

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
AT LEXINGTON
CIVIL ACTION NO. 98-431-WOB

KEITH RENE GUY, SR., *et al*

PLAINTIFFS

VS.

LEXINGTON-FAYETTE URBAN
COUNTY GOVERNMENT, *et al*

DEFENDANTS

**DOE IV PLAINTIFFS' OBJECTION TO MOTION
FOR LEAVE TO POST-HEARING MOTION**

May it Please the Court:

Come the Doe IV Plaintiffs, by and through counsel, and for their Objection to Defendants' Motion [DE#375] to File yet another Memorandum (and Replies in Support thereof) on the Doe IV Plaintiffs' Motion to Amend the June 27, 2007 Order [DE#241], state as follows:

The Federal Rules of Civil Procedure were established in such a way that competent legal counsel would be capable of adequately addressing complex legal issues. The well-known format for adjudication of legal issues is the filing of a Memorandum, a Response, and, finally, a Reply (if warranted). In rare circumstances, although the rules do not provide for any such filing, Courts may deviate from those Civil Rules and allow the party filing a Response to tender a "Sur-Reply" in order to address issues that were raised for the first time in a Reply. The Civil Rules assume that educated legal representatives have the capability

of succinctly setting forth positions and, more importantly, that issues need to be addressed in a structured, reasonable, manner.

Incredulously, despite having over 100 attorneys at their disposal, the Individual Defendants and their counsel appear to acknowledge that:

- 1) they were unable to include all of their arguments and thoughts in their initial Response [DE#363];
- 2) they were unable to articulate a proper position during the Oral Argument on January 9, 2009; and as a result
- 3) they needed to file a Sur-Reply – but were unable to formulate an adequate response in the Motion seeking permission to file the Sur-Reply, nor in the actual Sur-reply Opposing the Doe IV Motion to modify the June 27, 2007 Order [DE#371]; and
- 4) they still could not fully respond in their Reply in Support of Motion to File Sur-reply [DE#375].

Having failed to address the issues sufficiently in its original Response, the Oral Argument, or the Sur-Reply (and accompanying Motion and Reply), the Defendants now demand yet *another* filing, this time in the form of a “Post Hearing Memorandum,” in order to regurgitate the rehashed arguments contained in each of the previous filings – and, more importantly, squarely addressed by the Sixth Circuit when it remanded the Guy matter. Despite the Defendants’ protestations to the contrary, this Memorandum clearly addresses the very same issues which were raised in the Doe IV Plaintiffs’ Motion [DE#357] and Reply [DE#367] – and which were thoroughly argued before the Court during the January 9, 2009 Hearing. Frankly, it is beyond comprehension that Defense counsel would be audacious

enough to request leave to file this latest Memorandum – much less file it even before the Court had had an opportunity to even address its previous Motion for Leave to File a Sur-Reply! The Court filings are coming so quickly that Defendants cannot even wait for a ruling on their previous Motion before rushing out another argument.

The reason for the Defendants' frantic attempt to try to re-argue all of these issues is blatantly obvious: Defendants are fully aware of the fact that their proverbial ship is sinking. The Sixth Circuit *clearly* heard extensive argument about the impact of John Doe I, #18, the law of the case, judicial estoppel, equitable estoppel, and the statute of limitations, all as reflected in the transcript of the Sixth Circuit's Oral Argument.¹ As a result, Defendants can no longer deny that the issues raised by the Doe IV Plaintiffs in their Motion to Alter, Vacate, or Amend – i.e., the Statute of Limitations issue surrounding Doe I #18 and the viability of the Plaintiffs' claims against the 10 Individual Defendants who were sued in Doe I – were squarely before the Sixth Circuit in these four appeals and formed the basis of the Court's ultimate decision and mandate. As Judge Gilman unequivocally stated, if Guy were reopened pursuant to FRCP 60(b)(4), there would simply not be *any* Statute of Limitations issues that faced the putative class.

The Sixth Circuit reviewed the record, heard Oral Arguments, asked pointed questions

¹ It is crucial for this Court to recognize that there were two separate appeals addressed during the combined Oral Argument – the Guy and Doe I appeal, which centered on FRCP 60(b) relief, and Doe II and Doe III, which focused primarily on the Statute of Limitations, equitable tolling, equitable estoppel, and accrual. As reflected in Defendants' Memorandum, and as addressed in more detail hereinbelow, Defendants are desperately attempting to confuse this Court regarding the issues presented therein. Defendants' efforts should not be condoned.

about each of the four cases, and then decided that the best manner in which to handle these matters was to re-open Guy and allow the victims to proceed with their claims against the Defendants named in these four matters. The Defendants, in their tendered Memorandum, try desperately to argue that the Sixth Circuit did not address the Statute of Limitations issues, even going so far, on page 5 of their Memorandum, as to quote a portion of the transcript out of context. However, their effort to mislead this Court is to no avail. Defendants cite to an isolated comment by one of the Judges that Doe IV Plaintiffs' counsel was not seeking a ruling by the Sixth Circuit pertaining to the accrual date of the Statute of Limitations. Importantly, however, as reflected in footnote 1 above, the Oral Argument was a *combined* argument. The judge's comment was in direct response to counsel's discussion addressing the impact of accrual and tolling issues – issues that were only relative to the Doe II and Doe III portion of the Oral Argument, and, most importantly, completely separate from the other appeal, which sought the reopening Guy. Significantly, since neither accrual nor tolling were never even an issue in Guy or Doe I, the comment was solely related to Doe II and Doe III – cases where accrual and tolling would be applicable *but for* the re-opening of Guy. See Transcript [DE#377] at 20-23. On the other hand, Judge Gilman's prior comment acknowledging that if Guy were reopened there would be no statute of limitations issues, is focused solely on the Guy appeal, is directly referenced in the Sixth Circuit's subsequent Opinion, and thwarts the last four years of wrangling by the Defendants herein. In fact, after clearly stating, during oral argument, that the reopening of Guy would negate

all statute of limitations issues, Judge Gilman's Opinion stated, unequivocally:

[V]acating the *Guy* order reaches the equitable result of allowing the Does to go forward *with their case* [i.e., as presented in Doe II and Doe III] while preserving the settlement reached by the *Doe I* parties. Statutes of limitation that cover the acts alleged by the Does range from one year to six years. Because *Guy* will be reopened, however, the various statutes of limitation will be considered tolled from and after the filing of *Guy*. [Citation omitted.] We therefore need not address the discovery-rule and equitable-tolling arguments presented by the Does.

If that were not enough, Judge Gilman expounded upon this position, stating “[b]ecause the *Guy* class action will be reopened for the reasons set forth in Part II.B. above, we need not address the question of whether the statutes of limitation for *Doe II* and *Doe III* were tolled by the filing of *Doe I*.” *Id.* The Court of Appeals did not state that the issues would be addressed on remand. Instead, the Court of Appeals held, unequivocally, “we therefore need not address the discovery-rule and equitable-tolling arguments,” and “we need not address whether the statutes of limitation for Doe II and Doe III were tolled by the filing of Doe I.”

As stated in the Doe IV Plaintiffs' Response to the Defendants' previous request for leave to file a Sur-reply on these same issues: “Because the Defendants do not have an answer, they continue to hope that by filing pleading after pleading, they can somehow confuse this Court and avoid the impact of the prior Orders that have been entered herein. The Sur-Reply [and now the Post-Hearing Memorandum] is pure regurgitation of arguments and positions previously taken and, for that reason, should be disallowed.”

It has now been four years since the Sixth Circuit determined that reopening *Guy* would do away with the Statute of Limitations arguments raised by the LFUCG and the Individual Defendants, making it unnecessary to even address equitable estoppel, equitable

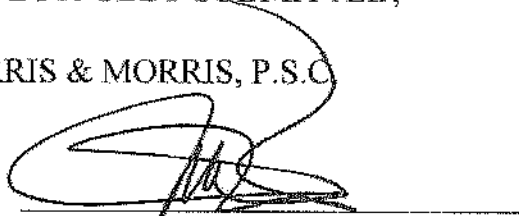
tolling, or the timing of Crown, Cork & Seal— and yet here we are, still squabbling over the same issues that were before the Sixth Circuit! Enough is enough.

Perhaps if the Defendants were forced to pay legal fees associated with this never-ending nonsense, they would cease abusing the judicial process and resources. Otherwise, these frivolous filings and needless multiplying of the litigation herein will continue unfettered. Accordingly, Doe IV Plaintiffs request that the Court put a stop to the apparently never-ending filings being submitted by Defendants, and that the Court order that Defendants reimburse Plaintiffs' counsel for having to repeatedly address their failures and apparent inability to cogently set forth arguments and positions.

RESPECTFULLY SUBMITTED,

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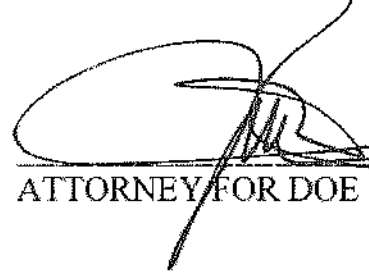
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