IN THE SUPREME COURT OF MISSISSIPPI
2010-CA-00881

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

v.

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

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

BRIEF OF CROSS-APPELLEE AND REPLY BRIEF OF APPELLANT

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RESPONSE TO CROSS-APPEAL

The State Auditor incorporates herein by reference his "Statement of Case and Facts" in Appellant's Brief for purposes of responding to the Cross-Appeal.

The Chancery Court properly allowed Intervention by the State Auditor.

A. Intervention of Right.

Miss. Rule Civ. Pr. 24(a) requires the following elements for a right of intervention: (1) The would be intervenor must make a timely application;(2) He must have an interest in the subject matter of the action;(3) He must be so situated that disposition of the action may as a practical matter impair or impede his ability to protect his interest; and (4) His interests must not already be adequately represented by the existing parties. *Cummings v. Benderman*, 681 So. 2d 97, 101 (Miss. 1996). There is considerable discretion with the trial judge in construing whether these requirements have been met. *Guaranty National Ins. v. Pittman*, 501 So.2d 377, 381 (Miss.1987).

> The various components of the Rule are not bright lines, but ranges-not all interests" are of equal rank, not all impairments are of the same degree, representation by existing parties may be more or less adequate, and there is no litmus paper test for timeliness. Application of the rule requires that its components be read not discreetly, but together. A showing that a very strong interest exists may warrant intervention upon a lesser showing of impairment or inadequacy of representation. Similarly, where representation is clearly inadequate, a lesser interest may suffice as a basis for granting intervention. The requirements for intervention embodied in Rule 24(a)(2) must be read also in the context of the particular statutory scheme that is the basis for the litigation and with an eye to the posture of the litigation at the time the motion is decided. Finally, although the Rule does not say so in terms, common sense demands that consideration also be given to matters that shape a particular action or particular type of action.

Cummings, 681 So. 2d at 101 (quoting *International Paper v. Town of Jay, Me.*, 887 F.2d 338, 344 (1st Cir.1989)). The grant or denial of a motion to intervene by the chancellor is reviewed only for an abuse of discretion. *Hood ex rel State Tobacco Litigation*, 958 So. 2d 790, 802 (Miss. 2007).

The factors governing the review of timeliness are as follows:

> (1) The length of time during which the would-be intervenor actually knew or reasonably should have known of his interest in the case before he petitioned for leave to intervene;
>
> (2) The extent of the prejudice that the existing parties to the litigation may suffer as a result of the would-be intervenor's failure to apply for intervention as soon as he actually knew or reasonably should have known of his interest in the case;
>
> (3) The extent of the prejudice that the would-be intervenor may suffer if his petition for leave to intervene is denied; and,
>
> (4) The existence of unusual circumstances militating either for or against a determination that the application is timely.

Hood ex rel State Tobacco Litigation, 958 So. 2d 790, 806 (Miss. 2007). In *Hood*, the Court found that intervention was properly allowed by the chancellor many years after the State tobacco settlement had been reached because an issue regarding allocation of the settlement funds that had never been litigated arose at a later date. *Id.* The same is true here, except that the State Auditor asserted his demand within days of the disputed public funds being first identified by the Microsoft Settlement Agreement entered June 11, 2009. (C.P. 262-63) On June 18, 2009, the State Auditor made demand under Miss. Code Ann. § 7-7-211(g) for the return of these funds, copying the Court, the Attorney General and Special Counsel, once it was confirmed that the Attorney General did not disclose during the settlement approval process that this particular issue was being litigated by the Attorney General in *The State of Mississippi and Stacey Pickering in his capacity as Auditor for the State of Mississippi v. The Langston Law Firm, P.A., Joseph C. Langston, and Timothy R. Balducci*, No. 2010-CA-00362 in the Circuit Court of Hinds County, Mississippi (hereinafter "*Langston*").

As stated in the State Auditor's demand, Special Counsel were advised of the *Langston* lawsuit and the Attorney General's intervention and voluntary participation therein to resolve the same issues raised by the State Auditor now. (C.P. 262-63) Upon receipt of this demand, the funds were held in trust by Special Counsel. It was only after Special Counsel sought final disbursement

of the disputed funds through their Petition to Approve Fees and Overrule Quasi Objection on January 12, 2010, that the State Auditor needed to intervene in this cause. (C.P. 37- 68) Until that time, the interests of the State Auditor were adequately protected. Thus, on February 5, 2010, the State Auditor filed his Motion to Intervene, followed by his Motion for Disbursement of Settlement Funds to the State of Mississippi and Response in Opposition to Petition to Approve Fees and Overrule Quasi-Objection, after the Court requested further briefing on the subject. (C.P. 140-264, 265-303) Assuming for purposes of argument that there was any delay of significance or failure to act by the State Auditor, and there wasn't, the prejudice to the State Auditor in denying intervention and the unique circumstances of this dispute overwhelmingly favored the chancellor's finding of timeliness.

The State Auditor maintains a direct statutory interest in the subject matter of the current cause of action through the following duties in Miss. Code Ann. § 7-7-211(g):

> 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. . . .

Similar to the Division of Medicaid's statutory interest to ensure the proper allocation of funds from the tobacco settlement in *Hood ex rel State Tobacco Litigation*, there is a compelling interest in ensuring that public settlement funds are not improperly allocated or misspent. *See Hood ex rel State Tobacco Litigation*, 758 So. 2d at 804. Likewise, there is heightened public interest because of the constitutional issues raised herein and the involvement of taxpayer money.

Without intervention, disposition of the Petition to Approve Fees and Overrule Quasi Objection filed by Special Counsel would have prejudiced the State Auditor and impaired his ability to protect this interest under Miss. Code Ann. § 7-7-211(g). The Attorney General was already in direct opposition to the State Auditor on the same issue in *Langston*, and thus the State Auditor's interests were not adequately represented and directly opposed by the existing parties to this cause of action. Based on all these findings of fact, the Chancellor did not abuse her discretion in finding the right of intervention by the State Auditor pursuant to M.R.C.P. 24(a). Accordingly, the Attorney General's Cross-Appeal should be denied on this basis alone.

B. Permissive Intervention

Permissive intervention is allowed any time the proposed intervenor's claim presents questions of law or fact that are common to the underlying cause. Miss. Rule Civ. Pr. 24(b). Obviously, the State Auditor's demand for the return of the disputed fees under Miss. Code Ann. § § 7-7-211(g) was directly related to the Petition to Approve Fees and Overrule Quasi Objection filed by Special Counsel. (C.P. 37- 68) As set forth in Special Counsel's filing, it directly contested the State Auditor's demand for legislative appropriation of these fees and/or the deposit of these funds in trust until resolution of the *Langston* matter. Because the Attorney General had also already voluntarily appeared in *Langston*, the issues of law asserted by the State Auditor herein were significantly intertwined with another pending cause of action. Accordingly, the Chancellor did not abuse her discretion by permitting the State Auditor's intervention in this cause.

WHEREFORE, the Attorney General's Cross-Appeal contesting the State Auditor's intervention in this matter should be DENIED.

ARGUMENT IN REPLY

I. The Mississippi Consumer Protection Act and the Attorney General's case law from other jurisdictions are not helpful in resolving the mandate of Miss. Code Ann. § 7-5-7.

Special Counsel's attempt to apply the provisions of the Mississippi Consumer Protection Act ("MCPA") to a settlement agreement has no basis in law or fact. There was no award of penalties, admission of liability and/or finding by the Chancellor of any wrongdoing whatsoever under the MCPA so as to support the Attorney General's claim that the disputed $10 million held in trust for Special Counsel constituted the recovery of attorneys' fees thereunder.[1] The Settlement Agreement provided the following:

> A. No Admission. By entering into this Settlement Agreement, Microsoft does not admit any liability or wrongdoing or the truth of any of the claims or allegations in the Mississippi Action. To the contrary, Microsoft specifically denies each and every one of the allegations of unlawful conduct and damages in the Mississippi Action. It is expressly understood and agreed that this Settlement Agreement is being entered into solely for the purpose of amicably resolving the Mississippi Action. Plaintiff agrees not to represent, publicly or otherwise, that the settlement in any way embodies, reflects, implies or can be used to infer any culpability by Microsoft or any of its directors, officers, employees, attorneys, insurers or agents.

(C.P. 22)

This language definitively negates any use of the settlement payments as evidence of civil penalties under the MCPA. Although the law favors settlement, Miss. Code Ann. § 75-24-19 is entirely irrelevant to the fees in this case with an express denial of any liability by Microsoft in its settlement agreement with the Attorney General.[2]

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[1] Unlike in the current matter, the case of *Aqua-Culture Technologies, Ltd. v. Holly*, 677 So. 2d 171, 185 (Miss. 1996) involved a finding of liability.

[2] The discussion of reasonableness by the Attorney General at this juncture misses the point. Consistent with the statutory law asserted by the State Auditor and the Constitutional authority of the Legislature to control the purse strings of the State, reasonableness was an issue for the Mississippi Legislature during its appropriations process, not the Chancery Court.

In *Nixon v. American Tobacco Co.*, 34 S.W.3d 122 (Mo. 2001), the Missouri Supreme Court ultimately ruled that the issue of the direct payment of special assistants by the opposing party should be reviewed by the Missouri General Assembly, which was allowed by the court until December 31, 2001 to enact legislation that prohibited the arrangement if there was any disagreement as to the source of funds for payment. *Id.* at 139. The basis of this ruling was Missouri Rule of Ethics 4-1.8(f) wherein the client, which the Court determined could only be the Missouri General Assembly since it was the public body that spoke for the citizens of State of Missouri, could withhold its consent to a settlement proposal. *Id.* at 136.

Similarly here, this Court has the authority to order in its final mandate that the Mississippi Legislature promptly review the fee and accept or reject all or part by the close of the next legislative session, thereby effectively complying with the provisions of Miss. Code Ann. § 7-5-7 and our similar rules of ethics. Any future Retention Agreements by the Attorney General's office could simply contain the critical language discussed in *Pursue Energy Corporation* providing for legislative review and appropriation of the fees. The purely personal interests of private outside counsel would be eliminated from the State of Mississippi's decisions as to whether to file lawsuits against companies doing business in this State and/or the amounts ultimately agreed upon in settlement discussions. The legislative appropriation mandated by Miss. Code Ann. § 7-5-7 is obviously intended to also prevent outside counsel from placing their own interests before his client.

As expressly recognized by the *Nixon* Court,

> 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.

In *North Dakota v. Hagerty*, 580 N.W2d 139 (N.D. 1998), the case did not involve the situation where special assistants had negotiated their attorneys' fees outside their contingency agreement and directly with the opposing party State. *See Hagerty*, 580 N.W2d at 148. In that case, the Court merely held that a contingency fee agreement was an acceptable means for employing such counsel. *Id.* Here, the State Auditor has never contested the hiring of special assistants under a contingency fee arrangement, just the manner in which Special Counsel obtained direct payment of fees from the opposing party during settlement negotiations without the final legislative oversight expressly required by Miss. Code Ann. § 7-5-7.

People v. Philip Morris, 759 N.E.2d 906 (Ill. 2001) concerned the issue of whether the Circuit Court versus the Illinois Court of Claims had jurisdiction to hear a fee dispute involving private attorneys hired by their attorney general in the tobacco litigation. The Supreme Court of Illinois merely held that the Circuit Court had jurisdiction to adjudicate whether the lien against the settlement proceeds was valid. Not only was there no comparable statute providing strict mandates on the source of payment of private attorneys, the Illinois Supreme Court never adjudicated whether the lien was valid but merely remanded for resolution by the Circuit Court. Reliance upon dicta in a case concerning jurisdiction of the circuit court is not helpful here because the State Auditor has already selected the jurisdiction of the Circuit Court for a determination of the validity of the receipt of the $10 million by Special Counsel under Miss. Code Ann. § 7-5-7.

In *Conant v. Robins, Kaplan, Miller & Ciresi, LLP*, 603 N.W.2d 143 (Minn. Ct. App. 1999), the issue was whether taxpayers or one state senator had standing to challenge the manner of payment of private attorneys by the attorney general. Here, the State Auditor is proceeding under direct authority of Miss. Code Ann. § 7-7-211(g), which provides him with the express authority and standing to bring such matters before the circuit court for adjudication. Like all other cases cited by the Attorney General, the statute relied upon in this Minnesota case gave no instruction on payment

of private attorneys hired on a contingency basis. Here, Miss. Code Ann. § 7-5-7 gives specific instruction.

Similarly, in *Philip Morris Incorporated v. Glendening*, 709 A.2d 1230, 1235 (Md. Ct App. 1998), the Court affirmed the trial court because "the plain language of subsection (b)(2)(ii) [the statute allowing payment of private attorneys] did not place any limitation on the source of the funds from which the Attorney General may compensate outside counsel." Obviously here, the statute in question provides the only two sources for payment of outside counsel, neither of which were utilized to pay Special Counsel. Despite the fundamental differences of this case from these foreign decisions, there still is no need or basis for this Court to rely on anything other than Miss. Code Ann. § 7-5-7 and *Pursue Energy* in Mississippi.

The Am. Jur. 2d sections cited by the Attorney General appear to be derived directly from *Pursue Energy Corp. v. Miss. State Tax Comm.*, 816 So.2d 385 (Miss. 2002) which did not hold that the legislature could be bypassed in the final appropriation of contingency fees. *Pursue Energy Corporation* held that a Retention Agreement providing for a contingency fee, which was subsequently modified to include legislative review and appropriation as the source of funds, was permissible under Miss. Code Ann. § 7-5-7.

Miss. Code Ann. § 7-5-5 simply does not address the issue regarding the source of funds that must be utilized to pay special assistants as suggested by the Attorney General.[3] That statute also concerns attorneys 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." There has never been any dispute that outside counsel representing the State against MCI were hired as "special counsel" pursuant to Miss. Code. § 7-5-7. As discussed above, the applicable statute expressly

[3] It is noted that the funds utilized to compensate these full time employees are also from amounts appropriated by the Mississippi Legislature.

provides that 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." Whether they were paid out of the attorney general's contingent fund or other appropriation under Miss. Code Ann. § 7-5-7 is the sole issue in this cause.

The separate provisions of Miss. Code Ann. § 7-5-7 allowing participation by the Governor are irrelevant to this cause of action. The Governor did not participate in this cause of action. The executive branch of government's independent authority to participate in lawsuits filed by the State of Mississippi does not suggest that counsel representing the State of Mississippi may avoid legislative appropriation. In fact, consistent with the express requirement of legislative appropriation of special assistants to the Attorney General in the final sentence of Miss. Code Ann. § 7-5-7 , the Governor's counsel must also be paid by legislative appropriation. The final sentence of Miss. Code Ann. § 7-5-7 is entirely consistent in this intent. Contrary to the pleas of the Attorney General, the Legislature has indeed written that all of the Attorney General's contingency agreement fees must involve legislative review and appropriation. Since these special assistants were not paid out of appropriations, the Chancery Court should be reversed and rendered.

II. The rationale for requiring presentation of the contingency fee to the Legislature for final review is sound but nevertheless irrelevant.

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 by the Legislature 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 source of final compensation of outside counsel is one of those aspects that has been expressly limited by the Legislature, a limitation that is consistent with the Legislature's authority to control the purse strings of the State. *See Hood ex. rel State Tobacco Litigation*, 958 So. 2d 790, 812 (Miss. 2007); *see Belmont v. Miss. State Tax Commission*, 860 So.2d 289, 306-07 (Miss. 2003); *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).

Recognizing the Legislature's authority to impose limitations, the Attorney General questions the Legislature's reasons for allowing contingency fee agreements if the final fee must also be presented to the Legislature for final appropriation. The Attorney General suggests to the Court that the State Auditor seeks to read the statute in isolation because the two mandates of the statute cannot co-exist. To the contrary, the obvious rationale is to maintain transparency with the Legislature and the taxpayers of this State as to the various lawsuits being asserted by the State of Mississippi and the identity of outside counsel profiting therefrom. As to the reasonableness of fees paid to Special Counsel hired by the Attorney General, that is and has always been a question for the Mississippi Legislature during the appropriations process pursuant Miss. Code. Ann § 7-5-7. Because the State Auditor has expressly raised constitutional issues concerning the bypassing of the Legislature in this regard, the Attorney General's insistence on discussing the reasonableness of the fees under the factors of *McKee v. McKee*, 418 So. 2d 764 (Miss. 1982) is unwarranted. As set forth in *Pursue Energy Corporation v. Mississippi State Tax Commission*, 816 So.2d 385 (Miss. 2002), the

Mississippi Legislature maintains the authority to appropriate the amounts it deems reasonable based on the circumstances, including consideration of the amounts proposed the contingency agreement.

Regardless of this rationale for review by the Legislature, it is not the job of the courts to question the Legislature's reasoning for permitting contingency agreements but also requiring final legislative appropriation for payment. 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). The fact that contingency agreements are permitted does not automatically suggest that another express provision in the statutes should be ignored. By ignoring the source of funds requirement in Miss. Code Ann. § 7-5-7, it is instead the Attorney General that seeks to read certain portions in isolation.

The Attorney General's general plea for deference is not permitted when the statute addresses the precise issue on the subject. In *Barbour v. State ex rel. Hood*, 974 So. 2d 232, 243 (Miss. 2008), the Governor's interpretation of a statute regarding election procedure for filling senatorial vacancies was afforded deference only because the statute was silent as to the specific circumstances of that case. *See also Chevron USA Inc. v. Natural resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984)(deference is granted only if statute is silent or ambiguous with respect to the specific issue being disputed). Pursuant to the plain and unambiguous terms of Mississippi Code Ann. § 7-5-7, compensation of all 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). Accordingly, the request for payment of fees must be taken to the Legislature where it was intended to be resolved.

III. The funds at issue were "public" not governed by lien law.

The Attorney General claims that the transfer of the $10 million from Microsoft directly to Special Counsel's trust account transformed these funds into private funds. The mechanics of the transfer was nothing more than a hat trick by the parties designed to hide public funds from the Legislature and avoid the mandate of Miss. Code Ann. § 7-5-7. There would have been no funds but for the claims of the only real party in interest, the State of Mississippi. Understanding the mandates of Miss. Code Ann. § 7-5-7 through its own personal experience in getting the fees appropriated in *Pursue Energy Corp.*, the Attorney General's office employed an elusive shell game designed solely to bypass the scrutiny of the Legislature and taxpayers of this State.

Nixon v. American Tobacco Co., 34 S.W.3d 122, 135 (Mo. 2001) recognized the fallacy of the claim that such funds are not public:

> [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.

Id. at 135.

Special Counsel elevated itself to the position of a party litigant during the settlement discussions. Although the Settlement Agreement may have been designed to avoid Miss. Code Ann. § 7-5-7 and *Pursue Energy*, the direct negotiations and payment also violated the Attorney General's own Retention Agreement with Special Counsel. The Retention Agreement never permitted these special assistants to negotiate their fees directly with the opposing party as was done here. Accordingly, the mechanics of the transfer to Special Counsel was insufficient to transform this money into something other than public funds or validate the direct negotiation of fees with an opposing party.

It is also claimed that Special Counsel hold a lien against any funds held in their possession for legal fees earned for services rendered to the State of Mississippi under the Retention Agreement. *See Collins v. Schneider*, 192 So. 20 (Miss. 1939). This argument places the cart before the horse. A valid lien could exist only if the underlying basis for the fees, i.e the Retention Agreement and Settlement Agreement, was valid and legal. Here, the State Auditor has specifically challenged the legality of both the Retention Agreement and the Settlement Agreement under Miss. Code Ann. § 7-5-7 which provides that "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." The cases cited by the Attorney General now concern the satisfaction of fees in which there was no contest to their legality. Accordingly, the State Auditor's position in this case does nothing to alter historical lien law.

Accepting the Attorney General's argument as true that his office did not ultimately compensate his special assistants from the settlement proceeds, then the proposed theory of a lien against those proceeds does not apply. The Attorney General cannot have it both ways -- arguing that it was a separately negotiated fee obtained directly from the opposing party, then claim it was purely a contingency fee for purposes of applying a common law lien against the settlement

proceeds. Common law notions of liens must also yield to Miss. Code Ann. § 7-5-7 which places additional limitations on the sources for payment of contingency fees to special assistant attorney generals. Express statutory provisions trump any common law lien analogies proposed by the Attorney General now. Accordingly, the resort to basic historical lien law concerning the legal fees at issue in this case is unhelpful to resolving this dispute.

The Attorney General would have this Court believe that it negotiated a complete and finalized agreement with Microsoft separately, with a concession by Special Counsel that they would independently negotiate legal fees at a later time with the possibility that it might get nothing. The Attorney General cannot make this argument with a straight face. The agreement for Special Counsel to receive $10 million was obviously made in conjunction with and simultaneously to Microsoft's overall decision to settle fully and finally, as evidenced by the executed Settlement Agreement that followed. It provided the following:

> C. Attorneys' Fees and Costs. Microsoft played no part in negotiating the fees and expenses to be paid to plaintiff's counsel and takes no position as to whether those fees and expenses are reasonable or appropriate.

(C.P. 23)

Since the agreement was for settlement of claims asserted by the State of Mississippi, not its Special Counsel, all such funds paid by Microsoft were public and subject to the mandate of Miss. Code Ann. § 7-5-7.

IV. There was no waiver by the State Auditor who has the independent statutory authority and duty to seek return of misspent public funds.

A. There is no waiver and estoppel against a government's right to seek return of funds obtained illegally.

There is no waiver and estoppel against the government acting in its sovereign capacity. The public policy rationale behind this was discussed in detail by the United States Supreme Court in *Heckler v. Community Health Services of Crawford County, Inc.*, 467 U.S. 51, 104 S. Ct. 2218

(1984). In that case, the Supreme Court held that United States Secretary of Health and Human Services had not waived and was not estopped from recovering federal funds improperly paid to a health care provider, even though the provider was previously instructed by a government agent that the expenditure was proper. The Court stated:

> When the Government is unable to enforce the law because the conduct of its agents has given rise to an estoppel, the interest of the citizenry as a whole in obedience to the rule of law is undermined. It is for this reason that it is well settled that the Government may not be estopped on the same terms as any other litigant.

Id. at 2224. The Court held a party who receives payment of government funds that is invalid under the law cannot establish either reasonable reliance or detrimental change in position:

> To analyze the nature of a private party's detrimental change in position, we must identify the manner in which reliance on the Government's misconduct has caused the private citizen to change his position for the worse. In this case the consequences of the Government's misconduct were not entirely adverse. Respondent did receive an immediate benefit as a result of the double reimbursement. Its detriment is the inability to retain money that it should never have received in the first place. Thus, this is not a case in which the respondent has lost any legal right, either vested or contingent, or suffered any adverse change in its status. . . . The question is whether the Government has entirely forfeited its right to the money. A for-profit corporation could hardly base an estoppel on the fact that the Government wrongfully allowed it the interest-free use of taxpayers' money for a period of two or three years . . . .

Id. at 2225. The Court held that parties that deal with the government do so with the risk that a government agent or employee may act outside the scope of his or her authority. Those parties are charged with knowing the statutes and regulations that control their dealings with the government. The Court said:

> Men must turn square corners when they deal with the Government . . . . . This observation has its greatest force when a private party seeks to spend the Government's money. Protection of the public first requires that those who seek public funds act with scrupulous regard for the requirements of the law . . . . . This is consistent with the general rule that those who deal with the Government are expected to know the law and may not rely on the conduct of Government agents contrary to the law . . . . . As a participant in the Medicare program, respondent had a duty to familiarize itself with the legal requirements for cost reimbursement.

104 S. Ct at 2225-26; *see State v. Ex. rel.* Rice, 4 So. 2d 270, 277 (Miss. 1940)("the state cannot abdicate its duty as trustee of property in which the whole people are interested, any more than it can surrender its police powers in the administration of government and in the preservation of peace and order"); *see also Office of Personnel Management v. Richmond,* 496 U.S. 414, 110 S. Ct. 2465 (1990) (payment of money from the public treasury contrary to statutory appropriation is prohibited by the Appropriations Clause of the Constitution, which provides that such money may be paid out only as authorized by statute, and the judicial use of estoppel could not grant the respondent a money remedy that Congress did not authorize); *Dun & Bradstreet Corporation Foundation v. United States Postal Service*, 946 F. 2d 189 (2nd Cir. 1991) (estoppel claim that will require the payment of government funds in contravention of statute will fail); *In re Yachthaven Restaurant, Inc.*, 103 B.R. 68, 78 (E.D.N.Y. 1989) (estoppel may not be invoked against a municipality to enforce an agreement which violates express statutory provisions because to do so would give vitality to illegal acts.)

The relevant facts of *Heckler* are strikingly similar to the contested issues in this case. The United States Supreme Court concluded that the defense of estoppel was precluded as a matter of law because unlawful receipt of funds can hardly constitute detrimental reliance, and any alleged reliance was not reasonable given the recipients duty to familiarize itself with the laws which apply to its very own business. Similarly, the issue here is whether these special assistants were entitled to the money in the first place. Their use of the funds can hardly be said to be detrimental if receipt of those funds is proven unlawful under the Mississippi Code.

The Attorney General's cases regarding waiver and estoppel by commercial parties to a contract are not applicable in this governmental setting. *See Setinel Indus. Contracting Corp. v. Kimmins Indus. Serv.* Corp., 743 So. 2d 954, 964 (Miss. 1999); *Eastline Corp. v. Marion Apartments, Ltd.*, 524 So. 2d 582, 584 (Miss. 1988). Here, Special Counsel knew they were being

hired by the government as special assistants to the Attorney General and were, or should have been, familiar with the statutes governing their retention and payment from government funds. Because the State Auditor is performing his sovereign duty for the benefit of the Mississippi taxpayers as a whole, neither the Attorney General, the State of Mississippi nor the State Auditor have discretionary authority to waive the provisions of Miss. Code Ann. § 7-5-7.

B. The State Auditor preserved his right to assert this cause of action.

State officers and agencies have no privity with one another when their interests are divergent, their roles are different, and one does not adequately represent the interests of the other. *See Cleveland County Association for Government By The People v. Cleveland County Board of Commissioners*, 142 F. 3d 468, 474 (D.C. Cir. 1998) (holding that *res judicata* did not apply where the interests of the two entities were divergent, because otherwise "consent decrees to which the government was a party would be immune from challenge"); *United States v. Alkay Enterprises, Inc.*, 969 F. 2d. 1309 (1st Cir. 1992) (finding insufficient identity, and hence no privity between the Interstate Commerce Commission ("ICC") and the United States Government, because the ICC's enforcement role was different from that of the Attorney General of the United States); *City of New York v. Beretta U.S.A. Corp.*, 315 F. Supp. 2d 256 (E.D.N.Y. 2004)(a final decision on the merits that is binding on one governmental agency or official is not binding on another agency or official if the second action involves an agency or official whose functions and responsibilities are so distinct from those of the agency or official in the first action that applying preclusion would interfere with the proper allocation of authority between them). If the State Auditor could be bound by the Attorney General's agreement to let a portion of the settlement proceeds be diverted directly to Special Counsel, it would interfere with the State Auditor's unique duty and authority to oversee the

disbursement of public funds pursuant to Mississippi Code Ann. § 7-7-211(g). Accordingly, there was no waiver by the State Auditor.

V. The State Auditor has a statutory right to challenge the validity of the Retention Agreement and Settlement Agreement.

The Attorney General argues that only parties to a contract or those with a legal right to challenge a contract may seek to negate it on the basis of illegality. However, pursuant to the express authority of Miss. Code Ann. § 7-7-211, the State Auditor has the statutory right to challenge Special Counsel's Retention Agreement and direct negotiation of fees from the opposing party under the Settlement Agreement. Regardless, illegal provisions of a contract are void as a matter of public policy, not merely voidable. *Price v. Purdue Pharma Co.*, 920 So. 2d 479, 484 (Miss. 2006); *Morrissey v. Balogna*, 123 So. 2d 537 (Miss. 1960)(court will not aid litigant whose actions are in violation of statute); *Lowenberg v. Klein*, 87 So. 653, 654-55 (Miss. 1921)(contract provisions in violation of state or federal statute will not be enforced). As to portions of a contract that violate state or federal statute, courts will not enforce those provisions "but will leave the parties where found, -insofar as any illegal items or portions are concerned." *Chas. Weaver & Co. v. Phares*, 188 So. 12, 13 (Miss. 1939).

Citing *Seymour v. Evans*, 608 So. 2d 1141 (Miss. 1992), the Attorney General argues that the Retention Agreement and Settlement Agreement may have been *malum prohibitum*, but not necessarily inherently evil so as to constitute a basis for voiding the contracts. However, *Seymour* ultimately concluded that there was no merit to an attack on a real estate contract, and more specifically the warranty that the property was free from encumbrances, because at the time of the execution of the contract the alleged zoning violations did not exist. *Id.* at 1148. It was only after the sale that the purchaser proposed a use for the property that did not comply with zoning ordinances. *Id* at 1142.

The Auditor asserts that the Retention Agreement and Settlement Agreement were illegal at the time of their formation. This lawsuit constitutes a direct attack on both for failure to include a provision that any fees be obtained through the appropriations process in the Mississippi Legislature. Because it is alleged that the formation of these contracts was prohibited by Miss. Code Ann. § 7-5-7, the *Seymour* analogy proposed by the Attorney General is not applicable. Accordingly, the decision of the lower court should be reversed and rendered.

VI. Constitutional issues concerning impairment of contracts or property rights were not raised in the court below.

The Attorney General argues that voiding the direct payment of fees by the opposing party violates the constitutional prohibition on impairment of contracts and would constitute an unlawful taking of property from Special Counsel. These issues were not raised by Special Counsel in the court below. Case law is established that a party may not pursue arguments in the Mississippi Supreme Court for the first time on appeal, whether appellant or appellee. *See Fidelity & Deposit Co. of Maryland v. Ralph McKnight & Son Const., Inc.*, 28 So. 3d 1382, (Miss 2010)(Supreme Court does not consider matters not decided by trial court); *Corporate Management, Inc. v. Greene County*, 23 So. 3d 454 (Miss. 2009)(issue must first be presented to trial court before being raised to appellate court); *Mathis v. ERA Franchise Systems, Inc.*, 25 So. 3d 298 (Miss. 2009)(absent extraordinary circumstances, Supreme Court will not consider issues raised for first time on appeal); *Pittman v. Dykes Timber Co., Inc.*, 18 So. 3d 923 (Miss. App. 2009)(appellate courts will not put trial courts in error for issues not first presented to trial court for resolution); *Estate of Johnson v. Adkins* 513 So. 2d 922 (Miss.1987)(party must pursue appeal on same legal theory advanced in trial court); *Estate of Myers v. Myers*, 498 So. 2d 376, 378 (Miss.1986)("One of the most fundamental and long established rules of law in Mississippi is that the Mississippi Supreme Court will not review matters on appeal that were not raised at the trial court level"). This should be especially true when a party

attempts to raise constitutional issues for the first time on appeal. Legality would nevertheless be a prerequisite to having lawful contract or property rights in the first place.

In *Franklin v. Ellis*, 93 So. 738 (Miss. 1922), the issue was whether subsequent legislative enactments could be utilized by the legislature to nullify contracts entered before the passage of limiting legislation. As to the ability of the legislature to place limitations on an agency's ability to enter into certain contracts, the Court held that was within the constitutional authority of the legislature despite the levee boards general authority over management of the levee system. *Id.* at 739-40. However, the Court concluded that the legislative enactments could not be utilized to limit contracts for levee repair that were entered into before passage of the legislative. *Id.* at 740.

Similarly, the Legislature may place express limitations on the general authority of the Attorney General to manage litigation by the State of Mississippi. However, the limitation on payment of Special Counsel here, Miss. Code Ann. § 7-5-7, was certainly in place before execution of the Retention Agreement and Microsoft Settlement Agreement. Thus, unlike that found in *Franklin*, there has been no retroactive impairment of contract rights in this particular cause. The issue of illegality existed from the time of execution of these contracts.

VII. The State Auditor does not contest or seek to alter the amounts paid by Microsoft in its settlement with the State of Mississippi.

The State Auditor does not seek to alter or modify the sum amounts paid by Microsoft to settle the claims asserted by the State of Mississippi. It is merely asserted that all funds negotiated by representatives for and on behalf of the State of Mississippi be deposited into the general fund for appropriation by the Legislature. This requirement is consistent with Miss. Code Ann. § 7-5-7 and the constitutional prerogative of the Legislature to control expenditures by the State. Special Counsel were not parties to the litigation as attempted by their direct receipt of funds, they were attorneys representing the State. As expressly defined by and stated in the Settlement Agreement,

it is an agreement that was negotiated by and exists solely between the State of Mississippi and Microsoft, not Special Counsel. With no objection from the State Auditor as to the sum amounts paid by Microsoft, the Settlement Agreement is not substantially altered as to the parties to the litigation and the settlement contract. As expressly provided by the Settlement Agreement:

> C. Attorneys' Fees and Costs. Microsoft played no part in negotiating the fees and expenses to be paid to plaintiff's counsel and takes no position as to whether those fees and expenses are reasonable or appropriate.

Consistent with having taken no position, Microsoft did not assert any position in response to the State Auditor's challenge to the specific account in which the disputed $10 million was transferred. It would make no difference to Microsoft since it has no effect on the amounts paid by it under the settlement. As it appears from the Attorney General's argument, he is the only one suggesting that he would seek to return all funds to Microsoft should this Court not uphold the direct disbursement of funds to his Special Counsel. However, as set forth in *Nixon v. American Tobacco Co.*, 34 S.W.3d 122, 136 (Mo. 2001), the Legislature is the public body that speaks for the citizens of the State and would be the only entity that could make such a decision. Since the subjection of fees to the appropriations process does not substantially modify the settlement as between the party litigants and/or contracting parties, such a recommendation by the Attorney General to the Legislature would be irrational. The Attorney General's attempts to blame the State Auditor for jeopardizing the settlement are unfounded, especially where it was not the agency that devised the payments in the first place. Accordingly, the requirement that Special Counsel's fees be subject to legislative appropriation does not substantially affect or modify the Microsoft settlement.

CONCLUSION

Special Counsel were not paid out of the Attorney General's contingent fund, or out of any other funds appropriated to the Attorney General's office, in violation of Miss. Code Ann. § 7-5-7. Any provisions in the Settlement Agreement or Retention Agreement allowing the $10 million

disbursed directly to Special Counsel to bypass the general fund and legislative appropriation were illegal and unenforceable as a matter of public policy. The payments made by Microsoft were not the result of civil penalties, nor does case law from other jurisdictions pertain to Miss. Code Ann. § 7-5-7. The State Auditor did not waive his authority under Miss. Code Ann. § 7-7-211(g) to seek return of these funds since his authority is autonomous from the Attorney General and no government may waive the enforcement of its own statutes. Strict interpretation of Miss. Code Ann. § 7-5-7 is consistent with the constitutional right and duty of the legislative branch of government to control the public treasury.

WHEREFORE, the judgment of the Chancery Court of Hinds County should be REVERSED and RENDERED.

THIS the 25th day of March, 2011.

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

By: _____
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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 25th day of March, 2011.

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