IN THE SUPREME COURT OF MISSISSIPPI

DEEP SOUTH TODAY d/b/a MISSISSIPPI TODAY, MARY MARGARET WHITE, ADAM M. GANUCHEAU, ANNA L. WOLFE, & JOHN DOE — **DEFENDANTS-PETITIONERS**

v. — **CASE NO. 2024-M-659-SCT**

PHIL BRYANT & DEBORAH BRYANT — **PLAINTIFFS-RESPONDENTS**

On Appeal from the Circuit Court of Madison County, Mississippi
Cause No. 45CI1:23-cv-238-JM
The Honorable M. Bradley Mills

MOTION FOR DAMAGES FOR FRIVOLOUS APPEAL

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Rules

Cases

Legal Treatises

News Media[1]

TRIAL COURT FILINGS

[1] All items listed in this section are made exhibits to this filing, except for the "Here & Now" segment. Audio cannot be filed on the Court's electronic filing system.

NOW INTO COURT, by and through undersigned counsel and under Miss. R. App. P. 38, come Plaintiffs-Respondents Phil and Deborah Bryant (referred to collectively as the "Bryants") and move this Court to award them damages from Defendants-Petitioners Deep South Today d/b/a Mississippi Today ("Mississippi Today") and Mary Margaret White (referred to collectively as "Petitioners") for the following reasons:

SUMMARY OF THE ARGUMENT

The petition for interlocutory appeal is a frivolous component of a nationwide press offensive undertaken by Mississippi Today to paint this action as meritless, label this state's judiciary as corrupt, pressure the circuit court to rule favorably on a pending motion to dismiss, unduly influence this Court to grant the petition, and poison the venire from which a jury will be chosen to hear this case at trial. This Court should award attorney's fees and double costs to the Bryants under Rule 38.

BACKGROUND

I. The Discovery Dispute and Order

Former Governor Bryant commenced this action against Mississippi Today and White on July 26, 2023 [MEC Doc. #1]. He served the petitioners with interrogatories, requests for production, and requests for admission (some of which incorporated follow-up interrogatories and requests for production) along with the complaint [MEC Doc. #9-1, 9-2]. The petitioners responded and objected to Bryant's requests for admission on September 6, 2023, but failed to respond to the follow-up interrogatories and document requests accompanying the requests for admission [MEC Docs. 34-6, 34-7]. Mississippi Today objected to several requests for admission based on the reporter's privilege.[2] It did not assert the confidential informant privilege.

[2] *See*, responses to requests for admission 37-38 and 41-45.

On September 22, 2023, Bryant moved to compel answers to the requests for admission and follow-up interrogatories and requests for production served on Mississippi Today [MEC Doc. #34]. Bryant's supporting memorandum analyzed the reporter's privilege, explained why the privilege did not apply to the false and defamatory accusations at hand, outlined the reasonable efforts that Bryant had undertaken to discover the sources of the false and defamatory accusations at issue, and explained why it was important for Bryant to discover the identity of the sources and information provided by these sources [MEC Doc. #35 at 2-21]. Mississippi Today responded to Bryant's motion on October 2, 2023 [MEC Docs. # 35-36]. It did not mention the confidential informant privilege.

The petitioners responded to Bryant's stand-alone interrogatories and requests for production on September 21, 2023 [MEC Docs. #217-1 through 217-4]. They objected to nearly every interrogatory and request based on the reporter's privilege[3] and objected to several requests based on attorney-client privilege and the work product doctrine.[4] Neither party mentioned the confidential informant privilege.

Bryant moved to compel answers to his interrogatories and requests for production on October 18, 2023, and incorporated the reporter's privilege arguments made in his earlier filings [MEC Docs. # 61-64]. The petitioners filed a motion for a protective order on October 30, 2023, arguing once again that the reporter's privilege shields the information and things sought by Bryant from discovery [MEC Doc. #66]. The petitioners did not mention the confidential informant

[3] *See*, Mississippi Today's answers to interrogatories 1-5, 8-9, and 11-12, and responses to requests 7, 11, 13-14, and 17; White's answers to interrogatories 1-4, 8, 10, and 13, and responses to requests 7, and 13-14.

[4] *See*, Mississippi Today's answers to interrogatories 5, 8-9, and 11, and responses to requests 6-7, 11, 15, and 17; White's answers to interrogatories 4, 8, 10, and 13, and responses to requests 6-7, and 13-15.

privilege in their briefing. Bryant responded to their motion on November 6, 2023 [MEC Docs. #80, 81].

The circuit court executed the Order on Pending Motions on May 16, 2024 [MEC Doc. #207] ("Order"). The *Order* addressed Bryant's motion to compel answers to his stand-alone interrogatories and requests for production and the corresponding motion for a protective order as follows:

> Motion of Defendants Deep South Today d/b/a Mississippi [Today] and Mary Margaret White for Protective Order Concerning Plaintiff's Motions to Compel Defendant Mary Margaret White to Answer and Respond to Plaintiff's First Set of Interrogatories and Responses to Requests for Production and Motion to Compel Defendant Deep South Today to Answer and Respond to Plaintiff's First Set of Interrogatories and Responses to Requests for Production (Doc. 66) is held in abeyance pending receipt and review of the privilege. However, the Court finds as to the *reporter's privilege* that Mississippi appellate courts have not yet recognized a First Amendment *reporter's privilege* which protects the refusal to disclose the identity of confidential informants. The information sought is relevant and Plaintiffs have shown a compelling interest, specifically that they must prove that Defendants either lied about having a confidential source or that source or the circumstances surrounding the source's information was so unreliable that it was reckless for the defendant to rely on it. *The requested items for which Defendants have raised this privilege should be produced as part of the privilege log for an in-camera determination.*

Id. at 2-3 (emphasis added). The circuit court also stated that "a privilege log should be submitted by June 6, 2024, for the Court's in-camera review, *which includes any request or interrogatory where a privilege has been raised*." *Id.* at 1 (emphasis added).

The language of the *Order* is clear. The circuit court identified the motions associated with Bryant's stand-alone interrogatories and requests for production; it observed that Mississippi's appellate courts have not yet recognized a First Amendment reporter's privilege; and it ordered the petitioners to do two things:

1. Identify in a privilege log the information, communications, documents, and things requested by Bryant that they contend are protected from discovery by the reporter's privilege, attorney-client privilege, or work product doctrine; and

2. Produce to the court for *in-camera* review the information, communications, documents, and things requested by Bryant that they contend are protected from discovery by the reporter's privilege, attorney-client privilege, or work product doctrine.

The circuit court did not mention the confidential informant privilege, and it is readily apparent why: the petitioners did not object to any discovery request based on the privilege, and no party addressed it in their briefing.[5]

II. The Petition for Interlocutory Appeal

On May 30, 2024, the petitioners moved the circuit court to stay its *Order*, pending the outcome of their impending petition for interlocutory appeal [MEC Doc. #208]. The Bryants opposed the motion on June 6, 2024 [MEC Doc. #210], arguing that (1) the item-by-item *in-camera* inspection ordered by the circuit court follows well-established precedent; (2) the petitioners would not suffer irreparable injury should the circuit court inspect purportedly privileged materials; (3) staying the order would prejudice the Bryants by further delaying an action that had already been unduly delayed; and (4) *in-camera* inspection of purportedly privileged materials is consistent with the public interest. *Id*. at 5-18. The petitioners did not seek expedited consideration of the motion. It remains pending.

Later that day, the petitioners filed a petition for interlocutory appeal with this Court, arguing it "should grant review to address the existence and scope of the reporter's privilege in a

[5] The absurdity of the petitioners' claim that they invoked and the court ordered them to produce items protected by the confidential informant privilege is underscored by the fact that it cannot possibly apply in this case. The government, not the media, holds the confidential informant privilege. *Willis v. City of Hattiesburg*, No. 2:14-cv-89-KS-MTP, 2016 WL 918038, at *5 (S.D. Miss. Mar. 10, 2016) ("The confidential informant privilege … actually refers to the government's privilege 'to withhold from disclosure the identity of persons who furnish information of violations of law to officers charged with enforcement of that law.'") (quoting *Roviaro v. U.S.*, 353 U.S. 53, 59, 77 S.Ct. 623, 1 L.Ed.2d 639 (1957)); *U.S. v. Sinha*, No. 1:14-cr9-HSO-JMR, 2014 WL 4402580, at *2 (S.D. Miss. Sept. 5, 2014) (same); *U.S. v. Griffin*, No. 2:10-CR-160-SA-JMV, 2012 WL 12878573, at *5-6 (N.D. Miss. July 19, 2012) (same).

defamation action where a news organization is a defendant." [Dkt. 2]. The petitioners attempted to use their brief to "poison the well" with false accusations irrelevant to the narrow legal issues before the Court. They accused Bryant of abusing the circuit court's process,[6] attempting to make "an end-run" around the one-year statute of limitations for defamation and false light claims,[7] and serving overbroad discovery requests for harassment purposes.[8] More troubling, the petitioners intentionally misrepresented the substance of the *Order*, writing, "On May 16, 2024, the circuit court held the motion for protective order in abeyance and entered an order directing petitioners to create a privilege log and submit the materials over which they are claiming a 'confidential informants' privilege for *in camera* review." *Id*. at 4. They continued, "[t]he court's order did not address Mississippi Today's argument that notes, interviews, and other unpublished newsgathering material not related to the publications at issue are also entitled to the reporter's privilege, even if they do not involve a confidential source." *Id*. at 5. Neither of these statements is true. The circuit court did not address the confidential informant privilege (which would not apply anyway), and it found Bryant sought relevant information for which he had shown a compelling need. The petitioners moved this Court for a stay but did not seek expedited review.

III. The Privilege Log

The petitioners submitted a privilege log to the circuit court and the Bryants on June 6, 2024 [MEC #211], in which they contended "[t]here are no confidential sources which Defendants

[6] Bryant "has used his defamation complaint against Mississippi Today … as leverage to seek discovery into a series of Pulitzer Prize-winning news reports not actually at issue in this litigation." *Id*. at 1-2.

[7] "Although Bryant indisputably cannot bring a defamation claim over the series itself, which falls outside the statute of limitations, he has attempted an end-run around the one-year time bar by suing over Mississippi Today's commentary about that reporting…." *Id*. at 2.

[8] Bryant's discovery requests are "overbroad" and "exceeding any legitimate need and appear to chill sources from providing information to Mississippi Today." *Id*.

interviewed and upon which Defendants relied in the three publications about which Plaintiff complains." They then listed five categories of text messages between former Governor Bryant and others that they would produce for *in-camera* inspection. *Privilege Log* at 1-2. The petitioners did not explain whether the messages were responsive to any particular discovery request. Additionally, a careful review of the log revealed that the petitioners intended to withhold numerous responsive materials from the circuit court despite the plain language of its *Order*.

IV. The Editor's Note

Mississippi Today commenced its nationwide press offensive later that day. On June 6, 2024, editor-in-chief Adam Ganucheau published a column that addressed the viability of this suit and the legitimacy of Bryant's discovery requests, the threat that the *Order* poses to all Mississippians, and the dire consequences all Mississippians would face should this Court deny the petition for interlocutory appeal.[9] Ganucheau publicly misrepresented facts about these matters to strong-arm this Court into granting the petition and to improperly influence potential jurors.

V. The Motion for Suppression Order

On June 10, 2024, the Bryants moved the circuit court for a gag order to prevent the parties from discussing the litigation in the press [MEC Doc. #214]. The motion discussed the "substantial likelihood" test outlined in *U.S. v. Brown*, 218 F.3d 415 (5th Cir. 2000), and the suppression order entered in *Mississippi Dep't of Human Services v. Mississippi Community Education Center, Inc., et al.*, No. 22-cv-286-EFP (Hinds Cty. Cir. Ct. May 5, 2023) ("MDHS Action"). The Bryants requested an order similar to that entered by Judge Peterson in the MDHS Action [MEC Doc. #214-3].

[9] https://mississippitoday.org/2024/06/06/mississippi-today-supreme-court-appeal/.

VI. The Rule 12(b)(6) Motion to Dismiss & Contempt Motion

All defendants moved the circuit court on June 10, 2024, to dismiss this case under Miss. R. Civ. P. 12(b)(6) [MEC Doc. #215-216]. On the following day, the Bryants moved the circuit court to hold Mississippi Today and White in contempt for their willful violation of the *Order* [MEC Doc. #217], arguing this case squares with this Court's decision in *Fresenius Medical Care Holdings, Inc. v. Hood*, 269 So. 3d 36, 57 (Miss. 2018) ("Our trial judges are afforded considerable discretion in managing the pre-trial discovery process in their courts. Furthermore, our trial judges also have a right to expect compliance with their orders, and when parties and/or attorneys fail to adhere to the provisions of these orders, they should be prepared to do so at their own peril. Parties must take seriously their duty to comply with court orders.") (quoting, *City of Jackson v. Presley*, 942 So. 2d 777, 781 (Miss. 2006); *Bowie v. Montfort Jones Mem'l Hosp.*, 861 So. 2d 1037, 1043 (Miss. 2003)) (internal quotation marks omitted).

The Bryants requested that the circuit court sanction the petitioners under Miss. R. Civ. 37(b)(2)(A) and order they have (1) waived their rights to assert privilege over the responsive information, documents, communications, and other items they intentionally withheld from the court's *in-camera* review and (2) waived their right to assert privilege over the text messages produced for *in-camera* review due to their failure to document each text message on an item-by-item basis in the privilege log.

VII. The Guest Essay

Ganucheau stepped up his criticisms in a guest essay published by The New York Times on June 14, 2023.[10] The essay commences with the following language:

> Slow-moving lawsuits intended to drain newsrooms of their limited financial resources and editorial bandwidth. Threats of jail time for journalists who expose political corruption and

[10] https://nytimes.com/2024/06/14/opinion/mississippi-press-freedom-republicans.html.

> refuse to give up their sources and turn over their notes. Judges with close ties to the politicians who have attacked reporters and their coverage.
>
> If you think these things sound outlandish in America, take a close look at what's happening here in Mississippi. All these possibilities are the subject of very serious conversations I'm having this week with my colleagues as the editor-in-chief of Mississippi Today, a nonprofit newsroom that covers the state's politics.[11]

After labeling this suit "meritless" and falsely claiming that Bryant "does not challenge the accuracy" of Mississippi Today's "reporting," Ganucheau turned to the *Order* and the petition:

> Last month, the state court judge presiding over the case – *an appointee of Mr. Bryant's successor, Gov. Tate Reeves* – ordered us to turn over confidential source documents regarding our reporting on Mr. Bryant. We asked the Mississippi Supreme Court to hear our emergency appeal, arguing the order was unconstitutional. We also asked the court to stay the order while the justices consider our plea to recognize a reporter's privilege, which serves as a basis of protection and privacy for journalists and the sources who share important information with the press. (I published an editor's note about all this in early June.)
>
> But our appeal, while strongly rooted in clear case-law precedent of 40 U.S. states, is politically perilous: *The nine-member Mississippi Supreme Court is made up of four Bryant appointees and at least two others who received Bryant's public endorsement for election in 2012.*
>
> The stakes are incredibly high: The court could guarantee these critical free-press rights for the first time in our state's history, *or it could establish a dangerous precedent for Mississippi journalists and the public at large by tossing aside an essential First Amendment protection.*[12]

Ganucheau noted that the Bryants moved the circuit court to hold the defendants in contempt before questioning the integrity of the circuit court and this Court:

> We have *no direct reason* to believe that the state judge or our state Supreme Court justices will *disregard their oaths of office and not "administer justice without respect to persons."* But this is Mississippi – a state where *a majority of the high court is politically aligned with a former governor* who once publicly called our journalists "liberals at an online Democratic propaganda machine." Frankly, it's *impossible not to worry about how the politics of Mississippi's system of government could affect the outcomes of this case.*[13]

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[11] *Id.* at ¶¶ 1-2.

[12] *Id*. at ¶¶ 13-15 (emphasis added).

[13] *Id*. at ¶¶ 18-19 (emphasis added).

Translation: Ganucheau said he has an indirect reason to believe Judge Mills and a majority of this Court "will disregard their oaths of office and not 'administer justice without respect to persons'" by ruling in the Bryants' favor. Ganucheau concluded his rant by explaining how "[e]very citizen" would be harmed should the defendants lose a jury trial:

> Yes, things have become tenuous for us in Mississippi, but *our case is perhaps one legal decision from being a problem the entire country must grapple with*.
>
> If we were to lose on a final judgment from the Mississippi Supreme Court, our remaining legal remedy would be an appeal to the U.S. Supreme Court on First Amendment grounds. And every American journalist is keenly aware that some on the court may relish an opportunity to reconsider federal legal precedents that grant most press freedoms.
>
> The all-important Sullivan decision is just one of several cases we're relying on for our defense and could be on the line before the U.S. Supreme Court. Two justices have already called on the court to reconsider that decision, which established the doctrine requiring public officials (and later, all public figures) to prove actual malice in order to win defamation cases.
>
> *It is not difficult to see how the lawsuit against us could become part of a broader effort to dismantle press freedoms for journalists across the nation. If journalist freedoms are stripped from us in Mississippi or elsewhere, the corruption and wrongdoing of our government leaders could go more easily unseen. Every citizen – not just the journalists – would be harmed.*
>
> While we hope our case doesn't go this far, we could be on the front end of yet another instance that proves you don't have to live in Mississippi to be profoundly affected by our government's and our court's stances on constitutional rights.[14]

It is difficult to imagine a message more clearly directed at intimidating the judiciary and convincing potential jurors of the righteousness of Mississippi Today's cause and the evils of Bryant's. This message's arrogance is astounding.

[14] *Id*. at ¶¶ 20-24 (emphasis added).

VIII. "Here & Now" Interview

Ganucheau's next stop was an interview with the National Public Radio program "Here and Now" on June 20, 2024.[15] During the interview, he told a national audience that this lawsuit is meritless, that Bryant has never questioned Mississippi Today's "original reporting," that Bryant is not seeking relevant information in discovery, that Bryant has not sufficiently proven falsity or defamation, and that this Court's denial of the petition for interlocutory appeal would have a "huge chilling effect" on their ability to operate as journalists. None of these things are true.

IX. Responses to the Suppression Order & Contempt Motions

The petitioners responded to the motions seeking suppression and contempt orders on July 1, 2024. Regarding the suppression order, they argued that Ganucheau's statements were not unduly prejudicial, a suppression order would be "grossly ineffective," and less restrictive methods are available to limit jury prejudice [MEC Doc. #231]. Regarding the contempt motion, they argued that they complied with the *Order*, but if the court determines they did not, it should not hold them in contempt [MEC Doc. # 232].

X. NBC Nightly News

Tired of Ganucheau's deceptive public relations campaign going unanswered, the undersigned agreed to an interview with NBC Nightly News. NBC News published an article addressing the suit, the *Order*, and the appeal in conjunction with the television news segment aired on July 2, 2024.[16] In their interviews, Ganucheau and Wolfe said they are willing to serve time in prison for their refusals to comply with the *Order*, which is strange considering

[15] https://www.capradio.org/news/here-now/.

[16] https://www.nbcnews.com/investigations/anna-wolfe-pulitzer-mississippi-welfare-scandal-phil-bryant-rcna159936. The link contains the article and embedded video of the segment that aired on NBC Nightly News.

the Bryants have not requested they be jailed and the circuit court has never indicated it was considering such. The NBC News article commences as follows:

> When Anna Wolfe won the Pulitzer Prize for her dogged reporting on Mississippi's welfare fraud scandal, she had no inkling she was soon going to have to contend with the possibility of going to jail. But just over a year after she secured journalism's top award for exposing how $77 million in federal welfare funds went to athletes, cronies, and pet projects, she and her editor, Adam Ganucheau, are contemplating what to pack for an extended stay behind bars. Sued for defamation by the state's former governor – a top subject of their reporting – they have been hit with a court order requiring them to turn over internal files, including the names of confidential sources. They say the order is a threat to journalism that they will resist.
>
> "If one of us goes to jail, we will be the first person to go to jail in the Mississippi welfare scandal," Wolfe told NBC News, referring to the eight indictments that stemmed from the imbroglio, none of which has yet resulted in a sentence. "How can I make promises to sources that I'm going to keep them confidential if this is possible?"[17]

The undersigned rightfully explained: "I didn't sue them because they exposed $77 million worth of misspending. He [Bryant] applauds them for doing that. The suit is about defamation."[18] The article continues by quoting one of the many false and defamatory statements at issue in this case:

> The investigation, published in a multi-part series in 2022, revealed for the first time how former Gov. Phil Bryant used his office to steer the spending of millions of federal welfare dollars – money intended to help the state's poorest residents – to benefit his family and friends, including NFL Hall of Fame quarterback Brett Favre.[19]

NBC News noted that "Bryant takes issue with that and similar pronouncements, saying he played no role in directing the money. The man who did, Quin said, is John Davis, the state's welfare director, who pleaded guilty to federal fraud and theft charges in September 2022 but has yet to be sentenced. 'The fact is, I did nothing wrong,' Bryant said in a statement in May 2023. 'I

[17] *Id*. at ¶¶ 1-3.

[18] *Id*. at ¶ 9.

[19] *Id.* at ¶ 16.

wasn't aware of the wrongdoings of others. When I received evidence that suggested people appear to be misappropriating funds, I immediately reported that to the agency whose job it is to investigate these matters.'"[20]

NBC News then turned its attention to White's embezzlement accusation before observing, "Embezzlement is a crime, and Bryant has never been charged, let alone convicted. There has been no indication he is a target of an ongoing federal investigation into the welfare fraud scandal. In May 2023 – a few days after the Pulitzer announcement – Quin sent Mississippi Today a notice of his intention to sue, citing the 'embezzlement' remark. A week later, White issued a public apology, saying: 'I misspoke at a recent media conference regarding the accusations against former Governor Phil Bryant in the $77 million welfare scandal. He has not been charged with any crime. My remark was inappropriate, and I sincerely apologize.'"[21] The NBC News article reports:

> But Quin said her apology should have gone further, saying Mississippi Today has no evidence that Bryant embezzled funds.
>
> "The upshot is 'you embezzled $77 million, and the criminal authorities aren't doing anything about it," he said. "So here we are to give one of their favorite words, accountability, to the situation. Well, the rabbit's got the gun now; we'll see who's going to be accountable."
>
> Quin has since incorporated more recent articles and is arguing that references to the Backchannel series amount to a "republication" that makes the entire body of work fair game.
>
> "This series of defamatory comments have taken a very serious toll on him," Quin said. "He's entitled to protect himself. He's entitled to enforce his rights just like anyone else."[22]

The article concludes by briefly reviewing the issues underlying the discovery dispute that led to the *Order* and providing Wolfe a forum to tug at the heartstrings of potential jurors:

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[20] *Id*. at ¶¶ 17-18.

[21] *Id.* at ¶¶ 21-22.

[22] *Id*. at ¶¶ 23-26.

> To win a defamation lawsuit, a public figure has to show that someone published false information with "actual malice" or a reckless disregard for the truth. Quin said that's why he needs the newspaper's internal emails and the names of confidential sources, something journalists are loath to ever provide. The order asks that the materials first be handed to the judge, who will decide whether any of the evidence is relevant to a claim of defamation.
>
> "It's not a fishing expedition," Quin said. "A judge is going through the files that you claim to rely on to support your defamatory statements to determine whether they support what you said."
>
> "It would have a chilling effect for the sources coming forward," Ganucheau said. "It would have the effect of making the journalists in Mississippi second-guess how they collect what they collect and whether they should in the first place."
>
> Meanwhile, fighting what she views as an unwarranted lawsuit is taking a toll on one of the state's most accomplished reporters.
>
> "It makes it harder to do my job," Wolfe said. "I mean, I'm working on a story right now that I think is of great significance that I now feel like I'm going to get sued over, as well. It feels like now, anything that I try to report is going to be met with the same level of gaslighting and intimidation and scrutiny. So, it definitely impacts my day-to-day."[23]

Wolfe is right about one thing – Bryant will carefully scrutinize her work. If she publishes additional false and defamatory statements about him, he will give her statutory notice and sue her and her employer again. He has had enough of their repeated acts of defamation.

XI. Replies in Support of the Motions Seeking Suppression & Contempt Orders

On July 8, 2024, the Bryants filed detailed replies supporting their motions seeking suppression and contempt orders. In support of their motion for a suppression order, the Bryants addressed *Brown*'s three-factor test[24] and argued that each factor weighed in favor of entering a

[23] *Id*. at ¶¶ 27-32.

[24] The Fifth Circuit looked at three factors when considering whether the gag order entered by the district court passed constitutional muster: (1) whether there was a substantial likelihood that extrajudicial comments of trial participants would prejudice the court's ability to conduct a fair trial; (2) whether the order was sufficiently narrow to prevent speech having a meaningful likelihood of materially impairing the court's ability to conduct a fair trial; and (3) whether the order was the least restrictive means of preventing prejudicial pretrial publicity. *Brown*, 218 F.3d at 428-431.

suppression order that prevented the parties from conducting a trial by newspaper [MEC Doc. #234]. The introduction of the Bryants' reply in support of their motion to hold the petitioners in contempt of court aptly summarizes their position on that matter:

> The depth of the defendants' dishonesty knows no bounds. They repeatedly lied about former Governor Bryant, giving rise to the claims in this action. Now, they are telling the court out of one side of their mouth that they are not defying its order while telling the national press out of the other side of their mouth that they could face jail time for doing so. As Judge Judy Sheindlin said, "Don't pee on my leg and tell me it's raining." The defendants know they intentionally defied this court's Order [ ]; they know the consequences of their contempt of court; and they made the conscious choice to face these consequences. The bill is now due, and it is time to pay up.

[MEC Doc. #235 at 1].

XII. Response to the Motion to Dismiss

The Bryants filed a fifty-five-page detailed response to the motion to dismiss on July 9, 2024 [MEC Doc. #236]. The introduction section of the response's supporting memorandum provides a brief synopsis of the case and the events that had transpired to that point:

> Under the leadership of chief executive officer Mary Margaret White, editor-in-chief Adam Ganucheau, and reporter Anna Wolfe, Mississippi Today embarked on a long-term campaign to tarnish the reputation of former Governor Phil Bryant. This campaign, which has allowed Mississippi Today to amass significant revenue and secure prestigious accolades, was a concerted effort to manipulate Mississippi's political landscape at the expense of the truth. As part of their campaign, Mississippi Today's leadership falsely accused Bryant of –
>
> - embezzling, squandering, and misusing $77 million of welfare funds;
> - steering $77 million of welfare funds to his family and friends;
> - blessing the misspending of $77 million of welfare funds;
> - agreeing to funnel $1.7 million of welfare funds to the pharmaceutical company Prevacus in exchange for company stock;
> - agreeing to invest at least $25,000.00 in Prevacus in exchange for company stock;
> - directing millions of welfare funds to construct a volleyball stadium at the University of Southern Mississippi ("USM"); and,

- threatening Mississippi Today for continuing to report these matters.

> The Complaint alleges in great detail why these statements are false and defamatory and why the persons who made them acted with actual malice. It consists of one hundred ninety-six pages and includes sixteen exhibits. It contains a factual background section covering a nearly seven-year period and alleging twenty-three distinct causes of action for defamation, false light invasion of privacy, and loss of consortium. The Bryants seek special and general damages, as well as injunctive relief. The Complaint may be the most detailed defamation complaint filed in this state's history, and considering the defendants' recent public relations campaign, it may be the most widely publicized.
>
> While a motion to dismiss the Complaint is a procedural option, the defendants come to this court with unclean hands. They are openly defying this court's recent Order on Pending Motions [MEC Doc. #207], thumbing their noses at this court's authority. Worse still, Ganucheau has publicly criticized this court's thoughtful application of Mississippi law and brazenly attacked the integrity of Mississippi's judiciary in The New York Times. According to Ganucheau, this state's courts are corrupt unless they rule in his favor. A ruling against the defendants would not be fair and evenhanded; it would be a political favor bestowed by judges who owe allegiance to Bryant. Whether wittingly or not, Ganucheau's recent attack on the judiciary gives the court a small dose of what Bryant has withstood for years. The irony is thick.
>
> The defendants' motion is a scattershot effort to throw arguments at the wall and see what sticks. It contains an uncompelling series of single-sentence arguments and citations to inapposite case law. The frivolous motion was filed to further delay this case's progress. The court should deny the motion and sanction the defendants under Miss. R. Civ. P. 11(b) and the Mississippi Litigation Accountability Act. A separate motion for sanctions is forthcoming.

[MEC Doc. #237 at 1-2]. The Bryants filed a motion seeking sanctions under Miss. R. Civ. P. 11(b) and the Litigation Accountability Act later that day [MEC Doc. #238].

STANDARD OF REVIEW

"Rule 38 of the Mississippi Rules of Appellate Procedure provides, '[I]n a civil case if the Supreme Court or Court of Appeals shall determine that an appeal is frivolous, it shall award just damages and single or double costs to the appellee." *Myles v. Lewis*, No. 2022-CA-1192-COA, 2024 WL 2825112, at *14 (Miss. Ct. App. June 4, 2024) (quoting Miss. R. App. P. 38). "An appeal is frivolous when the appellant has no hope of success." *Id.* (quoting *In re Estate of Cole v. Cole*,

256 So. 3d 1156, 1160 (Miss. 2018), and citing *McDowell v. Zion Baptist Church*, 203 So. 3d 676, 688 (Miss. Ct. App. 2016)). "Further, the 'inquiry into whether a party had any hope of success is an objective one to be exercised from the vantage point of a reasonable party in the litigant's position as it filed and pursued its claim.'" *Id.* (quoting *Dean v. Slade*, 164 So. 3d 468, 474 (Miss. Ct. App. 2014)); see also, *Garner v. Smith*, 277 So. 3d 536, 542 (Miss. 2019) ("This Court applies the same frivolous-filing test to appeals as it does for Rule 11 or Litigation Accountability Act of 1988 matters."). This Court and the Court of Appeals have not shied away from awarding damages under Miss. R. App. R. 38. *See*, e.g., *Alexander v. Pitts*, 229 So. 3d 1073, 1076-77 (Miss. Ct. App. 2017) (attempt to circumvent trial court by first presenting an issue on appeal resulted in damages award); *Foster v. Foster*, 788 So. 2d 779, 783-84 (Miss. Ct. App. 2000) (argument of baseless issues for purpose of harassing opponent resulted in damages award); *Young v. Benson*, 828 So. 2d 821, 824 (Miss. Ct. App. 2002) (argument of meritless issue resulted in damages award); *Roussel v. Hutton*, 638 So. 2d 1305, 1318 (Miss. 1994) (damages awarded when appellant had no hope of success).

ARGUMENT

The Court should award damages to the Bryants because the petition for interlocutory appeal is frivolous, and it was filed to delay this action and harass them. The petition should not be viewed in isolation. Mississippi Today instituted a press offensive that was calculated to taint the jury venire for this case, unduly influence the circuit court in its consideration of the pending motion to dismiss and bully this Court into granting the petition. This Court should not allow a party to so blatantly engage in bad faith conduct without receiving punishment.

I. The petition is frivolous.

The petition presents two issues: (1) whether Mississippi recognizes a First Amendment reporter's privilege, and if so, (2) whether the circuit court erred in not yet applying it [Dkt. 2 at 5]. There are two fundamental flaws with the petition.

First, the *Order* holds the discovery motions in abeyance "pending receipt and review of the privilege." *Order* at 2. After conducting its *in-camera* inspection, the circuit court may recognize a reporter's privilege and apply it on an item-by-item basis, or it may not. The *Order* seems to imply that the court intends to do so. Compare, *Miller v. Transamerican Press, Inc.*, 621 F.2d 721, 726 (5th Cir. 1980), *modified on reh'g*, 628 F.2d 932, *cert. denied*, 450 U.S. 1041, 101 S.Ct. 1759, 68 L.Ed.2d 238 (1981) (defamation plaintiffs must show that (1) the information sought is relevant, (2) the information cannot be reasonably obtained by alternative means, and (3) the plaintiff has a compelling interest in the information), with the *Order* at 2 ("The information sought is relevant and Plaintiffs have shown a compelling interest…."). Regardless, until the circuit court has conducted its item-by-item inspection, a petition for interlocutory appeal is premature and unripe. *State v. Europa Cruise Line, Ltd.*, 528 So. 2d 839, 840-41 (Miss. 1988) (orders holding motions in abeyance are not subject to interlocutory review). The petitioners are seeking an impermissible advisory ruling.

Second, the circuit court ordered the defendants to undertake two related actions: (1) produce to the court for *in-camera* inspection all materials responsive to Bryant's discovery requests that the defendants contend are privileged, and (2) identify those items in a privilege log that complies with Mississippi law. This Court has held that this is the proper procedure to follow when privilege claims are asserted for over thirty years. *See*, e.g., *Haynes v. Anderson*, 597 So. 2d 615, 619 (Miss. 1992); *Hewes v. Langston*, 853 So. 2d 1237, 1249-50 (Miss. 2003); *Mississippi*

United Methodist Conference v. Brown, 911 So. 2d 478, 481-82 (Miss. 2005); *Mississippi Baptist Health Systems, Inc. v. Johnson*, 360 So. 3d 949, 954 (Miss. 2023). The petitioners' refusal to engage in this court-ordered process renders them in contempt of court and subjects them to privilege waiver as a penalty. *Fresenius Medical Care Holdings*, 269 So. 3d at 57. If the circuit court determines the petitioners have waived their right to assert privilege, the issues presented in the petition would be moot.

II. The petition was filed for improper purposes.

The Litigation Accountability Act lists eleven factors for courts to consider when determining whether to sanction a party. These are: (1) the extent to which any effort was made to determine the validity of any action, claim or defense before it was asserted, and the time remaining within which the claim or defense could be filed; (2) the extent of any effort made after the commencement of an action to reduce the number of claims being asserted or to dismiss claims that have been found not to be valid; (3) the availability of facts to assist in determining the validity of an action, claim or defense; (4) whether the action was prosecuted or defended, in whole or in part, in bad faith or for an improper purpose; (5) whether issues of fact, determinative of the validity of a party's claim or defense, were reasonably in conflict; (6) the extent to which the party prevailed with respect to the amount of and number of claims or defenses in controversy; (7) the extent to which any action, claim or defense was asserted by an attorney or party in a good faith attempt to establish a new theory of law in the state, which purpose was made known to the court at the time of filing; (8) the amount or conditions of any offer of judgment or settlement in relation to the amount or conditions of the ultimate relief granted by the court; (9) the extent to which a reasonable effort was made to determine prior to the time of filing of an action or claim that all parties sued or joined were proper parties owing a legally defined duty to any party or parties

asserting the claim or action; (10) the extent of any effort made after the commencement of an action to reduce the number of parties in the action; and (11) the period of time available to the attorney for the party asserting any defense before such defense was interposed. *Hebert v. Hebert*, 374 So. 3d 562, 580 (Miss. Ct. App. 2023) (quoting Miss. Code Ann. § 11-55-7). The balance of these factors tilts heavily in favor of awarding damages to the Bryants.

1. The petitioners had ample time to learn their arguments were baseless: The petitioners had ample time to research their arguments and discover they lacked substance. They either did not research sufficiently or knew their arguments were unfounded when they made them. In either instance, this factor is satisfied.

2. The petitioners did not limit their arguments: The proper course would have been for the petitioners to produce all responsive items, allow the court to conduct its *in-camera* review, and then decide whether a petition for interlocutory appeal was necessary and advisable. That the petitioners did not allow this to occur begs the question – why? The answer is readily apparent.

The petitioners likely have discoverable materials proving their actual malice,[25] or perhaps worse,[26] that they want to conceal. This factor weighs heavily in the Bryants' favor.

[25] Actual malice is a subjective standard that requires Bryant to prove the defendants knew their offending statements were false when they made them or that the defendants acted in reckless disregard of whether their offending statements were untrue. David Elder, Defamation: A Lawyer's Guide § 7:2, *A Subjective Standard* (Oct. 2023 Update). This element of Bryant's defamation and false light claims can be proven with various evidence, including a defendant's failure to investigate the truthfulness of her remarks. Indeed, the general view of the case law is that "a failure to investigate may be 'probative of malice when received cumulatively with other evidence'" and journalism experts are allowed to testify "about accepted journalism ethics and standards and defendant's deviation therefrom." *Id*. (citing cases). As should be readily apparent, journalism experts develop their opinions upon a review of the subject journalist's investigative files. Bryant has retained such an expert and is entitled to provide him with the materials necessary for his review.

Additionally, a defendant cannot ignore easily accessible contradictory information and claim to have acted without actual malice. *Flowers v. Carville*, 310 F.3d 1118, 1130-31 (9th Cir. 2002) (Defendants George Stephanopoulos and James Carville could not "sanitize" a republication if they were aware the reports they republished were false or "disregarded obvious warning signs from other sources." The defendants "simply hid behind [the news stories] in such a case. What defendants actually want is a rule that *purported* reliance on reputable news sources cannot constitute actual malice – but that is not the law."). Here, Bryant is entitled to the investigative materials of each defendant to prove they did what Stephanopoulos and Carville were alleged to have done – namely, disregarded obvious warning signs about the falsity of their statements and hid behind earlier flawed news stories.

[26] Leaking investigative files to the press with the intent of pressuring federal authorities to pursue criminal charges raises severe obstruction of justice concerns. "The elements of obstruction of justice [under 18 U.S.C. § 1503] are: (1) a judicial proceeding was pending; (2) the defendant knew of the judicial proceeding; and (3) the defendant acted corruptly with the specific intent to influence, obstruct, or impede that proceeding in its due administration of justice." *United States v. Fisch*, 851 F.3d 402, 407 (5th Cir. 2017) (quoting *United States v. Sharpe*, 193 F.3d 852, 864 (5th Cir. 1999)). In this instance, the FBI was investigating the welfare fraud scheme, several criminal cases were pending, and Wolfe's source likely knew of the proceedings. Suppose the source leaked the investigative files to Wolfe so she could write sensational things about Bryant to influence criminal prosecutors to pursue charges against him. In that case, the source may have obstructed justice.

Likewise, Wolfe and her source may have engaged in a conspiracy to obstruct justice. "To support a conspiracy conviction under [18 U.S.C.] § 371, the government must prove three elements: (1) an agreement between two or more people to pursue an unlawful objective; (2) the defendant's knowledge of the unlawful objective and voluntary agreement to join the conspiracy; and (3) an overt act by one or more of the conspirators in furtherance of the conspiracy's objective." *Id.* at 406-07 (quoting *United States v. Porter*, 542 F.3d 1088, 1092 (5th Cir. 2008)). In this instance, it is conceivable that Wolfe and her source agreed that the source would supply investigative file materials to Wolfe so she could write articles they hoped would pressure authorities to pursue criminal charges against Bryant. Wolfe and her source would have likely known that Wolfe would use the investigative file materials to influence an ongoing investigation and prosecutions. Wolfe and her source would have also committed overt acts in furtherance.

3. The petitioners knew their petition was baseless: The petition's fundamental flaws are readily apparent, yet it does not address or attempt to overcome them. It ignores them. This factor weighs in favor of awarding damages to the Bryants.

4. The petitioners filed the petition in bad faith: Ganucheau's nationwide public relations campaign reveals the petitioners' bad faith. The editor's note is a thinly veiled effort to pollute the jury venire, influence the circuit court in its consideration of the pending motion to dismiss, and intimidate this Court into granting the petition. The guest essay misrepresented the issues before the circuit court and this Court, questioned the circuit court's and this Court's integrity, and positioned Mississippi Today as a defender of the constitutional rights of all Americans – including, notably, potential jurors. The appearances made on "Here and Now" and the NBC Nightly News further attempted to tilt the scales of justice in the petitioners' favor.

Ganucheau's insistence that the defendants may face jail time for refusing to comply with the *Order* is curious. Bryant has never argued in favor of this sanction, and the circuit court has never suggested it. Ganucheau floated the possibility to the national media all on his own. It is no secret that Mississippi Today has discussed producing a documentary with one or more streaming services. One can only wonder – do they want to be sentenced to jail? Do they think jail time is "good TV"? Will it help Mississippi Today raise money? Regardless, it is apparent that the petition was filed in bad faith. This factor weighs heavily in the Bryants' favor.

5. There are no issues of fact in conflict: The petition presents questions of law. This factor weighs in the Bryants' favor.

6. The Court will deny the petition: The Bryants expect this Court to deny the petition for all the reasons expressed in their answer and previously discussed in this motion. This factor favors the Bryants.

7. The petition seeks an impermissible advisory ruling: The petitioners seek to have this Court recognize a previously unrecognized privilege; however, their effort is premature and potentially moot because they violated the *Order*. This factor is either neutral or weighs in the Bryants' favor.

8. The parties have not discussed an offer of judgment or settlement: This factor is neutral.

9. Whether proper parties were sued or joined is not an issue: This factor is neutral.

10. The number of parties is not an issue: This factor is neutral. However, it should be noted that the Bryants sued John Doe because the petitioners refused to identify the author of a false and defamatory publication at issue in the complaint – a fact they are entitled to discover and will discover when the circuit court lifts the stay currently in place. Their refusal to identify John Doe before discovery is based purely on spite.

11. The defendants had sufficient time to learn their arguments were premature and unripe: Miss. R. App. P. 5(a) provided the petitioners twenty-one days after entry of the *Order* to formulate grounds for a petition. This was sufficient time to discover their reporter's privilege arguments were premature and unripe. The petitioners nonetheless decided to waste the time and efforts of this Court and the Bryants' counsel, hoping their public relations assault may bear fruit. This factor weighs heavily in favor of the Bryants.

CONCLUSION

The petition for interlocutory appeal was a frivolous effort to delay this case and harass the Bryants. It is a component of a bad faith press offensive undertaken on the front page of their online publication and in the national print and broadcast media. The court should grant this motion and award damages to the petitioners under Mississippi Rule of Appellate Procedure 38.

RESPECTFULLY SUBMITTED, this 10th day of July, 2024.

/s/ *William M. Quin II*
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Attorney for Plaintiffs-Respondents, the Honorable Phil Bryant, 64th Governor of the State of Mississippi, and Deborah Bryant, former First Lady of the State of Mississippi

CERTIFICATE OF SERVICE

I, William M. Quin II, certify that I have served a copy of the above and foregoing document to the following via filing with the MEC electronic filing system:

Henry Laird
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2510 14th Street, Suite 1125
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Further, I hereby certify that I have mailed a copy of the above and foregoing document to the Circuit Court of Madison County via the U.S. Postal Service at the following address:

Honorable M. Bradley Mills
MADISON COUNTY CIRCUIT COURT
28 West North Street
Canton, Mississippi 39046

SO CERTIFIED, this 10th day of July, 2024.

/s/ *William M. Quin II*
William M. Quin II