IN THE SUPREME COURT OF THE STATE OF KANSAS

No. 92,032

RYAN MONTOY, *et al.*,
Appellees,

v.

STATE OF KANSAS, *et al.*,
Appellants.

ORDER

The plaintiffs, Ryan Montoy, *et al.*, have filed a motion to reopen *Montoy v. State of Kansas*, Case No. 92,032. The defendants, the State of Kansas and the Kansas State Board of Education, have each filed a response. The plaintiffs have filed a reply to the defendants' responses.

Having fully considered the motion, the responses, and the reply, the court denies the motion.

On July 28, 2006, in the fifth and final decision in this case, this court concluded that the legislature's efforts in enacting 2005 H.B. 2247, modified by 2005 S.B. 3, and 2006 S.B. 549 constituted substantial compliance with our prior remedial orders. *Montoy*

v. State, 282 Kan. 9, 138 P.3d 755 (2006). Our decision was limited to determining compliance; we refused to address the question of whether the new legislation provided constitutionally suitable provision for finance of the public schools as required by Article 6, § 6 of the Kansas Constitution.

Our refusal was based on the limits of our appellate function. After reviewing S.B. 549, we determined that it had so "materially and fundamentally" altered the school funding formula that it had essentially replaced the funding scheme at issue in the case. 282 Kan. at 16, 25. While the extensive record before us contained volumes of evidence concerning the financial operation and effect of the prior funding formula, we had "no facts and figures in the record from which we could determine how [the new funding formula of S.B. 549 would] operate over the next 3 years." 282 Kan. at 25. Accordingly, we held:

> "[T]his court is an appellate court and not a fact-finding court. The constitutionality of S.B. 549 is not before this court. It is new legislation and, if challenged, its constitutionality must be litigated in a new action filed in the district court. We have already made the determination that the school finance formula which was before this court in *Montoy II* [*State v. Montoy*, 278 Kan. 769, 120 P.3d 306 (2005)] was unconstitutional. The school finance system we review today is not the system we reviewed in *Montoy II* or *Montoy III* [*State v. Montoy*, 279 Kan. 817, 112 P.3d 923 (2005)]. The sole issue now before this court is whether the legislation passed in 2005 and S.B. 549 comply with the previous orders of this court. If they do then our inquiry ends and this case must be dismissed. A constitutional challenge of S.B. 549 must wait for another day." 282 Kan. at 18-19.

Although we recognized that we could have remanded the case to the district court to allow the plaintiffs to amend their pleadings to challenge the new legislation, we chose

not to do so, "electing instead to end this litigation" by dismissing the case. 282 Kan. at 25. The decision to dismiss the case was not unanimous; nonetheless, it was the decision of a majority of the members of this court that dismissal was necessary to achieve finality in this case.

Now, over 3 years later, the plaintiffs ask us to reopen this case. Although the plaintiffs' motion was captioned as a motion to reopen the appeal, procedurally, it is more properly characterized as a motion to recall the mandate. The mandate on our July 28, 2006, decision dismissing this case was issued on August 21, 2006. Upon issuance of the mandate, our decision became final and our appellate jurisdiction ended. See K.S.A. 60-2106(c); Supreme Court Rule 7.06 (2009 Kan. Ct. R. Annot. 60).

Although issuance of an appellate mandate generally terminates appellate jurisdiction, an appellate court retains the inherent power to recall its mandate. However, because recalling a mandate disturbs the finality of a judgment, the power to recall a mandate is to be exercised only in extraordinary circumstances. "In light of 'the profound interests in repose' attaching" to a mandate, the power to recall a mandate "can be exercised only in extraordinary circumstances" and is thus a power "of last resort, to be held in reserve against grave, unforeseen contingencies." *Calderon v. Thompson*, 523 U.S. 538, 550, 140 L. Ed. 2d 728, 118 S. Ct. 1489 (1998) (quoting 16 Wright, Miller & Cooper, Federal Practice and Procedure § 3938, p. 712 [2d ed. 1996]); see also *Greater Boston Television Corporation v. F.C.C.*, 463 F.2d 268, 278 (D.C. Cir. 1971) (To recall a mandate, "[t]here must be special reason, 'exceptional circumstances,' in order to override the strong policy of repose, that there be an end to litigation.").

The context of this case at this time underlines the good reasons for the strong policy against recalling mandates. There are obvious standing issues. For example, it is

likely that the named plaintiff, Ryan Montoy, may no longer have standing as a plaintiff in this case. An issue has been raised as to whether all of the same school districts that participated in this case as named plaintiffs would continue in future litigation. There are other issues regarding necessary party defendants that have been raised in the responses to the motion to reopen this case.

Last, and most important, the plaintiffs' request would have this court recall its mandate and reassert its appellate jurisdiction in this case solely for the purpose of remanding it to the district court. On remand, the case would go through essentially the same process as a new case: the filing of an amended petition with substituted parties and new claims, discovery, and trial. Thus, there is nothing the plaintiffs are seeking that they cannot accomplish by filing a new lawsuit.

The power to recall a mandate is an extraordinary power to be used as a last resort. It should only be used to accomplish something that, without it, cannot otherwise be remedied. That is not the situation here. We conclude that the circumstances do not warrant recalling the mandate dismissing this case.

This decision denying the plaintiffs' motion to reopen this case is a procedural ruling, not a decision on the merits of any issues raised in the motion, responses, or reply.

BY ORDER OF THE COURT, this 12th day of February, 2010.

ROBERT E. DAVIS
Chief Justice

NUSS, J., and BILES, J., not participating