

FILED

IN THE CIRCUIT COURT OF FORREST COUNTY, MISSISSIPPI SEP 18 2014

CARTER CARROLL and
KIM BRADLEY

Forrest County Clerk
FORREST COUNTY CIRCUIT CLERK
PLAINTIFFS

VS.

CAUSE NO. CI 14-0212

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

DEFENDANT

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

COME NOW Plaintiffs, Carter Carroll and Kim Bradley, and file their Motion for Summary Judgment in accordance with Miss. R. Civ. P. 56.¹ For cause thereof, Plaintiffs would show unto the Court the following:

Despite the fact that this very issue has been litigated before, between these same parties, and ruled on adversely to the defendant by the highest court in this state, the Mayor has persisted in refusing to perform the duties of his office as required by law. In direct contravention of two separate opinions from the Mississippi Attorney General, as well as the prior ruling of this very Court, the Mayor still refuses to do what he is plainly required to do by the Mississippi Code.

The facts in this case are beyond dispute, and are set forth in detail in Plaintiffs' Statement of Undisputed Facts as well as the Complaint. The bottom line is this: Miss. Code Ann. §21-8-23(2) requires the defendant, in his capacity as mayor, to submit department directors to the City Council for confirmation at the beginning of a new term of office. There are a total of seventeen (17) department heads that must be submitted and approved by the Council. Since July 1, 2013, the Mayor has submitted only six nominees, five of which were approved on

¹ Miss. R. Civ. P. 56(a) allows a movant to move for summary judgment "at any time after the expiration of thirty days from the commencement of the action ..." This lawsuit was commenced on November 6, 2014, more than 30 days ago, therefore this motion is timely filed.

March 18, 2014. Otherwise, the Mayor has obstinately failed and refused to bring his department heads before the Council for approval.²

The Constitution of the State of Mississippi and state law require the City Council to exercise legislative power, and the Mayor to exercise the power of the executive branch. The Constitution of the State of Mississippi forbids any branch of state government from exercising any power properly belonging to the other branch: "The powers of the government of the State of Mississippi shall be divided into three distinct departments, and each of them confided to a separate magistracy, to-wit: those which are legislative to one, those which are judicial to another, and those which are executive to another." Miss. Const. Ann. Art. 1, §1. Section 2 of Article 1 states that "No person or collection of persons, being one or belonging to one of these departments, shall exercise any power properly belonging to either of the others."

Miss. Code Ann. §21-8-23 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 of the mayor appointing him, and until the appointment and qualification of his successor." Thus, the Mayor 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. See, e.g., *Alexander v. State*, 441 So. 2d 1329 (Miss. 1983), where the Supreme Court said:

Basic to our holding is our recognition that there is another side to the coin labeled on one side "separation of powers." This other side, commonly referred to as "checks and

² The vacant department directors are: City Clerk, Municipal Prosecutor; Municipal Prosecutor Post 2; Public Defender; City Attorney; Municipal Court Clerk; Municipal Court Judge; two Municipal Court Judges *Pro Tem*; Director of Urban Development; Director of Parks and Recreation; and, Police Chief. See Affidavit of Plaintiff Kim Bradley attached hereto as Exhibit "A."

balances,” is the mandate that important checks be placed upon each department’s exercise of its power. For example, legislative power is checked by the governor’s veto power, and by the judicial power of this Court to declare acts of the legislature unconstitutional. The power of the judiciary is checked by the governor’s pardon power, and by the legislature’s powers of impeachment and removal of judges. It is consistent with our constitutional system that the departments of government have powers to check and balance the other departments. This confirmation power is a legislative check on executive power.

Id. at 1346 (internal citations omitted). By failing to obey the law and submit nominees to these important offices, the Mayor has subverted this critical constitutional process.

Perhaps the most bewildering thing about this whole case is the fact that the Mayor has persisted in this behavior despite the prior ruling in the case of *DuPree v. Carroll*, 967 So.2d 27 (Miss. 2007), a copy of which is attached to the Complaint. If there was any doubt about what the Mayor is supposed to do, or when he is supposed to do it, all of those doubts were dispelled by the Supreme Court in that opinion: “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. The judgment of the Forrest County Circuit 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.” *Id.* at 31-32 (emphasis supplied). Neither the statute (Miss. Code Ann. §21-8-23(2)) nor the rule of law confirmed in *DuPree v. Carroll* have been amended or modified, thus the mandate of the law is clear.

In conclusion, it is a mystery to these plaintiffs why the Mayor stubbornly refuses to do that which he is sworn to do – uphold the law of the State of Mississippi: there is a statute that plainly sets out the mayor’s duty to submit his appointees; there are two separate opinions from the Attorney General affirming that duty; and, if that weren’t enough, there is a Supreme Court

case and opinion directly on point, in which the Mayor tried and failed to avoid his duty. It is a shame that the taxpayers of the City of Hattiesburg are funding the defense of this action (presumably through the office of the City Attorney, himself a holdover from a prior term), when there simply is no legitimate defense. However, while the Mayor's motivations and rationale are anything but clear, some things are perfectly obvious: there is no dispute of fact, and no just reason for delay. Plaintiffs are entitled to the requested relief, as a matter of established law.

WHEREFORE, plaintiffs move the Court to grant summary judgment in their favor, and issue an order in mandamus pursuant to Miss. Code Ann. §11-41-1 for defendant to immediately comply with Miss. Code Ann. §21-8-23(2), and 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 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 8th day of **December, 2014**.

**CARTER CARROLL and
KIM BRADLEY**

By:



ROBERT D. GHOLSON
Attorneys for Plaintiffs

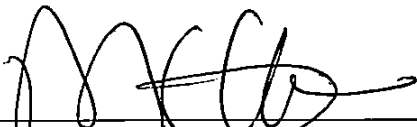
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CERTIFICATE OF SERVICE

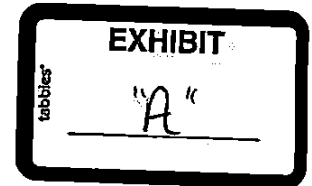
I, Robert D. Gholson, hereby certify that a copy of the above and foregoing document has been served on the following, by directing same to their office addresses through first-class, United States mail, postage prepaid, on this the 8th day of **December, 2014**:

Mayor Johnny L. Dupree
200 Forrest Street
Hattiesburg, MS 39401

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



ROBERT D. GHOLSON



STATE OF MISSISSIPPI
COUNTY OF FORREST

AFFIDAVIT OF KIM BRADLEY

Personally appeared before me, the undersigned authority, in and for the jurisdiction aforesaid, the within named, KIM BRADLEY, who having been first duly sworn by me, states on oath the following:

1. My name is Kim Bradley. I am over the age of twenty-one (21) years and competent to testify as to the matters set forth in this affidavit. I have personal knowledge of the matters and facts set forth in this affidavit.
2. I am a duly elected and serving member of the Hattiesburg City Council for Ward 1.
3. The Hattiesburg City Council is divided into five wards with each ward being represented by one councilperson.
4. On November 6, 2014, the date of filing the complaint in this action, I was (and am currently) the duly elected and serving councilpersons of Ward 1 of the City of Hattiesburg. Likewise, Carter Carroll was (and is currently) the duly elected and serving councilpersons of Ward 3 of the City of Hattiesburg.
5. Defendant is serving his fourth term as mayor, having first taken office in July, 2001. Most recently, defendant was re-elected in 2013 and was sworn into office July 1, 2013.¹
6. There are a total of seventeen (17) department directors that are appointed by the mayor, subject to approval by the City Council. Of these positions, defendant has only submitted six nominees to the City Council for approval. The Council has approved five of the nominees, and declined to approve defendant's nominee for city clerk.

¹ There was a special election ordered as a part of an election contest, which election took place in September 2013. Defendant prevailed in that special election.

7. Since his re-election for a fourth term, defendant has failed to bring nominees before the Council for any of the following positions: Municipal Prosecutor; Municipal Prosecutor Post 2; Public Defender; City Attorney; Municipal Court Clerk; Municipal Court Judge; two Municipal Court Judges *Pro Tem*; Director of Urban Development; Director of Parks and Recreation; and, Police Chief.

8. While defendant did place a nominee before the Council for the position of City Clerk on March 18, 2014, that nominee was rejected by the Council. Defendant has failed to bring any further nominees for that position before the Council since that time.

9. Despite being furnished a copy of this lawsuit, and a demand letter asking the defendant to comply with state law², defendant has refused to submit any nominees to the Council for approval since March 18, 2014.

10. More than 8 months have passed since defendant last placed any nominees before the Council for approval.

11. More than 15 months have passed since defendant was sworn in for his fourth term of office on July 1, 2013.

12. This is the second time that Mr. Carroll and I have filed suit against the defendant for precisely this subject matter. Back in 2006, the defendant refused to bring his appointees before the City Council for approval. Both the defendant and the City Council requested opinions from the Attorney General on the subject. On February 24, 2006, the Attorney General's office responded to both requests, opining that "[i]n 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." Despite having these opinions from the

² See Exhibit A.

Attorney General in hand, defendant persisted in his refusal to submit department directors for approval by the City Council. Because of this, Mr. Carroll and I filed suit, seeking to force the defendant to comply with the law. Finally, in 2007, the Mississippi Supreme Court found in our favor, and required the defendant to "forthwith submit department heads for approval by the council."

13. During my tenure, the City Council has never taken any action to prevent the defendant from submitting one or more qualified persons for consideration by the Council.

AND FURTHER AFFIANT SAITH NOT.


KIM BRADLEY

SWORN TO AND SUBSCRIBED BEFORE ME, on this the 25th day of November, 2014.


NOTARY PUBLIC

My Commission Expires:

May 1, 2016

