

IN THE SUPREME COURT OF THE
STATE OF KANSAS

RYAN MONTOY, *et al.*,
Plaintiffs,

v.

THE STATE OF KANSAS, *et al.*,
Respondents.

Case No. 04-92032-S

**PLAINTIFFS' COMBINED REPLY IN SUPPORT OF MOTION TO RE-OPEN
MONTROY V. STATE OF KANSAS, CASE NO. 04-92032-S**

COME NOW Plaintiffs, by and through their attorneys of record, and in reply to the State of Kansas' and the State Board of Education's Responses to Plaintiffs' Motion to Re-Open *Montroy v. State of Kansas*, Case No. 04-92032-S, state as follows:

INTRODUCTION

At the conclusion of *Montroy v. State of Kansas*, 282 Kan. 9, 24-25, 138 P.3d 75 (2006) (Montroy V), this Court found that the Legislature's efforts in 2005 and in 2006 S.B. 549 "constitute[d] substantial compliance" with its prior orders. At the same time, however, the Court did not make a specific finding regarding the constitutionality of the new funding scheme. This is almost certainly because, as the Court pointed out, S.B. 549 was a 3-year plan, and "it may take some time before the full financial impact of this new legislation is known." *Id.* at 26. Since that time, the State of Kansas has chronically rebuked its school funding responsibilities and has acted in defiance of its own laws, this Court's decisions, and the Kansas Constitution. Three years after *Montroy V*, the full financial impact of the Legislature's plan (as well as the Legislature's actions notwithstanding that plan and notwithstanding its representations to this Court) is finally known. It is imperative that the Court re-open *Montroy v. State of Kansas*, Case

No. 04-92032-S, to ensure Kansas schoolchildren receive the funding to which they are entitled under Article 6, § 6 of the Kansas Constitution. Plaintiffs do not seek to relitigate the same issues that were litigated in *Montoy*. Nor do they seek to initiate a new lawsuit. Rather, Plaintiffs seek only to fully and finally settle the issues of constitutionality which were reserved in *Montoy V*. Those issues include not only the constitutionality of S.B. 549, but also the constitutionality of funding cuts since that time, which directly contradict the *Montoy* orders.

ARGUMENTS AND AUTHORITIES

I. PLAINTIFFS' MOTION IS PROPER, AND THE COURT SHOULD RE-OPEN *MONTROY*.

A. The Legislature Failed to Follow the Mandates of *Montoy*.

Plaintiffs are well-aware of the law passed by the Legislature after the *Montoy* case, which requires all newly-filed Article 6 school finance lawsuits to file a notice containing: (1) the names and addresses of the parties and their attorneys; (2) “a concise statement of the factual basis of the alleged violation, *including supporting documentation*;” and (3) “a statement of the amount of monetary damages a [sic] specific relief that is being requested.” K.S.A. 2008 Supp. 72-64b02 (emphasis added). After the notice filing, plaintiffs must abide by a 120-day waiting period.

In this case, however, Plaintiffs are not asking the Court to open a new lawsuit. Instead, Plaintiffs seek only to re-open and finish the *Montoy* case for the purpose of fully settling the issues originally raised. Re-opening is proper where, as is the case here, the Court’s previous decision was based on representations by the State that it would take steps necessary to end the litigation, which were included in S.B. 3 and S.B. 549. The Court relied upon the State’s representations when it remanded the case for dismissal in *Montoy V* (“We conclude that the legislature’s efforts in 2005 and in 2006 S.B. 549 constitute substantial compliance with our

prior orders, through which it will have provided by 2008-09 at least 755.6 million additional dollars to the education of the State's most precious asset – our children.”). As we now know, however, 755.6 million additional dollars were not provided to the schools. As the State admits in its responsive brief, S.B. 23 reduced school funding statewide in the amount of \$25,345,039. The State attempts to minimize this action by stating that “the plan was reduced by *just* \$25 million.” Def. State Mem. at 9 (emphasis added). There is nothing minor about a \$25 million cut to our state's schools. This is especially true given the fact that S.B. 23 was adopted in direct defiance of the mandates of *Montoy*. This action alone is cause enough for the Court to re-open *Montoy*. The funding cuts did not stop there, however. As fully set forth in Plaintiffs' Motion, there were at least four subsequent funding cuts which, all totaled, amount to \$303 million, or a 40% reduction from *Montoy*. The State attempts to minimize these subsequent funding cuts by arguing: (1) the cuts affect fiscal years beyond the three years evaluated in *Montoy V*; (2) two of the cuts were accomplished by the Governor (as opposed to the Legislature); and (3) the current economic climate justifies its actions. These hollow excuses serve only to illuminate the Legislature's true intentions, or lack thereof.

First, the funding cuts affecting fiscal year 2010 and beyond - while admittedly outside the three-year scope of S.B. 549 – are just as clearly in violation of the *Montoy* mandates. The *Montoy* decisions addressed more than the limited issue of S.B. 549. Certainly the Court did not intend to mandate additional funding solely during the three years contemplated by S.B. 549. Indeed, in *Montoy v. State of Kansas*, 278 Kan. 769, 773, 120 P.3d 306 (2005) (*Montoy II*), the Court held that the Kansas Constitution imposes a general mandate that our educational system cannot be static or regressive, but must be one which “advance[s] to a better quality or state.” The duty of the Legislature – as defined in the Kansas Constitution and explained by *Montoy* – is

ongoing, and not one which ceases at the end of fiscal year 2009. As a result, even those funding cuts which are not covered by S.B. 549's three-year period are equally as violative of the *Montoy* mandates.

Secondly, the State hides behind the Governor's actions, and argues it is not responsible for his cuts. While it is true the Governor is no longer a party to this case, and while it is true the Legislature cannot control the independent actions of the Governor, the Governor was simply following the rescission process set out for him by the Legislature as "a matter of legislative delegation" set forth in the statutes. K.S.A. 75-6704. In any event, it is the Legislature's job to provide suitable funding. If the Governor cuts funds (which he did), the Legislature must act to make up for those cuts, to provide suitable funding as required by Article 6, § 6 of the Constitution, and as mandated by *Montoy*.

Finally, the State points to "dramatic changes in the national and local economic climate" as grounds for the funding cuts. Plaintiffs certainly are not ignorant of this Country's economic situation, and are well-aware of the breadth of recent budget cuts. Quite frankly, however, Article 6, § 6 of the Kansas Constitution does not direct the Legislature to make suitable provision for the finance of the educational interests of this state only in economically prosperous times. Rather, the Legislature is tasked with making suitable provision for school funding at all times. In fact, K.S.A. 72-64c03 requires the school financing formula to be given first priority, and to be paid first from existing state revenues. Similarly, K.S.A. 72-64c04 requires the Legislature to increase state aid to schools by not less than a percentage equal to the percentage increase in the Consumer Price Index (urban). If there is one thing these statutes and the *Montoy* decisions make abundantly clear, it is that funding for education simply cannot be compromised – no matter what the current economic situation may be. If would be a different

situation if cost data had been analyzed and revealed that the cost to provide the mandated level of education had gone down. This is not the case. Costs have risen, not declined. Standards have risen, not declined.

B. The Court has Jurisdiction to Re-Open Prior School Finance Litigation.

Defendants argue Plaintiffs' Motion is "unprecedented" and is a mechanism for avoiding the Court's procedural requirements. This situation was specifically addressed by the Arkansas Supreme Court, however, when it took steps to re-open a school funding issue that it determined required additional examination. *Lake View School District No. 25 of Phillips County, Arkansas v. Huckabee*, 210 S.W.3d 28 (Ark. 2005). The State disregards this case, relying solely on the obvious fact that "Kansas is not Arkansas." Def. State Mem. at 7. While the Arkansas decision is certainly not binding, the State fails to recognize that this Court looked to numerous other state school financing lawsuits for guidance in *Montoy V.* 282 Kan. at 25-26.

Furthermore, in *Montoy v. State of Kansas*, 279 Kan. 817, 112 P.3d 923 (Montoy IV), this Court specifically addressed the ongoing nature of school finance litigation and relied on the decision in *Knowles*, which held:

The right of persons to challenge the constitutional effect of a law upon their persons or property should not be aborted every time the law is amended by the legislature. In some instances amendments occur almost annually with minimal impact upon the overall effect of the law. It is entirely possible that the 1976 legislature will again amend this Act.

....

The nature of this controversy is such that the rights of the parties continue to be affected by the law. It is an ongoing controversy which can be adjudicated in the present action as well, if not better, than in a new action filed.

Knowles v. State Bd. of Educ., 219 Kan. 271, 279-80 (1976). The *Knowles* and *Montoy IV* decisions correctly identified the ongoing nature of school funding litigation, and the need to adjudicate such issues in continuity.

The Board of Education now argues this line of reasoning does not apply to the Plaintiffs' Motion based on a single distinction – that this Court chose “to end this litigation” in *Montoy V*. However, *Montoy IV* clearly established that if this Court had retained jurisdiction, it would be proper for this Court to conduct a “review to determine if there has been compliance with [the] opinion.” *Montoy IV*, 279 Kan. at 825. This distinction should not dissuade the Court from re-opening *Montoy*. As fully discussed in section I.A. herein, the Court dismissed *Montoy* before the true circumstances surrounding this litigation were fully revealed. The fact of the matter is the Court would not have ended the litigation had it known that less than three short years later, the Legislature would not abide by S.B. 549 and would fail to follow the *Montoy* mandates. In fact, in *Montoy II*, the decision in which the Legislature’s formula was first found to be unconstitutional, this Court stated that the Legislature’s “failure to act in the face of this opinion would require this court to direct action to be taken to carry out that responsibility.” *Montoy II*, 278 Kan. at 776 (emphasis added). Because this is an issue of statewide importance that mandates immediate review, the Court should exercise its authority to re-open the *Montoy* case and remand for review by a trial court.

C. The Concepts of Judicial Efficiency and Finality are Furthered by Re-Opening the *Montoy* Litigation.

Our judicial system is constructed on policies that value the finality of a decision, *Williams v. Lawton*, 288 Kan. 768, 794 (2006). However, state laws also recognize there are extraordinary circumstances in which finality is not the most important issue. *Id.* (recognizing courts will set jury verdicts aside when finality is outweighed by the need to reach a fair and impartial decision). This Court stated in *Montoy v. State of Kansas*, 279 Kan. 817, 826-27, 102 P.3d 1158 (2005) (*Montoy III*), that it is the duty of this Court to “engage in judicial review and, when necessary, compel the legislative and executive branches to conform their actions to that

which the constitution requires.” Re-opening *Montoy* will better serve to establish finality in the school finance arena.

The State argues the “law of the case” doctrine should apply because it promotes this idea of finality. Not only is this doctrine discretionary, but as the State points out, one of the purposes of the law of the case doctrine is “to avoid indefinite relitigation of the same issue.” *State v. Collier*, 263 Kan. 629, 631, 952 P.2d 1326 (1998). The best route to avoid indefinite litigation and to promote the idea of finality would be to reopen the *Montoy* case. This will allow the parties to *finally* settle the issues of constitutionality that the Court did not address in *Montoy V*. It is the Legislature’s unique position in this litigation that creates a cycle of indefinite litigation. The Legislature has the power to issue new legislation regarding the funding of school districts any time it sees fit. Because of the Legislature’s ability to continuously change the school funding legislation, the threat of indefinite relitigation will not end by denying Plaintiffs’ Motion. In fact, it is only by re-opening *Montoy*, and fully and finally addressing the constitutional issues of S.B. 549 and the legislature’s subsequent funding cuts, that the threat of litigation will disappear.

As the State points out, the Court cited a threat of relitigation as one of the reasons for dismissal in *Montoy V*. The Court, after looking to sixteen other state decisions, a majority of which had remanded the cases to a trial court, found that those states had the hardest time “producing a final plan.” It was finality that the Court was concerned with because those states experienced a resolution only after several years of litigation. Despite the Court’s early analysis, time has shown that finality problems do not stem from courts’ decisions regarding whether to retain jurisdiction. Rather, they stem from the unique position that many legislatures are in: as the body with the responsibility to fund the school systems, the Legislature is also the only body

with the power to change the school funding legislation. For every legislative amendment to school financing, there cannot be a requirement that there be a new finding of constitutionality. *Knowles*, 219 Kan. at 279 (“The right of persons to challenge the constitutional effect of a law upon their persons or property should not be aborted every time the law is amended by the legislature.”). Thus, in order to properly avoid indefinite relitigation, the Court should re-open *Montoy*.

Furthermore, the Court should re-open *Montoy* to promote judicial efficiency. First, while the parties agree that the efficient operation of the appellate court is of the utmost importance, there is no requirement that a party prove that their method for litigating a matter “would serve judicial efficiency.” Def. State Mem. at 5. Secondly, while it is not necessary for Plaintiffs to prove that re-opening *Montoy* would be judicially efficient, the evidence that it would is clear. Treating this lawsuit as new litigation, when it clearly is not, would require the Plaintiffs to file a new lawsuit, would require Plaintiffs to follow the unusual notice requirements and the 120-day waiting period for newly filed school finance litigation, would only serve to worsen the current funding crisis, and would require significant factual inquiry which would not otherwise be required.

Lastly, the State argues re-opening *Montoy* would be inefficient because it would require the parties to start over. Not only is this not true, but that “inefficient method” (starting over) is exactly what the State would have Plaintiffs do. Def. State Mem. at 6. (“This Court should adhere to its prior ruling releasing jurisdiction and require the plaintiffs to start their new case where new cases begin – in the district court.”). If it is true that starting over is so inefficient, it would make more sense to re-open *Montoy*. Thus, to further both judicial efficiency and finality, the Court should re-open the *Montoy* litigation.

II. PLAINTIFFS ARE THE REAL PARTIES IN INTEREST

The Board of Education makes the false assertion that Plaintiffs' Motion was filed by Schools for Fair Funding. This is not the case. Plaintiffs in *Montoy v. State of Kansas*, Case No. 04-92032-S brought this Motion to re-open. Defendant argues that Ryan Montoy may have already graduated from high school. While it is true that some of the individual plaintiffs may no longer have standing, and that the parties in this lawsuit will likely be substituted at one point, there is no dispute that U.S.D. 305 (Salina) and U.S.D. 443 (Dodge City) were Plaintiffs in the original action, and have standing to file this Motion.

The State makes a similar argument, which is equally empty, with respect to the parties' attorneys. The argument that a change in attorneys somehow makes this issue impervious to re-opening is completely without merit. The State changed attorneys three times before the case was dismissed in *Montoy V.* Furthermore, the Attorney General changed from Carla Stovall to Phill Kline, and the Governor changed from Bill Graves to Kathleen Sebelius. Even Supreme Court justices changed during the case. Lawyers and parties change all the time in litigation, but especially in *Montoy*. Liberal substitution has always been allowed, and is not an impediment to re-opening.

III. THE KANSAS BOARD OF EDUCATION IS A PROPER PARTY

The Board of Education claims that it is not a proper party to this lawsuit because there are no assertions "that Kansas school districts are not providing the educational opportunities mandated by state law or regulation or that there are material deficiencies caused by a failure of the KSBE or KSDE to properly accredit schools, license teachers or otherwise comply with applicable standards and statutory mandates" and because it "has satisfied its constitutional and statutory obligations with regard to public education." Def. Board Mem. at 5.

This argument distracts the Court from the current issue: whether *Montoy* should be re-opened. First, now is not the proper time to address the parties to this litigation. Unlike the State Treasurer and the Governor, the Board of Education never took the appropriate steps to have itself dismissed from this litigation. At this point, Plaintiffs are merely asking the Court to re-open this case and remand it to the district court to properly amend the pleadings. If, in fact, it is true that the Board of Education has met its statutory and constitutional obligations (which Plaintiffs do not admit), the Board of Education can petition the court for dismissal at the appropriate time.

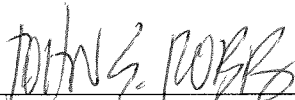
Secondly, the Board of Education *is* a proper party to this litigation. The Board serves an integral function in determining how school funding money is distributed through its calculation of various parts of the school funding formula. The Legislature relies on the Board to properly apportion the money based on the total the Legislature provides. Without the Board of Education, school funding in Kansas is not complete. Due to the Board of Education's vital role in the functioning of the school finance formula, it would be impossible for the Court to properly address school funding without also maintaining jurisdiction over the Board of Education.

CONCLUSION

The mandates of *Montoy* were clear – the Legislature is required to comply with Art. 6, § 6 of the Kansas Constitution, and in order to do so, must take actual costs of education and equality of distribution into account. In *Montoy V*, the Court determined S.B. 549 to be in substantial compliance with those mandates. Since that time, however, the Legislature has failed to comply with its own legislation, and failed to fully fund S.B. 549, as it represented to the Court that it would. Furthermore, the Legislature has taken actions (and failed to take actions) which resulted in additional funding cuts. These actions are in direct contradiction to the

mandates of *Montoy*, and therefore violate Kansas statutes as well as the Kansas Constitution. To remedy this situation with the most efficiency and finality, the Court should re-open *Montoy v. State of Kansas*, Case No. 04-92032-S.

Dated this 28th day of January, 2010.

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CERTIFICATE OF SERVICE


I hereby certify that on this 28th day of January, 2010, a true copy of the foregoing was served via United States mail, first class, postage pre-paid, addressed to the following:

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