

IN THE SUPREME COURT OF MISSISSIPPI
COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2006-CA-01875

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

APPELLANT

VERSUS

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

APPELLEES

Appeal from the Circuit Court of Forrest County, Mississippi
Case Number CI 06-0132

BRIEF FOR APPELLEES

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

Johnny L. DuPree, Mayor, City of Hattiesburg, defendant/appellant.

Charles E. Lawrence, Jr., attorney of record for defendant/appellant.

Carter Carroll, plaintiff/appellee.

C. E. Bailey, plaintiff/appellee.


Kim Bradley, plaintiff/appellee.

S. Wayne Easterling, attorney of record for plaintiff/appellee.

Frank D. Montague, Jr., attorney of record for plaintiff/appellee.

Honorable Robert B. Helfrich, Circuit Judge, Twelfth Judicial District.


S. WAYNE EASTERLING,


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STATEMENT OF ISSUES

Plaintiffs (appellees herein) are three ¹ of the five duly elected members of the City Council of the City of Hattiesburg, Mississippi. They filed a lawsuit in the Circuit Court of Forrest County, Mississippi, naming as defendant in his official capacity Johnny L. DuPree, the duly elected mayor of the City of Hattiesburg. The relief requested was an order in the nature of mandamus directing the mayor to take official action. The two issues before the Court are:

1. Do plaintiffs have standing to proceed; and
2. Does Section 21-8-23(2) of the Mississippi Code of 1972, as amended, require the mayor to submit department directors for confirmation by the council during his second term if the directors are hold-overs from the first term?

STATEMENT OF THE FACTS

The City of Hattiesburg has adopted as its form of government the mayor/council system and is, therefore, subject to Sections 21-8-1, *et seq*, of the Mississippi Code of 1972, as amended. The city is divided into five wards with each ward being represented by an elected council person.

DuPree was first elected mayor in 2001 and took office in July of that year to serve a four-year term. Immediately after taking office, he submitted the names of his proposed department directors to the city council for its consideration, and all were approved.

¹At the commencement of the lawsuit, all plaintiffs were members of the City Council. Subsequent to the filing of the lawsuit but prior to the hearing, Councilman C. E. Bailey resigned. The defendant moved that C. E. Bailey be removed as a plaintiff; and in his findings of fact and conclusions of law, the trial judge discussed this but concluded that it was not necessary to rule on this issue. Plaintiffs submit that this issue is moot inasmuch as any one of the councilmen would have standing to bring this action as was concluded by the trial judge.

DuPree was elected to a second four-year term which began July 1, 2005. He has not submitted the names of any of the department directors to the city council for confirmation since the beginning of his second term and has testified that he has no intention of doing so.

Thus, ultimate resolution of this dispute revolves around interpretation of Section 21-8-23(2) of the Mississippi Code of 1972, as amended, which states:

(2) 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.

ARGUMENT

The plaintiffs believe that as duly-elected council persons of the City of Hattiesburg, they have a statutory duty to consider and either affirm or reject the mayor's appointments of department heads. Since DuPree has testified under oath that he does not intend to submit these nominees to the council during his second term, plaintiffs have filed this lawsuit seeking to compel official action by him. They contend that their status as members of the city council gives them standing to bring this action. Both plaintiffs and defendant agree that the issues involved are ripe for summary judgment on both the issue of standing and on the interpretation of the statute.

1. Plaintiffs Contend That They Have Satisfied the Requirement of Standing.

Rule 2 of the Mississippi Rules of Civil Procedure supposedly abolished most of the ancient writs, leaving one form of action to be known as a civil action. However, the ancient writ of *mandamus* is still discussed in modern opinions of this Court. The definition of *mandamus* as found in *Black's Law Dictionary* is as follows:

Lat. We command. This is the name of a writ (formerly a high prerogative writ) which issues from a court of superior jurisdiction, and is directed to a private or municipal corporation, or any of its officers, or to an executive, administrative or judicial officer, or to an inferior court, commanding the performance of a particular act therein specified, and belonging to his or their public, official, or ministerial duty, or directing the restoration of the complainant to rights or privileges of which he has been illegally deprived.

In addition to its status as a common law writ, *mandamus* is the subject of Section 11-41-1 of the Mississippi Code of 1972, as amended:

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, 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.

Thus, plaintiffs herein are seeking a writ of *mandamus* and other relief including an injunction to compel DuPree to meet his constitutional and statutory obligations and to enable plaintiffs to meet their same obligations.

The defendant contends that the plaintiffs do not have an interest separate from or in excess of that of the general public and, thus, cannot bring an action of *mandamus*. He cites in support thereof several cases including *Aldridge v. West*, 929 So.2d 298 (Miss. 2006); and *Board of Education of Forrest County v. Sigler*, 208 So.2d 809 (Miss. 1968). These and other cases have established a four-part test to determine if a party can bring a writ of *mandamus*:

(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.

Board of Education of Forrest County, supra.

In *Aldridge, supra*, a private citizen of Natchez, Mississippi, filed a writ of mandamus against the mayor and board of aldermen claiming that they had improperly re-hired a policeman. The relief requested was that the policeman not be re-hired. The opinion in *Aldridge, supra*, relied heavily upon language in *Jackson County School Board v. Osborn*, 605 So.2d 731 (Miss. 1992), which in turn quoted extensively from *Board of Education of Forrest County v. Sigler, supra*. In *Osborn*, a private citizen of Jackson County, Mississippi, sued the county school board seeking order compelling the board to recommend that the county board of supervisors create a single member school district. This Court held that Osborn as a private citizen had no interest greater than or separate from that of any other citizen of Jackson County.

The Eighteenth Century founders of this country carefully crafted a government with power separated into three branches. Each branch served as a way of limiting the power of the other branches and of maintaining a series of checks and balances to prevent one branch from assuming absolute power. As inviolate as this principle has become, it is not provided for in the United States Constitution.

Mississippi's first constitution, adopted in 1817, provided for the three traditional branches of government, as did the constitutions adopted in 1832 and 1869. Our most recent constitution, adopted in 1890, actually went one step further than the three previous ones; and the change clearly indicates the importance placed upon separation of governmental powers. The first article of this document, Article 1, § 1, states as follows:

The powers of 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.

Article 1, § 2, then severely penalizes any attempt to violate Article 1, § 1, stating:

No person or collection of persons, being one or belonging to one of those departments, shall exercise any power properly belonging to either of the others. The acceptance of an office in either of said departments shall, of itself, and at once, vacate any and all offices held by the person so accepting in either of the other departments.

Thus, it is very apparent that the Mississippi Constitution emphasizes that each of the three branches of government has rights and obligations that cannot be violated by the other branch. Plaintiffs herein are members of the legislative branch of government (Section 21-8-9 of the Mississippi Code of 1972, as amended). Defendant DuPree is a member of the executive branch of government (Section 21-8-15 of the Mississippi Code of 1972, as amended).

Both plaintiffs and DuPree, thus, have separate functions in government. In this case, it is the belief of plaintiffs that they are required as part of their statutory duties to consider and either affirm or reject each nominee for director of a department in city government. Unfortunately, they cannot fulfill their obligation until defendant DuPree places the nominees before the city council. Thus, the refusal of DuPree to bring the names before the city council not only constitutes a breach of his obligation as mayor but also prevents plaintiffs from meeting obligations imposed upon them by Section 21-8-23 of the Mississippi Code. This violates the constitutionally required separation of powers — the executive branch of government through DuPree is encroaching upon the legislative prerogatives of the city council.

It follows, therefore, that DuPree's argument that plaintiffs lack standing must fail. Plaintiffs are the "private person who is interested" to which reference is made in Section 11-41-1 of the Mississippi Code; and, as members of the City Council being prevented from performing their

statutory duty, they have an interest separate from and far in excess of that of the general public. See *Fondren v. State Tax Commission*, 350 So.2d 1329 (Miss. 1977).

In *Dye v. State*, 507 So.2d 332 (Miss. 1987), two members of the Mississippi Senate filed suit in the Circuit Court of Hinds County, Mississippi, against the lieutenant governor. Their suit contended that the lieutenant governor, a member of the executive branch of government, was depriving them of certain powers and prerogatives belonging to the legislative branch. This Court stated that any such action clearly had an adverse effect upon the two plaintiffs as senators and that this adverse affect was clearly sufficient to confer standing on the senators to sue.

Mississippi has very liberal standing requirements. See *VanSlyke v. The Board of Trustees of State Institutions of Higher Learning*, 613 So.2d 872 (Miss. 1993); and *Fordice v. Bryan*, 651 So.2d 998 (Miss. 1995). Thus, it is respectfully submitted that plaintiffs have standing to bring this action.

Defendant's reliance upon *In Re: Fordice*, 691 So.2d 429, is misplaced because the *Fordice* case involved an attempt to bypass the circuit court, unlike this proceeding. In *Fordice*, the petitioner had another remedy available to him. In this case, the parties agree that no remedy other than this action is available to plaintiffs.

2. Section 21-8-23(2) of the Mississippi Code Requires
 Submission of Department Heads to the City Council.

Section 21-8-23 of the Mississippi Code of 1972, as amended, is very clear in its requirements. It states that each department within the city *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. It

further states that each director *shall* serve during the term of office of the mayor appointing him. At least two Attorneys General have construed the statute, as do the plaintiffs, adversely to DuPree's contention. The Attorney General has opined that Section 21-8-23(2) of the Mississippi Code clearly provides that department directors are appointed for a term commensurate with the term of the mayor and that any mayor who is re-elected is required to submit the appointees to the city council for confirmation, even if the appointees are the same individuals who have served as department directors during the prior term of office.

The Attorneys General reasoned that Mississippi statutes pertaining to directors of state agencies and appointment thereof by the Governor did not contain similar language to that contained in Section 21-8-23(2). The closest comparison is contained in Section 43-13-107 establishing the position of the Director of the Division of Medicaid. This statute provides that the director is appointed by the Governor with the advice and consent of the Senate and that the term of this director is concurrent with the term of the Governor appointing him. Comparison of the two statutes has led the Attorney General to conclude that the legislative intent was to limit the director to the specific term of office of the appointing authority. See Attorney General opinion requested by DuPree dated February 24, 2006, at R. 13-16.

It is, therefore, respectfully submitted that the wording in Section 21-8-23(2) expresses legislative intent that the office of a director in city government is vacant at the expiration of the mayor's term, subject to statutory hold-over authority.

Since no time period for permissive hold-over is specified in the statute, the Attorney General concluded that the appointment must occur within a "reasonable " amount of time. The opinion in the case at bar concludes that a reasonable time has expired inasmuch as a valid resolution of the

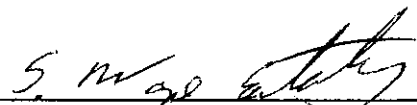
City Council has resolved this factual question adversely to the defendant's position. (R. 20, 219-220.)

In addition to the resolution, DuPree should be estopped from raising this issue because he has testified that he has no intention of submitting the names of his proposed directors to the City Council unless required to do so by court order. (R. 67-68, 75, 86.) He has also testified that it will take him less than five minutes to submit the names if ordered to do so by a court (R 55.) He also testified that it took him less than thirty days after taking office in 2001 to submit the names of the vast majority of department heads (R 53.).

The affidavit of Dr. William Hatcher, former chairman of the Department of Political Science at the University of Southern Mississippi, established as an uncontroverted fact that a reasonable amount of time has passed for the names to have been submitted. (R. 31.)

Thus, plaintiffs respectfully submit that the only way they can meet their constitutional and statutory duties in regard to this matter is for this Court to order defendant to submit the names of department directors for consideration by the City Council.

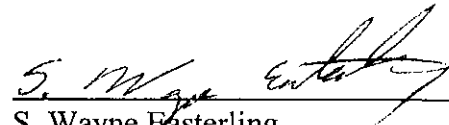
Respectfully submitted,


S. WAYNE EASTERLING,
Of Attorneys for Appellees


FRANK D. MONTAGUE, JR.
Of Attorneys for Appellees

CERTIFICATE

A true copy of the foregoing brief for appellees has been mailed, postage prepaid, to the Honorable Robert B. Helfrich, Circuit Court Judge, Post Office Box 309, Hattiesburg, Mississippi 39403-0309; and to the Honorable Charles E. Lawrence, Jr., Post Office Box 1624, Hattiesburg, Mississippi 39403-1624, attorney for appellant, on this 17th day of April, A.D., 2007.



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