RENDERED: DECEMBER 19, 2008; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-000443-MR
&
NO. 2007-CA-000511-MR

SHANNON STRAUB — APPELLANT/CROSS-APPELLEE

v.

APPEAL AND CROSS-APPEAL FROM CAMPBELL CIRCUIT COURT
HONORABLE FRED A. STINE, SENIOR JUDGE
ACTION NO. 04-CI-00729

ST. LUKE HOSPITAL, INC.; E. KREBS, R.N.; T. THEISEN; JOHN FEY; JOHN HOWARD HARRIS AND ERNEST PRETOT — APPELLEES/CROSS-APPELLANTS

OPINION
AFFIRMING IN PART, REVERSING IN PART, AND REMANDING

** ** ** ** **

BEFORE: CAPERTON AND STUMBO, JUDGES; BUCKINGHAM,[1] SENIOR JUDGE.

CAPERTON, JUDGE: Appellant, Shannon Straub (Straub), sued St. Luke Hospital, Dr. David Allen (Dr. Allen), nurses Tricia Thiessen (Theissen), Emma

[1] Senior Judge David C. Buckingham, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110 (5) (b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

Krebs (Krebs), and John Fey (Fey), and security guards Ernest Pretot (Pretot) and John Harris (Harris) in the Campbell Circuit Court for assault and battery and false imprisonment. Straub alleges forced stripping of her clothing, restraint, and catheritzation in the absence of a medical emergency. Straub also seeks compensation for harm she claims to have sustained when the aforementioned defendants allegedly acted in concert with City of Wilder police officer Jim Kilgore (Kilgore) to deny her substantive due process rights as guaranteed by Kentucky's Constitution.

Specifically, Straub first asserts that the trial court erred in denying her motion for a directed verdict as to the liability of the appellees with respect to her assault and battery claim. Second, she asserts that a narrative statement read by the jury following the verdict constitutes an inconsistent verdict on a matter of substance, and requests that the verdict be set aside and a new trial granted. Third, Straub argues that the trial court erred in refusing to answer a question propounded by the jury with respect to the nature of Straub's injury. Fourth, Straub argues that the trial court erred in allowing what she asserts was cumulative, prejudicial character evidence regarding her past drug use. Finally, Straub alleges that the trial court erred in granting summary judgment against Straub's claim that the hospital defendants acted in concert with the police in depriving her of her state constitutional right to substantive due process.

In a cross-appeal, the appellees first assert that all claims against security guards Harris and Pretot and against nurse Fey should have been

summarily dismissed from the circuit court action on the basis of the one year statute of limitations under KRS 413.140. Second, they argue that Straub's claims of assault and battery should have been summarily dismissed under KRS 413.140. Third, appellees assert that the Campbell Circuit Court action was not properly filed within the ninety-day window provided by KRS 413.270. Finally, appellees argue that the trial court erroneously gave a jury instruction on punitive damages.

Upon a thorough review of the record in this matter, we affirm in part, reverse in part, and remand this matter back to the trial court for additional proceedings not inconsistent with this opinion.

CASE HISTORY

On April 17, 1999, Straub and her friend Melissa Jo Wallace (Missy), volunteered at the American Legion VFW Lodge Bingo. They finished their volunteer work at approximately eleven o'clock that evening. Thereafter, Straub's friends decided to go to a condominium owned by the brother of Missy's friend, which was located at Brentwood Apartments. Straub apparently fell asleep on the floor at about 2:00 or 2:30 in the morning. Both Straub and Missy testified that Straub did not ingest drugs while at the condominium that evening.

Contrary to the testimony of Straub and Missy, Straub's boyfriend, Christopher Porter, testified that Straub informed him that she was under the influence of some substance on the night in question. Further, Straub allegedly provided information to various individuals, including her mother that she had taken some sort of drug earlier that evening. Straub did admit to smoking

marijuana the week before, and testified that her friends did smoke marijuana in her presence on the evening of April 17, 1999.

At approximately 6:00 a.m., Straub awoke in the apartment, and claims to have gone outside to her car to retrieve her backpack which contained her toothbrush and toothpaste. Straub testified that she walked out of the building without taking the keys to either the apartment or the building. Straub claims that she then forgot which building she had exited and, as a consequence, she began walking door to door, and rang ten or twelve doorbells in an attempt to wake up one of her friends. Straub woke up several residents, and informed one of them that she was lost. At approximately 6:30 a.m., one of the residents phoned the police, and Officer Kilgore of the Wilder Police Department arrived on the scene shortly thereafter.

Kilgore testified that upon arriving at the complex, he observed Straub wandering around on the sidewalk and requested her name. Straub initially told officer Kilgore that her name was Shannon Miller. Straub apparently also provided Kilgore with an incorrect address, and was unable to provide him with her social security number or birth date. Straub was also asked if she had identification, and she replied that she did not. Kilgore testified that Straub was not argumentative at this time.

Kilgore asked Straub if it was she who had been ringing the doorbells. Straub denied doing so. Kilgore testified that while speaking with Straub, he noticed that she was glassy-eyed, weaving on her feet, smelled heavily of

marijuana, and had slurred speech and a look of "no concentration". Kilgore testified that he asked Straub if she had taken any drugs, and Straub replied that she had, but did not know what kind. Kilgore stated that specifically Straub told him she had been at a party and had taken a pill out of a bowl.

At that time, Kilgore asked Straub where she lived, and she pointed to one of the apartment buildings. Kilgore escorted Straub back to that building, and testified that Straub stumbled on the way there. Both Kilgore and Straub testified that upon arriving at the building, Straub rang another doorbell. Kilgore testified that at that time, a lady came to the door and testified that she had seen Straub exit a car, and start ringing doorbells. Kilgore apologized to the lady, and turned to speak with Straub, at which time Straub again asserted that she lived at that particular residence, and rang the same doorbell again.

Kilgore testified that he then moved Straub away from the doorbells, at which time she again asserted that she was "lost," and that there was "no hope". It was at this time that Kilgore scanned the doorbell register for the last name Miller. Finding none, he commented to Straub that her name was not on the register. It was apparently at that time that Straub informed the officer of her true last name. Not finding the name "Straub" on the register either, Kilgore then explained to Straub that because she had given him multiple names, had no identification, could not provide her birth date or social security number, did not know what city she was in, and did not know where she was, he was going to take

her to the police station to try to locate her parents. Kilgore testified that Straub was cooperative as he took her to the station.

Inside the station, Kilgore asked Straub to sit in a chair next to his desk, and requested her parents' telephone number. Kilgore testified that Straub provided him with four or five phone numbers. Straub asserts that these were the numbers of two friends, her mother, and her aunt. Kilgore stated that while he was attempting to phone these numbers, Straub attempted more than once to leave her chair for the exit. Straub testified that Kilgore handcuffed her to the chair. Kilgore was ultimately unable to reach anyone at any of the telephone numbers provided.

Kilgore testified that while at the station, Straub remained compliant with his directives, and was not argumentative. Kilgore testified that after being unable to reach Straub's parents he considered filing criminal charges, but instead decided to call a court appointed social worker. After Kilgore explained the situation and his observations of Straub, the social worker advised him to take Straub to the hospital. Kilgore has testified that he again explained to Straub that because she did not know her name, correct address, phone number, or date of birth, she needed to be seen at the hospital. Straub claims that Kilgore never informed her where they were going, nor explained why they were doing so. Straub testified that she remained in handcuffs on the ride between the station and the hospital.

Kilgore testified that upon arrival at the hospital, when Straub exited the car, she stumbled again and nearly fell. Kilgore testified that after entering the

patient registration area, he handcuffed Straub to a chair to prevent her from leaving.

The hospital admitting registrar, Heather Tillett (Tillett), testified that she tried to obtain information regarding Straub. She spoke with Kilgore, who advised that he did not know Straub's name or address, and who stated that he found her wandering around ringing doorbells. Tillett stated that Kilgore also informed her of his belief that Straub had possibly been assaulted. Tillett stated that she was advised that Straub would not provide her name or address.

After Tillett's initial attempts to obtain information pertaining to Straub, triage nurse Tricia Theissen (Theissen) R.N., came to take Straub and Officer Kilgore back to the mental health evaluation room. Theissen testified that as Straub was proceeding down the hallway to the evaluation room, she was cursing loudly and staggering, and almost fell to the floor. Nevertheless, Theissen did not note glassy eyes or slurred speech, and testified that during her walk to the room, Straub was compliant and responsive.

While Straub was being taken to the examination room, she was observed by Nurse Robin Reilly (Reilly) R.N., who was charting at the nursing desk. Reilly testified that Straub was unsteady and staggering, that she was moving as if she was falling asleep while walking, and that Straub's eyes were very red and glassy.

Charge nurse John Fey (Fey) R.N., also observed Kilgore and Theissen walking Straub to the emergency room. He stated that Theissen and

Kilgore had to hold Straub's arms steady because she was wobbling. Fey testified that Kilgore stated that he had found Straub wandering on the street, ringing doorbells, and unable to determine which building she had exited. After speaking with Kilgore, Fey went to the evaluation room to assist Theissen.

Upon arrival at the examination room, Straub's handcuffs were removed. Theissen confirmed that at some point during this process, Kilgore provided her with Straub's name and address. Triage by Nurse Theissen began at approximately 8:07 a.m., which was approximately one and a half hours after Kilgore first responded to the Brentwood Apartments and observed Straub. Nurse Theissen testified that although Straub was angry at times during triage, her behavior was not threatening to either Theissen or Kilgore. Theissen's medical notes indicate that Straub's pupils were somewhat enlarged and sluggish, but that she had no hallucinations. Further, the emergency room chart does not mention threat of harm to any individual during any time while Straub was in the emergency room, nor did it indicate any bizarre behavior.

Upon finishing triage, Theissen did not tell the attending physician, Dr. David Allen (Dr. Allen) that Straub needed immediate attention. Dr. Allen waited approximately twenty minutes before examining Straub. Dr. Allen picked up Straub's chart at 8:31 a.m., and he testified that he saw her within three to five minutes of that time. Dr. Allen spoke with Straub, and testified that she appeared dazed and had poor eye contact, which he noted was associated with mental health issues. Straub remained in her street clothes and was not restrained at the time of

this initial examination. Dr. Allen testified that Straub would not respond to his questions, but did provide her name. Dr. Allen stated that Straub had informed him that she had fallen off of a motorcycle. In his chart, Dr. Allen noted that Straub denied trauma, injury, rape, or assault. Dr. Allen did testify that Straub told him she had taken “one pill".

At the conclusion of his initial examination, Dr. Allen’s differential diagnosis included drug abuse, trauma, head injury post-ictal following seizure, metabolic abnormality, and psychiatric disorder. Dr. Allen testified that Straub’s physical findings and behavior were definitely consistent with drug abuse, and diagnosed probable mind-altering intoxication. Dr. Allen testified that he was concerned about Straub, and suspected that she had been given something criminally, such as a date rape drug.

Following his examination, Dr. Allen ordered urine and blood toxicology screenings, and requested that the nurses get Straub into a gown. Dr. Allen did not recall Straub objecting to his orders, but did not ask for her consent. No consents appear in Straub’s medical chart with respect to any of the procedures which were ultimately performed. Dr. Allen did not order a catheterization of Straub to obtain a urine sample, and testified that he assumed that when he gave the order for the urine test, Straub would be given an opportunity to voluntarily urinate into a sterile cup. Further, Dr. Allen testified that at the time he left Straub after the first evaluation, she was quiet, still, and sedate, and there was no reason for restraints at that time.

Fey testified that after Dr. Allen requested the urine screening, he asked Straub to provide a urine sample several times, but each time Straub refused. Fey testified that after several requests for a urine sample, he informed Straub that if she would not voluntarily provide a sample, the nurses would have to put her in a gown and catheterize her. Straub, on the other hand, asserts that she was never offered an opportunity to voluntarily urinate in a cup. Nurse Krebs confirmed that she could not recall offering Straub an opportunity to urinate in a cup before she was catheterized.

Thereafter, Fey spoke with Dr. Allen, and informed him that Straub would not cooperate. He also advised Dr. Allen of his belief that the only way a urine sample could be obtained was to catheterize Straub. Fey testified that Dr. Allen told him to go ahead and catheterize Straub and put her into a hospital gown. Dr. Allen testified that he was aware that Straub was being catheterized, and that when a patient would not cooperate in providing a urine specimen, catheterization was the only option. Dr. Allen testified that he was not critical of the nurses for catheterizing Straub, and believed it the reasonable thing to do under the circumstances. Nevertheless, the hospital does concede that if Straub had refused to voluntarily provide a urine sample, such a refusal should have been recorded in the medical chart.

Fey testified that while in the examination room, Straub stated several times that she was going to leave, and attempted to force her way out of the room. Straub denies attempting to leave the room. Fey testified that while in the

examination room, he asked Straub several times to put on her gown both so that she could be examined and to deter her from leaving. Straub refused to do so before her mother arrived. Thereafter, Fey and two female nurses tried to put Straub into a gown. At that point, Straub began trying to kick, bite, and scratch the nurses.

One of the hospital security guards, Ernest Pretot (Pretot) recalled the nurses asking for help, and testified that he heard Straub spewing obscenities and making threats against the hospital staff. Kilgore confirmed that Straub was making such threats, and testified that she threatened to kill the nurses. Pretot testified that when he entered the room, Straub was kicking, biting, and swinging. Pretot testified that he considered Straub to be a threat to both herself and others, and described the room as "chaotic".

Another security guard, John Harris (Harris), testified that when he entered the room, one of the first things he noticed was Kilgore attempting to restrain Straub's head to keep her from biting one of the nurses. Harris testified that he grasped Straub's right hand to keep her from hitting someone, while the nurses placed a sheet over her. Harris testified that during that time, Straub was fighting, cursing, and kicking, and he felt her to be a threat to everyone in the room. Harris testified that after he entered the room, Straub prophesized that everyone would be sorry they got involved in the situation, and then attempted to bite Harris.

Ultimately, Straub's clothing was removed, she was gowned, and was placed in four-point restraints at some time between Dr. Allen's first and second examinations. Straub was catheterized at approximately 9:00 a.m. Straub asserts that everyone assisted in removing the clothing, including the male nurse and security officers. The hospital denies this to be the case. Kilgore concedes that he assisted in restraining Straub and helping to remove her pants. Straub asserts that a male nurse was present while this was happening, although the hospital denies that this was the case.

Dr. Allen testified that placing Straub in restraints was entirely appropriate, and testified that nurses have such authority if the patient is verbally or physically threatening, or otherwise presents a risk to the safety of the patient or the staff. Straub now asserts that St. Luke failed to comply with its own protocol for using restraints, and asserts that there is no reference in Straub's chart to a medical emergency which would justify such conduct. Straub's medical chart was submitted into evidence. Appellees do not direct us to any rationalization in the chart for the forced stripping and catheterization. Further, appellees concede that the normal hospital protocol for employing restraints in the emergency room was not followed.

Apparently, during the time that Straub remained in the room, Kilgore continued to attempt to reach Straub's relatives, and was eventually informed that Straub's mother was already on the way to the hospital. Upon arrival at the hospital Straub's mother, Tina Miller (Miller), provided the hospital with Straub's

correct name, address, and date of birth. Miller then entered Straub's room, and remained there for approximately five minutes, during which time Dr. Allen heard a lot of yelling, profanity, and screaming. According to Dr. Allen, Miller then exited the room, and informed him that Straub said she had taken some acid that evening. Dr. Allen recorded this conversation in his emergency department physician report.

Ultimately, Straub's drug screen returned positive for marijuana and benzodiazepines. Dr. Allen testified that he believed that the drug results could explain Straub's drowsiness, unsteadiness on her feet, agitation, rage, and confusion, and could have distorted Straub's perception of reality. Dr. Allen discussed the drug results with Miller. Ultimately, Dr. Allen testified that he was very worried about Straub from the time she entered the emergency room, and felt that the history of the evening, combined with her bizarre behavior, constituted a medical emergency.

After a discussion with Miller, Dr. Allen released Straub into Miller's custody, but advised Miller that social services would call her to follow-up on Straub in a few days. Dr. Allen also requested that Miller take Straub to a family physician for further evaluation.

PROCEDURAL HISTORY

Following this incident, on February 28, 2000, Straub, through her mother and next friend, Tina Miller, filed an action in United States Federal Court, Eastern District of Kentucky in Covington, wherein she sued The St. Luke

Hospital Inc., nurses Krebs and Theissen, Officer Kilgore, the City of Wilder, Kentucky, Dr. Allen, and his employer, Emergency Physicians of Northern Kentucky, Inc.[2]

During the discovery phase of the federal action, all defendants were deposed, in addition to security guards Harris and Pretot, and Nurse Robin Reilly. Those depositions occurred on March 29 and 30, 2001, respectively. During those depositions, Nurse Fey's involvement in Straub's emergency room care was discussed. Neither Harris, Pretot, nor Fey were named defendants in the federal action.

Over a year after the aforementioned depositions took place, and following motions for summary judgment made by the defendants, the federal court issued an April 10, 2002, opinion and order dismissing all of Straub's claims. In so doing, the court found that there was insufficient evidence to prove that the

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[2] That action alleged that Officer Kilgore and the City of Wilder violated Straub's 4th and 14th Amendment Rights under the United States Constitution by unlawfully arresting her, thereby giving rise to a 42 U.S.C. §1983 action for civil damages.

The complaint also alleged that Officer Kilgore, Dr. Allen, his employer, nurses Krebs and Theissen and St. Luke's Hospital violated Straub's rights under the 14th Amendment to the United States Constitution by falsely imprisoning Straub, and that the City of Wilder wrongfully authorized and endorsed such conduct.

In that same action, Straub asserted that the defendants violated her 14th Amendment rights under the United States Constitution by wrongfully gowning her, catheterizing her, and obtaining blood samples and that the defendants violated her 14th Amendment rights under the United States Constitution by an unreasonable search and seizure, and by denying her substantive due process by removing her clothes and allegedly exposing her to individuals of the opposite sex. Again, Straub claims that the City of Wilder wrongfully ratified such conduct.

Finally, Straub claimed that Kilgore and other unknown individuals wrongfully failed to intervene to prevent constitutional deprivations, and that the City of Wilder ratified such conduct, again violating Straub's 14th Amendment rights under the United States Constitution. Straub also alleged that Kilgore violated Straub's right to be free from false arrest under the common law of Kentucky, that the defendants falsely imprisoned Straub in violation of the common law of Kentucky, and that the defendants committed the tort of outrage. Finally, Straub sought punitive damages.

hospital defendants were state actors, and thus concluded that Straub could not maintain a §1983 action against them. Further, the court held that as Straub had presented no actionable federal law claims against those defendants, her remaining state claims, including common law false arrest, common law false imprisonment, and the tort of outrage, were dismissed without prejudice.

Straub appealed that decision to the Sixth Circuit of the United States Court of Appeals. On May 27, 2004, the U.S. Court of Appeals affirmed the federal court's dismissal of Straub's lawsuit. In so ruling, the Court of Appeals stated that it was unable to conclude that Straub had demonstrated that the hospital defendants had acted under color of state law, and found that Straub had made no showing that the hospital defendants were engaged in an action traditionally reserved to the state. Further, the Court of Appeals held that Straub had presented no evidence that Kilgore or any other representative of the state coerced or encouraged the hospital personnel such that their actions could be deemed to be those of the state, nor did it feel that Straub had adequately identified a relationship with the state from which the hospital or its personnel benefited. Finally, the Court of Appeals found that Straub had failed to show that she suffered a violation of her federally protected rights, either as a result of her arrest, or during her treatment at St. Luke Hospital. Accordingly, the Court found no need to address Straub's claims against the City of Wilder.

Following the decision of the U.S. Court of Appeals, Straub filed a petition for rehearing. While that petition was pending, Straub filed a new action

in the Campbell Circuit Court on June 25, 2004. In the new action, Straub named new defendants, including Fey, Harris, and Pretot. Straub made similar allegations as she had in the federal action, but asserted that the defendants had violated her rights under Sections 1, 2, 10, and 14 of the Kentucky Constitution. In addition, Straub reiterated her three common law claims of false arrest, false imprisonment, and the tort of outrage. On July 24, 2004, after Straub filed her new action in the Campbell Circuit Court, the U.S. Court of Appeals issued an order denying her petition for rehearing.

After Straub filed the action in Campbell Circuit Court, newly named defendants Fey, Harris, and Pretot moved to dismiss all claims against them except the tort of outrage, based upon a one-year statute of limitations. Defendant, St. Luke's Hospital, as well as defendants Krebs, Theissen, Fey, Harris, and Pretot also moved to dismiss all claims that the hospital, nurses, and security guards acted under color of state law to violate Straub's constitutional rights. Defendants based these motions on the prior federal court and U.S. Court of Appeals decisions, as well as their assertion that the underlying facts did not support a claim that the hospital employees had acted under color of state law to deprive Straub of any constitutional rights, whether under the United States or Kentucky constitutions. In addition, the one-year statute of limitations was argued.

Finally, the defendants argued that there has never been a Kentucky decision recognizing a civil claim for damages for violations of state constitutional

rights as compared with a 28 U.S.C. §1983 claim for civil damages for a violation of one's rights under the United States Constitution.

Thereafter, on September 8, 2004, Straub filed a motion to amend her Campbell Circuit Court action to include a new claim for common law assault and battery, a claim which was not specifically asserted in the federal action. Defendants again objected, asserting a one-year statute of limitations. The defendant hospital and all of its employees supplemented their motion to dismiss on October 4, 2004, asserting issue preclusion and statute of limitations. On December 1, 2004, the Campbell Circuit Court issued an Order overruling all motions relative to the statute of limitations arguments.

Thereafter, on January 13, 2005, the defendants again asked the Campbell Circuit Court to dismiss Straub's action, asserting that it had not been filed within the 90-day window established by KRS 413.270, following the final July 21, 2004, federal court ruling. That motion was also denied by the Campbell Circuit Court. On April 25, 2006, defendants renewed their motions for partial summary judgment. On August 4, 2006, the Campbell Circuit Court dismissed, without objection, Straub's claim for the tort of outrage, as well as all claims based on the assertion that the defendants had violated Straub's rights under the Kentucky Constitution while acting under color of state law.

In so ruling, the Campbell Circuit Court concurred with the reasoning of the Federal District Court and U.S. Court of Appeals in finding that the facts did not demonstrate that the hospital or its employees acted as agents of the state when

they made their medical decisions in this matter. In so finding, the Campbell Circuit Court held that those actions were independent healthcare decisions which were initiated by Dr. Allen and the nurses without instruction or request by Officer Kilgore. The circuit court also held that the particular issue of whether the hospital and its employees were state actors had already been litigated. Thus, relitigation was prohibited under either the doctrines of *res judicata* or issue preclusion. The court later recanted its reasoning with respect to the doctrines of *res judicata* and issue preclusion.

Ultimately, the claims against defendant Kilgore and the City of Wilder for false arrest, as well as claims against the health care providers and Officer Kilgore for false imprisonment and assault and battery, proceeded to trial on August 14, 2006. The jury heard testimony from Straub, her mother, Tina Miller, her friend, Melissa Jo Wallace, her boyfriend, Christopher Porter, Straub's expert nurse witness Carol Elliott, Officer Kilgore, emergency room receptionist Heather Tillett, emergency room nurse Robin Reilly, emergency room nurse Tricia Theissen, emergency room nurse Emma Krebs, emergency room nurse John Fey, emergency room physician Dr. David Allen, security guard Ernest Pretot, security guard John Harris, Dr. Allen's expert witness Dr. Samuel Kiehl, and the hospital's expert nurse witness, Rebeca Tacy.

At the close of Straub's evidence, the defendants moved for a directed verdict on all issues. Those motions were overruled. At this time, Straub's own counsel moved the court to dismiss the false arrest claim against Officer Kilgore,

and the court sustained the motion. At the time the case was given to the jury, the remaining claims were for assault and battery against the hospital defendants and Officer Kilgore, and false imprisonment on the part of the hospital defendants. During deliberations, the jury submitted the following three questions to the court with the following responses from the court:

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

Thereafter, the jury returned a verdict, finding that none of the defendants had breached any duty to Straub which was a substantial factor in causing injury. In answering the questions provided via the jury instructions, the jury answered "no" to Question Number Two which asked the jury 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. After reading the verdict, the jury foreman read a letter written by the jury concerning Question Number two, as follows:

> 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 had it been phrased such that St. Luke beared (sic) 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, nine of us voted to say "no" ...

Thereafter, Straub's Campbell Circuit Court action was dismissed via an order and judgment entered on September 18, 2006. Straub filed a CR 59.05 motion to alter, amend, or vacate the judgment, asserting that it was necessary to prevent manifest injustice. The court denied that motion on January 22, 2007. Straub then appealed to this court, and the appellees cross-appealed.

In their cross-appeal, appellees assert that the trial court erroneously failed to summarily dismiss all claims against Harris, Pretot and Fey based upon the one-year statute of limitations. The appellees also argue that the trial court erroneously allowed Straub to bring new claims of assault and battery, which were never part of the federal action, and that the trial court erroneously failed to dismiss Straub's circuit court claim because it was not filed within the 90-day window following the final U.S. Court of Appeals decision. The appellees also assert that the trial court erroneously gave an instruction on punitive damages. Finally, appellees assert that although the trial court did dismiss Straub's claims that asserted violations of her rights under the Kentucky Constitution, the court erroneously failed to dismiss the constitutional claims on the grounds of *res*

judicata and issue preclusion, the one-year statute of limitations, and because no case law exists to support recovery of civil damages for violation of state constitutional rights. We address each of these arguments herein below.

ARGUMENTS

Argument One

Straub argues that the trial court committed error in denying Straub's motion for directed verdict as to the liability of St. Luke's with respect to the assault and battery claim.

The standard of review for an appellate court in reviewing a decision of a trial court on a motion for directed verdict is well settled in the Commonwealth. In ruling on either a motion for a directed verdict or a motion for judgment notwithstanding the verdict, a trial court is under a duty to consider the evidence in the strongest possible light in favor of the party opposing the motion. *Taylor v. Kennedy*, 700 S.W.2d 415, 416 (Ky.App.1985). The court must give the opposing party the advantage of every fair and reasonable inference which can be drawn from the evidence. The court is precluded from entering a directed verdict unless there is a complete absence of proof on a material issue in the action, or if no disputed issue of fact exists upon which reasonable men could differ. *Id*. If such conflicting evidence does exist, it is for the jury to determine and resolve such conflicts, and any matters involving the credibility of witnesses. *Bierman v. Klapheke*, 967 S.W.2d 16, 19 (Ky. 1998). We review this matter with these standards in mind.

While it is undisputed that Straub was stripped, restrained, and catheterized without her consent, the appellees assert that the actions which they took in that respect were privileged due to a medical emergency. Having reviewed the record in detail, we cannot agree with Straub's assertion that the evidence, when taken as a whole, is without conflict.

This Court believes that reasonable minds could differ over whether or not a medical emergency existed in this case which would justify the actions taken by the hospital staff. While it is certainly best practice for medical records to be complete and thorough, mere notation in the medical record neither establishes nor precludes a finding that a medical emergency did or did not exist. As noted, the credibility of witnesses is for the jury, and we do not find the physical facts and content of the records in this instance to be so diametrically opposed as to make verbal testimony concerning the existence of a medical emergency unbelievable. Accordingly, we believe that the trial court correctly overruled Straub's motion for a directed verdict on this issue.

Argument Two

Straub asserts that the narrative statement read by the jury following the reading of the verdict[3] constitutes an inconsistent verdict on a matter of substance with respect to the St. Luke defendants. Thus, she argues that the verdict should be set aside, and a new trial ordered.

[3] The statement referred to by Straub in this argument stated "The jury would have been unanimous in voting "yes" for Question #2 had it been phrased such that St. Luke beared (*sic*) responsibility *regardless of injury to Shannon Straub* ... (Emphasis added)

Straub correctly states that when the jury renders an inconsistent verdict, a new trial is the appropriate remedy. *See Louisville & N.R. Co. v. Farney*, 172 S.W.2d 656, 600 (Ky. App. 1943), *Caretenders Inc. v. Commonwealth*, 821 S.W.2d 83, 85 (Ky. 1991). Our standard for reviewing a trial court's denial of a motion for a new trial is whether the denial was clearly erroneous. *Miller v. Swift*, 42 S.W.3d 599, 601 (Ky. 2001). We review this issue with that standard in mind.

In reviewing this issue, we note that the Supreme Court of Kentucky and the United States Supreme Court have also held that rigid adherence to a prohibition against inconsistent verdicts may interfere with the proper function of a jury, particularly with regard to lenity. *Commonwealth v. Harnell*, 3 S.W.3d 349 (Ky. 1999)(*citing Dunn v. United States*, 284 U.S. 390 (1932). Thus, inconsistent verdicts, in and of themselves, do not require reversal.

In this instance, we believe that the jury's statement, at the very least, indicates understandable confusion as to the legal grounds upon which they could have found the appellees liable. Finding the verdict itself reversible on the grounds presented in Argument Three below, we need not reach the question of whether the statement read afterwards by the jury constituted an inconsistent verdict.

Argument Three

As her third basis for appeal, Straub asserts that the trial court erred in refusing to answer the questions of the jury pertaining to Question #2. The jury indicated to the court that it was uncertain as to whether or not it was Straub's obligation to prove a permanent injury in order to be entitled to a judgment on her

assault and battery claim. Straub now argues that the court's refusal to inform the jury that permanent injury was not an element of Straub's burden misled the jury into believing it was an element. In support of her position in that regard, Straub cites to the portion of the jury's narrative statement indicating that the jury would have found against the St. Luke defendants had they understood the level of injury necessary to do so.[4]

Certainly, the law in this state permits the court to comment upon the law when the jury so requests. Nevertheless, the appellees correctly note that it is well-established that it is not mandatory that a trial judge explain or enlarge upon the instructions if he believes them to be clear and self-explanatory. *Thompson v. Walker*, 565 S.W.2d 172 (Ky. App. 1978). Likewise, our Court has previously held that a formal definition is not required to be included in jury instructions where the jury can understand the term without such a definition. *See Commonwealth v. Hager,* 35 S.W.3d 377, 379 (Ky. App. 2000).

However, we note that in *Thompson v. Walker*, one of the cases which appellees cited, this 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

[4] The jury would have been unanimous in voting "yes" for Question #2 had it been phrased such that St. Luke beared (*sic*) responsibility *regardless of injury to Shannon Straub* ... (Emphasis added)

have been eliminated. This Court found reversible error in that case, and consequently reversed the decision of the trial court.

In the matter sub judice, appellees argue simply that the jury instructions were consistent with jury instructions in Kentucky case law (although they cite no such cases) and Palmore's *Kentucky Instructions to Juries*. Although the jury instructions were in fact consistent with Palmore, that alone does not resolve the issue of whether the court's refusal to answer the question at issue misled the jury, and thus constituted reversible error. Having thoroughly reviewed the record, we agree with Straub on this issue.

It is well-established in this Commonwealth that jury instructions do not require formal definitions where the jury is able to understand the term without such a definition. In the matter sub judice, however, we conclude it was clear from the questions put forth by the jury that they lacked understanding as to whether or not a finding of permanent injury was a prerequisite to establishing liability. Our conclusion is supported by the jury's post-verdict statement that it would have rendered a unanimous verdict against the hospital defendants but for the court's response, or more specifically lack of response, concerning the degree of injury necessary to establish liability on behalf of the defendants.

It is clear that the court's refusal to answer the question exacerbated the jury's misunderstanding as to what was required for a finding of liability. As this was not harmless error, we believe the only appropriate remedy to be a remand of this case to the trial court for a new trial not inconsistent with this opinion.

Argument Four

As her fourth basis for appeal, Straub argues that the trial court committed error in allowing the introduction of character evidence regarding Straub's past drug use and her alleged habit of using profanity when agitated. Straub claims that the appellees repeatedly introduced testimony intended to convince the jury that Straub had been under the influence of drugs when taken to the hospital on the evening at issue. Further, Straub asserts that evidence of her use of profanity implied that she did not suffer an emotional injury as a result of the events of that evening. Straub objected to this testimony, relying on KRE 401, 403, and 404.

More specifically, Straub argues that the testimony of Straub's boyfriend, Christopher Porter, was erroneously admitted, and was the only testimony that contradicted Straub's evidence as to the events of April 16 and 17, 1999.[5] Straub argues that this information, indicating that Straub was under the influence of drugs or alcohol on the evening in question along with evidence pertaining to Straub's past and subsequent drug usage and habit of using profanity was highly prejudicial, and should have been excluded pursuant to KRE 403. We disagree in part.

Evidence is relevant which renders a material fact more probable or less probable than it would be without the item. *Commonwealth v. Mattingly*, 98 S.W.3d 865 (Ky. App. 2002). Nevertheless, Kentucky Rule of Evidence (KRE)

[5] Porter essentially testified that Straub had informed him, using expletives, that she was under the influence of an intoxicating substance or substances on the evening in question.

403 allows a judge to exclude otherwise relevant evidence if its probative value is substantially outweighed by the danger of undue prejudice, confusion of the issues, misleading the jury, undue delay, or needless presentation of cumulative evidence. The standard for an appellate court reviewing evidentiary rulings is whether the trial court abused its discretion. *Goodyear Tire & Rubber Co. v. Thompson*, 11 S.W.3d 575, 577 (Ky. 2000).

In the matter sub judice, after a thorough review of the record, we do not find an abuse of discretion in the trial court's decision to allow the testimony concerning Straub's drug and alcohol use on the specific evening in question. Certainly, the trial court could have found that this particular testimony was relevant, as it served to directly contradict Straub's testimony that she was coherent and free from the influence of any illicit substance at the time the events occurred at the hospital. Clearly, whether or not Straub was under the influence of any drug or alcohol on the evening of April 17, 1999, is a material issue in dispute, and directly relevant to the justification or lack thereof for the events that ultimately occurred.

Straub cites *Bloxam v. Berg*, 230 S.W.3d 592 (Ky. App. 2007), apparently to make the assertion that the introduction of evidence pertaining to Straub's past drug use was to create an inference that she used drugs on the night in question based upon little more than speculation. However, we find *Bloxam* to be clearly distinguishable from the case at bar. In *Bloxam*, this Court stated that "[t]he only possible motive for the introduction of such evidence would be to

induce an inference based upon Ms. Titzer's assumption as to Dr. Berg's daily use, an inference based upon little more than supposition." *Berg* at 503.

In *Bloxam*, Titzer was not directly informed by Berg of drug usage on the night in question, but instead merely assumed such to be the case on the basis of *past instances* in which she claimed to have witnessed him using drugs. There was no evidence before the *Bloxam* court of current drug usage; error occurred when the jury was allowed to infer current usage from past events.

In the matter sub judice, Porter testified that he was told directly by Straub that she was under the influence of some substance on the particular night in question. Contrary to the situation in *Bloxam*, such a scenario, if true, would not require Porter to make any inferences based upon prior experience or assumptions. Rather, the testimony simply consisted of Porter relating what Straub told him on the matter directly at issue, namely, her drug usage or lack thereof on the night of April 17, 1999.

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.

Argument Five

As her final basis for appeal, Straub argues that the trial court erred in granting summary judgment as to Straub's claim that the hospital defendants acted in concert with the police in depriving her of her state constitutional right to substantive due process.

As noted, Straub asserted that the forced stripping, restraint, catheterization, and blood draw without consent or court order deprived Straub of her right to substantive due process and to be free of unreasonable search and seizure as guaranteed by Sections 1, 2, 10, and 14 of the Kentucky Constitution.

Our standard of review on a trial court's motion for summary judgment is clear. The proper function of summary judgment is to terminate litigation when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his or her favor. *Steelvest, Inc. v. Scansteel Service Center, Inc.,* 807 S.W.2d 476, 480 (Ky. 1991). Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. KRCP 56.03.

The moving party bears the initial burden of showing that no genuine issue of material fact exists, and then the burden shifts to the party opposing

summary judgment to present "at least some affirmative evidence showing that there is a genuine issue of material fact for trial." *Suter v. Mazyck*, 226 S.W.3d 837, 841 (Ky. App. 2007), citing *Lewis v. B&R Corporation*, 56 S.W.3d 432, 436 (Ky. App. 2001). If the non-movant does not present affirmative evidence of a genuine issue of material fact, then summary judgment is properly granted as a matter of law. *Hubble v. Johnson*, 841 S.W.2d, 169, 171 (Ky. 1992).

The trial court must view the evidence in the light most favorable to the nonmoving party, and summary judgment should be granted only if it appears impossible that the nonmoving party will be able to produce evidence at trial warranting a judgment in his favor. The Kentucky Supreme Court uses the word "impossible" in a practical sense, not in an absolute sense." *Perkins v. Hausladen*, 828 S.W.2d 652, 654 (Ky. 1992).

The standard of review on appeal when a trial court grants a motion for summary judgment is "whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law." *Lewis* at 436. Because summary judgment involves only legal questions and the existence of any disputed material issues of fact, an appellate court need not defer to the trial court's decision and will review the issue *de novo*. *Lewis* at 436. This Court will now review this portion of Straub's appeal with these standards in mind.

In determining whether or not a private party is engaged in "state action" for purposes of holding that party responsible for a constitutional

deprivation, the court should determine if any evidence has been produced showing that the party provided "such significant encouragement that the actions must be deemed to be those of the state." *Bass v. Parkwood Hospital*, 180 F.3d 234, 242 (5th Cir. 1999). In her brief to this court, Straub cites numerous instances which she believes establish such encouragement on the part of Officer Kilgore.

Rather than address those instances specifically, we note simply that having reviewed the record in detail, and viewing the evidence in the light most favorable to Straub, we conclude that it would be possible for Straub to produce evidence at trial warranting a judgment in her favor. In light of Officer Kilgore's involvement[6] 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.

In response to Straub's arguments, the appellees assert that Straub's state constitutional claims are barred by the doctrine of issue preclusion. Having reviewed the record and applicable law, we again disagree. 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). In support of their argument, appellees argue that the U.S. District Court and U.S. Court of Appeals found that the hospital employees were not acting under color of state law in examining and treating Straub.

[6] While Officer Kilgore's actions restraining Straub are of little concern, his actions in removing Straub's pants appear more troublesome.

While this may be true, we find it an important distinction that both 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. Actions are intertwined with the right given, and there must be separate consideration given to whether the actions in question violated a right or rights under each constitution

As Straub correctly argues, there are provisions in the Kentucky Constitution, including Section Two of the Kentucky Constitution at issue in the matter sub judice, which provide broader protections than those afforded by the U.S. Constitution. As we noted in *Steelvest Inc. v. Scansteel Service Center, Inc.*,

> 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.

We find this holding to be applicable to the matter sub judice, and decline to find that the ruling of the federal court on a U.S. constitutional issue precludes our state court system from deciding an issue of law under the Kentucky Constitution.

Further, we find the case of *Davis v. Powell's Valley Water District*, 920 S.W.2d 75 (Ky. App. 1995), to be on point in the matter under review. In that case, the Appellants filed an original action[7] in federal court after voluntarily dismissing in state court. The *Davis* plaintiff, as did Straub, re-filed state law claims in state circuit court after a voluntary dismissal in federal court. The *Davis* defendants argued, as appellees argue in the matter sub judice, that the federal court's finding that there was "no state action," and that defendants were private parties not acting "under color of state law," foreclosed a claim under the Kentucky whistle-blower statute as being *res judicata*.

While the state circuit court accepted the defendant's argument, this Court reversed, finding that *res judicata* properly applies only to a final judgment upon the merits of an underlying action. Thus, in *Davis* the federal court's earlier dismissal of the action for lack of subject matter jurisdiction did not constitute adjudication upon the merits of that action. We find similarly in the instant matter, as it is clear that the federal court dismissed Straub's state law claims without prejudice; no adjudication, no res judicata. Finding no substantive distinction between the facts of *Davis* and the facts in the matter sub judice on the pertinent issues, we believe that law to be controlling and do not believe summary judgment to be appropriate on these grounds.

Finally, appellees assert that Straub's claims under the Kentucky Constitution are barred by the applicable statute of limitations, because Straub

[7] The action was filed to challenge a retaliatory discharge for whistle-blowing.

never made such claims in the federal action. We disagree. 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. Finally, as noted herein, any new claims or amendments would relate back to the original complaint in this action, as they are based entirely on the same transaction or occurrence set forth in the original complaint. *See* KRCP 15.03.

Cross-Appeal Argument One

As their first basis for cross-appeal, appellees assert that all claims against security guards Harris and Pretot, as well as all claims against Nurse Fey should have been summarily dismissed from the Campbell Circuit Court action based on a one-year statute of limitations.

As noted, Straub filed her federal action on February 28, 2000. At that time, The St. Luke Hospital Inc., and two of its nurses, Krebs and Theissen, were named as defendants. As part of that litigation, security guards Harris and Pretot were deposed in March of 2001. Appellees assert that at that time, Straub also learned of Fey's involvement in the events at issue during the course of the deposition of Nurse Robin Reilly, which was also conducted in March of 2001.

The federal action was ultimately dismissed on April 10, 2002. At that time, Straub had yet to add either Harris, Pretot, or Fey to the action. Appellees assert that any claims against Harris, Pretot, or Fey were barred by the one-year statute of limitations at that time. After review of the record and applicable case and statutory law, we agree with the appellees.

It is well established that the applicable statute of limitations for false imprisonment claims is one year, as provided by KRS 413.140(1)(a)(c). That provision clearly provides that all actions to which it applies are to be brought within one year after the cause of action accrues. In *Dunn v. Felty*, 226 S.W.3d 68 (Ky. 2007), our Supreme Court answered the question of when the cause of action accrues against an arrestee's claim for false imprisonment. As our Supreme Court noted, the United States Supreme Court recently provided persuasive guidance on this issue in *Wallace v. Kato*, 127 S.Ct. 1091, 529 U.S. 384 (U.S. 2007).

In *Wallace*, the Supreme Court addressed the issue of whether or not a suit in which the Plaintiff sought damages for an arrest in violation of the Fourth Amendment had been timely filed under §1983. The Supreme Court relied upon Illinois state law for the length of the statute of limitations, but determined the accrual date of the cause of action was based on common law tort principles. In so doing, the Supreme Court reasoned that the cause of action most closely related to the fact situation before it was false imprisonment.

In determining the beginning of the limitations period in the case, the Court reasoned as follows:

> The running of the statute of limitations on false imprisonment is subject to a distinctive rule-dictated, perhaps, by the reality that the victim may not be able to sue while he is still imprisoned: "Limitations begin to run against an action for false imprisonment when the alleged false imprisonment ends." *Citing* 2 H. Wood, Limitation of Actions § 187d(4), p. 878 (4th rev.ed.1916), 4 Restatement (Second) of Torts § 899, Comment c (1977); *and* A. Underhill, Principles of Law of Torts 202 (1881).

As our Supreme Court noted in *Dunn*, the Court's reasoning and conclusion in *Wallace* are in accord with the general rule on the subject. *Dunn* at 72, citing *Belflower v. Blackshere*, 281 P.2d 423, 425 (Okl. 1955).

Likewise, it is well-established that common law claims of assault and battery carry a one-year statute of limitation pursuant to KRS 413.140, and that Straub's allegations regarding violation of constitutional rights also have a statute of limitations of one year. *Million v. Raymer*, 139 S.W.3d 914 (Ky. 2004). Indeed, of all the claims filed by Straub in the Campbell Circuit Court, only the tort of outrage has a five-year statute of limitations. *See* KRS 413.120. As noted, upon the conclusion of proof in this matter, the outrage claim was dismissed by the circuit court and that dismissal was not appealed.

The events which give rise to the claims Straub alleges in this action both began, and ended on April 17, 1999. Within one year from that time, Straub appropriately filed her action in the federal court. At that time, however, neither Harris, Pretot, nor Fey were named as defendants. Further, even after Straub became aware of the extent of the involvement of these individuals on the date in question, she declined to join them in the federal action.

It was not until nearly five years after the events giving rise to the claim occurred, almost four years after Straub reached the age of majority, and three years after Harris and Pretot were deposed, that Straub joined Harris, Pretot, and Fey as defendants, when filing her Campbell Circuit Court action on June 25, 2004. Straub now argues that KRS 413.270, and our prior decisions in *Ockerman v. Wise*, 274 S.W.2d 385, 288 (Ky. App. 1955), and *Commonwealth v. Nelson*, 435 S.W.2d 449, 450 (Ky. 1968), preserved Straub's claims against those individual parties until her complaint was timely filed in state court, following the dismissal of her federal claims. We disagree.

KRS 413.270, in pertinent part, reads as follows:

> If an action is commenced in due time and in good faith in any court of this state and the defendants or any of them make defense, and it is adjudged that the court has no jurisdiction of the action, the plaintiff or his representative may, within ninety (90) days from the time of that judgment, commence a new action in the proper court. The time between the commencement of the first and last action shall not be counted in applying any statute of limitation.

Further, both *Ockerman* and *Nelson* provide that the purpose of KRS 413.270 is to protect an *action* which is commenced in due time and good faith, which was filed in the wrong jurisdiction, and for which a defense was made, by allowing it to be instituted in the proper court within ninety days of dismissal from the improper court. Further, as Straub correctly notes, those cases provide that the time between the first and last action doesn't count in applying the statute of limitations.

We agree that both KRS 413.270 and the case law cited preserve a Plaintiff's *cause of action* when the conditions are met. However, neither the cited law, nor any law of which we are aware, supports such an argument as it relates to non-defendants. We hold that if Straub wished to join any of these three defendants to this action, she should have done so within one year from the time she became aware that a cause of action existed. Instead, Straub fully litigated this matter in federal court while declining to join these defendants, despite the passage of several years time, and despite being fully aware of their involvement in the events at issue.

While KRS 413.270 would preserve Straub's right to bring the action in state court against the defendants following the conclusion of her federal action, it does not entitle her to add an entirely new group of defendants of whom she was already aware and against whom she previously declined to file an action. Had Straub wished to join Harris, Pretot, and Fey to an action, she should have done so within one year from the date of discovery of their involvement in the events at issue. *Underhill v. Stephenson*, 756 S.W.2d 459 (Ky. 1988).

Straub erroneously asserts that because she named Jane Doe Nurses and John Doe Security Guards in her federal complaints, she satisfied the requirements of CR 15.03 as it relates to Harris, Pretot, and Fey. As the appellees correctly note, this position is erroneous. In *Ford v. Hill*, 874 F.Supp. 149 (E.D. Ky. 1995), the Federal Court for the Eastern District of Kentucky analyzed the

practice of naming John Doe defendants, and later amending the complaint to name new defendants.

In addressing that issue, the court noted that FRCP 15, which is very similar to KRCP 15, permits an amendment to relate back *only* when there has been both an error concerning the identity of the proper party and where the party was chargeable with knowledge of the mistake. The court held that the rule did *not* permit relation back when there was a lack of knowledge of the proper party.

Such was the case in the instant claim, where Straub initially lacked knowledge of all of the alleged "proper" defendants, and elected to file a complaint against unknown nurses and security guards. Straub never made any attempt to amend her federal complaint to include these defendants, and sought only to do so nearly five years after the fact in state court. On the basis of the foregoing, we find that Harris, Pretot, and Fey were improperly named as defendants in this matter, and should therefore be dismissed from same.

Cross-Appeal Argument Two

As their second basis for cross-appeal in this matter, the appellees assert that Straub's claims of assault and battery should have been summarily dismissed pursuant to KRS 413.140.

As the appellees note, Straub never asserted an assault and battery claim in her federal action, and did not move the Campbell Circuit Court to add a claim of common law assault and battery until September 7, 2004. At the time that Straub sought to add the new claim, the defendants objected. Nevertheless, the

court allowed Straub to amend her complaint on December 1, 2004. After review of the record and applicable law, we affirm the trial court's decision.

Appellees correctly note that a common law claim for assault and battery carries a one-year statute of limitations in Kentucky pursuant to KRS 413.140. 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 both the original complaint filed in federal court, and the complaint subsequently filed in the Campbell Circuit Court.

We believe *Perkins v. Read*, 616 S.W.2d 495 (Ky. 1981), speaks adequately to the matter sub judice. In that case, a widow sued individually and as executrix of her husband's estate for injuries arising out of an automobile accident. Initially, the relief sought was limited only to a claim of damages for the husband's wrongful death and destruction of the family vehicle. However, nearly three years after the accident, the widow sought leave to amend her complaint to assert damages arising from personal injuries which she also sustained in the collision. The trial court ordered the claim dismissed as being barred by the one-year statute of limitations, a decision which was subsequently reversed by our Supreme Court.

In so deciding, the Supreme Court held that although the widow was seeking to amend her complaint to add an entirely new claim, the amendment was permissible and related back to the filing of the original complaint. In support of its opinion in this regard, the Supreme Court cited to CR 15.03, which reads in pertinent part as follows:

> (1) When the claim ... asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading.

As stated by the Supreme Court in *Perkins*, CR 15.03 is based on the theory that notification of litigation concerning a given transaction or occurrence should be sufficient to toll the statute even though the precise legal description is added later by amendment.

Having reviewed the matter sub judice, we find *Perkins* to control. Although Straub may not have specifically asserted the claim of assault and battery in the federal action, the situation from which the allegations arose was identical to that described in the original complaint. From the outset, the appellees have been aware of Straub's allegations, and of the injury she claims as a result. As the appellees were so apprised, we decline to find that the assault and battery claim was barred by the one-year statute of limitations in this instance.

Cross-Appeal Argument Three

As their third basis for cross-appeal in this matter, the appellees assert that the Campbell Circuit Court action was not properly filed within the ninety-day window provided by KRS 413.270. Having reviewed the record and applicable law, we disagree and affirm the trial court.

Appellees correctly note that the Federal Court of Appeals issued its final decision denying Straub's petition for rehearing on July 21, 2004. Straub filed her Campbell Circuit Court action approximately one month prior, on June

25, 2004. The appellees assert that Straub had only a ninety-day window between July 21, 2004 and October 20, 2004, and that by filing early, Straub did not file timely. In support of this assertion, Appellees cite *Ockerman v. Wise*, 274 S.W.2d 385, 388 (Ky. 1955), for the proposition that the saving statute, KRS 413.270, only allows cases to be re-filed within ninety days *after* the final appealable order.

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. As Straub correctly notes, the Sixth Circuit initially affirmed the decision of the district court on May 27, 2004. Although Straub filed a Petition for Rehearing, we find no authority to support the position that a party must wait for an official ruling on that petition before filing in state court.

Further, we find nothing in the record to indicate that the defendants were prejudiced by the early filing any more than they would have been had Straub waited until a few weeks later to file the same claims. 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.

Cross-Appeal Argument Four

As their final basis for cross-appeal in this matter, the appellees assert that the trial court erroneously gave a jury instruction regarding punitive damages. In support thereof, appellees assert that nothing in the record existed to allow the jury to reasonably conclude that the three nurses and/or the two security guards acted with maliciousness or gross neglect or reckless disregard for Straub's rights, nor that they acted in an intentional or deliberate manner possessing the character of outrage.

In this Commonwealth, the law is clear if any evidence exists to support an award of punitive damages, a plaintiff has a right to have the jury instructed on the option to award punitive damages. *Gersh v. Bowman*, 239 S.W.3d 567, 572 (Ky. App. 2007). After a thorough review of the record, we cannot conclude that a complete absence of evidence existed so as to prevent any reasonable jury from finding in this regard. Thus, we decline to find that the trial court was in error by allowing such an instruction to be given. Further, we note that error, even if any existed, was harmless, as no punitive damages were ultimately awarded on Straub's behalf, and the jury found in favor of the defendants.

CONCLUSION

For the foregoing reasons, we affirm in part and reverse in part, and remand to the trial court for additional proceedings not inconsistent with this opinion.

STUMBO, JUDGE CONCURS.

BUCKINGHAM, SENIOR JUDGE, DISSENTS.

BUCKINGHAM, SENIOR JUDGE, DISSENTING: The majority opinion is very thorough and well-reasoned. Nevertheless, as I believe the judgment should be affirmed rather than reversed, I respectfully dissent from portions of that opinion.

First, I disagree with the majority's conclusion that it was reversible error for the court to refuse to answer Question #2 submitted by the jury. The majority cites the *Thompson* case to support its reasoning. In *Thompson*, this court held that it was not mandatory "that the trial court explain or enlarge upon the instruction if it believes that the instructions are clear and self-explanatory." *Id*. at 174. Contrary to the facts in *Thompson*, in this case there is no serious contention that the instructions were unclear or otherwise erroneous. Rather, the contention is that the jury was nevertheless confused and that the court should have answered the jury's question to clear up any possible confusion.

I disagree with the majority's analysis for several reasons. First, contrary to the implication in majority opinion, the court in *Thompson* did not reverse on the basis that the judge should have answered the question submitted by the jury. Rather, this court reversed due to an erroneous instruction and merely expressed an opinion that the judge should have answered the question to clear up the confusion. *Id*. The *Thompson* court did not find reversible error on this ground as implied by the majority.

Further, while this court did criticize the trial judge in *Thompson* because he should have answered the jury's question, the court did not waiver from its earlier statement that an explanation was not "mandatory" where the instructions are otherwise "clear and self-explanatory". *Id*. Therefore, because the instruction given in this case was not unclear like the one in *Thompson*, I conclude that the *Thompson* case is not applicable.

In addition, I disagree with the manner in which the majority has characterized the jury's post-verdict statement. The majority states that the jury indicated in its statement that it would have rendered a verdict against the hospital defendants but for the court's lack of response concerning the degree of injury required to establish liability. I conclude that this language is different from what the jury actually said. The jury stated at the end of its statement that "[u]ltimately, the majority of the jury could not be convinced that Ms. Straub experienced injury based on the evidence presented." That statement by the jury, like the jury instruction itself, does not distinguish between "temporary" and "permanent" injury. Further, the jury stated in the first paragraph of its statement that it would have found in Straub's favor had it believed she had been injured. It did not qualify its statement by using the words "permanently injured". The implication is clear that the jury did not believe Straub had suffered any injury, either a temporary or permanent one. Also, while it is true that the jury had made reference earlier in its statement to "any lasting injury to Shannon", I believe it is mere speculation that the jury rested its decision in favor of the hospital defendants on

its belief that she had suffered no permanent injury. Such a conclusion is contrary to its language at the end of its statement.

Second, the majority reverses the judgment based on testimony from Straub's boyfriend that Straub had used drugs and had cursed in the past. Straub had acknowledged in her testimony that she had smoked marijuana and had used profanity in the past. She argues on appeal that the same testimony from her boyfriend, although cumulative, was inadmissible because it was offered to show that she was on drugs on the day of the incident and that, regardless of its admissibility, it was sufficiently prejudicial so as to warrant its exclusion. She maintains, and the majority agrees, that the trial court's failure to exclude the testimony was reversible error. In light of the nature of the testimony and the fact that it was cumulative, I conclude that any error in this regard was not prejudicial but was harmless.

Finally, the majority reverses the summary judgment awarded by the trial court to the appellees on Straub's claim that the hospital defendants acted in concert with the police officer to deprive Straub of her constitutional rights. The majority cites the *Davis* case to support its conclusion. The majority accurately cites *Davis* for the proposition that a dismissal of a federal cause of action based on lack of jurisdiction was not an adjudication on the merits and thus did not invoke the doctrine of *res judicata*. *Davis*, 920 S.W.2d at 77.

I disagree that *Davis* is on point. The facts here are much different than those in *Davis*. While in *Davis* the federal court dismissed the cause of action

due to lack of jurisdiction, here the federal court dismissed the action by awarding the defendants summary judgment on the claim. Such a judgment is an adjudication on the merits. Thus, Straub was precluded from again pursuing that claim in state court based on the doctrine of issue preclusion. *See Yeoman v. Commonwealth, Health Policy Board*. 983 S.W.2d 459, 464-65 (Ky. 1998).

The majority also holds that the doctrine of issue preclusion is not applicable because Straub's state court claim is different from her federal court claim because the appellees' actions may have violated the Kentucky Constitution but not the U.S. Constitution. Neither Straub nor the majority, however, identify what state constitutional right the appellees may have violated that was not also a right encompassed by the federal constitution. General reference to Section 2 of the Kentucky Constitution is not persuasive, in my opinion.

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