

IN THE CIRCUIT COURT OF LAFAYETTE COUNTY, MISSISSIPPI

JONES, FUNDERBURG, SESSUMS,
PETERSON & LEE, LLC

PLAINTIFF

v.

CIVIL ACTION NO. L07-135

RICHARD SCRUGGS, Individually;
DON BARRETT, Individually;
SCRUGGS LAW FIRM, P.A.;
BARRETT LAW OFFICE, P.A.;
NUTT & McALISTER, PLLC; and
LOVELACE LAW FIRM, P.A.

LAFAYETTE COUNTY

FILED

APR 04 2008

BY  D.C.

DEFENDANTS

SCRUGGS DEFENDANTS' MOTION TO CLARIFY SCOPE OF SANCTIONS

Defendants Richard Scruggs and the Scruggs Law Firm, P.A. (the "Scruggs Defendants") request this Court to clarify the scope of sanctions sought by Plaintiff's Motion for Sanctions. Specifically, the Scruggs Defendants seek a ruling that the potential sanction the Court is considering does not include a sanction that is criminal in nature and that any fine payable to Plaintiff must represent an actual loss. In support of their Motion, the Scruggs Defendants state:

1. Plaintiff's Motion for Sanctions (December 7, 2007) requests that "[t]he Defendants should pay a monetary sanction."
2. The Mississippi Supreme Court has held that "[t]o impose a purely punitive, noncompensatory fine the offending party must be held in contempt." *Cooper Tire & Rubber Co. v. McGill*, 890 So. 2d 859, 867 (Miss. 2004). Courts can impose penalties for either civil contempt or for criminal contempt, depending on the purpose for which the power is exercised. *Id.* at 868. Civil contempt is used to "enforce the rights of private party litigants or enforce

compliance with a court order”; if jailed or fined, “the contemnor must be relieved of the penalty when he performs the required act.” *In re Williamson*, 838 So. 2d 226, 228 (Miss. 2002).

Because the sanctions sought by Plaintiff are not avoidable, they cannot be considered “civil” sanctions. *See Int’l Union v. Bagwell*, 512 U.S. 821, 829 (1994) (holding that “a flat, unconditional fee totaling even as little as \$50 announced after a finding of contempt is criminal if the contemnor has no subsequent opportunity to reduce or avoid the fine through compliance”).

3. Criminal contempt sanctions are “designed to punish the contemnor for disobedience of a court order; punishment is for past offenses and does not terminate upon compliance with the court order.” *Id.* The U.S. Supreme Court has held that “criminal penalties may not be imposed on someone who has not been afforded the protections that the Constitution requires of such criminal proceedings.” *Bagwell*, 512 U.S. at 826 (quoting *Hicks v. Feiock*, 485 U.S. 624, 632 (1988)). *See also F.J. Hanshaw Enter., Inc. v. Emersld River Dev., Inc.*, 244 F.3d 1128, 1139 (9th Cir. 2001) (holding that “when a court uses its inherent powers to impose sanctions that are criminal in nature, it must provide the same protections that would be available in a criminal contempt hearing”); *Mackler Prod. Inc. v. Cohen*, 146 F.3d 126, 130 (2d Cir. 1998) (holding that “the imposition of a sufficiently substantial punitive sanction requires that the person sanctioned receive the procedural protections appropriate to a criminal case”).

4. The Mississippi Supreme Court has similarly held that persons accused of criminal contempt are entitled to protections normally afforded a criminal defendant. *Dennis v. Dennis*, 824 So.2d 604, 609 (Miss. 2002); *Ramsay v. Ramsay*, 88 So. 280 (Miss. 1921). Defendants to charges of criminal contempt generally have the right to an independent prosecutor, the right against double jeopardy, the privilege against self-incrimination, a

presumption of innocence, right to proof beyond a reasonable doubt, and, for “serious” criminal contempt sanctions, the right to a jury trial. *Bagwell*, 512 U.S. at 838 n.5. The Scruggs Defendants have not been afforded these protections as part of Plaintiff’s Motion for Sanctions. In addition, any fine required in a criminal contempt proceeding is payable to the court and not the opposing party. *Morris v. Walden*, 856 So.2d 705, 708 (Miss. App. 2003).

5. Civil fines issued as sanctions must be either compensatory or coercive in nature, and any fine payable to a complainant must be based upon evidence of actual loss. *See Law v. NCAA*, 134 F.3d 1438, 1433 (10th Cir. 1998) (citing *U.S. v. United Mine Workers of America*, 330 U.S. 258, 304 (1947)). In this case, there is no basis for a coercive fine. Any fine awarded to Plaintiff must be based solely upon evidence of Plaintiff’s actual loss. Plaintiff is not entitled to a windfall if the Court elects to imposes sanctions against the Scruggs Defendants.

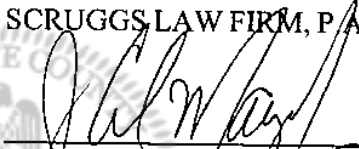
6. Despite the language contained in the Motion for Sanctions, counsel for Plaintiff has confirmed that Plaintiff does not seek criminal penalties against the Defendants and that the hearing will not be a criminal proceeding. *See Exhibit “A”* (emails from R. Percy).

WHEREFORE, PREMISES CONSIDERED, the Scruggs Defendants request the Court to clarify that, in the event that the Court determines that sanctions are appropriate: (1) the Scruggs Defendants are not subject to any form of criminal penalty, including a punitive monetary sanction, and (2) any award Plaintiff seeks to be paid to it must be based on actual damages incurred by Plaintiff. The Scruggs Defendants request such other relief as the Court deems appropriate under the circumstances.

THIS, the 4th day of April, 2008.

Respectfully submitted,

RICHARD SCRUGGS AND
SCRUGGS LAW FIRM, P.A.



J. CAL MAYO, JR. (MB NO. 8492)
POPE S. MALLETTE (MB NO. 9836)
PAUL B. WATKINS (MB NO. 102348)

ATTORNEYS FOR THESE DEFENDANTS

OF COUNSEL:

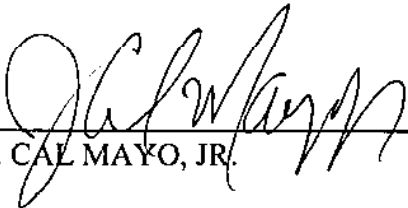
MAYO MALLETTE PLLC
5 University Office Park
2094 Old Taylor Road, Suite 200
Post Office Box 1456
Oxford, Mississippi 38655
Tel: (662) 236-0055

NOTICE OF HEARING

TO: All Counsel of Record

Please be advised that this matter will come on for hearing before Honorable William Coleman, Circuit Judge, as soon as counsel may be heard.

THIS, the 4th day of April, 2008.



J. CAL MAYO, JR.



CERTIFICATE OF SERVICE

I, J. Cal Mayo, Jr., one of the attorneys for Defendants Richard Scruggs and Scruggs Law Firm, P.A., do certify that I have this date delivered, by mail and by electronic means, a true and correct copy of the above and foregoing document to the following attorneys:

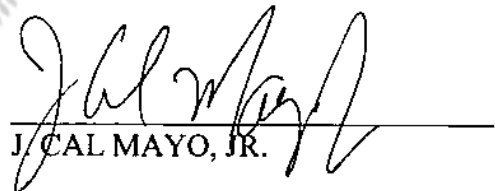
Grady F. Tollison, Jr., Esq.
Tollison Law Firm, P.A.
100 Courthouse Square
Post Office Box 1216
Oxford, Mississippi 38655

ATTORNEY FOR PLAINTIFF

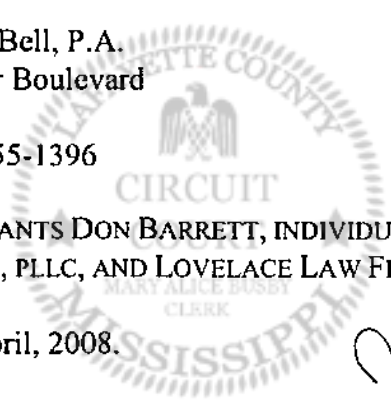
Larry D. Moffett, Esq.
Wilton V. Byars, III, Esq.
Daniel, Coker, Horton & Bell, P.A.
Suite R, 265 North Lamar Boulevard
Post Office Box 1396
Oxford, Mississippi 38655-1396

ATTORNEYS FOR DEFENDANTS DON BARRETT, INDIVIDUALLY, BARRETT LAW OFFICE, P.A., NUTT & MCALISTER, PLLC, AND LOVELACE LAW FIRM, P.A.

THIS, the 4th day of April, 2008.



J. CAL MAYO, JR.



From: Roy Percy [roy@tollisonlaw.com]

Sent: Tuesday, March 25, 2008 3:26 PM

To: 'Trey Byars'; Cal Mayo

Cc: Pope Mallette; Paul Watkins; LMoffett@Danielcoker.com; SScott@Danielcoker.com; 'Roy Percy'; 'Grady Tollison'; cameron@tollisonlaw.com; 'Bill Duke'

Subject: Jones v. Scruggs
Trey and Cal,

I am responding to your respective inquiries regarding which witnesses, if any, we intend to hold to their subpoenas for the sanctions hearing.

If we can go ahead and get the hearing scheduled during the week of April 14-18, we will forego the depositions currently scheduled for that week, and the only witnesses whose hearing subpoenas we will not waive will be Richard Scruggs, Zach Scruggs, Sidney Backstrom and Henry Lackey.

That being the case, it is my understanding Trey is available for the hearing any day that week. I propose we give Judge Coleman several dates that week – perhaps April 15, 16, 17 and 18 -- and let him select the one he prefers.

Also, to address Cal's concerns we will consent to including in the order a stipulation that the sanction to be considered at the hearing is an order striking the defendants' pleadings, entering default judgment against the defendants, and ordering the defendants to pay the plaintiff's reasonable expenses, including attorney fees, incurred as a result of the alleged sanctionable conduct. This should put to rest any fear that this proceeding is somehow a criminal contempt proceeding.

A proposed order setting the hearing is attached for your review. Please give me your thoughts.

I await word of your approval of the order and the proposed dates before submitting it to Judge Coleman. We have been trying to get this hearing set for some time now, so if we do not have Cal's availability by 5:00 pm tomorrow we will inform the judge and ask him to set the hearing on a date convenient to counsel for the other parties.

For some reason my original emails do not always reach Cal, so to be sure he receives this message I request that Pope and Paul forward it to him. Please call me with any questions or comments.

Thanks,
Roy

Tollison Law Firm, P.A.
100 Courthouse Square
P.O. Box 1216
Oxford, MS 38655
Tel: (662) 234-7070
Fax: (662) 234-7095

www.tollisonlaw.com

From: Roy Percy [roy@tollisonlaw.com]
Sent: Thursday, March 27, 2008 8:07 AM
To: Cal Mayo; 'Judge William Coleman'
Cc: 'Bill Duke'; 'Cameron Abel'; 'Grady Tollison'; 'Robert Schultze'; 'Larry Moffett'; 'Shea Scott'; 'Trey Byars'
Subject: RE: Jones Funderburg v. Scruggs et al (Lafayette County Circuit Court)
Judge Coleman,

In response to Cal Mayo's email to you yesterday, to my knowledge there are no "unresolved issues concerning the availability of certain witnesses" for the hearing. We have confirmed that Judge Lackey is available any day of the week of April 14-18, and we have notified opposing counsel that we will release all other witnesses from their subpoenas except for Richard Scruggs, Zach Scruggs and Sidney Backstrom. Despite repeated inquiries we have been advised of no conflicts with those three witnesses, who again remain under subpoena. If those witnesses wish to rebut any allegations in the indictments to which they pleaded guilty under oath, then they will certainly have that opportunity. Regarding Mr. Mayo's concern that this may somehow be a criminal contempt proceeding in which his clients are entitled to a jury and other due process protections, we simply do not see how this proceeding could possibly be considered a criminal contempt proceeding and we have repeatedly assured Mr. Mayo that is not the case. At issue before the court is the imposition of judicial sanctions, not criminal contempt penalties. Again, we believe this is an attempt to further delay these proceedings, and we understand counsel for the other defendants have yet more objections to setting the sanctions hearing in addition to those raised by Mr. Mayo. We do not believe any further delay is warranted, but if you believe yet additional argument on this matter is appropriate prior to setting the sanctions hearing, we restate our preference that it be done in open court rather than by teleconference.

Respectfully,
Roy Percy

Tollison Law Firm, P.A.
100 Courthouse Square
P.O. Box 1216
Oxford, MS 38655
Tel: (662) 234-7070
Fax: (662) 234-7095



www.tollisonlaw.com

From: Cal Mayo [mailto:cmayo@MAYOMALLETTE.com]
Sent: Wednesday, March 26, 2008 5:24 PM
To: Judge William Coleman
Cc: Bill Duke; Cameron Abel; Grady Tollison; Robert Schultze; Roy Percy; Larry Moffett; Shea Scott; Trey Byars
Subject: Jones Funderburg v. Scruggs et al (Lafayette County Circuit Court)

Dear Judge Coleman:

I just received the email from Mr. Tollison with his letter and other attachments. Since last week, I have been in communication with Roy Percy (one of Mr. Tollison's law partners) about the setting of the evidentiary hearing and related matters. These communications have been complicated by an email problem which prevents my emails from reaching the Tollison law firm. In any event, there remain several unresolved issues concerning the availability of certain witnesses, the release of witnesses subpoenaed by Plaintiff, and the agreement to a stipulation concerning the limitation of items under consideration in the motion for sanctions, all of which impact our ability to agree on a hearing date for the Motion for Sanctions. In addition, with their respective guilty pleas entered, Richard Scruggs, Zach Scruggs and Sid Backstrom have upcoming sentencing hearings, consideration of which directly impacts their ability to provide testimony to rebut any evidence introduced on behalf of Plaintiff concerning the

allegations in the Indictment, many of which are demonstrably wrong

Attached to this email is a proposed Order Concerning Plaintiff's Motion for Sanctions. Entry of this Order is necessary to clarify that no monetary penalty is sought by Plaintiff and that the sanction proceedings are not criminal contempt proceedings. In its Motion for Sanctions and related briefing, Plaintiff has requested a monetary penalty. I do not believe that Plaintiff now intends to pursue such a penalty. However, if this requested relief remains viable, my clients are entitled to certain constitutional and due process protections which will have a dramatic impact on the sanctions hearing.

I also understand that Mr. Moffett, one of the attorneys for the other defendants, has raised with Mr. Percy certain questions and concerns about the exact items under consideration at the hearing which Plaintiff is attempting to set.

To most efficiently resolve these questions, I propose a teleconference with the Court. I understand that Mr. Percy is out of the office tomorrow and Friday. I am available on Monday (after 11:00) and Tuesday (after 11:00) to discuss these items and a setting for the hearing.

Thank you for your consideration.

Respectfully submitted,

Cal Mayo
Attorney for Scruggs Defendants

<<Order re limitation as to contempt.pdf>>

J. Cal Mayo, Jr.
Mayo Mallette PLLC
5 University Office Park
2094 Old Taylor Road
Post Office Box 1456
Oxford, Mississippi 38655
Tel: (662) 236-0055
Dir: (662) 513-4897
Fax: (662) 236-0035
cmayo@mayomallette.com
www.mayomallette.com



Any federal tax advice contained in this message (including any attachments or enclosures) was not intended or written by me to be used, and cannot be used, for the purpose of (i) avoiding penalties that may be imposed on a taxpayer, or (ii) promoting, marketing, or recommending to another party any transaction or other matter addressed in this message.

This message may contain privileged material. If you are not the intended recipient, you are notified that any dissemination, distribution or copying of this message is strictly prohibited. If you have received this message in error or are not sure whether it is privileged, please immediately notify me by telephone and destroy this message.