

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF KENTUCKY  
AT ASHLAND  
CASE NO. 0:15-CV-00044-DLB

APRIL MILLER, *et al.*

PLAINTIFFS

v.

ROWAN COUNTY, KENTUCKY, *et al.*

DEFENDANTS

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DEFENDANT ROWAN COUNTY, KENTUCKY'S RESPONSE IN OPPOSITION  
TO THIRD-PARTY DEFENDANTS' MOTION TO AMEND FINDINGS  
AND CONCLUSIONS AND MOTIONS TO AMEND JUDGMENT

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The Defendant, Rowan County, Kentucky, by and through counsel, and for its Response to in Opposition to Third-Party Defendants' Motion to Amend Findings and Conclusions and Motion to Amend Judgment, (R. 208) states as follows:

**I. THE THIRD-PARTY DEFENDANTS MOTION SHOULD BE DENIED BECAUSE THEY HAD THE OPPORTUNITY TO RAISE THEIR ARGUMENTS BEFORE JUDGMENT AND FAILED TO DO SO**

The Third-Party Defendants' Motion is premised on the assumption that they were blindsided by the Court's decision as to attorney fees. Acting on this assumption, they assert that their Motion is procedurally proper because they did not have the opportunity to participate when Plaintiffs' attorney fee petition was briefed. (R. 208 at PageID 3009 n. 2)

But, as the Court has already noted, the Third-Party Defendants were placed on notice that they *should* have participated in the briefing on Plaintiffs' attorney fee petition even though they chose not to do so. (R. 206 at PageID 2966 n.22) Indeed, the Court initially found that Davis acted as a state, rather than County, policymaker in its August 12, 2015 Order granting the preliminary injunction. (R. 43 at PageID 1153) This Order was

entered after Defendant Davis filed her Third-Party Complaint against the Third-Party Defendants, so they were most certainly part of the action at the time. (*See* R. 34)

Based on these circumstances, the Court correctly concluded that the Third-Party Defendants had “notice and an opportunity to respond” during the initial briefing of Plaintiffs’ attorney fee petition. (R. 206 at PageID 2966 n.22) As such, they could have raised the arguments in the instant Motion at that time. Rule 59, of course, cannot be used as a vehicle “to raise arguments . . . that could have been raised prior to the entry of judgment,” *J.B.F. v. Ky. Dep’t of Educ.*, 2017 U.S. App. LEXIS 11778 (6<sup>th</sup> Cir. June 30, 2017) (quoting *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 485 n.5 (2008)). Because they could have, but failed to, make their arguments in response to Plaintiffs’ attorney fee petition, Third-Party Defendants’ Rule 59 Motion is improper and should be denied.

## **II. THIRD-PARTY DEFENDANTS’ LEGAL ARGUMENTS ARE FLAWED AND FAIL TO DEMONSTRATE ANY CLEAR ERROR OF LAW BY THE COURT**

Assuming *arguendo* that the Third-Party Defendants’ Motion is procedurally proper, it still fails for substantive reasons. While the Third-Party Defendants correctly note that Rule 59 relief is proper to correct a clear error of law, they fail to demonstrate that the Court committed any such error. (R. 208 at PageID 3009 (citing *ACLU of Ky. v. McCreary County*, 607 F.3d 439, 450 (6<sup>th</sup> Cir. 2010)).

At most, the Third-Party Defendants’ arguments appear intended only to chip away at the Court’s attorney fee liability analysis. Yet, each of their arguments is severely flawed and fails to establish any error of law in the Court’s decision. For instance, relying on *Kentucky v. Graham*, 473 U.S. 159 (1985), Third-Party Defendants make the simplistic argument that fees can only be awarded against the party that “lost.” Since, at the time of the fee decision, they were not technically a “party,” Third-Party Defendants reason, no fees

can be awarded against them. (R. 208 at PageID 3010) This argument fails for several reasons.

First, *Graham* set forth the distinction between official versus individual capacity suits. 473 U.S. at 168. It did not address the issue presented here: whether Davis acted as a state, as opposed to county, policymaker in enforcing her “no marriage licenses” policy. *Id.* Thus, the Third-Party Defendants’ reliance on *Graham* is misplaced because the holding contains no prohibition on imposing attorney fee liability against them.

Second, and more significantly, it just is not true that Third-Party Defendants did not lose this case. They “lost” when the Court (correctly) determined that Davis was a state – and not a county – policymaker. (R. 206 at PageID 2979 – 2780) Because the Court ruled that Davis’ actions represented policy for the Commonwealth of Kentucky, Third-Party Defendants can be held responsible for fees on the official capacity suit against her. *Graham*, 473 U.S. at 166 (noting that official capacity suits “generally represent only another way of pleading an action against an entity of which an officer is an agent.”).

Third-Party Defendants also attempt to cast doubt on the Court’s Order by criticizing its reliance on *Crabbs v. Scott*, 786 F.3d 426 (6<sup>th</sup> Cir. 2015). By no means was *Crabbs* the only authority upon which the Court relied on to support its finding that Davis acted as a state, rather than county, official. (See R. 206 at PageID 2965 – 2980) Thus, even if the Court’s reliance on *Crabbs* was somehow misplaced, the decision was still supported by an array of other binding precedent from Kentucky, the Sixth Circuit, and the Supreme Court. *Id.* The vast majority of those decisions, of course, are never mentioned in the Third-Party Defendants’ Motion, which leaves the analytical support for the Court’s decision structurally intact irrespective of *Crabbs*.

Moreover, even Third-Party Defendants' argument as to *Crabbs* is wrong. Third-Party Defendants claim that the Court erred in relying on *Crabbs* because it was not a case about attorney fees. While true, that distinction is nothing more than a distraction. While the Court in *Crabbs* did not address attorney fee liability, and instead determined an official's entitlement to sovereign immunity, the same issue here was pivotal there: whether the official was a state or county actor. 786 F.3d at 428-429. Thus, while the ultimate result in this case is different from the one in *Crabbs*, the same issue and therefore the same test applies in both cases. As a result, the Court appropriately cited to and relied on *Crabbs* in considering whether Davis acted for Rowan County or the Commonwealth.

In their next attempt to demonstrate a clear error from the Court's well-researched and thoroughly analyzed decision, Third-Party Defendants engage in a tortured reading of Supreme Court precedent. Cherry-picking a few choice words from the Court's decision in *Hutto v. Finney*, 437 U.S. 678 (1978), they imply that the decision stands for the proposition that fees should only be collected from a government official or "**from funds of his agency or under his control, . . .**" (R. 208 at PageID 3011 (emphasis in Motion but not cited decision)). In reality, and in stark contrast to what the Third-Party Defendants attempted to imply, the language from *Hutto* actually reads:

The legislative history is equally plain: "[It] is intended that the attorneys' fees, like other items of costs, will be collected either directly from the official, in his official capacity, from funds of his agency or under his control, or from the State or local government (whether or not the agency or government is a named party).

*Hutto*, 473 U.S. at 694. The last portion of this quote – "or from the State or local government (whether or not the agency or government is a named party)" – is the part that Third-Party Defendants omitted. The reason they did so is transparent: the language

undermines, rather than supports, their argument since it makes clear that the circumstances of each case dictate ultimate fee liability and not a one-size fits all rule that only that agency under the official's control (i.e. the Rowan County Clerk's Office) must automatically be charged with the full brunt of fee liability.

Third-Party Defendants' last attempt to demonstrate that the Court committed a "clear error of law" is their weakest argument. They contend that the Court clearly erred when it failed to follow an unpublished, non-binding decision from a District Court in South Carolina on an issue that is not pertinent here: *Summers v. Adams*, 2010 U.S. Dist. LEXIS 53164 (D.S.C. 2010). Precisely why the Third-Party Defendants think that the Court should have followed *Summers* is unclear, since no other court, even those in South Carolina, has done so. Nor was the case ever appealed and approved of by any higher appellate court.

Moreover, the result in *Summers* is not as applicable here as the Third-Party Defendants' perceive it to be. In *Summers*, the Court was addressing attorney fee liability among various different state agencies. See 2010 U.S. Dist. LEXIS 53164 at \*20-22. It was not necessary in that case, as it was here, to determine if the relevant officials served state or county entities for the particular functions at issue. *See id.* Because all of the entities in *Summers* were state entities, the court in *Summers* opted to simply impose attorney fee liability "jointly and severally." *Id.*

Despite the fact that *Summers* has no apparent connection to the issues present here, Third-Party Defendants attempt to use that case to suggest that the Court's decision is equivalent to a hyper-technical analysis as to which account should be debited to pay for Plaintiffs' attorney fees. While that may be true for a case like *Summers*, which involved only various branches of the same entity (the state), it is not true when the determination

is whether the official serves one entity (the state) or another (the County). Unlike in *Summers*, the Court did not merely need to decide where the source of the funds to pay the fees had to come from; it had to determine which entity Davis actually served while implementing her “no marriage licenses” policy. Because this is plainly not an issue addressed in *Summers*, the Court had no reason to follow it. And, frankly, given the confusion that would have been caused had the Court chosen to order fees against Davis “in her official capacity” without explanation, it would have been irresponsible for the Court to do anything at all similar to what the court in *Summers* did.

In short, the Third-Party Defendants have offered a series of criticisms of the Court’s Order imposing attorney fee liability against them, but none of their arguments are correct and none of them call the validity of the Court’s decision into question. Since the Third-Party Defendants have not demonstrated that the Court committed a clear legal error in its attorney fee decision, relief under Rule 59 is improper and their Motion should be denied.

### **III. THE THIRD-PARTY DEFENDANTS HAVE FAILED TO DEMONSTRATE THAT THE COURT ORDER CONSTITUTES A MANIFEST INJUSTICE**

Third-Party Defendants also assert that imposing fees against the Commonwealth, the entity which Davis was found to represent in enacting her unconstitutional policy, would result in a “manifest injustice.” (R. 208 at PageID 3013) Their arguments are unpersuasive.

Relying on *May v. Cooperman*, 578 F.Supp. 1308 (D.N.J. 1984), the Third-Party Defendants suggest that fees may be denied against state officials, if they “did not take steps to implement an allegedly unconstitutional statute.” (R. 208 at PageID 3013) Third-Party Defendants construe the result in *May* to mean that a party in multi-party litigation

under § 1983 can avoid fees merely by maintaining neutrality. The Third-Party Defendants are wrong.

The Court in *May* did not hold that the state defendants' neutrality constituted a special circumstance which justified denying an attorney fee award against them. Instead, the state defendants' actions in *May* went far beyond neutrality. According to the court, the state defendants had "consistently taken a principled position in refusing to defend a statute which the State's highest executive legal authority deemed unconstitutional." 578 F.Supp. at 1316. In addition, the court noted that the state defendants never opposed a single motion filed by the Plaintiffs. *Id.* As a result of those circumstances, the court found that awarding fees against those defendants would be unjust.

Third-Party Defendants are not in the same position as the state defendants in *May*. They never once took a principled position as to anything that Davis did. Instead, in this litigation, they at most attempted to demonstrate their neutrality and their lack of control over her actions. Mere neutrality, however, is not enough to make an award of fees against Third-Party Defendants improper. Indeed, at least one court has refused to follow the logic used in *May* and advocated here to limit fee exposure where the defendant did not actually *support* the plaintiff's position in the litigation. *See Dickinson v. Indiana State Election Bd.*, 817 F. Supp. 737, 754 (S.D. Ind. Dec. 8, 1992). Since the Third-Party Defendants never went this far in this action, the circumstances in this case do not make it clearly unjust for them to bear the burden of paying Plaintiffs' attorney fees.

Third-Party Defendants also argue that they "did not direct, ratify, or approve Ms. Davis' decision to withhold the issuance of marriage licenses." (R. 208 at PageID 3013) This argument, however, is both irrelevant and misleading. It is irrelevant because their direct

participation, ratification, or approval is not required for attorney fee liability for Davis' actions. Since she was found to be a policymaker for the Commonwealth, as opposed to the County, Davis' actions in themselves were sufficient to direct attorney fee liability to Third-Party Defendants.

The argument is also misleading for two reasons. First, it is inaccurate. While it is, perhaps, accurate to say that the Commonwealth never officially sanctioned Davis' conduct, it is inaccurate to suggest that Governor Bevin did not unofficially endorse her actions. As a candidate for Governor, Bevin visited Davis in jail<sup>1</sup> and criticized her incarceration for contempt on his campaign website.<sup>2</sup> He later publically declared that Davis enjoyed his "absolute" support "without any question[.]"<sup>3</sup> Immediately after Bevin was elected, he told the press that changing the marriage license form to resolve Davis' problems was his top priority.<sup>4</sup> In signing the executive order as Governor, which delivered on this promise, Bevin referenced Davis when he stated it was intended to "ensure that the sincerely held religious beliefs of all Kentuckians are honored."<sup>5</sup> Given this course of conduct, it is just not true that Third-Party Defendants' did not approve of Davis' actions.

In contrast, no official for Rowan County publicly endorsed Davis' actions or promised to render her any kind of aid to help her avoid the consequences of her actions. Thus, even if Third-Party Defendants' arguments were premised on true facts, it would

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<sup>1</sup> Available at [https://www.washingtonpost.com/news/powerpost/wp/2015/11/02/the-daily-202-gop-using-kim-davis-saga-gay-marriage-backlash-to-galvanize-evangelicals-in-low-turnout-kentucky-governors-race/?utm\\_term=.ec6dbb4e8a0c](https://www.washingtonpost.com/news/powerpost/wp/2015/11/02/the-daily-202-gop-using-kim-davis-saga-gay-marriage-backlash-to-galvanize-evangelicals-in-low-turnout-kentucky-governors-race/?utm_term=.ec6dbb4e8a0c).

<sup>2</sup> Available at <http://www.mattbevin.com/matt-bevin-responds-to-kim-davis-arrest>.

<sup>3</sup> Available at <http://www.courier-journal.com/story/news/politics/2015/09/01/matt-bevin-defends-rowan-clerk-kim-davis/71514564/?cookies=&from=global>.

<sup>4</sup> Available at <http://www.reuters.com/article/us-usa-gaymarriage-kentucky/governor-elect-to-remove-clerk-names-from-kentucky-marriage-licenses-idUSKCN0SV2FV20151106>.

<sup>5</sup> Available at <http://www.npr.org/sections/thetwo-way/2015/12/23/460790418/per-governors-order-kentucky-marriage-licenses-no-longer-need-clerks-name>.

place them in entirely the same position as Rowan County. If that is the case, it would be manifestly unjust (using the logic of the Third-Party Defendants) to impose fee liability against Rowan County. But that is exactly what the Third-Party Defendants propose when they contend that fee liability must be shifted to the Rowan County Clerk's Office budget, since any excess from that budget, according to Davis' testimony, is returned to the County general fund and used by the Fiscal Court to determine the budget for the County Clerk's Office the following year. As the Court found, the County Clerk's funds from marriage licenses would cover less than 20% of the attorney fee judgment entered in this case, and thus, would in effect adversely impact the County itself. (R. 208 at PageID 2975 n.36)

In other words, ratification is not the issue the Court needs to decide to determine which party should be held responsible for Plaintiffs' attorney fees and the Court was correct not to consider it in rendering its decision. Hence, Third-Party Defendants have failed to demonstrate that the Court's fee decision resulted in any manifest injustice and their Rule 59 Motion should be denied.

#### **IV. CONCLUSION**

For the foregoing reasons, Defendant, Rowan County, respectfully requests that this Court deny the Third-Party Defendants' Motion to Amend Findings and Conclusions and Motion to Amend Judgment. (R. 208)

Respectfully submitted,

*/s/ Jeffrey C. Mando*

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**CERTIFICATE OF SERVICE**

This is to certify that on the **8<sup>th</sup>** day of September, 2017, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to all counsel of record.

*/s/ Jeffrey C. Mando*

Jeffrey C. Mando, Esq.