

COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
DIVISION I
CIVIL ACTION NO. 18-CI-379
- AND -
CIVIL ACTION NO. 18-CI-414

COMMONWEALTH OF KENTUCKY
ex rel. ANDY BESHEAR, ATTORNEY GENERAL, *et al.*

PLAINTIFFS

v.

MATTHEW G. BEVIN, in his official capacity
as Governor of the Commonwealth of Kentucky, *et al.*

DEFENDANTS

PLAINTIFFS' RESPONSE TO MOTION TO ALTER, AMEND, OR VACATE

Come the Plaintiffs, the Commonwealth of Kentucky, *ex rel.* Andy Beshear, Attorney General, the Kentucky Education Association (“KEA”), and the Kentucky State Lodge Fraternal Order of the Police (“FOP”), by and through counsel, and submit the following opposition to the Governor Matthew G. Bevin’s Motion to Alter, Amend, or Vacate. The Court should deny the motion because its Order fully voided SB 151 under Section 46 of the Kentucky Constitution. As such, there is no reason to consider additional grounds, nor is the Court required to issue *dicta* or an advisory opinion at the request of counsel. Further, given SB 151 was passed through an unconstitutional process, no portion of the bill can be “severed.” Indeed, the Governor failed to ever brief or argue severability during this action. Accordingly, this Court should deny the Governor’s motion as yet another attempt to delay finality in this action.

STANDARD OF REVIEW

In Kentucky, a court may grant a motion to alter, amend, or vacate pursuant to Motion to CR 59.05 on one of the following four grounds also recognized by the federal courts in construing Federal Rule of Civil Procedure 59(e):

First, the movant may demonstrate that the motion is necessary to correct manifest error of law or fact upon which the judgment is based. Second, the motion may be granted so that the moving party may present newly discovered or previously unavailable evidence. Third, the motion will be granted if necessary to prevent manifest injustice. Serious misconduct of counsel may justify relief under this theory. Fourth, a Rule 59(e) motion may be justified by an intervening change in controlling law.

Bowling v. Kentucky Dep't of Corrections, 301 S.W.3d 478, 483 (Ky. 2009) (quoting *Gullion v. Gullion*, 163 S.W.3d 888, 893 (Ky. 2005)). A court's "reconsideration of a judgment after its entry is an extraordinary remedy which should be used sparingly." *Gullion*, 163 S.W.3d at 893 (citation omitted).

The Governor only raises the first ground in his motion. (*See Commonwealth ex. rel Andy Beshear, Attorney General, et al. v. Matthew G. Bevin, et al.*, 18-CI-379, 18-CI-414, Governor's Memo. in Support of Motion to Alter, Amend, or Vacate, at 2 (Franklin Cir. Ct. June 29, 2018).) "A 'manifest error' is not demonstrated by the disappointment of the losing party. It is the 'wholesale disregard, misapplication, or failure to recognize controlling precedent.'" *Oto v. Metro. Life Ins. Co.*, 224 F.3d 601, 606 (7th Cir. 2000) (applying analogous federal rule) (citation omitted).

ARGUMENT

The Governor claims that this Court's June 22, 2018 Opinion and Order was manifestly erroneous because it did not address the constitutionality of the provisions of SB 151 that violate the inviolable contract, and because the Court did not decide whether the unconstitutional appropriations provisions are severable. The Governor is wrong, on both counts, and therefore he has not shown that he is entitled to the "extraordinary remedy" he seeks.

I. The Court Properly Exercised Its Discretion By Addressing Only The Unconstitutional Procedure By Which SB 151 Was Passed.

The Governor argues that the Court must address the inviolable contract to provide “guidance” to the General Assembly.¹ As such, the Governor seeks an advisory opinion. The Court, however, is “prohibited from producing mere advisory opinions.” *Med. Vision Group, P.S.C. v. Philpot*, 261 S.W.3d 485, 491 (Ky. 2008). Having concluded that SB 151 was passed in an unconstitutional manner, it was not error – much less “manifest error” – for the Court to decline to render advisory *dicta* about the application of the contracts clause to the inviolable contract.² To the contrary, reopening the case to address the substance of a bill that the Court has already declared unconstitutional “would now be ‘merely hypothetical or an answer which is no more than an advisory opinion.’” *Koenig v. Pub. Prot. Cabinet*, 474 S.W.3d 926, 930 (Ky. App. 2015) (citation omitted).

Moreover, if the Supreme Court were to reach a different conclusion than this Court concerning the procedure by which SB 151 was passed, it could address the inviolable contract argument, because an appellate court “may affirm the trial court for any reason sustainable by the record.” *Kentucky Farm Bureau Mut. Ins. Co. v. Shelter Mut. Ins. Co.*, 326 S.W.3d 803, 805 n.3 (Ky. 2010). Thus, this Court’s exercise of its discretion to limit its Opinion and Order in no way prevents the Supreme Court from addressing the issues the Governor raises.

¹ The Governor’s argument that the Opinion and Order represents “manifest error” because it does not construe the inviolable contract is particularly striking given that just weeks ago the Governor argued that the Court was required to disqualify because it would commit error if it did rule on “the meaning and parameters of the term ‘inviolable contract...’” (See Letter from S. Pitt to Hon. Phillip J. Shepherd, May 30, 2018, attached to Franklin Cir. Ct. Order, May 31, 2018.)

² The Governor’s argument rests on conjecture – that the General Assembly will again vote to breach the inviolable contract, even if it follows a constitutional procedure in the future. But experience shows that the General Assembly has not broken the inviolable contract when it has followed a constitutional procedure in enacting past pension reform. That is why past changes to the pension were purely *prospective*, and therefore did not violate the contracts clause. That is also why, after SB 1 was defeated following public outcry, the General Assembly chose to employ an unconstitutional procedure in order to pass SB 151.

In sum, the Court was well within its discretion not to reach the constitutionality of SB 151's changes to the inviolable contract. The Court should therefore deny the motion.

II. The Court Did Not Err When It Did Not Address Severability, Which The Governor Did Not Argue And Which Does Not Apply.

The Governor next claims that it was “manifest error” for this Court not to consider whether the unconstitutional appropriations provisions in SB 151 can be severed from the rest of the bill – an issue that, in hundreds of pages of briefing, the Governor *did not raise*. CR 59.05 “cannot be used to raise arguments and introduce evidence that should have been presented during the proceedings before entry of judgment.” *Short v. City of Olive Hill*, 414 S.W.3d 433, 441 n.7 (Ky. App. 2013).

In this case, the only time the Governor raised severability was as a passing comment during oral argument, but even then, Governor's counsel simply asserted the existence of the severability clause in SB 151 and the general savings statute, KRS 446.090. Not once did the Governor articulate the standard for severability, which would require the Court to find that the unconstitutional provisions are not “essential [to] and inseparable [from]” the rest of the bill. *Louisville Metro Health Dep't v. Highview Manor Ass'n, LLC*, 319 S.W.3d 380, 384 (Ky. 2010). Nor did the Governor explain how, in his view, the doctrine would apply to SB 151.

The Governor's omission is not surprising, because the General Assembly's failure to comply with the majority-vote requirement of Section 46 rendered SB 151 unconstitutional in full. That requirement mandates that “Any *act or resolution* for the appropriation of money or the creation of debt shall, on its final passage, receive the votes of a majority of all the members elected to each House.” KY. CONST. § 46. Under the plain terms of KY. CONST. § 46, SB 151 – the “act” at issue – is unconstitutional because it did not receive the requisite number of votes in the House of Representatives. Accordingly, the severability clause and statute do not apply.

Moreover, even if severability analysis did apply to SB 151, the appropriations provisions go to the heart of SB 151. Those provisions include the statutory sections establishing new, less-generous retirement plans for future employees, as well as the reenactment of KRS 61.565, which is the statute that establishes the KERS public pension system. Those provisions, which the legislature passed unconstitutionally, are plainly essential to SB 151.³ The rest of the bill simply cannot be severed from these unconstitutional appropriations.

Regardless, in the unlikely event that the Governor has preserved this issue on appeal – a doubtful prospect – then he may make the argument to the Kentucky Supreme Court. There is no reason why this Court must revisit its Opinion and Order, particularly in light of the fact that SB 151 is also unconstitutional in its entirety under the three readings requirement of Section 46 of the Kentucky Constitution.

CONCLUSION

This Court did not err as a matter of law in issuing its Opinion and Order on June 20, 2018. For that reason, the Court should deny the Governor’s Motion to Alter, Amend, or Vacate pursuant to CR. 59.05.

³ Indeed, recent comments from SB 151’s Senate Sponsor further demonstrate that the appropriations provisions are essential to the bill. In an op-ed published June 22, 2018, Senator Joe Bowen admitted that SB 151 “adds significant new funding” to the pension systems. (See Sen. Joe Bowen, Guest Column, *Publisher’s column ignores own reporting*, The State Journal, June 22, 2018, available at <https://www.state-journal.com/2018/06/22/guest-column-publishers-column-ignores-own-reporting/> (attached as Exhibit 1).)

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing Response to the Governor's Motion to Alter, Amend, or Vacate using the Court's electronic filing system on July 6, 2018, and that on same date I served true and accurate copies of the foregoing electronically and via-email to the following: M. Stephen Pitt, S. Chad Meredith, Matthew F. Kuhn, Office of the Governor, The Capitol, Suite 100, 700 Capitol Avenue, Frankfort, Kentucky 40601; Brett R. Nolan, Finance and Administration Cabinet, Office of the General Counsel, Room 329, Capitol Annex, Frankfort, Kentucky, 40601; Katherine E. Grabau, Public Protection Cabinet, Office of Legal Services, 655 Chamberlin Avenue, Suite B, Frankfort, Kentucky 40601; Jeffrey Walther, Walther, Gay & Mack, 163 E. Main St., Suite 200, Lexington, KY 40588; David Leightty, Priddy, Cutler, Naake, Meade, 2303 River Road, Suite 300, Louisville, KY 40206; David Fleenor, Capitol Annex, Room 236, Frankfort, KY 40601, Eric Lycan, Office of the Speaker, Capitol Annex, Room 332, Frankfort, KY 40601, Mark Blackwell, 1260 Louisville Road, Frankfort, KY 40601, and Bill Johnson, Johnson Bearse, LLP, 326 West Main St., Frankfort, KY 40601. I certify that I served true and accurate copies of the foregoing Response to the Governor's Motion to Alter, Amend, or Vacate, on the individuals whose names appear on the following Service List via U.S. mail and/or hand delivery on July 6, 2018.

/s/ La Tasha Buckner

La Tasha Buckner

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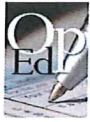
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Exhibit 1

Guest column: Publisher's column ignores own reporting



(<https://www.state-journal.com/author/State Journal Opinion/>)

By State Journal Opinion (<https://www.state-journal.com/author/State Journal Opinion/>)

Email the author (<mailto:letters@state-journal.com>)

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Columnist



(https://www.state-journal.com/wp-content/uploads/2017/02/020917_Bowenbest_bb.jpg)

Sen. Joe Bowen, R-Owensboro

By Sen. Joe Bowen

Guest columnist

Frankfort is not just the location of Kentucky's State Capitol. It is home to thousands of state employees who make state government work.

Those state employees, their families and the businesses providing services to them count on checks from the state treasurer to grow and prosper. Frankfort is also home to thousands of retired state employees who count on a monthly check from the Kentucky Retirement System (KRS).

During the 2018 Regular Session, the General Assembly took the bold, but difficult, steps necessary to ensure that all the systems managed by the KRS and the Kentucky Teachers' Retirement System are able to provide the benefits current retirees, active employees and this community are counting on. I was then somewhat dismayed when I read the column by Publisher Steve Stewart published in the June 9-10 edition ("Secrecy smelliest part of sewer bill") about these reforms. The column described the reforms as "secret" and "passed in the dark of night."

Reporting by this newspaper confirms that the reforms ultimately enacted in Senate Bill 151 evolved over many months.

The "secrecy" column ignored The State Journal's own coverage of the:

- Public Pension Oversight Board (PPOB) and the public testimony and discussion of reform proposals to address the funding crisis for years preceding the 2018 Regular Session.
- The October 2017 public presentation of proposed public pension reforms by Governor Matt Bevin with Senate President Robert Stivers and then-House Speaker Jeff Hoover.
- The introduction of Senate Bill 1 on February 20, 2018, which proposed comprehensive changes to the state pension plans. A "discussion only" meeting of the Senate Committee on State and Local Government was held on February 28. On March 7, Senate Bill 1, as amended by a Senate Committee Substitute, was reported favorably from committee.

This newspaper continued to cover the pension reform discussion in the Capitol during the 2018 Session, including the many visits and communications teachers had with legislators. Legislators listened and understood there were several provisions of SB 1 that needed to be removed.

The original provisions of SB 151 were removed by a House committee meeting — in an amendment called a committee substitute — allowing SB 151 to become the new vehicle for pension reform. This parliamentary procedure has been used many times before to pass important bills at the end of legislative sessions. In fact, this procedure was used by the General Assembly after Andy Beshear became attorney general without other such legislation being challenged in court. Will criminal defendants now challenge a 2015 law (SB 192 from the 2015 Regular Session) that increased penalties for heroin traffickers because it was passed in a similar manner to SB 151?

The Franklin County Circuit Court has now issued its ruling. Ultimately, it will be the responsibility of the Kentucky Supreme Court to pass judgment regarding SB 151. But the Commonwealth is at a crossroads on pensions. SB 151 makes commonsense changes that do not affect elementary and secondary public school teachers. It also adds significant new funding for imperiled systems.

These important facts, confirmed by the reporting of this newspaper, have been lost.

Sen. Joe Bowen, R-Owensboro, represents the 8th District, including Daviess, Hancock, and McLean counties. He is chairman of the State and Local Government Committee

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