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**

APPELLANTS' REPLY BRIEF

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have this 4th day of January, 2011 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 I further certify that the record on appeal was not withdrawn by the parties filing this brief.

SCOTT M. POWERS

STATEMENT OF POINTS AND AUTHORITY

ARGUMENT

MISSTATEMENTS IN PLAINTIFF'S COUNTER-STATEMENT OF THE CASE

Plaintiff misstated the record when she told this Court that officer Kilgore's testimony about Straub taking a pill out of a bowl at the drug party was excluded. That evidence came in during officer Kilgore's testimony of what happened at the scene. (VR 59, 8/16/06; 15:23:58). It was not until the next day of testimony that the Court precluded officer Kilgore from talking about his personal experience with kids taking pills out of bowls at drug parties. (VR 61, 8/17; 9:01:36 et seq.)

KRS 446.070 DOES NOT CREATE A PRIVATE RIGHT OF ACTION AGAINST "STATE ACTORS/STATE AGENTS" FOR ALLEGEDLY VIOLATING KENTUCKY CONSTITUTIONAL RIGHTS.

The Plaintiff erroneously asserts that KRS 446.070 permits a private right of action against the Defendants/Appellants for allegedly violating Plaintiff's state constitutional rights. Appellants see this issue governed by the following: KRS 446.070 is no substitute for 42 U.S.C. 1983. KRS 446.070 states 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 for forfeiture is imposed for such violation." KRS 446.070 is not ambiguous and should be applied as it is clearly written. Plaintiff cites *Clevinger v. Bd. of Educ. Of Pike County*, 789 S.W.2d 5 (Ky. 1989) for the proposition that Kentucky implicitly recognizes a cause of action against state agents if they violate an individual's state constitutional rights. However, *Clevinger* came to a different conclusion.

> "In *Wood v. Board of Education of Danville, Supra.*, as in the present case, the argument was made that Sections 2, 14, and 26 of the Kentucky Constitution afford

> a remedy for every injury and that Section 231 of the Kentucky Constitution should not bar such an action. We responded: '[T]he different sections of the Constitution shall be construed as a whole so as to harmonize the various provisions and not to produce a conflict between them. . . whatever may have been intended by Sections 2, 14, and 26 of the Kentucky Constitution, under which appellant seeks redress, it was not intended that those sections should in any way impinge on the right of the Commonwealth by its General Assembly under Section 231 to direct in what manner and in what courts suits may be brought against it." 412 S.W.2d at 879. Thus, the argument made by these school board employees based on Section 2 of the Kentucky Constitution and KRS 446.070, has been rejected by our Court in a decision of longstanding." *Clevinger* at p. 11

Wood v. Bd. Of Educ. Of Danville is found at 412 S.W.2d 877 (Ky. 1967).

The Kentucky "Bill of Rights", Ky. Const. Sections 1, 2, 10 and 14 were adopted to protect the people of Kentucky from their state government. Hence, Plaintiff's theory of her case is premised on a determination that the hospital nurses and security guards were "state actors", i.e. state agents. Agents of the state are immune from liability for damages sustained by another if the injury was caused by negligence of the state agent in performing or exercising a **discretionary** function. *Franklin County, Ky. v. Malone*, 957 S.W.2d 195 (Ky. 1997) and Y*anero v. Davis,* 65 S.W.3d 510, 529 (Ky. 2001). *Yanero* extensively reviewed sovereign immunity, governmental immunity, official immunity, and the Board of Claims Act, "limited waiver of immunity". For Plaintiff to prevail, this Court would have to create new law, something to the effect that: Because the hospital nurses and security guards clearly engaged in "discretionary" functions, Straub must show that the hospital personnel were both: (1) "agents of the state", when they gowned, restrained and catheterized Straub and then draw blood for a blood alcohol test; and (2) as state agents, they willfully or maliciously violated a clearly established right of the Plaintiff. *Rowan County v. Sloas*, 201 S.W.3d 469, 481 (Ky. 2006). We presently have no such law; and

Straub has not shown either (1) or (2).

THE DOCTRINE OF ISSUE PRECLUSION PRECLUDES STRAUB FROM RELITIGATING THE ISSUE OF WHETHER THE HOSPITAL EMPLOYEES WERE STATE ACTORS.

"Issue preclusion", also known as "collateral estoppel", which bars a party from relitigating an issue actually litigated and finally decided in an earlier action was recently reaffirmed. *Coomer v. CSX Transportation, Inc.*, 319 S.W.3d 366, 374 (Ky. 2010); see also *Buts v. Elliott*, 142 S.W.3d 137 (Ky. 2004). Whether the hospital employees acted as agents for the state was explored through deposition testimony, briefed, and decided in Straub's two previous federal decisions. In fact, it was the fundamental finding of fact which led to the dismissal of Plaintiff's Federal Constitutional claims. As stated by Judge Bertelsman in his District Court opinion, for Straub to successfully maintain a Section 1983 action, she had to both: (1) identify a right secured by the U.S. Constitution; and a (2) deprivation of that right by a person acting under color of law. Judge Bertelsman considered the three tests to determine whether the conduct of hospital personnel, was fairly attributable to the state and therefore, "under color of law". He enunciated those tests as: (1) the public function test; (2) the state compulsion test; (3) the nexus or symbiotic relationship test. (See Judge Bertelsman's summary judgment Opinion and Order marked as Exhibit C to Exhibit 1 in Appellate's appendix, pages 14-17).

Judge Bertelsman found that the Plaintiff could not show that the hospital employees were state actors under the state compulsion test. "In this case, although a state actor, officer Kilgore, brought the Plaintiff to the hospital, he was not involved in the selection of a treatment method." (Judge's opinion p. 15) Judge Bertelsman noted that at

no point did officer Kilgore suggest the urine drug screen or blood alcohol test. There was no evidence that officer Kilgore directed or requested any particular type of medical treatment; and only at the request of the nurses did officer Kilgore assist hospital personnel in restraining the Plaintiff in their attempt to place Plaintiff into a hospital gown, so that she could undergo further medical evaluation. (Judge's opinion p. 16) Straub could not show that the hospital employees were state actors under the nexus test because there was no evidence that the blood and urine samples were taken at the direction of officer Kilgore or that the Plaintiff's clothes were removed at officer Kilgore's request. (Judge's opinion p. 16) Finally, the public function test was not met because hospital employees did not exercise power traditionally reserved exclusively to the state, such as holding elections and eminent domain proceedings. (Judge's Opinion p. 16)

The U.S. Court of Appeals, (Exhibit 4 to Appellant's appendix), similarly found that the decisions to order a urine drug screen, blood alcohol test, and to gown Straub were independent medical judgments. (U.S. Court of Appeals Opinion p. 8) When the patient physically resisted gowning, the nurses decided to restrain her. That decision was exclusively theirs, and not officer Kilgore's. The nurses catheterizing the patient for a urine drug screen and drawing blood for a blood alcohol test were medical decisions which the healthcare providers made alone. The Court found that Officer Kilgore had no input into those decisions; and that Officer Kilgore's acquiescence or assistance to the private individuals, when requested to help restrain the patient was not sufficient to hold the state responsible for those initiatives, citing *Wolotsky v. Huhn,* 960 F.2d 1331, 1335 (6th Cir. 1992) (U.S. Court of Appeals Opinion p. 8-9). The Court summarized as follows:

> "Employing these tests, we are unable to conclude that Straub has demonstrated that the hospital defendants acted under color of state law. First, Straub has made no showing that the hospital defendants were engaged in an action traditionally reserved to the state, and, therefore, she has failed to meet her burden of showing that the hospital defendants are state actors under the public function test. Second, with respect to the symbiotic relationship test, Straub has not identified a relationship with the state from which the hospital or its personnel benefitted. Finally, under the state compulsion test, 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."

Plaintiff has tried to confuse the "state actor" issue by arguing that the Kentucky Constitution might provide greater rights to Straub than the Federal Constitution. What greater rights is Plaintiff talking about? Further, **whether any "greater rights" exist, does not change the criteria for whether individuals who are not employed by the state temporarily become "state actors" in a particular circumstance.** Judge Bertelsman and the U.S. Court of Appeals cited the cases setting forth the criteria which determine whether or not private person's actions constitute "state action" including: *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982); *Lansing v. City of Memphis*, 202 F.3d 821 (6th Cir. 2000); *Blum v. Yaretsky*, 457 U.S. 991, 996 (1982); *Wolotsky v. Huhn*; *Russo v. City of Cincinnati*, 953 F.2d 1036, 1042 (6th Cir. 1992); *Collyer v. Darling*, 98 F.3d 211, 232 (6th Cir. 1996); *Wittstock v. Mac A. Van Sile, Inc.*, 330 F.3d 899, 902 (6th Cir. 2003); *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961).

Nowhere, has Plaintiff demonstrated a shred of evidence that Kilgore influenced the decisions or actions of the healthcare providers, namely the ordering the urine screen or blood alcohol test or gowning of the patient, which led to restraints; or the performance of the catheterization and blood draw necessary to carry out Dr. Allen's orders.

THE KENTUCKY COURT OF APPEALS PROPERLY DISMISSED THE DEFENDANTS HARRIS, PRETOT AND FEY BASED ON PLAINTIFF'S FAILURE TO JOIN THOSE INDIVIDUALS AS DEFENDANTS WITHIN ONE YEAR AFTER SHE LEARNED OF THEIR INVOLVEMENT IN THE EVENTS GIVING RISE TO THIS LITIGATION.

First, the Appellee, Straub, did not challenge the dismissal of Harris, Pretot and Fey by filing a C.R. 76.21 cross-motion for discretionary review of the Court of Appeal's decision on that issue. *Perry v. Williamson*, 824 S.W.2d 869 (Ky. 1992); *Crain v. Dean*, 741 S.W.2d 655 (Ky. 1987); *Green River Dist. Health Dept. v. Wigginton*, 764 S.W.2d 475 (Ky. 1989); and *Nelson Steel Corp. v. McDaniel*, 898 S.W.2d 66 rehearing denied (Ky. 1995). Second, the Court of Appeals correctly concluded that the Plaintiff should have joined Harris, Pretot, and Fey within one year of March 2001, when she learned of their involvement in the incident giving rise to the litigation. (See Court of Appeals Opinion p. 38-43). A one year statute of limitations applied to Plaintiff's claims against Defendants Harris, Pretot and Fey. As stated by the Court of Appeals, it was almost four years after Straub reached age of majority, and three years after Harris and Pretot were deposed, that Straub made any effort to join Harris, Pretot and Fey as defendants. That was too late.

Plaintiff's argument that K.R.S. 413.270 tolled the statute of limitations relative to "new" defendants is also erroneous. The statute simply states that if an action is commenced in due time and "the defendants" are successful in convincing the court that it has no jurisdiction, then the time between the commencement of the first action and the second action shall not be counted in applying the statute of limitations. That applies only to the "defendants" named in the first action.

THE PLAINTIFF INACCURATELY ARGUES THAT THE JURY FOUND FOR THE HOSPITAL BECAUSE THE JURY THOUGHT THAT JURY

INSTRUCTION QUESTION NUMBER TWO (FOUND ON PAGE 18 OF JURY INSTRUCTIONS) REQUIRED THE JURY TO FIND THAT THE PLAINTIFF HAD SUSTAINED A PERMANENT OR LASTING INJURY BEFORE THEY COULD FIND IN HER FAVOR.

The jury question stated: "Do you find from the evidence that the Defendant, St. Luke Hospital, Inc., breached its duties as set forth herein, and that said breach was a substantial factor in causing injury to Shannon Straub?" "Yes____ No___". The jury instruction was both consistent with Palmore's Kentucky Instructions to Juries, and not objected to by Plaintiff's counsel before submission to the jury. There was nothing inherently confusing about the instruction. Hence, no explanation of the term "injury" was required. *Com. v. Hager*, 35 S.W.3d 377, 379 (Ky. App. 2000).

The jury's post-verdict "letter" simply stated that they would have found in Straub's favor if they believed she had been "**injured**". The jury made no distinction between "lasting" injury or "temporary" injury. The jury's answer to question number two in the negative, coupled with the jury's letter stating that they did not believe Straub had been "injured" leaves one to only speculate as to whether the jury rested its final decision in favor of the hospital on a belief that Plaintiff suffered no lasting injury versus a temporary injury. Under such circumstances the jury's verdict should be followed. *McDonald's Corporation v. Ogborn,* 309 S.W.3d 274, 296. Regardless of a jury "note" or "letter", the jury speaks through its verdict.

THE TRIAL JUDGE DID NOT COMMIT REVERSIBLE ERROR BY ALLOWING IN EVIDENCE REGARDING PLAINTIFF'S PAST DRUG USE OR HER OUTBURSTS OF PROFANITY IN THE ER.

The trial judge did not commit reversible error by allowing in evidence regarding Plaintiff's past drug use or her outbursts of profanity in the ER. Plaintiff volunteered to

the jury that she had smoked marijuana before April 17, 1999 and she claimed she routinely used profanity when agitated. Plaintiff did this to explain away both her urine drug screen which was positive for marijuana, and her sporadic outbursts of threatening profanity in the ER, consistent with volatile emotional swings associated with drug use. Plaintiff's violent outbursts of threatening profanity were interspersed between periods where the patient exhibited a flat affect, refusal to answer questions, dilated pupils, pupils sluggish in reaction to light and an elevated pulse. Nurse Fey testified that Plaintiff's behavior and physical findings were both consistent with drug abuse. Dr. Allen also heard several of Plaintiff's violent outbursts. He found the patient to be "dazed" with poor eye contact and giving a history of falling off a motorcycle. Dr. Allen explained that low amounts of tricyclic anti-depressants, can cause rapid fluctuations in behavior, including violent outbursts. He further explained that a toxic level of Valium could have caused Plaintiff's symptoms, including unsteady gait, acute hyper-excited state, anxiety, hallucinations, confusion and rage. The plaintiff told the jury that she was not under the influence of Valium when she was in the ER, yet she tested positive for Valium.

Plaintiff opened the door to cross-examination regarding her drug use, when she volunteered drug use information on direct examination, as her explanation for why she had marijuana in her urine drug screen. Evidence concerning Plaintiff's post-incident drug use was relevant to her claims of how her life had been changed by her experience in the ER. Similarly, Plaintiff tried to convince the jury that her outbursts of threatening profanity interspersed between periods of flat affect, were nothing more than her habitual routine of using profanity when agitated. On one hand, Plaintiff wanted to use KRE 406

offensively to explain her outbursts of profanity in the ER, but then prevent the Defendants from examining her use of profanity in the ER. In sum, the trial judge acted appropriately by allowing the jury to hear and understand the complete picture of Plaintiff's presentation throughout her stay in the ER.

Plaintiff's reliance on *Burchett v. Com.*, 98 S.W.3d 492 (Ky. 2003) to support her argument concerning "character evidence" is misplaced. *Burchett,* a criminal case, addressed the subject of whether "habit" evidence was admissible prior to the adoption of KRE 406. *Burchett* concluded that before KRE 406, habit of smoking marijuana everyday was not something to be considered in determining whether *Burchett* had probably smoked marijuana on the day of the motor vehicle accident. Our Supreme Court later adopted KRE 406 on July 1, 2006, before the Straub v. St. Luke Hospital, Et Al. trial.

REGARDING PUNITIVE DAMAGES, PLAINTIFF INCORRECTLY ARGUED THAT TWO WITNESSES TESTIFIED THAT THE NURSING STAFF KNEW THAT SHANNON'S MOTHER HAD BEEN CONTACTED AND WAS ON HER WAY PRIOR TO THE NURSES ATTEMPTING TO GOWN THE PATIENT, WHICH LED TO THE APPLICATION OF THE RESTRAINTS. (Appellee's brief p. 47).

Plaintiff misstated the testimony of officer Kilgore, citing VR 59, 8/16/06 at 15:58:55. When one listens to the videotape, one hears officer Kilgore testify that he was at the hospital for about 20 to 25 minutes before he was asked by the nurses to assist in holding Shannon down so that restraints could be applied. (VR 59, 8/16/06 at 15:57:17). (The hospital chart shows that the patient was triaged at 8:07 a.m. The handwritten nursing notes show that the patient's clothes were taken off the patient and to the nursing station, and the patient was catheterized for a toxicology screen before 9:00 a.m.) Officer Kilgore was then asked how long it was after Shannon's clothing had been removed and

she had been placed in restraints that Shannon's mother arrived at the hospital. He responded that the mother did not get to the hospital until after 10:00 o'clock. (VR 59, 8/16/06 at 15:58:55). The patient was discharged at 10:15 a.m. Never did officer Kilgore testify that he told a male nurse, prior to the application of the restraints, that Shannon's mother had been reached and was on her way to the hospital.

Plaintiff's counsel also skewed the testimony of security guard Pretot. Ernest Pretot simply responded to one of Plaintiff counsel's questions, wherein he stated that while he was in the area with officer Kilgore and security guard Harris, he did hear someone say that contact had been made with the mother. No time frame was given for that statement. In fact, officer Kilgore and officer Harris were still present in the immediate area, after the restraints were applied. VCR No. 59:8/16/06; 15:55:05 and 16:38:01 to 16:38:37. Kilgore was only a few feet from Straub's door when he was making his phone calls. More importantly, Kilgore testified that he spent half an hour or so after Shannon was restrained making phone calls before he was able to reach Shannon's mother's husband. VCR No. 61:8/17/06; 9:13:12 to 9:13:52. Thereafter, Ms. Miller arrived at the hospital ER (after 10:00 a.m.) and went immediately to Shannon's room.

CONCLUSION

Appellant/Defendants respectfully request the relief previously requested in their initial brief filed herein.

Respectfully submitted,

SCOTT M. POWERS, ESQ.