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**COMMONWEALTH OF KENTUCKY**
**SUPREME COURT OF KENTUCKY**
**CASE NO: 2009-SC-000027-D**

**COURT OF APPEALS NO: 2007-CA-000443-MR**
**AND NO. 2007-CA-000511-MR**

**ST. LUKE HOSPITALS, INC.; E. KREBS, R.N.; T. THEISEN; JOHN FEY, JOHN HOWARD HARRIS; AND ERNEST PRETOT** — **APPELLANTS**

**VS.**

**SHANNON STRAUB** — **APPELLEE**

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# APPELLEE'S BRIEF

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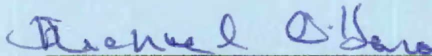
**Respectfully submitted,**



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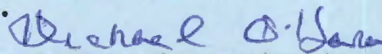
## CERTIFICATION

**I hereby certify that I have, this 17TH day of December, 2010, mailed a copy of the foregoing pleading to the following attorneys of record: Susan Stokley Clary, Clerk, Kentucky Supreme Court, Capital Building, Room 285, 700 Capital Avenue, Frankfort, KY 40601; Scott M. Powers, Esq., 4 West Fourth Street, Suite 400, Newport, KY 41071; Fred A. Stine, V, Judge, Campbell Circuit Court, 330 York Street, Newport, KY 41071.**



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## I. INTRODUCTION

Shannon Straub sued St. Luke Hospital, nurses Tricia Theissen, Emma Krebs and John Fey, and security guards Ernest Pretot and John Harrison for assault and battery and false imprisonment after her forced stripping, restraint and catheterization in the absence of a medical emergency. Ms. Straub also seeks compensation for injury she sustained when these Defendants acted in concert with Wilder police officer Jim Kilgore to deny her substantive due process rights guaranteed her by Kentucky's Constitution.

## II. STATEMENT CONCERNING ORAL ARGUMENT

Appellee Shannon Straub requests oral argument, as she believes it will be helpful to the Court due to the number of issues involved in this appeal, as well as the uniqueness of certain of her issues on appeal.

## III. COUNTERSTATEMENT OF THE CASE

On April 17, 1999, without her consent, Appellant Shannon Straub was taken to St. Luke Hospital, forcibly stripped, placed in 4-point restraints, and catheterized for the purpose of obtaining urine and blood samples. At that time, she was 16 years of age, five feet, two inches tall and weighed about 125 pounds. She lived with her mother and step-father in Dayton, Kentucky. (VR 57, 8/15/06, 13:29:30; 13:32:05).

On April 16, 1999, Shannon and her friend, Melissa Wallace, volunteered at the American Legion VFW Lodge Bingo, as they did every Friday. (VR 57, 8/15/06, 13:32:40). She finished her work around 11 p.m. and went outside to wait for her ride. (VR 57, 8/15/06, 13:35:00). She had no alcohol or marijuana that evening, although she admits to smoking it the week before. Melissa Wallace smoked marijuana that evening in Shannon's presence. (VR 57, 8/15/06, 13:35:59). A friend picked up Shannon and Melissa at the VFW and took them to her boyfriend's home in Wilder, Ky., where they spent the night watching movies, playing cards and drinking pop. Shannon fell asleep about 2 or 2:30 in the morning. She did not use alcohol or drugs while there. (VR 57, 8/15/06, 13:37:25; 13:38:30; 13:41:14; 13:42:58).[1] These facts are confirmed by Melissa. (VR 64, 8/22/06, 10:12:00-10:15:30). The condo where they stayed belonged to a friend's boyfriend, whose name was Shawn.

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[1]In their Brief, Defendants cite testimony from Officer Kilgore about Shannon's purported drug use at a party where she pulled an unknown pill out of a bowl. (Appellant's Brief, pp 2-3). At trial, Plaintiff's counsel objected to this testimony, and the question was withdrawn. (VR 61, 8/17/06, 9:01:36). However, counsel for Appellants readdressed this same issue during his questioning of Officer Kilgore. (VR 61, 8/17/06, 9:18:10). The trial court then sustained Plaintiff's objection to this testimony, deeming it "pretty far afield." (*Id.* At 9:20:12). Thus, this statement is not part of the record in this case, and must not factor into this Court's decision on this appeal.

Shannon awoke at about 5:00 or 6:00 the morning of April 17th. She went outside to the car to get her back pack that contained her toothbrush and tooth paste. As she left the building she realized she didn't have the car keys and started back to the condo. (VR 57, 8/15/06, 13:43:45). Not being familiar with the buildings, she could not recall which condo she had exited, although she thought she had the correct building. She began ringing doorbells in an effort to get back into the building. At that point an elderly lady responded that she did not know Shawn, so Shannon rang a couple more bells. Apparently, about 6:30 a.m., a resident phoned the police about the doorbell ringing and Officer Jim Kilgore from the Wilder Police Department responded right away. (VR 57, 8/15/06, 13:44:20; 13:45:10; VR 59, 08/16/06, 15:12:15).

Officer Kilgore approached Shannon on the sidewalk outside the apartments. He asked her name and she gave him it to him. She also told him where she lived and explained the situation about how she got locked out. (VR 57, 8/15/06, 13:45:15; 13:46:20). Officer Kilgore testified that Shannon originally gave the name of Shannon Miller (her mother's married surname), but also concedes that she also gave him her correct name while they were at the Bentwood apartments. (VR 59, 8/16/06, 15:16:00). According to the Officer, she was not argumentative. (VR 59, 8/16/06, 15:15:41). Officer Kilgore tried to help Shannon locate Shawn's apartment by escorting her back to the building she thought she had exited, where Shannon rang another doorbell. (VR 57, 8/15/06, 13:47:00; VR 59, 8/16/06, 15:18:50).

Officer Kilgore asked Shannon to empty her pockets and for identification. She complied with his request but told him that she did not have identification on her. (VR 57, 8/15/06, 13:48:35-51). After they were unable to locate Shawn's apartment, Officer Kilgore

handcuffed Shannon and told her she would have to go with him. (VR 57, 8/15/06, 13:48:55-13:49:05). Shannon complied with Officer Kilgore's request and was not belligerent. (VR 57, 8/15/06, 13:49:40-13:50:00). Officer Kilgore confirmed that she was cooperative as he took her to the police station. (VR 59, 8/16/06, 15:24:26). When she arrived at the police station, she was escorted in and handcuffed to a chair while Kilgore used the phone. (VR 57A, 8/15/06, 13:512:30-52:50). Shannon gave him four telephone numbers, those of two childhood friends, her mother and her Aunt Ruthie. (VR 57, 8/15/06, 13:51:30-13:52-50). Officer Kilgore testified the Shannon remained completely compliant while at the police station as he attempted unsuccessfully to reach Shannon's mother and friends through phone numbers supplied by Shannon. (VR 59, 8/16/06, 15:26:26; 15:28:17). The Officer confirmed that, during the entire 30-minute stay at the police station, Shannon was not argumentative, engaged in no cursing or name-calling, and was compliant with his directives. (VR 59, 8/16/06, 15:26:26; 15:29:07; and 15:32:41). Officer Kilgore up to this point told Shannon only that he took her to the police station to make the phone calls so that she could go home. (VR 57, 8/15/06, 13:54:35-48). He never told her she was under arrest or that she had committed any offense or crime. (VR 57, 8/15/06, 13:54:48-13:55:05).

When he was unable to reach Shannon's mother or relatives, Officer Kilgore called the court designated worker (CDW) who instructed him to take Shannon to St. Luke Hospital. (VR 59, 8/16/06, 15:30:47, 15:31:31; 15:32:10). When they left the police station, Shannon does not recall being told anything by Officer Kilgore about where they were going. At no point while she was being taken to the hospital by Officer Kilgore did he try to explain any criminal charges to her or why he was taking her to the hospital. She remained in

handcuffs between the police station and the hospital. (VR 57, 8/15/06, 13:55:48-13:56:45).

**EVENTS AT THE HOSPITAL**

Officer Kilgore took Shannon Straub to the Emergency Room registration area at St. Luke Hospital. Nurse Theissen escorted Shannon and Officer Kilgore to the secured ER room (AC-5), where she took care of the triage of Shannon. Ms. Theissen remembered Shannon being handcuffed to the chair in the waiting area when she first saw her. Appellants now concede this fact. (Appellants' Brief, p. 5). Nurse Theissen permitted Shannon to walk back to AC-5 on her own without a wheelchair. (VR 61, 8/17/06, 09:49:28; 09:50:39; 09:52:58). Theissen did not note that Shannon had glassy eyes or slurred speech. (*Id.* 09:48:27). During her walk to the ER room, Shannon was compliant and responsive. (VR 59, 8/16/06, 15:41:17).[2] When she was in the back, her handcuffs were removed. (VR 57, 08-15-06, 13:58:35-46). At some point in this process, Nurse Theissen confirms that Officer Kilgore gave her Shannon's first name and address. Appellant's full name and address appeared on the Hospital's face sheet that is completed at registration and timed 8:08 a.m. (VR 61, 8/17/06, 09:55:04; Plaintiff's Ex. 1, p. 2).

Triage by Nurse Theissen began at 8:07, about an 1 ½ hours after Officer Kilgore first responded to the Bentwood Apartments and observed Plaintiff. (Plaintiff's Ex. 1, p. 3). Nurse Theissen testified that, during triage, Shannon was angry at times but her behavior was not physically threatening to her or the Officer. (VR 61, 8/17/06, 10:01:30; 10:04:22). The

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[2]Appellants attempt to paint an entirely different picture of Shannon's condition and behavior on her arrival at the Hospital by citing self-serving testimony of two other nurse Defendants. (Appellant's brief, pp. 6-7). As the triage nurse, Ms. Theissen's testimony and her records are a more accurate portrayal of what actually occurred during this period. (App. E, Medical Records).

ER chart does not mention **threat of harm** to Appellant or any other individual at any time in Shannon's ER course. (App. E, Medical Records, Plaintiff's Ex. 1). (The references to medical records throughout the brief can be found in Appendix E, attached.) Nurse Theissen received information from Officer Kilgore that he suspected marijuana abuse by Shannon. (Plaintiff's Ex. 1, p. 6, attached as Ex. 3). Officer Kilgore remained with Shannon throughout triage. (VR 61, 8/17/06, 10:06:33, 10:07:56). Theissen found Shannon's pupils to be somewhat enlarged and sluggish. (Plaintiff's Ex. 1, p. 6). Shannon had no hallucinations. Except for her pulse being a bit high, all her vital signs were normal, and Shannon was oriented to time, place and person. Although she was at times uncooperative, she was found at triage not to be combative. (Plaintiff's Ex. 1, pp. 4, 6). At no time during triage did Shannon physically threaten either Theissen or Kilgore, nor did she attempt to leave the ER. (VR 61, 8/17/06, 10:47:05). During triage, no bizarre behavior is noted on Shannon's treatment record or nursing assessment. (VR 61, 8/17/06, 10:48:03; App. E, pp. 4, 6). There was no slurred speech or red or glassy eyes noted. *Id.* Finally, both Nurse Theissen's testimony and her records indicate that she was the only Hospital employee who conducted triage for Shannon Straub. (VR 61, 8/17/06, 10:10:09).

Defendants efforts to also place Defendant Fey in the examining room during triage so as to provide a foundation for his alleged observations is not supported by the record. (Appellants' Brief, p. 7). Thus any facts asserted by Defendants through the testimony of Nurse Fey as to his observations of Ms. Straub during triage lacks credibility.

When Theissen finished triage, she did not tell Dr. Allen (the physician in charge) that Shannon needed immediate attention. (VR 61, 8/17/06, 12:44:38). In fact, Dr. Allen

waited about 20 minutes before examining Shannon. (See App. E, p. 4, noting that Dr. Allen's exam begins after 8:31 A.M.). Thus, no emergent medical need existed at the time of triage.

Dr. Allen, the physician in charge, picked up Shannon's chart at 8:31 a.m.[3] and saw her within three to five minutes of that time. (VR 62, 8/18/06, 10:35:03). He got Officer Kilgore's information either before or just after his first meeting with Ms. Straub. (VR 62, 8/18/06, 10:36:45). Dr. Allen noted that she would not talk, but did give him her name. He does note in the chart that she "denies trauma, injury, rape or assault." (Plaintiff's Ex. 1, p. 4, "MD Notes"). Dr. Allen confirmed that he recalled during his deposition that he may have spoken with Officer Kilgore, who was in the ER room at the time. (VR 62, 8/18/06, 10:48:10).

Shannon was not agitated during Dr. Allen's initial exam when he examined her heart and lungs. (VR 62, 8/18/06, 10:49:08). The fact that her heart rate was elevated at 114 did not tell him much clinically. He found no evidence of physical injury although she made some reference to falling off a motorcycle. (VR 62, 8/18/06, 10:49:08).[4] At the conclusion of his initial exam, he ordered urine and blood toxicology screens. (See Physician's Orders, App. E, p. 4). During this first exam, Shannon was not in four point restraints and remained in her street clothing.

Dr. Allen does not recall Shannon saying anything indicating an objection to his

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[3]This is now nearly two hours after Officer Kilgore first saw Shannon.

[4]Shannon admits that she was angry because she did not believe she needed any medical attention and that she was tired of answering questions, so she gave an incorrect story about a motorcycle incident. (VR 57A, 8/15/06, 14:15:40 - 14:16:56).

orders. However, he did not ask for her consent. (VR 62, 8/18/06, 10:54:00, 10:54:27). There are no consents appearing in the medical chart anywhere for any of these specific procedures performed on Shannon. (See App. E). Dr. Allen did not order a catheterization of Shannon to obtain a urine sample. Rather, he assumed that when he gave the order for the urine test, Shannon would be given an opportunity to voluntarily urinate into a sterile cup. (VR 62, 8/18/06, 10:59:02). Although the use of restraints is not noted in her chart, all parties agree that Shannon was forcibly stripped of her clothing, gowned, and placed in four-point restraints sometime between Dr. Allen's first and second exams. This occurred even though Dr. Allen never ordered catheterization, the forced stripping or use of restraints. Indeed, he concedes that when he left his first evaluation of her, there was no reason for any order of restraints. (VR 62, 8/18/06, 11:01:01 and 11:06:40). When Dr. Allen left his first evaluation of Shannon, she was quiet, still and "sedate." (VR 62, 8/18/06, 11:05:48).

Shannon was never offered an opportunity to voluntarily urinate in a cup so that she could avoid the restraints, forced stripping and catheterization. (VR 57, 8/15/06, 14:08:10 and 14:08:55). Nurse Krebs, the nurse in charge of Shannon's care, could not recall offering Shannon an opportunity to urinate in a cup before she catheterized her. (VR 62, 8/18/06, 15:27:08). Indeed, if Plaintiff had refused to provide a urine sample, Defendants concede that such a refusal would have to be recorded in the medical chart. (VR 62, 8/17/06, 15:51:20; 8/18/06, 11:09:18).

The forced stripping and restraining of Shannon occurred shortly after Dr. Allen's first exam. The catheterization is noted to have occurred at 9:00 a.m., so the stripping and application of restraints had to occur prior to 9:00 a.m. (Plaintiff's Ex. 1, p. 5). It is

important to note that Dr. Allen concedes that the more thorough examination he conducted during his second evaluation probably could have been done during his first evaluation when Shannon was in street clothes. In fact, he acknowledged that it would have been easier to conduct his second examination of Plaintiff if she were not restrained. (VR 62, 8/18/06, 11:24:34; 11:29:06).

The medical chart provides a contemporaneous record of Plaintiff's course in the ER at St. Luke. Nowhere in that chart is any medical emergency noted that justify the forced stripping, restraint and catheterization of Shannon Straub. (Plaintiff's Ex. 1, pp. 1-13). Indeed, Dr. Allen's dictation, under his general findings, notes the following regarding Shannon's course in the ER:

> Awake, alert and oriented times 3. The Glasgow Coma Scale is 15 [normal]. She was calm and cooperative with most questions but would not give any detailed information about what she was doing last night. Speech was clear. Mentation and judgment were not impaired. Her mood and affect were neutral. She did become verbally abusive when her mother arrived, however. . . . they had a verbal argument but there was no physical violence and no physical threats. . . . .

(App. E, Plaintiff's Ex. 1, p. 8).

Appellees concede that St. Luke Hospital's protocol for employing restraints in the emergency room were not followed. (See Plaintiff's Ex. 5, pp. 3-8, attached as App. F). For example, the policy required documentation that the restraints are only used to protect the safety of the patient or others in the environment, "while protecting and preserving the patient's rights, dignity, and well-being." (App. F, p. 1). Restraints can only be used as a last resort after the staff exhausted "less restrictive interventions" such as verbal intervention and family involvement. The patient must have verbally or physically displayed violence or

assaultive behavior toward the patient or another person. Restraints may not be used for punishment or staff convenience. Additionally, the protocol provides the following:

> If all criteria on the Restraint Protocol are met (1) check under each criteria, only an initial physician order "restrain per protocol" is needed. ***Even with an order, if the criteria is not met, the patient cannot be restrained.*** (Emphasis added).

(App. F, p. 3).

In all cases, the protocol form must be completed. (See final page of App. F). It is undisputed that this protocol was not followed and none of the required documentation was included in the chart. (App. E., Plaintiff's Ex. 1; VR 63, 8/18/06, 15:11:45).

Defendants' expert, Dr. Samuel Keihl agreed that Shannon's vital signs were essentially normal, with the exception of her heart rate of 114. (VR 59, 8/16/06, 14:10:05). However, Dr. Keihl noted that a pulse of 114 was consistent with an agitated teenage girl who didn't want to be held in a hospital. (VR 59, 8/16/06, 14:04:00). Dr. Keihl also agreed that the records indicated that Shannon was oriented x 3. "It is a good sign for the alertness part of the brain." (VR 59, 8/16/06, 14:11:10). Like her vitals, her neurological findings were normal. (VR 59, 8/16/06, 14:12:00). Dr. Keihl agreed that Dr. Allen's dictation regarding his general findings were all good signs showing good mental health. (VR 59, 8/16/06, 14:14:22). All of Dr. Allen's physical findings were normal. (VR 59, 8/16/06, 14:15:30). He agreed that Dr. Allen's dictation indicated a patient who was generally sedate, not causing any problems but not very communicative. He found that these conclusions would not be a sufficient basis to put Shannon in restraints. (VR 59, 8/16/06, 14:17:40).

Dr. Keihl agreed that there is no order for restraints anywhere in the medical records.

He said that applying generally accepted medical standards, an order for patient restraint should be in the chart if the physician is in the area where the patient is being treated. (VR 59, 8/16/06, 14:21:54). If there is a verbal order for anything, generally accepted medical standards would require the verbal order be noted in writing in the patient's chart. He agrees there is no notation of any such orders in Shannon's chart. (VR 59, 8/16/06, 14:22:34).

Dr. Keihl noted that the toxicology results[5] showed evidence of cannabis and benzodiazepines (Valium) in Plaintiff's system. Dr. Keihl agreed with Dr. Allen that the toxicology results would have little value in determining treatment options.[6] They would not say anything about when Shannon may have been exposed to those drugs. One exposure to cannabis can be in the body for three to four weeks, at which point the effects of the drug would long since have disappeared. (VR 59, 8/16/06, 14:26:55). Dr. Keihl could not say based on the test results that Shannon was under the influence of the tested drugs. (VR 59, 8/16/06, 14:29:03).

Dr. Keihl agreed that the differential diagnosis of physical trauma could be ruled out "pretty quickly." He noted that no physical trauma assessment was ever prepared by the staff. (VR 59, 8/16/06, 14:28:19). Dr. Keihl conceded that use of a catheter, while a

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[5]Plaintiff objected to introduction of toxicology results as being irrelevant since they could not justify the conduct which was at issue in the case. The toxicology results were not available until well after Plaintiff had already been stripped, restrained and catheterized. (VR 55A, 8/14/06, 8:57:35 - 57:49).

[6]Despite Appellants' efforts to misrepresent and interpret the toxicology results as justifying their conduct, three facts are important to note. The results do not show that Shannon's Valium levels were "toxic," and the results were not available prior to any of the conduct giving rise to Plaintiff's claims against these Defendants. Lastly, the alleged use of "acid" smokescreen is just that. This is an issue wholly created by Appellants as a *post hoc* justification for their conduct.

minimally invasive procedure, should either be in a physician's order or the chart should reflect the physician's okay to use a catheter. (VR 59, 8/16/06, 14:29:48-14:31:07).

Finally, Dr. Keihl agreed that physical restraints like the ones used on Shannon Straub should be used only as the last resort. This is so because use of such restraints create medical risks of their own. For that reason, once they are used, it is important to have medical monitoring of a patient in restraints. In this case, of course, there is no record of any monitoring of any kind while Shannon was in restraints. (VR 59, 8/16/06, 14:34:25; 14:35:50; 14:36:30). Dr. Keihl conceded that a patient's simple refusal to answer questions would not be a basis for restraining a patient. (VR 59, 8/16/06, 14:53:40).

Despite the utter lack of medical information justifying the forced stripping, restraint and catheterization of Shannon, there is no dispute that it occurred. Shannon admits she was not fully cooperative because she knew she did not require medical treatment and resented being held against her will. (VR 57, 8/15/06, 13:59:55-14:00:53). Shannon testified that she was never offered an opportunity to voluntarily provide a urine sample. Nor did anyone ever tell her that she could avoid the use of restraints if she agreed to put on a hospital gown. (VR 57, 8/15/06, 14:08:10-14:09:10). In fact, she agreed to put on a gown if hospital personnel would simply wait until her mother arrived. (VR 57, 8/15/06, 14:03:24).

After Shannon refused to put on the gown before her mother got there, she heard a call for security. Shortly after that, two male nurses, two female nurses, two male security guards and Officer Kilgore all came into her room. They lifted her out of the chair, put her onto the bed and forcibly stripped every piece of clothing from her body until she was naked. She believed everyone assisted in removing the clothing, including the male nurse and

security officers. Officer Kilgore admits that he assisted in restraining her and helping to remove her pants. (VR 59, 8/16/06, 15:47:02; 15:52:33 - 55:18). After they removed her clothing, they first strapped each of her legs into the restraints, slid her arms through the gown and then strapped her arms into the restraints. After they completed placing her in four point restraints, a nurse came into catheterize her. She just knew that they were "putting something between her legs." She says that there was a male present while this was happening. Shannon testified that the experience was totally humiliating and painful. (VR 57, 8/15/06, 14:05:55-14:08:34). At no time did any of the staff at St. Luke comply with its own protocol for using restraints. (*Id.*) . Finally, nowhere in Shannon Straub's entire chart from St. Luke Emergency Department is there any reference to a medical emergency that would justify such conduct. (App. E, Plaintiff's Ex. 1).

Tina Miller, Shannon's mother, received a call from the Hospital before 9:00 a.m. on the morning these events occurred. (VR 60, 8/16/06, 9:21:35). Ms. Miller immediately got dressed and left her home at approximately 9:00. (VR 60, 8/16/06, 9:22:01). She stated she arrived at the Hospital at 9:15. (VR 60, 8/16/06, 9:22:25). Thus, someone at the Hospital was aware that Shannon's mother had been contacted about her daughter's presence at the Hospital before the stripping, restraining and forced catheterization of Shannon occurred. (See also, the testimony of Officer Kilgore reporting that he informed someone at the hospital that Ms. Miller was on her way. (VR 59, 8/16/06, 15:58:55)).

**JURY DELIBERATIONS AND VERDICT.**

The case was submitted to the jury on August 23, 2006. After many hours of deliberation, the jury returned a form verdict for St. Luke and the individual Defendants,

answering "No" to question No. 2 that asked whether St. Luke Hospital, Inc. breached any of its duties as set forth in the instruction and whether the breach was a substantial factor in causing injury to Shannon Straub. (R. 1668, attached as Ex. 5). By agreement of all the parties, the jury was permitted to read a handwritten narrative statement in which all jurors joined. That statement read in relevant part:

> For the record, we the jury believe that St. Luke bears some of the responsibility for what happened to Shannon Straub. ***The jury would have been unanimous in voting "Yes" for question No. 2 had it been phrased such that St. Luke beared responsibility regardless of the injury to Shannon Straub.*** The question, however, was written such that both parts had to be agreed to in order to render a "Yes" response. This prompted us to ask our first question. Since we were directed to answer the question as written, 9 of us voted to say "No". . . .

(R. 1681). The question to which the jury referred is the question they submitted in writing to the Court during deliberation. That question read as follows:

> Does "injury" that is listed w/each question need to be lasting or temporary?

(R. 1649, attached as App. B). In response to that question, Plaintiff's counsel proposed that the Court inform the jury as to Kentucky law regarding that issue; that is, to inform the jury that an injury sufficient to support a verdict could be temporary. Over Plaintiff's objection, the Court refused to respond to the question and simply referred the jury to the instructions and their "collective judgments." (VR 65, 8/23/06, 17:36:00-17:48:00).

Because the undisputed medical evidence confirmed that no medical emergency existed that would legally justify the actions against Shannon, Plaintiff moved for and was denied a Motion for Directed Verdict against all St. Luke Defendants. (VR 64, 08/22/06, 10:25:00; VR 65, 08/22/06, 16:46:00). The Court overruled the Motion, and following the

verdict and the overruling of Plaintiff's Motion to Alter, Amend or Vacate, or for a New Trial (R. 1741), she filed a timely appeal with the Court of Appeals. That Court of Appeals affirmed in part, reversed in part reversed and remanded for a new trial. (Appendix A, attached, and see *Straub v. St Luke Hospital, Inc.*, 2008 WL 5264284 (Ky. App., 2008) (unpublished). This Court has granted discretionary review and Appellee Shannon Straub now responds to the Brief for Appellants.

## IV. ARGUMENT

### A. THE COURT OF APPEALS PROPERLY REVERSED THE TRIAL COURT'S GRANT OF SUMMARY JUDGMENT TO THE HOSPITAL DEFENDANTS AS TO PLAINTIFF'S CLAIM THAT DEFENDANTS ACTED IN CONCERT WITH POLICE IN DEPRIVING PLAINTIFF OF HER STATE CONSTITUTIONAL RIGHT TO SUBSTANTIVE DUE PROCESS.

Plaintiff Straub alleged below that the St. Luke Hospital Defendants' acted under color of state law, by acting in concert with Dayton Police Officer Kilgore, when they detained Plaintiff, placed her in four-point restraints, stripped her of her clothing, forcibly catheterized her and drew blood, without consent of Plaintiff or her parent and without court order. Plaintiff contended below that those actions violated Plaintiff's rights as secured by the Constitution of the Commonwealth of Kentucky, Section 1 (protecting the right to liberty), Section 2 (proscribing exercise of absolute or arbitrary power over one's liberty), Section 10 (protecting individuals from unreasonable search and seizure of their person without probable cause supported by oath or affirmation), and Section 14 (affording injured parties a remedy by due course of law). The Court of Appeals recognized these rights as actionable and found there was a dispute of fact regarding whether the St. Luke Hospital

Defendants acted under color of state law in depriving Plaintiff of those rights. (Slip Opinion, App. A, pp. 34, *Straub v. St. Luke Hospital, Inc.*, 2008 WL 5264284, at *15).

> In light of Officer Kilgore's involvement in the events in question from beginning to end, we believe that this issue is one that, on its face, properly belongs before the jury and is not to be determined by the court upon a motion for summary judgment.

(App. A, p. 34; *Straub v. St. Luke Hosp., Inc.*, 2008 WL 5264284, *15 (Ky. App. Dec. 19, 2008)).

Appellants contend that the Court of Appeals erred for three reasons: (1) the claim is precluded by the federal court's dismissal of federal constitutional claims; (2) St. Luke Hospital Defendants did not act in concert with Police Officer Kilgore; and (3) there is no private right of action in Kentucky to enforce violation of Kentucky constitutional provisions. Because the issue of whether Plaintiff is afforded a private right of action is fundamental to this Court's resolution of Ms. Straub's state constitutional claims, Appellee will address that issue first.

**1. KRS 446.070 Permits A Private Right of Action to Redress Violations of State Constitution.**

The courts below have expressly or implicitly rejected the argument advanced by Appellants, i.e., that KRS 446.070 specific reference to "statutory rights" and its silence as to state constitutional rights foreclose a private right of action to recover for injuries suffered as a consequence of a violation of rights protected by the Constitution of Kentucky. The trial court initially held that Plaintiff does have a private cause of action under KRS 446.070 to bring an action in state court to enforce state constitutional rights. (R. 598). Finding the existence of a private right of action to enforce violations of rights protected by the Kentucky

constitution is a conclusion compelled by logic, relevant provisions of state law and the Constitution itself.

First, Kentucky's Constitution appears to require the courts of the Commonwealth to recognize a private right of action where a person has been injured as a consequence of a violation of a right protected by the state Constitution.

> All courts shall be open, and every person for an injury done him in his lands, goods, person or reputation, ***shall have remedy by due course of law***, and right and justice administered without sale, denial or delay.

*Ky. Const.* § 14. To adopt Appellants' position, this Court would have to carve an exception to the "injuries" covered by this provision, by excluding those resulting from state constitutional deprivations. Neither the plain language of Section 14, nor the jurisprudence of this Court, would permit such an incongruous interpretation.

The breadth of the jural rights afforded by Section 14 (and its companion provisions, Sections 54 and 241) was recognized by this Court in *Perkins v. Northeastern Log Homes,* 808 S.W.2d 809 (Ky. 1991), where this Court explained: "The point is that the critical cases on this subject, . . . afford protection of "jural rights" in a ***broad context as our Kentucky Constitution intended*** . . . ." *Id.* at 816. While the Court in *Perkins* was applying jural rights protections to a products liability claim, the analysis by the Court surely would include claims based on state constitutional provisions.

> In drafting our constitutional protections in §§ 14, 54 and 241, our founding fathers were protecting the jural rights of the individual citizens of Kentucky ***against the power of the government to abridge such rights***, speaking to their rights as they would be commonly understood by those citizens in any year, not just in 1891. The protection afforded to jural rights is not limited definitively to fact situations existing in the year 1891. . . .

*Id.* It would defy the principles that underlie Section 14 to hold that claims for negligence come within the fundamental protections of the Kentucky Constitution's "jural rights" provisions, but a violation of the constitution itself does not. Such a limiting interpretation would impair rather than advance the intent of the founders to protect its citizens against "the power of the government to abridge such rights." *Id.*

Indeed, it would create an absurd result to hold that a violation of a state statute can be addressed by a suit pursuant to KRS 446.070, but state constitutional claims are absolutely foreclosed. Of course, such a result is impermissible under accepted rules of statutory construction. *See, Bailey v. Reeves,* 662 S.W.2d 832 (Ky. 1984), (holding that courts must "accord to words of a statute their literal meaning ***unless to do so would lead to an absurd or wholly unreasonable conclusion.***" *Id.* at 834. (Emphasis added). The Court of Appeals implicitly rejected Appellants' proffered interpretation by ruling that "KRS 446.070 . . . extends a ***right of action*** only for the ***violation of*** a Kentucky statute or ***a constitutional provision.***" (Emphasis added). *Shrout v. The TFE Group,* 161 S.W.3d 351, 355 (Ky. App. 2005).

This Court appears to have, at least implicitly, accepted the existence of a private cause of action to address state constitutional violations in *Associated Indus. of Kentucky v. Com.,* 912 S.W.2d 947, 951 (Ky. 1995). Although not specifically addressing the private right of action issue, the Court entertained a suit by lobbyists challenging certain legislative and executive ethics code provisions as, *inter alia,* violative of the Kentucky and U.S. Constitutions. The Court reached the merits and found the provisions at issue did not violate protections under either Constitution. *Id.* at 951. Of course, the Court could not have reached

the merits if there was no recognized private right of action. While that was a declaratory judgment action and not an action for damages, there would be no logical reason to deny a claim to someone who has already been injured by a state constitutional violation, someone for whom declaratory relief alone would do no good.

It is also worth noting that in *Clevinger v. Bd. of Educ. of Pike County,* 789 S.W.2d 5, 9 (Ky. 1990), this Court did not appear concerned that a private cause of action to enforce the state constitutional protection was advanced by plaintiffs. While the court affirmed dismissal of a damages claim based on the state constitutional violation, they did so because it violated sovereign immunity. Of course, there would be no reason to reach the sovereign immunity issue if the state constitutional violation did not admit of a private right of action.

Appellants argue that there is no state statutory analog to 42 U.S.C. §1983 and, thus, there should be no recognized private right of action for violation of state constitutional provisions. Of course, that was no hurdle to federal courts recognizing a claim directly under the federal Constitution as to constitutional deprivations that occur at the hands of the federal government and its agents. In *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), the court recognized the cause of action for damages directly under the Federal Constitution for violation of rights protected by the Fourth Amendment by federal officials.

> The damages may be obtained for injuries consequent upon a violation of the Fourth Amendment by federal officials should hardly seem a surprising proposition. Historically, damages had been regarded as the ordinary remedy for an invasion of personal interest in liberty.

*Id.* at 398. Thus, the absence of an enabling statute may not, of itself, prevent the recognition of a cause of action directly under the Constitution of the Commonwealth of Kentucky. (See

also *Widgeon v. Eastern Shore Hospital Center*, 300 MD. 520, 479 A.2d 921, 929 (MD App. 1984) (recognizing a cause of action for violation of state constitutional provisions contained in the Declaration of Rights).

Whether a private right of action is recognized under KRS 446.470 or found to exist directly under Section 14 of the Constitution itself, the authority discussed above compels the conclusion that such a cause of action must exist. To avoid the absurd result of protecting statutory rights while foreclosing protection of Kentucky constitutional rights, this Court should affirm the decision of the Court of Appeals and explicitly recognize a private right of action to redress injuries caused by violation of rights expressly secured by the Kentucky Constitution.

**2. Plaintiff's Claim That Defendants Violated Her Rights Protected by Kentucky Constitution, Sections 1, 2, 10 and 14 Is Not Subject to Issue Preclusion as a Result of a Federal Court's Dismissal of Federal Constitutional Claims.**

The Court of Appeals rejected Appellants' argument that Ms. Straub's state constitutional claims, including the claim that St. Luke Defendants acted under color of state law when they acted in concert with Officer Kilgore, were precluded by the federal court's dismissal of Ms. Straub's federal constitutional claims.

> The law is clear that the doctrine of issue preclusion, bars parties from relitigating any issue which was ***actually litigated and finally decided*** in an earlier action. *Yeoman v. Com. Health Policy Bd.*, 983 S.W.2d 459, 465 (Ky.1998). (Emphasis added). (App. A, Slip. Op., pp. 34-35).

*Straub v. St. Luke Hosp., Inc.*, 2008 WL 5264284 *15 (Ky. App. 2008)).

In that regard, it is undisputed that the United States District Court considered none of Ms. Straub's state law claims on the merits. It declined to exercise subject matter

jurisdiction over any of her state claims by dismissing those claims without prejudice, consistent with 28 U.S.C. §1367(b). As the federal trial court held , "because the plaintiff presents no actionable claim ***under federal law*** against these defendants, her remaining state law claims should be dismissed ***without prejudice*** pursuant to 28 U.S.C. §1367." (Emphasis added). *Straub v. Kilgore,* USDC Case No. 200-41, Opinion and Order p. 17, App. G, attached). Thus, no the state law claims were "actually litigated and finally decided" in the federal litigation as required by *Yeoman*. This necessarily includes Ms. Straub's claim that the St. Luke Hospital Defendants deprived her of rights protected by the Kentucky Constitution when they engaged in concerted action with the police in detaining, placing Ms. Straub in restraints and stripping her of her clothing without consent or court order. The Court of Appeals followed *Yeoman* in noting,

> [B]oth the U.S. District Court and the U.S. Court of Appeals were assessing Straub's claims under the United States Constitution, and not the Kentucky Constitution. Thus, a determination that the defendants were not acting under color of state law for purposes of the United States Constitution, does not reach the merits of whether or not their actions were in violation of Straub's rights as protected by the Kentucky State Constitution.

*Id.* Thus, the decision by the Court below is entirely consistent with this Court's ruling in *Yeoman.* Indeed, this Court would have to overrule or modify *Yeoman* to reach the result argued by Appellants.

In addition, this Court would have to overrule the Court of Appeals long-standing decision rendered in *Davis v. Powell's Valley Water Dist.,* 920 S.W.2d 75 (Ky. App. 1995). Like Ms. Straub in the instant case, the plaintiffs in *Davis* filed a civil rights action under 42 U.S.C. §1983 claiming they were deprived of their federal constitutional rights by their

employer while acting under color of state law. The federal district court in *Davis* had found that the defendants were "not state actors, nor are their actions fairly attributable to the state" - the very same rulings rendered by the federal district court in this case. *Id.* At 76. The federal court in *Davis* declined to exercise jurisdiction over plaintiff's state law claim.

The *Davis* plaintiff, like Plaintiff here, re-filed her state claims in state circuit court under the Kentucky's whistle blower statute. The defendants in *Davis* advanced the same argument Appellants offer here, i.e., that the federal court's finding that there was "no state action" and that defendants were private parties who did not act "under color of state law" was *res judicata* and foreclosed a claim under the Kentucky's whistle blower statute. *Id.* at 76. The *Davis* Circuit Court applied *res judicata* to the federal court's finding that the private defendant did not act under color of state law and dismissed. The Court of Appeals reversed, noting that the state claims were dismissed in federal court for reasons other than the merits. Therefore, the doctrine of *res judicata* did not apply. The Court explained:

> In the first place, the doctrine of res judicata applies only to a final judgment which is rendered "upon the merits" of the underlying action. *Dennis v. Fiscal Court of Bullitt County,* Ky. App., 784 S.W.2d 608, 609 (1990); 46 Am.Jur.2d *Judgments* §§ 394 (1969). Both Fed.R.Civ.P. 41(b) and CR 41.02(3) indicate that an action's dismissal for lack of jurisdiction does not constitute "an adjudication upon the merits" of the action. Therefore, the earlier dismissal of appellants' federal court action for lack of subject matter jurisdiction did not constitute an adjudication upon the merits of that action, and ***res judicata did not attach to the issues raised therein or preclude appellants from raising the same issues in the instant action.*** . . . (Emphasis added).

*Id.* at 76. Thus, issues pertinent to a plaintiff's state law claims, including issues relating to whether a private party engaged in state action, cannot be foreclosed by a federal court's disposition of that issue as part of a federal constitutional claim.

There is no substantive distinction between the facts of *Davis* and facts of Shannon Straub's case that are germane to the issue of *res judicata* and collateral estoppel. The federal court's finding in *Davis* that the Water District was a private actor for purposes of the federal constitutional claims was not binding on the Circuit Court with respect to state claims. *Davis,* like the Court of Appeals here, did nothing more than follow the principles enunciated by this Court in *Yeoman.*

Kentucky's restrictive application of the doctrines of *res judicata* and collateral estoppel with respect to federal court determinations of federal constitutional issues is apparent in *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 908 S.W.2d 104 (Ky. 1995):

> ***State constitutions may offer greater protections*** for their citizens than the federal constitution and ***the Kentucky courts are not bound by decisions of the United States Supreme Court when deciding whether a state statute . . . . impermissibly infringes upon individual rights guaranteed by the state constitution,*** as long as the state constitutional protection does not fall below the federal floor.

(Emphasis added). *Id.* at 107. This holding is consistent with the principles of sovereignty that apply to all states, including the Commonwealth of Kentucky. *Com. v. Wasson*, 842 S.W.2d 487, 492 (Ky. 1992).

True to this principle of sovereignty, this Court held in *Wasson* that Kentucky courts, not federal courts, determine the parameters of rights protected by the Kentucky Constitution. Specifically, in *Wasson* this Court held that Kentucky's Bill of Rights, including Section 2 at issue in this case, provides more specific and broader protection than that afforded by the federal Bill of Rights:

> . . . there are both textual and structural differences between the United States Bill of Rights and our own, which suggest a different conclusion from that

> reached by the United States Supreme Court is more appropriate. More significantly, ***Kentucky has a rich and compelling tradition of recognizing and protecting individual rights from state intrusion in cases*** similar in nature, found in the Debates of the Kentucky Constitutional Convention of 1890 and cases from the same era when that Constitution was adopted.

*Id.* at 494. For these reasons, neither the doctrine of *res judicata* nor collateral estoppel foreclose Plaintiff's claims under Kentucky's Constitution.

None of the cases cited by Appellants undercut this authority. Appellants suggest that *Davis* contravenes decisions rendered by this Court, but they fail to explain how and offer no supporting analysis. (Appellant's Brief pp. 28-29). In *Sedley v. City of W. Buechel,* 461 S.W.2d 556 (Ky. 1970), this Court applied *res judicata* to a federal court's ruling on the merits of a state law claim.

> [T]he court 'made a ruling that the bonds ***were not issued in conformity with*** the law and ***Kentucky statutes*** and were therefore invalid.' That is the order which was pleaded in the instant case as res judicata. It was not part of the ultimate final judgment in the case but on appeal of the judgment to the United States Court of Appeals, Sixth Circuit, that court said that it accepted the order as 'a final adjudication of that issue. Therefore we are of the opinion that the order must be considered a final adjudication for purposes of application of res judicata, and we reject the appellant's contention that the order was merely interlocutory. (Emphasis added).[7]

*Id.* at 558. The case is inapposite as the federal courts here declined to exercise jurisdiction over any state law claims.

In *Moore v. Com.*, 954 S.W.2d 317, 319 (Ky. 1997), this Court simply applied issue preclusion to bar a mother from litigating a paternity claim against a third party that had been

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[7]Ultimately the Court found that there was a question as to whether the determination was necessary to the federal court holding and found that the defendants had not raised the defense. It, therefore, reversed the trial court's application of *res judicata. Id.* at 559-560.

resolved in her prior divorce proceeding with her former husband. That was the issue that was actually decide in a prior state court suit. *Id.* at 319-20.

This Court's decision in *Gregory v. Com.,* 610 S.W.2d 598 (Ky. 1980) can have no bearing on the preclusion ruling here. In *Gregory*, this Court refused to apply *res judicata* to a juvenile court ruling, which the Court found was not essential to its ruling. *Id.* at 600. Similarly, in *Yeoman* this Court refused to apply *res judicata* to a second state court suit challenging provisions of health care reform bill, finding that the challenged provisions were not identical to the provisions challenged in the earlier litigation.

None of the cases cited by the Hospital Defendants in their Brief stand for the proposition that a federal court ruling regarding a federal constitutional claim bind a Kentucky court from determining a state law claim brought under the Kentucky constitution. Indeed, such would conflict with this Court's decision in *Steelvest Inc. v. Scansteel,* that Kentucky's Bill of Rights provides broader protections than the federal constitution. 908 S.W.2d at 107 If federal courts cannot bind the Kentucky Courts regarding the scope of state constitutional protections, they cannot dictate to state courts what the components of the state constitutional claim will be. The federal courts, therefore, cannot dictate what constitutes "acting under color of state law" for purposes of Kentucky constitutional violations, anymore than they can dictate what constitutes excessive force or unlawful arrest under the Kentucky Constitution. The only exception would be the case where the parties voluntarily litigate those issues in the federal court AND the federal court accepts subject matter jurisdiction of such claims. Neither of those things occurred here. *Yeoman* was properly followed by the Court of Appeals in rejecting application of *res judicata* to Ms.

Straub's state constitutional claims. This Court should accordingly affirm that ruling.

### 3. The Court of Appeals Properly Found That There Was Sufficient Evidence in the Record from Which a Jury Could Find That St. Luke Was Acting in Concert with the Police and, Thus, Acting Under Color of State Law.

The Court of Appeals held that the trial court erred in granting summary judgment on Plaintiff's claim that the her state constitutional rights were violated when St. Luke Hospital Defendants, by acting in concert with Police Officer Kilgore, detained Plaintiff, stripped her of her clothing and placed her in four-point restraints and catheterized her. The Court of Appeals found that there was a material factual dispute regarding whether the St. Luke Hospital Defendants were acting under color of state law when they engaged in such conduct.

In considering whether the record in this case would support a finding that the Hospital Defendants were acting under color of state law, the deposition testimony St. Luke Security Guard Pretot is critical. Security Officer Pretot was called to the ER after Plaintiff arrived and was asked to explain his actions in assisting Officer Kilgore and other hospital personnel in placing Plaintiff in four-point restraints and forcibly stripping her clothes from her body. He stated that when he accompanied Police Officer Kilgore into the ER room to assist with the stripping and restraining of Plaintiff, he did not ask any questions of Shannon because: "No. I didn't feel there was any need that I should even talk to her. ***This was Officer Kilgore's situation.***" (Emphasis added). (R. 912, p. 12; VR 62, 8/17/06, 14:12:55).

Indeed, there was an abundance of evidence produced in the record below that would justify a jury finding that Police Officer Kilgore *'**exercised such coercive power or such***

***significant encouragement that it is responsible for [the private party's] conduct."*** '
*Roberson v. Com.*, 185 S.W.3d 634, 640 (Ky. 2006) (quoting *United States v. Garlock*, 19 F.3d 441, 443 (8th Cir.1994))Such "coercive power" or "significant encouragement" would then convert the otherwise private action into "state action" against which constitutional protections attach. *Id.* The evidence upon which the Court of Appeals relies includes:

- Dayton Police Officer Kilgore was told to take Shannon to the Hospital by a Court Designated Worker (CDW), not by a medically trained individual. Kilgore saw no reason to take Shannon to the hospital prior to his call to the CDW. (R. 912, p. 10; VR 59, 8/16/06, 15:30:47 - 32:00).

- Nurse Theissen relied on Officer Kilgore for an explanation as to why he brought Shannon to the Hospital and Kilgore stayed with her during triage. (R. 912, p. 10, VR 61, 8/17/06, 10:06:24 - 10:07:56).

- Ms. Theissen remembered Shannon being handcuffed to the chair in the waiting area when she first saw her. (VR 61, 8/17/06, 09:49:28; 09:50:39; 09:52:58).

- Medical personnel recorded most of what Kilgore told them on their assessment. (Nursing Assessment, Plaintiff's Ex. 1).

- After Theissen completed her assessment, Kilgore remained in the ER room with Shannon when Theissen left the room. Theissen called security to inform them that a Wilder Police Officer had brought Shannon in. (R. 912, p. 11, (VR 61, 8/17/06, 10:57:07 - 23).

- Kilgore stayed with Theissen during her assessment of Plaintiff. (R. 912, p. 11, VR 61, 8/17/06, 10:07:56).

- Kilgore admits that he prevented Plaintiff from leaving the hospital by requiring her to remain in the examining room when she tried to leave by exiting the back door "several times." Plaintiff complied with Kilgore's directives. (R. 912, p. 11; VR 59, 8/16/06, 15:43:50 - 15:44:01; VR 61, 8/17/06, 9:30:31 - 30:55).

- Kilgore briefed St. Luke's security guards before they went to restrain Ms. Straub. Kilgore assisted in the restraining and removing her clothes. (R. 912, p. 11, VR 61, 8/17/06, 14:05:31; 14:12:42; VR 62, 8/17/06, 14:31:03;

14:35:13 - 19).

- Officer Kilgore was in Shannon's room ***during her initial examination by the ER Doctor Allen***. (R. 912, p. 12, VR 62, 8/17/06, 10:36:45 - 10:37:45).

- Defendant Pretot, St. Luke security guard, explained that when he accompanied Kilgore into the ER room to assist with the stripping and restraining of Plaintiff, he did not ask any questions of Shannon because: "No. I didn't feel there was any need that I should even talk to her. ***This was Officer Kilgore's situation.***" (R. 912, p. 12; VR 62, 8/17/06, 14:12:55).

Considering this evidence most favorably to Plaintiff, a jury could fairly conclude, indeed, logic dictates the conclusion, that there was no medical emergency and that hospital personnel were acting in concert with Kilgore for the purpose of collecting potential evidence at the expressed or tacit direction of Kilgore, or to assist him in his investigation of Ms. Straub. Officer Kilgore provided "such significant encouragement that the actions must be deemed to be those of the state." *Nelson v. Cauley,* 2005 WL 415144 at *3. (N.D. Tex. 2005), citing *Bass v. Parkwood Hospital*, 180 F.3d 234, 242 (5th Cir. 1999).

The ruling of the Court of Appeals on this issue is entirely consistent with the jurisprudence of the Supreme Court regarding the conversion of private action to state action. In *Blum v. Yaretsky,* 457 U.S. 991, 1004 (1982), the Court held that the state compulsion (or coercion) test holds the state responsible "for a private decision only when [the state] has exercised coercive power or has provided such significant encouragement, ***either overt or covert,*** that the choice must in law be deemed to be that of the State." (Emphasis added) (internal quotations omitted). *Id.* at 1004. Additionally, state action can be found where the state (in this case Officer Kilgore) has "so far insinuated itself into a position of interdependence with the [private actor] that it was a joint participant in the enterprise."

*Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 357-58 (1974). The evidence itemized above shows such interdependence, "joint participation" as well as "significant encouragement" either overt or covert, sufficient to convert the actions of the St. Luke Defendants into state action.

As they did below, Appellants rely on *Rudy v. Sparta*, 990 F. Supp. 924 (W.D.Mich. 1996). That case has no factual application to the present case. In*Rudy*, plaintiff was placed under arrest and charged with DUI after drinking as many as 13 beers and smoking as many as three joints of marijuana. It was for this reason that the officer transported his prisoner to a hospital. The Court in *Rudy* based its summary judgment decision on the fact that the uncontested evidence demonstrated that the doctor exercised independent medical judgment when he ordered a catheterization because the Plaintiff was "unable to void." *Id*. at 927. The doctor offered undisputed evidence that the catheterization was ordered by him based on his independent medical judgment. No similar orders were rendered by Dr. Allen here as to the stripping, restraint or catheterization of Plaintiff. Nor does *Rudy* address a situation where the police officer is actively involved in the four-point restraint and stripping of plaintiff as occurred here.

Closer to point is *Williams v. Payne*, 73 F.Supp.2d 785, 800 (E.D. Mich. 1989), in which the federal district court denied an argument by a private physician that he did not act under color of state law in his effort to have constitutional claims against him dismissed. In that case, a prisoner challenged the physician's actions in pumping the plaintiff's stomach against his will. The court found that there were genuine issues of material fact regarding whether the physician "and a policeman somehow reach an understanding to cause a

violation of . . . constitutional rights". *Cf. Adicks v. S.H. Kress & Co.*, 398 U.S. 144 (1970) (private party who collaborated with an official state actor in the deprivation of a federal constitutional right is liable for the constitutional deprivation).

Appellants mistakenly focus on Dr. Allen's decision to order the drug screen. First, in light of the record itemized above, a jury could conclude that the drug screen was ordered at the express or implicit request of Officer Kilgore. As explained in the statement of facts above, Dr. Allen concedes that the screen he ordered would show only the presence of marijuana or certain drugs in Ms. Straub's system. The tests could not provide any quantitative results. Indeed, Allen admits he did not even know what the quantitative threshold was for the tests he ordered. Thus, the drug screens he ordered would be of no treatment value. In fact, Dr. Allen never referred Plaintiff for any treatment. (App. E, Plaintiff's Ex. 1). Like *Williams*, a jury could conclude from these admissions that the drug screen was ordered simply to assist the officer in collecting evidence should he choose to prosecute.

More important, Dr. Allen never ordered the restraining, stripping or catheterization of Plaintiff. [8] He assumed that Plaintiff would be asked to urinate in a cup. (VR 62, 8/18/06, 10:59:11-22). Yet there was no evidence that she was asked to do so, and Plaintiff denies that she was ever given this more civil, and less traumatic alternative. (VR 57A, 8/15/06,

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[8]Appellants simply mischaracterize the record in stating that "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 the them to ask for help. . ." Appellants' Brief p. 31. In fact, it was the stripping of her clothing by the defendants (both men and women) that prompted Plaintiff to attempt in vain to defend herself. (Tape 57A, 8/15/06, 14:09:30-14:10:08).

14:08:10-55). The actions of detaining Ms. Straub against her will, stripping Ms. Straub of her clothing, and forcing her into four-point restraints all occurred with the active participation of Officer Kilgore, the person that security guard Pretot believed to be in charge. Dr. Allen's so-called independent medical judgment cannot logically justify this conduct, as none of it was ordered by him nor did he participate in any way.

Thus, the record demonstrates that it was not "impossible" for Shannon to present evidence to support her constitutional claims against Appellees as required by *Steelvest.* The trial court erred in granting summary judgment in light of such a genuine dispute of fact. *Lewis v. B & R Corporation,* 56 S.W.3d 432, 436 (Ky. App. 2001). The Court of Appeals properly reversed that finding and remanded for a trial on the state constitutional claims.

### B. THE COURT OF APPEALS CORRECTLY FOUND THAT THE TRIAL COURT ERRED IN ALLOWING THE INTRODUCTION OF CUMULATIVE AND PREJUDICIAL CHARACTER EVIDENCE REGARDING PLAINTIFF'S USE OF PROFANITY.

Appellants argue that Ms. Straub's use of profanity in the ER should have been admitted as part of her "clinical picture." (Appellants' Brief, p. 32). Conspicuously absent from Appellants' argument is even a single reference to the record where a physician believed that Ms. Straub's use of profanity had any diagnostic, treatment or other clinical significance. Nevertheless, the Court of Appeals ***agreed with the trial court*** and held that evidence of drug use on the night preceding the events in question and her use of profanity in the ER was properly admitted and not outweighed by its prejudicial value. (Slip Op., p. 30; *Straub v. St. Luke Hosp., Inc.,* 2008 WL 5264284 at *13-*14). Appellants, thus, are arguing for reversal of a ruling that the Court of Appeal rendered in their favor.

It was not the admission of use of profanity on the day in question or the alleged use of drugs the night preceding the events in the ER that the Court below found to be an abuse of discretion. Rather, it was the prejudicial and cumulative use of evidence and allegations about Ms. Straub's purported history of drug use, including her use of drugs long after the events in question, that the Court found to run afoul of the rules of evidence. (Slip Op., App. A, pp. 31-32; *Straub v. St. Luke Hosp., Inc.,* 2008 WL 5264284 at *14). Plaintiff addresses this argument below.

### C. THE COURT OF APPEALS CORRECTLY FOUND THAT THE TRIAL COURT ABUSED ITS DISCRETION TO THE PREJUDICE OF PLAINTIFF WHEN IT ALLOWED DEFENDANTS TO INTRODUCE CUMULATIVE, PREJUDICIAL EVIDENCE REGARDING PLAINTIFF'S PAST DRUG USE.

As the Court of Appeals noted, Plaintiff objected to repeated questions by counsel and use of evidence concerning Plaintiff's of history of use of profanity as well as her alleged history of drug use, both before and after the events that occurred on April 17. Because such evidence could have no relevance the events of April 17 in the ER, the Court of Appeals found the admission of such evidence was prejudicial and amounted to an abuse of the trial court's discretion.

> With respect to evidence and testimony concerning Straub's past and subsequent drug usage and alleged habit of using profanity, we are of the opinion that such evidence would properly be characterized as character evidence pursuant to KRE 404, and accordingly, should not have been found admissible by the court below. Having reviewed the record and the arguments of the parties, we are not of the opinion that such evidence rises to the level of habit as that term is defined by KRE 406 and accompanying case law. Nevertheless, we hold that even if such evidence did constitute habit evidence, same should still have been excluded under KRE 403 as being more prejudicial than probative in this instance. Thus, the admission of such evidence by the trial court was reversible error.

(Slip Op., App. A, pp. 31-32; *Straub v. St. Luke Hosp., Inc.,* 2008 WL 5264284 at *14).

Appellants complain that 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 [history of drug use] . . . ." (Appellants Brief, p. 34). The record is replete with objections to Defendants' efforts to introduce what can only be considered improper character evidence relating to her history of drug use.[9] Indeed, at one point counsel for St. Luke went so far as to ask Plaintiff if she had any friends who used LSD.[10] While the objection was sustained[11] the question had clearly done its intended damage of prejudicing the jury.

One of the most egregious examples of co-defendants peppering the record with irrelevant evidence of post-incident drug use were questions posed by a co-defendants' attorney specifically asking to quantify her use of marijuana prior to her deposition in the litigation ***and after*** the events that were the subject of the complaint.[12]

There can be no plausible explanation for this improper line of questioning except to convince the jury that Plaintiff was simply a bad character and that its verdict should rest

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[9]In addition to cites contained in footnotes 10, 11 and 12 below, Plaintiff refers this Court to testimony and objections to it at VR 57A, 8/15/06, 15:51:28 - 15:51:39; 16:37:34-38; and 16:39:53 - 16:40:16. At this point, the trial court informed Plaintiff's counsel that it recognized a continuing objection to this testimony.

[10]VR 57A, 8/15/06,15:27:58 - 15:28:08.

[11]VR 57A, 8/15/06,15:28:08 - 15:30:36.

[12]Plaintiff renewed her objection to the continuing references to post-incident drug use (VR 57A, 8/15/06,16:37:34-38). While the trial court noted Plaintiff's continuing objection to drug use questions, it permitted the evidence to come in. ( VR 57A, 8/15/06, 16:39:53-16:40:16, and 16:40:18-16:40:28).

on that bias, rather than upon evidence relevant to the incidents occurring in the St. Luke on April 17. *See Burchett v. Com.*, 98 S.W.3d 492, 498 - 499 (Ky. 2003) (admission of past marijuana use by defendant required remand and new trial).

The ruling of the Court of Appeals regarding the introduction of prejudicial drug use history evidence is entirely consistent with this Court's decision in *Burchett v. Com., supra*. In that case this Court held that the admission of past marijuana use by defendant required remand and new trial. The Court explained the insidious nature of purported "habit" evidence:

> Unfortunately for Appellant, his blood sample could not be tested and the drug test results could not corroborate his testimony that he did not smoke marijuana that morning, so evidence of his daily smoking was admitted. This scenario ferrets out the dangerous non sequitur that the habit evidence rule encourages: because a defendant regularly performs a particular act, he also did so on this particular occasion. In light of these difficulties, ***this Court chooses to avoid the introduction of such specious evidence into the courtrooms of this Commonwealth.***

*Id..*, 98 S.W.3d at 498 - 499. (Emphasis added.)

The Court found the evidence of his marijuana smoking habit should have been excluded from defendant's trial on the charge of reckless homicide. This was so despite the defendant's admission that he smoked it on a daily basis. *Id.* The Court concluded that the prejudicial error occurred. "Having no proper basis for admission, the evidence of Appellant's marijuana use should have been excluded. This error by the trial court was not harmless." *Id.* at 499.

Appellants make a point of Shannon Straub's concession that she smoked marijuana in the past. This point made by Appellants reinforces Ms. Straub's contention that

Defendants' persistent efforts throughout the trial to introduce cumulative evidence about both pre-incident and post-incident marijuana use could only have been for the sole purpose of inducing the jury to use the same improper inferences that the Court in *Burchett* inveighed against, and to convince the jury that Plaintiff was simply not of "good character." Neither inference is appropriate under the Rules of Evidence and the Court of Appeals was correct in so holding.

### D. THE COURT OF APPEALS ERRED IN REVERSING THE TRIAL COURT'S DECISION TO PERMIT PLAINTIFF TO NAME HARRIS, PRETOT AND FEY AS DEFENDANTS IN THE STATE COURT ACTION WHEN THE STATUTE OF LIMITATIONS HAD NOT RUN AT THE TIME THEY BECAME DEFENDANTS IN THE STATE COURT ACTION.

Appellants contend the trial court erred in not dismissing St. Luke security guards Harris, Pretot and Nurse Fey, and support the Court of Appeals decision reversing that holding. Like the Court of Appeals, Appellants contend that these Defendants should be dismissed because they were not named in the federal action and the statute of limitations had consequently run. (Appellants' Brief p. 36). The Court of Appeals erred in accepting this logic. (App. A, Slip Op. p. 40-41, 2008 WL 5264284, at *18). Indeed, its holding in this regard is inconsistent with its correct ruling, that the statute of limitations had been tolled between the filing of the federal court and state court complaints. (App. A, Slip Op., p. 43, 2008 WL 5264284, at *16).

As the trial court correctly ruled, KRS 413.270 preserved Ms. Straub's claims against these individual parties until her complaint was timely filed in state court, following the Sixth Circuit Court of Appeals' affirmance of the dismissal of Plaintiff's federal claims. (R.

598). This Court should sustain the trial court on this issue.

The trial court properly overruled Defendants' summary judgment motion seeking the dismissal of claims against Harris, Pretot and Fey on the basis of the statute of limitations. The longstanding rule regarding the applicability of KRS 413.270 that saves a cause of action filed in the wrong court is that the statute of limitations is suspended from the time of the filing of the original action in an improper court until it is properly filed in the correct court. *Ockerman v. Wise*, 274 S.W.2d 385, 388 (Ky. 1954); *Com. v. Nelson*, 435 S.W.2d 449, 450 (Ky. 1968) ("The time between the commencement of the first and last action does not count in applying any statute of limitation."). That is substantively no different than what occurred here. Once the original action was filed in federal court the statute of limitations was tolled. As it was timely re-filed in state court, the statute of limitations could not have expired and Plaintiff was free to include all liable parties in her state court complaint. The Court of Appeals appears to recognize this basic principle in ruling that the limitations period for the state law claims "did not expire between the filing of the two complaints." (App. A, Slip Op., p. 37, 2008 WL 5264284, at *16). The Court of Appeals correctly reasoned as follows:

> Each of the claims asserted by Straub under the Kentucky Constitution carries a one-year statute of limitations. *Million v. Raymer,* 139 S.W.3d 914 (Ky.2004). However, as previously stated herein, Straub filed her state complaint within thirty days of the dismissal of her federal complaint. Thus, pursuant to KRS 413.270, the limitations period for her state law claims did not expire between the filing of the two complaints. The statute of limitations with respect to her state law claims was tolled during the pendency of her federal action and subsequent federal appeal.

(App. A, Slip Op. p. 37, 2008 WL 5264284, at *16)

If the limitations did not expire, her claims against Pretot, Harris and Fey would

necessarily be timely. The Court of Appeals effectively holds that the statute of limitations had not expired for the underlying claims but had expired as to those three parties. Rather, the tolling that occurs pursuant to KRS 413.270 permits a plaintiff timely refiling her claim in state court to include whatever valid claims she may have. As the statute unambiguously states, "The time between the commencement of the first and last action ***"shall not be counted in applying any statute of limitation.*** " KRS 413.270 (1).[13] As the time between suits is not counted in "any statue of limitations," it necessarily permits the inclusion of any party against whom she has a valid claim. This Court is constrained to apply the plain meaning of the statute. The trial court properly applied this rule and the Court of Appeals erred in ruling otherwise.

Even if the statute were not tolled, the Court of Appeals erred in holding that Plaintiff's claims for violation of state constitutional rights was governed by the one-year limitations announced in *Millon v. Raymer,* 139 S.W.3d 914 (Ky. 2004). The Court below is mistaken. The plaintiff in that case sued only under the Federal Constitution, regarding which a one-year statute has always been applicable. There is no statute of limitations articulated in the Kentucky Revised Statutes for damage actions brought directly under the state constitution. Thus, KRS 413.120(2) would set the statute at five years. As the Court of Appeals noted, Plaintiff's state court complaint was initiated within less than four years

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[13]There is no dispute that this statute applies to cases dismissed on jurisdictional grounds in a federal court, then re-filed in a state court. That is precisely what occurred here, as the federal courts declined to exercise jurisdiction over any state law claims. Nor is there a dispute that the time for refiling is calculated from the judgment ultimately rendered by the federal appellate court. *Ockerman v. Wise,* 274 S.W.2d.385, 388 (Ky. 1954).

of Plaintiff reaching her age of majority. (App. A, Slip Op. p. 40, 2008 WL 5264284, at *16).[14]

This Court should affirm the trial court's decision with respect to the timely naming of Harris, Pretot and Fey as defendants in this action and reverse the decision of the Court of Appeals overruling that decision. As demonstrated, the Court of Appeals decision is inconsistent with the plain language of the statute that requires tolling "of any statute of limitations." (*Cf., Dollar General Stores Ltd., v. Smith*, 237 S.W.3d 162, 164-165 (Ky. 2007), where the Court interprets the "jurisdiction" language of KRS 413.270 "broadly to achieve its remedial purpose.").

### E. THE COURT OF APPEALS CORRECTLY AFFIRMED THE TRIAL COURT'S RULING THAT PLAINTIFF TIMELY FILED HER CLAIMS OF ASSAULT AND BATTERY AND CLAIMS FOR VIOLATION OF HER RIGHTS SECURED BY THE KENTUCKY CONSTITUTION.

Appellants argued in the Court of Appeals that Ms. Straub's assault and battery claims and claims for violations of state constitutional rights were barred by the one year statue of limitations since those specific claims were not included in her federal complaint. As to the assault and battery claims, the Court rejected Defendants' argument, noting (as did the trial court) that the amendment adding the assault and battery claims was timely.

> However, the claim for assault and battery asserted in the Campbell Circuit Court in this matter arises out of the identical facts, circumstances, and occurrences set out in

[14]As Appellants have conceded previously, two of the three individual Defendants (Pretot and Harris) were deposed during the federal court action, and knew that their conduct toward Ms. Straub was being challenged. Furthermore, they identified Defendant Fey during their testimony, and ultimately all of these Defendants were represented by the same counsel. Thus all had actual or constructive knowledge during the original federal proceedings.

> both the original complaint filed in federal court, and the complaint subsequently filed in the Campbell Circuit Court.

(App. A, Slip Op. p. 44, 2008 WL 5264284, at *19). The Court of Appeals was compelled to follow this Court's holding in *Perkins v. Reed,* 616 S.W.2d 495 (Ky. 1981). In *Perkins,* this Court held that, although the plaintiff sought to amend her complaint to add an entirely new claim after expiration of the applicable statue of limitations, the amendment must be allowed.

> Hence the important consideration is not whether the amended pleading presents a new claim or defense, but whether the amendment relates to the general factual situation which is the basis of the original controversy.

*Perkins,* 616 S.W.2d at 496. In this case, as the Court of Appeals correctly held, the amendment to add the assault and battery claim was based on facts identical to those raised in the original federal court complaint as well as those asserted in the state court complaint.

In this regard, it is important to consider the liberal construction required to be given to pleadings in the courts of the Commonwealth.

> CR 8.06 requires that 'All pleadings shall be so construed as to do substantial justice.' This rule, sometimes called a 'liberal construction' rule, requires that a ***pleading be judged according to its substance rather than its label or form***. To construe this pleading as a claim against the defendants in their official capacity would result in the claim being barred. To construe it as an individual capacity claim permits the litigation to proceed toward the merits, a goal we have expressly embraced in other contexts. (Emphasis added).

*McCollum v. Garrett,* 880 S.W.2d 530, 533 (Ky. 1994); *and see, W. R. Willett Lumber Co. v. Hall,* 375 S.W.2d 266, 267-268 (Ky. 1964) (plaintiff's complaint construed to include a claim for personal liability against the wife of a grantor although "***no direct allegations are made that she committed any wrongful act, nor is any specific relief asked against her***.").

(Emphasis added). This liberal construction requirement lends additional support for the decisions of the courts below.

Of course, in this case no liberal construction is necessary. From day one, Defendants were aware that Plaintiff was seeking damages for injuries suffered as a result of her detention, forced stripping, placement in four-point restraints, forced catheterization, and blood draw - all occurring without consent, warrant or court order. Their awareness of this is not affected by adding new labels to the claims included in Plaintiff's amended complaint.

It is worth noting that Appellants do not dispute that the amendments to add both the assault in battery and state constitutional claims are based on facts virtually identical to those asserted in both the original federal complaint and the re-filed initial state court complaint. Thus, Appellants cannot reasonably argue that they suffered any prejudice by the amendment. That, of course, was central to the Court's ruling in *Perkins.* It cannot be said that they will be unduly prejudiced by allowing the complaint to be amended. *Id.* at 496.

Appellants rest their argument on the contention that Plaintiff should have amended her Complaint in federal court. (Appellants Brief, pp. 38-39). Of course, this gets the parties nowhere, as the federal court declined to exercise jurisdiction over any state law claim. Had it not been dismissed, Plaintiff surely would have filed the same amendments in the federal action.

Appellants' reference to *Underhill v. Stephenson,* 756 S.W.2d 459 (Ky. 1988) is of no avail. The Court held that the trial court should have permitted the plaintiff in a medical negligence case to add a nurse whose identity was learned after suit. The Court held "The

important consideration is not whether the amended pleading presents a new claim or defense, but whether the amendment ***relates to the general factual situation which is the basis of the original controversy.***" (Emphasis added). *Id.* at 460. The Court held that the amendment to add the party and a negligence claim against the hospital should have been allowed. Nothing in *Underhill* undercuts the Court of Appeals' ruling regarding the relation back doctrine.

*Perkins* required the holding rendered by the Court of Appeals. Appellants seem to concede this by failing to address either *Perkins* or the analysis of the Court of Appeals. (Appellants' Brief, pp. 37-39). Rather, they simply offer a rhetorical suggestion that "Maybe it's time to reconsider the parameters for a plaintiff has to amend her complaint . . . ." (Appellant's Brief p. 39). As no prejudice can be claimed here, there is no reason for this Court to revisit *Perkins* to set an arbitrary deadline not contemplated by Civil Rule 15.03.[15] The decision of the Court of Appeals should be accordingly affirmed.

**F. PLAINTIFF TIMELY FILED HER STATE COURT ACTION WITHIN THE 90-DAY WINDOW PROVIDED BY KRS 413.270.**

Appellants argue that Ms. Straub violated the 90-day statute of limitations contained

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[15]St. Luke Hospital Appellants spend much of their argument on an analogy to "splitting a cause of action." This was not raised below in the Court of Appeals and thus should not be addressed on discretionary review. Obviously, it has no proper analogy here since all claims were joined in a single action in Campbell Circuit Court, the only trial court to address the merits of the state law claims. As no claims were tried "piece meal," no prohibited "splitting" occurred. *Egbert v. Curtis,* 695 S.W.2d 123, 124 (1985) has no application. That ruling rested on the third party plaintiff's failure to bring his claim as a compulsory counter-claim in a prior suit. The Court, therefore, applied res judicata to that claim. The case is clearly inapposite. Even had Appellants here raised the "splitting causes of action" argument in the Court of Appeals it would have been properly rejected.

in KRS 413.270 by filing her state court Complaint too early. Defendants do not provide any legal authority for this position and none exists. This argument was rejected by the Court of Appeals. "Having reviewed the applicable statutory and case law, we find nothing to support a prohibition against filing prior to the time that the ninety-day window would officially begin to run. (App. A, Slip Op. p. 46, 2008 WL 5264284, at *21).

As the record reflects, Ms. Straub filed her state court action before 90 days expired after the final decision of the Sixth Circuit was rendered. Appellants concede this, but argue that it was filed too early. The Sixth Circuit affirmed the District Court's decision on May 27, 2004. *Straub. v. Kilgore,* 100 Fed.Appx. 379 (6th Cir. 2004). A Petition for rehearing was denied on July 21, 2004, as Appellees concede. KRS 413.270 simply sets a time ***limit*** on refiling in state court. Plaintiff clearly filed before the time set by that statute expired. Kentucky courts have consistently held that the 90-day period for filing a dismissed federal action in state court begins to run from "the decision which finally determines the disputed issue over the [federal] court's jurisdiction." *Ockerman*, 274 S.W.2d at 388. Appellant indisputably filed her state complaint before that 90-day period expired. Nothing in the statute requires a party to wait until there is a ruling on a petition for rehearing before she may properly re-file state law claims in state court. Appellants cite no authority to the contrary.

Even if the filing were considered "premature," the Complaint would still be considered timely filed. For purpose of analogy, a premature appeal is not fatal to consideration of the appeal, particularly when the appellee is not prejudiced by that filing. *Johnson v. Smith*, 885 S.W.2d 944, 950 - 951 (Ky. 1994); *Clark v. Com., Cabinet for Health*

*and Family Services*, 170 S.W.3d 426, 428 (Ky. App. 2005).

The position advanced by Appellants, i.e., that the complaint was filed too early, lacks both logic and legal support. Noting the obvious, that Defendants could not have been prejudiced by an early filing, the Court of Appeals rejected Appellants' unreasonable technical reading of the statute.

> We believe that KRS 413.270 sets a definitive time limit by which Straub *must* have filed her claims in state court, but find nothing that would prohibit her from filing those claims after a judgment of the trial court but before that of the Court of Appeals, as she did here. Accordingly, we decline to dismiss Straub's claims on these grounds, as to do so would certainly put form over substance. (Emphasis in original).

(App. A, Slip Op. p. 46, 2008 WL 5264284, at *21).

The decision of the trial court and the Court of Appeals rejecting Appellants' contention should be affirmed by this Court, consistent with the clear language of KRS 413.270, as Appellants concede the Complaint herein was filed before the expiration of the 90-day period set forth in the statute.

**G. THE COURT OF APPEALS PROPERLY HELD THAT IT WAS ERROR TO OVERRULE PLAINTIFF'S REQUEST TO ANSWER A JURY QUESTION BY INSTRUCTING THAT PLAINTIFF NEED SHOW ONLY TEMPORARY INJURY TO BE ENTITLED TO A VERDICT.**

During jury deliberations, the jury posed the following question to the Court: "Does `injury' that is listed with each question need to be lasting or temporary?" (App. B, Questions from Jury with Court's Responses, R. 1649). Although the law undisputedly permits a finding of liability and an award of damages for temporary injury, the trial court (over Plaintiff's objection) simply instructed the jury to apply the instructions already given

and declined to answer the question. The Jury was thus led to believe that a "temporary injury" was insufficient to support a verdict for Plaintiff. (R. 1649). The jury expressed its' obvious misunderstanding of the law by reading a written narrative statement that was signed by all jurors.

> For the record, we the jury believe that St. Luke bears some of the responsibility for what happened to Shannon Straub. ***The jury would have been unanimous in voting "yes" for Question # 2[16] [regarding liability of St. Luke]***, had it been phrased such that St. Luke beard (*sic*) responsibility ***regardless of injury to Shannon Straub. . . . .***
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> *　　　　　　*　　　　　　*
>
> Further, we feel that if the nurses at St. Luke felt that there was a true medical emergency that necessitated forced gowning and catheterization of Ms. Straub, then there would have at least been a second screening of her vital signs. . . .[17]

(App. C, Jury Narrative Statement, R. 1681).

The Court of Appeals found that the narrative statement placing blame on St. Luke reflected "understandable confusion as to the legal grounds upon which they could have found the appellees liable." The Court below found no need to reach the issue of whether the narrative statement constituted an inconsistent verdict because it correctly concluded that

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[16]Jury Verdict Question 2 reads: "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." (App. D, Jury Instructions and Verdicts. p. 18). It was this question to which the jury would have responded a unanimous "Yes" had the Court informed them that permanent injury was not required proof.

[17]Earlier in the narrative statement, the jury refers to the absence of "lasting injury." *Id.* The jury incorrectly believed that the injury had to be permanent in order to render a verdict for Plaintiff. (Jury Question, R. 1649). The trial court incorrectly refused to inform the jury that temporary injury was sufficient. *Id.*

the trial court committed reversible error in refusing to resolve the jury's obvious confusion by providing it with an answer to its question. (App. A, Slip Op. p. 25-28, 2008 WL 5264284, at *11-*12).

The Court of Appeals recognized that not all terms require formal definition where the jury can understand the term without such a definition. (*Id.* Slip Op. p. 27, 2008 WL 5264284, at *12). Of course, in this case, its question to the Court and unanimous narrative statement made it quite apparent that the jury did not understand Plaintiff's burden regarding the degree of injury that must be proved.

As they did before the Court of Appeals, Appellants again rely on *Thompson v. Walker,* 565 S.W.2d 172 (Ky, App. 1978). Like the Court of Appeals here, that same Court found the jury instructions confusing and reversed the verdict rendered as a result, because the Court refused to respond to a jury question seeking clarification. The Court below actually applied *Thompson* in reversing the judgment in this case. The Court of Appeals explained the direct applicability of *Thompson* to its holding here:

> [T]his Court criticized the judge for directing the jury to the instructions already given when they sent a question to the court asking for clarification of one of its negligence instructions. In reviewing the matter, this Court noted that the instructions as given were clearly confusing to the jury, and found that if the trial court had provided explanation, some of the confusion might have been eliminated. This Court found reversible error in that case, and consequently reversed the decision of the trial court.

(App. A, Slip Op. p. 27, 2008 WL 5264284, at *12).

Appellants argue that a new statute regarding the handling of a jury during deliberations has gone into effect since *Thompson* and it does not obligate the Court to respond to jury questions. That of course is not the issue. Rather, the issue is whether the

court has an obligation to answer the question of a jury when it is clearly confused regarding application of the instructions or verdict forms to the facts they are to decide. Appellants cite no case that would suggest the Court of Appeals was wrong in requiring a trial court to explain a point of law in the face of clearly expressed jury confusion. No such authority exists.

There is no question that compensable injury was proved. Contrary to Appellants' assertion, it was the question of whether Plaintiff's injuries were permanent, that provided the confusion that prevented the jury from answering the St. Luke Liability Question 2, with a unanimous "Yes." If the Jury believed there was no injury, there would be no reason for its query to the court: "Does the injury that is listed with each [verdict] question need to be lasting or temporary?" (App. B. Questions from Jury, p. 2; and see the Narrative Statement's questioning "***lasting*** injury." (Emphasis added.)).

It is beyond dispute that Plaintiff suffered significant emotional injury at the time of the events. Indeed, it is just not plausible to suggest that any 16 year old girl, who is forcibly stripped of her clothing, placed in four-point restraints, and forcibly catheterized would not suffer trauma.

Moreover, the law presumes damages in such a situation. Where an intentional tort such as a battery is established (as uncontradicted credible evidence establishes here), damages should be presumed. There was no evidence to contradict Plaintiff's testimony regarding her emotional injury, and the battery against Plaintiff carries presumed damages. *Walje v. City of Winchester, Ky.*, 773 F.2d 729, 731 (6th Cir. 1985); and see *Louisville & N.R. Co. v. Dickey,* 104 S.W. 329, 330 (Ky. App. 907). *Cf., Miller v. Swift*, 42 S.W.3d 599, 604

(Ky. 2001) ("This well-established holding states that the right to damages for pain and suffering is presumed when palpable injury exists."). *And see, Johnson v. Pankratz*, Ariz. App., 2 P.3d 1266, 1269 (2000), ("The traditional rule for battery cases is that general damages or presumed damages 'of a substantial amount' can be recovered merely upon showing that the tort was committed at all."). Moreover, upon establishing her false imprisonment claim, Plaintiff is automatically entitled to an award of damages as a matter of law. *Banks v. Fritsch*, 39 S.W.3d 474, 479 (Ky. App. 2001) ("The tort [of false imprisonment] is complete after even a brief restraint on the plaintiff's freedom, and the plaintiff may recover nominal damages.").[18]

Thus, Plaintiff met her burden as to injury. The trial court erred in not making that clear to the jury who effectively informed the judge that they were confused about the law. *Thompson,* 565 S.W.2d at 174[19]. The Court of Appeals applied the only appropriate remedy to grant a new trial in the face of the jury's clear misunderstanding of the law regarding Plaintiff's burden at trial. (*Cf., Lee v. Henderson,* 331 S.W.2d 884, 885-886 (Ky. 1960) (where Court affirmed trial court's decision to respond to jury's question regarding plaintiff's burden of showing injury, as it resolved the jury's clear confusion regarding that issue.)

The jury's question posed to the trial court here leaves no question that they were

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[18]Appellants suggestion in their brief that the narrative statement was only critical of St. Luke's record keeping is simply wrong. The narrative begins with a general criticism that St. Luke bore some responsibility "for what happened to Shannon." Additionally, they question whether there was a "true medical emergency that necessitated forced gowning and catheterization." (App. C, Jury Narrative Statement).

[19]While the Court did not expressly reverse on this issue, there was no need to as it had already reversed based on the impropriety of another instruction.

confused about Plaintiff's burden to show permanent injury. Given the jury's narrative statement, the verdict was unquestionably tainted by the court's refusal to resolve their confusion. The Court of Appeals was, therefore, correct in vacating that verdict. Appellants offer no authority to the contrary. This Court should accordingly affirm the Court of Appeals, vacate the verdict and remand for a new trial.

## H. THE TRIAL JUDGE PROPERLY GAVE AN INSTRUCTION ON PUNITIVE DAMAGES.

Appellants' final argument challenges the trial court's decision to give an instruction regarding punitive damages. The St. Luke Defendants contend that there was no evidence of malice, gross neglect or recklessness on their part. (Appellant Brief, pp. 43-44). The Court of Appeals disagreed and found sufficient evidence to support the instruction. (App. A, Slip Op. p. 47, 2008 WL 5264284, at *21).

The evidence presented by Plaintiff demonstrated that Appellees acted toward her in an utter absence of any medical emergency or other medical justification. The medical records confirm the absence of a "medical emergency." (App. E, Plaintiff's Medical Records, Plaintiff's Ex. 1). Dr. Allen testified that, upon completion of his initial medical exam, he saw no medical reason or justification to place Shannon in restraints. (VR 62, 8/18/06, 11:06:40-52). As previously shown, that examination was completed shortly prior to the stripping and restraining of Plaintiff. No evidence was offered that her medical condition changed in the interim.

Additionally, two witnesses testified that the nursing staff was put on notice that Shannon's mother had been reached and was on her way. Kilgore testified that he conveyed

this information to a male nurse prior to the application of the restraints. (VR 59, 8/16/06, 15:58:55). Security Guard Pretot testified that he heard the nurses indicate that the mother was present in the hospital before Shannon was stripped and restrained. (VR 61, 8/17/06, 13:58:55). Thus, there was substantial medical and other testimonial evidence that supports the conclusion that Defendants acted in total disregard of the Plaintiff's right not to be subject to forced stripping, restraints and catheterization without her or appropriate parental consent. A jury could easily conclude from this evidence that Defendants were grossly negligent and acted in intentional disregard of Plaintiff's legal rights. *Gersh v. Bowman*, 239 S.W.3d 567, 572 (Ky. App. 2007). This is not speculation. The "medical emergency" argument offered by Appellants in their Brief to this Court, was seriously questioned by the jury in its narrative statement:

> Further, we feel that if the nurses at St. Luke felt there was a true medical emergency that necessitated forced gowning & catheterization of Ms. Straub, then there would be at least a second screening of her vital signs. Essentially, a lack of documentation concerning that she was restrained & catheterized (***including the rationale for this***) should have been provided. . . .

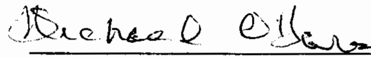
(App. C). The jury clearly did not believe there was credible evidence of a medical emergency. Absent that, their actions can only be explained by malice or a reckless disregard for Plaintiff's rights. Both the trial court and the Court of Appeals were correct in concluding that an instruction on punitive damages was appropriate.

## CONCLUSION

This Court should affirm the Court of Appeals on all rulings granting Shannon Straub's appeals, as indicated above, and reverse its decision on the issue of the statute of limitations for naming additional individual defendants in the state law claim. Having so

ruled, this Court must remand this case to the trial court for a retrial on the merits.

Respectfully submitted,



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