No. _____

In the Supreme Court of the United States

RICKY KOEL,

Petitioner,

v.

CITIZENS MEDICAL CENTER, INC., ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

A tightly stretched fence wire snapped into Ricky Koel's right eye, piercing the globe. He arrived at Citizens Medical Center—vomiting from pain but still able to perceive light—indicating vision could be saved with timely intervention. Staff suspected a ruptured globe, a known emergency. Yet instead of referring him to an ophthalmologist or arranging transfer, the hospital summoned an optometrist—unqualified under EMTALA or hospital bylaws to screen. Mr. Koel was misdiagnosed, not transferred, and left permanently blind.

This case presents a clean vehicle to resolve a core EMTALA issue left open by the Court's dismissal of *Moyle v. United States*, 603 U.S. 324 (2024): when hospitals fail to treat or transfer patients with known emergencies. Unlike *Moyle*, there is no state law barrier here—only a failure to follow EMTALA's mandate. EMTALA forbids hospitals from treating emergency patients differently based on diagnosis, staffing, cost, or internal workarounds. The Questions are:

1. Whether the emergency imperative of EMTALA displaces a State Law medical malpractice exception just as the EMTALA emergency imperative displaced a state law abortion ban for purposes of the District Court's injunction in *Moyle v. United States*?

2. Whether the Tenth Circuit's zeal to adhere to the EMTALA malpractice exception in *Repp v. Anadarko Mun. Hosp.* exposes a Circuit Split with the Fourth Circuit's "standard to which the hospital adheres" rule in *Power v. Arlington Hosp. Ass'n*?

3. Whether Dan Kuhlman, M.D., the Citizens' Medical Center's emergency department medical director, violated EMTALA by allowing an unqualified Optometrist to examine and diagnose a serious eye injury and discharge the patient for economic reasons?

LIST OF PROCEEDINGS

United States Court of Appeals for the Tenth Circuit

No. 23-3232

Ricky Koel, *Appellant* v. Citizens' Medical Center, Daniel P. Kuhlman, M.D., Sam Roger Funk, O.D. and Sam Roger Funk, O.D., P.A., *Appellees*

Opinion: February 24, 2025

Rehearing Denial: March 24, 2025

United States District Court for the District of Kansas

No. 2:21-cv-2166

Ricky Koel, *Plaintiff* v. Citizens' Medical Center, Daniel P. Kuhlman, M.D., Sam Roger Funk, O.D. and Sam Roger Funk, O.D., P.A., *Defendants*

Date of Final Judgment: October 10, 2023

LIST OF PARTIES

Petitioner

Ricky Koel

Respondents

Citizens' Medical Center
Daniel P. Kuhlman, M.D.
Sam Rodger Funk, O.D.
Sam R. Funk, O.D., P.A.

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The Opinion of the U.S. Court of Appeals for the Tenth Circuit dated February 24, 2025 is published at 128 F.4th 1329 (10th Cir. 2025), is included at App.1a. The Order Granting Summary Judgment of the U.S. District Court for the District of Kansas dated October 10, 2023 is reproduced at App.27a.

JURISDICTION

The U.S. Court of Appeals for the Tenth Circuit denied a Petition for Rehearing on March 24, 2025. App.59a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES, REGULATIONS AND INTERPRETIVE GUIDELINES

1. 42 U.S.C. 1395dd (App.61a)
2. 42 C.F.R. § 482.55 (App.68a)
3. 42 C.F.R. § 489.24 (App.61a)
4. HHS/CMS Interpretive Guideline 2009 (App.74a)
5. HHS/CMS Interpretive Guideline 2010 (App.75a)
6. HHS/CMS Interpretive Guideline 2019 (App.76a)
7. K.S.A. § 65-1501 (App.77a)
8. K.S.A. § 65-1501a (App.78a)
9. K.S.A. § 60-258a (App.78a)

STATEMENT OF THE CASE

A. Statutory Background

EMTALA requires that a Medicare/Medicaid participating hospital provide for an appropriate medical screening examination in its emergency department "to determine whether or not an emergency medical condition . . . exists" 42 U.S.C. 1395dd(a). "The examination must be conducted by an individual[s] who is[are] determined qualified by hospital bylaws or rules and regulations and who meet[s] the requirements of §482.55 [of 42 C.F.R.] concerning emergency services personnel and direction" 42 C.F.R. § 489.24(a)(1)(i). "It is not acceptable for the hospital to allow the medical director of the emergency department to make what may be informal personnel appointments that could frequently change." HHS/CMS Interpretive Guidelines Published July 19, 2019 (See the Interpretive Guidelines dated 2009, 2010 and 2019 set forth in full in the Appendix to this Petition).

B. Factual Background

On April 10, 2019, in Thomas County, Kansas, near Colby, Ricky Koel suffered a severe right eye globe-piercing injury from the snapping-back of a strand of metal farm fence wire he was tightening in the late afternoon. He was bleeding from his eye socket and vomiting. He could see light with his right eye. He went to the Citizens Medical Center (CMC) in Colby and was examined in the emergency department by Optometrist Sam R. Funk, O.D. at the request of Daniel P. Kuhlman, M.D., the acting Medical Director. Dr.

Funk diagnosed Ricky's right eye globe as healthy and closed, not pierced or open. Ricky had no money or insurance and it was snowing. Dr. Funk called Luther Fry, M.D., an Ophthalmologist in Garden City, Kansas, about 105 miles away, and arranged for Ricky to see Dr. Fry the following morning. Neither Dr. Funk nor Dr. Fry had privileges to practice medicine at CMC or to perform emergency medical screening examinations at CMC. Ricky was discharged to go home to see Dr. Fry the following morning. Ricky was seen by a vitreo-retinal surgeon over 24 hours later and diagnosed as blind in his right eye.

C. Statement of Facts

1. On April 10, 2019, Ricky Koel suffered a severe right eye globe injury while repairing a wire fence in the country outside Colby, Kansas. He was struck by the whiplashing-back of a strand of metal fence wire which broke while he was stretching it. The fence wire struck him directly in the right eye. He sustained an open globe injury, meaning the globe of his right eye was struck and pierced or cut open (App.85a, 86a-94a, 111a, 149a).

2. The Colby, Kansas General Hospital, Defendant, called "Citizens' Medical Center, Inc." (hereinafter CMC) Emergency Department staff testified that they examined Ricky Koel's eye, observed the continuous bleeding, and ordered a CT scan because they suspected a "ruptured globe" from the nature of the injury and the symptoms. (App.111a, 237a, 247a, 250a).

3. During pretrial discovery, CMC Hospital representative Ms. Niblock testified that Ricky Koel had an "emergency medical condition" when he was treated by the CMC Hospital Emergency Department

on April 10, 2019, as defined in the Hospital's EMTALA policy (App.110a, 219a).

4. Dr. Kuhlman, the Physician in charge of the Emergency Department of CMC hospital when Ricky Koel arrived there, contacted Dr. Funk, an Optometrist, to request Dr. Funk come to the hospital to examine and diagnose Ricky Koel's right eye injury. In the opinion of the Plaintiff's Expert Witness John R. Ludgin, M.D., this was a violation of EMTALA because Dr. Funk was not qualified to examine or diagnose emergency conditions under CMC hospital's rules. (App.135a, 149a-151a, 154a). Jenny Niblock, a CMC administrator and authorized representative, with authority to bind the hospital, agreed. (App.170a).

5. Sam Funk, D.O. is an Optometrist in Colby, Kansas licensed by the State of Kansas (App.132a). He is qualified to prescribe glasses and contact lenses *Id.*

6. Dr. Funk is not mentioned by name or specialty in the Citizens Medical Center Emergency Department (ED) Rules as eligible to provide examination or diagnosis of patients in the CMC ED (App.127a).

7. Dr. Funk examined Ricky Koel and determined Ricky's right eye globe was closed, meaning intact (App.165a). Dr. Funk spoke by 'phone to Luther Fry, M.D., an Ophthalmologist in Garden City about Ricky Koel's condition and treatment (App.166a) and later characterized his opinion after his conversation with Dr. Fry as follows: " . . . [You] know, time is of the essence, but a few hours is not going to make a lot of difference in the visual outcome." (App.166a) and "We would like to get them in [eye injury patients into

surgery] but we don't need to get them in yesterday." (App.166a).

8. In the medical record, Dr. Kuhlman wrote "closed globe per optometry" to mean he was writing not his diagnosis but instead merely repeating Dr. Funk's diagnosis of "closed globe" made by Dr. Funk, an Optometrist, from Dr. Funk's slit lamp examination (App.165a) of no globe rupture (App.119a, 156a-164a, 160a, 161a-164a).

9. The optometry finding of closed globe caused Dr. Kuhlman to advise Ricky Koel to drive non-emergently to Garden City, Kansas to see Luther Fry, M.D., an Ophthalmologist the following day, which resulted in Ricky Koel missing the crucial 24-hour retinal surgery window, thus losing a significant chance of better recovery including restoration of sight in his right eye. He is now blind in that eye (App.81a-82a, 82a-84a, 86a-94a, 98a-101a, 101a-110a, 186a-196a).

10. Jenny Niblock testified CMC Hospital policy was for Ophthalmologists with privileges at CMC to be consulted by phone if necessary (App.171a). Dr. Funk confirmed this (App.170a-171a).

11. The Plaintiff moved for Partial Summary Judgment based upon the premise that CMC's own EMTALA-required Medical Screening Examination (MSE) Rules and the EMTALA statutes, rules and regulations restricted CMC's MSE procedure to only Physicians, Resident Physicians, Physician Assistants and Nurse Practitioners (App.95a, 101a, 98a-101a) concluding with the statement that Dr. Funk, an Optometrist, was not qualified under CMC's rules or under EMTALA statutes, rules and regulations, to examine and diagnose patients in the CMC Emergency Depart-

ment (App.101a). The Defendant CMC admitted that the Plaintiff's paragraphs 1, 4-7, 9-12 & 15 were not controverted and only filed controversions of paragraphs 2, 3, 8 & 16 (App.269a).

12. The Defendant CMC moved for Summary Judgment based upon the premise that Dr. Kuhlman, the Medical Director of the CMC Emergency Department, was allowed by CMC articles, bylaws and EMTALA statutes, rules and regulations to request or call Dr. Funk, an Optometrist, to come to the CMC Emergency Department to examine and diagnose patients for EMTALA MSE purposes in the CMC Emergency Room (App.173a). The Plaintiff filed controversions of CMC's paragraph 19 & 24 factual allegations (App.256a-258a).

13. The District Court granted Summary Judgment, concluding that CMC Medical Staff Bylaws section 10.4 requires "emergency medical treatment exams" to be conducted by "Physicians, resident physicians, nurse practitioners and physicians' assistants . . . to determine whether a medical emergency exists." (App.275a) and the District Court concluded further as follows:

> Dr. Kuhlman [ER Director *pro tem*] called Sam Funk, OD. Dr. Funk is a local optometrist who agreed to assist in Plaintiff's evaluation. Dr. Funk arrived at the ER just before Plaintiff's CT scan was performed. He used a slit lamp to examine Plaintiff's eye after the CT scan. But the ruptured globe could not be seen with the slit lamp because Plaintiff's eye was filled with blood, hiding where the rupture occurred. And Dr. Funk performed a Seidel test. This test is designed to identify

> some ruptured globes. It was negative but did not rule out a ruptured globe. Dr. Funk ruled out an open globe from what he could see. He stated in his deposition that his diagnosis was that it was a closed globe (from what he could see) but that Plaintiff needed more treatment for "another issue, lens vitreous retinal, or globe." Doc. 123-18 at 27.

(App.276a).

14. Dr. Kuhlman testified:

> Q. What is your understanding of a treatment plan for an open globe, if you know?
>
> . . .
>
> THE WITNESS: —the example I gave earlier was if, for example, the CT scan had read definitively an open globe injury, we would have planned to immediately transfer that patient out [by ground or air ambulance] for an ophthalmologic exam and whatever treatment plan they determined was appropriate.

(App.249a).

15. Dr. Kuhlman testified further:

> Q. Is it your first choice to call an optometrist when you have a differential diagnosis of open globe in the emergency room?
>
> A. So it's part of the workup. I still have plans to call the ophthalmologist. I—I try and get as much information as I

> can for the ophthalmologist before we call them, so that they can give us a better recommendation.

(App.253a).

16. Dr. Kuhlman testified, giving an exemplar of his emergency routine, that in eye emergency cases he would call Dr. William Clifford, M.D., a Garden City, Kansas Ophthalmologist and active Eye Surgeon with privileges to practice at CMC, and consult *via* telephone with Dr. Clifford "regardless" of whether Dr. Clifford was physically present in the hospital:

> Q. The—you said, "That's how I was trained." Is it your testimony that you were trained to call an optometrist in the —would you explain that for me, please.
>
> A. We were trained to ask for help from anyone in town that was available. If there's an ophthalmologist available, we'll—so if, for example, Dr. Clifford spends one day, or I think one day a week, a month, as an ophthalmologist in our specialty clinic. If he happened to be there that day, we would have called him down to ask for help. If there isn't an ophthalmologist available to help us with the physical exam, and there's an optometrist as the next best available, I will call the next best available and—
>
> Q. Is—go ahead.
>
> A. I'm not required to do so. I'm just trying to get additional data and information to try and help the ophthalmologist we

eventually call be able to make a better decision and a better recommendation.

Q. The standard of care in the treatment of eye trauma is to defer to an eye specialist; right?

A. So at some point in care of all eye trauma, generally, an ophthalmologist will be consulted or an eye specialist will be consulted at some point.

Q. It sounds like that if, for example, Dr. Clifford was available, you would have called him before calling an optometrist. Is that—would you agree with me?

A. If he was physically there, absolutely, and you know, again, at some point in the timeliness of that case, [Dr. Clifford] would have been called, regardless.

(App.254a-255a).

17. Jenny Niblock, an authorized corporate representative of Defendant CMC, admitted her testimony was binding on CMC with respect to all matters surrounding the care and treatment of Ricky Koel (App.219a).

18. Jenny Niblock testified that emergency department or emergency room privileges to practice at CMC were granted only to medical staff, and that on April 10, 2019, as relevant to this case, only Daniel P. Kuhlman, M.D., a Colby, Kansas Family Practice Physician and the acting CMC Emergency Department Director on that date, William Clifford, M.D. a Garden City, Kansas Ophthalmology Specialist and Eye Surgeon and Kristen A. Berwick, M.D., a North Platte, Nebraska

Physician Ophthalmology Specialist and Eye Surgeon, were members of the medical staff with emergency privileges, and that Dr. Funk, a non-Physician Optometrist, was not a member of the medical staff and had no emergency privileges. (App.202a, 207a, 259a). (*See also* App.197a, App.208a-209a, 215a-216a).

19. Jenny Niblock testified that neither Dr. Fry, a Physician Ophthalmologist in Garden City nor Dr. Funk, a non-Physician Optometrist in Colby, were members of the medical staff and neither one of them had privileges to practice Medicine at CMC, and that Dr. Funk was not qualified to perform an EMTALA medical screening examination on Ricky Koel (App.197a, 217a).

20. Jenny Niblock testified that Physician Specialist Consultants with privileges to practice at CMC were contacted *via* telephone by CMC to provide medical opinions and consultation on active emergency department cases when they were unable to be present in person (App.218a).

REASONS FOR GRANTING THE PETITION

I. The Emergency Imperative of EMTALA Displaces a State Law Medical Malpractice Exception Just as the EMTALA Emergency Imperative Displaced a State Law Abortion Ban for Purposes of the District Court's Injunction in *Moyle v. United States,* 603 U.S. 324 (2024)

In *Moyle v. United States*, 603 U.S. 324 (2024), the U.S. Supreme Court dismissed *certiorari* as improvidently granted and simultaneously vacated its stay of

the District Court injunction, allowing the injunction to remain in force while the case progressed normally *Id.* 325. Justice Kagan approved of this as causing the least harm since the injunction against the Idaho abortion ban would remain in force *pendente lite Id.* 327-328 (carryover paragraph).

This case is the ophthalmic equivalent of *Moyle*. It provides a clean vehicle for this Court to declare the emergency imperative of EMTALA displaces the medical malpractice exception of *Repp v. Anadarko Mun. Hosp.*, 43 F.3d 519, 522 (10th Cir. 1994) in ophthalmology. EMTALA is just as alive and potent here as it is foreshadowed to be in obstetrics by the concurrences and dissents in *Moyle, supra.* In this eye emergency case, an EMTALA violation and medical malpractice overlap without diminishing the force of EMTALA (Statement of Facts (SOF) paras. 4-9, 13, 18 & 19). Please read also arguments II, III and IV below, incorporated here by reference.

As the Honorable Monti Belot, U. S. District Judge for the District of Kansas wrote about the medical malpractice exception in *Griffith v. Mt. Carmel Medical Center*, 831 F.Supp. 1532 (1993):

> The same evidence that supports a medical malpractice claim under state law may, in some circumstances, also constitute evidence of differential treatment sufficient to support a claim for failure to give an "appropriate medical screening" under EMTALA.

Griffith, supra., 831 F.Supp. at 1543, first whole paragraph, second sentence. That is certainly true of the improper, informal non-EMTALA appointment of the unapproved non-physician Dr. Funk and his call to an

un-approved, non-staff physician Dr. Fry in this case, which resulted in the District Court's factual conclusion that Dr. Funk, an unqualified and unapproved Optometrist, made the controlling erroneous diagnosis of closed globe here (SOF 13) which caused Ricky Koel's permanent right eye blindness (SOF paras. 4-9, 13, 18 & 19) *See also* Arguments II-V below in support of this Argument.

II. The Tenth Circuit Misapprehended that Dr. Funk Was in Reality an Optometrist and not a Physician and Both the District Court and the Tenth Circuit panel Ignored that Dr. Kuhlman Violated 42 U.S.C. § 1395dd(a) and 42 C.F.R. § 489.24(a)(1)(i) When He Permitted Dr. Funk to examine and Diagnose a Serious Open Globe Eye Injury, Exposing a Circuit Split

The Tenth Circuit committed clear error by failing to realize that Dr. Funk was an Optometrist and not a Physician and therefore unqualified to examine and diagnose under EMTALA (SOF 4-6, 11 &13). Both the District and Tenth Circuit courts also failed to understand that Dr. Kuhlman's informal appointment of Dr. Funk was outside the terms of CMC Medical Staff Bylaw 10.4 (SOF 11 & 4-6). That is, it was a violation of Defendant Citizens' Medical Center, Inc's (hereinafter CMC's) medical staff bylaws and EMTALA statutes and regulations to appoint Dr.Funk to examine and diagnose Ricky Koel (SOF 11 & 4-6).

The Tenth Circuit wrote the following which clearly proves it mistakenly thought Dr. Funk was a physician:

> Similarly, Section 10.4 of Citizens' Bylaws, titled "Emergency Medical Treatment Exam,"

> provides that a medical screening examination may be conducted by physicians (*i.e.*, Drs. Kuhlman and Funk), resident physicians, nurse practitioners, or physicians' assistants . . . .

(App.9a). (Tenth Circuit Opinion, PACER Document number 75, page 9, last four lines) (emphasis added).

The formally-adopted CMC Medical Staff Bylaw 10.4 is by definition "the standard to which the hospital [CMC] adheres" *Power v. Arlington Hosp. Ass'n.*, 42 F.3d 851, 858 (4th Cir. 1994) quoting *Power v. Arlington Hosp. Ass'n.*, 800 F.Supp. 1384 at 1387, fn. 6 (E.D. Va. 1992) and *Griffith, supra. See also Repp v. Anadarko Municipal Hospital*, 453 F.3d 519, 522-523, fn. 4 (10th Cir. 1994).

The Fourth Circuit's "the standard to which the hospital adheres" rule is clearly a moderate and correct approach to EMTALA application in this context. Yet, footnote four in *Repp, supra.* and the surrounding text clearly indicate that the more moderate Fourth Circuit view of EMTALA is disfavored by the Tenth Circuit *Repp*, *supra.*, 453 F.3d at 522-523, fn. 4. This exposes a Circuit split between the Tenth and Fourth Circuits in their different practical approaches to handling the overlapping of EMTALA with medical malpractice.

In footnote four of *Repp, supra.*, 453 F.3d at 522-523, fn. 4, the Tenth Circuit wrote, in part: "A court should ask only whether the hospital adhered to its own procedures. . . . " *Id.* However, the Tenth Circuit did not do that in this case. The Tenth Circuit did not apply CMC Medical Staff Bylaw 10.4 to the facts here and determine, as it should have, that CMC violated

EMTALA by violating its own Medical Staff Bylaw 10.4 by allowing Dr. Funk, an Optometrist, to perform an MSE, examining and diagnosing a serious sight-threatening eye injury. That is precisely why the Circuit split between the Tenth and Fourth Circuits here must be resolved. The split is defined here by the failure of the Tenth Circuit to actually execute, in practice, the correct application of EMTALA uniformly with all other Circuits when medical malpractice facts are present. This Court should step in to resolve the split by directing all Circuits to conform to the required application of EMTALA rubric in this context: to hold participating hospitals to the strict adherence to their formally-adopted EMTALA MSE rules or Bylaws regardless of the presence of medical malpractice facts.

The Tenth Circuit is too quick to reject an EMTALA case which contains even a hint of medical malpractice. That overly-tense, overly-limited, *strictissimi juris* EMTALA atmosphere in the Tenth Circuit, shown in its actual, deficient execution of EMTALA in this case must be contrasted with the moderate, more plain view taken of these overlap cases by the Fourth Circuit as evinced in *Power, supra*. The Tenth Circuit's cramped view is manifest in this case where the drive to dismiss on *de minimis* grounds (Tenth Circuit opinion, p. 7, last two lines and p. 10, top para. and fn.3) distracted the panel from attending to the important detail that Dr. Funk, a non-physician, was wholly unqualified and unapproved under CMC Bylaw 10.4 to examine and diagnose in the emergency department, yet invited to do so by Dr. Kuhlman. It was not *de minimis* for Dr. Kuhlman to violate the main EMTALA Physician-credentialing requirement in the CMC MSE-related Medical Staff Bylaws. This Court should grant

certiorari to resolve this inconsistent and overly-limited divergence in approach by the Tenth Circuit.

The record incontrovertibly establishes that Dr. Funk was not a Physician, but an Optometrist, professionally and legally incapable of conducting an ophthalmic examination to diagnose globe rupture under Kansas law (K.S.A. 65-1501(a) & (b) , K.S.A. 65-1501a(o)) as well as EMTALA (SOF 4-6, 11 & 13). The Tenth Circuit's erroneous reliance on Dr. Funk's Optometric non-"diagnosis" that Ricky Koel's globe was closed, or healthy and intact, as if it were a true Licensed Physician's diagnosis, is a foundational factual mistake. That mistake caused the Tenth Circuit to miss or overlook Dr. Kuhlman's EMTALA violation which was the cause of CMC's failure to recognize the emergency through proper Ophthalmologic consultation with Dr. Clifford, a CMC-approved, properly credentialed Consulting Ophthalmologist (SOF 16) and immediately transfer Ricky Koel to a tertiary care center in Denver for necessary critical emergency ophthalmic surgery (SOF 9, 10, 14, 15 &16). That also was an additional part of "the standard to which the hospital [CMC] adhere[d]" *Power, supra.* which Dr. Kuhlman proved through his own testimony (SOF 16, 14, 15 9 & 10).

Had the panel properly recognized Dr. Funk's status as a non-physician, it would have been compelled to acknowledge that CMC violated EMTALA by failing to provide a proper medical screening examination within the terms of CMC staff Bylaw 10.4. Further, CMC was bound to follow Dr. Kuhlman's precise, habitual practice which he testified he followed "regardless" (SOF 16) *Power, supra.* Instead, the panel's misunderstanding of this fact resulted in the

incorrect factual and legal conclusion that CMC satisfied its statutory obligations under EMTALA.

There is also a genuine dispute of material fact precluding Summary Judgment pursuant to FRCP 56(a) on the issue of who actually made the MSE diagnosis of "closed globe" or "no globe rupture" in Ricky Koel's right eye, written in the medical record (Statement of Facts (SOF) *supra.*, paras. 7, 8 &13). There was ample direct evidence that it was solely the diagnosis of Defendant Sam Funk, Optometrist, unqualified under CMC's own staff bylaws, EMTALA and Kansas State Law *Id. (*SOF 4-9, 11 &13). The District Court found as a fact that Dr. Sam Funk diagnosed a closed globe: "Dr. Funk ruled out an open globe from what he could see. He stated in his deposition that his diagnosis was that it was a closed globe. . . . " (District Court Memorandum and Order pages 3-4)(*See also* the final paragraphs of argument IV, *infra.*).

But the cause of that misdiagnosis was the permission which Dr. Kuhlman granted to Dr. Funk to be in a physical position so that Dr. Funk would have an opportunity to do anything at all for Ricky Koel, in the Emergency Department, in the first place. It was a clear violation of CMC Hospital's Emergency Department EMTALA-compliant protocol (see argument IV, infra.) by Dr. Kuhlman which caused the disastrous and crucial, irremediable further injury to Ricky Koel's right eye by the over twenty-four hour delay (SOF 4-9). That was not medical malpractice by Dr. Kuhlman as the District Court and the Tenth Circuit erroneously concluded. It was instead a bright-line violation of EMTALA by Dr. Kuhlman. That violation was Dr. Kuhlman's failure to observe the clearly-set-forth CMC Hospital written rule that only

Physicians, Interns, Physician Assistants and Registered Nurses could perform EMTALA Medical Screening Examinations as set forth in federal law (See final paras. of argument IV, *infra.*).

CMC could have made provision for non-Physicians to become involved in EMTALA screening examinations; however, it did not do so by a Board-approved or Medical Staff-approved written amendment or enlargement of the formally-promulgated list of four types of authorized practitioners set forth above. There was no special additional list of names of non-Physicians or categories of non-Physician health practitioners which CMC caused to be set out in writing, formally, and formally approved in the CMC Articles, Bylaws or Medical Staff Rules (*See also* HHS/CMS Interpretive Guidelines at App.74a, 75a & 76a). The District Court granted Summary Judgment on that discrete point (SOF 4-6, 11-13, 16 & 19).

III. The District and Circuit Courts Erred in Failing to Apply Controlling EMTALA Precedent in *St. Anthony Hospital v. U.S. Department of H.H.S.,* 309 F.3d 680 (10th Cir. 2002)

The District and the Tenth Circuit courts both erroneously failed to apply the bright line EMTALA rule that if a hospital cannot provide examination or treatment for a patient's emergency medical condition it must immediately transfer him, at its own expense, to a facility which can.

The Tenth Circuit panel's ruling is in direct conflict with *St. Anthony Hospital v. U.S. Department of H.H.S.*, 309 F.3d 680, 692-693 (10th Cir. 2002), which unambiguously requires that a hospital must "provide"

(meaning pay for) either examination, treatment, and stabilization or transfer. *Id.* When this obligation of CMC to pay for an air or ground ambulance transfer to Denver (the closest tertiary care center to Colby in Western Kansas) is considered in tandem with Argument V *infra.,* the conclusion is inescapable that Ricky was not properly diagnosed and immediately transferred for financial reasons in violation of EMTALA (See Argument V, *infra*.).

IV. The District and Circuit Courts Erred in Failing to Conclude That Dr. Funk's Misdiagnosis of Closed Globe and the Resulting Failure to Transfer Ricky Koel Immediately to Denver Were Rooted in Dr. Kuhlman's Informal *Ad Hoc* Appointment of Dr. Funk

The District Court and the Tenth Circuit panel both failed to recognize Dr. Kuhlman's EMTALA violation caused the erroneous diagnostic conclusion by Dr. Funk that Ricky Koel's right eye globe was unharmed and intact, leading to his non-emergency discharge (See Arguments II & III, *supra*.)

This case surely provides an opportunity for this Court to clearly explain the extent to which liability under EMTALA can coexist with medical malpractice liability under State Law. The presence of medical malpractice in the facts of an EMTALA case certainly does not "poison the well." Overlapping medical malpractice does not serve as a rude shield of immunity from EMTALA liability if all the elements of an EMTALA violation enable, create the opportunity for and therefore in fact do coincide with medical malpractice (See Arguments II & III, *supra*.)

It was neither Dr. Funk's negligence nor Dr. Kuhlman's negligence which was the root cause of the damage to Ricky Koel's eye: it was instead only Dr. Kuhlman's violation of EMTALA in his failure to follow CMC's Hospital Bylaws and Staff Rules (SOF 4). It was the physical access which Dr. Kuhlman granted to Dr. Funk to examine and diagnose Ricky Koel's right eye which caused Ricky Koel's discharge and which effectively prevented Ricky Koel's urgent transfer by ground or air ambulance from Colby to Denver, delaying timely treatment and causing or contributing to cause permanent total blindness in his right eye (SOF 4-9, 13 & 19).

This case presents a but-for causation or proximate cause/contributing cause issue. This Court should avail itself of this case as a vehicle to explain precisely how the admixture of EMTALA violations with medical negligence does not destroy an EMTALA case. That is, this Court should fully delve into the issue of whether the actions of Dr. Kuhlman in violating EMTALA through his selection of and request to Dr. Funk to come to the emergency department were the proximate but-for cause of misdiagnosis of the globe, delay and the following non-emergency discharge of Ricky Koel instead of immediate emergency transfer. Logically, the answer is yes: but-for causation is proven here. But for Dr. Kuhlman's violation of EMTALA, Dr. Funk would not have been in a position to cause the misdiagnosis, delay and complete loss of sight in Ricky Koel's right eye *See Paroline v. United States*, 572 U.S. 434, 134 S.Ct. 1710, 188 L.Ed.2d 714 (2014). In the alternative, given no causation language in 42 U.S.C. 1395dd, the EMTALA violation was a concurring or contributing cause. Please see the Kansas Comparative

Negligence Statute K.S.A. 60-258a. This Court should grant Certiorari to make clear that analysis of EMTALA causation should not be abandoned simply because medical malpractice was committed in an overlapping manner with the EMTALA violation still operating as a true proximate, but-for cause of the injury in a definite, clear, decisive and consequential causal manner.

Viewed simply and directly, this case presents a scenario in which, without the action of Dr. Kuhlman, the acting or *pro tem* Medical Director of the CMC Emergency Department, Dr. Funk would, rightly, properly and pursuant to all CMC rules, bylaws and EMTALA provisions, not have been allowed to conduct an emergency medical exam (SOF 4 and 13 (first part of 13; App. 74a, 75a & 76a).). Dr. Funk would thus not have been able to do anything concerning Ricky Koel, and not able to do him any harm through incorrect actions and incorrect diagnoses (SOF 4-9, 13 & 19).

Both the District Court and the Tenth Circuit erred in concluding that this EMTALA violation was *de minimis* citing *Repp v. Anadarko Municipal Hospital*, 453 F.3d 519 (10th Cir. 1994) (*See* District Court Memorandum and Order at its third unnumbered paragraph and later in its section III(A) first paragraph, and the Tenth Circuit Memorandum Opinion at II(B)(1), para. 2, citing *Repp*). This was legally incorrect because *Repp* and its similar *de minimis* decisions are not analogous. *Repp* involved a claim that emergency room nurses, qualified under hospital rules to be present and lawfully attempting to do their job correctly, failed to take a complete medical history from the patient and failed to ask the patient to list his medications, but the record disclosed that the patient's wife informed the nurses of his medical history and

medications *Id.* 523. This case does not involve anything like that. In this case, an unqualified Optometrist who was not a Physician and did not have privileges to practice medicine in the CMC Emergency Department and was not expressly-listed in the hospital bylaws as a non-medical ancillary staff member who was specially permitted by CMC to assist in emergency medical care, and was not a QMP ("qualified medical professional") and therefore not allowed to perform an MSE ("medical screening examination") under EMTALA statutes, regulations, or CMC Articles, Bylaws or Medical Staff Rules, was informally allowed to examine and diagnose a serious bleeding open globe eye injury (SOF 4-9) *Power, supra.*, 42 F.3d 851, 858 (4th Cir. 1994).

Petitioner has searched diligently throughout the cases involving the *de minimis* exception and cannot find any case involving the claimed wrongful medical emergency examination or medical diagnostic act of a person who was: (1) unqualified to examine and diagnose under state law because not holding a license to practice medicine or medical care in the categories of licensed medical professionals expressly permitted by hospital emergency department rules; (2) not expressly and specially named or permitted to examine and diagnose by category expressly stated in any other part of the hospital articles of incorporation, hospital bylaws or medical staff rules to be present in the emergency department and examine and diagnose patients therein; and (3) not qualified to examine and diagnose, in other words, to perform an MSE ("medical screening examination") within the rubric of the EMTALA statute 42 U.S.C. 1395dd and its accompanying HHS/CMS regulations and HHS/CMS interpretive

guidelines discussed in this brief (SOF 4-6, 13, 18-19 & App.74a, 75a & 76a).

When causation is considered, the participation of Dr. Fry, a red herring up to this point, is more appropriately characterized as a concurring cause which, but for the call Dr. Funk made to him, would not have come into being. Dr. Funk's testimony about his 'phone call to Dr. Fry proves that the 'phone consultation they had only served to confirm Dr. Funk in his erroneous unallowed, unprofessional and impermissible diagnosis (SOF 7). It must also be remembered that Dr. Funk did not have privileges to practice as a Consultant Physician at CMC. Whatever involvement Dr. Fry had, it is surely correct to conclude that involving him was another EMTALA violation because he was not privileged to provide 'phone consultation since he was not a member of the non-resident consulting staff (SOF 18 & 19). The only person who involved him in this case was Dr. Funk, whose invitation, presence and participation were all, also, in violation of EMTALA (Please see the contradictory "time is of the essence" & "but we don't need to get them in yesterday" testimony of Dr. Funk, set forth in SOF 7). It is only right to conclude that this cascade of EMTALA violations consisting in and springing from Dr. Funk's conduct render Dr. Kuhlman's invitation to Dr. Funk a meaningful, significant and consequential injury-causing EMTALA violation.

It is the purpose of EMTALA to require that medical screening examinations for all patients who enter each hospital's emergency department receive the same care as all others, according to the hospital's rules, bylaws and staff protocols and EMTALA generally 42 U.S.C. 1395dd. A bright line violation of written

hospital rules which causes or contributes to cause injury to a patient is, of itself, a sufficient, actionable violation of EMTALA without more and no specific evidentiary proof of specifically-named or identified other similar patients in a certain "more favorably treated" list of similar cases or "more favorably examined" group of similar patients is necessary. Both the District Court (slip opinion: page 11, bottom para., line 4; page 14, line 10; page 16, second whole para., line 1) and the Tenth Circuit (slip opinion page 10, final sentence) erred in implicitly requiring this additional factual list-type proof of "disparate treatment," when none is necessary:

> "Disparate treatment" is simply another term for describing or measuring a hospital's duty to abide by its established procedures. Unless each patient, regardless of perceived ability or inability to pay, is treated in a uniform manner in accordance with the existing procedures, EMTALA liability attaches. *See Repp*, 43 F.3d at 522.

Phillips v. Cobb, 244 F.3d 790 (10th Cir. 2001) (Opinion sec. II(A)(2)(fourth paragraph)) (emphasis added).

The CMC EMTALA-mandated formal written Hospital Staff rules and bylaws ("established procedures" *Phillips, supra.* 244 F.3d 790 at II(A)(2)) which Dr. Kuhlman violated were written and adopted by CMC in clear compliance with the applicable EMTALA rules set forth in 42 U.S.C. § 1395dd(a), 42 C.F.R. § 489.24(a)(1)(i) and the HHS/CMS Interpretive Guidelines issued in 2009, 2010 and 2019 which are all reprinted at App.74a, 75a & 76a. The 2009 version reads:

> The MSE must be conducted by an individual(s) who is [are] determined qualified by hospital by-laws or rules and regulations . . . in a document approved by [a] governing body of the hospital. . . . It is not acceptable for the hospital to allow informal personnel appointments that could frequently change.

2009 publication (1) above (App.74a) the last sentence of which was reworded in 2019:

> It is not acceptable for the hospital to allow the medical director of the emergency department to make what may be informal personnel appointments that could frequently change.

2019 publication (3) above (App.76a; *See also* App.74a, 75a). This is truly "the standard to which the hospital [CMC] adheres" but violated in this case *Power, supra.*, 42 F.3d 851, 858 (4th Cir. 1994).

The Plaintiff Ricky Koel suffered a serious injury to the globe of his right eye. He was examined by an unqualified and unapproved Optometrist and not treated with anything but a superficial eye shield. Summary Judgment should have been denied for CMC's violation of its Bylaw 10.4 "the standard to which [it] adhere[d]" in all similar cases but ignored in this one *Power, supra.*, 42 F.3d 851, 858 (4th Cir. 1994) FRCP 56 (SOF 4-9, 13, 18-19).

Dr. Kuhlman knew how to contact Dr. Clifford, an Ophthalmologist, for 'phone consultations in the emergency department after hours, and had done so in the past. That course of action was his usual procedure in Ophthalmologic cases. He could have easily followed the CMC rules and bylaws, spoken to Dr. Clifford and not called Dr. Funk, and transferred Ricky

Koel urgently to Denver very quickly, saving sight in Ricky Koel's right eye (SOF 9, 15, 16 &20). *Power, supra.*

Defendant CMC, acting through Dr. Kuhlman, the Medical Director of its Emergency Department, violated EMTALA by informally calling Dr. Funk, an Optometrist, to come to the Emergency Room to examine, diagnose and treat Ricky Koel. This violation caused Ricky Koel to lose a substantial chance of better recovery and restoration of sight in his right eye *Delaney v. Cade*, 255 Kan.199, 203 (2nd whole para.) 873 P.2d 175 (1994). This specific EMTALA violation also directly caused CMC to fail to immediately transport Ricky to a tertiary care center in Denver by air ambulance, which it was required to do to provide him with crucial retinal surgery by experts during the all-important initial 24-hour window after his open globe injury. As this court recognized in *St. Anthony Hospital v. U. S. Department of H.H.S.*, 309 F.3d 680, 692-693 (10th Cir. 2002) "the hospital must provide either [examination, treatment and stabilization] or transfer . . . ." *Id.* Defendant Citizens' was required to "provide," *i.e.*, arrange and pay for, Ricky's emergent transfer to a facility capable of treating his condition.

EMTALA requires that a hospital provide for an appropriate medical screening examination at 42 U.S.C. 1395dd(a):

> . . . the hospital must provide for an appropriate medical screening examination within the capability of the hospital's emergency department, including ancillary services routinely available to the emergency department, to determine whether or not an emergency medical condition . . . exists.

42 U.S.C. § 1395dd(a)(final three clauses; emphasis added).

The applicable Code of Federal Regulations subsection 42 C.F.R. § 489.24(a)(1)(i) which implements 42 U.S.C. 1395dd(a) reads:

> . . . Provide an appropriate medical screening examination within the capability of the hospital's emergency department, including ancillary services routinely available to the emergency department, to determine whether or not an emergency medical condition exists. The examination must be conducted by an individual(s) who is [are] determined qualified by hospital bylaws or rules and regulations and who meet[s] the requirements of § 482.55 of this chapter concerning emergency services personnel and direction . . .

42 C.F.R. § 489.24(a)(1)(i)(emphasis added) first published in the Federal Register Vol. 59, No. 119, Wednesday, June 22, 1994, pages 32120 (lower right-hand column)-32121 (upper left-hand column).

The above Medicare Code of Federal Regulations subsection is applied and enforced to carry out EMTALA *via* the U.S. Department of Health and Human Services' Center for Medicare and Medicaid Services Interpretive Guidelines 16-page July 16, 2010 CMS Manual System Pub. 100-07, App.75a. This specific paragraph proves Defendant CMC Hospital violated EMTALA through Dr. Kuhlman's informal appointment of his friend (App. 163a). Dr. Funk to examine and diagnose the Plaintiff:

> The MSE must be conducted by an individual(s) who is [are] determined qualified by hospital by-laws . . . in a document . . . It is

> not acceptable for the hospital to allow informal personnel appointments that could frequently change.

CMS Manual System Pub. 100-07 *Id.* (*See* App.75a).

A full understanding of the meaning of the May 29, 2009 Interpretive Guidelines language (App.74a) quoted above can be gleaned from reading its successor version published on July 19, 2019, exactly 100 days after the April 10 incident in this case, entitled Revisions to the State Operations Manual (SOM) Chapter 5 and Appendix V, PDF pages 5-6 of 68 total pages (Carryover paragraph; *See* App.76a) which reads:

> It is not acceptable for the hospital to allow the medical director of the emergency department to make what may be informal personnel appointments that could frequently change.

Revisions to the State Operations Manual, published 7-19-19. (App.76a).

The last interpretive guideline quoted above, published on July 19, 2019, 100 days after the April 10, 2019, incident in this case, App.76a, can be retroactively applied. Retroactive application of its interpretive guidance is consistent with the Tenth Circuit's previously-expressed view that an agency's interpretive rulings or corollaries can be applied retroactively, whereas statutes cannot *Farmers Telephone Company, Inc. v. F.C.C.*, 184 F.3d 1241, 1252 (second and third whole paragraphs)(10th Cir. 1999). The Tenth Circuit quoted *Manhattan General Equipment Company v. Commissioner of Internal Revenue*, 297 U.S. 129, 135, 56 S. Ct. 397 (1936):

> . . . explaining that an agency ruling interpreting a statute "is no more retroactive in its operation than is a judicial determination construing and applying a statute to a case in hand.

Farmers, supra., 184 F.3d at 1252, quoting *Manhattan Co., supra.*, 297 U.S. at 135.

It is notable that the final highlighted sentence in the last interpretive guidelines paragraph quoted above from 2019 is identical with the actions of Dr. Kuhlman in this case:

> It is not acceptable for the hospital to allow the medical director of the emergency department [Dr. Kuhlman] to make what may be informal personnel appointments [of Dr. Funk] that could frequently change.

SOM EMTALA Guidelines Revision Issued 7-19-'19, pages 5-6 of 68 (App.76a, adapted by interlineation). Dr. Kuhlman, the CMC Emergency Department's Medical Director, informally appointed Dr. Funk, an Optometrist, to perform the crucial emergency medical screening examination on Ricky Koel. Dr. Funk, as a definite causal result thereof, was placed precisely in position to examine and misdiagnose Ricky Koel's injured globe as closed and uninjured. Further, Dr. Funk was enabled by that violation to erroneously recommend treatment which consisted of doing nothing for well over 24 hours.

CMC's assertion of ignorance of the ruptured globe is undermined by its decision to request an optometrist, Dr. Funk, to conduct the emergency medical screening—a role for which he lacked the necessary qualifications. This improper delegation

violated EMTALA, delaying essential treatment. By assigning a critical task to an unapproved, unqualified individual, the hospital breached EMTALA, causing severe injury to Ricky.

The Court has the right to rely on these HHS/CMS Interpretive Guidelines to understand the meaning and effect of 42 C.F.R. 489.24(a)(1)(i) in this case. The Interpretive Guidelines are reasonable and, in their character and context, do no more than provide concrete examples of proper enforcement of the law and regulation. The interpretive guidelines quoted above satisfy the Tenth Circuit's interpretive guidelines criteria of reasonableness, appropriate context and character as set forth in *Berkley V. Walker v. BOKUF, Nat'l. Assn.*, 30 F.4th 944, 1010-1011 (10th Cir. N.M., April 8, 2022), reh. den. 5-19-'22, cert. den. 10-17-'22.

The Plaintiff is well aware of *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, Nos. 22-451, 22-1219, 2024 WL 3208360, (June 28, 2024) which might vitiate *Berkley, supra.* However, the Plaintiff is also aware that the Tenth Circuit has considered that matter and has concluded that *Loper, supra.*, does not call into question previous cases, such as *Berkley, supra.*, which have relied on the framework established under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Please see footnote 16 in *Oklahoma v. United States Department of Health & Human Servs.*, 107 F.4th 1209 (10th Cir. 2024) which reads at page 1226 as follows:

> In *Rust v. Sullivan*, the Supreme Court applied a two-part test that had been established in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837 (1984). Roughly two weeks ago, the Court overruled

> *Chevron. Loper Bright Enters. v. Raimondo*, 603 U.S. [369], Nos. 22-451, 22-1219, 2024 WL 3208360, at *21 (June 28, 2024). But the Court clarified that it was not "call[ing] into question prior cases that [had] relied on the *Chevron* framework.

Id. Oklahoma v. United States Department of Health & Human Servs., 107 F.4th 1209, 1218-1219, 1226, fn.16 (10th Cir. 2024).

To make clear the authority of HHS/CMS to promulgate and publish these Interpretive Guidelines it should be emphasized that there is no notice and comment required for interpretive guidelines 5 U.S.C. 553(b)(4)(A):

> (b) general notice of proposed rulemaking shall be published . . . Except when notice or hearing is required by statute, this sub-section does not apply – (A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice. . . .

5 U.S.C. 553(b)(4)(A)(with preamble). *See Perez v. Mortgage Bankers Ass'n.*, 575 U.S. 92, 96-97, 135 S. Ct. 1199, 1203-1204, 191 L. Ed. 2d. 186 (2015).

The Interpretive Guidelines regular revisions from May 29, 2009 and July 19, 2019 and one interim supplement from July 16, 2010, were all published electronically via email on their dates of publication and disseminated to all Medicare and Medicaid Participants and are available as set forth in detail in the CMS website at:

> https://www.cms.gov/medicare/regulations-guidance/transmittals

In light of the above, and in an attempt to fulfill the requirements of it, of the Defendant Citizens established the following EMTALA Emergency Department Rules:

> Physician List. CMCI must maintain a list of Physicians who are on-call to provide treatment necessary to stabilize an individual with an emergent medical condition within the capabilities and capacity of the staff and the facility. When an emergent patient needs the services of a Physician on the on-call list, the on-call Physician or extender (ARNP, PA, or resident Physician) must appear within 30 minutes from the presentation time of the patient . . .

(App.127a). And:

> 14.3 PATIENT PROTOCOL
>
> (a) Medical Screening Examination. All persons who come to the Hospital for treatment shall be afforded a medical screening examination to determine whether or not an emergency medical condition exists. Individuals qualified to conduct the medical screening examination include:
>
> 1. (i) Physicians;
> 2. (ii) Resident Physicians;
> 3. (iii) Nurse practitioners; and
> 4. (iv) Physician assistants.

(App.127a-128a). Defendant CMC never promulgated a list of names of non-Physician, non-employee EMTALA screeners in the Hospital Board meetings held to approve the above rules on January 30, 2018 and February 19, 2018, respectively (App.131a).

Given the above very clear rules, the Petitioner submits there was no excuse for Dr. Kuhlman summoning Dr. Funk when he knew how to contact Dr. Clifford, an Ophthalmologist he knew well, by 'phone, and obtain a 'phone consultation from Dr. Clifford immediately, which would have revealed the true imperative of instantaneous transfer of Ricky Koel to Denver for sight-saving surgery in his right eye (SOF 14-16 & 18-20).

V. The District and Circuit Courts Erred in Failing to Conclude That Ricky Koel's Right Eye Globe Was Misdiagnosed as Closed and Non-Emergent and He Was Therefore Not Immediately Sent by Air Ambulance to Denver for Emergency Eye Surgery Because He Had No Health Plan or Workers Compensation Insurance

Dr. Kuhlman decided that Ricky should not be transferred to a facility capable of treating a ruptured globe (App.111a). Dr Kuhlman believed that immediate transfer *via* ground or air ambulance to such a facility could leave Ricky with a "five-figure medical bill" (App.112a). Dr. Kuhlman and CMC knew Ricky did not have any insurance and did not have enough money for even one night in a hotel in Garden City (App.113a). Dr. Funk also did not want to treat Ricky urgently with emergency eye surgery because he did not want to waste the cost of a surgical team (App.111a).

The District Court considered the Plaintiff's argument (App.114a-118a) that financial considerations caused the Plaintiff to receive different medical care than that required by CMC's emergency department policies, and rejected it (App.32a. 49a).

The Tenth Circuit considered the Plaintiff's argument that his substandard evaluation and diagnosis was influenced by financial considerations in violation of EMTALA and rejected it. (*See* 10th Circuit Appellant's Brief Doc. 29, pp. 34-36, Argument point 3; *See also* 10th Circuit Slip Opinion at App.4a. 10a.)

It is clear that EMTALA does not require a Plaintiff to show an economic motive to recover; however, the existence of an economic motive is highly relevant to prove that a patient's misdiagnosis was motivated by economic considerations or the patient's lack of insurance *Griffith v. Mt. Carmel Medical Center*, 831 F.Supp. 1532, 1542-1543 (D. Kan. 1993). Just as in *Griffith, supra.*, the statements made by Dr. Kuhlman and Dr. Funk about the Plaintiff's penury are evidence which, if believed, proves that the failure to diagnose the Plaintiff with an apparent globe rupture, or to diagnose his condition as an eye globe emergency and order an emergent transfer, were much more than a misdiagnosis: "In the present case, Mrs. Griffith has presented evidence, including the alleged statements of hospital personnel discussed *supra*, suggesting that more than a mere misdiagnosis was involved." *Griffith, supra.*, 831 F.Supp. 1532, 1542.

Please see the related Argument III, *supra.,* which emphasizes that in this case EMTALA requires the participating transferring hospital (CMC) to provide or pay for the cost of emergency transfer if a patient

in an emergency condition (Ricky Koel) is without financial resources.

CONCLUSION

WHEREFORE, the Plaintiff prays Certiorari be granted.

Respectfully submitted,

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