IN THE SUPREME COURT FOR THE STATE OF MISSISSIPPI
NO. 2010-CA-00362

STACEY PICKERING, in his capacity
as Auditor for THE STATE OF MISSISSIPPI, APPELLANT

VS.

THE LANGSTON LAW FIRM, PA, JOSEPH C. LANGSTON, TIMOTHY R. BALDUCCI, STATE OF MISSISSIPPI, LUNDY & DAVIS, LLP and AYLSTOCK, WITKIN, KREIS & OVERHOLTZ APPELLEES

APPEAL FROM THE CHANCERY COURT OF
HINDS COUNTY, MISSISSIPPI
FIRST JUDICIAL DISTRICT

SUPPLEMENTAL BRIEF OF APPELLANT

Article 4, § 100 of Mississippi Constitution

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I. THE MANDATES OF ARTICLE 4, § 100 OF THE MISSISSIPPI CONSTITUTION, THE STATUTORY AUTHORITY FOR THE STATE AUDITOR'S CAUSE OF ACTION, AND MISSISSIPPI SUPREME COURT CASE LAW REQUIRE THE DEPOSIT OF ALL PROCEEDS FROM A PUBLIC LAWSUIT INTO THE PROPER TREASURY.

The State Auditor has challenged the manner in which special counsel negotiated and obtained compensation directly from the opposing party into their personal trust accounts during their representations of the State of Mississippi against Microsoft Corporation and MCI/Worldcom. Article 4, § 100 of Mississippi Constitution provides the following conditions for the release of any obligations owed to the State or political subdivision:

> **§ 100 Release of obligation or liability owed to State or political subdivision**
>
> No obligation or liability of any person, association, or corporation held or owned by this state, or levee board, or any county, city, or town thereof, shall ever be remitted, released or postponed, or in any way diminished by the Legislature, nor shall such liability or obligation be extinguished except by payment thereof into the proper treasury; nor shall such liability or obligation be exchanged or transferred except upon payment of its face value; but this shall not be construed to prevent the Legislature from providing by general law for the compromise of doubtful claims.

The requirements of Art. 4, § 100 are incorporated into the statutory authority under which this cause of action was originally brought by the State Auditor, Miss. Code Ann. § 7-7-211(g), which imposes the following duties on the State Auditor:

> To make written demand, when necessary, for the recovery of **any amounts representing public funds improperly withheld**, misappropriated and/or otherwise illegally expended by an officer, employee or administrative body of any state, county or other public office, and/or for the recovery of the value of any public property disposed of in an unlawful manner by a public officer, employee or administrative body, such demands to be made (i) upon the person or persons liable for such amounts and upon the surety on official bond thereof, and/or (ii) upon any individual, partnership, corporation or association to whom the illegal expenditure was made or with whom the unlawful disposition of public property was made, if such individual, partnership, corporation or association knew or had reason to know through the exercising of reasonable diligence that the expenditure was illegal or the disposition unlawful. Such demand shall be premised on competent evidence, which shall include at least one (1) of the following: (i) sworn statements, (ii) written documentation, (iii) physical evidence, or (iv) reports and findings of government or

other law enforcement agencies. Other provisions notwithstanding, a demand letter issued pursuant to this paragraph shall remain confidential by the State Auditor until the individual against whom the demand letter is being filed has been served with a copy of such demand letter. If, however, such individual cannot be notified within fifteen (15) days using reasonable means and due diligence, such notification shall be made to the individual's bonding company, if he or she is bonded. **Each such demand shall be paid into the proper treasury of the state, county or other public body through the office of the department** in the amount demanded within thirty (30) days from the date thereof, together with interest thereon in the sum of one percent (1%) per month from the date such amount or amounts were improperly withheld, misappropriated and/or otherwise illegally expended. In the event, however, such person or persons or such surety shall refuse, neglect or otherwise fail to pay the amount demanded and the interest due thereon within the allotted thirty (30) days, the State Auditor shall have the authority and it shall be his duty to institute suit, and the Attorney General shall prosecute the same in any court of the state to the end that there shall be recovered the total of such amounts from the person or persons and surety on official bond named therein; **and the amounts so recovered shall be paid into the proper treasury of the state, county or other public body through the State Auditor.** In any case where written demand is issued to a surety on the official bond of such person or persons and the surety refuses, neglects or otherwise fails within one hundred twenty (120) days to either pay the amount demanded and the interest due thereon or to give the State Auditor a written response with specific reasons for nonpayment, then the surety shall be subject to a civil penalty in an amount of twelve percent (12%) of the bond, not to exceed Ten Thousand Dollars ($ 10,000.00), to be deposited into the State General Fund.

Miss. Code Ann. § 7-7-211(g)(emphasis added).

The State Auditor has asserted from the inception of this lawsuit that all funds recovered as the result of lawsuits brought by the State of Mississippi or any political subdivision constitute "public funds." The funds negotiated and obtained by special counsel directly from the opposing party in the matters pending before this Court were obtained solely as the result of lawsuits brought by the State of Mississippi or a political subdivision (the State Tax Commission). In *Nixon v. American Tobacco Co.*, 34 S.W.3d 122 (Mo. 2001), special counsel to the Missouri Attorney General sought to avoid judicial review of nearly identical fee arrangements by suggesting that their personal compensation from public lawsuits did not constitute public money. In recognizing the shallowness of this argument, the Court concluded as follows:

> [W]e find Respondents' argument unpersuasive, as it relies on an elusive shell game that misdirects the nature of the attorney fees. While it is true that these funds do not originate in the state treasury, our analysis does not end there. Instead, we look to the method by which parties settle disputes. When considering whether to make an offer to settle, a litigant establishes a monetary amount that reflects, among numerous other factors, both his potential loss should he continue litigation and the risk that he may not succeed on the merits. This adjusted figure represents that litigant's maximum settlement price. Once the litigant has negotiated a settlement amount he finds favorable, it is of absolutely no consequence to him how the settlement is divided among various parties.
>
> We view with suspicion Respondents' contention that theses attorneys fees are not state funds for purposes of justiciability. We find that to characterize these funds as wholly private funds places form before substance, as it is these parties that negotiated the funds in this manner. . . for purposes of justiciability, it suffices to point out that the tobacco companies would owe Strong nothing if he were not representing the State of Missouri as to the merits of the controversy between the State and the tobacco defendants. For this reason, justiciability is established and we address the merits.

Nixon v. American Tobacco Co., 34 S.W.3d at 135. Any claims brought by an official of behalf of a governmental entity are *choses in action* - alleged rights of the state to recover money. Black's Law Legal Dictionary (6th ed. 1990). A chose in action is an intangible form of property or rights to property Id. ; 63A AM. JUR 2D *Property*, §§4, 22. Regardless of the nature of the chose in action, such right is already the property of the government. "State constitutions frequently contain provisions to the effect that no money shall be paid out of the treasury of the state, or from any of its funds, or from any of the funds under it management, except in pursuance of an appropriation by law." 63C. AM. JUR 2D *Public Funds* §34 (1997). Even funds awarded by judgment in a lawsuit including attorneys fees belong to the party, not his attorney. 63A AM. JUR 2D *PROPERTY* §§4, 25. *SEE, GENERALLY*, 7A C.J.S. *ATTORNEY & CLIENT*, §284(1980). ("In the absence of a statue or agreement to the contrary, a judgment for costs and attorney's fees is the property of the client and not the attorney."); 63C AM. JUR 2D *Public Funds* §34 34 (1997); *see also* 814 A C.J.S. *States* §233 (1977) ("General funds, available for general state purposes, which are deposited in the state treasury, are subject to constitutional requirements as to appropriations with respect to their

disbursement, and this is true regardless of the source from which such funds are derived.") Federal law unambiguously concludes that attorneys fees awarded in an action belong to the client, not the attorney. *Venegas v. Mitchell*, 495 U. S. 82,87-88 (1990); *see also Brown v. General Motors Corp., Chev. Div.*, 722 F.2d 1009, 1011 (2d Cir. 1983)(holding that prevailing party, not attorney, is also entitled to award of attorneys' fees and that attorneys lack standing to petition the court for fees). As a matter of general accounting principals, the total amount of a settlement is likewise considered the gross income of the party litigant regardless of whether a contingency fee is also recorded as an expense or liability that may ultimately entitle the litigant to a deduction on his taxes. *Commissioner of Internal Revenue v. Banks*, 125 S. Ct. 826 (2005)(resolving split among federal circuits and requiring treatment of total settlement proceeds as gross income for accounting purposes). These special assistants were not party litigants despite their attempts to interject themselves as such and negotiate payment on their own behalf against the settlement amounts obtained by the State. Having taken an oath to serve as special counsel for the State of Mississippi, all settlement funds obtained for the State of Mississippi constitute public funds. Not even the retention agreements for these special assistants allowed for direct negotiation of their own fees at the settlement table.[1]

The constitutionality of bypassing the Legislature during the collection and disbursement of public funds was expressly addressed in the Mississippi Supreme Court cases *In re Hood v. State*

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[1] "There is a potential danger in an agreement where a plaintiff's attorney's fee is to be paid by defendants. The danger is that the lawyer's own interest will prevail over the client's- or to put it another way, that the lawyer might be unduly influenced by an oversized fee to recommend an inadequate settlement for the client." *Nixon*, 34S.W.3d at 135. Consistent with this observation, Mississippi Rule of Professional Conduct 1.8(j) prohibits a lawyer from acquiring a proprietary interest in a cause of action. *See also* 5 U.S.C. §7301 No federal governmental official acting in his official capacity shall have any personal interest in the exercise or outcome of any of his official powers or duties. See, e.g., 5 U.S.C. §7301 and Ex. Ord. No. 12674 of April 12, 1989, 54 Fed. Reg. 15159.

of Mississippi, 958 So. 2d 790 (Miss. 2007) and *Pursue Energy Corporation v. State Tax Commission,* 816 So.2d 385 (Miss. 2002).

> Under all constitutional governments recognizing three distinct and independent magistracies, **the control of the purse strings** of government **is a legislative function**; indeed, it is the **supreme legislative prerogative**, indispensable to the independence and integrity of the legislature, and **not to be surrendered or abridged**, save by the constitution itself, without disturbing the balance of the system and endangering the liberties of the people. The right of the legislature to control the public treasury, to determine the sources from which the public revenues shall be derived and the objects upon which they shall be expended, to **dictate the time, the manner, and <u>the means both of their collection and disbursement</u> is firmly and inexpugnably established in our political system**.

In re Hood v. State of Mississippi, 958 So. 2d 790, 812 (Miss. 2007); *see Belmont v. Miss. State Tax Commission*, 860 So.2d 289, 306-07 (Miss. 2003);[2] *see also Myers v. City of McComb*, 943 So.2d. 1, 4 (Miss. 2006)(emphasizing the importance of separation of powers doctrine and holding that "legislative department alone has access to the pockets of the people" and "judicial branch cannot perform a clearly legislative branch function"); *see also King's Daughter Medical Center, et al. v. Haley Barbour, et al.*, Cause No. G-2006-1621, Chancery Court of Hinds County, Mississippi, First Judicial District (July 10, 2008)(declaring Division of Medicaid assessment void as matter of law in violation of Miss. Code Ann. § 43-13-11(18)(b) since it usurped legislative authority to control purse strings of State).

* * *

More recently, in *Myers v. City of McComb,* 943 So.2d 1 (Miss.2006), we reiterated the importance of the separation of powers doctrine outlined in the Mississippi Constitution. In our discussion of the separation of powers doctrine we stated, "Article 1, Section 2 of the Mississippi Constitution prohibits the exercise of '*any power* ' belonging to one branch by a member of another branch." *Id.* at 4 (emphasis in original). Thus, it follows that the judicial branch cannot perform a clearly legislative branch function. **The prevailing power of the Legislature stems from the power of the purse.** In *Myers,* we again enunciated, " 'the legislative department alone has access to the pockets of the people, and has in some Constitutions full discretion, and in all, a prevailing influence over the pecuniary rewards of those who fill the other departments, a dependence is thus created in the latter, which gives still

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[2] *Belmont v. Miss. State Tax Commission*, 860 So.2d 289, 299-300 (Miss. 2003) specifically cites Art. 4, § 100 of the Mississippi Constitution though it does not offer any detailed analysis.

> greater facility to encroachments of the former.' " *Id.* at 8 (citing The Federalist No. 48 at 334 (James Madison)).
>
> Before money can come out of the state treasury, such money must be appropriated by the Legislature. *State ex rel. Barron v. Cole,* 81 Miss. 174, 193, 32 So. 314, 315 (1902) ("[n]o money can come into the treasury or go out of it lawfully except as directed by legislative act. **Collection and disbursement of public money belong to the legislature** and must be done as it directs."). Without question, the expenditure of public funds is appropriately a legislative function. *Bd. of Supervisors v. Bailey,* 236 So.2d 420, 423 (Miss.1970) ("The appropriation of public funds is traditionally within the exclusive province of the legislature.")

In re Hood v. State of Mississippi, 958 So. 2d at 812.

Once the settlement funds are deemed public, special counsels' control and diversion into personal bank accounts for their personal compensation without participation or review by the Legislature was improper under case law, the statutory authority for this cause of action, and the constitutional requirement of Art. 4, § 100 that such funds be deposited into the "proper treasury." The Attorney General's Office has issued opinions interpreting Art. 4, § 100 to require that the total amounts of any public funds recovered by a public entity be deposited into the proper treasury, with any applications for fees or commissions to independently follow the proper channels for appropriation. *See, eg.* AG Opinion No. 2009-00503; Murdock, Sept. 4, 2009; AG Opinion No. 2003-0533, Trapp, Nov. 14, 2003; AG Opinion No. 2006-00657; Herring, Jan. 12, 2007; AG Opinion No. 2007-00455, Joiner, Sept. 14, 2007.

In Murdock, the City of Gulfport sought to remove itself as the intermediary depository for cobra payments being made from former employees since the payments were ultimately transmitted to the insurance carrier's third-party administrator. Relying specifically on Art. 4, § 100 of the Mississippi Constitution, the Attorney General opined that "[p]ayments owed to the city must be made to the city." Although the Attorney General believed that the City might enter into a contract for the third-party administrator to handle receipt of the mailings, it was concluded that the money

must still be made payable to the municipality and "first deposited into a municipal account, provided that such deposits are made timely." Similarly here, special counsels' claim throughout this dispute that they are ultimately owed the fees becomes irrelevant since they may not bypass the requirement that the entire settlement be first deposited timely into the proper treasury of the State under Art. 4, § 100 of the Mississippi Constitution.

In Trapp, the Attorney General explained to the Alcorn Board of Supervisors that the code sections governing such boards allowed the hiring of attorneys and private collection agents for the purpose of seeking the return of any overpayments made by the county for telephone service. However, the Attorney General instructed the Board as follows:

> . . . the Mississippi Department of Audit has established rules and regulations which counties must follow to enter into a contract under this statute. Those regulations require the entire amount of delinquent payments recovered to be remitted to the county. The payments may not be reduced by any collection fees. Instead, a claim for collection fees must be presented to the board of supervisors for its consideration for payment.

Based on this clear understanding of the requirement that the full amounts of any recoveries for a public entity be first deposited into the public account before consideration of contingency fees by the local legislative body, the Attorney General's special assistants should be required to do the same.

The Attorney General has suggested instead that the ability of the Legislature to provide for the resolution of doubtful claims alone allowed for the deposit of any settlement proceeds into personal accounts. As a preliminary matter, this single provision of Art. 4, § 100, by its plain reading, does not negate the requirements contained in the preceding provisions. In this regard, the case of *Adams v. Fragiacomo*, 15 So. 798 (Miss. 1893) is argued by the Attorney General out of context. That case concerned a challenge to the Legislature's ability to repeal a criminal statute as a violation of Art. 4, § 100 since repeal of the criminal statute without a savings clause would have

absolved an accused liquor retailer of liability for certain fines in a pending criminal matter. *Id.* at 799. The Court determined that Art. 4, § 100's use of the term "liability" could not be interpreted so broadly as to prohibit the legislature from repealing a statute, even though it may ultimately release someone from "liability" for a fine. Immediately following the quote offered by the Attorney General, the Court explained the State's purpose for passage of Art. 4, § 100:

> . . . . It was dealing in reference to a known evil, and its purpose was to use such language as should make effectual the prohibition it imposed. The principal form in which that evil existed was in reference to delinquencies by persons charged with the collection, custody, and disbursement of public moneys, and who were, by law, required to give bond for the faithful discharge of such duties.

Id. at 800. The Court merely concluded that "liabilities" and "obligations," in the context of Art. 4, § 100, cannot be interpreted so broadly as to touch upon the legislature's ability to pass laws affecting issues of liability in contract, tort or criminal law, but that **"a liability which is the subject of exchange and transfer, and which has a face value would unquestionably fall under the meaning of the word 'obligation.'"** *Id.* (emphasis added)

Here, the settlement proceeds were certainly an item with a face value capable of transfer, and therefore, should have been deposited into the proper treasury pursuant to Art. 4, § 100. Because the funds became liquidated once the settlement was executed with State, the "liquidated v. unliquidated" distinction offered by the Attorney General as an absolute test for application of any provision in Art. 4, § 100 is insufficient. Whether it becomes an item with face value and capable of exchange with the State, the test offered by the *Fragiacomo* Court more than a century ago, is the better indication for determining whether Art. 4, § 100 is applicable to preclude further negotiation and require deposit into the "proper treasury." Once the precise amount of funds to be paid for settlement was established by a legally binding agreement with the State, it became a defined obligation owed the State with a certain face value fully capable of exchange, and therefore, could not be diminished or extinguished without deposit into the "proper treasury" under Art. 4, § 100.

The case of *Gully v. Stewart*, 178 Miss. 178, 174 Miss. 559 (1937) concerned the tax collector's statutory authority to pursue a cause of action for tort. In holding that the tax collector had no authority to pursue anything other than an action for collection of unpaid taxes, it concluded that Art. 4, § 100's use of the word "liability" did not extend so broadly to preclude dismissal of the tax collectors lawsuit. *Id.* at 559-60. Once again, the reference to any distinction between liquidated and unliquidated matters referenced therein is taken completely out of context for purposes here, especially given that the opposing parties' obligations to the State were established as a matter of undisputed fact upon execution of the settlement contracts. *See also Bd. of Levee Comm'rs v. Parker*, 193 So. 346 (Miss. 1940)(obligations are doubtful only when based on uncertain facts). As recognized in *Fragiacomo*, Art. 4, § 100 was specifically passed to prevent "delinquencies by persons charged with the collection, custody, and disbursement of public moneys. 15 So. at 800. Article 4, § 100 should certainly apply to prohibit individuals from redirecting public settlement proceeds once they have been tendered. Accordingly, Art. 4, § 100 required the deposit of all public settlement funds into the "proper treasury."

II. The "proper treasury" is the account normally utilized by the state, county or other public body for deposit of the proceeds demanded in the lawsuit.

The State Auditor has not challenged the accounts or treasury into which the majority of the settlement funds were deposited. Consistent with the scope of the State Auditor's challenge, it is submitted that the "proper treasury" for the fees negotiated and paid directly to the special assistants by the opposing parties were the same treasuries designated and utilized for the remainder of the settlement funds. It is in this respect that the special assistant fees were not paid into the "proper treasury" as required Art. 4, § 100 and Miss. Code Ann. § 7-7-211(g).

Pursuant to Miss. Code Ann. § 7-7-211(g), under which these pending causes of action were brought by the State Auditor, the specific relief ordered by the Court should require tender of the

challenged amounts to the Department of Audit, with payment thereafter being directed by the State Auditor to the treasuries that were previously designated and utilized for the remainder of the public settlement funds at issue. In support of such relief, Miss. Code Ann. § 7-7-211(g) provides, in relevant part, as follows:

> **Each such demand shall be paid into the proper treasury of the state, county or other public body through the office of the department in the amount demanded** within thirty (30) days from the date thereof, together with interest thereon in the sum of one percent (1%) per month from the date such amount or amounts were improperly withheld, misappropriated and/or otherwise illegally expended . . . and **the amounts so recovered shall be paid into the proper treasury of the state, county or other public body through the State Auditor.**

By its most basic terms, this same statute implicitly identifies the "proper treasury" or precise accounts in which public settlements should be deposited. In a matter brought on behalf of any state agency, county or local political subdivision, the "proper treasury" would logically seem to be the account where the public entity bringing the lawsuit normally deposits receipts of the type demanded in its lawsuit. As a general rule, proceeds recovered as the result of a lawsuit filed by a public plaintiff should be deposited into the account normally designated and utilized by that plaintiff for the particular funds demanded through legal action had they been received without the need for a lawsuit. While every conceivable circumstance of any potential public lawsuit cannot be contemplated at this juncture, this requirement as a general rule seems to ensure under most circumstances that proceeds recovered for the benefit of the public are utilized for the purpose originally intended. Application of this general proposition is demonstrated by the Attorney General's instructions given in Murdock, Sept. 4, 2009; AG Opinion No. 2003-0533 and Trapp, Nov. 14, 2003; AG Opinion No. 2006-00657 discussed in detail above, wherein local authorities were instructed that the "proper treasury" was the treasury and account of the local government for whom the funds were demanded and collected.

It is State Auditor's understanding that all funds recovered through the State Tax Commission's proof of claim in the MCI/Worldcom matter (except the amounts to the special assistants) were wired directly to the state treasury through the Office of the State Treasurer. As indicated by the following statute, this appears to have been ultimately consistent with the Department of Revenue's normal collection practice for taxes:

> **§ 27-3-57 Deposit of funds; apportionment of collections; bonding**
>
> All funds collected by the Commissioner of Revenue and by the Department of Revenue under the provisions of any law are designated as public funds of the State of Mississippi. All such funds shall be deposited in the State Treasury on the same day in which the funds are collected, in accordance with Section 7-9-21. The State Treasurer shall transfer such monies to municipalities, counties and other special accounts, as provided by law.
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> The Commissioner of Revenue shall determine amounts due all municipalities, counties and such special funds as provided by law and shall certify to the State Treasurer at the end of each month the amount due each municipality, county or special fund. All tax collections to be apportioned by the Department of Revenue pursuant to Sections 27-65-75, 27-19-159, 27-5-101 and 27-5-103 shall be distributed to the proper sources as provided by law by the State Treasurer upon the certification of apportionment by the Department of Revenue. The State Treasurer shall requisition monies from the Treasury in such amounts as determined and certified by the Department of Revenue. The Department of Finance and Administration shall deliver the warrant to the State Treasurer who shall transfer such funds to each municipality, county or other such special fund by warrant or by electronic funds transfer on the due date.
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> Officers charged with the responsibility of handling such funds shall be required to provide fidelity bonds in the amount provided by law.

Since the MCI/Worldcom settlement funds (except the amounts negotiated by the special assistants) were handled consistently with normal tax receipts, the State Auditor asserted no challenge to the treasury utilized for the majority of these funds. As stated above, the special assistant fees should have been similarly directed to the same treasury, with the special assistants making application to the Legislature for their fees under Miss. Code Ann. § 7-5-7.

Attorney General Mike Moore confirmed the following procedure for paying special assistants under contingency fee arrangements when they were also pursuing unliquidated claims on behalf of the State Tax Commission:

> If any severance and/or income tax monies are ultimately recovered by the State due to the legal efforts of Mr. Blair, **attorneys fees** for Mr. Blair **will not be paid out of the tax monies so recovered.** This fact was understood by all, including the firm of McDaniel and Blair, P. A. Instead, it was contemplated that if recovery was had **the Attorney General would apply to the Legislature for an appropriation** to this Office to pay the McDaniel and Blair firm an amount to be measured by the terms of the Retention Agreement. The Legislature could in its discretion appropriate all, part, or none, of the Attorney General's recommendation for attorneys fees.[3] This office will work to see that compensation is appropriated. However, **in no event are attorneys fees for Blair to be directly paid out of any tax monies recovered.**

(C.P. 291-92)(emphasis added)

In response to this testimony, the *Pursue Energy* Court opined as follows in its affirmation of a proposed contingency arrangement for General Moore's special assistants:

> It was understood by all that Blair [the attorney] would not be paid out of any tax monies recovered. Instead, it was contemplated that if recovery was had, the Attorney General would apply to the Legislature for an appropriation to pay the firm an amount to be measured by the terms of the retention agreement. The Legislature could in its discretion appropriate all, part, or none of the Attorney General's recommendation for attorneys' fees, but in no event were they to be paid directly out of any tax monies recovered.
>
> Even more compelling is the freedom provided the Legislature in the instant case who could independently determine the fee payable to Blair for his service, even to the extent that it could refuse to pay. We are therefore unpersuaded by Pursue's arguments.

(C.P. 273)(citing *Pursue Energy Corp. v. Mississippi State Tax Comm'n*, 816 So. 2d 385, 387, 392 (Miss. 2002) and *Thomas v. McDonald*, 667 So. 2d 594, 597 (Miss. 1995)(appellate court interpretation of statute subsequently retained by the Legislature without amendment is binding

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[3] As stated in oral argument, the State Auditor does not and will not speak for the Legislature in regard to its normal appropriations process and its authority to accept or reject requests made through the proper procedures.

precedent)). Through this decision, the Mississippi Supreme Court affirmed the ruling of the trial court (Rankin County Chancellor John Grant) which had held the following:

> Considering all the foregoing, the Court finds, as a matter of law, that the attorney general has the statutory authority to enter the referenced contract with special assistant attorney general Blair, but not the authority to pay the special assistant attorney general, except through appropriated funds available through the attorney general's budget or through appropriation by the Mississippi legislature. Only the Mississippi legislature maintains legislative power over the state's finances. Only the Mississippi legislature can authorize payment to Blair over and above fees available through the budgeted funds of the attorney general's office.
>
> As set out in this opinion, there is no genuine issue of any material fact and Defendants are entitled to Judgment as a matter of law.

(C.P. 294-302). Not only is this holding consistent with the Legislature's prerogative to control the appropriation of tax receipts deposited through the state treasury, it is consistent with the requirements of Miss. Code. Ann. § 7-5-7 discussed below.

As to the identity of the "proper treasury" for the Microsoft settlement proceeds, the funds represented a demand for recovery by the State of Mississippi, all it agencies, and its citizens.[4] Although the Settlement Agreement afforded individual citizens vouchers to use for the purchase of new Microsoft products,[5] it is a logical conclusion that the "proper treasury" referenced in Art. 4, § 100 of the Mississippi Constitution and Miss. Code Ann. § 7-7-211(g) for the recovery must be a general fund ultimately controlled by the Legislature whose members were elected to collect and disburse general public funds. Since it is the understanding of the State Auditor that the funds from the Microsoft Settlement, excluding those wired the special assistants' trust account in Houston, Texas, were also deposited with the State Treasury, again the only challenge presented by the State

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[4] The style of the underlying case was *"Jim Hood, Attorney General ex re. State of Mississippi v. Microsoft Corporation."*

[5] It is the understanding of the State Auditor that $2.5 million in vouchers were redeemed to Microsoft towards their purchase of new Microsoft products.

Auditor concerns the particular treasury (personal accounts) utilized for the special assistant fees. *See In re Hood v. State of Mississippi,* 958 So. 2d at 812, 815 ("With this being said, we note the obvious. The Legislature holds the purse strings.")(holding improper the Attorney General's appropriation of $20 million from tobacco settlement to a fund not subject to legislative appropriation). The trust account in Houston, Texas was not the "proper treasury" for proceeds obtained solely as the result of a public lawsuit.

As to the identity of the "proper treasury" for future settlement proceeds involving state agencies, it would appear to be identified primarily through the various code sections dealing with the particular state agency, political subdivision or revenue being collected. *See, e.g.,* Miss. Code Ann. § 41-59-61 (court fines for hazardous moving traffic violation deposited in emergency medical services operating fund); Miss. Code Ann. § 47-5-77 (corrections department must deposit funds with state treasurer); Miss. Code Ann. § 47-5-513 (deposit of funds by department of corrections for correctional industries work program); Miss. Code Ann. § 43-20-12 (fees and penalties relating to child care facilities must be deposited into special fund); Miss. Code Ann. § 99-19-32 (deposit of fines and assessments on persons convicted of felonies); Miss. Code Ann. §§ 27-55-47, 27-57-35, 27-59-51 (comptroller funds); Miss. Code Ann. § 27-59-51 (liquefied compressed gas, taxes, funds placed in depositories; Miss. Code Ann. § 27-65-75 (sales tax distribution); Miss. Code Ann. § 53-3-203 (penalties assessed for violations of petroleum substances transportation regulations paid into oil and gas board fund); Miss. Code Ann. § 27-25-11 (collection and deposit of severance taxes); Miss. Code Ann. § 27-3-57 (deposit of taxes with state treasurer); Miss. Code Ann. § 7-25-11 (collection and distribution of timber taxes); Miss. Code Ann. § 27-55-555 (special fuel tax revenue deposits); Miss. Code Ann. § 53-3-13 (disposition of drilling permit fees); Miss. Code Ann. § 73-14-47 (deposit of hearing aid dealers' license fees into special fund); § 73-38-36 (special fund for state board of health regulation of speech pathologists); Miss. Code Ann. § 75-74-19 (special fund for

regulation of youth camps); Miss. Code Ann. § 77-1-6. (Public Service Commission Regulation Fund). Consequently, if the deposit or use of settlement proceeds bypass any such normal agency requirements for deposit, a cause of action would seem to arise in the agency, political subdivision or designated fund for return of the funds to the "proper treasury" under Art. 4, § 100 of the Mississippi Constitution.

Considering the scope of the State Auditor's challenge to both the Microsoft and MCI/Worldcom matters, the only analysis required here is whether the "proper treasury" for the amounts negotiated by special counsel was the account designated for the remainder of the settlement funds and whether the compensation arrangement allowed by the Attorney General violated Miss. Code Ann. § 7-5-7. As established in the preceding section, all settlement funds were public, and therefore, the deposit of portions into the personal accounts of special assistants violated the requirement of Art. 4, § 100 that such funds be deposited into the proper treasury. Accordingly, the rulings below should be reversed and rendered with direction that the funds be returned to the Department of Audit for his deposit in the proper treasury pursuant to Miss. Code Ann. § 7-7-211(g).

III. Miss. Code Ann. § 7-5-7 established a specific procedure for the payment of special assistants which was not followed in this case.

The State Auditor has also challenged as improper special counsels' direct negotiations and deposit of public settlement proceeds into their personal bank accounts under Miss. Code Ann. § 7-5-7, which provides the following as to their compensation:

> **§ 7-5-7. Special counsel and investigators.**
>
> The governor may engage counsel to assist the attorney general in cases to which the state is a party when, in his opinion, the interest of the state requires it, subject to the action of the legislature in providing compensation for such services.
>
> The attorney general is hereby authorized and empowered to appoint and employ special counsel, on a fee or salary basis, to assist the attorney general in the preparation for, prosecution, or defense of any litigation in the state or federal courts

or before any federal commission or agency in which the state is a party or has an interest.

The attorney general may designate such special counsel as special assistant attorney general, and may pay such special counsel reasonable compensation to be agreed upon by the attorney general and such special counsel, in no event to exceed recognized bar rates for similar services.

The attorney general may also employ special investigators on a per diem or salary basis, to be agreed upon at the time of employment, for the purpose of interviewing witnesses, ascertaining facts, or rendering any other services that may be needed by the attorney general in the preparation for and prosecution of suits by or against the state of Mississippi, or in suits in which the attorney general is participating on account of same being of statewide interest.

The attorney general may pay travel and other expenses of employees and appointees made hereunder in the same manner and amount as authorized by law for the payment of travel and expenses of state employees and officials.

The compensation of appointees and employees made hereunder ***shall be paid out of the attorney general's contingent fund, or out of any other funds appropriated to the attorney general's office.***

(emphasis added).[6]

Where the language used by the legislature in a statute is plain and unambiguous and conveys a clear directive, it must be strictly construed. *Miss Power Co. v. Jones*, 369 So. 2d 1381, 1388 (Miss. 1979); *Forman v. Carter*, 269 So.2d 865 (Miss. 1972); *State v. Heard*, 246 Miss. 774, 151 So.2d 417 (1963); *Harrison County School District v. Long Beach School District* 700 So. 2d 286, 288-89 (Miss. 1997). Pursuant to the plain and unambiguous terms of Mississippi Code Ann. § 7-5-

[6] It is noted that the Chancery Court of Hinds County, Mississippi based its decision partly on language within Miss. Code Ann. § 7-5-5 providing that the Attorney General was the sole judge of compensation for assistants hired under that particular section. However, the special assistants here were not engaged under Miss. Code Ann. § 7-5-5 which concerns assistants that "devote their entire time and attention to the duties pertaining to the department of justice under the control and supervision of the attorney general." As recently argued in an interlocutory appeal currently pending before this Court, *Barbour v. McCoy*, 2011-M-00456, the legislative history of Miss. Code Ann. §7-5-5 indicates it was passed decades ago solely to govern assistants hired by the Attorney General to spend their full time fighting efforts by the United States Department of Justice to integrate Mississippi's public institutions.

7, compensation of these special assistants "shall" be paid directly from the attorney general's contingent fund or out of funds appropriated to his office. It is a fundamental rule of statutory interpretation in Mississippi that "shall" means absolutely mandatory. *Franklin v. Franklin*, 858 So. 2d 110, 115 (Miss. 2003).

It is undisputed that the Attorney General and his special assistants did not follow the requirement of Miss. Code Ann. § 7-5-7 despite any other constitutional requirements. In its ruling, the circuit court agreed as follows to the interpretation of Miss. Code Ann. § 7-5-7 asserted by the State Auditor:

> **There is no question that if the attorneys fees are paid by the State, then such fees must be paid in accordance with the clear dictates of Miss. Code Ann. § 7-5-7.**

Despite this conclusion, the same court looked to the form of the wire transfer to the special assistants and substantively overlooked the reality that the fees were ultimately incurred by the State since they were part of the overall amount that the defendants were willing to pay to settle the case. *See Nixon v. American Tobacco Co.*, 34 S.W.3d 122 (Mo. 2001).

Adherence to § 7-5-7 leads to the same result demanded by the State Auditor under Miss. Code Ann. § 7-7-211(g), *In re Hood, Pursue Energy Corp.*, or Art. 4, § 100 of the Mississippi Constitution. The Mississippi Supreme Court abstains from constitutional issues unless such determination is necessary to disposition of the case. *In re Hood v. State of Mississippi,* 958 So. 2d 790, 812 (Miss. 2007); *Freeman v. PERS*, 822 So.2d 274, 281 (Miss.2002); Dean v. PERS, 797 So.2d 830, 833 (Miss.2000); *Johnson v. Memorial Hosp.*, 732 So.2d 864, 866 (Miss.1998); *Scott v. Flynt*, 704 So.2d 998, 1007 (Miss.1996); *Kron v. Van Cleave*, 339 So.2d 559, 563 (Miss.1976) ("It is familiar learning that courts will not decide a constitutional question unless it is necessary to do so in order to decide the case."). It would nevertheless be plain error to ignore Art. 4, § 100 of the

Mississippi Constitution if this Court determined that it to be the determining factor since this case involved the management of public funds by a legal officer of the State who has issued internal interpretations of Art. 4, § 100 that are directly contrary to his arguments now. *See State Highway Comm'n of Mississippi v. Hyman*, 592 So. 2d 952, 957 (Miss. 1991)(plain error rule preserves arguments on appeal where substantial right is affected such as when large amounts of State money are at stake).

The facts were undisputed that special counsel were not paid from the Attorney General's "Contingent Fund," ultimately identified at oral argument, or through funds appropriated to the Attorney General's office.[7] The requirements of § 7-5-7 were not followed by allowing special assistants to negotiate the amount of their own fees and expenses directly with the opposing party and arrange for the direct wiring of these funds to personal bank accounts. The diversion of funds in this manner evaded any review or disbursement by the Mississippi Legislature on behalf of the citizens of the State of Mississippi. As maintained by the State Auditor, transparency as to fees and expenses claimed by special assistants exists only through the appropriations process in the Mississippi Legislature where the individuals elected and entrusted by the citizens of this State to manage public funds may be found. Assigning a monetary figure at this juncture for the harm done to our governing statutes, case law and our constitutional form of government by these ongoing settlement arrangements with special assistants is certainly difficult. However, determining whether the citizens of this State have been financially harmed by either the expenses claimed by the special assistants or the direct negotiation of attorneys' fees with an opposing party and the assignment of a dollar figure for any such harm is a matter that should be resolved during the appropriations

[7] The suggestion that the opposing party, the Attorney General or the special assistants could appropriate settlement funds to themselves overlooks the fact that the settlement proceeds were public funds, and therefore, could only be appropriated thereafter by the Legislature.

process in the Legislature, not through voluntary website postings. Where the collection and disbursement of public funds have escaped any legislative review, the duty to seek their return arises in the State Auditor.

It is a fundamental and constitutional principal of law that while the Attorney General's Office has general authority to pursue litigation of behalf of the State of Mississippi, it must yield to any express statutory limitations on that authority. *Frazier v. State ex rel. Pittman*, 504 So. 2d 675, 687-90 (Miss. 1987)("all public officers, including the Attorney General, are subordinate to the laws of this State"); *State v. Warren*, 180 So. 2d 293, 300 (Miss. 1965)(Attorney General clothed with common law powers "except insofar as they have been restricted or modified by *statute* or the State Constitution"). Here, the Attorney General's authority regarding the final compensation of outside counsel is one of those aspects that has been expressly limited by statute. Any other holding would ignore an entire section of Miss. Code Ann. § 7-5-7. *See Davis v. Miller*, 32 So. 2d 871 (Miss. 1940)(court cannot ascribe meaning to statute that renders part of statute meaningless).

WHEREFORE, the judgment of the Chancery Court of Hinds County, Mississippi should be REVERSED and RENDERED and the amounts demanded by the State Auditor in the court below tendered to the Department of Audit for payment into the proper treasury.

THIS the 8th day of September, 2011.

STACEY PICKERING in his official capacity as Auditor for the State of Mississippi

By: _____
Arthur F. Jernigan, Jr.

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CERTIFICATE OF SERVICE

I hereby certify that I have this day delivered via U.S. Mail a true and correct copy of the attached and foregoing document to the following persons:

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THIS the 8th day of September, 2011.

Arthur F. Jernigan, Jr.