1**IN THE UNITED STATES COURT OF APPEALS**
FOR THE EIGHTH CIRCUIT

LARRY NORRIS and
PATRICIA TURENSKY,
DEFENDANTS-APPELLANTS,

vs. **NO. 07-2481**

SHAWANNA NELSON,
PLAINTIFF-APPELLEE.

EASTERN DISTRICT OF ARKANSAS
THE HONORABLE JAMES M. MOODY
UNITED STATES DISTRICT JUDGE

PETITION OF APPELLEE FOR REHEARING AND REHEARING *EN BANC*

On July 18, 2008, a three judge panel of this Court reversed the district court's denial of the Defendants-Appellants' ("Defendants") motion for summary judgment on the basis of qualified immunity. The panel concluded that "Nelson's allegations and undisputed facts do not amount to a constitutional violation. Therefore, we do not need to inquire further regarding qualified immunity." *Nelson v. Correctional Med. Servs.*, No. 07-2481 (8th Cir. July 18, 2008). Because the panel's decision conflicts with the Supreme Court's precedent in *Farmer v. Brennan*, 511 U.S. 825 (1994), regarding the elements of an Eighth Amendment claim based on the denial of minimally adequate confinement conditions, and erroneously relied upon *Haslar v. Megerman*, 104 F.3d 178 (8th Cir. 1997), in concluding that Defendant Officer Patricia Turensky did not violate Ms. Nelson's constitutional rights, this Court should grant petitioner's request for a rehearing and rehearing *en banc*.

BACKGROUND

Plaintiff-1Appellee Shawanna Nelson ("Plaintiff") entered the Arkansas Department of Corrections ("ADC") in June of 2003, when she was six months pregnant. She was serving a sentence for non-violent offenses. SA 204. On September 20, 2003, she went into labor. She tried to report for her work assignment, but because of the intense pain caused by the onset of labor, she could not work. SA 207-08. When she arrived at the medical unit around noon, the nurses only checked her vital signs. SA 209-10. Soon her contractions were occurring in intervals of five minutes or less. SA 183. When prison staff finally began preparing Ms. Nelson for transport to the hospital, her contractions were so strong that twice she had to stop walking and move to the wall in order to endure the pain of walking from the medical unit to the sally port exit of the prison. SA 186-87. The nurse escorting Ms. Nelson to the sally port instructed the correctional officers to transport her to the hospital quickly. SA 183-84. A correctional officer assisted Ms. Nelson into the transport van taking her to the hospital. SA 196.

Defendant Officer Patricia Turensky is an employee of the Arkansas Department of Corrections. SA 190. She is a correctional officer with no medical training and no special training in childbirth and delivery. SA 191. Although Officer Turensky was "not concerned" that Ms. Nelson was a flight or safety risk, she handcuffed Ms. Nelson and took leg shackles with her during the transport. SA 196-97.

According to the hospital security log, which Officer Turensky filled out, upon arriving at the hospital, Ms. Nelson had already dilated to seven centimeters. SA 55; Def.'s Ex. D. When she arrived in the labor room, Officer Turensky handcuffed Ms. Nelson and shackled her legs to opposite sides of the bed. SA 215. Officer Turensky would allow only temporary unshackling when the nurses asked to check Ms. Nelson's vital signs. SA 215. During the entire time she was shackled,

Ms. Nelson was "feeling sick" and her labor was very painful. *See* SA 55; Def.'s Ex. D, SA 212. While she was shackled to the bed, her movement was constrained and "[she] couldn't get up in a position to move out of the bed." SA 47. During labor, the shackles made her leg "cramp up and cause[d] severe pain . . ." SA 61. Despite the pain and difficulty the shackles caused during Ms. Nelson's labor, Officer Turensky kept Ms. Nelson shackled for nearly an hour and a half, until hospital staff took her to the delivery room at 6:18 pm, *see id.*, SA 44, 56. Ms. Nelson's nearly ten-pound baby boy was finally born at 6:23 pm. SA 56. Officer Turensky put leg shackles back on Ms. Nelson immediately after Ms. Nelson gave birth to her son and she remained shackled to the bed during visits with her newborn baby. SA 57, 216-217.

At 6:40 pm, Officer Turensky was relieved by a new security shift, she handed over the leg irons and cuffs to Officer Hubbard. SA 56. Officer Hubbard stayed with Ms. Nelson through her second night at the hospital. Acknowledging that Ms. Nelson was not a flight risk, and observing that the shackling caused Ms. Nelson to soil herself and the sheets with human waste, Officer Hubbard did not shackle Ms. Nelson during the second night. SA 49, 217-19.

In contrast to her insistence on shackling Ms. Nelson during labor and recovery, Officer Turensky repeatedly admitted her knowledge of the obvious health and safety reasons for not shackling pregnant women. Indeed, Officer Turensky claims "to use common sense" when making shackling decisions in transporting inmates to the hospital. Nonetheless, despite being told (and learning in her ADC training class) that she only needed to use full restraints on prisoners as long as they "weren't too crippled or pregnant to do so," she used restraints on the nine-months pregnant Ms. Nelson when transporting her to the hospital and after she arrived at the hospital to give birth. *See* SA 194-96, 198. Officer Turensky admitted that Ms. Nelson was neither a safety risk nor an escape risk. *See* SA 197. Furthermore, she stated that she shackled Ms. Nelson only because she

did not want the Warden to "write [her] up." SA 198. She stated that it is her "preference" not to shackle pregnant women because the shackles might cause them to trip and it is difficult to walk when shackled. *Id.* Officer Turensky also stated: "After the inmates have their babies, they're still going to have medical problems, and I do not shackle them in transport again." SA 201. She further acknowledged that restraints during labor would cause pain, "I imagine they hurt the ankles when you're lying in bed," *id.*, and would expose a laboring woman to "not very sanitary" conditions. SA 202. Contrary to her own actions during Ms. Nelson's labor, delivery, and post-partum recovery, Officer Turensky's written response to Ms. Nelson's grievance acknowledge that there are "obvious medical reasons" for not shackling pregnant women. SA 64.

In addition to Officer Turensky's own statements, undisputed expert testimony submitted by Dr. Cynthia N. Frazier, a Fellow of the American College of Obstetricians & Gynecologists, establishes that shackling a pregnant woman during labor is "inherently dangerous." SA 169-172. The ADC's policies and practices related to the shackling of pregnant women, as implemented and followed by Officer Turensky, were inherently dangerous and painful for Ms. Nelson and for the safe and humane delivery of her baby boy. *Compare* SA 44, 215 *with* SA 169.

ARGUMENT

The narrow question raised in this petition for rehearing or rehearing en banc is whether Ms. Nelson is entitled to proceed to trial to prove her claim that Defendant Turensky violated the Eighth Amendment when she shackled Ms. Nelson during labor and post-partum recovery.[1] Specifically, Ms. Nelson must show that restraints during active labor, childbirth and post-partum recovery pose

[1] Defendants do not dispute that pregnancy is a serious medical need. Ms. Nelson's claims that the *medical* care available to her during her pregnancy, labor and postpartum were constitutionally inadequate did not survive summary judgment and were not raised in Defendants' interlocutory appeal before this Court.

serious risks of harm to pregnant women's health and that Officer Turensky knew of and disregarded those risks when she shackled Ms. Nelson during active labor and post-delivery recovery. Under *Farmer v. Brennan*, 511 U.S. 825 (1994), a finder of fact should determine whether Ms. Nelson has made that showing. In direct conflict with *Farmer*, the panel dismissed Ms. Nelson's remaining claims as a matter of law, and erroneously held that a practice of shackling pregnant women in active labor, and after delivery, regardless of any individualized security concerns, comports with the Eighth Amendment prohibition on cruel and unusual punishment. Because *Farmer* instructs that this type of determination should not be decided on summary judgment, and because this Court's decision in *Haslar* does not control, the panel's decision should be reversed.

1. The Panel Failed to Apply the Supreme Court Standard in *Farmer v. Brennan.*

In *Farmer v. Brennan* the Supreme Court defined the "deliberate indifference" necessary to prevail on an Eighth Amendment claim:

> Whether a prison official had the requisite knowledge of a substantial risk is a question of fact subject to demonstration in the usual ways, including inference from circumstantial evidence . . . and a fact-finder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious.

Farmer v. Brennan, 511 U.S. 825, 842 (1994) (internal citations omitted). Under this standard, awareness of a substantial harm can be "conclusively presumed . . . from a risk's obviousness." *Id.* at 840. For example, as the Court explained:

> [I]f an Eighth Amendment plaintiff presents evidence showing that a substantial risk of [harm to inmates] was longstanding, pervasive, well-documented, or *expressly noted* by prison officials in the past, and the circumstances suggest that the defendant-official being sued had *been exposed to information concerning the risk* and thus must have known about it, then such evidence could be sufficient to permit a trier of fact to find that the defendant-official had actual knowledge of the risk.

Id. at 842-43 (emphasis added). Although "[i]t is not enough merely to find that a reasonable person would have known, or that the defendant should have known," a defendant does not escape liability

"if the evidence showed that he merely refused to verify the underlying facts that he strongly suspected to be true, or declined to confirm inferences of risk that he strongly suspected to exist." *Id.* at 843 n.8.

Thus, to survive Officer Turensky's motion for summary judgment, Ms. Nelson was required to come forward with specific record facts to support her allegations that the harms posed by restraining a pregnant woman during labor, delivery, and recovery were known to and disregarded by Officer Turensky. As the district court correctly concluded, Ms. Nelson met that burden. The panel decision, however, fails to apply the *Farmer* standard and likewise fails to give any consideration to the record facts that support Ms. Nelson's claim of deliberate indifference.

The health and safety risks of restraining a woman during the course of labor and immediately after childbirth are of the type that are so obvious, even in the absence of direct evidence that Officer Turensky knew of these risks, a fact-finder "might well infer that [the defendant] did in fact realize it." 511 U.S. at 842. The record in Ms. Nelson's case contains sufficient evidence for a fact-finder to conclude that Defendant Turensky knew that shackling Ms. Nelson, or any pregnant prisoner for that matter, during labor and recovery posed a substantial risk of serious harm.

A. Record evidence supports the fact that Officer Turensky knew of the risk of shackling Ms. Nelson but disregarded the risk.

First, the obviousness of the risks of restraining women during labor, childbirth, and recovery and the fact that Officer Turensky was aware of those risks is evident from ADC's policies regarding restraints generally and restraints on pregnant women specifically. The administrative regulations for the ADC allow restraints "*only* when circumstances require the protection of inmates, staff, or other individuals from potential harm or to deter the possibility of escape." SA 116; AR 403

(emphasis added). The regulations further require that restraints will not "inflict physical pain" and they should not "be used longer than is necessary." *Id*. Moreover, under Administrative Directive 95:21 discretion in the use of restraints is allowed where a prisoner is "rendered incapable of assaultive actions or escape and the removal of restraints is essential to provide adequate assessment or treatment." SA 124. Finally, the ADC "Hospital Security Post Order" generally requires all prisoners who are hospitalized to be restrained to a bed, but, that same policy has specific provisions related to the use of restraints on pregnant prisoners. The Post Order authorizes removal of restraints at the point of delivery, or upon specific direction by the "physician in charge." SA 111-13.

Due to the risky nature of using restraints, ADC requires training for all new employees as well as a yearly refresher course for staff on these restraint policies. *See* SA 117; AR 403. Officer Turensky received training on the use of restraints which instructed her to restrain prisoners as long as they "weren't too crippled or pregnant to do so." SA 194-95. Yet despite this training, and although she admitted that Ms. Nelson was neither a safety risk nor an escape risk, *see* SA 197, Officer Turensky insisted on shackling Ms. Nelson, who was full-term and in labor, when transporting her to the hospital and while she was at the hospital to give birth because she claimed to be afraid that the Warden would discipline her otherwise. *See* SA 44, 196-98, 215-16. Notably, and in contrast, the officer who relieved Officer Turensky chose not to shackle Ms. Nelson.[2] SA 217. Under *Farmer*, whether or not Officer Turensky's decision to shackle Ms. Nelson despite her training evinced deliberate indifference to a serious risk of substantial harm and was therefore an unconstitutional application of ADC policy, is a question for a trier of fact.[3]

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[2] Officer Hubbard stayed with Ms. Nelson through her second night at the hospital. Acknowledging that Ms. Nelson was not a flight risk, and observing that the shackling caused Ms. Nelson to soil herself and the sheets with human waste, Officer Hubbard did not shackle Ms. Nelson during the second night. SA 49, 217-19.

[3] Plaintiff does not concede that ADC's restraint policies in and of themselves respond to the known and obvious risks created by shackling a pregnant woman during the course of labor,

Officer Turensky also repeatedly admitted her knowledge of the obvious medical and safety reasons for not shackling a pregnant woman. Indeed, in Officer Turensky's response to the grievance Ms. Nelson filed after she was shackled, the Defendant stated "I/M while pregnant does NOT wear *Shackles*, Chain AND Box for *obvious* Medical Reasons." SA 64 (capitalization in original, italics added). Given Officer Turensky's written admission that shackling a pregnant woman should not be done for *obvious* medical reasons, a trier of fact could find that she was deliberately indifferent to Ms. Nelson's serious medical needs. Moreover, Officer Turensky also admitted that she was aware that shackling a pregnant woman in labor and postpartum causes pain, is unsanitary and causes problems for women after they give birth. *See* SA 201-02. Thus, a trier of fact could find that the risk was obvious to Officer Turensky, she was aware of it, and nevertheless, she needlessly shackled Ms. Nelson.

B. Expert testimony in the record supports the fact that the risk of shackling Ms. Nelson was obvious.

Beyond Officer Turensky's own admissions, the record contains the undisputed expert opinion of Dr. Cynthia Frazier, an obstetrician and Fellow of the American College of Obstetricians & Gynecologists, stating that shackling a woman during the final stages of labor is "inherently dangerous" to both the woman and the fetus. SA 169-170. This affidavit also reflects the well-established standard within the relevant medical and correctional health community of ensuring continuous mobility (not only intermittent mobility upon a doctor's direct orders) during labor and delivery and during post-partum recovery. Such mobility is essential for a woman to safely manage

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delivery and post-partum in a constitutionally adequate manner. And for the reasons discussed *infra* Part 2, neither the summary judgment record in this case, nor prior decisions of this Court, supports, let alone requires, a conclusion that the policy is constitutional on its face. However, the Court need not decide that question in order to permit, as it should, a trier of fact to determine whether the policy was applied unconstitutionally against Ms. Nelson—the issue raised in this petition.

the process of labor and delivery, to minimize intense pain, and so that health staff can quickly respond to rapidly changing circumstances. *See, e.g., id.*; *Standards for Health Services in Correctional Institutions*, p. 108 (APHA 2003).[4]

Indeed, consistent with this standard, the federal courts have recognized that correctional authorities cannot use "restraints on any woman in labor, during delivery, or in recovery immediately after delivery." *See Women Prisoners of the District of Columbia v. District of Columbia*, 93 F.3d 910, 918, 936 (D.C. Cir. 1996) (noting prison did not challenge district court's finding that "use of physical restraints on pregnant women . . . violate[s] the Eighth Amendment" and quoting order of remedy issued below). In analyzing the Eighth Amendment claim below, the D.C. District Court found that prison officials acted with deliberate indifference in shackling women since the risk of injury to women prisoners is obvious. *Women Prisoners of District of Columbia Dep't of Corrections v. District of Columbia,* 877 F. Supp. 634, 668 (D.D.C. 1994) ("*Women Prisoners I*"), *vacated in part, modified in part by*, 899 F. Supp. 659 (D.D.C. 1995), *remanded by*, 93 F.3d 910 (D.C. Cir. 1996). The court further found the Warden's statement that he would not shackle a third trimester woman indicative of a recognition of an obvious risk. *See id*. at 669. The court noted that "the physical limitations of a woman in the third trimester of pregnancy and the pain involved in delivery make complete shackling redundant and unacceptable in light of the risk of injury to woman

[4] The American Public Health Association recommends that, "[w]omen must never be shackled during labor and delivery." *Standards for Health Services in Correctional Institutions*, p. 108 (APHA 2003). The American College of Obstetricians and Gynecologists published guidelines for "Health and Health Care of Incarcerated Adult and Adolescent Females" states, "[a]pplying physical restraints to pregnant women should be needed only very rarely, in extreme situations, for short periods." *Special Issues in Women's Health*, p. 97 (ACOG 2005). The ACOG guidelines also provide specific recommendations on how to safely position a pregnant woman who is restrained, none of which are reflected in the ADC policy or in Officer Turensky's treatment of Ms. Nelson. *Id*.

and baby." The court held that *any* shackling "while a woman is in labor and shortly thereafter . . . is inhumane." *Id*. at 668.

Like the Warden in *Women Prisoners I*, Officer Turensky's actions and statements are indicative of the recognition of an obvious risk and a trier of fact could conclude that she was aware of the obvious risks of physically restraining a woman during labor and during post-partum recovery.

This record evidence is more than sufficient for a trier of fact to find that Officer Turensky shackled Ms. Nelson during active labor and post-partum recovery, despite knowing the obvious and serious health risks, and pain and suffering, such practices posed to laboring women and new mothers.

2. *Haslar v. Megerman* Does Not Determine the Result in This Case.

In addition to the panel's failure to properly apply the *Farmer* standard for factual determinations in Eighth Amendment claims, the panel's wholesale reliance on *Haslar* v. *Megerman*, 104 F.3d 178 (8th Cir. 1997), is misplaced. *Haslar* does not support the proposition, let alone hold, that it is "eminently reasonable" to have a blanket policy and practice of restraining pregnant women during labor and post-delivery recovery regardless of individualized security concerns. In *Haslar*, this court held that a general policy of restraining detainees to a hospital bed while they receive medical attention was constitutional because it "serves the legitimate penological goal of preventing inmates awaiting trial from escaping . . . less secure confines, and is not excessive given that goal." *Id.* at 180. That very general principle, however, is not determinative of the constitutionality of a prison officer's practice of using restraints on women during labor, childbirth and recovery.

As already discussed, record evidence supports a finding that Officer Tuerensky was aware of a unique set of health risks inherent in restraining pregnant women who are in labor, delivery, or immediate postpartum recovery. *See supra* at 7-8. Moreover, record evidence demonstrates that

Defendant Turensky was aware that ADC does not consider the risk of escape by a female prisoner at the point she is in labor, delivery, or post-delivery recovery to be comparable to most other prisoners transported to hospitals for medical care. *See supra* at 7. With respect to this case, Officer Turensky admitted that Ms. Nelson was neither a safety risk nor an escape risk during the labor and delivery of her child and that shackling Ms. Nelson had nothing to do with a penological objective or safety concern; rather Officer Turensky was chiefly afraid that the Warden would discipline her if Ms. Nelson was not shackled. *Id.*

Thus, even if a general policy of restraining hospitalized prisoners may not be constitutionally "excessive" in most or many of its applications, a fact-finder could very well conclude that because of the significant and known differences in the risks inherent in shackling pregnant women, Officer Turensky's insistence on shackling Ms. Nelson throughout labor and immediately after delivery of her child was in fact constitutionally "excessive."

3. The Eighth Amendment Standard Relevant to This Case Was Clearly Established at All Relevant Times.

The panel did not reach the issue of whether or not Officer Turensky was entitled to qualified immunity. It is clear, however, that prison officials in Officer Turensky's position reasonably should have known the unconstitutionality of shackling pregnant women during labor, delivery and immediately after childbirth. Therefore, she is not entitled to qualified immunity. *See* Brief of Appellee at 7-8; *see also Women Prisoners of the District of Columbia*, 93 F.3d at 918, 936 (D.C. Cir. 1996) (discussing decision below that held restraints during labor and delivery constitutes cruel and unusual punishment).

The Supreme Court held thirty years ago that prison officials violate the Eighth Amendment when they act with deliberate indifference to prisoner's serious medical needs. *Estelle v. Gamble,*

429 U.S. 97, 104 (1976). The precise standard required to demonstrate a violation of the Eighth Amendment regarding prison conditions of confinement was defined by *Farmer v. Brennan* in 1994. Accordingly, the parameters of the constitutional right in question were clearly established long before any of the events relevant to Defendant's liability.

In *Hope v. Pelzer,* 536 U.S. 730 (2002), the Supreme Court authoritatively set forth the standards for determining whether a particular constitutional right is clearly established. In that case, the Supreme Court reviewed a lower court decision that had concluded that, while the practice of restraining a prisoner to a "hitching post" as a disciplinary measure violated the Eighth Amendment, that right was not clearly established because there had been no binding previous decision that involved facts "materially similar" to the prisoner's claim. *Id.* at 736.

While upholding the decision of the lower court that the use of the hitching post for discipline violated the Eighth Amendment, the Supreme Court reversed the lower court's decision to allow the defense of qualified immunity. The Court reasoned that the basic interest protected by allowing a defense of qualified immunity is the right of government agents to "fair warning" that their conduct violated the Constitution. The Court then quoted with approval language in its earlier case of *United States v. Lanier,* 520 U.S. 259 (1997):

> In some circumstances, as when an earlier case expressly leaves open whether a general rule applies to the particular type of conduct at issue, a very high degree of factual particularity may be necessary. But general statements of the law are not inherently incapable of giving fair and clear warning, and in other instances a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though the action in question has [not] previously been held unlawful.

Hope, 536 U.S. at 740-41(citations and internal quotation marks omitted; bracketed material in original) (quoting *Lanier*, 520 U.S. at 270-71).

For this reason, officials can be provided fair notice that their actions violate the Constitution even in novel factual circumstances. While previous cases with similar facts can provide especially strong support for a conclusion that the law is clearly established, they are not necessary to such a finding. *Hope*, 536 U.S. at 741. *Farmer,* particularly when viewed in combination with *Estelle*,[5] provides a standard for federal courts to apply in all Eighth Amendment challenges to prison conditions of confinement cases, specifically including medical care cases, and thus constitutes a "general constitutional rule" of the type identified in *Hope* and *Lanier:*

> Under the test that we adopt today, an Eighth Amendment claimant need not show that a prison official acted or failed to act believing that harm actually would befall an inmate; it is enough that the official acted or failed to act despite his knowledge of a substantial risk of serious harm.

Farmer, 511 U.S. at 842.[6]

For that reason, proof of an Eighth Amendment violation regarding medical care, such as shackling pregnant women during labor, delivery and post-partum, or other conditions of confinement, automatically defeats a qualified immunity defense. The Eighth Circuit and other federal courts have long recognized that, in light of *Farmer* and *Estelle*, prison officials who act with deliberate indifference to prisoners' serious medical needs are not entitled to qualified immunity. *See Miller v. Schoenen,* 75 F.3d 1305, 1309-11 (8th Cir. 1996) (in interlocutory appeal of denial of qualified immunity on summary judgment to claim that prisoner was denied specialized necessary

[5] *Estelle,* 429 U.S. 97 (1976), holds that prisoners' Eighth Amendment rights are violated when prison officials, with deliberate indifference, fail to provide for their "serious medical needs." *Id.* at 104.

[6] Throughout *Farmer,* the Supreme Court relies, without distinction, on cases involving lack of medical care, failures to protect prisoners from physical assault, and threats to prisoner safety posed by environmental conditions. *See, e.g.*, *id.* at 835 (citing *Estelle,* 429 U.S. at 104); 843-44, 846-47 (citing *Hutto v. Finney,* 437 U.S. 678, 681-82 (1982)) (cited regarding risk of sexual assault by other prisoners and about prison conditions that included extreme overcrowding, insufficient food, and unsanitary conditions); *Helling v. McKinney,* 509 U.S. 25, 33 (1993) (cited regarding discussion of liability for exposure of prisoners to infectious diseases).

medical treatment in light of his needs as a heart transplant survivor, court of appeals examined whether there was evidence sufficient to survive summary judgment that prisoner had an objectively serious medical need as required by *Estelle* and evidence that defendants knew of and disregarded that need, as required by *Farmer;* finding such evidence in the record, the court affirmed the district court's denial of qualified immunity); *see also LaBounty v. Coughlin,* 137 F.3d 68, 74 (2d Cir. 1998) (reversing district court's recognition of qualified immunity defense to prisoner's claim that he was exposed to friable asbestos particles in the air; reasoning that the right to be free of deliberate indifference to serious medical needs was clearly established in *Estelle*); *Williams v. Mehra,* 135 F.3d 1105, 1112 (6th Cir. 1998), *rev'd in part en banc on other grounds,* 186 F.3d 685 (1999) (holding, in the context of a case involving allegations of a failure to provide necessary psychiatric care and treatment to a prisoner who committed suicide, that the defendant psychiatrists were not entitled to a qualified immunity defense because the right to medical care for serious medical needs was clearly established in *Estelle*). In other words, if a prison official had "knowledge of a substantial risk of serious harm," then the Eighth Amendment required the official to take appropriate action against that harm, and that obligation was clearly established as a matter of law.

As noted above, the record establishes that a trier of fact could find that Defendant Turensky had "knowledge of a substantial risk of serious harm" posed by shackling a pregnant woman during labor, delivery and post-partum, but she failed to take appropriate action against that harm to Ms. Nelson as required by the Eighth Amendment and contrary to clearly established law. *See supra* pp. 7-14. Accordingly, Defendant Turensky's argument that she is entitled to qualified immunity must be rejected.

CONCLUSION

For all of these reasons, Ms. Nelson's constitutional claims related to Defendant Turensky's use of restraints during labor and post-delivery recovery cannot be dismissed at the summary judgment stage and are entitled to proceed to trial.

Appellee understands that an *amicus curiae* brief is being submitted to the Court, and has no objection to it.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Cathleen V. Compton, do hereby certify that a true and correct copy of the foregoing has been served on the following electronically this 31st day of July, 2008.

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