share[d] electrical panels in the basement at the bottom of these [common] walls.' Moreover, because a 'high density' of people lived in 'all [the] connected apartments,' Schunck explained that 'a definite life hazard and possible structur[al] fire type situation' existed. These facts further supported Schunck's decision to enter defendant's residence.

On the basis of all these facts, we conclude that Schunck acted reasonably in

entering defendant's residence pursuant to an emergency call. The Fourth Amendment does not prevent firefighters responding to emergency calls from undertaking their duty to protect the public from imminent danger. However, we emphasize that the Fourth Amendment does not give firefighters a blank check to enter and search private residences, and we caution reviewing courts to apply these principles carefully in order to ensure the appropriate protection of private residences under the Fourth Amendment.”

Legal Lessons Learned: Very helpful decision, that hopefully courts in other states will also follow.

File: Chapter 1 – American Legal System

**KENTUCKY: FIREMAN'S RULE - ALSO APPLIES TO POLICE INJURED
MAKING AN ARREST OF DRUNK - POLICE CAN NOT SUE OWNER OF BAR**

On Oct. 28, 2011, in Derrick Wallace v. Thoroughbred Hospitality LLC, doing business as Crown Plaza Hotel, Court of Appeals of KY, 2011 Ky. App. Unpub. LEXIS 794, affirmed the trial court's decision holding that two police officers, and their municipal employer, Lexington-Fayette County Government which joined in the lawsuit, cannot sue the hotel for injuries incurred while they were subduing and arresting a drunk patron. Full opinion [unpublished, so cannot be cited in other lawsuits] can be read: <http://opinions.kycourts.net/coa/2010-CA-001289.pdf>.

“On December 20, 2007, Shepherd Communications, a Lexington company, held its holiday party at the Crowne Plaza Hotel, which is operated by Thoroughbred Hospitality. [After an incident where a piece of glass was broken by a bottle of beer, and police were called] Shepherd Communications asked hotel management if they could continue the party and were allowed to move it to Bogart's Bar, a hotel lounge, which is part of the Crowne Plaza hotel and located on the hotel premises.

At around 11:00 p.m., another disorder call was made to the police by Crowne Plaza management and security. They asked the police to respond to another situation. The police, including Wallace and Combs, discovered a party getting out of hand at Bogart's Bar. The police then walked through Bogart's Bar to show a police presence. But problems persisted, and Crowne Plaza Hotel security requested police assistance with Daniel Billings, an attendee at the Shepherd party. The police asked Billings and his wife to leave the premises, but they continued to try to walk back into the bar. At this point, the police escorted the Billingses outside. Later, the police again asked the Billingses to leave when the couple was observed in the parking lot.

As his wife was being arrested, Billings interfered with the arrest and charged Officer Combs. Additionally, Billings assaulted Officer Wallace as the officer tried to move Billings out of the area.

Firefighter's Rule – KY court decisions:

“The Firefighter’s Rule, as it applies in this state, was enunciated in *Buren v. Midwest Industries, Inc.*, 380 S.W.2d 96, 97–98 (Ky. 1964), as follows:

[As] a general rule the owner or occupant is not liable for having negligently created the condition necessitating the fireman’s presence (that is, the fire itself), but may be liable for failure to warn of unusual or hidden hazards, for actively negligent conduct and, in some jurisdictions, for statutory violations “creating undue risks of injury beyond those inevitably involved in fire fighting.” (quoting *Krauth v. Geller*, 31 N.J. 270, 157 A.2d 129, 131 (N.J. 1960).”

In *Fletcher v. Illinois Central Gulf Railroad Co.*, 679 S.W.2d 240 (Ky. App. 1984), the Court of Appeals extended the rule to police officers.

In *Sallee v. GTE South, Inc.*, 839 S.W.2d 277, 279 (Ky. 1992), the Kentucky Supreme Court enunciated three necessary conditions for the application of the Firefighter’s Rule as adopted in Kentucky:

- 1) The purpose of the policy is to encourage owners and occupiers, and others similarly situated, in a situation where it is important to themselves and to the general public to call a public protection agency, and to do so free from any concern that by so doing they may encounter legal liability based on their negligence in creating the risk.
- 2) The policy bars public employees [from asserting a claim for negligence](firefighters, police officers, and the like) who, as an incident of their occupation, come to a given location to engage a specific risk; *and*
- 3) The policy extends only to that risk. (Footnote omitted).”

Multiple police calls does not create exception.

“The fact that they were called several times and the incidents occurred at different locations in the hotel does not alter the fact that the police were called to protect the public by exercising their police powers. Finally, the third condition, that is, the policy extends only to the risk arising from the exercise of their occupation is also met. Although it is unfortunate that Wallace and Combs were injured in the performance of their job as police officers, these injuries are the result of risks intrinsic to the exercise of this police power. Hence, the Firefighter’s Rule bars liability on the part of Thoroughbred Hospitality.

Arguments, fights, and public brawls often occur over a significant time period and at different places in a location. But police officers are still mandated to respond to the disorder over this time period and at the various spots it is occurring. In addition, the public must have confidence in their ability to ask for police assistance.”

Legal Lessons Learned: Many states, including Ohio, recognize the Fireman's Rule as a matter of public policy. However, several states have now abolished the Rule either by legislation or by court decision, including Minnesota, Florida, New Jersey, Pennsylvania, Oregon and Colorado. In Missouri, legislation was introduced on January 21, 2001, House Bill 525, that would also abolish the Rule. <http://www.emsvillage.com/articles/article.cfm?id=577>.

File: Chapter 2 – Firefighter Line Of Duty Deaths / Safety

OHIO: FIREFIGHTER DIED OF HEART ATTACK - WIFE FILED CLAIM FOR WORKERS COMP AS A DEATH FROM "OCCUPATIONAL DISEASE" - CLAIM REINSTATED - OHIO STATUTORY PRESUMPTION

On June 9, 2011, in Mataraza v. City of Euclid, 193 Ohio App.3d 479, 2011-Ohio-2795, the Court of Appeals for Cuyahoga County, held that a firefighter's widow claim for compensable injury under workers comp. is reinstated. Full decision can be read: <http://www.sconet.state.oh.us/rod/docs/pdf/8/2011/2011-ohio-2795.pdf>.

"Mataraza's late husband, James Mataraza (referred to herein as 'James' or 'the decedent'), began working as a firefighter for the city of Euclid in 1991. On January 19, 2005, James, who was then 41 years old, suffered a fatal heart attack. Mataraza filed a request for determination of death benefits for 'accident/occupational disease' with the Bureau of Workers' Compensation. According to Mataraza, James's heart disease was 'caused or contributed to by the cumulative effect of exposure to heat, the inhalation of smoke, toxic gasses, chemical fumes and other substances in the performance of his duties [as a firefighter] over the prior fourteen years,' and was therefore a work-related death under the rebuttable presumption codified at R.C. 4123.68(W).

On January 5, 2006, the administrator of the Bureau of Workers' Compensation denied the claim, noting:

"The decedent's death did not occur in the course of and arising out of employment. The employee was not on property owned or controlled by the employer. * * * There is no medical documentation to indicate the death was caused by employment."

The firefighter's wife filed an appeal. On Jan. 8, 2007, a District Hearing Officer reversed and held:

"District Hearing Officer finds decedent's occupation as a firefighter to be a contributing factor to the decedent's coronary artery disease and myocardial infarction resulting in death per Dr. Kravitz review dated 09/16/2006 and the 12/01/2006 [Dr. Haridas] Biswas review."

The City of Euclid filed an appeal to a Staff Hearing Officer, which also ruled for the wife. The City then filed an appeal to the Court of Common Pleas.

“Euclid maintained, however, that James had cardiovascular disease prior to becoming a firefighter, and that the aggravation of this preexisting disease is not compensable.

[In support of this, the City filed a doctor’s report, which conclude] “It is certain [James] had atherosclerosis prior to any fire-fighting due to his family history and hyperlipidemia (high cholesterol). His cholesterol was extraordinarily high at 269, his LDL, or bad cholesterol, at 197 (nl less than 80).”

The City also filed with Court of Common Pleas a report from another doctor about the firefighter’s condition when he was hired in 1991.

“Euclid presented the May 27, 2010 report of its medical expert, Dr. Harris, who indicated that at the time he was hired, James had a number of risk factors for the potential development of coronary artery disease, including elevated cholesterol and triglyceride levels, smoking, and a family history of cardiovascular disease.”

The trial court agreed with the City.

The wife then filed an appeal, and the Court of Appeals reversed the trial court, citing the statutory presumption in Ohio Revised Code R.C. 4123.68 (W):

“Cardiovascular, pulmonary, or respiratory diseases incurred by fire fighters or police officers following exposure to heat, smoke, toxic gases, chemical fumes and other toxic substances: Any cardiovascular, pulmonary, or respiratory disease of a fire fighter or police officer caused or induced by the cumulative effect of exposure to heat, the inhalation of smoke, toxic gases, chemical fumes and other toxic substances in the performance of his duty constitutes a presumption, which may be refuted by affirmative evidence, that such occurred in the course of and arising out of his employment.”

The Court of Appeals explained.

“The presumption which arises is not that all cardiovascular disease in firefighters is caused by or arises out of their work, but that *if* it is shown that cardiovascular disease in an individual is caused by cumulative exposure to things which firefighters normally encounter in their line of work that the causative exposure occurred at work, rather than elsewhere.

There is absolutely no indication in the record to establish that James was diagnosed with atherosclerosis at the time he was hired, at the age of 27.

In accordance with the foregoing, we conclude that there is a genuine issue of material fact as to whether James developed cardiovascular disease in the course of and arising out of his employment.

There are genuine issues of material fact as to whether (1) James developed cardiovascular disease in the course of and arising out of his employment and (2) whether James's heart attack was an acute event or compensable injury that was brought about by the stresses of his job.

The judgment of the trial is reversed, and the matter is remanded for further proceedings consistent with this opinion.”

Legal Lesson Learned: The Ohio Revised Code statutory presumption is very important for firefighters and their survivors. Annual physicals can also help detect heart disease and prevent line of duty deaths. USFA's report "Firefighter Fatalities (2011)" confirms that "The leading nature of fatal injuries to firefighters is heart attack (44 percent); trauma, including internal and head injuries, is the second leading type of fatal injury at 27 percent." <http://www.usfa.fema.gov/fireservice/fatalities/statistics/history.shtm>.

File: Chap. 4 – Incident Command

NJ: WIRES DOWN – HOMEOWNER SHOCKED, ARM AND LEG AMPUTATED – \$20.5 MILLION JURY VERDICT - JURY FINDS FIRE DEPARTMENT 60% AT FAULT

On Nov. 5, 2011, a jury awarded William Hagerman Jr., 52, Tifton, NJ, \$18.5 million and his wife, Patricia, was awarded \$2 million.

“Hagerman was shocked after stepping on the lives wires when he got out of his car in his driveway after a storm on Feb. 15, 2007, according to police reports. The settlement amount was to cover medical costs, disability, deformity, physical suffering and the cost of prosthetic devices which have to be changed every three to five years, [their attorney] Hobbie said.

Hobbie said the Northside fire company had left the scene of the downed high tension wires knowing that the 7,200-volt wire was still on the ground and in the Hagerman's driveway.

Firefighters and a JCP&L supervisor also responded, and the company was preparing to send a crew to make repairs, when Hagerman and his wife began to pull out of their driveway, police said at the time.

Their vehicle came into contact with the wire, and although they saw sparks and flames, they apparently did not realize it was because of a fallen wire, police said.

They pulled back into the driveway, and when Hagerman got out of the vehicle, he was shocked, police said.”

<http://www.app.com/article/20111104/NJNEWS/311040149/Tinton-Falls-couple-wins-20-5-million-award-downed-wire-case>.

A fire chief contacted the author of this Newsletter about “wires-down” cases. The following two cases may be useful in conducting training.

INDIANA: CHILD KILLED BY DOWNED POWER LIGHT – FIRE DEPARTMENT NOT LIABLE, DID NOT ASSUME DUTY

In City of Muncie v. Weidner, 831 N.E.2d 206, 2005 Ind. App. LEXIS 1311 (Ind. Ct. App., July 22, 2005), the Court of Appeals ordered lawsuit against FD be dismissed. Full opinion can be read at: <http://www.in.gov/judiciary/opinions/pdf/07220511jsk.pdf>.

“On July 29, 2002, a storm caused more than 5,300 Muncie residents to lose electric power. That afternoon, Tony Gothard went home early from work in response to his wife’s call reporting that their home’s circuit breaker box was sparking. After arriving home, Gothard, who lived at 1308 North Mann Avenue, discovered no loss of electricity and found no sparks at the breaker box, but noted that the outside power line to his home was sagging. Gothard reported the problem to the electric company that owned the line, Indiana Michigan Power Company, a unit of American Electric Power (“AEP”), and returned outside to inspect the line. While outside, Gothard heard cracking and popping noises emanating from his next-door neighbor’s backyard at 1300 North Mann Avenue. Upon further investigation, Gothard noticed a power line hanging down into the middle of the bushes between the two homes and reported it to the Muncie Fire Department.

The fire department dispatched a truck with fireman Mark Hill in charge. By the time the truck arrived, Gothard no longer heard any cracking or popping, but showed Hill the area where he had heard the sounds and where the line could still be seen hanging into the bushes. Hill told Gothard to keep his family out of the backyard because electricity can travel both through bushes and through the ground. Earlier, AEP had instructed the fire department to assume that all downed lines were live and to stay away from them. Hill called E-911 dispatch, which immediately faxed a report to AEP, notifying them of the address and stating, ‘wires down in yard, burning.’ *Appellant’s Appendix* at 99-100. The fire department completed its business at the Gothards’ home in about five minutes and left before AEP arrived on the scene.

[The next day] around 2:00 p.m., while D.B and A.W. were mowing a backyard that abutted the Gothard’s backyard, D.B. discovered A.W. unconscious and lying on his back.”

Court of Appeals finds no duty owed by the FD.

“To prevail on a claim of negligence, the Weidners must show: (1) a duty owed to them by Muncie or its fire department; (2) a breach of that duty; and (3) compensable injury proximately caused by Muncie or its fire department’s breach of duty.

We find that Muncie designated sufficient evidence, which was not rebutted by the Weidners, to establish that Muncie did not assume a duty for which it could be held liable. Here, the record before us contains evidence to establish that the Muncie Fire Department’s response to Gothard’s call about a downed power line did not increase the risk of harm to A.W. The duty to maintain the lines was AEP’s. Upon learning of the downed line, Gothard’s first call was to AEP to report the line was down. It was not until Gothard heard popping noises emanating from the bushes near the downed line that he thought to call the fire department. A.W. would have been victim to the same tragic accident regardless of whether the fire department failed to respond, had never been called, or, as was the case, responded and warned Gothard and his family to stay out of their backyard.

Likewise, the Weidners have failed to show that the Muncie fire department undertook to perform a duty owed by AEP to A.W. By the parties’ own admissions, AEP had told the fire department to stay away from the lines and had asked the fire department to inform

them about downed lines. Further, AEP had told the fire department to assume that a downed wire was live and to stay away. There is no evidence in the record before us that the fire department undertook to perform a duty owed by AEP.”

**CT: VOLUNTEER FIREFIGHTER ELECTROCUTED - FIRE CHIEF NOT LIABLE
– NO WILLFUL OR MALICIOUS CONDUCT**

In Todd Arnone, Administrator (estate of Craig M. Arnone) v. Connecticut Light And Power Company, et al, Appellate Court of Connecticut, 90 Conn. App. 188; 878 A.2d 347; 2005 Conn. App. LEXIS 294 (July 12, 2005), held that the Fire Chief was not liable for the death of the volunteer firefighter. Full opinion can be read at:
<http://www.jud.ct.gov/external/supapp/Cases/AROp/AP90/90AP389.pdf>

“Craig M. Arnone, who died in the course of fighting a fire while acting as a volunteer fireman with the Somers volunteer fire department on December 8, 1996. ... During the night of December 7 into the morning of December 8, 1996, a heavy snowfall blanketed Somers. Shortly after midnight on December 8, the [Fire Chief; “defendant’] received a call that a wire was down and arcing in the vicinity of 879 Main Street in Somers. While on his way to the scene, he was notified that the house at 879 Main Street was burning.

He called for a response from the department. Shortly after he arrived, there was a large electrical explosion on the premises. The wires continued to hum and crackle. The defendant contacted the dispatcher and requested that the dispatcher notify the power company to disconnect the power. He never received verification that the power company had disconnected the power. After the firefighters had arrived, there was a second explosion, after which the wires ceased humming and crackling, and all the lights in the neighborhood were dark.

The defendant believed that the power was not operative at the premises at that time. He saw no reaction when snow fell on any of the wires in the area or when firefighters were brushed by a wire hanging by the front entrance. Firefighters fought the fire, at least partly under the direction of the defendant, and brought it more or less under control. The firefighters entered and exited the house, ventilated the premises and tended to hot spots. No people had been inside the house at the time the fire began.

The defendant heard another explosion as he was turning back toward his truck. The decedent, who was one of the volunteers who had responded to the fire, was lying on the ground. He had received a fatal infusion of current after contacting a wire hanging by the door.

The defendant previously had purchased a ‘hot stick,’ which was a device that could detect the presence of electrical current. The hot stick was in a truck at the scene, but was not used. The hot stick had never been used by the department, and its use had never been approved. No firefighters had been trained in the use of the device.”

Court held there was no claim under Connecticut law, since no evidence of willful or malicious conduct.

“As the [trial] court stated, ‘the most that can be said—with reasonable inferences made in favor of the plaintiff’s position—is that [the defendant] was aware of potential danger and was aware that a course of conduct involving the possibility of contact with live

wires was being embarked on. There were choices which could have been made to avoid the tragedy. Our legislature has determined that [fellow firefighters] are to be liable only for willful and malicious conduct, though, and the facts do not rise to that level of malfeasance.’ We agree and, accordingly, the plaintiff’s claim fails.”

Court also held there was no claim under 42 USC 1983 (breach of U.S. Constitution by government official); conduct did not “shock the conscience.”

“The [trial] court noted in its decision that the factual situation in *County of Sacramento v. Lewis*, 523 U.S. 833, 118 S. Ct. 1708, 140 L. Ed. 2d 1043 (1998), ‘is highly analogous to the factual situation at hand in that public safety officers acted recklessly (or, allegedly, acted with a higher degree of intent). [High speed chase; innocent driver killed.] The United States Supreme Court held that even if standards of reasonableness under tort law were violated, that sort of judgment call does not shock the conscience as exceeding the bounds of governmental authority.’ In *County of Sacramento*, the police officer was faced with allegations similar to those that the plaintiff has alleged against the defendant in this case. See *id.*, 836-37. The plaintiff in that case alleged that a police officer was deliberately indifferent to the decedent’s survival, which the United States Supreme Court treated as equivalent to a claim of reckless disregard for life. *Id.*, 854. The court determined that ‘while prudence would have repressed the reaction, the officer’s instinct was to do his job as a law enforcement officer, not to . . . cause harm, or kill. . . . There is no reason to believe that [his actions] were tainted by an improper or malicious motive on his part.’ *Id.*, 855.

Likewise, we view the defendant’s actions to be difficult choices made in the line of duty that were not intended to cause harm, but which nonetheless resulted in the unfortunate death of the decedent. Although prudence and adherence to established policy arguably might have prevented that unfortunate result, and a reasonable fact finder might construe the defendant’s actions as negligent, we conclude, as a matter of law, that a fact finder could not reasonably conclude, on the basis of the allegations of the complaint, that the defendant’s actions were of such a nature that they shocked the conscience. Accordingly, the plaintiff’s claim fails.”

Legal Lessons Learned: Fire & EMS departments should adopt a SOG that requires, prior to leaving the scene, that downed wires be marked by yellow scene tape, and that residents and other nearby civilians be notified of risk.

File: Chapter 5 - Emergency Vehicle Operations

OHIO: MUTUAL-AID CALL - TOWNSHIP NOT LIABLE FOR INJURIES FROM POLICE CRASH RESPONDING TO ASSIST COUNTY DEPUTY SHERIFF - LACK OF FORMAL MUTUAL-AID AGREEMENT DOES NOT ELIMINATE GOVERNMENTAL IMMUNITY

On Sept. 20, 2011, in *Smith v. McBride*, 130 Ohio St.3d 51, 2011-Ohio-4674, the Ohio Supreme Court (6 to 1) held that Clinton Township is immune from liability even if they had no mutual-aid agreement with Franklin County, where the accident occurred.

Full decision can be read at: <http://www.sconet.state.oh.us/rod/docs/pdf/0/2011/2011-ohio-4674.pdf>.

“Late in the evening of March 14, 2006, Clinton Township Police Sergeant Travis Carpenter was at his police headquarters in Clinton Township, an unincorporated area of Franklin County, when he heard a general dispatch call from a Franklin County Sheriff’s deputy requesting assistance because the deputy was on foot and was pursuing a fleeing suspect. The call originated about two miles from Carpenter’s location in what Carpenter knew to be a high-crime area outside of Clinton Township’s jurisdiction.

Carpenter immediately headed to the location in a marked police cruiser. Although Carpenter was speeding, he was not using his siren or emergency lights. Driving east in light traffic on Morse Road, he approached the intersection with Chesford Road. Carpenter had a green light to proceed through the intersection, which is located in the city of Columbus, a third jurisdiction.

Just prior to Carpenter’s entry into the intersection, a vehicle that had been traveling west on Morse Road made a left turn in front of him to go south on Chesford Road. That vehicle was closely followed by a second vehicle, which also attempted to make a left turn onto Chesford Road. The latter vehicle and Carpenter’s cruiser collided in the intersection.

The speed limit on Morse Road at this location was 45 miles per hour. Evidence in the record indicates that Carpenter was traveling about 64 miles per hour at the time.”

The driver, Vashawn McBride was severely injured, and her passenger, Lea Smith, was also injured. They sued Officer Carpenter and Clinton Township. After depositions were taken, the trial judge granted summary judgment to the defendants, finding that the officer was authorized to respond to the call, that he had not engaged in willful or wanton misconduct, and his driving was not reckless.

The Ohio Court of Appeals agreed, as did the Ohio Supreme Court:

“At issue is whether the police officer can be considered to have been on an emergency call at the time of the accident for purposes of R.C. Chapter 2744 when the evidence is insufficient to establish the existence of a mutual-aid agreement between the jurisdictions. We hold that he can, because application of the immunity statutes in this case does not depend on whether a mutual-aid agreement existed.”

Legal Lessons Learned: This decision will be helpful for fire and EMS departments responding into neighboring jurisdictions. Remember, use of lights and sirens can help avoid accidents with civilian vehicles.

File: Chapter 6 – Employment Litigation

FACEBOOK POSTING – NATIONAL LABOR RELATIONS BOARD - ADMIN. LAW JUDGE HOLDS THAT FIVE EMPLOYEES IMPROPERLY FIRED

On Sept. 2, 2011, in Hispanics United of Buffalo, Inc. v. Carlo Ortiz, Case No. 3-CA-27872, National Labor Relations Board, an Administrative Law Judge held that five employees were

unlawfully terminated for criticizing their employer, since they had a right under Section 7 of National Labor Relations Act to “engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.” Full opinion can be read at: <http://www.scribd.com/doc/64175123/Hispanics-United-of-Buffalo-Case-No-3-CA-27872-Sept-2-2011>.

The employer, Hispanics United of Buffalo, Inc. is a not-for-profit, providing social services to poor Hispanics in Buffalo, New York area, including housing, translation services, food pantry, and employment services. The NLRB has jurisdiction because the employer has gross revenues in excess of \$250,000 a year, including federal government grants.

Lydia Cruz-Moore, a domestic violence advisor, who accompanies victims to hearing before the City of Buffalo, Family Justice Service, regularly sends text messages complaining about the job performance by employees in the employer’s Housing Department (HUB). Early on Saturday, Oct. 9, 2010, she advised co-workers she going to raise her concerns with Executive Director, Lourdes Iglesias.

This has upset numerous HUB workers, including Mariana Cole-Rivera, who at 10:14 am, posted on her FACEBOOK page:

“Lydia Cruz, a coworker, feels we don’t help our clients enough at HUB
I about had it! My fellow coworkers, how do u feel?”

Five employees exchanged comments, including:

“Tell her to do my fucking job.”

Lydia Cruz then complained to the Executive Director about these comments. On Oct. 12, the Executive Director met with each of the five employees, told them that Lydia Cruz has suffered a heart attack because of their postings, and they would have to pay for her medical care. The Executive Director then fired all five employees.

Administrative law judge ordered the company to reinstate all five employees.

“I conclude their FACEBOOK communications with each other, in reaction to a co-worker’s criticisms of the manner in which HUB employees performed their jobs, are protected [under NLRB].

[The employees in their FACEBOOK postings] were taking a first step toward group action to defend themselves against accusations they could reasonably believe Cruz-Moore was going to make to management.”

Legal Lessons Learned: Fire and EMS departments should adopt a Social Media policy. This issue is not going away for employers. For example, there are reportedly over 100 complaints now filed with NLRB. On Feb. 8, 2011, the NLRB announced their settlement with the private ambulance company, American Medical Response of Connecticut, Inc., which fired an employee for her negative FACEBOOK comments about a supervisor. NLRB concluded the employee “engaged in protected activity when she posted the comments about her supervisor, and responded to further comments from her co-workers. Under the National Labor Relations Act, employees may discuss the terms and conditions of their employment with co-workers and

others.” <https://www.nlr.gov/news/settlement-reached-case-involving-discharge-facebook-comments>.

File: Chapter 13 – EMS

OHIO: PATIENT SMOKED CIGARETTE WITH PCP – 11 MINUTES AFTER EMS DEPARTED FROM THE SCENE, HE JUMPED OFF SECOND-STORY BALCONY AND IS NOW PARALYZED – CITY AND EMS NOT LIABLE - NO WILLFUL OR WANTON MISCONDUCT

On May 5, 2011, in Johnson v. Cleveland, 194 Ohio App.3d 355, 2011-Ohio-2152, Court of Appeals for Cuyahoga County, the court (3 to 0) held the trial judge should have granted the defendants’ motion for summary judgment and dismissed the lawsuit. Full opinion can be read: <http://www.sconet.state.oh.us/rod/docs/pdf/8/2011/2011-ohio-2152.pdf>.

“On November 18, 2007, Johnson’s girlfriend, Carine Gabriel, called 9-1-1 after Johnson smoked a cigarette laced with PCP. The call was categorized as an overdose/poisoning/ingestion. Gabriel and Johnson were located at a two-story residential building at 241 East 156th Street in Cleveland.

When the EMS unit arrived, Gabriel informed the EMTs that Johnson had accidentally smoked PCP and that he needed their help. She did not inform the EMTs of the amount of drugs Johnson had ingested. She told the EMTs that she did not know whether Johnson was violent or not. She later stated during her deposition that she had no reason to believe that Johnson was attempting to hurt himself.

In the meantime, Johnson walked down the driveway in a normal manner. According to [the paramedic], Johnson stated in a clear voice that he did not call EMS, he seemed a little agitated that EMS was there, and he walked away. According to Gabriel, Johnson never spoke to the EMTs and he was ‘really quiet and just standing there one second and the next minute he was gone.’ Johnson recalled that an ambulance was there and that he walked down and turned around; however, he did not remember saying anything. The EMTs were unable to physically examine Johnson or obtain his vitals. After Johnson walked away, [paramedic] called to cancel the call for the Cleveland police.

Gabriel found Johnson ‘just sitting on the bed like this in our room quiet.’ She does not remember exactly what she told the EMTs when she returned outside; however, she ‘might have told [paramedic] that [Johnson] was just sitting there.’ According to [the paramedic], Gabriel informed her that Johnson appeared to be calming down. Gabriel asked the EMTs to continue to wait and make sure Johnson was all right. The EMTs informed Gabriel that they could not continue to stand around waiting, but that if anything were to change to call back and they would transport Johnson.”

The EMS were at the scene for about 21 minutes. Paramedic Stosak called her Captain, and was authorized to leave the scene, and recorded the EMS run as a “refusal special circumstance.” About 11 minutes after they left the scene, Johnson jumped off two-story balcony. The same EMS responded to the call, and transported him to the hospital.

“Johnson was treated for fractures of multiple thoracic vertebrae, multiple rib fractures, and bilateral pneumothoraxes. He was permanently paralyzed from the waist down.”

After pre-trial discovery, including depositions, the City and EMS filed a motion for summary judgment. The plaintiff filed an opposition, with affidavits of two expert witnesses who asserted that the EMS should have examined Mr. Johnson prior to leaving the scene. After the City filed an affidavit of its expert, the trial judge denied the motion for summary judgment. The trial judge held “there is an issue of fact as to whether the acts or alleged failure to act by defendants constitutes willful and wanton misconduct and whether such failures proximately caused [Johnson’s] injuries.”

The City took an immediate appeal, and the Court of Appeals reversed, and ordered the lawsuit dismissed.

“[Ohio Revised Code] 4765.49 specifically grants immunity to emergency-service personnel and their municipal employers from tort claims based on their administration of emergency medical services ‘unless the services are administered in a manner that constitutes willful or wanton misconduct.’

The Ohio Supreme Court has defined ‘willful’ misconduct as ‘conduct involving an intent, purpose or design to injure’ and ‘wanton’ misconduct as ‘conduct where one fails to exercise any care whatsoever toward those to whom he owes a duty of care, and [t]his failure occurs under circumstances in which there is a great probability that harm will result., *Zivich v. Mentor Soccer Club, Inc.* (1998), 82 Ohio St.3d 367.”

There is no evidence that Johnson’s condition worsened in the approximately 21 minutes that the EMTs were on the scene.... Before leaving, the EMTs informed Gabriel that if anything changed, she should call back and they would transport Johnson.... We do not find, when construing the evidence most strongly in Johnson’s favor, that reasonable minds could find that the actions of the emergency personnel rose to the level of willful or wanton misconduct.”

The expert opinions submitted by Johnson discuss the failure of the EMS employees to follow protocol and to exercise the appropriate standard of care. While this may well have amounted to negligent conduct, it did not rise to the level of willful or wanton misconduct. The legal conclusions reached by the experts do not alter the outcome in this case. See *Mitchell v. Norwalk Area Health Serv.*, Huron App. No. H-05-002, 2005-Ohio-5261 (disregarding experts’ legal conclusions of willful and wanton misconduct); *Denham*, 138 Ohio App.3d 439 (record did not support a claim of willful or wanton misconduct despite expert’s legal conclusion).

Legal Lessons Learned: To avoid litigation involving drug abuse, call police to the scene, and take patient's vitals in the presence of the police.

File – Chapter 16: CISM

OHIO: FIRE CHIEF ORDERED FIREFIGHTER TO SEE PSYCHOLOGIST FOR FITNESS-FOR-DUTY EVALUATION AND SUSPENDED FF WITH PAY - GRIEVANCE FILED – ARBITRATOR HAD NO AUTHORITY TO REVIEW - “MANAGEMENT RIGHTS” PROVISION IN CBA

On March 31, 2011, in Stow Firefighters, IAFF Local 1622 v. Stow (Case No. 25209), 193 Ohio App.3d 148, 2011-Ohio-1559, the Court of Appeals for Summit County, Akron, OH (2 to 1), held that the arbitrator should not have ordered a firefighter reinstated. Full decision can be read: <http://www.supremecourt.ohio.gov/rod/docs/pdf/9/2011/2011-ohio-1559.pdf>.

[Note: Court of Appeals in companion case held arbitrator should decide grievance about termination of firefighter by the Mayor, Stow Firefighters, IAFF Local 1662 v. Stow (Case No. 25090) 2011-Ohio-1558, can be read at:

<http://www.supremecourt.ohio.gov/rod/docs/pdf/9/2011/2011-ohio-1558.pdf>.]

“The city of Stow suspended [firefighter], a member of the city’s fire department, for three days for allegedly harassing and acting discourteously, disrespectfully, and unprofessionally toward a member of the city’s parks department and for supposedly being insubordinate and dishonest during an investigation of that alleged misconduct. At the same time it suspended him, it ordered him to submit to a fitness-for-duty evaluation by a specific psychologist and placed him on involuntary paid leave pending that evaluation. Following the fitness-for-duty evaluation, the city continued him on involuntary leave, but changed it to unpaid leave, and told him he could not return to work until the psychologist released him for duty. At the conclusion of the unpaid leave, it discharged him because his leave had expired and the psychologist had not released him for duty.”

Investigation by Fire Chief:

“The parties agree that [firefighter] made a sarcastic comment to a parks department employee, Neil Winnen, about some safety-town buildings that Winnen was helping to move into the fire station where [firefighter] was working. After someone complained of harassment, the Stow fire chief, William Kalbaugh, opened an investigation into the incident. Chief Kalbaugh talked to the park employees and the firefighters who had been present at the time of the incident. Chief Kalbaugh concluded that [the firefighter] and two other firefighters were lying about what had happened. As a result, he suspended all three for three days.

At the same time that Chief Kalbaugh informed [firefighter] of his three-day suspension, the chief also notified him that he was being placed on involuntary paid leave pending the results of a fitness-for-duty evaluation to be conducted by Dr. Alfred Grzegorek. The union filed a grievance on behalf of the firefighters. [The firefighter’s] grievance proceeded separately and is the only grievance at issue in this appeal.

After notifying [firefighter] about the evaluation, the chief continued gathering

collateral information from other firefighters about other alleged incidents [firefighter] had been involved in over the years. In preparation for the evaluation, the chief disclosed the information to Dr. Grzegorek, but refused to share it with [firefighter] or the union. On the first day of the arbitration hearing, the city was required to disclose the information in response to a subpoena duces tecum.”

Arbitrator’s ruling:

“An arbitrator chosen by the city and the union conducted a four-day hearing spread over four months. He heard testimony from 16 witnesses and issued a 74-page opinion and award.

[Regarding fitness-for-duty , the arbitrator found] “The City’s placement of the grievant on involuntary leave pending and subsequent to his fitness for duty examination shall be set aside as void and without effect for lack of reasonable cause, and the grievant shall be reinstated to his position with full back pay and benefits.”

The City appealed to the Court of Common Pleas. The trial judge:

“vacated the arbitrator’s determination that the city acted without reasonable cause when it placed Yoder on unpaid leave following the fitness-for duty evaluation and his direction that the city reinstate him with full back pay and benefits. According to the court, the issue of whether the fitness-for-duty evaluation was fatally flawed was not properly before the arbitrator.”

The IAFF Local appealed. The Court of Appeals held:

Under R.C. 2711.10(D), “the court of common pleas shall make an order vacating the [arbitration] award upon the application of any party to the arbitration if * * * [t]he arbitrator[] exceeded [his] powers.” The purpose of R.C. 2711.109(D) is “to ensure that the parties get what they bargained for by keeping the arbitrator within the bounds of the authority they gave him” in the underlying arbitration agreement. *Piqua v. Fraternal Order of Police*, 185 Ohio App. 3d 496, 2009-Ohio-6591, at ¶ 21.

The arbitrator did not point to any term or provision of the management rights and responsibilities section of the agreement that in any way affected the employer’s right to conduct fitness-for-duty evaluations.

The union has not pointed to any term or provision of the collective-bargaining agreement that modifies the city’s reserved right to order an employee to submit to a fitness-for duty evaluation so as to subject disputes regarding such evaluations to arbitration.

Therefore, the arbitrator’s award failed to draw its essence from the collective bargaining

agreement and the arbitrator exceeded the power the agreement afforded him. See R.C. 2711.10(D). Under R.C. 2711.10(D), when an arbitrator exceeds his power, “the court of common pleas shall make an order vacating the award upon the application of any party to the arbitration.” In this case, the statute required the trial court to grant the city’s motion to vacate the part of the arbitrator’s award that addressed the arbitrability of the grievance. The city’s first assignment of error is sustained to the extent that it addressed the arbitrator’s decision that the union’s grievance was arbitrable.”

Legal Lessons Learned: The Fire Chief, under the management reservation of rights clause in the CBA, had the authority to order a fitness-for-duty examination of a firefighter, including a mental health evaluation. Consult with your labor attorney regarding rights under your CBA.

File: Chapter 17 - Arbitration / Mediation

OHIO: FIREFIGHTER TERMINATED – FAILED PSYCHOLOGIST’S FITNESS-FOR-DUTY EXAM - GRIEVANCE MUST GO TO ARBITRATION

On March 31, 2011, in Stow Firefighters, IAFF Local 1662 v. Stow, (Case No. 25090), 2011-Ohio-1558, the Court of Appeals for Summit County, held the “the City failed to demonstrate that the exclusionary language of the otherwise standard arbitration provision in the collective bargaining agreement explicitly excludes this type of grievance.” Full opinion can read: <http://www.supremecourt.ohio.gov/rod/docs/pdf/9/2011/2011-ohio-1558.pdf>.

[Note: Court of Appeals in companion case (Case No. 25209) held that Fire Chief had authority under CBA to order the fitness-for-duty examination. See Chapter 16. Full decision can be read: <http://www.supremecourt.ohio.gov/rod/docs/pdf/9/2011/2011-ohio-1559.pdf>.]

“Firefighter [_____] filed a grievance with the City of Stow after the City terminated his employment due to his failure to pass a fitness-for-duty evaluation by a psychologist. [Firefighter] had previously been disciplined for an incident involving unprofessional behavior toward a member of the City’s Parks Department. At that time, the fire chief told [firefighter] that he would be placed on involuntary paid leave until he completed a fitness-for-duty evaluation. [Firefighter’s] collective bargaining representative, Local 1662 of the International Association of Firefighters, filed a grievance on his behalf. Following an unsatisfactory report from the psychologist, the chief placed [firefighter] on unpaid leave until he could be deemed fit for duty. The first grievance then went to arbitration. When [firefighter’s] unpaid leave expired without him passing a fitness-for-duty evaluation, the chief terminated his employment with the fire department. The Union filed a second grievance on [firefighter’s] behalf contesting the termination. This opinion addresses only the second grievance. The first grievance is addressed in an opinion in a companion case, *Stow Firefighters, IAFF Local 1662 v. City of Stow*, Case Number 25209, which is also being filed today.

The City refused to arbitrate the second grievance, arguing that a discharge due to unfitness for duty is not subject to the grievance procedure under the parties’ collective bargaining agreement. According to the City, that dispute should be referred to the Stow Municipal Civil Service Commission under Section 124.34 of the Ohio Revised Code and Rule IX of the Civil Service Commission Rules for the City of Stow. The Union, on

the other hand, argued that the discharge was disciplinary and covered by Article XIII of the collective bargaining agreement.”

When the arbitrator refused to hear the case, the union appealed to Court of Common Pleas, which ruled for the City. The Court of Appeals disagreed, and remanded for case for arbitration.

“Article XII [of the CBA deals with ‘Disciplinary Procedure’ and, among other things, provides that ‘[d]iscipline shall be imposed only for just cause.’

The union’s grievance alleges: ‘The City’s termination of Firefighter [...] on the alleged basis of his inability to return to work is a pretext for discipline that is without just cause.’ As a remedy, the Union requested, among other things, that [firefighter’s] termination be rescinded and that he be compensated for “any wages and/or benefits lost as a result of the wrongful termination....’

This Court is unable to say ‘with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.’ *Council of Smaller Enters.*, 80 Ohio St. 3d at 666 (quoting *AT & T Techs. Inc.*, 475 U.S. at 650. Therefore, we must resolve our doubts in favor of coverage. *Id.* The Union’s first assignment of error is sustained.

Legal Lessons Learned: The termination decision will now go to arbitration; the arbitrator’s decision is binding on the parties. Consult with labor attorney about whether fitness-for-duty termination is subject to arbitration under your CBA.



Lawrence T. Bennett, Esq.

Program Chair
Fire Science & Emergency
Management,
College of Engineering &
Applied Science,
University of Cincinnati

Cell 513-470-2744

lawrence.bennett@uc.edu