

IN THE CIRCUIT COURT OF FORREST COUNTY, MISSISSIPPI

FILED

CARTER CARROLL and
KIM BRADLEY

MAR 12 2015

PLAINTIFFS

VS.

Forrest Adams
FORREST COUNTY CIRCUIT CLERK

CAUSE NO. CI 14-0212

JOHNNY L. DUPREE, *in his official
capacity as Mayor of the City of Hattiesburg*

DEFENDANT

**PLAINTIFFS' RESPONSE TO DEFENDANT'S MOTION TO STAY ORDER OF
MANDAMUS**

COME NOW Plaintiffs, Carter Carroll and Kim Bradley, and file their Response to Plaintiff's Motion to Stay Order of Mandamus, and for cause thereof would show unto the Court the following:

1. On February 20, 2015, Plaintiffs filed with the Mississippi Supreme Court their *Motion to Docket and Dismiss Appeal*. A copy of the same is attached hereto as **Exhibit "A."** For the reasons set forth in said Motion, Defendant's attempt to appeal the existing interlocutory orders is improper. *Bowen v. Clark*, 239 Miss. 182, 121 So.2d 624 (Miss. 1960) (holding that a motion to dismiss appeal must be sustained where plaintiff appealed from an order on a petition to intervene because such appeal was not from a final disposition of the issues). It would be futile to stay these proceedings based on the pendency of an appeal which is itself due to be dismissed.

2. Moreover, staying these proceedings would be contrary to the clearly stated statutory function of mandamus. By its very nature, the purpose of a mandamus is to provide a remedy "where there is not a plain, adequate, and speedy remedy in the ordinary course of law." Miss. Code Ann. § 11-41-1 (emphasis supplied). See, e.g., *Thompson v. Mayfield*, 204 So.2d 878, 880 (Miss. 1967) (holding that a delay of a mere 60 days in signing and filing a bill of exceptions is sufficient to warrant the remedy of mandamus). The stay sought by Defendant would certainly

thwart the salutary purpose of the statutory scheme. This is especially true where, as here, the delays are measured in terms of many months, as opposed to days.

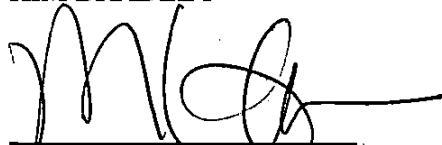
3. Finally, it is important to note that, by virtue of its finding that a writ of mandamus be issued, this Court has already found as a matter of law that there is no "plain, adequate and speedy remedy" otherwise available to the Plaintiffs. Moreover, the Court – in its most recent pronouncements – has indicated its intent to maintain jurisdiction over the case to ensure prompt compliance with the order of mandamus. To grant the current motion would be in derogation of this Court's continuing jurisdiction and enforcement of its orders.

WHEREFORE, premises considered, Plaintiffs submit that Defendant's motion is not well-taken and is due to be denied. Plaintiffs also move for an award of their attorney's fees and all costs of court for responding to the present motion, and for such other and further relief as to which they may be entitled.

Respectfully submitted, this the **10th** day of **March, 2015**.

CARTER CARROLL and
KIM BRADLEY

By:



ROBERT D. GHOLSON
Attorney for Movants

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Telephone: (601) 649-4440
Facsimile: (601) 649-4441
Attorneys for Appellees

CERTIFICATE OF SERVICE

I, Robert D. Gholson, hereby certify that a copy of the above and foregoing document has been filed with the Clerk of Court and has been served on the following, on this the **10th** day of **March, 2015**:

Charles Lawrence, Esq. (Via Email and Regular Mail)
1105 Edwards Street
Hattiesburg, MS 39401

I further certify that a copy of the above and foregoing document has been served via United States Mail, postage prepaid, to the following:

Shawn O'Hara (Via Regular Mail)
P.O. Box 15275
Hattiesburg, MS 39404

Elisha Jackson (Via Regular Mail)
P.O. Box 1542
Hattiesburg, MS 39403



ROBERT D. GHOLSON

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

JOHNNY L. DUPREE, *in his official
capacity as Mayor of the City of Hattiesburg*

APPELLANT

VS.

CAUSE NO. 2015-TS-00241

CARTER CARROLL and
KIM BRADLEY

APPELLEES

MOTION TO DOCKET AND DISMISS APPEAL

COME NOW Carter Carroll and Kim Bradley, putative Appellees in this matter (hereafter referred to as "Movants") and file their Motion to Docket and Dismiss Mayor DuPree's Appeal to the Mississippi Supreme Court. For cause thereof, Movants would show unto the Court the following:

1. On November 6, 2014, Carroll and Bradley (members of the Hattiesburg City Council) filed their *Complaint for Mandamus* pursuant to Miss. Code Ann. 11-41-1 *et seq.* in the Circuit Court of Forrest County, Mississippi seeking to compel Hattiesburg Mayor Johnny DuPree to comply with well-established Mississippi law concerning the submission of his nominees for department directors to the Hattiesburg City Council for approval.¹

2. In its Order filed on January 16, 2015, Special Circuit Judge L. Breland Hilburn rejected Mayor DuPree's claims of mootness stemming from his *Motion for Summary Judgment*, and specifically directed the Mayor to "appoint and submit to the Hattiesburg City Council for confirmation, the names of legally qualified directors for all city departments which, as of this date, have not been confirmed by the Hattiesburg City Council."²

3. Following the comments of Mayor DuPree to a local newspaper that he had already

¹ See *Complaint*, attached hereto as Exhibit "A."

² See *Order on Writ of Mandamus*, attached hereto as Exhibit "B."



State Bldg. Com., 217 Miss. 903, 908, 65 So. 2d 227, 229 (Miss. 1953). Similarly here, the orders at issue are clearly interlocutory and therefore are not properly the subject of a direct appeal under Rule 4, Miss. R. App. P. If the Mayor wished to properly appeal these orders – which movants submit would be a waste of time and money at this stage – the proper method for doing so would be as prescribed in Rule 5, Miss. R. App. P. Failing in this, the present appeal is fatally flawed and due to be dismissed.

8. Not only is this matter not properly before this Court, but instead of aiding an already arduous and exceedingly long process of confirming individuals for positions which have remained open since July 1, 2013, any appeal at this stage would result in further delay, expense, and frustration for the citizens of Hattiesburg.

In conclusion, it is plain that the Circuit Court of Forrest County, Mississippi has retained jurisdiction over this matter in an effort to ensure compliance with its Order. As such, the basis for Mayor DuPree's appeal is clearly interlocutory. Because the Mayor has failed to follow the prescribed procedures of the Mississippi Rules of Appellate Procedure, his appeal is not properly before the Court and should be dismissed.

WHEREFORE, Premises considered, Movants move for this Court to docket and dismiss Defendant's appeal. Movants also move for an award of all costs of court accruing in this cause, and for such other and further relief as to which they may be entitled.

Respectfully submitted, this the 20th day of February, 2015.

CARTER CARROLL and
KIM BRADLEY

By: s/Robert D. Gholson
ROBERT D. GHOLSON
Attorney for Movants

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KATHERINE B. SUMRALL - MSB# 104668
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Telephone: (601) 649-4440
Facsimile: (601) 649-4441
Attorneys for Appellees

CERTIFICATE OF SERVICE

I, Robert D. Gholson, hereby certify that a copy of the above and foregoing document has been filed with the Clerk of Court using the MEC system and has been served on the following, on this the 20th day of February, 2015:

Charles Lawrence, Esq.
1105 Edwards Street
Hattiesburg, MS 39401

I further certify that a copy of the above and foregoing document has been served via United States Mail, postage prepaid, to the following:

Shawn O'Hara
P.O. Box 15275
Hattiesburg, MS 39404

Elisha Jackson
P.O. Box 1542
Hattiesburg, MS 39403

s/Robert D. Gholson
ROBERT D. GHOLSON

FILED

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Forrest County Circuit Clerk

IN THE CIRCUIT COURT OF FORREST COUNTY, MISSISSIPPICARTER CARROLL and
KIM BRADLEY

PLAINTIFFS

VS.

CAUSE NO. CI14-0212JOHNNY L. DUPREE, in his official
capacity as Mayor of the City of Hattiesburg

DEFENDANT

COMPLAINT

COME NOW Plaintiffs, Carter Carroll and Kim Bradley, and file this Complaint for an order of mandamus against Johnny L. DuPree, in his official capacity as Mayor of the City of Hattiesburg. For cause thereof, Plaintiffs would show unto the Court the following:

I. INTRODUCTION

1. Plaintiffs bring this civil action for an order of mandamus pursuant to Miss. Code Ann. § 11-41-1 *et seq.* to compel Defendant to comply with well-established Mississippi law concerning the submission of the mayor's nominees for department directors to the Hattiesburg City Council for approval. This action is necessitated because of Defendant's refusal to comply with his duties of office, as specifically mandated by Miss. Code Ann. § 21-8-23(2).

II. VENUE AND JURISDICTION

2. This court has personal jurisdiction of the parties.
3. This court has jurisdiction of the subject matter herein.
4. Venue is proper in this Court.

Exhibit "A"

III. PARTIES

5. Plaintiff, Carter Carroll, is an adult resident citizen of the City of Hattiesburg, Forrest County, Mississippi. Plaintiff Carroll is a duly elected and serving member of the Hattiesburg City Council for Ward 3.
6. Plaintiff, Kim Bradley, is an adult resident citizen of the City of Hattiesburg, Forrest County, Mississippi. Plaintiff Bradley is a duly elected and serving member of the Hattiesburg City Council for Ward 1.
7. Mayor Johnny DuPree is the currently serving mayor of the City of Hattiesburg, and can be served with process at his office in City Hall at 200 Forrest Street, Hattiesburg, MS 39401. Defendant is sued herein in his official capacity as Mayor of Hattiesburg.

IV. FACTS

8. The City of Hattiesburg is a municipal corporation which has adopted the "mayor/council" form of government as provided for and governed by Miss. Code Ann. § 21-8-1 *et seq.* The City Council is composed of five members, with each councilperson representing a separate geographically defined ward.
9. Plaintiffs are suing in their individual capacities and as members of the City Council of the City of Hattiesburg. As public officials of the City of Hattiesburg, and as private citizens in a matter affecting the public interest, they seek the performance of a duty resulting from an office where there is not a plain, adequate, and speedy remedy in the ordinary course of law. Plaintiffs further have standing to bring this action, in that they have a separate interest (as duly elected members of the City Council) in excess of the general public. *DuPree v. Carroll*, 967 So.2d 27, 30 (Miss. 2007).

10. The Constitution of the State of Mississippi and state law require the City Council to exercise legislative power. Likewise, the Constitution of the State of Mississippi and state law require the Mayor to exercise the power of the executive branch. The Constitution of the State of Mississippi and state law forbid any branch of state government from exercising any power properly belonging to the other branch.
11. Miss. Code Ann. § 21-8-23 states as follows: "Each department shall be headed by a director, who shall be appointed by the mayor and confirmed by an affirmative vote of a majority of the council present and voting at any such meeting. Each director shall serve during the term of office of the mayor appointing him, and until the appointment and qualification of his successor." Thus, Defendant is required by law to appoint a director to head each department of the city, and submit those appointments to the council for confirmation. This process – that is, confirmation by the legislative branch of an executive's appointment – is an important feature of the separation of powers mandated by our Constitution.
12. The Mayor and the members of the City Council commenced a four-year term of office on July 1, 2013.
13. To date, the Mayor has failed and refused to submit the majority of his department directors to the City Council for confirmation. Specifically, of the 17 department director positions, only 5 have been duly submitted and confirmed by the City Council. Those positions remaining for confirmation are:
 - (a) Municipal Prosecutor;
 - (b) Municipal Prosecutor, Post 2;
 - (c) Public Defender;

- (d) City Attorney;
- (e) Municipal Court Clerk;
- (f) Municipal Court Judge;
- (g) Both Municipal Court Judges *Pro Tem*;
- (h) Director of Urban Development;
- (i) Director of Parks and Recreation;
- (j) Police Chief; and,
- (k) City Clerk.

14. This is not the first time that this issue has existed, nor is it the first time that this issue has been before this Court. Following his re-election in 2005, Defendant refused to comply with state law and submit all of his department directors for confirmation by the City Council. Defendant and Plaintiff Carroll (in his capacity as then-president of the City Council) each separately requested an opinion from the Mississippi Attorney General to determine the propriety of Defendant's actions in refusing to bring his appointments before the City Council. Replying to each request separately, the Attorney General opined that:

- (a) The department directors are appointed for a term commensurate with the term of the mayor;¹
- (b) At the beginning of a new term, vacancies exist in the positions of department directors;² and,
- (c) The mayor is required by law to submit his appointees to the City Council for approval, even if the appointees are the same individuals who served as department directors during the prior term.³

¹ 2006 Miss. AG LEXIS 24, *2 (February 24, 2006) (Exhibit A).

² 2006 Miss. AG LEXIS 26, *3 (February 24, 2006) (Exhibit B).

³ *Id.* at *5.

15. Despite the clear direction from the Attorney General's office in February of 2006, Defendant persisted in his refusal to submit his appointments to the City Council for approval. Therefore, Plaintiffs⁴ were required to file suit for a writ of mandamus against Defendant.⁵ After months of litigation, the trial judge found in favor of Plaintiffs and ordered "that the Petition for Writ of Mandamus ... be granted in that the Defendant, Johnny L. DuPree, in his official capacity as Mayor of the City of Hattiesburg, Mississippi, is ordered to appoint and submit his directors to the council for confirmation."⁶ Defendant appealed the order, and in due course, the Mississippi Supreme Court affirmed the actions of the trial court, ordering that "the judgment of the Forrest County Circuit Court issuing an order of mandamus to compel the Mayor of Hattiesburg to resubmit directors to the city council is affirmed. The mayor shall forthwith submit department heads for approval by the council."⁷ Eventually, Defendant complied with the weight of authority and submitted department directors for confirmation.
16. Since the 2013 election, Plaintiffs have made multiple inquiries of the Defendant as to when he would comply with the clear mandate of the law and submit his department heads to the city council for confirmation. Those inquiries have been unavailing. Defendant's unwillingness to comply with his duties under state law is especially puzzling, given the outcome of the prior litigation and the unequivocal order from the highest court in this state.

⁴ Along with a third member of the City Council, C. E. Bailey. Mr. Bailey is no longer serving on the City Council.

⁵ See the copy of the Complaint in *Carter Carroll, et al v. Johnny L. DuPree*, cause no. CI06-0132 in the Circuit Court of Forrest County, Mississippi (Exhibit C).

⁶ A copy of the Order dated September 29, 2006, is attached as Exhibit D.

⁷ *DuPree v. Carroll*, 967 So.2d 27, 31-2 (Miss. 2007) (Exhibit E).

17. The Mayor's lack of diligence in submitting nominees for these vital city positions require a conclusion that the Mayor has no intention of voluntarily performing his duties as required by state law. Thus, until such time as the Mayor fulfills his lawful obligation and duty to allow the City Council to consider his appointments, Plaintiffs are unable to perform their statutory duties as council members with respect to these positions.

18. Because Plaintiffs have the requisite standing,⁸ and there is no other legal remedy available,⁹ an order of mandamus is the appropriate remedy.

WHEREFORE, Plaintiffs pray that process will issue for Defendant according to law, and that upon a final hearing, the Court will enter an order pursuant to Miss. Code Ann. § 11-41-1 for Defendant to immediately comply with Miss. Code Ann. § 21-8-23(2), requiring Defendant to forthwith submit the names of all proposed directors of the following departments of the City of Hattiesburg to the City Council for its consideration: Municipal Prosecutor; Municipal Prosecutor, Post 2; Public Defender; City Attorney; Municipal Court Clerk; Municipal Court Judge; both Municipal Court Judges Pro Tem; Director of Urban Development; Director of Parks and Recreation; Police Chief; and, City Clerk. Plaintiffs further pray for an award of all costs of court accruing in this cause, and for such other and further relief as to which they may be entitled.

Respectfully submitted, this the 6th day of November, 2014.

**CARTER CARROLL and
KIM BRADLEY**

By: _____

ROBERT D. GHOLSON
Attorneys for Plaintiffs

⁸ *Id.* at 30.

⁹ *Id.*

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Attorneys for Plaintiffs

2006 Miss. AG LEXIS 24

Office of the Attorney General of the State of Mississippi

February 24, 2006

Reporter

2006 Miss. AG LEXIS 24

2006-0013; 144-A

February 24, 2006

Core Terms

appointee, city council, confirm, department director, reasonable time, prior term, nominee, qualification, re-elected, successor, mayor's, wait

Syllabus

[*1]

Municipalities

Re: Appointment of Department Directors

Request By: Carter Carroll, President

Hattiesburg City Council

Post Office Box 1898

Hattiesburg, Mississippi 39403-0013

Opinion By: JIM HOOD, ATTORNEY GENERAL; Heather P. Wagner, Assistant Attorney General

Opinion

Attorney General Jim Hood has received your request for an official opinion and has assigned it to me for research and response. Your letter reads as follows:

Members of the Hattiesburg City Council have waited more than six months now for the opportunity to consider Mayor Johnny Dupree's nominees for department heads and other city appointees. Since his re-election, Mayor Dupree has provided various reasons for refusing to submit a full list of nominees for Council approval. Most recently, newspaper reports quote him as stating that he is not required by law to present his nominees in a timely fashion and that, in fact, the law allows him to wait until his last day in office to provide a list of names for ratification.

The Council remains united in insisting that the Mayor's list of appointments be voted on in its entirety, and on more than one occasion has refused to consider partial lists he has submitted.

I am writing on behalf of the [*2] Hattiesburg City Council to ask you to render an opinion as to whether the Mayor is correct in his reading of the law. We also are seeking your advice as to any additional options the Council may entertain regarding these appointments.

* * * *

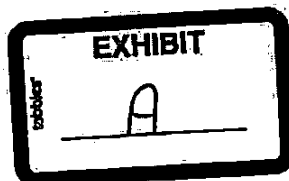


Exhibit "A"

2006 Miss. AG LEXIS 24, *4

Miss. Code Ann. Section 21-8-23(2) provides as follows:

Each department shall be headed by a director, who shall be appointed by the mayor and confirmed by an affirmative vote of a majority of the council present and voting at any such meeting. Each director shall serve during the term of office of the mayor appointing him, and until the appointment and qualification of his successor.

The Attorney General has, on numerous occasions, opined that this provision clearly provides that department directors are appointed for a term commensurate with the term of the mayor. MS AG Op., Doty (February 18, 2000); MS AG Op., McLemore (January 25, 2002). Section 21-8-23 requires a mayor who is re-elected to office to submit his appointees to the city council for confirmation, even if the appointees are the same individuals who served as department directors during the prior term. MS AG Op., Lawrence (March [*3] 9, 1994); MS AG Op., Doty (February 18, 2000); MS AG Op., Bailey, (February 2, 2004). A city council's decision not to confirm a mayoral appointee is not subject to the mayor's power to veto. MS AG Op., Jones (February 28, 1990); MS AG Op., McLemore (January 25, 2002); MS AG Op., Bailey (February 2, 2004). Section 21-8-23 specifically provides that department directors from a prior term continue to hold over until such time as a successor is duly appointed. We are of the opinion that payment of salaries of individuals who have not yet been appointed but are lawfully holding over from the prior term is a lawful expenditure.

While Section 21-8-23 does not state the time frame in which the appointments should be submitted to the council for confirmation, it is the opinion of this office that the intent of this provision of law is that a mayor shall make such appointments within a reasonable time after taking office, so as to afford the city council the opportunity to review the qualifications of the appointees and determine whether such appointees should be confirmed.

Section 21-8-23 does not provide specific relief for situations in which a mayor does not, for whatever reason, make [*4] the required appointments within a reasonable time. What constitutes a reasonable time is a factual question which cannot be determined by way of an Attorney General's opinion, which opinions must be limited to questions of law. Miss. Code Ann. Section 7-5-25. If the governing authorities cannot resolve the question, then resort may be had to a court of competent jurisdiction. See Section 11-41-1 of the Miss. Code.

If our office may be of further assistance, please advise.

Exhibit "A"

2006 Miss. AG LEXIS 26, *4

We point out that the language emphasized in your request is but one part of a sentence, and must be read in context. The full sentence provides as follows:

Each director shall serve during the term of office of the mayor appointing him, and until the appointment and qualification of his successor.

We must read this sentence in its entirety in order to determine its meaning and legislative intent. The Attorney General has opined that the first phrase of this sentence clearly provides that department directors are appointed for a term commensurate and coterminous with the term of the appointing mayor. MS AG Op., Doty (February 18, 2000); [*3] MS AG Op., McLemore (January 25, 2002). The effect of this language is, therefore, to create a limited term of office for department directors serving in a mayor/council form of municipal government. A mayor is elected and serves a term of four (4) years pursuant to Miss. Code Ann. Section 21-8-7(2), and must be re-elected upon the expiration of the four (4) year term. Each time a mayor is re-elected, it represents the beginning of a new four (4) year term of office. The term of service of the department directors appointed by that individual expire at the end of the appointing mayor's four (4) year term. At the beginning of a new term, whether an incumbent mayor is re-elected or a new mayor is elected, it is the opinion of this office that vacancies exist in the positions of department directors. Miss. Code Ann. Section 25-1-7 provides that where an elected or appointed official holds over beyond the expiration of his or her term, a vacancy exists and it should be filled in the manner prescribed by law. Although department directors are not "public officers" per se, (see MS AG Op., Kohnke [February [*4] 24, 2006]), the language in this statute is useful for purposes of general guidance.

As you noted in your letter, department directors are given specific authority to hold-over after the expiration of their term pursuant to Section 21-8-23(2). The effect of this language is that, unless they have been specifically terminated, at the beginning of a new four (4) year term, the prior department directors may "hold-over" in the capacity of department director, but only until such time as the mayor makes an appointment for the current term. The mayor may choose to appoint the same individual as served in the prior term. Department directors may receive full salary and benefits during the time they serve in a hold-over capacity. Unfortunately, the statute does not place a time limit on how long a department director may serve in a hold-over capacity or specify a time within which department heads must be submitted for confirmation. See MS AG Op., Lawrence (March 9, 1994); MS AG Op., Doty (February 18, 2000); MS AG Op., Bailey, (February 2, 2004).

Section 21-8-23(2) requires that appointees be "confirmed by an affirmative vote of a majority of the council present and voting at any such meeting." [*5] When the law does not specify a time for action, a reasonable time must be implied. Therefore each new council must, within a reasonable amount of time after the beginning of a new term, be given the opportunity to confirm or reject appointees for the new term.

Therefore, it is and remains the opinion of this office that Section 21-8-23 establishes a term for department directors, and upon the expiration of that term, a vacancy exists in the position, which must be filled as provided by law. In a mayor/council form of municipal government, a mayor, including one who is re-elected to a new four (4) year term of office, must submit his appointees to director positions to the city council for confirmation, even if the appointees are the same individuals who served as department directors during the prior term. This appointment should be made within a reasonable time after the beginning of the new term. Until such time as the appointments are made, authority exists for the directors serving during the prior term to serve in a hold-over capacity.

In responding to this request, our office reviewed various statutes pertaining to directors of state agencies and the Governor's authority with [*6] regard to making appointments to these positions. None contain identical language as found in Section 21-8-23(2) regarding the mayor's authority to make appointments. Section 43-13-107, establishing the position of the director of the Division of Medicaid, most closely mirrors the appointment language of 21-8-23(2), by providing that the director is appointed by the Governor with the advice and consent of the Senate, and that

the term of office of the executive director . . . shall be concurrent with the term . . . of the Governor appointing The incumbent executive director . . . shall serve until the the appointment and qualification of [a] successor.

Exhibit "A"

2006 Miss. AG LEXIS 26, *6

In contrast is that language contained in Section 43-1-2, establishing the position of Director of the Mississippi Department of Human Services, which provides that the appointment is made by the Governor with the advice and consent of the Senate, that the director serves at the will and pleasure of the Governor and until his successor is appointed and qualified, with no limitation creating a term of service for the position of Director of Human Services. It is the opinion of this office that by using language which directs [*7] that a term of office shall be concurrent with the term of the appointing authority, or requires that service in a position shall be "during the term of office" of the appointing authority, as is found in Section 21-8-23(2), it was the intent of the Legislature to limit the time a person may serve in an office, after which time the position is vacant, subject to permissive hold-over language until an appointment is made to fill the vacancy.

If our office may be of further assistance, please advise.

Exhibit "A"

Exhibit "A"

V.

That the City of Hattiesburg, Mississippi, is a municipal corporation which has adopted as its governing form the "mayor/council" form of government as provided for and governed by Section 21-8-1, *et seq.*, of the Mississippi Code of 1972, as amended.

VI.

That the Council of the City of Hattiesburg, Mississippi, is composed of five members, with each councilman representing a separate geographically defined ward.

VII.

That plaintiffs herein are suing in their capacity as members of the City Council of the City of Hattiesburg, Mississippi, and as constituting a majority of said Council. As public officials of the City of Hattiesburg, Mississippi, and as private citizens in a matter affecting the public interest, they seek the performance of a duty resulting from an office where there is not a plain, adequate, and speedy remedy in the ordinary course of law; and they have standing to bring this action.

VIII.

That the Constitution of the State of Mississippi and state law require the City Council to exercise legislative power.

IX.

That the Constitution of the State of Mississippi and state law require the Mayor to exercise executive power.

X.

That the Constitution of the State of Mississippi expressly forbids any branch of state government from exercising any power properly belonging to the other branch.

XI.

That defendant is required by Section 21-8-23 of the Mississippi Code of 1972, as amended, to appoint a director to head each department of the city, which appointment must be confirmed by an affirmative vote of a majority of the council present and voting at the council meeting at which the appointment is considered by the council.

XII.

That the council and its members are required to consider each appointment submitted by the mayor and to exercise their responsibilities thereto pursuant to the Constitution of the State of Mississippi.

XIII.

That the Mayor and Councilmen commenced a four-year term of office on July 1, 2005.

XIV.

That plaintiff Carroll, acting as president of the Council, and the Mayor each requested opinion from the Attorney General of the State of Mississippi concerning the Mayor's obligation to submit department directors to the Council. In each case, the Office of the Attorney General advised that the Mayor had an obligation to submit each director for consideration by the Council, and the Council had an obligation to consider each appointment. Copy of the opinion requested by plaintiff Carroll is attached hereto as Exhibit "A," and copy of the opinion requested by the defendant is attached hereto as Exhibit "B," each being made a part hereof by reference.

XV.

That the Mayor has steadfastly refused to submit departmental directors of the City Council as required by state law.

XVI.

That the failure to act by the Mayor prevents plaintiffs herein from exercising their constitutional and statutory duties to consider and act upon the appointment of said department directors by the Mayor.

XVII.

That the City Council considered the failure of the Mayor to act at its May 2, 2006, Council meeting and has determined by resolution adopted by a majority of the Council that more than a reasonable amount of time has expired since the Mayor has taken office for him to perform his legal requirement of submitting departmental directors to the City Council. A copy of said resolution adopted by the City Council is attached hereto as Exhibit "C" and made a part hereof.

XVIII.

That the defendant has indicated that he will not submit departmental directors for consideration by plaintiffs and the remainder of the City Council until such time as he is assured that a majority of the Council will vote to confirm his appointments and has also indicated that he is not required to submit said appointments for Council consideration until near the end of his four-year term of office.

XIX.

That the position taken by the Mayor and the lack of diligence in submitting at least two proposed departmental directors to the Council require conclusion that the Mayor has no intention of voluntarily performing his duties required by State law.

XX.

That, until such time as the Mayor fulfills his lawful obligation to allow the plaintiffs and the remainder of the Council to consider his appointments, plaintiffs herein are unable to perform their legal obligation to consider said appointments.

XXI.

WHEREFORE, plaintiffs file this their complaint and pray that process issue for the defendant and that upon final hearing hereof the following relief be granted to them:

A. An order be entered pursuant to Section 11-41-1 of the Mississippi Code of 1972, as amended, requiring the Mayor to submit the names of all proposed directors of departments of the City of Hattiesburg, Mississippi, to the City Council for its consideration.

B. An order be entered declaring that a reasonable amount of time has expired between the Mayor's commencing his term of office and submitting directors of departments for consideration by the City Council within a specific time period.

C. Issue a declaratory judgment that a reasonable amount of time has passed since the Mayor commenced office and that he should submit his directors of departments of the City of Hattiesburg to the City Council for action, or declare that vacancies exist in said departments and that the department directors are improperly holding over.

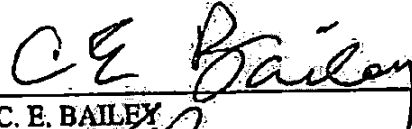
D. That an injunction be granted requiring the Mayor to submit all department directors to the City Council for its consideration within a specified time which plaintiffs believe should not exceed thirty (30) days.

WHEREFORE, plaintiffs file this their complaint and pray that process issue for Johnny L. DuPree in his official capacity as Mayor of the City of Hattiesburg, Mississippi, and that the plaintiffs be granted the relief requested.

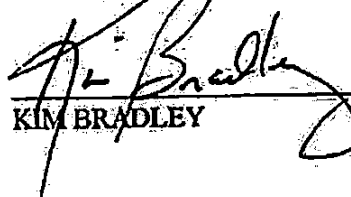
Respectfully submitted,



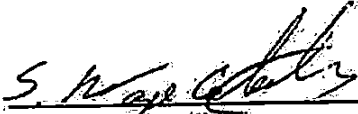
CARTER CARROLL



C. E. BAILEY



KIM BRADLEY



S. Wayne Easterling
Attorney at Law
Post Office Box 1471
Hattiesburg, MS 39403-1471
(601) 544-8900



Montague, Pittman and Varnado
Attorneys at Law
Post Office Drawer 1975
Hattiesburg, MS 39403-1975
(601) 544-1234

STATE OF MISSISSIPPI



JIM HOOD
ATTORNEY GENERAL

OPINIONS
DIVISION

February 24, 2006

Carter Carroll, President
Hattiesburg City Council
Post Office Box 1898
Hattiesburg, Mississippi 39403-0013

Re: Appointment of Department Directors

Dear Mr. Carroll:

Attorney General Jim Hood has received your request for an official opinion and has assigned it to me for research and response. Your letter reads as follows:

Members of the Hattiesburg City Council have waited more than six months now for the opportunity to consider Mayor Johnny Dupree's nominees for department heads and other city appointees. Since his re-election, Mayor Dupree has provided various reasons for refusing to submit a full list of nominees for Council approval. Most recently, newspaper reports quote him as stating that he is not required by law to present his nominees in a timely fashion and that, in fact, the law allows him to wait until his last day in office to provide a list of names for ratification.

The Council remains united in insisting that the Mayor's list of appointments be voted on in its entirety, and on more than one occasion has refused to consider partial lists he has submitted.

I am writing on behalf of the Hattiesburg City Council to ask you to render an opinion as to whether the Mayor is correct in his reading of the law. We also are seeking your advice as to any additional options the Council may entertain regarding these appointments.

460 HIGH STREET • POST OFFICE BOX 220 • JACKSON, MISSISSIPPI 39205-0220
TELEPHONE (601) 359-3660 • FACSIMILE (601) 359-2295

Exhibit "A"

EXHIBIT "A"

Carter Carroll, President
February 24, 2006
Page 2

Miss. Code Ann. Section 21-8-23(2) provides as follows:

Each department shall be headed by a director, who shall be appointed by the mayor and confirmed by an affirmative vote of a majority of the council present and voting at any such meeting. Each director shall serve during the term of office of the mayor appointing him, and until the appointment and qualification of his successor.

The Attorney General has, on numerous occasions, opined that this provision clearly provides that department directors are appointed for a term commensurate with the term of the mayor. MS AG Op., Doty (February 18, 2000); MS AG Op., McLemore (January 25, 2002). Section 21-8-23 requires a mayor who is re-elected to office to submit his appointees to the city council for confirmation, even if the appointees are the same individuals who served as department directors during the prior term. MS AG Op., Lawrence (March 9, 1994); MS AG Op., Doty (February 18, 2000); MS AG Op., Bailey, (February 2, 2004). A city council's decision not to confirm a mayoral appointee is not subject to the mayor's power to veto. MS AG Op., Jones (February 28, 1990); MS AG Op., McLemore (January 25, 2002); MS AG Op., Bailey (February 2, 2004). Section 21-8-23 specifically provides that department directors from a prior term continue to hold over until such time as a successor is duly appointed. We are of the opinion that payment of salaries of individuals who have not yet been appointed but are lawfully holding over from the prior term is a lawful expenditure.

While Section 21-8-23 does not state the time frame in which the appointments should be submitted to the council for confirmation, it is the opinion of this office that the intent of this provision of law is that a mayor shall make such appointments within a reasonable time after taking office, so as to afford the city council the opportunity to review the qualifications of the appointees and determine whether such appointees should be confirmed.

Section 21-8-23 does not provide specific relief for situations in which a mayor does not, for whatever reason, make the required appointments within a reasonable time. What constitutes a reasonable time is a factual question which cannot be determined by way of an Attorney General's opinion, which opinions must be limited to questions of law. Miss. Code Ann. Section 7-5-25. If the governing authorities cannot resolve the question, then resort may be had to a court of competent jurisdiction. See Section 11-41-1 of the Miss. Code.

Exhibit "A"

Carter Carroll, President
February 24, 2008
Page 3

If our office may be of further assistance, please advise.

Sincerely,

JIM HOOD, ATTORNEY GENERAL

By: *Heather P. Wagner*
Heather P. Wagner
Assistant Attorney General

STATE OF MISSISSIPPI



JIM HOOD
ATTORNEY GENERAL

OPINIONS
DIVISION

February 24, 2006

Mayor Johnny L. DuPree
City of Hattiesburg
Post Office Box 1898
Hattiesburg, Mississippi 39402-1898

Re: Miss. Code Ann. Section 21-8-23: Appointment of Department Directors

Dear Mayor DuPree:

Attorney General Jim Hood has received your request for an official opinion and has assigned it to me for research and response. Your letter reads as follows:

The city of Hattiesburg operates under the Mayor-Council form of government. MS Code Ann. Section 21-8-23(2) states "Each department shall be headed by a director, who shall be appointed by the mayor and confirmed by an affirmative vote of a majority of the council present and voting at any such meeting. Each director shall serve during the term of office the mayor appointing him, and until the appointment and qualification of his successor."

I am aware that opinions have been issued stating that a mayor "should" bring back directors who have already been confirmed by the council. However, the language "and until the appointment and qualification of his successor" seems to indicate otherwise. [emphasis in original]

I was first elected Mayor of Hattiesburg and took office in July, 2001. At that time, I presented department directors to the city council for confirmation. I was re-elected to a second term and took office in July, 2005. I do not wish to appoint a "successor" to any of the department director positions which are currently held by the directors that were approved in July, 2001. I would appreciate your opinion as to whether or not there is a legal requirement that I reappoint these directors.

430 HIGH STREET - POST OFFICE BOX 320 - JACKSON, MISSISSIPPI 39208-0220
TELEPHONE (601) 369-2880 - FACSIMILE (601) 369-2286

Exhibit "A"

EXHIBIT "B"

Mayor Johnny L. DuPree
February 24, 2008
Page 2

We point out that the language emphasized in your request is but one part of a sentence, and must be read in context. The full sentence provides as follows:

Each director shall serve during the term of office of the mayor appointing him, and until the appointment and qualification of his successor.

We must read this sentence in its entirety in order to determine its meaning and legislative intent. The Attorney General has opined that the first phrase of this sentence clearly provides that department directors are appointed for a term commensurate and coterminous with the term of the appointing mayor. MS AG Op., Doty (February 18, 2000); MS AG Op., McLemore (January 25, 2002). The effect of this language is, therefore, to create a limited term of office for department directors serving in a mayor/council form of municipal government. A mayor is elected and serves a term of four (4) years pursuant to Miss. Code Ann. Section 21-8-7(2), and must be re-elected upon the expiration of the four (4) year term. Each time a mayor is re-elected, it represents the beginning of a new four (4) year term of office. The term of service of the department directors appointed by that individual expire at the end of the appointing mayor's four (4) year term. At the beginning of a new term, whether an incumbent mayor is re-elected or a new mayor is elected, it is the opinion of this office that vacancies exist in the positions of department directors. Miss. Code Ann. Section 25-1-7 provides that where an elected or appointed official holds over beyond the expiration of his or her term, a vacancy exists and it should be filled in the manner prescribed by law. Although department directors are not "public officers" per se, (see MS AG Op., Kohnke [February 24, 2006]), the language in this statute is useful for purposes of general guidance.

As you noted in your letter, department directors are given specific authority to hold-over after the expiration of their term pursuant to Section 21-8-23(2). The effect of this language is that, unless they have been specifically terminated, at the beginning of a new four (4) year term, the prior department directors may "hold-over" in the capacity of department director, but only until such time as the mayor makes an appointment for the current term. The mayor may choose to appoint the same individual as served in the prior term. Department directors may receive full salary and benefits during the time they serve in a hold-over capacity. Unfortunately, the statute does not place a time limit on how long a department director may serve in a hold-over capacity or specify a time within which department heads must be submitted for confirmation. See MS AG Op., Lawrence (March 9, 1994); MS AG Op., Doty (February 18, 2000); MS AG Op., Bailey, (February 2, 2004).

Mayor Johnny L. DuPree
February 24, 2008
Page 3

Section 21-8-23(2) requires that appointees be "confirmed by an affirmative vote of a majority of the council present and voting at any such meeting." When the law does not specify a time for action, a reasonable time must be implied. Therefore each new council must, within a reasonable amount of time after the beginning of a new term, be given the opportunity to confirm or reject appointees for the new term.

Therefore, it is and remains the opinion of this office that Section 21-8-23 establishes a term for department directors, and upon the expiration of that term, a vacancy exists in the position, which must be filled as provided by law. In a mayor/council form of municipal government, a mayor, including one who is re-elected to a new four (4) year term of office, must submit his appointees to director positions to the city council for confirmation, even if the appointees are the same individuals who served as department directors during the prior term. This appointment should be made within a reasonable time after the beginning of the new term. Until such time as the appointments are made, authority exists for the directors serving during the prior term to serve in a hold-over capacity.

In responding to this request, our office reviewed various statutes pertaining to directors of state agencies and the Governor's authority with regard to making appointments to these positions. None contain identical language as found in Section 21-8-23(2) regarding the mayor's authority to make appointments. Section 43-15-107, establishing the position of the director of the Division of Medicaid, most closely mirrors the appointment language of 21-8-23(2), by providing that the director is appointed by the Governor with the advice and consent of the Senate, and that

[t]he term of office of the executive director . . . shall be concurrent with the term . . . of the Governor appointing The incumbent executive director . . . shall serve until the the appointment and qualification of [a] successor.

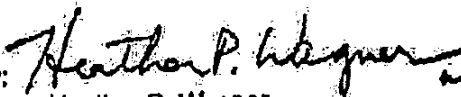
In contrast is that language contained in Section 43-1-2, establishing the position of Director of the Mississippi Department of Human Services, which provides that the appointment is made by the Governor with the advice and consent of the Senate, that the director serves at the will and pleasure of the Governor and until his successor is appointed and qualified, with no limitation creating a term of service for the position of Director of Human Services. It is the opinion of this office that by using language which directs that a term of office shall be concurrent with the term of the appointing authority, or requires that service in a position shall be "during the term of office" of the appointing authority, as is found in Section 21-8-23(2), it was the intent of the Legislature to limit the time a person may serve in an office, after which time the position is vacant, subject to permissive hold-over language until an appointment is made to fill the vacancy.

Mayor Johnny L. DuPre
February 24, 2008
Page 4

If our office may be of further assistance, please advise.

Sincerely,

JIM HOOD, ATTORNEY GENERAL

By: 
Heather P. Wagner
Assistant Attorney General

OFFICIAL OPINION

RESOLUTION

WHEREAS, the City of Hattiesburg, Mississippi, operates under the mayor-council form of government and, thus, is subject to Section 21-8-23 of the Mississippi Code of 1972, as amended; and,

WHEREAS, the mayor of the City of Hattiesburg began a new term of office on July 1, 2005, and, of this date, has not yet submitted the directors of each city department for consideration of confirmation by the council; and

WHEREAS, Section 21-8-23 of the Mississippi Code of 1972, as amended, requires the director of each department to be appointed by the mayor and confirmed by an affirmative vote of a majority of the council present and voting at such meeting; and,

WHEREAS, the Attorney General of the State of Mississippi has stated that the mayor, after having been re-elected to a new four-year term of office, must submit his appointees to the city council for confirmation, even if the appointees are the same individuals who serve as department directors during the prior term, and that this appointment should be made within "a reasonable time after the beginning of the new term"; and,

WHEREAS, the council is concerned about its legal obligations and responsibilities pursuant to Mississippi law and, after having carefully considered the issue as to what constitutes a "reasonable time" for the mayor of the City of Hattiesburg to have submitted his proposed department directors for consideration by the council and having requested of the mayor his reasons and possible justifications for further delay;

IT IS, THEREFORE, RESOLVED that more than a reasonable amount of time has expired since June 27, 2005, and the mayor of the City of Hattiesburg has not complied with his legal requirements pursuant to Section 21-8-23 of the Mississippi Code of 1972, as amended, and that no further justification for delay in submitting said appointments exists.

THE above and foregoing Resolution was introduced by Council member

Exhibit "A"


THE President thereby declared the motion carried and the Resolution adopted this, the
2nd day of May, A.D., 2006.

(SEAL)

ATTEST:


CLERK OF COUNCIL

ADOPTED:


COUNCIL PRESIDENT

THE above and foregoing Resolution having been submitted to and approved by the
Mayor on this, the 2nd day of May, A.D., 2006.

ATTEST:

CITY CLERK

APPROVED:

MAYOR

Exhibit "A"

IN THE CIRCUIT COURT OF FORREST COUNTY, MISSISSIPPI

CARTER CARROLL, C. E. BAILEY,
AND KIM BRADLEY,

PLAINTIFFS)

VERUS

JOHNNY L. DUPREE, in His Official
Capacity as Mayor of the City of
Hattiesburg, Mississippi,

Copy

DEFENDANT)

) CASE
) NUMBER

CF06-0132

SUMMONS

THE STATE OF MISSISSIPPI

To: Johnny L. DuPree
Mayor of the City of Hattiesburg
City Hall
Hattiesburg, MS 39401

THE COMPLAINT WHICH IS ATTACHED TO THIS SUMMONS IS IMPORTANT AND YOU
MUST TAKE IMMEDIATE ACTION TO PROTECT YOUR RIGHTS.

You are required to mail or hand-deliver a copy of a written response to the Complaint to
S. Wayne Easterling Post Office Box 1471, Hattiesburg, Mississippi 39403-1471, the attorney for
the plaintiff. Your response must be mailed or delivered within thirty (30) days from the date of
delivery of this summons and complaint or a judgment by default will be entered against you for the
money or other things demanded in the complaint.

You must also file the original of your response with the Clerk of this Court within a
reasonable time afterward.

Issued under my hand and seal of said Court, this 30th day of May, A.D., 2006.

Lou Ellen Adams
Circuit Clerk
Post Office Drawer 992
Hattiesburg, MS 39403-0992

By LEA
Deputy Clerk

Exhibit "A"

IN THE CIRCUIT COURT OF FORREST COUNTY, MISSISSIPPI
TWELFTH JUDICIAL DISTRICT

CARTER CARROLL, C. E. BAILEY,
AND KIM BRADLEY

FILED

SEP 29 2006

FORREST COUNTY CIRCUIT CLERK

PLAINTIFFS

VERSUS

CAUSE NO. CI06-0132

JOHNNY L. DUPREE, In His Official
Capacity as Mayor of the City of
Hattiesburg, Mississippi

DEFENDANT

ORDER

This matter is before the Court on the Petition for Writ of Mandamus filed by Plaintiffs, Carter Carroll, C. E. Bailey and Kim Bradley. Pursuant to the Findings of Fact and Conclusions of Law entered on September 29, 2006, this Court finds that said Petition for Writ of Mandamus is well taken and should be granted to the extent stated herein.

IT IS THEREFORE ORDERED that the Petition for Writ of Mandamus filed by Plaintiffs, Carter Carroll, C. E. Bailey and Kim Bradley, be granted in that the Defendant, Johnny L. Dupree, in his official capacity as Mayor of the City of Hattiesburg, Mississippi, is ordered to appoint and submit his directors to the council for confirmation.

SO ORDERED this the 29th day of September, A. D., 2006.


CIRCUIT COURT JUDGE



Exhibit "A"

Lexis Advance®

Document: DuPree v. Carroll, 967 So. 2d 27

DuPree v. Carroll, 967 So. 2d 27

Copy Citation

Supreme Court of Mississippi

October 25, 2007, Decided

NO. 2006-CA-01875-SCT

Reporter

967 So. 2d 27 | 2007 Miss. LEXIS 589

JOHNNY L. DUPREE, IN HIS OFFICIAL CAPACITY AS MAYOR OF THE CITY OF
HATTIESBURG, MISSISSIPPI v. CARTER CARROLL, C. E. BAILEY AND KIM BRADLEY

Prior History: [1] COURT FROM WHICH APPEALED: FORREST COUNTY CIRCUIT
COURT. DATE OF JUDGMENT: 09/29/2006. TRIAL JUDGE: HON.

ROBERT B. HELFRICH ▼.

DuPree v. Carroll, 2007 Miss. LEXIS 149 (Miss., Feb. 15, 2007)

Disposition: AFFIRMED.

Core Terms

council member, resubmit, writ of mandamus, nominate, department director,
appointing, mandamus, general public, new term, re-elected, holdover, powers,
checks and balances, executive power, city council, requires, separate interest,
private person, previous term, writ petition



Exhibit "A"

10/21/2014 2:19 PM

Case Summary

Procedural Posture

Appellant mayor sought review of an order from the Circuit Court of Forrest County (Mississippi), which granted appellee council members' petition for a writ of mandamus directing the mayor to resubmit department directors for approval to the council.

Overview

In 2001, the mayor nominated department directors pursuant to Miss. Code Ann. § 21-8-23(2) (Rev. 2007). The council approved the directors. The mayor was reelected and began a second term in 2005. At that time, the mayor indicated he was not going to resubmit the department directors for approval to the council. Three council members sought a writ of mandamus to compel him to comply with what they perceived the law required. The trial court issued the writ. On appeal, the court found that the council members had standing to seek a writ under Miss. Code Ann. § 11-41-1 (Rev. 2002). It was undisputed that the mayor had a duty to nominate, and the council a duty to approve or disapprove, directors of municipal departments. The council members demonstrated that, by virtue of their position as the legislative check and balance on the executive power of the mayor, they had a separate interest or an interest in excess of the general public. Miss. Code Ann. § 21-8-23(2) required that the mayor resubmit directors for approval by the council at the beginning of the new term of office, even if a director was a holdover from the previous term and had been previously approved by the council.

Outcome

The court affirmed the judgment of the trial court.

►LexisNexis® Headnotes

Exhibit "A"

10/21/2014 2:19 PM

Counsel: FOR APPELLANT: CHARLES E. LAWRENCE, JR. ▼

FOR APPELLEE: S. WAYNE EASTERLING ▼, FRANK D. MONTAGUE, JR. ▼

Judges: BEFORE DIAZ ▼, P.J., CARLSON ▼ AND RANDOLPH, JJ. SMITH ▼, C.J.,
WALLER ▼, P.J., CARLSON ▼, GRAVES ▼, DICKINSON, RANDOLPH AND LAMAR, JJ.,
CONCUR. EASLEY ▼, J., CONCURS IN RESULT ONLY.

Opinion by: DIAZ ▼

Opinion

[28] NATURE OF THE CASE: CIVIL - OTHER

DIAZ ▼, PRESIDING JUSTICE, FOR THE COURT:

P1. This case asks whether members of a city council have standing to seek a writ of mandamus against the mayor of their city. It also addresses whether a mayor must resubmit directors for approval by the council at the beginning of a new term of office. Finding in the affirmative as to both issues, we affirm the circuit court's order of mandamus.

Facts and Proceedings Below

P2. The facts are undisputed. The City of Hattiesburg has a "mayor-council form of government" adopted under Mississippi Code Section 21-8-1, et seq. (Rev. 2007). The city has five wards and five city council persons who act as the legislative branch of government. Miss. Code Ann. § 21-8-9 (Rev. 2007).

P3. Johnny DuPree is the mayor of Hattiesburg, and [2] at the time this suit was filed, all three adverse parties--Carter Carroll, C.E. Bailey, and Kim Bradley--were councilpersons in the city. In 2001, DuPree became mayor and nominated department directors pursuant to statute. See Miss. Code Ann. § 21-8-23 (2) (Rev. 2007). The council approved the directors. Then, DuPree was re-elected and began a second term in 2005.

P4. At that time, the mayor indicated he was not going to resubmit the department directors for approval to the council. The council demanded he do so. DuPree refused, and the three named council members sought a writ of mandamus to compel him to comply with what they perceived the law required. [14] The Circuit Court of Forrest County agreed with the council members, and issued the writ demanding that the mayor resubmit the department heads for approval.

P5. Aggrieved, the mayor appeals. We are presented with only two questions. First, do the councilpersons have the necessary statutory standing to seek a writ of mandamus? If they do, does state statute require a mayor to resubmit a choice of department directors for approval at the beginning of a new term of office, [3] even if those directors are holdovers from the previous term?

Exhibit "A"

10/21/2014 2:19 PM

P6. **HN1** We will review these questions of law de novo. See *Aldridge v. West*, 929 So. 2d 298, 300 (Miss. 2006).

I. Do the plaintiffs have standing to seek a writ of mandamus?

P7. The named council members sought a writ of mandamus to compel the mayor to resubmit the directors. The writ of mandamus exists to force an elected official to perform a duty of office. State statute authorizes the writ, which can only be issued:

HN2 On the complaint of the state, by its Attorney General or a district attorney, in any matter affecting the public interest, or on the complaint of any private person who is interested, the judgment shall be issued by the circuit court, commanding any inferior tribunal, corporation, board, officer, or person to do or not to do an act the performance or omission of which the law specially enjoins as a duty resulting from an office, trust, or station, where there is not a plain, [29] adequate, and speedy remedy in the ordinary course of law. All procedural aspects of this action shall be governed by the Mississippi Rules of Civil Procedure.

Miss. Code Ann. § 11-41-1 (Rev. 2002). Our precedent has developed a four-part test [4] to determine who may seek mandamus. **HN3** To obtain relief, we have previously stated that "it must affirmatively appear that four essential elements are present: (1) the petition must be brought by the officers or persons authorized to bring the suit; (2) there must appear a clear right in petitioner to the relief sought; (3) there must exist a legal duty on the part of the defendant to do the thing which the petitioner seeks to compel; and (4) there must be an absence of another remedy at law." *Aldridge*, 929 So. 2d at 302 (citation omitted).

P8. Part one of the test addresses whether the person seeking the writ is authorized; per statute, an authorized person may be the Attorney General, a district attorney, or "any private person who is interested." The council members concede they must proceed under the "any private person who is interested" portion of the statute.

P9. Part two of the test requires that one seeking a writ be "authorized to bring the suit." **HN4** A private person may only be authorized to "petition for a writ of mandamus 'if he can show an interest separate from or in excess of that of the general public.'" *Aldridge*, 929 So. 2d at 302 (quoting *Jackson County Sch. Bd. v. Osborn*, 605 So. 2d 731, 734 (Miss. 1992)); [5] *Fondren v. State Tax Comm'n*, 350 So. 2d 1329, 1332 (Miss. 1977)). The crux of our analysis today is whether the council members have a separate interest or one in excess of the general public.

P10. The council members offer that their interest in pursuing the writ is unique from that of the public at large because of the role they play within the separation of powers. The statutory scheme authorizing the mayor-council system expressly gifts that legislative body with strong checks and balances on the executive power of the mayor. **HN5** While only the mayor may nominate department directors, it is only through the assent of the council that they may become directors. Miss. Code Ann. § 21-8-23 (2) (Rev. 2007). The council members argue that they are prevented from exercising their legislative power as authorized by the Legislature, which vests in them an interest separate from, and in excess of, the general public. The trial court agreed with this argument, and held that "[a]s members of the City Council, [the plaintiffs] have the right and duty to confirm directors appointed by the Mayor," [6] determining that this distinction sufficed as an interest separate from or in excess of the general public.

P11. By analogy, the council members offer the case of *Dye v. State ex rel. Hale*, 507 So. 2d 332, 338 (Miss. 1987), where two state senators alleged the lieutenant

Exhibit "A"

10/21/2014 2:19 PM

governor was exercising legislative powers in violation of the Constitution of 1890. We found that the actions of the lieutenant governor "certainly ha[d] an adverse impact upon [the state senators] sufficient to confer upon them standing to sue," and "[w]e refuse[d] to relegate to the Attorney General either the exclusive authority to bring a suit such as this or the discretion whether and how that authority should be exercised." *Id.* at 338.

P12. The mayor counters that the state senators in *Dye* did not file a writ of mandamus, as the council members did in this case. Yet while the *Dye* petition was not filed as a writ of mandamus, it certainly shared some characteristics with that statutory right. The state senators sought to enjoin the lieutenant governor from exercising [30] authority the senators argued was unconstitutional as a violation of separation of powers; they also sought a declaratory judgment that the Senate [7] Rules, as written, conferred an unconstitutional grant of power. *Id.* at 335-36. This is certainly similar to seeking a writ of mandamus to "command[] any . . . officer . . . to do or not to do an act the performance or omission of which the law specially enjoins as a duty resulting from an office, trust, or station" under the mandamus statute, Miss. Code Ann. § 11-41-1 (Rev. 2002). Additionally, there is no doubt that the question at hand was whether the mayor had encroached upon the powers expressly granted to the council by the Legislature.

P13. The mayor asserts in response that one cannot be a public official and claim that a duty arising out of one's elected position confers standing for a writ of mandamus. He argues that "[i]f you have a duty as a result of your elected position and it affects a matter of public interest, then [the mandamus statute] requires that a petition for a writ of mandamus be brought on complaint by the state." Yet the statute does not set out such a requirement; nor does the mayor cite any case law in support of such an interpretation of the statute.

P14. The third factor, whether there is a duty, is to an extent addressed in the second section of this [8] opinion. However, it is undisputed by the parties that the mayor did have a duty to nominate, and the council a duty to approve or disapprove, directors of municipal departments. It was also undisputed by the parties that there was no other legal remedy available, meeting the fourth prong of the test.

P15. The council members have demonstrated that, by virtue of their position as the legislative check and balance on the executive power of the mayor, they have a separate interest or an interest in excess of the general public. Accordingly, they have also demonstrated they have the standing necessary to seek a writ of mandamus.

II. Does state statute require the mayor to resubmit his directors once he is re-elected?

P16. **HN6** State law governing the mayor-council system requires that the mayor nominate the directors of the city departments; the nominated directors may only serve if approved by the council. Miss. Code Ann. § 21-8-23 (2) (Rev. 2007). The statute also provides that "[e]ach director shall serve during the term of office of the mayor appointing him, and until the appointment and qualification of his successor." Miss. Code Ann. § 21-8-23 (2) (Rev. 2007). The parties do not dispute [9] that a mayor cannot unilaterally hire directors without the approval of the council. The question presented today is whether a mayor must resubmit directors who have been previously approved at the beginning of a new term of office.

P17. **HN7** "Where the statute is plain and unambiguous there is no room for

Exhibit "A"

construction." **Bailey v. Al-Mefty**, 807 So. 2d 1203, 1206 (Miss. 2001) (Internal quotation and citation omitted). Further, "[t]he **HN8** primary rule of construction is to ascertain the intent of the legislature from the statute as a whole and from the language used therein," and we "may look not only to the language used but also to its historical background, its subject matter, and the purposes and objects to be accomplished." *Id.* at 1206 (internal quotation and citation omitted).

P18. In his appeal, the mayor urges that "the statute itself is silent" when directors should be presented to the council for approval, "regardless of whether it is [31] during a first term or successive term of office." While the statute may not be explicit, it is not silent.

P19. The statute clearly vests in the council checks and balances on the executive powers of the mayor. A plain reading of the statute supports the [10] conclusion that "the term of office" is to be read in the singular, meaning that a director, once confirmed, serves only for the term of the mayor nominating him. As the trial court reasoned, **HN9** the mayor and the council members each serve four-year terms. See Miss. Code Ann. § 21-8-7 (2) (Rev. 2007). Accordingly, the council members who originally confirmed the nomination of a director may no longer be on the council at the beginning of the new term. As discussed *supra*, the checks and balances on executive power vested in each council member are unique and separate abilities not shared by members of the general public. An interpretation which allowed those council members who were present when a mayor first took office to have greater powers than those council members present at the beginning of the new term of office would subvert the statutory scheme.

P20. Additionally, it is not uncommon for mayors to serve multiple terms, and in some extreme cases, remain in office for decades. The council, as a legislative body, would be stripped of valuable checks and balances that preserve the separation of powers if a mayor could simply shield his or her decisions with political longevity. A contrary [11] construction of the statute where the simple re-election of a mayor would nullify the checks and balances on executive power expressly created by the Legislature would disregard the clear intention of that body. We shall not disregard the clear intent of the Legislature to create these checks and balances. **24**

P21. This result has previously been reached by the Attorney General in multiple written opinions on the subject, including one involving the parties and facts at hand, and dating back to at least 1994. The opinions state "that **HN10** department directors are appointed for a term commensurate and coterminous with the term of the appointing mayor" and opine that a re-elected mayor must resubmit holdover directors. Miss. Atty. Gen. Op. Opinion No. 2006-0058, 2006 Miss. AG LEXIS 26, 2006 WL 1900672, *1 (Feb. 24, 2006). While an attorney general's opinion is not binding on this Court, it is persuasive, [12] and it further underscores our analysis. See *State ex rel. Holmes v. Griffin*, 667 So. 2d 1319, 1326 (Miss.1995).

P22. Accordingly, a mayor shall resubmit directors for approval by the council if the mayor is re-elected, even if the director is a holdover from the previous term.

Conclusion

P23. The council members have standing to seek a writ of mandamus against the mayor by virtue of the fact that their position creates in them a separate interest or an interest in excess of the general public. Additionally, **HN11** Mississippi Code Section 21-8-23 (2) requires that a mayor must resubmit directors for approval by the council at the beginning of the new term of office, even if the director is a holdover from the previous term and has been previously approved by the council.

Exhibit "A"

P24. The judgment of the Forrest County Circuit issuing an order of mandamus to compel the Mayor of Hattiesburg [32] to resubmit directors to the city council is affirmed. The mayor shall forthwith submit department heads for approval by the council.

P25. **AFFIRMED.**

SMITH v, C.J., WALLER v, P.J., CARLSON v, GRAVES v, DICKINSON, RANDOLPH AND LAMAR, JJ., CONCUR. EASLEY v, J., CONCURS IN RESULT ONLY.

Footnotes

1

The action was not a formal act of the Hattiesburg City Council.

2

On appeal, the mayor offered the analogy of appointment of department heads to the President's unilateral appointment of cabinet members. See U.S. Const. Art. II, § 2. Unlike that constitutional grant of power to the President, the powers of a mayor and a city council are derived wholly from enactments of the Legislature.

Content Type: Cases

Terms: dupree v carroll

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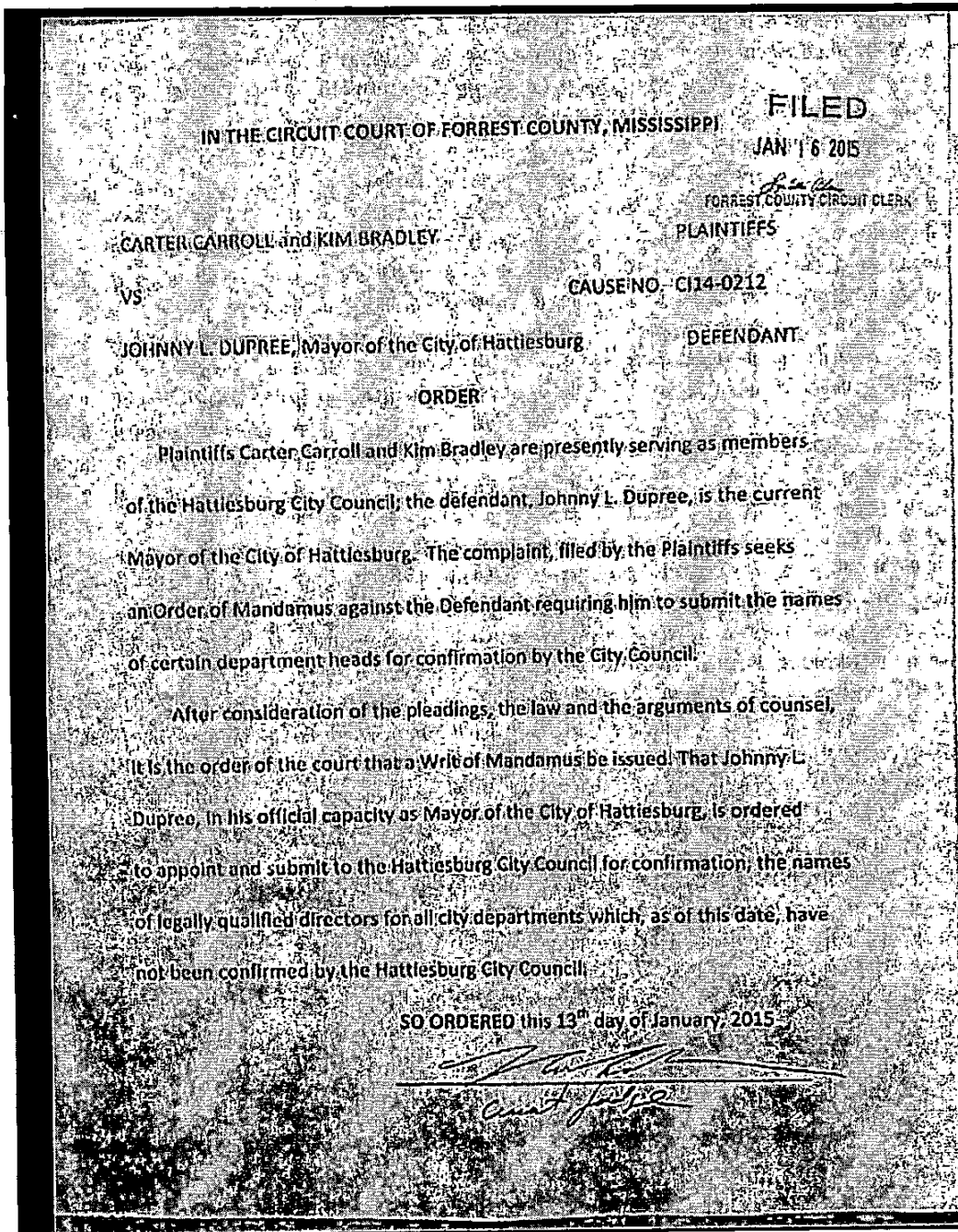
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Exhibit "A"

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IN THE CIRCUIT COURT OF FORREST COUNTY, MISSISSIPPI

CARTER CARROLL and
KIM BRADLEY**FILED**

PLAINTIFFS

JAN 22 2015

CAUSE NO. CI 14-0212

VS.

JOHNNY L. DUPREE, *in his official* ^{*Forrest County Clerk*} FORREST COUNTY CIRCUIT CLERK
capacity as Mayor of the City of Hattiesburg

DEFENDANT

PLAINTIFFS' MOTION FOR MODIFICATION OF ORDER

COME NOW Plaintiffs, Carter Carroll and Kim Bradley, pursuant to Rule 59 of the Mississippi Rules of Civil Procedure and file their Motion for Modification of Order, and for cause thereof, would show unto the Court the following:

1. In its Order filed on January 16, 2015, this Court flatly rejected Defendant's claims of mootness, and specifically directed Defendant to "appoint and submit to the Hattiesburg City Council for confirmation, the names of legally qualified directors for all city departments which, as of this date, have not been confirmed by the Hattiesburg City Council."

2. Now, just a matter of days after the Order was issued, Defendant has taken the position that he has met all of the conditions of the Order- despite having done nothing whatsoever in the interim. In a comment to a local newspaper, the Hattiesburg American, published January 16, 2015, Mayor Dupree is quoted explaining his position that he has met the requirements of the Order, stating, "It says that I must as mayor, I must do my job, and bring them (the nominees) forward, which I have done. And it goes on to say that the council needs to do their job. That's the way I read it. They need to confirm them." See Hattiesburg American article attached hereto as Exhibit "A."

3. This express declaration of mootness flies in the face of this Court's mandamus and demonstrates Defendant's disregard for the solemn processes and authority of this Court. It is

plain from the Defendant's comments that he believes he is not required to make any further nominations and that the impetus is on the council to take action. Plaintiffs, therefore, are regrettably forced to ask the Court to modify its prior Order to ensure compliance of said Order by the Defendant.

4. Plaintiffs request that this Court modify its original Order to specifically require that the Defendant accomplish the following:

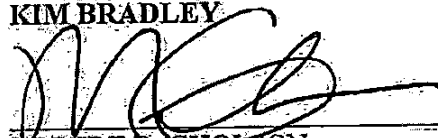
- a. Within thirty (30) days of the date of filing of this Order, Mayor Johnny Dupree shall submit for nomination the holdover employees for those positions which no new appointment has been made. Those positions include municipal judge *pro tem*, city attorney, police chief, and public defender.
- b. Within thirty (30) days of the date of filing of this Order, Mayor Johnny Dupree shall submit for nomination a previously un-nominated and legally qualified candidate as a nominee for the vacant position of city clerk.
- c. Until such time as the positions of city clerk, municipal judge *pro tem*, city attorney, police chief, and public defender have been filled by nominees which have been approved for appointment by a majority vote of the Hattiesburg City Council, Mayor Johnny Dupree shall submit previously un-nominated and legally qualified nominees to the city council for those five previously stated positions.

WHEREFORE, PREMISES CONSIDERED, Plaintiffs respectfully request this Court modify its Order filed on January 16, 2015, to direct the Defendant to comply with the specific requirements stated above. Plaintiffs also respectfully request any such other and further relief as to which they may be entitled.

Respectfully submitted, this the 22nd day of January, 2015.

**CARTER CARROLL and
KIM BRADLEY**

By:


ROBERT D. GHOLSON
Attorney for Plaintiffs

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Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I, Robert D. Gholson, hereby certify that a copy of the above and foregoing document has been served on the following, by directing same to their office addresses through first-class, United States mail, postage prepaid, on this the **22nd** day of **January, 2015**:

Charles Lawrence, Esq.
1105 Edwards Street
Hattiesburg, MS 39401

Shawn O'Hara
P.O. Box 15275
Hattiesburg, MS 39404

Elisha Jackson
P.O. Box 1542
Hattiesburg, MS 39403


ROBERT D. GHOLSON

Hub City mayor ordered to submit directors for approval

Tim Doherty, American Staff Writer

10:19 p.m. CST January 16, 2015



(Photo: American file photo)

Hattiesburg Mayor Johnny DuPree was ordered by a specially-appointed circuit court judge to bring forward directors for any city department that has not been confirmed by City Council.

How long the mayor has to do so is not spelled out in a one-page order signed Tuesday by Special Judge L. Breland Hilburn and filed Friday in Forrest County Circuit Court.

Hilburn ordered DuPree "in his official capacity as Mayor of the City of Hattiesburg ... to appoint and submit to the Hattiesburg City Council for confirmation, the names of legally qualified directors for all city departments which, as of this date, have not been confirmed by the Hattiesburg City Council."

DuPree said he had met the requirements of the order

"It says that I must as mayor, I must do my job, and bring them forward, which I have done," he said. "And it goes on to say that the council needs to do their job. That's the way I read it. They need to confirm them."

"It's already been done, but I will continue to perform the duties of the mayor."

Five positions have yet to be confirmed by the council — police chief, city attorney, public defender, judge pro-tem and city clerk — and the first four positions are being held by administrators who DuPree had not brought forward since being sworn to a fourth term in September 2013.

The order did not specify whether those four holdovers — Police Chief Frazier Bolton, City Attorney Charles Lawrence Jr., Public Defender Alethea Shaw Milton and Judge Pro-tem Carol Jones Russell — had to be put up for approval immediately or whether they would serve until replacements were found and confirmed.

DuPree said the situation was the same as last winter, when he had nominated two new appointees to the Convention Center Commission. The council, wishing to see the holdovers continue in their duties, did not approve DuPree's nominees.

"And they continue to serve in those positions, and will continue to do so until I bring two more people forward and the council approves them," DuPree said. "This is no different. It's the same thing."

Breland's order resulted from a civil complaint brought against the mayor in November by City Councilmen Kim Bradley and Carter Carroll. The complaint, which was amended in December, asked the court to require DuPree to bring forward 12 of 17 nominees requiring council approval.

On Dec. 31, DuPree submitted 11 for approval. Council approved seven on Jan. 5.

But four first-time candidates were not even considered for a vote by council, and it turned out that one of them, Judge Pro-tem nominee Crystal Wise Martin, did not meet residence eligibility requirements.

Lawrence, DuPree's defense attorney, had argued that since the 2013 special election, the mayor had brought forward candidates for all 17 positions, with council rejecting five candidates. Lawrence had asked Hilburn to deem the complaint moot and dismiss the suit.

But Robert Gholson, who represented the councilmen, said Hilburn clearly didn't agree with that interpretation.

"The mayor said, 'Well, I've already done what statute requires me to do, I've already put people up, and, judge, don't make me do it anymore,'" Gholson said. "Well, the judge rejected that argument completely, and you have to believe that's because what the mayor has done so far is insufficient."

"The thrust of this is, and if you look at (past) attorney general opinions as well, this is not supposed to be a game. You're supposed to be doing this in good faith and what's in the best interests of the city and not to try and accomplish some sort of plan or scheme that you have personally."

DuPree and the council had butted heads previously over his nominees and timeliness of their submission for approval.

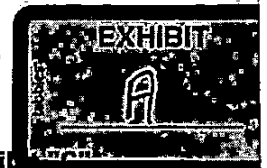
In 2008, DuPree was sued over nominees, and after an 18-month legal battle that wound up in the Mississippi Supreme Court, was ordered to bring them forward.

"What I'm hopeful of is that (DuPree will) look at this, be mindful of what the Supreme Court has already said, and say, 'OK, I'm either going to put my holdovers up right away or I'm going to put other, qualified people up right away, such that we can get them up and confirmed by the council.'"

If that doesn't happen, Gholson said the councilmen would have no other action than to take the mayor back to court.

"My clients do not want to do that," Gholson said. "They want this to be over with, and they want to move forward."

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IN THE CIRCUIT COURT OF FORREST COUNTY, MISSISSIPPI**CARTER CARROLL and
KIM BRADLEY****FILED****FEB 06 2015****PLAINTIFFS****VS.***Forrest County*
FORREST COUNTY CIRCUIT CLERK**CAUSE NO. CI 14-0212****JOHNNY L. DUPREE, in his official
capacity as Mayor of the City of Hattiesburg****DEFENDANT****ORDER GRANTING PLAINTIFFS' MOTION FOR MODIFICATION OF ORDER**

THIS CAUSE CAME THIS DAY to be heard on the Motion of the Plaintiffs, Carter Carroll and Kim Bradley, for Modification of the Court's prior Order filed January 16, 2015; and the Court, having heard and considered the Motion and Defendant's response to same, and arguments of counsel, finds that the Motion is well-taken and should be granted.

IT IS, THEREFORE, ORDERED AND ADJUDGED that the Court's Order filed January 16, 2015 is hereby amended to include the following:

1. For the office of City Clerk, Johnny L. Dupree, as Mayor of the city of Hattiesburg, is hereby ordered to submit the name of a duly qualified person for that office to the Hattiesburg City Council within twenty-one (21) days of February 2, 2015.
2. For the department heads or positions of Municipal Judge *pro tem*, City Attorney, Police Chief, and Municipal Court Public Defender, Johnny L. Dupree, as Mayor of the city of Hattiesburg, is hereby ordered to submit the names of duly qualified persons for each of these offices to the Hattiesburg City Council within twenty-one (21) days of February 2, 2015. The names submitted for these positions may or may not be the names of those persons now serving in these positions as holdover employees.

3. Should any person who may be submitted by the Mayor to the City Council fail to be confirmed by the Council, then the Mayor shall forthwith submit another name of a duly qualified person for that position.

4. Johnny L. Dupree, as Mayor of the city of Hattiesburg, is further ordered to appear before this Court on February 23, 2015, at 10:00 a.m. to present to the Court evidence of his compliance with this Court's Order, or to show cause why he should not be held in contempt of court for violation of this Court's order.

SO ORDERED AND ADJUDGED, this the 3rd day of February, 2015.


L. BRELAND HILBURN
SPECIAL CIRCUIT JUDGE

Prepared and submitted by:
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LILA E. CAVES

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March 10, 2015

Honorable Lou Ellen Adams
Forrest County Circuit Clerk
P.O. Box 992
Hattiesburg, MS 39403-0992

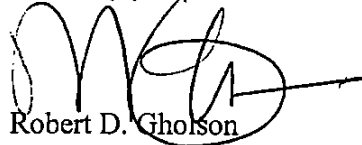
**Re: *Carroll & Bradley v. Dupree*
*Cause No. CI14-0212***

Dear Ms. Adams:

Enclosed herein for filing in the above referenced matter is the Plaintiffs' Response to Motion to Stay Order Mandamus, along with an extra copy to be stamped filed and returned in the self-addressed, stamped envelope provided.

If you have any questions, please feel free to give me a call.

Sincerely yours,


Robert D. Gholson

RDG/lp

Enclosures

cc: Honorable L. Breland Hilburn
Charles Lawrence, Esq.
Shawn O'Hara
Elisha Jackson

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