

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

FILED

AUG 06 1997

CLERK
SUPREME COURT

J. DENIS GIULIANI, Administrator of the
Estate of Mary K. Giuliani, Deceased;
J. DENIS GIULIANI, Individually; J. DENIS GIULIANI,
FATHER AND NEXT FRIEND OF JAMES M. GIULIANI, an
infant, KATHERINE M. GIULIANI, an infant, MARY K.
GIULIANI, an infant, and DAVID M. GIULIANI, an infant

APPELLANTS,

-v-

APPELLANTS' RESPONSE IN OPPOSITION TO
APPELLEE GUILER'S MOTION FOR LEAVE TO
FILE REPLY MEMORANDUM

MICHAEL GUILER, M.D.; RICHARD BENNETT, M.D.;
VELMA TAORMINA, M.D.; UNIVERSITY OF KENTUCKY
MEDICAL CENTER RESIDENTS TRAINING PROGRAM;
and BAPTIST HEALTH CARE SYSTEMS, INC., D/B/A
CENTRAL BAPTIST HOSPITAL

APPELLEES.

* * * * *

Appellee Guiler seeks leave to file a Reply Memorandum in Support of his Motion to Recuse Special Justice Conway contending (1) that he has had no opportunity to address the issue of waiver, (2) that he has "new evidence" of impropriety on the part of Special Justice Conway, and (3) that the tendered Reply is not cumulative. Not one of these three contentions is accurate.

Appellee Guiler argues this is his "only opportunity to respond to the issue of waiver raised by Appellant in his Response." But it is obvious that waiver was the first and foremost legal impediment to Appellee's motion; Appellee Guiler knew this, as is clear from his simultaneously filed Petition for Rehearing in which he stated "undoubtedly Appellants will object that this argument is waived." (Guiler's Petition for Rehearing at 3). The rules of appellate procedure do not allow a party to file a reply brief after filing a Motion in the appellate courts.

Appellee Guiler was fully aware of the issue of waiver at the time he filed his Motion to Recuse and he chose not to brief the issue. That was his strategic choice. Appellee should not be allowed to file a Reply simply because he chose not to address an issue when he had the opportunity to do so.

Second, Appellee Guiler submits no “new evidence” of impropriety. Leaving aside the elementary question relative to a newspaper story as evidence, and the question of whether anything is “new,” the newspaper story does not, as Appellee Guiler contends, contain one iota of criticism from “prominent individuals in the legal community.” (Guiler’s Tendered Reply at unnumbered 3). Nor does it make the first mention of “real, public concern” (*id.*) regarding Special Justice Conway’s alleged impairment to sit in this case due to his prior (and presumably future) representation of injured parties. It is ironic, and deserves mention, that the *only* criticisms in the story specific to Special Justice Conway are the references to Appellees’ Petitions for Reconsideration. Kentucky’s system for use of Special Justices, while criticized in the newspaper story, is not an issue here by Appellees’ express admission.

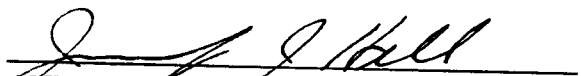
Third, the balance of Appellee Guiler’s argument in his Reply Memorandum (and well over one half of the tendered Memorandum) *is* cumulative as he reargues the contended “appearance of impropriety” which was the basis of his Motion to Recuse.

Appellee Guiler laments that he should have been able to “have some level of trust in the Court” and not have had to “intimately investigate” Special Justice Conway’s background. (Guiler’s Tendered Memorandum at unnumbered 2). This is not about “trusting the Court” in making proper appointments, rather it is about litigants being prepared and taking responsibility when and if they are not. Any litigant is, and should be, knowledgeable about the jurists sitting on their cases, and whether they have addressed a particular issue previously. It would not have

taken Appellee much effort to learn of Special Justice Conway's practice and background from the "numerous sources" he now has, particularly given the "prominent" role Special Justice Conway plays in the plaintiff's bar. It would not have been difficult for Appellee to obtain the data (or lack of data) he now has sometime in the six months before this Court rendered its Opinion.

For all the above reasons, Appellee Guiler's Motion for Leave to File a Reply Memorandum in Support of his Motion to Recuse should be denied.

Respectfully submitted,


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CERTIFICATE OF SERVICE

It is hereby certified that a copy hereof was this 5^A day of August, 1997, mailed to Hon. John R. Adams, Judge, Fayette Circuit Court, Division 4, Fayette County Courthouse, 215 W. Main St., Lexington, KY 40507; Hon. George Fowler, Clerk, Kentucky Court of Appeals, 360 Democrat Boulevard, Frankfort, KY 40601; David C. Trimble, Esq., 2800 Lexington Financial Center, Lexington, KY 40507, Kenneth W. Smith, Esq., Ste. 200, 167 W. Main St., Lexington, KY 40507; William T. Adkins, Esq., Ronald L. Greene, Esq., 444 W. Second St., Lexington, KY 40507; and William J. Gallion, Esq., 200 W. Vine St., Ste. 710, Lexington, KY 40507-1620, Counsel for Appellees.


Counsel for Appellants