IN THE CHANCERY COURT OF HINDS COUNTY, MISSISSIPPI
FIRST JUDICIAL DISTRICT

Charles Araujo, Evelyn S. Garner Araujo, Cassandra Overton-Welchlin, John Sewell, Kimberly Sewell, Lutaya Stewart, and Arthur Brown, all on behalf of themselves as taxpayers and as next friends of their minor children

PLAINTIFFS

v.

CAUSE NO. 25CH1:16cv001008

Governor Phil Bryant, the Mississippi Department of Education, and the Jackson Public School District

DEFENDANTS

MOTION TO INTEREVENE AS DEFENDANTS

COMES NOW THE MOVANTS, pursuant to Rule 24 of the Mississippi Rules of Civil Procedure, and files this Motion to Intervene as Defendants in the above-captioned case.

I. BACKGROUND

Movants are residents and taxpayers of Jackson, Mississippi, and parents of both children who are currently attending free, public charter schools located in Jackson and children who are currently attending Jackson Public School District schools ("JPS"). Although directly impacted and inordinately affected by whatever outcome of the instant lawsuit, Movants were not included as defendants by the plaintiffs in the initial Complaint filed. Movants and their children now seek permission from this Court to intervene in this lawsuit so that their voices may be heard, their interests represented, and their legal positions made known in the courts. Movants are asking for permission to intervene as a matter of right, or in the alternative, intervention by permission of the Court. A denial of their motion to intervene, and their participation in this litigation, would be an injustice to the Movants, their children, and the entire legal system.

II. INTERVENORS

Gladys Overton and Andrew Overton, Sr. are married homeowners residing in Jackson, Mississippi. They have two children currently attending JPS schools and one child attending ReImagine Prep, a free, public charter school in Jackson.

Ella Mae James lives in Jackson, Mississippi, and has two children who have graduated from JPS schools, two children currently at ReImagine Prep, a free, public charter school in Jackson, and one child attending a JPS school.

Tiffany Minor is a resident of Jackson, Mississippi, who has two children currently attending JPS schools and one child attending Smilow Prep, a free, public charter school in Jackson.

III. ARGUMENT

Rule 24 of the Mississippi Rules of Civil Procedure governs intervention in litigation. The Mississippi Supreme Court has expressed a preference for intervention: "We think there is much to be said for an overall attitude which gives the benefit of the doubt to the one seeking intervention, particularly where intervention of right under Rule 24(a)(2) is claimed." *Guaranty Nat'l Ins. Co. v. Pittman*, 501 So.2d 377, 385 (Miss. 1987) (citing *Corby Recreation, Inc. v. General Electric Co.*, 581 F.2d 175, 177 (8th Cir. 1978)). The Court continued by relying on the now-repealed Comments to Rule 24 in saying that "[t]his attitude is expressed in the Comment to Rule 24 which describes the rules as 'represent[ing] a judgment that . . . justice demands that the interest of the absentee [intervenor] should predominate over the interests of the original parties and of trial convenience.'" *Guaranty Nat'l Ins. Co.*, 501 So.2d at 385 (citing *Alaniz v. Tillie Lewis Foods*, 572 F.2d 657, 659 (9th Cir. 1978); *Fidelity Bankers Life Inc. Co. v. Wedco*, 102 F.R.D. 41, 43 (D.Nev. 1984)). The Mississippi Supreme Court concluded by noting that:

> whether as a practical matter one has an interest that may be impaired or jeopardized is a matter no court will ever be able to determine as well as the intervenor himself. The court will never understand the facts as well as the intervenor, nor, because its neck is not on the line, may a court be expected to appreciate the impact of refusing intervention.

Guaranty Nat'l Ins. Co., 501 So.2d at 385-86. Thus, there appears to be a clear preference for intervention in Mississippi law.

A. Intervention of Right

Rule 24(a) states that "[u]pon timely application, anyone shall be permitted to intervene in an action:

> (1) when a statute confers an unconditional right to intervene; or
>
> (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Miss. R. Civ. P. 24(a) (2015) (emphasis added). Movants here are claiming a right to intervene under Rule 24(a)(2).

There are four prerequisites for intervention under Rule 24(a)(2): "(1) timely application; (2) an interest in the subject matter of the action; (3) an applicant who is so situated that disposition of the action may as a practical matter impair or impede his ability to protect his interest; and (4) an applicant's interest is not already adequately represented by existing parties." *In re: Hood ex rel. State Tobacco Litigation*, 958 So.2d 790, 805 (Miss. 2007); *see also Guaranty Nat'l Ins. Co.*, 501 So.2d at 381. "[W]hen a movants satisfies [these] four separate requirements, the trial court 'shall' allow intervention." *Madison HMA, Inc. v. St. Dominic-Jackson Memorial Hospital*, 35 So.3d 1209, 1215 (Miss. 2010) (citing *Guaranty Nat'l Ins. Co.*, 501 So.2d at 381); *In re Hood*, 958 So.2d at 806 ("One a would-be intervenor meets these requirements, the rule mandates that the would-be intervenor must be allowed to intervene). The

Mississippi Supreme Court has also relied on other federal appellate court decisions in determining how the factors are to be balanced:

> 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.

Cummings v. Benderman, 681 So.2d 97, 101 (Miss. 1996) (quoting *Int'l Paper v. Town of Jay, Me.*, 887 F.2d 338, 344 (1st Cir. 1989) (emphasis added).

1. Timeliness

The Mississippi Supreme Court uses four factors in determining whether a motion to intervene is timely:

> (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.

Guaranty Nat'l Ins. Co., 501 So.2d at 382 (citations omitted). The Mississippi Supreme Court went on to state that "likelihood of success on the merits of the claim in intervention is not a factor which should be considered in determining whether a motion for leave to intervene is timely or should otherwise be granted . . ." *Id.* Similarly, "timeliness is not limited to chronological considerations, but 'is to be determined from all the circumstances.'" *In re Hood*, 958 So.2d at 806 (quoting *Stallworth v. Monsanto Co.*, 558 F.2d 257, 263 (5th Cir. 1977) (citations omitted)). "'Timeliness' is not a word of exactitude or of precisely measurable

dimensions." *Vasser v. Bibleway M.B. Church*, 50 So.3d 381, 385 (Miss. Ct. App. 2010) (quoting *McDonald v. E.J. Lavino Co.*, 430 F.2d 1065, 1074 (5th Cir. 1970)). "While none of the factors are outcome-determinative, satisfying one in some instances may be enough." *In re Hood*, 958 So.2d at 806.

i. Length of Time Intervenor Knew or Reasonably Should Have Known of His Interest Before Petitioning for Leave to Intervene

First, the plaintiffs' complaint in this lawsuit was filed on July 11, 2016, and upon information and belief, the plaintiffs served the defendants the next day. Movants found out about the lawsuit sometime shortly after it was filed. Comparing the filing date of the instant Motion to Intervene with those dates, there have only elapsed 30 days and 29 days, respectively. In fact, as of the date of this filing, the deadline for the Answer to be filed has not yet arrived nor has the Answer been filed by the defendants. This relatively short period of time, especially compared with other cases allowing for intervention, favors the Movants in this instance. *See Guaranty Nat'l Ins. Co.*, 501 So.2d at 382 (granting intervention where motion was filed 119 days after lawsuit filed); *In re Hood*, 958 So.2d at 806-808 (intervention granted even though motion filed four years after court order was entered); *Madison HMA, Inc.*, 35 So.3d at 1217 (no more than one month between HMA's constructive knowledge of the lawsuit and filing of motion to intervene).

ii. Prejudice to Existing Parties

In analyzing this factor, the Court is "concerned with the possibility of substantial prejudice resulting from the failure of the would be intervenor to file as soon as he learned of the action." *Guaranty Nat'l Ins. Co.*, 501 So.2d at 382. "When considering prejudice in the context of timeliness, the only prejudice that is relevant is 'that prejudice which would result from the would-be intervenor's failure to request intervention as soon as he knew or reasonably should

have known about his interested in the action.'" *In re Hood*, 958 So.2d at 807 (quoting *Stallworth v. Monsanto Co.*, 558 F.3d at 265). Such prejudice is measured at the time the motion to intervene is filed, and the Court "cannot take into account any and all prejudice that existing parties are likely to incur if intervention is permitted." *In re Hood*, 958 So.2d at 807. "This may well be the only significant consideration when the proposed intervenor seeks intervention of right." *McDonald*, 430 F.2d at 1073; *see also* 7C Wright, Miller & Kane, § 1916, at 541-48 ("[T]he most important consideration in deciding whether a motion . . . is untimely is whether the delay in moving for intervention will prejudice the existing parties to the case.").

As noted above, there was little time between Movants becoming aware of the litigation and their filing the instant motion to intervene. Thus, based on definition of prejudice above, there is no indication that the existing parties have been or will be prejudiced by the Court granting the Movant's Motion to Intervene. The deadline for the defendants to Answer the Complaint has not yet occurred, nor has any discovery or depositions taken place. Further, Movants will not delay the litigation. These facts mirror the facts in *Madison HMA, Inc.*, where the Court held that "[i]n the absence of actual prejudice being shown, St. Dominic's argument of prejudice due to untimeliness carries little, if any, weight when balanced against the prejudice to be suffered by the putative intervenor, i.e., being excluded from presenting a case at all." *Madison HMA, Inc.*, 35 So.3d at 1217; *see also Guaranty Nat'l Ins. Co.*, 501 So.2d at 382 ("Prejudice to existing parties would ordinarily, in a Rule 24 context, consist of delaying them in the prosecution of claims or defenses in the pending action. . . . GNIC's motion for leave to intervene did not introduce into the case any new claim or require any new litigation beyond that already before the court . . .). This factor therefore leans in favor of granting the motion.

iii. Prejudice to Intervenor If Petition to Intervene is Denied

The Court must also consider "the extent of the prejudice that the would be intervenor may suffer if his petition for leave to intervene is denied." *Guaranty Nat'l Ins. Co.*, 501 So.2d at 382 (citations omitted). This is also measured at the time of the application for leave to intervene is made. *Id.* at 383. Right now, there is no party in this lawsuit representing the very specific and personal interests of these parents and their minor children who are attending free, public charter schools. If the plaintiffs were to prevail, the result would be devastating to the Movants herein, resulting in the probable closure of charter schools, Movants' children being taken from these improved educational environments where they are learning and growing significantly, and being thrown back into a system that is not meeting their needs or the needs of their fellow citizens in Jackson. *See* David Kenney, *State Releases Scathing J.P.S. Audit*, WLBT (Aug. 1, 2016), *available at* http://www.msnewsnow.com/story/32592348/state-releases-scathing-jps-audit (Jackson Public Schools could face a downgrade in their accreditation after the Mississippi Department of Education found that JPS violated 20 of the state's 32 accreditation standards; many graduating seniors did not meet graduation requirements; many professional positions in the district are filled by staff who do not hold a valid teacher's license; and over 100 pages of maintenance problems at schools where the state says there are "life threatening conditions for students and staff"). The prejudice to Movants could not be greater. Plaintiffs' counsel Southern Poverty Law Center has been contacted by the undersigned and refused to consent to the Movants' motion to intervene in this matter. The plaintiffs' intentional omission of such a necessary and indispensable party and continuing objection should not be rewarded lest the movants be denied their fundamental right to have their day in court on an issue that is of such grave importance not just to the parents themselves but more importantly to the children and

their future. The balance of harms thus tips decidedly in favor of the Movants for intervention in this matter.

iv. Unusual Circumstances Either For or Against Timeliness

There doesn't appear to be any unusual circumstances that exist here for or against the determination of timeliness. Thus, this factor does not weigh in favor of either party.

Therefore, the relevant factors related to timeliness all point in favor of the Movants. Thus, the motion is timely and should be granted.

2. Interest in the Subject Matter of the Action;

Movants claiming intervention of right must also show that they have "an interest relating to the property or transaction which is the subject of the action." Miss. R. Civ. P. 24(a)(2). In interpreting this part of the Rule, the Mississippi Supreme Court has stated

> The wording of Rule 24, in our view, calls for an interpretation based in common sense and practicality. Legalistic formalism and mechanical jurisprudence simply do not fit the language or philosophy of the rule. All that is necessary is that [the Intervenor] establish an interest in the rights that are at issue in the litigation.

Guaranty Nat'l Ins. Co., 501 So.2d at 384 (citing *Hartford Accident and Indemnity Co. v. Crider*, 58 F.D.R. 15, 18 (N.D. Ill. 1973)). In *Guaranty Nat'l Ins. Co.*, the Mississippi Supreme Court reversed the Circuit Court's decision denying intervention[1] and held that intervention was appropriate despite the fact that the would-be intervenor was not legally capable of initiating the

[1] The Circuit Court found the Intervenor's interest inadequate and stated:

> This court is still uncertain as to what interest GNIC claims relating to the subject matter of this suit. It certainly does not admit coverage, in any shape, form or fashion. Additionally, this court is satisfied, notwithstanding the coverage issue, that since GNIC could not have been sued directly in this cause, it could not have been allowed in intervene in any pre-judgment proceedings; therefore, this court finds no compelling reason to now allow GNIC to intervene in any post-judgment proceedings.

Guaranty Nat'l Ins. Co., 501 So.2d at 383.

suit directly. *Guaranty Nat'l Ins. Co.*, 501 So.2d at 383-84. Thus, Mississippi law recognizes interests "that are contingent upon the outcome of trial." *Madison HMA, Inc.*, 35 So.3d at 1216.

As noted above, Movants here are have a clear and delineable interest in the subject matter of this litigation. The pending suit involves constitutional challenges to the legislation that authorized free, public charter schools in Mississippi and established the funding mechanism for such schools. This funding includes both state and local taxes. The Movants are residents and taxpayers of Jackson and Mississippi who have children attending free, public charter schools and children attending JPS schools. It is clear that they have an interest superior to any other party in this litigation, as whatever outcome in this litigation will directly affect their families in more ways than any other party. The literal future and educational opportunities of their children are at stake here. There are few greater interests than that. Although infrequently exhibited in government, common sense and practicality are required by Mississippi law to be applied in this analysis, in place of legalistic formalism and mechanical jurisprudence. Under such a review, it is common sensical, practical, and obvious that Movants have "establish[ed] an interest in the rights that are at issue in the litigation." *Guaranty Nat'l Ins. Co.*, 501 So.2d at 384.

3. Applicant So Situated that Disposition of the Action May Impair or Impede His Ability to Protect His Interest

"The third requisite for intervention of right under Rule 24(a)(2) expressly adopts the idea of practicality, to-wit: the intervenor must be 'so situated that the disposition of the action may as a practical matter impair or impede his ability to protect . . . [his] interest.'" *Id.* The Court has held that this factor is difficult to separate from the previous requirement of "interest," such that the two are normally discussed and considered as one. *Id.* (citing 7C Wright, Miller & Kane, Federal Practice & Procedure § 1908 (2d ed. 1986)). Further, mere availability of

alternative legal forums (such as federal courts) is not sufficient to deny a motion to intervene. *Id.* (citations omitted). The Mississippi Supreme Court stated in *Guaranty Nat'l Ins. Co.* that:

> The central purpose of this requisite is to allow intervention by those who might, in a practical sense, be disadvantaged by the disposition of the action. The rule is satisfied whenever disposition of the present action would put the would be intervenor at a practical disadvantage in protecting his interest.

Guaranty Nat'l Ins. Co., 501 So.2d at 384.

Here, there is no doubt that a negative disposition in favor of the plaintiffs would practically and greatly disadvantage the Movants here, parents and children in free, public charter schools, preventing them from asserting their legal claims in a courtroom setting addressing the constitutional status of a law that directly and greatly impacts their children, their tax dollars, and their families' future. A ruling in the plaintiff's favor would impede and impair the Movants' ability to protect their previously-mentioned interest in this case, with the concomitant beneficial educational opportunities effectively extinguished. If not allowed to intervene, these parents and children will have had their "day in court" suppressed and will not have been afforded "a full measure of justice." *Madison HMA, Inc.*, 35 So.3d at 1217-18; *see also S.G. v. D.C.*, 13 So.3d 269, 279 (Miss. 2009) (finding grandmother's interest in safety and well-being of her grandchildren affected by disposition of custody dispute at time she filed a motion to intervene because the court had placed the children in DHS custody with no provision for grandparent visitation). The potential impairment of the Movants' ability to protect their interest here based on disposition of the legal action strongly necessitates intervention.

4. *Applicant's Interest Not Already Adequately Represented by Existing Parties*

Finally, the rule requires that the would-be intervenor establish that his interest in this matter is not "adequately represented by the existing parties." Miss. R. Civ. P. 24(a)(2). Obviously, the plaintiffs' interests are completely antithetical to the Movants here, as plaintiffs' counsel has orally objected to Movant's intervention and, through their lawsuit, are attempting to defund and shut down free, public charter schools in Mississippi to the direct detriment of the would-be intervenors, certain Jackson parents and children.

Counsel for Jackson Public Schools was contacted about this motion and communicated to the undersigned that she (JPS Counsel) had not spoken with the JPS Superintendent about the motion and thus did not have authority to give consent to the Movants' request to intervene. In any event, although JPS is named as a "defendant" in this lawsuit by the plaintiffs, JPS is also alleged in the Complaint to be a victim of this "unconstitutional" law, having lost millions of dollars as a result of the Charter Schools Act and is purported to lose even more in the coming years. Thus, it can hardly be said that JPS will adequately represent the interest of the Movants, charter school children and their parents, in this litigation. Confusingly, even as a purported "defendant" in this case, JPS has much more to gain financially from actually losing the lawsuit.

Finally, the Attorney General's Office, who is counsel for Governor Phil Bryant and the Mississippi Department of Education ("MDE"), has consented to the Movants intervening in the lawsuit. While it may be argued that these defendants have the same interests as the Movants here and therefore can adequately represent Movants' interest, this is not the case. While "technically" true that they are on the "same side" in advocating to uphold the constitutionality of the Act, the courts have said that Rule 24 "mandates sensitivity to practical considerations." *Guaranty Nat'l Ins. Co.*, 501 So.2d at 385. Because neither the Governor nor MDE have actual "skin in the game" and their "neck is not on the line," *Guaranty Nat'l Ins. Co.*, 501 So.2d at 385-

86, in terms of their children attending free, public charter schools or the risk of their children being snatched away from these educational sanctuaries and thrown back into a declining and struggling school system, it is hard to imagine that these defendants would argue and legally fight "with the same vigor" as would these Movant parents and children. *Id.* The Governor and MDE have public interests that can and should be considered separate and distinct from the private interests of the Movant parents and children. Thus, because Movants' interests are not adequately represented by the existing parties, the court should grant the motion to intervene.

B. Intervention by Permission

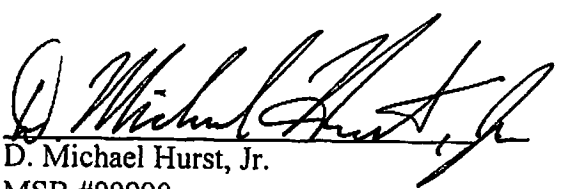
Alternatively, if the court were to find that Movants have not met the prerequisites for intervention as a matter of right under Rule 24(a)(2), Movants would argue for leave to enter the instant lawsuit via permissive intervention under Rule 24(b)(2). Permissive intervention simply states that "[u]pon a timely application anyone may be permitted to intervene in an action . . . (2) when an applicant's claims or defense and the main action have a question of law or fact in common." Miss. R. Civ. P. 24(ab)(2). Unquestionably, as detailed above, the Movants here have filed a very timely application and their claims and interests have common questions of law and facts with the main action. Based upon the clear and present commonality of interests here, Movants pray that the court would grant them the right to intervene so that their voices may simply be heard in this lawsuit affecting them and their families.

IV. CONCLUSION

For the foregoing reasons, coupled with the overall attitude in Mississippi precedent of giving the benefit of the doubt to the one seeking intervention and the judgment that justice demands that the interest of the intervenor should predominate over the interests of the original parties and trial convenience, the Motion to Intervene as Defendants should be granted.

Dated this 10th day of August, 2016.

ATTORNEY FOR MOVANTS

By: 

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