UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
CENTRAL DIVISION AT LEXINGTON

Eastern District of Kentucky
FILED
MAY 1 - 2009
AT COVINGTON
LESLIE G WHITMER
CLERK U S DISTRICT COURT

CIVIL ACTION NO. 1998-431 -- WOB

KEITH RENE GUY, SR., ET AL. PLAINTIFFS

VS. MEMORANDUM OPINION AND ORDER

LEXINGTON FAYETTE URBAN
COUNTY GOVERNMENT, ET AL. DEFENDANTS

This matter is before the court on defendant's motions for summary judgment (Doc. #323, #341), plaintiffs' motion to modify (Doc. #357), defendants' motion for leave to file surreply (Doc. #371), and defendants' motion for leave to file a post-hearing memorandum (Doc. #376). The court heard oral arguments on the motions for summary judgment and motion to modify on January 9, 2009, after which it took those motions under submission.

Having reviewed further submissions by the parties, and after close study, the court now issues the following memorandum opinion and order.

Factual and Procedural Background[1]

This case arises out of alleged sexual abuse and other unlawful conduct perpetrated by Ronald Berry who, in 1969, founded a summer program for disadvantaged youth in Lexington, Kentucky. The program was called "Micro-City Government" and was

[1]The underlying alleged facts and complex procedural background of this matter are also reported at *Doe v. Lexington-Fayette Urban County Gov't.*, 407 F.3d 755 (6th Cir. 2005).

funded by the Lexington-Fayette Urban County Government ("LFUCG"). Berry's abuse allegedly occurred between 1969 and 1996.

A. Filing of Lawsuits

On October 15, 1998, four victims filed the instant proposed class action. (Doc. #1) The complaint named only the LFUCG as a defendant. Plaintiffs alleged that high-ranking LFUCG officials, including several mayors, knew of Berry's abuse but actively and knowingly concealed and facilitated it for political purposes. The named plaintiffs ultimately settled in 2000, prior to any ruling on class certification. Two additional victims then moved the court to provide notice of the dismissal to the putative class pursuant to Rule 23(e). The court denied that motion and the case was dismissed.

On May 3, 2000, a second class action complaint was filed naming the LFUCG, as well as ten individual city officials, as defendants. *Doe v. LFUCG*, No. 00-166-KSF (E.D. Ky.) ("*Doe I*"). That case was settled and dismissed on June 28, 2002, again with no notice being given (indeed, none was requested) to putative class members.

On September 25, 2002, a third class action complaint was filed naming the LFUCG and fourteen individual city officials as defendants. *Doe #1-33 v. LFUCG*, No. 02-439-JMH (E.D. Ky.) ("*Doe II*"). On August 22, 2003, the district court dismissed the case

as time-barred.

On January 13, 2003, a fourth class action complaint was filed repeating the allegations of *Doe II*. *Doe #1-44 v. LFUCG*, No. 03-12-JMH (E.D. Ky.) ("*Doe III*"). That case was also dismissed as time-barred.

Concurrent with their filing of *Doe III*, the 58 named plaintiffs therein also moved separately, pursuant to Rule 60(b)(4), to intervene in *Guy* and *Doe I*. The plaintiffs argued that the district court's failure to give notice to the putative class of the proposed dismissal of those cases violated class members' due process rights, making the judgments in the two cases void. The district court rejected this motion.

B. Appeals to the Sixth Circuit

Related appeals were taken to the United States Court of Appeals for the Sixth Circuit.

On May 5, 2005, the Sixth Circuit issued an opinion holding that the district court abused its discretion in not providing notice to putative class members in *Guy* and *Doe I*. *See Doe v. Lexington-Fayette Urban County Gov't.*, 407 F.3d 755, 763-64 (6th Cir. 2005). The Sixth Circuit declined to vacate the judgment in *Doe I*, however, reasoning that it did not wish to disturb the settlement therein. *Id.* at 764. Instead, the Sixth Circuit vacated only the district court's judgment in *Guy*, stating that such an approach "reaches the equitable result of allowing the

Does to go forward with their case while preserving the settlement reached by the *Doe I* parties." *Id.*

The Sixth Circuit further stated: "Because *Guy* will be reopened, however, the various statutes of limitation will be considered as tolled from and after the filing of *Guy*." *Id.* (citing *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 353-54 (1983)).

C. Litigation Following Remand

On remand, plaintiffs -- who by then were represented by two separate sets of attorneys -- were given leave to file amended complaints.[2] Those amended complaints were filed in December 2006. (Doc. ##184, 185)

In their amended class action complaint, the *Doe* plaintiffs named not only the LFUCG as a defendant, but they also named fourteen individual city officials. (Doc. #184) The *Roes*, in turn, named the LFUCG and ten of the fourteen individual officials named by the *Does*. (Doc. #185)

The individual defendants moved to dismiss all claims against them as time-barred. In a memorandum opinion and order, dated June 27, 2007, this court granted the individual defendants' motion to dismiss. (Doc. #255) In pertinent part, this court held that:

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[2]For clarity, one set of plaintiffs was designated the "Doe" plaintiffs, and the other as the "Roe" plaintiffs.

(1) Plaintiffs' causes of action against the individual defendants accrued at the time plaintiffs were abused by Berry, and the statute of limitations began to run at that time, unless plaintiffs were under legal disability (*id.* at 6-7);

(2) The filing of *Guy* did not toll the running of the statute of limitations as to the individual defendants not named therein (*id.* at 5-6);

(3) The filing of *Doe I* on May 3, 2000, tolled the statute of limitations on claims against the individual defendants named therein in their individual capacity with respect to any plaintiffs whose claims were not already time-barred as of that date (*id.* at 8 n. 3);

(4) The claims against the individual defendants in plaintiffs' amended complaints did not relate back under Fed. R. Civ. P. 15(c) (*id.* at 14); and

(5) The claims against the individual defendants were time-barred, except perhaps for any who may have been under legal disability (*id.* at 15).

As to any plaintiffs who might allege that their claims were timely due to having been under a legal disability, the court stated: "Such plaintiffs, if any, may seek modifications to this order on the basis of circumstances pertaining to them individually." (*Id.* at 15)

On September 17, 2007, the court issued an order clarifying that its opinion dated June 27, 2007 did not apply to the ultimate statute of limitations issue as to the LFUCG, as opposed to the individual defendants. (Doc. #300) The court noted that the "parties agree that further discovery on the timeliness of plaintiffs' claims against the LFUCG should occur." *Id.* at 2. The court set a deadline of May 14, 2008 for such discovery, and

stated that discovery as to plaintiffs' alleged legal disabilities would be held in abeyance pending further order of the court. *Id.* at 3.

On March 13, 2008, the court issued a memorandum opinion and order granting defendant's motion for partial judgment on the pleadings, dismissing all claims save those under 42 U.S.C. §§ 1983, 1985 and 1986. (Doc. #313)[3]

Thereafter, defendants filed two separate motions for summary judgment, and plaintiffs filed a motion to modify the court's June 27, 2007 order as to individuals alleged to have been under legal disabilities. These motions were ripe in December 2008 and January 2009, respectively. The court held oral argument on January 9, 2009, after which it ordered the parties to supplement the record with materials from the Sixth Circuit appeal. (Doc. #370) Those materials have been filed.

Analysis

A. Statute of Limitations

The court's opinion and order of June 27, 2007 (Doc. #255) discusses in detail the applicable law governing the accrual of causes of action. Importantly, under "federal law, the limitations period begins to run when a plaintiff knew or should have known of the injury that forms the basis of the claim." *Fox*

[3]The court dismissed the state law tort claims against the LFUCG on grounds of sovereign immunity. At that time, of course, the individual defendants had been dismissed.

v. DeSoto, 489 F.3d 227, 233 (6th Cir. 2007) (citation omitted). After allowing further discovery and briefing on the issue of the running of the statute of limitations as to the LFUCG, the court concludes that plaintiffs' claims against the LFUCG accrued, like their claims against the individual defendants, at the time they were abused by Berry.

Plaintiffs undoubtedly knew they were injured at the time that these acts, the latest of which is alleged to have occurred in 1996, were committed. As the court previously noted, plaintiffs also allege in their Amended Complaint that the connections of the Micro-City program to the urban government were well known in the community. For the reasons stated in the court's June 27, 2007 opinion, plaintiffs need not have known all the facts necessary to bring a cause of action, so long as they knew they had been injured and that their injuries were caused in part by another person's conduct.[4]

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[4]In plaintiffs' joint memorandum in opposition to defendant's motion for summary judgment on the statute of limitations, plaintiffs argue that an action does not accrue under Kentucky law until plaintiff discovers not only that he has been injured, but also that the injury may have been caused by defendant's conduct. (Doc. #344 at 29) This argument is misplaced, of course, because "[t]he date on which the statute of limitations begins to run in a § 1983 action is a question of federal law." *Eidson v. State of Tenn. Dep't of Children's Serv.*, 510 F.3d 631, 635 (6th Cir. 2007) (citation omitted). Moreover, a claim likewise generally accrues under Kentucky law when the injury occurs, and Kentucky courts have held that the "discovery" rule does not apply to delay the accrual of sexual abuse claims. *See, e.g., Roman Catholic Diocese of Covington v. Secter*, 966 S.W.2d 286, 288-90 (Ky. App. 1998).

Plaintiffs argue strenuously that this accrual rule does not apply to their claims against the LFUCG because liability against the LFUCG is premised, not upon the abuse itself, but rather on the LFUCG's knowledge of Berry's propensities and its failure to take action that would have prevented Berry from carrying out such abuse. This "custom or policy" of inaction, plaintiffs allege, was the moving force that led to their constitutional deprivation. (Amended Compl. ¶¶ 25, 59, 66, 72, 81, 87-88, 96, 104, 125, 146)[3]

This characterization of plaintiffs' claim against the LFUCG does not lead to a different result. A "custom or policy" of failing to take steps to thwart Berry's illegal activities could not have caused plaintiffs injury any later than the date that they were allegedly abused. Stated differently, how could a cause of action for a deliberately indifferent failure to prevent abuse accrue any later than the date of the abuse which defendant failed to prevent? Viewed from either angle, plaintiffs' claims all arise out of the acts of abuse allegedly committed against them, and those claims thus accrued at the time the abuse was committed.

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[3]In their argument to the Sixth Circuit, plaintiffs' counsel stated: "The injury here is the negligent exposure to a known problem. The injury is the LFUCG's negligent exposure of these children to a known sexual predator." (Certified Transcript of Sixth Circuit Argument, March 16, 2005 at 56)(Doc. # 377) ("Transcript")

The Sixth Circuit's 2005 decision is not to the contrary. All the Sixth Circuit held was that the district court erred in not giving notice to putative class members in *Guy* and *Doe I* when those actions were dismissed after settlement, and that such error rendered the judgments "void" for purposes of Fed. R. Civ. P. 60(b)(4). *See Doe v. Lexington-Fayette Urban County Gov't.*, 407 F.3d 755, 763-64 (6th Cir. 2005). The Sixth Circuit expressly declined to reach the statute of limitations issues in the cases. *Id.* Indeed, the plaintiffs did not ask the court to render any relief as to the statute of limitations.[6]

Plaintiffs correctly noted during oral argument before this court that, but for the panel's concern about unraveling the *Doe I* settlement, the Sixth Circuit stated that it would have been inclined to vacate the judgment in that action, just as it did in *Guy*, for failure of notice. *Id.* at 764. What would have happened had it done so? The *Doe I* plaintiffs would then have

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[6]The transcript of the Sixth Circuit oral argument, which has been filed with this court, is telling:

> Judge Cole: You're not asking that this court make any determination specifically as to when the statute of limitations accrued, just that we would reverse the District Court, send this back to the District Court for determination there of when the plaintiffs knew that the defendant was involved and purportedly covering up and condoning this activity?
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> By Mr. Morris: That's correct, Your Honor. . . .

(Transcript at 22) (Doc. #377)

been in the same position that they were in before the district court entered judgment in that case on June 28, 2002. They would not, however, have been in any *better* position.

Yet this is what plaintiffs advocate: that they be deemed to have filed, in 1998, claims against individuals who were never named as defendants in the *Guy* complaint and who were not so named until the filing of *Doe I* two years later.

While plaintiffs base these arguments on alleged ambiguities in the Sixth Circuit's opinion, this court believes that, in light of the whole record, no such ambiguity exists. The Sixth Circuit left it for the district court on remand to address the statute of limitations issues, and it gave no indication that it intended to effect the changes in existing law that plaintiffs urge this court to adopt by reading in between the lines of that opinion.[7]

Therefore, the court concludes that plaintiffs' claims against the LFUCG accrued at the time that they were abused and that, but for the four individuals discussed below, those claims are time-barred.[8]

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[7]In light of its ruling on the accrual issue, this court need not address the issues concerning pervasive publicity and judicial estoppel.

[8]The court also does not find persuasive plaintiffs' argument that the LFUCG is estopped from asserting the limitations defense due to its violation of the Kentucky statute which requires persons to report actual or suspected child abuse. *See* KRS 620.030. Unlike the Diocese in *Secter*, upon which

B. Motion to Modify

Plaintiffs move to modify the court's June 27, 2007 opinion and order to permit four individual John Doe plaintiffs who either (1) obtained the age of 18 less than one year before *Guy* was filed; (2) were minors at the time that *Guy* was filed; or (3) were minors both at the time *Guy* and *Doe I* were filed, to proceed with claims against both the LFUCG and the ten individual defendants named in *Doe I*.[9] Plaintiffs also ask the court to reconsider its June 27, 2007 order as to the timeliness of all other plaintiffs' claims against individual defendants named in their Amended Complaints in this matter.

Plaintiffs' latter request is denied. For the reasons stated above and in the court's previous orders, the filing of *Guy* tolled the statute of limitations only as to the defendant named therein - the LFUCG - and not as to defendants who were not named in the original complaint. It was not until the filing of *Doe I* that any individual defendants were sued, and thus only

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plaintiffs rely, the LFUCG did not actively conceal actual knowledge of the abuse of identified children, which was the basis for the estoppel in that case. *Secter*, 966 S.W.2d at 290. Although the court concludes that evidence of the information conveyed to city officials is sufficient to raise a triable issue as to "custom or policy," *see infra*, it does not believe the evidence shows that the information conveyed to the LFUCG was so specific as to raise a duty to report under the statute at issue.

[9]The ten individual defendants named in *Doe I* were Pam Miller, H. Foster Pettit, James Amato, Scotty Baesler, Robert Jefferson, Michael Wilson, John McFadden, Lawrence Walsh, Barbara Curry, and Arnold Gaither.

that action may toll the limitations period for claims against them. The June 24, 2002 order by Judge Forester allowing John Doe #18 to intervene in *Doe I* makes no finding as to the timeliness of his claims,[10] and it does not alter this court's conclusions as to the tolling effect of *Guy*.

The issues raised as to the four John Does are more complex. The pertinent dates as to the timeliness of their claims are:[11]

Name	Date of Birth	Date Statute of Limitations Expired
John Doe #24	6/23/81	6/24/00
John Doe #33	10/13/83	10/14/02
John Doe #39	6/5/81	6/6/00
John Doe #45	11/12/79	11/12/98

1. John Doe #45

John Doe #45 reached the age of majority on November 12, 1997. His claim against the LFUCG is thus timely because *Guy* was filed on October 15, 1998, less than one year later. *See* KRS 413.170(1).

As to defendants not named in *Guy*, however, his statute of limitations expired on November 13, 1998, one year after he

[10]This order is attached as Exhibit D to defendants' opposition to plaintiffs' motion to modify. (Doc. #363)

[11]The court recognizes that defendants have not yet had an opportunity to conduct discovery as to the merits of these plaintiffs' claimed legal disabilities, and as discussed below, it will afford them an opportunity to do so.

reached the age of majority. Because *Doe I* was not filed until May 3, 2000, any claim by John Doe #45 against the individual defendants is thus time-barred.

2. John Doe #24

John Doe #24 reached the age of majority on June 23, 1999, after the filing of *Guy*. His claim against the LFUCG is thus timely. His statute of limitations as to defendants not named in *Guy* then expired one year after his eighteenth birthday, on June 24, 2000. As noted, *Doe I* was filed more than a month before that date, and thus John Doe #24's claims against the ten individual defendants sued therein are also timely.

The court rejects defendants' argument that the dismissal of *Doe I* on June 28, 2002, caused the limitations period to begin running anew. That dismissal was entered without notice to the putative class which, as the Sixth Circuit concluded, was an abuse of discretion rendering the judgment void as to class members who did not receive notice.

3. John Doe #33

John Doe #33 reached the age of majority on October 13, 2001, after the filing of both *Guy* and *Doe I*. His claims against the LFUCG and the ten individual defendants named in *Doe I* are thus timely.[12]

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[12]In addition, John Doe #33's statute of limitations did not expire until October 14, 2002. *Doe II* was filed before that

4. John Doe #39

John Doe #39 reached the age of majority on June 5, 1999, after the filing of *Guy*. His claims against the LFUCG are thus timely. His statute of limitations as to defendants not named in *Guy* expired on June 6, 2000, before the filing of *Doe I*, and his claims against the ten individuals sued therein are also timely.

C. Official Custom or Policy

Defendant's second motion for summary judgment argues that the LFUCG is entitled to summary judgment on plaintiffs' § 1983 claims because the evidence does not raise a triable issue as to whether the LFUCG had a "custom or policy" of inaction in the face of notice of Berry's unlawful activities. The court has reviewed the record on this issue and disagrees.

There is evidence in the record from which a reasonable jury could infer that Lexington mayors, council members, and police officials were informed generally of Berry's unlawful activities and took no action to investigate those activities or indicated a lack of intent to do so based on political considerations.

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date, on September 25, 2002. There were an additional four individual defendants named in *Doe II* who were not named in *Doe I* and who the Doe plaintiffs named in their amended complaint (Doc. #184) herein: George Brown, Donna Alexander Cantrell Counts, Sandra Nichols, and Mary Ann Delaney. Although plaintiffs do not make this assertion in their motion to modify, it would appear to the court that this plaintiff, subject to discovery, would also have timely claims against these four additional defendants. Because plaintiffs have not addressed this issue, the court will require them to file a statement as to their position on this question.

(Parsons Depo. 22-24) Contrary to defendants' assertions, this evidence does not show that such knowledge was merely of "rumors" or "scuttlebutt."

In sum, viewing the record in its totality, the court concludes that plaintiffs have "advance[d] sufficient evidence to create a genuine issue of material fact as to the existence of such custom or policy" for purposes of their § 1983 claims. *Doe v. Claiborne County, Tenn.*, 103 F.3d 495, 509 (6th Cir. 1996). Whether defendants' conduct constituted "deliberate indifference" is then a question for a jury "and not for the court at the summary judgment stage." *Id.*[13]

Conclusion

These rulings allow only those four individuals identified above to survive the current motions for summary judgment and to proceed, at this juncture, against the defendant(s) against whom they have timely claims under the above analysis. With only these four *Doe* plaintiffs having timely claims, it thus appears that the claims of all *Roe* plaintiffs are time-barred and that group of plaintiffs falls out of the case.

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[13]The court also finds, at this stage, that triable issues exist on plaintiffs' claims under 42 U.S.C. §§ 1985, 1986. While defendants argue that plaintiffs have shown no racial motivation on defendants' part, the fact that there is evidence that inaction on the part of LFUCG officials was motivated by a desire to capture the vote of the black community brings race sufficiently into play to create a jury question on these claims.

The court recognizes that, because all individual defendants were previously dismissed, defendants have not yet had either a reason or opportunity to brief the issues of qualified and perhaps other types (*e.g.*, legislative) of immunity. The court will thus allow briefing on those defenses following a period of additional discovery as to the four plaintiffs discussed herein.

Therefore, having reviewed this matter, and the court being otherwise sufficiently advised,

IT IS ORDERED that:

(1) Defendant's motion for summary judgment as to policy or custom (Doc. #323) be, and is hereby, **DENIED**;

(2) Defendant's motion for summary judgment as to the statute of limitations (Doc. #341) be, and is hereby, **GRANTED IN PART AND DENIED IN PART**, consistent with this opinion;

(3) Plaintiffs' motion to modify (Doc. #357) be, and is hereby, **GRANTED IN PART AND DENIED IN PART**, consistent with this opinion. All four plaintiffs discussed herein may proceed with their claims against the LFUCG. In addition, the claims of John Does #24, #33, and #39 against the ten individual defendants who were named in *Doe I*, as identified in this opinion, are hereby **REINSTATED**[14];

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[14]Because the court's prior dismissal of the state law tort claims was only as to the LFUCG, those claims would also now be

(4) Defendants' motion for leave to file surreply (Doc. #371) be, and is hereby, **GRANTED**, and their motion for leave to file a post-hearing memorandum (Doc. #376) be, and is hereby, **DENIED**;

(5) The Doe plaintiffs shall file a notice **on or before May 12, 2009**, stating their position as to whether John Doe #33 is also pursuing claims against George Brown, Donna Alexander Cantrell Counts, Sandra Nichols, and Mary Ann Delaney;

(6) Defendants shall have until **June 30, 2009** to conduct discovery as to John Does #24, #33, #39, and #45;

(7) Defendants shall file any motion for summary judgment on the grounds of any type of immunity **no later than August 4, 2009**;

(8) This matter is set for a final pretrial conference on **Friday, December 11, 2009 at 10:00 a.m.** A copy of the court's standard final pretrial order shall enter concurrently herewith; and

(9) This matter is set for a jury trial to commence on **January 12, 2010 at 10:00 a.m.**

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reinstated as to these three plaintiffs.

This 1st day of May, 2009.

Signed By:
William O. Bertelsman WOB
United States District Judge