COMMONWEALTH OF KENTUCKY
SUPREME COURT
NO. 95-SC-001004

J. DENIS GIULIANI, ET AL. **APPELLANTS**

V.

MICHAEL GUILER, M.D., ET AL. **APPELLEES**

** ** ** ** ** ** ** ** ** ** ** ** ** ** ** ** **

ON APPEAL FROM THE COURT OF APPEALS OF KENTUCKY
NO. 94-CA-0021

** ** ** ** ** ** ** ** ** ** ** ** ** ** ** ** **

MOTION FOR LEAVE TO FILE REPLY MEMORANDUM IN SUPPORT OF MOTION TO RECUSE

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Appellee, Michael Guiler, M.D., by counsel, hereby Moves the Court for leave to file the attached Reply Memorandum in support of his Motion to Recuse now pending before the Court. Appellee states that such Reply Memorandum is necessary for a full and fair adjudication of the issue presented, because (1) it is Appellee's only opportunity to respond to the issue of waiver raised by Appellant in his response, and (2) new evidence specifically related to the issue of whether there is an appearance of impropriety in the appointment of Special Justice Thomas Conway is attached and included as part of the Reply Memorandum. The Reply Memorandum is brief, and not cumulative of any other filing in this action; Appellee therefore requests that it be filed of record as part of his position in this case.

NEWBERRY, HARGROVE & RAMBICURE, PSC

BY: _____
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(606) 231-3700

ATTORNEY FOR APPELLEE
MICHAEL GUILER, M.D.

This is to certify that a true copy of the foregoing Motion was served by first-class mail, postage prepaid to Ann Oldfather, Esq., Oldfather and Morris, 1330 South Third Street, Louisville, KY 40208; Kenneth W. Smith, Esq., Roberts & Smith, 167 West Main Street, Suite 200, Lexington, KY 40507; Gregory Jenkins, Esq., Boehl, Stoepher & Graves, 444 West Second Street, Lexington, KY 40507; William Gallion, Esq., Gallion, Baker & Bray, PNC Bank Plaza, Suite 710, 200 West Vine Street, Lexington, KY 40507; Hon. John R. Adams, Judge, Fayette Circuit Court, Fayette County Courthouse, 215 West Main Street, Lexington, KY 40507; and to Hon. George Fowler, Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601; this 30 day of July, 1997.

_____
ATTORNEY FOR APPELLEE MICHAEL GUILER, M.D.

COMMONWEALTH OF KENTUCKY
SUPREME COURT
NO. 95-SC-001004

J. DENIS GIULIANI, ET AL. — APPELLANTS

V.

MICHAEL GUILER, M.D., ET AL. — APPELLEES

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ON APPEAL FROM THE COURT OF APPEALS OF KENTUCKY
NO. 94-CA-0021

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REPLY MEMORANDUM IN SUPPORT OF MOTION TO RECUSE

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Appellee, Michael Guiler, M.D., by counsel, hereby submits the following Reply Memorandum in further support of his Motion to Recuse:

I. THE MOTION TO RECUSE HAS NOT BEEN WAIVED

Appellant cites to the decision of Kentucky Utilities v. South East Coal Co., Ky., 836 S.W.2d 407 (1992), in support of the argument that any motion to recuse at this point in these proceedings should be considered waived. The decision in that case unfortunately does not state the acts upon which South East Coal sought recusal, nor when they knew them. However, it must be assumed that sufficient facts were available to South East Coal at or about the time of the appointment of a Special Justice in that case, or else the decision of this Court in that proceeding is wholly inconsistent with well-established principles of "waiver".

"Waiver" is the voluntary relinquishment of a known right. Greathouse v. Shreve, Ky., 891 S.W.2d 387 (1995). In this instance, information raising questions about Special Justice Conway's participation in these proceedings only came to the attention of Appellees after news of the Court's decision was "on the street". Before receiving this knowledge, Appellees had no information with

which to even question the appointment of Justice Conway, much less object to same. To imply any earlier responsibility to raise these questions on the part of a litigant before the Court necessarily implies that each litigant faced with the appointment of a Special Justice should automatically suspect that well-stated principles of judicial ethics may not be followed, and that the appointment should be intimately investigated. This is not, or should not be, the goal in these situations.

It should go without saying that any litigant before this Court, or any other Court of the Commonwealth, should be entitled to some level of trust in the Court, and/or its special appointees, following the guiding principles of the Code of Judicial Ethics. It would be an anarchic state of affairs indeed were litigants encouraged, or even forced, to investigate and object to each and every appointment of a Special Justice for fear of waiving a claim for relief. The doctrine of waiver should thus not be wielded to block legitimate inquiry into questions of judicial ethics, no matter when raised.

II. THE APPEARANCE OF IMPROPRIETY IS SUFFICIENT FOR RECUSAL

Canon 2 of the Code of Judicial Conduct, SCR 4.300, states that **"A Judge should avoid impropriety and the appearance of impropriety in all of his activities."** In the context of a decision affecting the ability of lawyers to enter into alternative fee arrangements, this Court stated, **"the appearance of impropriety is just as egregious as any actual or real conflict".** American Ins. Ass'n. v. Kentucky Bar Ass'n., Ky., 917 S.W.2d 568, 573 (1996). Thus, it is wholly unnecessary to determine whether, in fact, any actual impropriety in this case has occurred, before a recusal is required. Had Appellant read the Motion to Recuse and Petition for Rehearing filed by this Appellee more closely, it would have been obvious that these issues are being raised "upon information and belief", based upon statements made to the undersigned by numerous members of the Bar, specifically including several members of the Jefferson County Bar. Appellee at this time has

no hard evidence of actual impropriety, but has received enough indirect information that the Motion to Recuse became a necessity, particularly on the point that the Special Justice and his clients potentially stood to receive a financial benefit from the decision. Appellee merely seeks that this Court look into the situation, determine whether there is, in fact, at least an "appearance of impropriety", and act accordingly.

That said, there should be no question that the Opinion entered by this Court will provide a cause of action for an entire new class of plaintiffs, and which will necessarily thus provide a new and enlarged source of contingent fee income for the attorneys who will represent them. This expansion of tort liability is clearly a benefit to the Plaintiff's Bar, and the seating of a Special Justice who is an active participant in that group as well as one who represents individuals who might well benefit from this change in the law, and through which he stands to gain personally through contingent fees, clearly taints these proceedings with the appearance of impropriety.

Co-Appellee Central Baptist Hospital, in its Petition for Rehearing, postulated a situation of press coverage of this matter, as an illustration of the appearance of impropriety in this situation. This postulation is now reality - attached herewith is an article from the July 22, 1997 *Louisville Courier-Journal*, which includes interviews with prominent individuals in the legal community, both from Kentucky and from other states. It is clear from this article that the appearance of impropriety is not a figment of the imagination of the Appellees to this case, but is a real, public concern that should be addressed by this Court.

WHEREFORE, Appellee respectfully requests that Special Justice Conway be recused from any and all further proceedings in this case.

NEWBERRY, HARGROVE & RAMBICURE, PSC

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ATTORNEY FOR APPELLEE
MICHAEL GUILER, M.D.

This is to certify that a true copy of the foregoing Reply was served by first-class mail, postage prepaid to Ann Oldfather, Esq., Oldfather and Morris, 1330 South Third Street, Louisville, KY 40208; Kenneth W. Smith, Esq., Roberts & Smith, 167 West Main Street, Suite 200, Lexington, KY 40507; Gregory Jenkins, Esq., Boehl, Stoepher & Graves, 444 West Second Street, Lexington, KY 40507; William Gallion, Esq., Gallion, Baker & Bray, PNC Bank Plaza, Suite 710, 200 West Vine Street, Lexington, KY 40507; Hon. John R. Adams, Judge, Fayette Circuit Court, Fayette County Courthouse, 215 West Main Street, Lexington, KY 40507; and to Hon. George Fowler, Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601; this 25 day of July, 1997.

_____
ATTORNEY FOR APPELLEE MICHAEL GUILER, M.D.

Lawyer who drove drunk hears high court's DUI case

Continued from Page One

states, judges from lower courts are assigned; in others, such as Indiana, the highest court simply decides the case with fewer justices, which is how the U.S. Supreme Court does it. In case of a tie vote, the lower court's decision is affirmed.

KENTUCKY CHIEF Justice Robert Stephens declined to comment on the appointments of Conway or Keane, but he defended Kentucky's rules. The state constitution, he said, has been interpreted in a way that bars appointing lower court judges to the Supreme Court.

Stephens said lawyers appointed as special justices take their oaths of impartiality seriously and are able to leave their biases behind. And he said a tie vote that could result when only six justices hear a case would leave the litigants involved less than satisfied.

Kentucky justices who must withdraw from a case in effect select their own replacements, who may be friends or campaign supporters. Each justice submits a list of lawyers in his district who the justice thinks would qualify as a substitute; the chief justice then appoints someone from that list to preside over a particular case. (If two or more justices have to step aside, the governor selects the replacements.)

KEANE AND Conway were appointed to substitute for Justice Martin Johnstone of Louisville, who had to recuse himself because he'd participated in both cases while on the state Court of Appeals.

Keane was appointed as a special justice last December — three months before she was arrested and charged with drunken driving after police spotted her car weaving on Interstate 71. She pleaded guilty in April, and her license was suspended for 90 days.

She served as a substitute justice on the Supreme Court last month as it heard arguments in the drunken-driving case of Lesley Blades of Logan County.

Blades was charged with public intoxication in November 1996 when police found him walking along U.S. 31W in Warren County. When police saw his car a mile away — and he told them he'd driven it there — he was also charged with driving under the influence of intoxicants and subsequently convicted of that offense. In his appeal, he contends there was no evidence to prove he'd been driving the car.

Louisville Bar Association President Margaret Keane, who pleaded guilty to drunken driving, said it was an honor to be a substitute justice.

Keane, whose own driver's license was still suspended when she heard Blades' case, declined to comment on whether she should have heard the matter, which the court is expected to decide soon. She would only say that she was honored to have been appointed as a special justice and that she'd taken an oath to follow the law.

George Gleitz, the assistant county attorney who prosecuted Blades in Warren County, described Keane's involvement with the case as "interesting." Gleitz said he's occasionally left people on juries in drunken-driving cases who had been convicted of that crime themselves, "but I don't make a habit of it."

Joe Gutmann, an assistant commonwealth's attorney in Jefferson County, said a prospective juror in a DUI case who himself had recently been convicted of drunken driving might be automatically dismissed by the court "for cause." But if the potential juror was not dismissed that way, Gutmann said, he'd use one of his "strikes" as a prosecutor to remove the person.

The Code of Judicial Conduct would not automatically disqualify Keane from being a substitute justice, said both Shaman and Monroe Freedman, a Hofstra law professor who is a nationally recognized authority on judicial ethics. They pointed out that there are judges who have been convicted of drunken driving presiding over DUI cases.

"The judge has to look into his or her heart and mind and decide if there's a conflict," Shaman said. Freedman said it is more a matter of public relations than judicial ethics. "It's an unfortunate coincidence," he said.

In the wrongful-death case, the lawyers for one of the doctors involved contend that Conway regularly represents plaintiffs in medical-malpractice suits and other types of cases, and so both he and his clients stand to benefit by the decision to allow a child to collect damages for the loss of a parent's companionship.

CONWAY SAID he resents the implication. He noted that he also represents defendants in civil cases, although more of his clients are plaintiffs.

"Every lawyer comes from some type of background," he said. "They do some type of litigation. But as special judges they sit with complete integrity. They don't go into it with any kind of prejudice in the case. I didn't go into it with any kind of prejudice in this case."

Justice William Cooper of Elizabethtown, who wrote the dissenting opinion in the case, said Conway's situation reflects a problem with the system. In an interview, Cooper said justices voting on cases shouldn't have a financial interest in them.

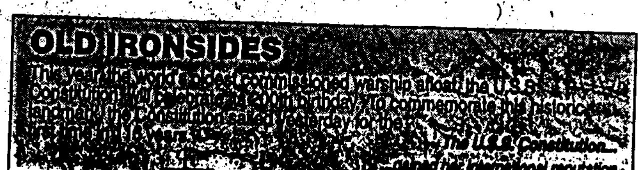
If the case had been decided without a replacement for Johnstone, the vote would have been 3-3 and the Court of Appeals' ruling rejecting the right of a child to sue for loss of a parent's consortium would have stood. Johnstone wrote that opinion for the Court of Appeals, but he said he had no choice but to follow existing case law while on that intermediate court. In the opinion, he urged the parties to appeal to the Supreme Court.

JOHNSTONE SAID in an interview that he would have voted the same way as Conway if he'd heard the case while on the Supreme Court.

Johnstone, who was elected in November and has so far been replaced in nine cases by special justices, said he thinks the lawyers have voted responsibly. "From everything that I've seen, it's worked on a fair and impartial plane," he said.

Still, Shaman said that if Kentucky is going to continue to appoint private practitioners to its court of last resort, it should make sure they're not handling the types of cases they might be arguing later.

Hoosier gets to set



Victim recounts abduction

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to wiggle her hand up behind the outside of a shade in the van, she said.

she got a notice from her bank indicating that more than $400 had been

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FORECAST

Chance of storms

Kentucky: Chance of thunderstorms through tomorrow. Highs, low 90s today, near 90 tomorrow. Lows tonight, 65 to 70.
Details, B2

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Marblehead, Mass., on a one-hour voyage marking its 200th anniversary. The ship is normally docked at the Charlestown Navy Yard near Boston, where it has been a floating museum for generations.

The 44-gun frigate sailed the Atlantic at a modest speed of 4 knots in light winds.

The sailing was vastly different from the days when the Constitution outran its enemies, deflected cannonballs and outgunned the British in the War of 1812.

"At first, it was a little bit scary," said Bill Conser, a Navy recruit, as he prepared to climb the rigging. "But it's something you overcome. If someone were shooting a cannonball at me, it would make it a lot harder to do."

Launched on Oct. 21, 1797, as one of the Navy's first warships, Old Ironsides was undefeated in 30 engagements.

A 3½-year restoration effort cost $12 million.

Modern sailcloth and computers aided yesterday's crew, who worked in dress whites as officers in period costume shouted orders from the deck.

The 204-foot, three-masted frigate traditionally has ventured from its dock only once a year on the Fourth of July, when it was turned around to make sure it weathered evenly. It last sailed under its own power in 1881.

The ship was to be towed back to Charlestown last night.

ASSOCIATED PRESS

Crewmen unfurled sails on Old Ironsides as it began its hourlong trip from Marblehead, Mass., to Boston yesterday.

HOOSIER ON BOARD: A Columbus, Ind., seaman helped set sails. **A5**

Group Inc., "but they canceled after five, six months."

LeBow did not specify how much money Liggett got from its largest competitor, but he said that at the time Liggett was spending $10 million a year defending itself from lawsuits and other accusations that its products were killing its customers.

In a highly unusual move, LeBow testified on behalf of 60,000 former and current non-smoking airline flight attendants who are suing the tobacco industry for $5 billion for health problems they say they suffered from breathing secondhand cigarette smoke on the job. It's the first class-action suit against the industry to come to trial.

LeBow is chairman of Brooke Group Ltd., whose Liggett Group makes Chesterfield, L&M and more than 100 discount and generic

Yesterday LeBow testified against his company — Liggett is a defendant — and was questioned by lawyers for his company.

Plaintiffs' attorney Stanley Rosenblatt said Philip Morris "didn't pay his bills out of the goodness of their heart. That was a means of buying his silence and his cooperation so he would not be a spokesman for the opposite position."

LeBow was unequivocal when Rosenblatt asked if smoking causes cancer, heart disease, emphysema and other diseases. "The answer is yes," LeBow said.

To another question, he responded, "Yes, we believe that for many people smoking cigarettes is very addictive."

But he was less certain whether secondary smoke — the issue in the trial — is injurious.

KENTUCKY'S UNIQUE SYSTEM FOR NAMING SUBSTITUTE JUSTICES IS QUESTIONED

Lawyer who drove drunk hears DUI case for Supreme Court

"It's just daggone wrong," former Chief Justice John Palmore said of the state's use of private lawyers to fill in for justices. "It's fundamentally unsound."

By KIM WESSEL
The Courier-Journal

Just two months after the president of the Louisville Bar Association pleaded guilty to drunken driving, she sat as a special justice on the Kentucky Supreme Court in a drunken-driving case and will eventually vote on its outcome.

Authorities on judicial ethics say the appointment of Margaret Keane as a special justice creates the appearance of a conflict of interest and raises doubts about the court's impartiality.

They also say it illustrates the flaws in Kentucky's apparently unique system of appointing private lawyers — including some who might benefit financially from their votes — to fill in for justices who must disqualify themselves.

"It's just daggone wrong," said former Chief Justice John Palmore. "It's fundamentally unsound."

Just last month, while serving as a special justice, a prominent Louisville plaintiffs' lawyer, Tom Conway, joined in a 4-3 vote allowing children to collect damages for the loss of a parent's companionship in wrongful-death cases. In a petition asking the court to reconsider, the losing side has questioned the propriety of Conway's appointment, noting that he and his clients could profit from it in future cases.

In an interview, Conway denied that his background as a plaintiffs' lawyer figured in his vote. "Special judges sit with complete integrity," he said.

But others say that putting private lawyers on the state's highest court is asking for trouble. "It strikes me as not being a very good system," said Jeffrey Shaman, a DePaul University law professor who is also a senior fellow of the American Judicature Society.

Shaman said Kentucky is the only state he knows that assigns lawyers to take the place of justices. In some

See LAWYER
Page 5, col. 1, this section