COMMONWEALTH OF KENTUCKY
KENTUCKY SUPREME COURT
CASE NO. 2009-SC-000027-DG
(2007-CA-000443-MR & 2007-CA-000511-MR)

ST. LUKE HOSPITAL, INC.; E. KREBS, R.N.;

APPELLANTS

T. THEISEN; JOHN FEY; JOHN HOWARD HARRIS; AND ERNEST PRETOT

vs.

CAMPBELL CIRCUIT COURT
CASE NO. 04-CI-00729

SHANNON STRAUB

APPELLEE

BRIEF FOR APPELLANTS, ST. LUKE HOSPITAL, INC.; E. KREBS, R.N.; T. THEISEN; JOHN FEY; JOHN HOWARD HARRIS; AND ERNEST PRETOT

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have this 18 day of October, 2010 mailed a copy of the foregoing to Suzanne Cassidy, Esq., and Michael J. O'Hara, Esq., 25 Crestview Hills Mall Road, Suite 201, Covington, Kentucky 41017; Susan Stokley Clary, Clerk, Kentucky Supreme Court, Capitol Building, Room 235, 700 Capital Avenue, Frankfort, Kentucky 40601; Sam Givens, 360 Democratic Drive, Frankfort, Kentucky 40601 and Hon. Fred A. Stine, V, Campbell Circuit Judge, 330 York Street, Newport, Kentucky 41071. I further certify that the record on appeal was not withdrawn by the parties filing this brief.

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SCOTT M. POWERS

INTRODUCTION

This is a personal injury action (alleged assault, battery, false imprisonment and violation of plaintiff's Kentucky Constitutional rights), in which several defendants appeal from the Court of Appeals' Opinion affirming in part, reversing in part, and remanding for a new trial. Three defendant nurses, two hospital security guards and the defendant hospital had previously received a defense verdict from which the plaintiff-patient had appealed to the Court of Appeals.

STATEMENT CONCERNING ORAL ARGUMENT

Oral argument is requested because of the complexity of the case and issues of first impression, which are important not only to Appellants but future litigants.

STATEMENT OF POINTS AND AUTHORITY

STATEMENT OF THE CASE

This personal injury action began eleven years ago. The case wound its way through the Federal District Court, (Summary Judgment for Defendants), the U.S. Court of Appeals, (Summary Judgment affirmed) ,the Campbell Circuit Court, (defense verdict after an eight day trial) and the Kentucky Court of Appeals, (order reversing and remanding).

The Event

Plaintiff, Shannon Straub, was 16 years old. (Date of Birth: 11/6/82) Around midnight on April 16, 1999, Shannon's friends smoked some pot, and then everyone decided to go "hang out" at a condo/apartment in Wilder, Kentucky, owned by the brother of a friend's friend. (VCR No. 57:8/15/06; 15:12:35 and 15:13:44). Between 2:00 a.m. and 2:30 a.m. Shannon fell asleep on the apartment floor. (VCR No. 58:8/15/06; 15:14:13).

Shannon's story at trial was that at **6:00 a.m. on April 17, 1999**, she awoke. (VCR No. 58:8/15/06; 15:14:35) She went outside to her friend's car to get a toothbrush. (VCR No. 57:8/15/06; 15:15:40) When Shannon got to the car, she realized that she did not have the car keys, so she turned around to go back for the keys. (VCR No. 59:8/16/06; 9:15:07). Shannon claimed that she "forgot" what building she had just come out of. (VCR No. 58:8/15/06; 15:16:56). Shannon testified that because she was not sure what building she had just come out of, she began ringing ten to 12 doorbells thinking that she would eventually wake up one of her friend's who would let her back in. (VCR No. 58:8/15/06; 15:35:17 and VCR No. 59:8/15/06; 9:15:42). Instead, Shannon woke up several residents. She told one of the residents that she was "lost". (VCR No.

58:8/15/06; 15:19:05). Some of the residents called the police and Officer Kilgore, a Wilder Police Officer, responded to the scene. (VCR No. 59:8/16/06; 9:16:10).

Upon arriving at the apartment complex, officer Kilgore observed Shannon wandering around on the sidewalk and asked her what she was doing there. (VCR No. 59:8/16/06; 15:14:50). Shannon told Kilgore that "she had been dropped off by a car." (VCR No. 61:8/17/06; 9:25:25 and 09:02:27). When asked her name, Shannon replied that she was Shannon "Miller". (VCR No. 59:8/16/06; 15:15:41; 16:21:33). Kilgore asked Shannon what her address was, and Shannon stated that it was 501 Madison in Newport. (VCR No. 59:8/16/06; 15:18:22). (Officer Kilgore knew that there was no "Madison" in Newport). (VCR No. 59:8/16/06; 15:27:23 and 16:29:15). Officer Kilgore then asked Shannon if she had any identification, and Shannon said "no". (VCR No. 59:8/16/06; 15:17:18 and 16:22:26). Kilgore asked Shannon for her Social Security number and Shannon could not recall. (VCR No. 59:8/16/06; 15:17:00 and VCR No. 61:8/17/06; 9:07:26). Likewise, Shannon was unable to give her date of birth. (VCR No. 61:8/17/06; 9:07:30).

Officer Kilgore asked Shannon if she was the one who had been ringing doorbells and Shannon said "no". (VCR No. 59:8/16/06; 16:22:36). Kilgore noted that Shannon was weaving on her feet, was glassy-eyed, had slurred speech, and smelled heavily of marijuana. (VCR No. 59:8/16/06; 15:32:10). Shannon had a "look of no concentration". (VCR No. 61:8/1706; 09:03:20) Officer Kilgore then asked Shannon if she had taken any drugs. **Shannon replied that she had taken some drugs, but did not know what kind.** Kilgore asked Shannon where she got the drugs, and Shannon replied that **she had been at a party** and **had taken a pill out of a bowl.** (VCR No. 59:8/16/06; 16:24:00 and VCR

No. 61: 9/17/06; 09:18:15 to 09:18:23). Kilgore asked Shannon again where she lived, and Shannon pointed to one of the apartment buildings. Kilgore escorted Shannon up the sidewalk to the apartment building. On the way, Shannon stumbled. (VCR No. 59:8/16/06; 15:36:25). When they got to the building, Shannon pushed one of the doorbells, and a lady came to the door. In an upset manner, the lady stated that she had seen Shannon get out of a car, and start ringing doorbells and waking people up. (VCR No. 59:8/18/06; 15:19:35 and VCR No. 61:8/16/06; 9:24:08; VCR No. 59:8/16/06; 16:22:56; VCR No. 59; 8/16/06; 15:19:15). Kilgore apologized to the woman and explained that he was trying to get the girl home. The lady closed her door and Kilgore turned to talk to Shannon. However, Shannon remarked that this was where she lived, and Shannon again pushed the same lady's doorbell. (VCR No. 59:8/16/06; 16:23:30) The lady angrily returned to her door, and Officer Kilgore apologized again. Kilgore then moved Shannon away from the doorbells. Shannon remarked that she was "lost", and "there was no hope". (VCR No. 58:8/15/06; 15:27:11)

Officer Kilgore looked at the names on the doorbell register and saw no "Miller"; and commented to Shannon that there was no "Miller" on the register. In response, Shannon said her last name was "Straub". (VCR No. 59:8/16/06; 16:22:40). Kilgore looked and saw that there was no "Straub" on the apartments register either. Kilgore explained to Shannon that she had given him two different names (Miller and Straub); had no identification; could not remember her date of birth or Social Security number; had given him a non-existent address (Madison in Newport); did not know where she was; did not know what city she was in; and that he was going to take her to the police station **to try to locate her parents**. (VCR No. 59:8/16/06; 15:23:20)

Outside the station, Shannon exclaimed that she knew another police officer who walked by. Kilgore asked the other officer if he knew the girl. The officer looked at Shannon, and did not recognize her. At this point, Shannon loudly exclaimed again that the officer did know her. (VCR No. 59:8/17/06; 15:25:10). The officer again looked and repeated that he did not know Shannon.

Inside the police station, Officer Kilgore asked Shannon for her parent's' telephone number, and asked Shannon to sit in a chair next to his desk. (VCR No. 59:8/16/06; 15:25:15) Shannon gave Officer Kilgore four or five phone numbers. (VCR No. 59:8/16/06; 16:26:30). While Kilgore was trying those phone numbers, a couple of times Shannon got out of her chair and headed to the exit door. (VCR No. 59:8/17/06; 15:28:20 and 15:29:10). Shannon testified that Kilgore then handcuffed her to a chair. (VCR No. 58:8/15/06; 15:44:23; VCR No. 57:8/15/06; 13:51:40) Kilgore tried all the phone numbers to no avail. (VCR No. 59:8/16/06; 15:30:00)

Unable to reach Shannon's parents, Kilgore decided to call a social worker. (VCR No. 59:8/16/06; 15:33:40 and 15:30:07). Kilgore explained to the social worker what had happened, and that the child was glassy-eyed with slurred speech, and was wavy on her feet. (VCR No. 59:8/16/06; 15:32:10). The social worker advised Officer Kilgore to take the girl to the hospital to be checked out. (VCR No. 59:8/16/06; 15:31:28) Wherefore, Kilgore explained to Shannon that she apparently did not know her name, her address, her phone number, or her date of birth, and she needed to be checked out at a hospital. (VCR No. 59:8/16/06; 15:37:40).

When they got out of the cruiser at the ER parking lot, Shannon stumbled again and nearly fell. (VCR No. 59:8/16/06; 15:36:00 and 16:27:20). (Kilgore explained that there

was nothing in the parking lot to trip over). Upon arriving at the patient registration area, Kilgore seated Shannon in a chair, and handcuffed her to the chair to keep her from leaving. (VCR No. 58:8/15/06; 16:42:41; VCR No. 58:8/15/06; 15:45:24 and VCR No. 61:8/17/06; 9:49:25).

Once Shannon was brought to the emergency department, **under federal law**, the Defendant, **St. Luke Hospital, had a duty to provide a medical screening examination** within the capability of the hospital's emergency department, including ancillary services routinely available through the emergency department, **to determine whether or not Shannon had an emergency medical condition**. (EMTALA 42 U.S.C. §1395dd; *Martin v. Ohio County Hospital Corporation*, 295 S.W.3d 104, 114 (2009) and *Thomas, et al. v. St. Joseph Healthcare, Inc.*, 2010 WL 2812967 (rendered 7/6/10, petition for discretionary rev. filed 8/16/10). "The statute puts an absolute duty on hospitals to do what it requires", and imposes specific duties on medical providers and imposes **strict liability** on the provider for violation of those duties. *Thomas* at p. 3. **Under Kentucky law**, the hospital also had a **duty to promptly determine on the basis of examination and any other available information whether the child needed immediate hospitalization**. [KRS 645.120(2)]. In addition, both the hospital and the emergency room physician also had a **duty to render health services to the minor child without consent of the parent or her legal guardian, if in the judgment of the emergency room physician, the risk to the child's health was such that treatment should be given without delay and obtaining consent would result in delay or denial of treatment**. [KRS 214.184(4)]. (Discussion by Dr. Allen at VCR No. 62:8/18/06; 13:20:30 through 13:22:48; and 13:23:15 through 13:23:33 and 13:24:00 through 13:24:45). Dr. Allen also discussed the

medical **standard of care** which requires doctors to medically evaluate and treat minors when parents are not available. (VCR No. 62:8/18/06; 13:17:08).

The hospital admitting registrar, Heather Tillett, tried unsuccessfully to get information regarding Shannon. (VCR No. 63:8/17/06; 14:58:10, 14:58:20, 14:59:40). Ms. Tillett spoke with Kilgore, who advised that he did not know the patient's name or address, and that he had found the patient wandering around ringing doorbells, and **the patient had possibly been assaulted**. (VCR No. 63:8/17/06; 15:00:10 to 38).

The triage nurse, Tricia Theisen, R.N., came to take the patient. (VCR No. 61:8/17/06; 9:49:20). Theisen escorted Shannon back to the mental health evaluation room, AC5. (VCR No. 61:8/17/06; 9:51:00). While going down the hallway to the evaluation room, Shannon cursed loudly, staggered and almost fell for the third time. (VCR No. 61:8/17/06; 9:53:32 and VCR No. 59:8/16/06; 16:28:20 and VCR No. 59:8/16/06; 15:40:40). As nurse Theisen and Kilgore assisted Shannon in walking back to the mental health evaluation room, nurse Robin Reilly, R.N. observed that Shannon was unsteady and staggering. Shannon was moving like she was falling asleep while she was walking. Her eyes were very red and glassy. (VCR No. 63:8/17/06; 15:09:22).

The charge nurse, John Fey, R.N., saw Kilgore and nurse Theisen walking the patient back to AC5. He noted that nurse Theisen and Kilgore had to hold the patient's arms to steady her because she was wobbling. (VCR No. 63:8/17/06; 15:15:00). The patient was placed in the mental health evaluation room, where there was a gown and sheet laying on the stretcher. (VCR No. 63:8/17/06; 15:17:20). The triage nurse, Theisen, got some brief background information from officer Kilgore and then went into the triage room to assess the patient. (VCR No. 61: 8/17/06; 10:07:30) Kilgore then walked to the

telephone at the nurses' station, which was only a few steps away, and started trying to get hold of Shannon's parents with the several different phone numbers Shannon had given him. (VCR No. 59: 8/16/06; 16:34:50). Nurse Fey spoke to Kilgore who said that he found the patient wandering on the street, ringing doorbells, and she had been unable to tell what building she had come out of, and he could not get any straight answer as to the patient's name. (VCR No. 63:8/17/06; 15:18:00). (VCR No. 63:8/17/06; 15:19:10). Nurse Fey then went to the patient's evaluation room, to help nurse Theisen with the triage. Per hospital policy, one of the nurses called hospital security to alert them that a police officer had brought in a patient. (VCR No. 61: 8/17/06; 10:57:07)

Nurse Fey tried unsuccessfully to get some information from Shannon, including her age. (VCR No. 63:8/17/06; 15:18:20). Nurse Emma Krebs recalled that the patient would not provide her mother's name and responded to questions with agitated profanity. (VCR No. 62:8/17/06; 15:34:30 and 15:33:30). Shannon kept trying to push her way out of her room. (VCR No. 63: 8/18/06; 15:18:45and 15:20:08; 15:23:40) **Nurse Fey asked the patient three or four times to put on the gown,** which would discourage her from leaving the hospital. (VCR No. 63:8/17/06; 15:22:50). Nurse Fey did not want anyone to get hurt, either the patient or hospital staff. (VCR No. 63:8/17/06; 15:23:00 through 15:24:30). Kilgore could see Shannon's door from the nurses' station where he was using the phone and when Shannon stuck her head out the door and looked at the exit door, Kilgore told Shannon to go back inside her room. He was concerned that Shannon might leave the hospital before she was evaluated. (VCR No. 61: 8/17/06; 9:37:00) Per nurse Fey, the patient refused to answer questions; had a **flat affect**; had **dilated pupils** (twice the normal size); (VCR No. 62:8/18/06; 13:11:27 and VCR No. 63:6/18/06; 15:21:20)

had **pupils with sluggish reaction to light**. (VCR No. 63:8/18/06; 15:21:07). Shannon's **pulse was elevated**, at 114. (VCR No. 63:8/17/06; 15:21:00; VCR No. 61:8/17/06; 10:10:45) Nurse Fey explained that these **findings, along with Plaintiff's agitation, were consistent with drug abuse, alcohol abuse, trauma, or head injury**. (VCR No. 63:8/17/06;15:22:17).

Dr. Allen spoke briefly with Kilgore. (VCR No. 62: 8/18/06; 10:36:45). He recalled someone saying that Shannon was wandering around very early in the morning ringing doorbells with no coat on when it was 39 degrees outside. (VCR No. 62:8/18/06; 13:34:50). He thought Kilgore was in the hallway or near Shannon's room. He could not recall whether he talked to the patient before or after he spoke with Kilgore. (VCR No. 62: 8/18/06; 10:37:10). **Dr. Allen talked to the patient.** He felt that Shannon was **"dazed"** and had **poor eye contact**. (VCR No. 62:8/18/06; 13:26:58). Poor eye contact is associated with mental health issues. (VCR No. 62:8/18/06; 13:07:05) Shannon did not respond to questions by Dr. Allen. (VCR No. 62:8/18/06; 13:26:46-13:27:20). **Shannon told Dr. Allen that she had fallen off a motorcycle**. (VCR No. 62:8/18/06; 13:36:27) Shannon had an abrasion/scrape on her knee. (VCR No. 62:8/18/06; 13:45:29). **Shannon told Dr. Allen that she had taken "one pill".** (VCR No. 62:8/18/06; 13:59:43). **DR. ALLEN'S DIFFERENTIAL DIAGNOSIS** INCLUDED DRUG ABUSE, TRAUMA, HEAD INJURY, POST-ICTAL FOLLOWING SEIZURE, METABOLIC ABNORMALITY, AND PSYCHIATRIC DISORDER. (VCR No. 62:8/18/06; 13:36:38 through 13:37:15). **Dr. Allen was very concerned about the patient.** (VCR No. 62:8/18/06; 13:12:50) He explained that he and the hospital had an obligation under EMTALA to use all the resources of the hospital to medically screen the

patient to determine if she had any condition which could pose a risk to her health or possibly deteriorate if undiagnosed and/or treated. (VCR No. 62: 8/18/06; 13:22:00). Dr. Allen felt that Shannon's physical findings and behavior were definitely consistent with potentially serious drug abuse. (VCR No. 62:8/18/06; 14:14:35). Following Dr. Allen's evaluation of the patient, he thought Shannon probably suffered mind altering intoxication. (VCR No. 62:8/18/06; 13:33:30). He testified that tricyclic antidepressant can be fatal in fairly low amounts, and other drugs could cause rapid fluctuations in behavior, including violent behavior which can put a patient at risk for injury. (VCR No. 62:8/18/06; 13:29:16 to 13:31:50)

Dr. Allen, explained that a toxic level of valium, (Shannon did have Valium in her system), could cause almost all of her symptoms, including unsteady gait, acute hyper-excited state, anxiety, hallucinations, muscle spasticity, confusion and rage. (VCR No. 62: 8/18/06, 14:07:55-14:08:20) **Dr. Allen suspected that Shannon had been given something criminally, such as a date rape drug.** (VCR No. 62:8/18/06; 13:34:40) Dr. Allen testified that he considered Shannon's condition to be a medical emergency. (VCR No. 62: 8/17/06; 14:14:00) He explained that this included any condition that could deteriorate or pose a risk of injury to the patient if not properly evaluated and treated. (VCR No. 62: 8/18/06; 13:23:00) **Dr. Allen asked the nurses to get the patient into a gown** (VCR No. 62:8/18/06; 13:38:55) and he **ORDERED A URINE DRUG SCREEN AND BLOOD ALCOHOL**. (VCR No. 63:8/17/06; 15:24:22). Dr. Allen wanted the patient in a gown so that he could fully examine her and also to discourage elopement of the patient. (VCR No. 62: 8/18/06; 13:39:00 – 13:39:45). Dr. Allen did not order a head CT because he wanted the drug screen back first, and he did

not think the patient would hold still for the scan. (VCR No. 62: 8/18/06; 13:37:22 – 13:38:42). Thereafter, **nurse Fey asked Shannon several times, to provide a urine sample**. (VCR No. 63:8/17/06; 15:24:43); and provided her with a cup and showed her the bathroom. (VCR No. 63: 8/17/06; 15:24:48). Each time the **Plaintiff refused**. After several episodes of Shannon refusing to cooperate, nurse Fey specifically told Shannon that if she did not get into a gown and give a urine specimen, that they would end up having to take her clothes off, place her into a gown and catheterize her. (VCR No. 63: 8/17/06; 15:25:08)

Thereafter, nurse Fey talked to Dr. Allen and explained that patient would not cooperate, and that the only way they could get a urine sample would be to catheterize the patient. Nurse Fey asked Dr. Allen what he wanted to do. (VCR No. 63:8/17/06; 15:25:40 and 16:02:30). **Dr. Allen told nurse Fey to go ahead and put the patient into a hospital gown and catheterize her**. (VCR No. 63:8/17/06; 15:26:00, 16:02:30 and VCR No. 64: 8/21/06;14:03:58). Dr. Allen testified that when a patient does not cooperate in giving a urine specimen, there is no other option except to catheterize the patient. (VCR No. 62: 8/18/06; 13:52:27). Thereafter, nurse Fey and two female nurses tried to put Shannon into a gown. (VCR No. 63:8/17/06; 15:26:45).

When nurse Fey and the two female nurses tried to place Shannon into a gown, Shannon tried to **kick, bite**, and **scratch** the nurses. (VCR No. 64: 8/21/06; 14:03:46 and 14:04:50 and VCR No. 59:8/16/06; 16:37:35). A security guard, Ernest Pretot, heard the nurses ask for help. (VCR No. 61: 8/17/06; 14:02:13). Mr. Pretot also heard the patient **threatening the staff**. (VCR No. 62: 8/17/06; 14:34:25 and 14:35:38). When Mr. Pretot entered the room, the patient was kicking, biting, and swinging. Mr.

Pretot considered the patient a threat to herself and others. (VCR No. 62: 8/17/06; 14:38:10 and 14:39:20). The room was "chaotic". (VCR No. 62: 8/17/06; 14:42:20 and VCR No. 59:8/16/06; 16:38:40).

Another security guard, Mr. John Harris was asked to assist. When Harris entered the room, he grasped the Plaintiff's right hand to keep her from hitting someone, while the nurses put a sheet over the patient. (VCR No. 62: 8/18/06; 9:59:48 and 9:53:00). Per Harris, Shannon was fighting, cursing, and kicking. (VCR No. 62: 8/18/06; 10:00:00 and 10:00:30). Shannon tried to bite Mr. Harris. (VCR No. 62: 8/18/06; 10:01:30 and 10:05:48). Mr. Harris considered the patient to be a threat to everyone in the room. (VCR No. 62: 8/18/06; 10:05:40).

At the time of the commotion in Shannon's treatment room, Officer Kilgore was still using the phone at the nurse's station trying to locate Shannon's parents. (VCR No. 59: 8/16/06; 15:44:25). Kilgore heard Mr. Pretot ask for assistance. (VCR No. 59: 8/16/06; 15:45:40). Kilgore entered the room and saw the nurses, both security guards, and the patient on the bed with a "cover" over her from her neck down to below her knees. (VCR No. 59:8/16/06; 15:49:20 and16:37:10) Shannon's arms and legs were flailing and kicking. (VCR No. 59: 8/16/06; 16:37:10 and VCR No. 59: 8/16/06; 15:50:10 and 15:50:38). Officer Kilgore saw Shannon **trying to bite, scratch,** and **kick**. (VCR No. 59: 8/16/06; 16:37:40) Officer Kilgore heard Shannon threaten to kill the nurses. (VCR No. 59:8/16/06; 16:42:04 to 16:42:38). **Kilgore heard one of the nurse's remark that they needed to put a gown on the patient so the doctor could examine her**. (VCR No. 59: 8/16/06; 15:49:48).

While this was going on, the nurses had a sheet over top of Shannon. Kilgore

could not see what the nurses were doing under the sheet but assumed that the nurses were trying to put Shannon into a gown. (VCR No. 59: 8/16/06; 15:52:52 to 15:54:54). Mr. Pretot testified that the nurses had a sheet over the patient the entire time that the nurses were removing the patient's clothes. (VCR No. 62: 8/17/06; 14:06:20 to 14:09:50). Kilgore testified that after he held Shannon's right leg for "maybe 25 seconds", the nurses said "We've got it" and Kilgore left the room, and went back to making telephone calls, trying to reach Shannon's parents. (VCR No. 59:8/16/06; 15:55:05 and 16:38:01 to 16:38:37). [Kilgore thought he was out of the room by the time hospital personnel put Shannon into restraints. (VCR No. 59:8/16/06; 15:55:00 to 15:15:25)]

After the nurses got Shannon into a gown, they placed her in restraints to prevent her from hurting herself or others. (VCR No. 59: 8/16/06; 15:56:50). **Dr. Allen testified** that it was "**entirely appropriate**" for the nurses to put Shannon in restraints. (VCR No. 62:8/18/06; 13:44:38). The nurses had the authority to place a patient in restraints if the patient presented a risk to the safety of the patient or the staff. (VCR No. 62:8/18/06; 13:47:48) Dr. Allen he had no criticism of the nurses for restraining the patient when she became violent. He felt it was the "reasonable thing to do". (VCR No. 62: 8/18/06; 13:51:50).

Nurse Emma Krebs then went into Shannon's room and explained the catheterization process to Shannon. (VCR No. 62: 8/17/06; 15:20:50). Thereafter, nurse Krebs catheterized Shannon while Shannon was fully covered. (VCR No. 62: 8/17/06; 15:23:08). The procedure took a few seconds. (VCR No. 62: 8/17/06; 15:23:08). **Only nurses were in the room, when Shannon was catheterized**. (VCR No. 62:8/17/06; 15:34:00 and VCR No. 59:8/16/06; 10:26:20). Dr. Allen testified that he

was aware that the patient was being catheterized, and considered it the proper thing to do. (VCR No. 62: 8/18/06; 13:51:38).

Kilgore spent another half hour or so at the nurses' station trying to locate Shannon's mother, Mrs. Miller. (VCR No. 61: 8/17/06; 9:13:12 to 9:13:52) He was never able to speak directly with her. However, he eventually reached Mrs. Miller's husband who told Kilgore that Mrs. Miller was coming to the hospital. When Shannon's mother arrived at the ER, the **registration clerk**, Heather Tillett **finally, got Shannon's correct last name, address, and date of birth, from Mrs. Miller** (VCR No. 63:8/18/06; 14:59:18 and 15:00:10; See also VCR No. 62:8/18/06; 13:54:00 through 13:55:11) Ms. Miller then proceeded back to Shannon's room. Dr. Allen heard some yelling. (VCR No. 62: 8/18/06; 13:52:55 and 14:13:09 and VCR No. 61:8/16/06; 16:44:18). Mrs. Miller then came out of Shannon's room and told Dr. Allen **that Shannon had said she had taken some Acid,** given to her by a friend. (VCR No. 62:8/18/06; 15:56:20 and 14:19:54 to 14:20:08) **Dr. Allen recorded** in his emergency department physician report a summary of his conversation with Mrs. Miller:

> "The mother suspects that they were out partying, states that the patient has been known to use marijuana in the past, and the **patient admitted to her in the emergency department that she was given some acid by a friend.**" (VCR No. 62: 8/18/06; 13:56:00) (Emphasis added).

Shannon's drug screen came back positive for marijuana and benzodiazepines (VCR No. 62:8/18/06; 13:50:10). Acid (LSD) had not been on the drug screen panel, so Acid could not be ruled out. (VCR No. 62:8/18/06; 13:58:04). Dr. Allen explained that the drug screen results (marijuana and Valium) could explain Shannon's drowsiness, unsteadiness on her feet, agitation, rage, and confusion. (VCR No. 62:8/18/06; 14:07:40 to 14:09:10)

The **three drugs (marijuana, Valium and acid), alone or in combination, could have distorted Shannon's perception of reality**. (VCR No. 62:8/18/06; 14:19:11 to 14:20:36). Dr. Allen explained that the **possible adverse side effects of a toxic level of Valium** alone, included drowsiness, unsteady gait/stumbling anxiety, hallucination, rage, and confusion. (VCR No. 62: 8/18/06; 14:06:40 and 14:08:20). He explained how a patient who has abused Valium could be sedate one moment, and then agitated or violent the next, which was how Shannon behaved in the ER. (VCR No. 62: 8/18/06; 14:05:00 and 14:06:50). (VCR No. 62: 8/18/06; 14:13:52 and 14:14:00 to 14:14:27).

Dr. Allen concluded that he felt Shannon's clinical picture, including: a history of a 16 year old confused female wandering alone at 6:00 a.m. in 39 degrees weather without any parent or responsible adult, possible motorcycle accident, who had both enlarged and sluggish pupils, combined with confusion and bursts of agitation, and rage, **constituted a medical emergency**. (VCR No. 62: 8/18/06; 14:13:52 to 14:14:27) **Dr. Allen explained that the history, physical findings, and the patient's behavior were consistent with possible head injury, and/or abuse of marijuana and/or Valium and/or LSD/acid**. (VCR No. 62: 8/18/06; 14:13:52 and 14:14:30).

Nurse expert, Becky Tacy testified that the nurses' conduct and actions were appropriate. (VCR No. 64:8/21/06; 15:37:35 through 15:47:10).

By the time of the discussion between Dr. Allen and Mrs. Miller it had been about four hours since Shannon had been found wandering the streets and Shannon seemed to be improved, which was consistent with the drugs she had in her system, so Dr. Allen decided to release Shannon into the custody of Mrs. Miller. (VCR No. 62:8/18/06; 14:10:35 through 14:13:35) Dr. Allen asked Mrs. Miller to take Shannon to her family doctor to be

checked in a couple of days, and advised Mrs. Miller that social services would be following up on Shannon. Mrs. Miller apologized to the hospital personnel for the way her daughter had behaved and left the hospital. (VCR No. 61:8/17/06; 13:17:40 and VCR No. 63:8/18/06; 15:30:00)

Mrs. Miller never took Plaintiff to her family physician for any follow-up, or to any psychiatrist, psychologist, social worker or other mental health professional to be evaluated for possible mental or emotional difficulty. (VCR No. 57:8/15/06; 14:39:25 and 14:40:15 to 14:40:53)

Post Event Legal Proceedings

On February 28, 2000, the Plaintiff, Shannon Straub, through her mother and next Friend, filed an action in FEDERAL COURT, U.S.D.C., EASTERN DISTRICT OF KENTUCKY AT COVINGTON, CASE NO. 2000-41, wherein she sued The St. Luke Hospital, Inc. and two of its nurses, nurse E. Krebs and nurse T. Theisen, as well as police officer Kilgore, the City of Wilder, Kentucky, the emergency room physician, David Allen, M.D., and his employer. (T.R. 157) That Complaint alleged that:

(a) officer Kilgore and the City of Wilder violated Plaintiff's fourth and 14th U.S. Constitution Amendment Rights by unlawfully arresting her, thereby giving rise to a 42 U.S.C. §1983 action for civil damages. (**Count One**). (T.R. 167)[1]

(b) Officer Kilgore, Dr. Allen, his employer, nurse Krebs and nurse Theisen and St. Luke Hospital, through state action, violated Plaintiff's rights under the 14th Amendment to the U.S. Constitution by falsely imprisoning the Plaintiff. (**Count Two**).

[1] 14th Amendment to U.S. Constitution provides that no state shall deprive any person of life, liberty or property, without due process of law.

(c) Defendants, through state action, violated her 14th Amendment rights by wrongfully gowning her and catheterizing her and obtaining urine and blood samples. (**Count Three**).

(d) Defendants, through state action, violated her 14th Amendment Rights by an unreasonable search and seizure. (**Count Four**).

(e) Defendants, through state action, violated her 14th Amendment Rights by denying her substantive due process by taking her clothes off and allegedly exposing her to individuals of the opposite sex. (**Count Five**).

(f) Kilgore and unknown individuals wrongfully failed to intervene to prevent U.S. constitutional deprivations and that the City of Wilder ratified such conduct, again violating Plaintiff's 14th Amendment Rights. (**Count Six**).

(g) Kilgore violated Plaintiff's right to be free from common law false arrest. (**Count Seven**).

(h) the Defendants falsely imprisoned Plaintiff in violation of Kentucky common law. (**Count Eight**).

(i) the Defendants committed the common law tort of outrage. (**Count Nine**).

(j) Plaintiff sought punitive damages (**Count Ten**)

During the discovery phase of the Plaintiff's federal action, all of the Defendants were deposed. In addition, the non-defendants, security guard John Harris, security guard Ernest Pretot and ER nurse Robin Reilly, R.N., were deposed. Both **Mr. Harris** and **Mr. Pretot were deposed** on **March 29, 2001. (T.R. 191 and 192)** Nurse Reilly was deposed on March 30, 2001. **(T.R. 193)** During the depositions, **nurse John Fey's involvement in Shannon's ER care was discussed.** (See depositions filed 9/16/04;

Harris' depo p. 45, 46, 48, 51, 62, 63, 66, 80, 82; Pretot depo p. 84; Theisen depo p. 55, 58, 60, 64; Krebs' depo p. 74, 75; Reilly depo p. 31, 40). (T.R. 194-195) **Plaintiff chose not to name Mr. Harris, Mr. Pretot and/or nurse Fey as defendants in the federal action**. (T.R. 172) [Plaintiff had until her 19th birthday (11/6/01) to file new claims or join new defendants per KRS 413.140 and KRS 413.120. Pursuant to FRCP 15(c), Plaintiff may have had until one year after the March 2001 depositions to amend her federal complaint to join Mr. Harris, Mr. Pretot and Mr. Fey and/or assert new claims as discussed on p. 36 hereafter.]

Over a year after the depositions, pursuant to motions for summary judgment, the **Federal District Judge issued an opinion and order on April 10, 2002 dismissing plaintiff's claims**. (T.R. 80) The Court found that **there was insufficient evidence for a jury to reasonably conclude that the Defendants, St. Luke Hospital, Theisen, Krebs or Dr. Allen were "state actors", and thus the Plaintiff could not maintain a Section 1983 action against those Defendants. Summary judgment for the defendants was entered**. (T.R. 96) Because the Plaintiff presented no actionable claims under Federal law against the Defendants, her remaining state common law claims were dismissed without prejudice pursuant to 28 U.S.C. §1363. (T.R. 96) (Page 17 of the Opinion and Order) (**The remaining state law claims were common law false arrest, false imprisonment and the tort of outrage**).

The Plaintiff appealed to the U.S. COURT OF APPEALS, SIXTH CIRCUIT, CASE NO. 02-552. On **May 27, 2004**, the **U.S. Court of Appeals affirmed** Judge Bertelsman's prior dismissal of Plaintiff's lawsuit. (T.R. 99) **The Court of Appeals stated that "we are unable to conclude that Straub has demonstrated that the hospital**

Defendants acted under color of state law." (T.R. 108) The Court commented that "Straub has made no showing that the hospital defendants were engaged in an action traditionally reserved to the state." "Straub has not identified a relationship with the state from which the hospital or its personnel benefitted." **"Straub has presented no evidence that Kilgore or any other representative of the state coerced or encouraged the hospital personnel such that their actions could be deemed to be those of the state."** "We are satisfied that the hospital personnel properly supported their motions for summary judgment in the district court by showing that **there was no evidence that would support a finding that they acted under color of state law**." (T.R. 108-109) The U.S. Court of Appeals decision was summarized in an annotation under Baldwin's Kentucky Constitution Section 14 Annotation 3b regarding "State Action" as follows:

> "Arrestee failed to prove that police officer or hospital personnel acted under color of state law when they restrained her, thus defeating her §§ 1983 claim that her constitutional rights were violated when they subjected her to invasive medical procedures against her will; the arrestee made no showing that the hospital personnel were engaged in action traditionally reserved to the state, that there was a relationship with the state from which the hospital or its personnel benefited, or that the officer coerced or encouraged the hospital personnel, and there was no evidence that the officer restrained her for the purpose of conducting a criminal investigation or evidence to refute his claim that he was merely acting at the direction of hospital personnel when he assisted them in restraining her. *Straub v. Kilgore*, (C.A. 6 (Ky.) 2004) 100 Fed.Appx. 379, 2004 WL 1193841, Unreported."

After the U.S. Court of Appeals affirmed the U.S. District Court's dismissal, Plaintiff filed a petition for rehearing. While that petition was pending, Plaintiff filed a new action in the CAMPBELL CIRCUIT COURT ON **JUNE 25, 2004**, CASE NO. 04-CI-729. (T.R. 3) In Plaintiff's new state court action:

(1) **Plaintiff named three new defendants** including nurse **John Fey**, security guard **John Harris**, and security guard **Ernest Pretot**. (T.R. 4)

(2) Plaintiff claimed that the Defendants, through state action, had violated her due process rights and right to be free from unreasonable search and seizure, under Sections 1, 2, 10 and 14 of the **Kentucky Constitution**. (T.R. 13-14) (2)

(3) Plaintiff restated the three common law claims she previously had raised in the federal court action, (false arrest, false imprisonment and tort of outrage) which claims had been dismissed without prejudice by the federal court when Plaintiff's Section 1983 claims were dismissed for lack of "state action" by the hospital employees. (T.R. 16)

On **July 24, 2004**, the U.S. Court of Appeals denied Plaintiff's petition for rehearing. (T.R. 113)

On **August 11, 2004**, the new Defendants, John Fey, John Howard Harris, and Ernest Pretot moved to dismiss all claims, (except for tort of outrage), against them based on the one year statute of limitations. (T.R. 151) On **August 12, 2004**, the Defendant, St. Luke Hospital and its nurses, Krebs, Theisen, Fey and security guards Harris and Pretot moved to dismiss all claims which required the hospital, nurses and security guards to have acted under color of state law. (T.R. 205)

On **September 8, 2004**, Plaintiff filed a motion to amend her Campbell Circuit Court action to add a **new claim** for common law **assault and battery**, which had never been alleged in the Federal Court action. (T.R. 297) The Defendants objected based upon the one year statute of limitations. (T.R. 276) On October 4, 2004, the Defendants, Fey, Harris and Pretot, supplemented their previous statute of limitations argument. (T.R. 403) The Defendant Hospital and its employees again supplemented their motion to dismiss Plaintiff's Kentucky Constitutional violation claims. (T.R. 454). On **December 1, 2004**, the Campbell Circuit Court denied Defendants' motions. However, the judge

stated in his Order that 42 U.S.C. §1983 provides remedies only for claims brought under federal law or the federal constitution; and that "it should be pointed out that Kentucky Court's have not addressed the need for enabling legislation for a private remedy under Section 14 of the Kentucky Constitution." (Order p. 4) He noted however that the Kentucky Supreme Court had held that persons do have the right to resort to Kentucky courts for relief from Constitutional violations per Section 14 of the Kentucky Constitution, citing *Kendall v. Beiling*, Ky., 175 S.W.2d 489, 491 (1943). (The trial judge's order p. 4.)

On **January 13, 2005**, Appellees asked the court to dismiss the Plaintiff's Campbell Circuit Court Action for the reason that it had not been filed within the 90 day window following the final federal court ruling on July 21, 2004, as permitted by KRS 413.270. (T.R. 639) On **April 25, 2006**, Defendants renewed and supplemented their motions for partial summary judgments and also asked to dismiss Plaintiff's claim for "outrage". (T.R. 773) Defendants again supplemented their arguments on May 31, 2006. (T.R. 953)

On **August 4, 2006**, in response to renewed motions to dismiss, the Campbell Circuit Court dismissed, without objection, Plaintiff's claim for the tort of outrage. (T.R. 1376) **The Court also dismissed Plaintiff's claims which asserted that the hospital Defendants had, while acting under color of state law, violated Plaintiff's rights protected by the Kentucky Constitution.** (T.R. 1381) The Campbell Circuit Court agreed with the previous analyses of the Federal District Court and the Federal Court of Appeals, that **the facts did not demonstrate that the hospital employees and/or Dr.**

Allen had acted as agents of the state when they made their medical decisions and their treatment interventions, namely gowning the patient, restraining her, catheterizing her and drawing blood. (T.R. 1379) **The Campbell Circuit Court found that those actions were clearly independent healthcare decisions and interventions initiated by Dr. Allen and the nurses without instruction or request by officer Kilgore.** Further, the Campbell Circuit Court stated that the issue of whether the Defendant Hospital, its employees, and Dr. Allen were "state actors" had already been litigated in both the Federal District Court and the U.S. Court of Appeals, and that relitigation of that particular issue was prohibited under the doctrine of res judicata/issue preclusion. (T.R. 1381). Subsequently, the trial court retracted its opinion that res judicata or issue preclusion applied. (T.R. 1518).

The claims against Defendants Kilgore and his employer, City of Wilder, for false arrest prior to the hospitalization; along with claims against the healthcare providers and officer Kilgore for false imprisonment and assault and battery at the hospital proceeded to **trial** on **8/14/2006**. (T.R. 1381 – 1382).

The **crux of the trial** came down to whether the police officer, the emergency room physician, the emergency room nurses and the hospital security guards acted reasonably and with adequate justification considering their responsibilities and obligations under EMTALA, state law, and applicable standards of medical and hospital care with respect to medical evaluation of a minor child brought to a hospital following her strange behavior, suspected possible criminal assault (date rape), possible motorcycle accident and abnormal physical findings; (e.g., ringing doorbells at 6:00 a.m., not knowing where she lived,

unable to provide name, date of birth or social security number, stumbling, wobbling, leaning on people, dilated pupils, sluggish pupils, elevated heart rate, statements of ingesting an unknown drug/pill, knee abrasion, being lost, confused, flat affect associated with rapidly changing demeanor from calm to rage, etc.)

Plaintiff claimed at trial that she had not been under the influence of any drugs while at the hospital and that she had behaved normally while in the ER. However, Shannon's boyfriend, Christopher Porter, testified that **Shannon told him she was screwed up** when she was taken by the police officer to the hospital. (VCR No. 65: 6/22/06; 14:11:00).

Q. You said she told you about the lawsuit, and on a couple of occasions and you said she talked about – why don't you tell me exactly what she told you about the underlying facts? Once she got picked up by the officer, and she was taken to the hospital. What did she tell you, specifically?
A. She told me her and her friends was riding around, and they was drunk or whatever. And she went to the hospital. And either the police officer or the doctor or whatever took her clothes off and did something to her where – when her mother wasn't there, when they weren't supposed to do it. She didn't give them no consent to do it.
Q. Did she suggest to you she under the influence of some substance At that time?
A. Yeah.
Q. Did she tell you what it was?
A. No.
Q. As you sit here today, you can't remember – you said she was drunk or Under the influence, but you don't know what – whether it was alcohol, or drugs, or both?
A. I don't know.
Q. Okay. That's just what she told you?
A. Yeah. **Said she was fucked up. That's what she tells me.**
(Christopher Porter deposition taken October 4, 2005, pp. 42 & 44, Deposition "M" in trial record – played into evidence at VCR No. 65: 6/22/06; 14:11:00).

After the evidence was concluded, instructions were given to the jury. During

deliberations, the jury submitted three questions to the Court: (T.R. 1649 and 1650) and the judge responded as follows:

> **Question #1:** In Question #2, can we the jury separate out the culpability of St. Luke versus the injury to Shannon Straub? That is, can we find fault with the defendant without believing that Ms. Straub has experienced any injury (i.e. psychological)?
> **Response by Judge**: You are instructed to answer Question #2 as presented.
> **Question #2**: May we please have Shannon Straub's testimony or her deposition?
> **Response by Judge**: You may not have either recorded testimony from trial or a deposition. You must rely on your collective recollections.
> **Question #3**: Does "injury" that is listed with each question need to be lasting or temporary?
> **Response by Judge**: Please reread and review the instruction(s) and rely on your collective judgments.

Thereafter, **the jury returned a verdict concluding that none of the defendants had breached any duty to the Plaintiff which was a substantial factor in causing injury to the Plaintiff.** (T.R. 1651, et seq.) The jury foreman stated that he would like to read a letter he had written. The gist of the letter was that the jury believed St. Luke Hospital "was at fault for poorly managing its records." (R.R. 1681). The foreman further stated that "essentially a lack of documentation concerning that she was restrained and catheterized (including the rationale for this) should have been provided." The jury foreman further stated "ultimately, the majority of the jury could not be convinced that Ms. Straub experienced injury based on the evidence presented." Whereupon, Plaintiff's Campbell Circuit Court action was dismissed by order and judgment entered September 18, 2006. (T.R. 1694).

From there, **Plaintiff appealed** to the Kentucky Court of Appeals. (T.R. 1747) **Defendants cross-appealed.** (T.R. 1751) The Defendants assert that the trial court erred as followed:

(1) The trial court erroneously failed to summarily dismiss all claims against Defendants Harris, Pretot and Fey based on the one year statute of limitations;

2) Although the trial court did dismiss Plaintiff's claims which asserted violations of Kentucky Constitutional rights, the trial court erroneously failed to dismiss those claims because of: (a) res judicata/issue preclusion; (b) the one year statute of limitations; and (c) Kentucky having no law creating such a cause of action;

(3) The trial court erroneously allowed Plaintiff to bring new claims of assault and battery, which were never asserted in the federal action;

(4) The trial court erroneously failed to dismiss Plaintiff's entire Campbell Circuit Court action because it had not been filed in the statutorily allowed 90 day window following the U.S. Court of Appeals order of June 25, 2004 overruling Plaintiff's petition for a rehearing; and

(5) The trial court improperly submitted a punitive damages instruction to the jury.

On **December 19, 2008**, the majority in the Court of Appeals reversed the trial court's summary judgment previously awarded to the hospital defendants on Plaintiff's claims which depended on a finding that the hospital employees had engaged in state action. (Court of Appeals Opinion pp. 32-37). The Court of Appeals also found that the trial Court had committed reversible error by: (a) allowing in evidence of Plaintiff's use of profanity in the ER (Court of Appeals Opinion pp. 28-31); (b) allegedly allowing in evidence of Plaintiff's past drug use (Court of Appeals Opinion, pp. 28-31); and (c) by not answering question #3 by the jury (Court of Appeals Opinion pp. 26-28). Defendants' appeal to this Supreme Court followed.

ARGUMENT

A. THE COURT OF APPEALS ERRONEOUSLY REVERSED THE TRIAL COURT'S SUMMARY JUDGMENT DISMISSING ALL OF PLAINTIFF'S CLAIMS WHICH DEPENDED ON A FINDING THAT THE HOSPITAL EMPLOYEES HAD ENGAGED IN STATE ACTION.

[This issue was preserved in Defendants' motions to dismiss and memoranda found at T.R. 205, 454, 773, 953]

(a) Kentucky's highest court first recognized the **doctrine of issue preclusion** in *Sedley v. City of West Buechel*, 461 S.W.2d 556 (Ky. 1970). The Court held that a person who had not been a party to a former action could assert res judica against a party to the former action, to preclude the relitigation of an issue determined in the prior action. *Id.* p. 559. The Court stated that the "issue preclusion" doctrine precludes relitigation of an issue previously addressed and decided where the issue was essential to the determination of the former case. *Id.* p. 559; see also *Moore v. Com., Cabinet for Human Res.*, 954 S.W.2d 317, 319 (Ky. 1997). Whether the hospital employees acted under color of state law in examining and testing (gowning, restraining, catheterizing and drawing blood) Shannon Straub was the central issue litigated in the Federal Courts. Depositions of all the healthcare providers, as well as the Plaintiff, were taken in the federal action. Whether the healthcare providers engaged in state action was briefed and argued before both the U.S. District Court and the U.S. Court of Appeals. In fact, it was the **only issue** which those courts addressed in their effort to determine whether the federal courts had jurisdiction over Plaintiff's claims.

"Collateral estoppel or issue preclusion is part of the concept of res judicata and

serves to prevent parties from relitigating issues necessarily determined in a prior proceeding." *Gregory v. Com.*, 610 S.W.2d 598, 600 (Ky. 1980). The determination of whether the healthcare providers gowned, restrained, catheterized, and drew blood from the Plaintiff at the direction, request or coercion of Officer Kilgore did not hinge on whether those actions violated rights guaranteed by the U.S. Constitution or Kentucky State Constitution. The test of whether the hospital employees were "state actors" hinged on whether the healthcare providers exercised independent professional judgment for medical reasons, or whether they acted at the behest of officer Kilgore in choosing and implementing the medical decisions and tests. After considering the depositions of the Plaintiff, the healthcare providers and officer Kilgore, the Federal District Court concluded that the healthcare providers had clearly not acted under color of state law in gowning, restraining, catheterizing or drawing blood from Shannon. The U.S. Court of Appeals affirmed that decision. Hence, the doctrine of issue preclusion should have precluded Straub from relitigating the issue in the Campbell Circuit Court regardless of whether she claimed that the health care providers' conduct violated her rights protected by the Kentucky Constitution instead of the U.S. Constitution.

The doctrine of issue preclusion was more recently recognized and approved in *Yeoman v. Com., Health Policy Bd.*, 983 S.W.2d 459, 465 (Ky. 1998), which cited *Restatement (Second) of Judgments,* §27 (1982). For issue preclusion to operate as a bar to further litigation, certain elements must be found to be present. First, the issue in the second case was the same as the issue in the first case. Second, the issue must have been actually litigated. *Id.* Third, the issue was actually decided in the previous action. *Id.* Fourth, the decision on the issue in the prior action must have been necessary to the court's

judgment. *Id.* See also *Coomer v. CSX Transportation, Inc.*, (2008-SC-000784-DG). All four elements were present in the case *sub judice*. While Plaintiff's substantive State and Federal Constitutional claims theoretically could be independent[2], the question of what constitutes state action remains the same. Defendants are unaware of any Kentucky test for state action which is different from or broader than the tests used by the Federal Courts and Plaintiff has not cited any difference. In fact, in arguing that state action was involved Plaintiff cited federal court decisions.

The doctrine of "issue preclusion", which may be used either "offensively" or "defensively", precludes relitigation of issues decided in an earlier action. *Godby v. University Hospital*, 975 S.W.2d 104 (Ky. App. 1998). Reasons for "issue preclusion" include not only economy of litigation and fairness to the parties, but avoidance of inconsistent judgments. *Barnett v. Commonwealth*, 348 S.W.2d 834, 835 (Ky. 1961). The Kentucky Supreme Court previously addressed this subject in *City of Louisville v. Louisville Professional Firefighters Assoc.*, 813 S.W.2d 804 (Ky. 1991).

> However, where a judgment disposes of an action without a determination on the merits, it is nevertheless conclusive as to the issues or technical points actually decided therein, and this rule has been applied to a judgment based on a lack of jurisdiction, so as to render conclusive the prior court's determination of its lack of jurisdiction, as well as questions material to the issue of jurisdiction and actually decided by the judgment. *Id.* at 807.

The Court went on to state:

> The first trial court action decided the ultimate issue of whether the circuit court or the Board had subject matter jurisdiction to hear the case. The decision made final and conclusive the issue of whether KRS Chapter 345 applied to the parties'

[2] Section 2 of the Kentucky Constitution provides that the state shall have no absolute or arbitrate power over the lives, liberty, or property of free men. Section 10 provides that people shall be free from unreasonable searches and seizures by the state. Section 14 provides that every person shall be entitled to due process of law.

> dispute, even though the trial court dismissed the case without prejudice. To reach this result, the trial court made findings of fact and conclusions of law on its subject matter jurisdiction. The trial court then determined that the agreement was governed by KRS Chapter 345 and that the Board had exclusive jurisdiction under the statute to hear the dispute. Therefore, we find that to this extent, the merits of the case were reached by the trial court. We agree with the trial court and the Court of Appeals that the city is barred under the doctrine of res judicata and waiver from asserting the issue of the applicability of the KRS Chapter 345 in the subsequent trial court case. We also find that the city is collaterally stopped from relitigating the issue. *Id.* at 809 (emphasis added).

Plaintiff has shown no legitimate reason why this Court should over-ride the public policy favoring both an end to litigation and precluding Defendants from answering to the same arguments over "state action" more than once. See *Matosantos Commercial Corp. v. Applebee's International, Inc.*, 245 F.3d 1203 (10th Cir. 2001) (rejecting the argument that Rule 41(b) allows issues decided in a jurisdictional dismissal to be relitigated in another proceeding); *Bromwell v. Michigan Mut. Ins. Co.*, 115 F.3d 208 (3d Cir. 1997) (holding that a dismissal for lack of subject-matter jurisdiction is conclusive as to matters actually adjudged.) Wherefore, the Kentucky Court of Appeals should have held that the doctrine of issue preclusion barred Plaintiff from relitigating the issue of whether the healthcare providers had engaged in "state action" when they evaluated and tested Plaintiff.

The majority in the Kentucky Court of Appeals inappropriately relied upon dictum found in *Davis v. Powell's Water District*, 920 S.W.2d 74 (Ky. App. 1995) which suggested that a state court is not bound by a federal court's determination that defendants were not state actors. First, the opinion in *Davis* was dictum. The *Davis* court pointed out that the defendant had waived the argument by failing to plead res judicata in its answer. *Davis* at p. 77. Secondly, the majority opinion in Davis was contrary to the law

firmly established by Kentucky's highest court as set forth above.

(b) The Kentucky Supreme Court recently spoke to the subject of "state action" in *Robertson v. Com.*, 185 S.W.3d 634, 639 , 640 (Ky. 2006). It gave the example of when a private entity acts in accordance with a court order or government regulation. That was not the situation in the case at bar. *Robertson* referred to *Adkins v. Com.*, 96 S.W.3d 779 (Ky. 2003), which rejected an argument that a defendant's brother had acted in conjunction with the police to encourage the defendant to confess to a crime. The *Adkins* Court found that the police officer neither "coerced" nor "significantly encouraged" Adkins to interrogate the suspect. *Id.* at p. 791.

Mere approval by a government entity of or acquiescence in the initiatives of a private party is not sufficient to justify a conclusion that the parties constituted state actors. *Blum v. Yaretsky*, 457 U.S. 991, 1004-05 102 S. Ct. 2777, 73 L. Ed. 534 (1982); *Wolotsky v. Huhn*, 960 F.2d 131, 135 (6th Cir. 1992); *Bass v. Parkwood Hospital*, 180 Fed.3d 234, 242 (5th Cir. 1999). **The key determinant is whether the doctor and other medical personnel based their decisions on their own professional judgment and medical reasons, or whether they acted at the behest of the state.** *Kim Williams v. Officer FNU Payne, et al.*, 73 F. Supp.2d 785, 800 (E.D. Michigan 1999); *Collyer v. Darling*, 98 F.3d 211, 231-232 (6th Cir. 1996). *Blum v. Yaretsky*, 457 U.S. 991, 1004-05 102 S. Ct. 2777, 73 L. Ed. 534 (1982).

There was no evidence that officer Kilgore influenced Dr. Allen's decision to order a urine drug screen and blood alcohol test, or the doctor's request to get the patient into a gown. When Kilgore came to the ER, he told the registrar that he found the girl

wandering around apparently lost, ringing doorbells, and had possibly been assaulted. Kilgore helped walk the patient back to a room as she stumbled and staggered down the hallway. He spoke briefly with the triage nurse. If he entered the triage room as claimed by the Plaintiff, there was no evidence that Kilgore participated in the triage examination in any way. While the patient was triaged, Kilgore went to the nurses' station to make phone calls in an effort to locate Straub's parents. He spoke briefly with nurse Fey and Dr. Allen when they sought some history concerning the patient. **Dr. Allen recorded in his dictation** that the patient had been picked up after ringing doorbells and would not give the police officer her name and did not have any I.D. "**and the police officer did not know what to do with her, therefore, she was brought to the emergency department for evaluation**". (See Emergency Department Physician Report). Kilgore told Dr. Allen that he had smelled marijuana when he picked the patient up and that one of the residents had reported that the patient had gotten out of a car. (See handwritten M.D. notes on Emergency Department treatment record). **After the triage and Dr. Allen's examination of the patient, Dr. Allen felt it was necessary for him to (a) determine whether Straub had ingested any one of a number of powerful drugs either voluntarily or involuntarily; (b) rule out psychiatric illness; (c) rule out metabolic disorder; (d) rule out head injury possibly associated with the motorcycle falling over; (e) rule out seizure/loss of consciousness/amnesia.** (VCR No. 62:8/18/06; 13:33:48 to 13:36:30) **No evidence suggested that officer Kilgore coerced or directed the medical personnel relative to any of their orders or actions.**

Security guard Pretot's comment in his deposition that "this was officer Kilgore's situation" was not evidence that officer Kilgore requested a urine drug screen, blood

alcohol test or that the patient be placed in a gown. It was not until after the nurses attempted to place the patient into a gown that the Plaintiff began trying to kick, hit and bite the nurses, thus causing them to ask for help, which led to security guards Pretot and Harris responding, and then Kilgore. **There was no evidence that officer Kilgore ever requested or suggested that the patient be put in restraints and/or catheterized**. The decision to restrain the patient was solely one of the nurses (to protect themselves and the patient), and the decision to catheterize the patient was a medical decision which Kilgore had no input to whatsoever.

(c) Another reason to affirm the trial court's dismissal of all claims alleging violation of Kentucky Constitutional Rights is because the Kentucky Constitution does not provide a private right of action for damages for violations of state constitutional provisions. Kentucky does not have a statute comparable to 42 U.S.C. Section 1983 which authorizes private civil actions for damages arising from violations of U.S. Constitutional Rights or Federal Statutes. Plaintiff's reliance on KRS 446.070 is misplaced. KRS 446.070 provides that a person injured by the violation of any **statute** may recover from the offender such damages as he sustained by reason of the violation, although a penalty or forfeiture is imposed for such violation. The word "statute" is unambiguous and should be accorded its common meaning. KRS 446.080(4). Kentucky Court's have held that KRS 446.070 applies to Kentucky state statutes. It does not create a cause of action for violation of municipal ordinances. *Baker v. White*, 251 Ky. 691, 65 S.W.2d 1022 (1933). It does not apply to violation of a federal statute. *Alderman v. Bradley*, 957 S.W.2d 264, 266-267 (Ky. App. 1997). See also *Young v. Carron*, 289

S.W.3d 586 (Ky. App. 2008), which held that KRS 446.070 did not create a cause of action for violation of the Federal Health Insurance Portability and Accountability Act. (HIPAA) Wherefore, unless the Kentucky General Assembly enacts a statute comparable to 42 U.S.C. Section 1983, claims such as Plaintiff's (due process and unreasonable search and seizure) should be left within the province of 42 U.S.C. Section 1983 unless the Plaintiff is seeking injunctive relief. *Lucas v. Voirol*, 136 S.W.3d 477 (Ky. App. 2009); *Kendall v. Beiling*, 175 S.W.2d 489 (Ky. 1943); *Akers v. Floyd County Fiscal Court*, 556 S.W. 2d 146 (Ky. 1977); *Baker v. Fletcher*, 204 S.W.3d 589 (Ky. 2006).

B. THE KENTUCKY COURT OF APPEALS ERRONEOUSLY FOUND THAT THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY ALLOWING IN EVIDENCE OF THE PROFANITY PLAINTIFF USED WHEN SHE WAS IN THE EMERGENCY ROOM. (Court of Appeals opinion p. 28-32).

The Defendants were entitled to have the jury understand exactly what was observed when Plaintiff was in the emergency room. Plaintiff's demeanor and affect vacillated between calm and/or a dazed to acts of rage. Plaintiff's bursts of enraged profanity in the ER were part of her clinical picture consistent with toxic drug ingestion and/or possible head trauma as explained by Dr. Allen and nurse Fey. Plaintiff's violent obscene threats against the nurses were also part of the picture which led to temporary restraints being applied.

The standard of review on evidentiary issues is abuse of discretion. *Clark v. Com.*, 223 S.W.3d 90, 95 (Ky. 2007). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles. *Goodyear Tire and Rubber Company v. Thompson*, 11 S.W.3d 575, 581 (Ky.

2000). No evidentiary error may be ground for reversal unless it affects the substantial rights of the parties. (CR 61.01 and KRE 103).

Not only were the hospital defendants entitled to have the jury understand the complete clinical picture they were dealing with, Plaintiff cited no references in her brief before the Court of Appeals relative to an objection to any particular evidence concerning Plaintiff's use of profanity in the emergency room, except for page 22 of Plaintiff's Court of Appeals brief which referenced Plaintiff's profanity's when the hospital staff were changing the patient into a gown. At that time, that the patient was screaming threats to kill members of the nursing staff. The Defendants had the right to introduce a complete and accurate picture of what they were dealing with when they decided to restrain the patient. The Plaintiff was not entitled to a present sanitized and censored version of what occurred. The portion of the Kentucky Court of Appeals opinion holding that trial court committed reversible error by allowing in evidence concerning Plaintiff's use of profanity in the ER should be reversed.

C. THE COURT OF APPEALS ERRONEOUSLY HELD THAT THE TRIAL COURT IMPROPERLY ADMITTED EVIDENCE OF PLAINTIFF'S PAST HISTORY OF DRUG USE

In order to explain her urine drug screen result of positive for marijuana, Plaintiff volunteered on direct examination that she sometimes smoked pot with her friends. (VCR No. 57, 8/15/06; 13:36:16-32 and 14:09:30). However, Plaintiff claimed that she did not do so on the evening in question, even though she said her friends did smoke pot that evening. (VCR No. 57: 8/15/06; 13:35:59) Plaintiff claimed that she was not under the

influence of any drugs when she was at St. Luke Hospital, and that she behaved normally while in the emergency department. Her testimony contrasted with the testimony of all the defendants.

Because Plaintiff's credibility was at issue and she disputed the testimony of the Defendants, Defendants called Plaintiff's boyfriend, Christopher Porter, as a witness. Mr. Porter testified that Plaintiff told him that she was in fact under the influence of some substance(s) at the time. Porter's testimony both contradicted Straub's story that she had not taken any drugs on the night in question and supported the testimony of the nursing staff, security guards, and Dr. Allen, that Plaintiff was wobbly on her feet, stumbling, vacillating between flat affect and loud cursing, and vacillating between being sedate and agitated, having dilated pupils which were also sluggish in reaction to light, having an elevated heart rate and being confused as to whether or not she had been dropped off by a car or had fallen off a motorcycle. Porter's testimony was also consistent with the fact that Plaintiff could not tell anyone her date of birth, social security number, where she lived or who her parents were. Plaintiff's failure to appropriately communicate, combined with her physical and mental abnormalities were consistent with being under the influence of drugs, whether it was one pill out of a bowl or a combination of drugs. The Court of Appeals agreed. (Court of Appeals opinion p. 29-30). Plaintiff did not file a C.R. 76.21 cross-motion for discretionary review of that issue. That part of the Court of Appeals decision should be upheld.

However, the Court of Appeals interjected, without reference to any particular part of the record, that the trial court should not have allowed in any evidence of Straub's drug usage prior to the night of April 17, 1999, and that such evidence constituted reversible

error. (Court of Appeals opinion p. 31 and 32). The Defendants do not know what the Court of Appeals is referring to. Neither the Plaintiff nor the Court of Appeals referenced any specific testimony or portion of the trial record where Defendants introduced evidence of Straub using drugs prior to April 17, 1999. The only two references in the Plaintiff's Court of Appeal's brief to any objection were references to VCR No. 62: 8/18/06; 9:12:58; and VCR No. 64: 8/21/06; 8:39:30 found on page 21 of Plaintiff's brief. At VCR No. 62: 8/18/06; 9:12:58, there was an in-camera discussion with the judge regarding the depositions of Plaintiff's two former boyfriends, Raymond Crawford and Chris Porter. The discussion dealt almost exclusively with Raymond Crawford, who had given his deposition from prison. At the end of the discussion, it was decided that Raymond Crawford's deposition would not even be played at trial. There was some brief additional discussion regarding the deposition of Christopher Porter, who had also given his deposition from prison. Discussion of Mr. Porter's deposition was taken up again at VCR No. 64: 8/21/06; 13:39:50. Pursuant to the Plaintiff's request, the Court deleted from the jury's viewing any reference to the fact that the deposition was taken from the Marion County Jail. The judge also restricted the Defendants from introducing any portion of Mr. Porter's deposition other than how long he had known the Plaintiff and what the Plaintiff told him about the night in question. The judge specifically excluded any testimony by Porter concerning Plaintiff's experimentation with drugs before the night in question. Yet, the Court of Appeals inexplicably concluded that the trial court committed reversible error by allowing in evidence of Plaintiff's drug use before and after April 17, 1999. (Court of Appeals Opinion p. 31) That portion of the Court of Appeals opinion should be reversed.

D. THE COURT OF APPEALS CORRECTLY CONCLUDED THAT THE CLAIMS AGAINST HARRIS, PRETOT AND FEY SHOULD HAVE BEEN DISMISSED BY THE TRIAL COURT BASED ON THE ONE YEAR STATUTE OF LIMITATIONS. (Court of Appeals Opinion p. 38-43).

[This issue was preserved through Defendants' motion to dismiss found at T.R. 151 and T.R. 403 and T.R. 454].

All of Plaintiff's claims against security guard Harris, security guard Pretot, and nurse Fey carried a one year statute of limitations (assault and battery, false imprisonment and violation of constitutional rights). KRS 413.140; *Smith v. Stokes*, 54 S.W.3d 565, 566 (Ky. App. 2001); *Dunn v. Felty*, 226 S.W.3d 68 (Ky. 2007); *Wallace v. Kato*, 127 S. Ct. 1091, 529 U.S. 384 (U.S. 2007); *Million v. Raymer*, Ky. 139 S.W.3d 914, 919 (Ky. 2004). Hence, Plaintiff should have joined Harris, Pretot and/or Fey to the federal action within one year after she learned of their involvement through the discovery depositions taken in March 2001. *Underhill v. Stephenson*, 756 S.W.2d 459 (Ky. 1988); *Phelps v. Wehr Constructors, Inc.*, 168 S.W.3d, 395, 397 (Ky. App. 2004); *Pelphrey v. Cochran*, 454 S.W.2d 675 (Ky. 1970). She did not do so. Plaintiff's federal complaint was dismissed more than a year after she learned of the involvement of Fey, Harris and Pretot. Plaintiff waited until she filed her Campbell Circuit Court Action on June 25, 2004 to name Harris, Pretot and Fey as defendants. Wherefore, Plaintiff's time to sue Harris, Pretot and Fey for assault and battery, false imprisonment and/or violation of her Kentucky Constitutional Rights expired before she named them as defendants in the Campbell Circuit Court action. The Appellee, Straub, did not file a C.R. 76.21 cross-motion for discretionary review on that issue. The Court of Appeals opinion on this issue should be summarily affirmed.

E. THE TRIAL COURT ERRONEOUSLY ALLOWED PLAINTIFF TO ASSERT NEW CLAIMS IN THE CAMPBELL CIRCUIT COURT ACTION WHICH HAD NOT BEEN ASSERTED IN THE FEDERAL DISTRICT COURT ACTION; AND THE COURT OF APPEALS ERRONEOUSLY ALLOWED THAT DECISION TO STAND.

[This issue was preserved through Defendants' objection to Plaintiff's Amended Complaint found at R.R. 276 and through Defendants' motion to dismiss at T.R. 403 and T.R. 454].

In the Federal District Court action, Plaintiff did not assert claims for assault and battery or violation of her Kentucky Constitutional Rights. Those claims were first asserted in the Campbell Circuit Court Action, which was filed over five years after the events giving rise to the claims occurred; almost four years after Straub reached age of majority; and three years after the hospital healthcare providers were deposed in the Federal Court action. Clearly, all actions which would normally be barred by a one year statute of limitations would be precluded unless those claims were somehow preserved.

When Plaintiff filed her Federal District Court action on February 28, 2000, she knew she had potential causes of action for assault and battery and/or a violation of her Kentucky Constitutional rights, as well as her potential common law claims of false imprisonment, false arrest, and the tort of outrage. All the claims were "ripe" as of April 17, 1999. Plaintiff essentially split her causes of action between her federal lawsuit and her much later state lawsuit. Splitting causes of action has always been frowned upon. *Whitaker v. Cecil*, 69 S.W.3d 69 (Ky. 2002). As stated in *Egbert v. Curtis*, Ky. App. 695 S.W.2d 123 at 124 (1985) "a cause of action may not be split and tried piece meal." All of Plaintiff's claims herein concerned the same controversy and arose from the same nucleus of facts. Should not Plaintiff have asserted her claims of assault and battery and violation

of the Kentucky Constitution in her first lawsuit? *Harris v. Ashley*, 165 F.3d 27, 1998 WL 681, 219 at *3 (6th Cir. Sept. 14, 1998) (applying Kentucky law). Plaintiff voluntarily elected not to assert claims of assault and battery and/or claims of violation of her Kentucky Constitutional Rights until many years after the events occurred, and three years after the fact witness depositions were concluded in March 2001. Plaintiff could have amended her federal complaint pursuant to FRCP 15(c) to assert "battery" and/or "violation of her Kentucky Constitutional Rights" but she chose not to. The one year statute of limitations ran on those claims by the time her federal complaint was dismissed.

Should not the applicable statute of limitations begin to run against claims when the Plaintiff knows sufficient facts and the identity of the potential tortfeasors? In other words, should not a Plaintiff be required to assert a claim for assault and battery and/or violation of Kentucky Constitutional rights, within one year after the time she had knowledge of the pertinent facts, circumstances, and the individuals involved?

Defendants submit that KRCP 15.03(2) does not allow Plaintiff to assert new claims in a state court action which were not timely asserted in her federal lawsuit. Plaintiff has never cited a case which says KRCP 15.03(2) allows her to do so. KRCP simply allows a party to amend a state court action and possibly have those amendments relate back to the time the state court action was filed. Per KRS 413.270 Plaintiff's second lawsuit was a "new action". Hence, when Plaintiff filed her "new action" in state court, she logically should have been limited to those claims she had preserved in her federal action. By that time, Plaintiff filed her new action, the one year statute of limitations had expired relative to any claim for assault, battery or violation of Kentucky Constitutional

rights.

If KRCP 15.03(2) applies, then the question becomes whether Plaintiff took "reasonable steps" to amend her complaint after she knew the parties involved and the events which transpired. As stated in *Underhill, Supra.*

"The crucial question involves the application of Civil Rule 15.03(2) which in some circumstances authorizes the amendment of a pleading so as to change parties or amend the nature of the cause of action, and relates back to the date of the original pleading."

* * *

"The Underhills, **within one year after they discovered** the alleged negligence of the hospital employee in misrepresenting the presence of the physician in the emergency room, took reasonable steps to amend their complaint to add this additional defendant and allege negligence of the hospital through this employee." (Emphasis added) (*Underhill v. Stephenson*, 756 S.W.2d 459, 460 (Ky. 1988).

Maybe it is time to reconsider the parameters for how long a plaintiff has to amend her complaint to assert new causes of action under KCRP 15.03(2). The Appellants respectfully ask this Court to do so.

F. THE PLAINTIFF'S ENTIRE CAMPBELL CIRCUIT COURT ACTION SHOULD HAVE BEEN DISMISSED BECAUSE IT WAS NOT FILED IN ACCORDANCE WITH KRS 413.270.

[This issue was preserved through Defendants' Motion found at T.R. 639].

The Plaintiff relied on KRS 413.270 when she filed her Campbell Circuit Court action five years after the incident giving rise to the litigation. The Court of Appeals accepted

Plaintiff's argument. (Court of Appeals Opinion pp. 45-47) However, KRS 413.270 grants a party who mistakenly, but in good faith, files an action in a Kentucky Court which lacks jurisdiction over the action, 90 days from the date of the judgment dismissing the action in which to file a new action in the proper court. In *Cherry v. Augustus*, 245 S.W.3d 766, 775 (Ky. App. 2006), the Court stated that "(w)hen an appeal is taken from the order or judgment determining that there is no jurisdiction, the 90 days begins to run upon the **final ruling** of the appellate court that ultimately determines the disputed issue of jurisdiction". In the case *sub judice*, the **final ruling** of the federal appellate court was on July 21, 2004 when the Federal Court of Appeals issued its order denying Straub's petition for rehearing. Plaintiff's Campbell Circuit Court action was not filed in the 90 days subsequent to July 21, 2004. Instead, Plaintiff's action was filed in the Campbell Circuit Court June 25, 2004, thirty-one days prior to the opening of that 90 day window. Unless saved by KRS 413.270, Plaintiff's claims were clearly barred by statute of limitations. The Kentucky Court of Appeals stated that it knew of no authority to support an argument that a plaintiff must wait for a **final ruling** of the appellate court on the issue of jurisdiction before filing a second action in another court. (Court of Appeals Opinion p. 46). The appellate healthcare providers ask this Court to address this issue. Is there a 90 day window as stated in the statute, or is there a larger window that runs from whenever an appellant court first decides there is no jurisdiction until 90 days after the final ruling of the appellate court. If so, can it be said that Straub could have filed her Campbell Circuit Court action any time in between May 27, 2004 (date U.S. Court of Appeals affirmed the U.S. District Court opinion) and October 19, 2004 (90 days after the U.S. Court of Appeals

denied Plaintiff's petition for rehearing)? That would be a window of 145 days.

G. THE COURT OF APPEALS ERRONEOUSLY CONCLUDEDTHAT THE TRIAL COURT COMMITED REVERSIBLE ERROR IN ITS RESPONSES TO THE JURY'S THREE QUESTIONS DURING DELIBERATIONS. [Court of Appeals Opinion p. 26-28].

It is not mandatory for a trial judge to explain or comment upon jury instructions if they are clear and self-explanatory. *Thompson v. Walker*, 565 S.W.2d 172, 174 (Ky. App. 1978). Thompson referenced the older statute, KRS 29.304 which stated that if the jurors desired to be informed as to any point of law arising in the case, they could be brought into court, where the information should be given. The court in *Thompson, Supra*, concluded that jury instruction #1regarding "negligence" was in fact "an incorrect statement of the law." *Id.* p. 174. As for the other instruction on "causation" of damages, the court stated: "The problem was that the instructions were not clear on this point. The instructions state that if the defendant's negligence caused the accident, the jury was to award the plaintiff for her injuries." The *Thompson* instructions did not state that the accident had to be a "substantial factor" in causing the plaintiff's injuries. The instructions in *Thompson* did not state that the jury should only award damages which plaintiff suffered "as a direct result of the defendants' beach of duties". The *Thompson* jury was confused regarding the law on "causation" because the jury instructions were confusing. Hence, the court suggested to the trial judge that he address the matter when the case was retried because of <u>other</u> reversible errors. *Id.* p. 174. However, the *Thompson* court did not find reversible error due to the judge's decision not to comment on the "causation" instruction.

KRS 29.304, which was in effect when *Thompson* was rendered, was superseded by KRS 29A.320 in 1976. KRS 29A.320 contains no provision that the trial judge has an

obligation to answer any jury questions or explain the jury instructions. To **require** a judge to answer jury questions or expand on the instructions, when instructions are otherwise clear and self-explanatory, would encourage unnecessary impromptu interchange with the jury after instructions had been carefully and usually laboriously crafted. Does this Court want to do that?

No definition of a term contained in a jury instruction is required if the term is straightforward. *Com. v. Hager*, 35 S.W.3d 377, 379 (Ky. App. 2000). The jury instructions given to the jury in the case *sub judice* were taken from *Palmore Instructions To Juries*. There can be no serious contention that the instructions were unclear or otherwise erroneous. **Plaintiff erroneously argues** that the jury was nevertheless confused and that the court was **required** to clear up any possible confusion.

Further, the jury *sub judice* concluded in its letter to the court that "[u]ltimately, the majority of the jury could not be convinced that Ms. Straub experienced injury based on the evidence presented." The jury's letter to the court did not distinguish between "lasting" or "temporary" injury. The jury informed the court that it would have found in Straub's favor had it believed she had been injured. One can only speculate whether the jury rested its decision in favor of the hospital defendants on a belief that the Plaintiff suffered no lasting injury versus no temporary injury, and such speculation is undermined by the jury's statement at the end of its letter.

Finally, the criticism the jury had relative to the hospital was its failure to have better documentation in the chart. Failure to document could not have caused injury to the Plaintiff.

The Court of Appeals opinion reversing and remanding this case for a new trial based on the trial judge's responses to the jury questions should be overturned.

H. THE TRIAL JUDGE ERRONEOUSLY GAVE A JURY INSTRUCTION REGARDING PUNITIVE DAMAGES

[This issue was preserved by Defendants via their motion for directed verdict found at VCR No. 65:8/22/06; 12:30:00].

In **false imprisonment cases**, punitive damages are not justified absent a showing that the acts were either willful or malicious or that they were performed in such a way as would indicate a gross neglect or disregard for the rights of the person wronged. *Horton v. Union Light, Heat & Power*, 690 S.W.2d 382, 389 (Ky. 1985). In discussing assault cases and false arrest and **false imprisonment**, the Court stated: Thus "evil motive" and "reckless indifference to the rights of others" are considered as synonymous. The distinguishing characteristic in cases where punitive damages are authorized has not been whether the injury was intentional but whether the misconduct "has the character of outrage." *Hensley v. Paul Miller Ford, Inc.*, Ky. 508 S.W.2d 759, 762 (1974). There is no question that the hospital personnel had obligations to promptly determine whether the minor child, Straub, had an emergency medical condition and/or needed immediate hospitalization. EMTALA and KRS 645.120(2) *Supra*. It cannot seriously be contended that the hospital personnel acted with malice or a character of outrage in pursuing those obligations.

The rule in this Commonwealth has been that punitive damages may be recovered in an **assault and battery case**. . . only where the assault is willful, malicious and without justification. *Shields Adm'rs. v. Rowland*, 151 Ky. 136, 151 S.W. 408 (1912); cited in

Banks v. Fritsch, 39 S.W.3d 474, 481 (Ky. App. 2001). The threshold for the award of punitive damages is misconduct involving something more than merely commission of the tort. The "something more" is that the assault must be willful, malicious, and without justification. *Ashland Dry Goods Co. v. Wages*, 302 Ky. 577, 195 S.W.2d 312 (1946); *Fowler v. Mantooth*, 683 S.W. 2d 250 (Ky. 1984).

There was nothing in the evidence here for a jury to reasonably conclude that the three defendant nurses and/or the two security guards acted with evil motive, maliciousness or reckless disregard for the rights of the patient or that their conduct had the character of outrage. See also *Kentucky Dept. of Corrections v. McCullough*, 123 S.W.3d 130, 134 (2004); *Marcus & Millichap Real Estate Inv. Brokerage Co. v. Skeeters*, 395 F.Supp.2d 541, 2005 U.S. Dist. Lexis 24358 (W.D. Ky. 2005). KRS 411.184 provides that a plaintiff shall recover punitive damages only upon proving, by **clear and convincing evidence** that the Defendant acted toward the Plaintiff with **oppression, fraud or malice**. Under the facts *sub judice*, a jury could not have reasonably concluded that the hospital employees met this test.

In the end, what the jury criticized was lack of better documentation by the nurses as to why and when they gowned/restrained and catheterized the patient. Lack of documentation/poor management of records would not support an award of punitive damages. Hence, the issue of punitive damages should never have been submitted to the jury.

CONCLUSION

The Appellants respectfully ask this Court to reverse those portions of the Court of Appeal's opinion which reversed the Trial Court's judgment and remanded this case for a new trial. Specifically, the Appellants ask this Court to enter the following findings and order:

A. The Trial Court properly dismissed all of Plaintiff's claims which depended on a finding that the hospital employees had engaged in "state action". That issue had been resolved in the Federal Court decisions and re-litigation of the issue was precluded under the doctrine of issue preclusion. Further, the evidence was clear that Dr. Allen did not order a urine drug screen or blood alcohol test or ask that patient be placed in a gown because of any influence, direction, or coercion by Officer Kilgore. Further, the evidence was clear that the nurses' decision to restrain the Patient was not made pursuant to any suggestion, influence or coercion by Officer Kilgore. Likewise, the decision to catheterize the Patient was not made as a result of direction, influence or coercion by Officer Kilgore. Hence, the hospital employees were clearly not state actors. Lastly, Kentucky has no statute comparable to 42USC Section 1983. Hence, unless and until the General Assembly sees fit to authorize recovery of damages for violation of rights guaranteed by the Kentucky Constitution, redress to the courts shall be via injunctive relief.

B. The Trial Court did commit reversible error in allowing evidence of Plaintiff's profanity exhibited in the emergency room.

C. The Trial Court did not commit reversible error through introduction of any evidence concerning Plaintiff's drug use either prior to or subsequent to her hospitalization.

D. The Plaintiff had, at most, one year following her discovery of the identity and involvement of the Defendants, Harris, Pretot, and Fey in the federal action to assert claims against those defendants and she declined to do so. Hence, Plaintiff's claims against defendants, Harris, Pretot, and Fey should have been dismissed by the Campbell Circuit Court.

E. Plaintiff had, at most, one year after she discovered the identity of all potential defendants and the facts giving rise to her various causes of action to assert whatever claims she wished to make. Because Plaintiff elected not to assert claims for assault and battery and/or violation of her Kentucky Constitutional rights in her federal action within one year after she discovered the identity of all potential defendants and the substance of all pertinent facts, her opportunity to amend her suit to assert such claims expired. That expiration occurred prior to Plaintiff's filing of her Campbell Circuit Court action.

F. Plaintiff did not file her Campbell Circuit Court action within the ninety (90) day window provided in KRS 413.270. Hence, Plaintiff's Campbell Circuit Court action was improperly filed and should have been dismissed accordingly.

G. The Trial Court did not commit reversible error in its responses to the jury's three questions during deliberations. Specifically the juries question regarding

whether the "injury" needed to be lasting or temporary arose from a jury instruction which was clear and self-explanatory. Hence, the Judge was not required to respond to the jury's question with further explanation. In addition, the jury's letter to the Court demonstrates that the jury concluded the Plaintiff had suffered no injury. Further, the letter revealed that the jury's criticism of the hospital related to its record keeping and lack of documentation as to when and why the hospital employees had taken the action they did. Lack of adequate and proper documentation could not have caused any injuries to the Plaintiff.

H. Considering the evidence in a light most favorable to the Plaintiff, there was insufficient basis to instruct the jury on punitive damages. There was never clear and convincing evidence that the Defendants acted with oppression, fraud, or malice. There was no clear and convincing evidence that the Defendants ever acted with "evil motive" or "reckless indifference to the rights of the Plaintiff". The actions of the Defendants could not reasonably have been considered to have "the character of outrage".

Wherefore, the Court of Appeals opinion affirming in part, reversing in part, and remanding, is reversed. The judgment of the Trial Court is reinstated.

Respectfully submitted,

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