

**IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI
NO. 2010-CA-00881**

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

APPELLANT

VS.

**JIM HOOD, ATTORNEY GENERAL *ex rel.*
STATE OF MISSISSIPPI and
MICROSOFT CORPORATION**

**APPELLEES/
CROSS-APPELLANT**

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

**REPLY BRIEF OF APPELLEE/CROSS-APPELLANT
JIM HOOD, ATTORNEY GENERAL *ex rel.*
THE STATE OF MISSISSIPPI ON CROSS-APPEAL**

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TABLE OF CONTENTS

	<u>Page</u>
TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES.....	ii
REPLY ARGUMENT SUPPORTING CROSS-APPEAL.....	1
I. The Auditor’s Motion to Intervene Under Rule 24(a) Was Untimely.....	1
A. The Auditor’s Lengthy Delay Was Unreasonable.....	1
B. The Auditor’s Intervention Prejudiced the Parties.....	2
C. No Prejudice to the Auditor.....	4
II. None of the “Interest” Intervention Factors Favor the Auditor.....	5
III. The Partnership For A Healthy Mississippi Decision Does Not Support the Auditor’s Position.....	6
IV. Rule 24(b) Does Not Validate the Auditor’s Intervention.....	7
CONCLUSION.....	8
CERTIFICATE OF SERVICE.....	10

TABLE OF AUTHORITIES

Page

Mississippi State Cases

<i>City of Tupelo v. Martin</i> , 747 So. 2d 822 (Miss. 1999).....	1
<i>Crosswhite v. Golman</i> , 939 So. 2d 831 (Miss. Ct. App. 2006).....	2
<i>Cummings v. Benderman</i> , 681 So. 2d 97 (Miss. 1996).....	5
<i>Dockins v. Allred</i> , 849 So. 2d 151 (Miss. 2003).....	7
<i>Hartford Cas. Ins. Co. v. Halliburton Co.</i> , 826 So. 2d 1206 (Miss. 2001).....	3
<i>Hood ex rel. State Tobacco Litigation</i> , 958 So. 2d 790 (Miss. 2007).....	6-7

Federal Cases

<i>Corley v. Jackson Police Dept.</i> , 755 F.2d 1207 (5 th Cir. 1985).....	3
<i>Engra, Inc. v. Gabel</i> , 958 F.2d 643 (5 th Cir. 1992).....	3
<i>U.S. v. U.S. Steel Corp.</i> , 548 F.2d 1232 (5 th Cir. 1977).....	3

Cases from Other Jurisdictions

<i>Button's Estate v. Anderson</i> , 28 A.2d 404 (Vt. 1942).....	5
<i>Conant v. Robins, Kaplan, Miller & Ciresi, LLP</i> , 603 N.W 2d 143 (Minn. Ct. App. 1999).....	5
<i>People v. Phillip Morris, Inc.</i> , 759 N.E. 2d 906 (Ill. 2001).....	5
<i>Phillip Morris Inc. v. Glendening</i> , 709 A.2d 1230 (Md. 1998).....	5

Statutes

Miss. Code Ann. § 7-7-1(4).....	4
Miss. Code Ann. § 7-7-211(g).....	4

Rules

Miss. R. Civ. P. 24(a).....	1, 3, 7-8
Miss. R. Civ. P. 24(b).....	7-8

REPLY ARGUMENT SUPPORTING CROSS-APPEAL

The trial court's ruling on the merits now on direct appeal was correct. The State asserts its cross-appeal as to the propriety of the Auditor's intervention in the court below as an alternative ground that this Court may reach the correct result, *i.e.*, the Auditor has no right to disgorge the attorneys' fees and expenses earned by retained counsel. The State incorporates its Statement of the Case in Appellee/Cross-Appellant's Brief previously submitted to the Court.

I. The Auditor's Motion to Intervene Under Rule 24(a) Was Untimely.

The court below only analyzed and applied the first "timeliness" prong of the Rule 24(a) test for intervention of right. With all due respect to the trial court, its decision permitting intervention was wrong. This Court should consider the following factors regarding an intervenor's timeliness: (1) the length of time the intervenor actually knew or reasonably should have known of an interest prior to moving to intervene; (2) the prejudice to existing parties as a result of the intervenor's delay; (3) the prejudice to the intervenor if intervention is denied; and (4) other circumstances for or against a determination of timeliness. *City of Tupelo v. Martin*, 747 So. 2d 822, 826 (Miss. 1999). None of the factors support the Auditor's intervention.

A. The Auditor's Lengthy Delay Was Unreasonable.

The Auditor claims that his office timely moved to intervene because a letter was sent to the Attorney General and his retained counsel a week after the trial court approved the Microsoft Settlement Agreement. That overlooks two dispositive points. First, on direct appeal, the Auditor claims he has a right to challenge the propriety of retained counsel's Retention Agreement. As explained in the State's Response Brief, the Auditor did not seek to void that Agreement in the trial

court and is barred from arguing that now. *See, e.g., Crosswhite v. Golman*, 939 So. 2d 831, 833 (Miss. Ct. App. 2006) (appellant barred from raising issue on appeal not raised below). But, the Auditor's "void Retention Agreement" argument – even though it is wrong – is an admission that the validity of that Agreement is an essential component of the Auditor's claimed relief.

The Retention Agreement was signed in 2004. The Auditor knew or had reason to know about it for *five years* before he wrote to retained counsel about it in June 2009. He did not move to intervene to challenge the effect of the Agreement until February 2010. The Auditor's intervention motion was filed more than five-and-a-half years after the publicly available Retention Agreement was consummated. So the actual time frame evidencing the Auditor's delay is five years, not the one week he now claims.

Second, even disregarding the fact that the Retention Agreement was available for many years prior to the Auditor's intervention, there is no dispute the Auditor did not move to intervene until more than six months after the court-approved Settlement Agreement and a final judgment was entered by the trial court. The Microsoft Settlement Agreement was approved on June 11, 2009. The time for anyone to appeal the trial court's judgment, which was specifically included in the Microsoft Agreement, ran in July 2009. The Auditor did not move to intervene until February 2010.

Measuring the Auditor's delay from either relevant date – the August 2004 signing of the Retention Agreement or the trial court's June 9, 2009 approval of the Microsoft Settlement Agreement – shows that his motion to intervene filed in February 2010 was untimely by more than simply a week.

B. The Auditor's Intervention Prejudiced the Parties.

The Auditor's belated move to intervene also caused prejudice to the parties, a factor that was apparently not fully considered by the trial court since it only considered at the timeliness factor. The counter-arguments in the Auditor's Reply regarding prejudice are wrong for at least two reasons. First, intervention was sought *after* there was already a final judgment and a court-approved settlement with Microsoft. Intervention after a final judgment is disfavored because it prejudices the existing parties. While this Court has not directly addressed a similar issue before, the Fifth Circuit has often recognized that applications to intervene following a judgment causes prejudice and found them untimely. *See, e.g., Engra, Inc. v. Gabel*, 958 F.2d 643, 645 (5th Cir. 1992) (attorney's attempt to intervene in lawsuit after settlement and dismissal in order to address payment of fees improper); *Corley v. Jackson Police Dept.*, 755 F.2d 1207, 1210 (5th Cir. 1985) (intervention following judgment not allowed); *U.S. v. U.S. Steel Corp.*, 548 F.2d 1232, 1235-36 (5th Cir. 1977) (denying post-judgment intervention and explaining intervention attempts after final judgments are "ordinarily looked upon with a jaundiced eye").¹ In the Auditor's scenario, like those previously addressed by the Fifth Circuit, his move to intervene was post-judgment and therefore prejudiced the parties.

Second, aside from the fact it was post-judgment, the Auditor's intervention also prejudiced the parties, and the people of Mississippi, because meddling with the Microsoft Settlement Agreement risks putting all the settlement funds back in Microsoft's hands. The Auditor half-heartedly says that he is not challenging the payments by Microsoft under the Settlement Agreement.

¹ The provisions of Mississippi Rule of Civil Procedure 24 are identical in all material respects to its counterpart Federal Rule of Civil Procedure 24. When that is the case, Mississippi courts treat federal interpretations of its rules as persuasive authority. *See, e.g., Hartford Cas. Ins. Co. v. Halliburton Co.*, 826 So. 2d 1206, 1215 (Miss. 2001).

But, even if it is not his intent, that is not what would happen if his illegitimate claims prevail. The Microsoft Settlement Agreement specifically provides that if the trial court's approval of the agreement or its judgment is modified, the entire agreement is null and void. Specifically, the Microsoft Settlement Agreement says:

Effect of Disapproval: If the Court for any reason (1) determines not to approve this Settlement Agreement; (2) does not enter the Order Approving Settlement and Release and Entering Final Judgment substantially in the form of Appendix B hereto; or (3) if the Court's approval or judgment is modified, reversed, or set aside on appeal, then the Settlement Agreement terminates and becomes null and void except as otherwise provided herein.

[Settlement Agreement at p.5, C.P. 6-36 & Appellant R.E. 2]. Undoubtedly, the cost of the Auditor's intervention, to the tune of 40 to 50 million dollars that went to the State, was potential prejudice cutting against allowing intervention in the first place. That is another reason intervention never should have been allowed.

C. No Prejudice to the Auditor.

The Auditor has repeatedly claimed, as he did in the trial court, that Miss. Code Ann. § 7-7-211(g) authorized him to go after the attorneys' fees and expenses paid to retained counsel as part of the Settlement Agreement. But the simple fact is that Section only permits the Auditor to recover money that are "public funds." The language of the Auditor's statute does not support his "public funds" argument. *See* MISS. CODE ANN. § 7-7-1(4) (explaining "public funds" are "all funds which are received, collected by, or available for the support of or expenditure by any state department, institution or agency"). None of the attorneys' fees or expenses paid to retained counsel meet the definition.

Furthermore, an overwhelming number of the cases that have addressed the same issue – whether contingency fees of states’ retained counsel are public monies – all say they are not.² The Auditor has not, and cannot, distinguish the reasoning of those cases which is equally applicable in this situation. “Public funds” are not at issue. That fact demonstrates that the Auditor would not suffer any prejudice if this Court determines he should never have been allowed to intervene in the first place.

II. None of the “Interest” Intervention Factors Favor the Auditor.

In addition to timeliness factor, several “interest” factors must also be considered. Specifically, an intervenor is also required to have an interest in the subject matter of the action, the intervenor must be situated so that disposition of the action without him would impair or impede his ability to protect an interest, and the intervenor’s interests must not already be adequately represented by the existing parties. *See Cummings v. Benderman*, 681 So. 2d 97, 101 (Miss. 1996). None of these “interest” factors merited the Auditor’s intervention in this case.

As explained above, and in the State’s Response Brief, the Auditor does not have any interest in the attorneys’ fees and expenses paid to retained counsel because they are not “public funds.” Even assuming for the sake of argument that the Auditor ever had a legitimate interest, if the case proceeded without him, that would not impair or impede his ability to protect it. The Auditor has demonstrated as much by his repeated references to the *Langston* matter, where the Auditor’s office filed a separate lawsuit long after the settlement in that case was completed. Additionally, the

² *See People v. Phillip Morris, Inc.*, 759 N.E. 2d 906, 913-14 (Ill. 2001); *Conant v. Robins Kaplan, Miller & Ciresi, LLP*, 603 N.W. 2d 143, 148-49 (Minn. Ct. App. 1999); *Phillip Morris Inc. v. Glendening*, 709 A.2d 1230, 1240-44 (Md. 1998); *Button’s Estate v. Anderson*, 28 A.2d 404, 410 (Vt. 1942).

Auditor's interests – which mirror the State's interest in achieving the best settlement possible – were sufficiently represented because the Attorney General maintained control over all aspects of the litigation. There is no good reason supporting the trial court's decision to allow the Auditor to intervene.

III. The Partnership for a Healthy Mississippi Decision Does Not Support the Auditor's Position.

The Auditor repeatedly and improperly relies on *Hood ex rel. State Tobacco Litigation*, 958 So. 2d 790 (Miss. 2007) to justify his intervention and to support his ill-founded “public funds” arguments. The decision does not support his position. If anything, it shows why the Auditor's intervention was inappropriate and why the money the Auditor claims a right to recover is not “public funds.”

The issue in the Partnership For A Healthy Mississippi case was whether annual court-ordered tobacco payments made to the Partnership should go to the Mississippi Health Care Trust Fund instead. The intervenors were allowed to come in to enforce the actual terms of the settlement agreement in that case. *Id.* at 808. Significantly, that settlement agreement did not provide for payments to the Partnership. *Id.* at 814. Rather, it said that the payments would be made “into a special account for the benefit of the State of Mississippi.” *Id.* The court enforced what the settlement agreement specifically said, and held that the amendment to it sending money to the Partnership (by way of court order) was improper. *Id.* at 816. Moreover, the court did not disturb the terms of the settlement agreement providing for initial funding of the tobacco cessation pilot program. *Id.* In short, the settlement agreement language prevailed in the Partnership case.

The Auditor's current claim is entirely different. The Microsoft Settlement Agreement in this case does not support his goal. The contract says that the attorneys' fees and expenses paid to retained counsel would be paid to the State, or any State-controlled account. It explicitly required the money at issue to be paid to retained counsel. In other words, the terms of the Microsoft Settlement Agreement do not give the Auditor an interest in retained counsel's payment. Without any legitimate interest, his intervention was improper.³

Last, but not least, if anything from the Partnership decision is instructive here, it is that court's adherence to the express terms of the settlement agreement before it. Just like the court's position in the Partnership case, it would be improper to override the express terms of the Microsoft Settlement Agreement in this case. This Court should hold as such, and, at a minimum, declare that the Auditor's intervention was improper.

IV. Rule 24(b) Does Not Validate the Auditor's Intervention.

Finally, the Auditor's Reply Brief claims that permissive intervention under Rule 24(b) was appropriate even if Rule 24(a) intervention was not properly available to him. Like his Rule 24(a) argument, the permissive intervention claim has no merit.

The Auditor says "[p]ermissive intervention is allowed any time the proposed intervenor's claim presents questions of law or fact that are common to the underlying cause." [Auditor's Reply Br. at p. 4]. His mischaracterization of the rule overlooks the fact that permissive intervention must

³ Another reason that the terms of the Settlement Agreement should control here, just as the agreement in *Hood* did, is that the Auditor is precluded from relying on the Settlement Agreement to support his arguments, and then turning around to argue it is invalid as to retained counsel's payments. Judicial estoppel bars the Auditor from relying on the Settlement Agreement only when it suits him. *See Dockins v. Allred*, 849 So. 2d 151, 155 (Miss. 2003). The Auditor says the Settlement Agreement proves that Microsoft's payments were consumer protection penalties, and the provisions providing payment to the State are valid, but on the other hand says it is invalid as to retained counsel's payments. He should be judicially estopped from taking those inconsistent positions.

be sought "upon timely application." Miss. R. Civ. P. 24(b). The Auditor's move to intervene was untimely under Rule 24(b) for the same reasons it was untimely under Rule 24(a), as explained above. Rule 24(b) simply does not provide the Auditor with an escape hatch to avoid the requirement he failed to meet under Rule 24(a).

CONCLUSION

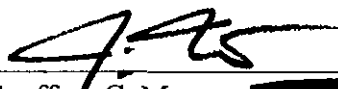
For all the reasons set forth in the State's Response to the Auditor's direct appeal, the trial court's judgment should be affirmed. However, and in the alternative only, if the Court does not affirm on direct appeal, then the Court should hold that the Auditor's Motion to Intervene should not have been granted and reverse and render on the State's cross-appeal.

THIS the 11th day of April, 2011.

Respectfully submitted,

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CERTIFICATE OF SERVICE


I hereby certify that a true and correct copy of the foregoing Reply Brief of Appellee/Cross-Appellant, Jim Hood, Attorney General *ex rel.* the State of Mississippi on Cross-Appeal, has been served via U.S. Mail, properly addressed and postage prepaid, to the following persons:

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