

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 PLAINTIFFS' MOTION TO MODIFY JUNE 27, 2007 ORDER
AND MEMORANDUM IN SUPPORT THEREOF**

May It Please the Court:

Come the Doe IV Plaintiffs, by and through counsel, and, in accordance with the Court's June 27, 2007 Order [DE #255] allowing modification of that order upon certain circumstances, and respectfully state as follows: (1) the Doe IV Plaintiffs request that this Court's Order [DE #255] be MODIFIED as to John Doe IV # 24, born June 23, 1981; John Doe IV #33, born October 13, 1983; John Doe IV #39, born June 5, 1981; and John Doe IV #45, born 11/12/1979, as well as any additional Plaintiffs who may be joined who were minors at the time of the filing of *Guy* or *Doe I*; and (2) that the Order be MODIFIED as to the ten Individual Defendants named in *Doe I*. In support, the Doe IV Plaintiffs state as follows:

In its June 27, 2007 Memorandum Opinion and Order [DE #255], this Court stated, on page 15:

[I]t is conceivable that some plaintiffs may have been immune from the running of limitations by some ongoing disability, or their statutes may have been sufficiently tolled by reason of minority, or their claims were otherwise not time-barred as of the filing of *Doe I*. Such plaintiffs, if any, may seek modifications to this order on the basis of circumstances pertaining to them individually.

Since John Doe IV #45, a minor at the filing of Guy, was protected by the tolling of Guy, and since John Doe IV #24 and #38 reached the age of majority within one year of the filing of Doe I, and since John Doe IV #33 was a minor at the time of filing of both Guy and Doe I, each of these four Plaintiffs' claims against the ten individual Defendants named in Doe I should be REINSTATED and these Plaintiffs should be entitled to proceed against the ten individual Defendants named in Doe I on the claims raised therein. Similarly, any additional Plaintiffs who are joined in this action who were minors at the time of the filing of the Guy and Doe I litigation should be permitted to proceed against the Individual Defendants on the claims raised in Doe I.

Secondly, the remaining Doe IV Plaintiffs respectfully request that the June 27, 2007 Order be MODIFIED as to the ten individual Defendants named in Doe I, based upon the June 24, 2002 Order entered by Judge Forester. The June 24, 2002 Order allowed John Doe #18 to intervene as a party plaintiff in the Doe I proceedings – over the strenuous objection of the LFUCG. In the LFUCG's response to John Doe No. 18's Motion to Intervene, [a copy of which is attached to Plaintiffs' Joint Response to Limitations Motion [DE #344] as Exhibit "G"], the Individual Defendants' and LFUCG's counsel asserted that the statute of limitations had run as to claims against the LFUCG **and the individual Defendants** based upon the claims asserted in Guy and Doe I, and that the claims of any additional plaintiffs were forever barred. Id. at 5.

However, Judge Forester, in Doe I, entered an Order on June 24, 2002, rejecting the positions set forth by the LFUCG, and held that John Doe I # 18 was allowed to intervene and to bring forth his claims – including those against the Individual Defendants – because the statute of limitations had not run ***as of June 24, 2002***. Accordingly, Doe IV Plaintiffs respectfully request that this Court MODIFY the June 27, 2007 Order [DE #255] as it pertains to the ten

Individual Defendants named in Doe I. The June 24, 2002 Order, acknowledging that the statutes of limitations had not yet run as of that date, constitutes a judgment that should not be modified by subsequent order, since the LFUCG failed, at any point after the entry of that Doe I Order to challenge the decision that John Doe I #18's claims were timely filed as of that date.

Having previously ruled that an individual – who clearly failed to bring a claim until well after the mid-1998 statute of limitations expiration date now being postulated by the LFUCG – was authorized to intervene because the statute of limitations had been and was still tolled, this District Court cannot now treat these similarly-situated individuals any differently simply because this is a separate case. To hold to the contrary would undermine the Doe I District Court's conclusion that the intervening plaintiff John Doe I # 18 was properly joined to the Doe I action, and allowed to assert his claims against the LFUCG and the Individual Defendants as recently as June 24, 2002, and would impermissibly treat the Plaintiffs herein differently from an individual whose claims were allowed to proceed as late as 2002.

Under the law of the case doctrine, a court generally ought not reopen issues decided at an earlier point in litigation. Agostini v. Felton, 521 U.S. 203, 236 (1997). “Issues decided at an early stage of the litigation, either explicitly or by necessary inference from the disposition, constitute the law of the case.” Hanover Ins. Co. v. American Eng'g Co., 105 F.3d 306, 312 (6th Cir. 1997)(citation and quotation marks omitted). As explained in United States v. Moored, 38 F.3d 1419 (6th Cir. 1994), “[u]nder the doctrine of law of the case, findings made at one point in the litigation become the law of the case for subsequent stages of that same litigation,” *citing* United States v. Bell, 988 F.2d 247, 250 (1st Cir. 1993).

Although the doctrine of law of the case is “not an inexorable command,” the power of a court to reach a result inconsistent with a prior decision reached in the same case is “to be

exercised very sparingly, and only under extraordinary conditions.” General Am. Life Ins. Co. v. Anderson, 156 F.2d 615, 619 (6th Cir. 1946). In Petition of United States Steel Corp., 479 F.2d 489, 494 (6th Cir.), *cert. den.*, 414 U.S. 859, 38 L. Ed. 2d 110, 94 S.Ct. 71 (1973), the Sixth Circuit held that the law of the case doctrine dictates that issues, once decided, should be reopened only in limited circumstances, *e.g.*, where there is "substantially different evidence raised on subsequent trial; a subsequent contrary view of the law by the controlling authority; or a clearly erroneous decision which would work a manifest injustice." (*citing White v. Murtha*, 377 F.2d 428, 431-432 (5th Cir. 1967)), *accord United States v. Rivera-Martinez*, 931 F.2d 148 (1st Cir.), *cert. den.*, 112 S.Ct. 184 (1991).

In the case at bar, put simply, Defendants cannot avoid the impact of the June 24, 2002 Doe I Order allowing intervention of John Doe I #18 against the LFUCG and these individual Defendants as not being barred by the statute of limitations as of June 24, 2002. Since a judicial determination has already been made that the statute had *not* run against these ten Individual Defendants as of June 24, 2002, the LFUCG is precluded from re-litigating that decision, and this Court's June 27, 2007 Order [DE #255] should be MODIFIED to permit the Plaintiffs to assert their claims against the ten Individual Defendants who were named in Doe I on the claims raised in Doe I.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

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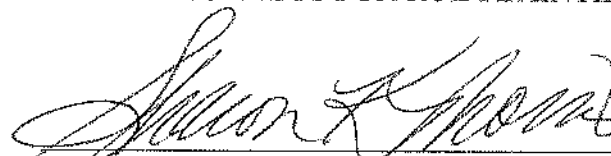
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