

No. 2024-M-00659-SCT

---

---

**IN THE SUPREME COURT OF MISSISSIPPI**

PHIL BRYANT & DEBORAH BRYANT,

*Plaintiffs-Respondents,*

v.

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

*Defendants-Petitioners.*

---

On Appeal From The Circuit Court Of Madison County, Mississippi  
Case No. 45CI1:23-cv-238-JM  
The Honorable M. Bradley Mills

---

**OPPOSITION TO MOTION FOR DAMAGES  
FOR “FRIVOLOUS” APPEAL**

---

Katherine Moran Meeks\*  
GIBSON, DUNN & CRUTCHER LLP  
1050 Connecticut Avenue, N.W.  
Washington, DC 20036  
(202) 955-8500

Henry Laird (MSB #1774)  
WISE CARTER CHILD & CARAWAY, P.A.  
2510 14th Street, Suite 1125  
Gulfport, MS 39501  
(228) 867-7141

Sasha Dudding\*  
GIBSON, DUNN & CRUTCHER LLP  
200 Park Ave.  
New York, NY 10166  
(212) 351-4000

Theodore J. Boutrous, Jr.\*  
GIBSON, DUNN & CRUTCHER LLP  
333 South Grand Avenue  
Los Angeles, CA 90071  
(213) 229-7000

*Counsel for Defendants-Petitioners*

\* Admitted *pro hac vice*

---

---

## TABLE OF CONTENTS

	<u>Page</u>
BACKGROUND .....	2
LEGAL STANDARD .....	4
ARGUMENT .....	4
I.    Bryant Does Not Come Close to Satisfying the Rule 38 Standard to Impose Damages for a Frivolous Appeal. ....	4
A.    The Alleged “Press Offensive” of Which Bryant Complains Does Not Provide Any Basis for Damages Under Rule 38.....	5
B.    Bryant’s Analysis Under the Litigation Accountability Act Is Inapposite.....	6
CONCLUSION .....	10
CERTIFICATE OF SERVICE .....	1

## TABLE OF AUTHORITIES

<b>Cases</b>	<u>Page(s)</u>
<i>Alexander v. Pitts</i> , 229 So. 3d 1073 (Miss. Ct. App. 2017) .....	8
<i>Asanov v. Hunt</i> , 914 So. 2d 769 (Miss. Ct. App. 2005) .....	9
<i>Check Cashers Exp., Inc. v. Crowell</i> , 950 So. 2d 1035 (Miss. Ct. App. 2007) .....	9
<i>Coleman v. Triplett</i> , 725 So. 2d 217 (Miss. 1998) .....	9
<i>Dall. Morning News Co. v. Garcia</i> , 822 S.W.2d 675 (Tex. Ct. App. 1991) .....	8
<i>Dean v. Slade</i> , 164 So. 3d 468 (Miss. Ct. App. 2014) .....	4, 5
<i>In re Est. of Cole</i> , 256 So. 3d 1156 (Miss. 2018) .....	4, 9
<i>Forrest v. McCoy</i> , 996 So. 2d 158 (Miss. Ct. App. 2008) .....	9
<i>Foster v. Foster</i> , 788 So. 2d 779 (Miss. Ct. App. 2000) .....	9
<i>Garner v. Smith</i> , 277 So. 3d 536 (Miss. 2019) .....	9
<i>McDowell v. Zion Baptist Church</i> , 203 So. 3d 676 (Miss. Ct. App. 2016) .....	4
<i>Miller v. Provident Advert. &amp; Mktg., Inc.</i> , 155 So. 3d 181 (Miss. Ct. App. 2014) .....	7
<i>Miller v. Transamerican Press, Inc.</i> , 621 F.2d 721 (5th Cir. 1980).....	8
<i>In re Murphy-Brown, LLC</i> , 907 F.3d 788 (4th Cir. 2018).....	6
<i>Nationwide Mut. Ins. Co. v. Evans</i> , 553 So. 2d 1117 (Miss. 1989) .....	5
<i>Panola Cnty. Tax Assessor v. Oak Inv. Co.</i> , 297 So. 3d 1122 (Miss. Ct. App. 2020) .....	9

**TABLE OF AUTHORITIES** *(continued)*

	<u>Page(s)</u>
<i>Perkins v. McAdams</i> , 234 So. 3d 413 (Miss. 2017) .....	9
<i>Randolph v. Lambert</i> , 926 So. 2d 941 (Miss. Ct. App. 2006) .....	7
<i>Snyder v. Phelps</i> , 562 U.S. 443 (2011).....	5
<i>United States v. Cuthbertson</i> , 630 F.2d 139 (3d Cir. 1980) .....	8
<i>Vice v. Hinton</i> , 811 So. 2d 335 (Miss. Ct. App. 2001) .....	9
<i>Willis v. City of Hattiesburg</i> , No. 14-cv-89, 2016 WL 918038 (S.D. Miss. Mar. 10, 2016).....	7
<i>Young v. Benson</i> , 828 So. 2d 821 (Miss. Ct. App. 2002) .....	9
 <b>Statutes</b>	
Miss. Code Ann. § 11-55-5 .....	6
 <b>Rules</b>	
Miss. R. App. P. 38 .....	4, 5

In the span of one month between June 10 and July 10, 2024, plaintiff Phil Bryant buried defendants Deep South Today d/b/a Mississippi Today and Mary Margaret White in four meritless pleadings totaling 110 pages. These include a frivolous motion for sanctions, a flagrantly unconstitutional motion for a gag order, and 55-page response brief double the size permitted under the local rules. *See* Bryant Mot. for Damages (“Mot.”) 6–7, 14–15. Bryant has now added the instant motion for damages asking this Court to “punish[]” defendants for their supposedly “frivolous” petition seeking interlocutory review of an unresolved question of law: whether journalists may assert a reporter’s privilege under the First Amendment or state law in civil actions in which they are named as defendants. *See* Mot. 1, 16. The circuit court put a stop to Bryant’s fusillade of abusive motions by staying the case and barring additional motion practice pending resolution of this petition. Cir. Ct. Dkt. 240. This Court should follow suit and deny Bryant’s baseless motion for damages under Mississippi Rule of Appellate Procedure 38.

The only party that has sought “frivolous” relief from this Court is Bryant. *See* Mot. 1. His motion for damages complains of a host of issues irrelevant to Mississippi Today’s and White’s petition for interlocutory review. Bryant argues, for example, that Mississippi Today editor-in-chief Adam Ganuchau and reporter Anna Wolfe have embarked on “a nationwide press offensive” to publicize their views about this lawsuit. *Id.* But neither Ganuchau nor Wolfe is party to the petition for interlocutory review and, even if they were, they have a First Amendment right to comment in the press on the merits of Bryant’s libel claims and the importance of the reporter’s privilege. Bryant also makes the patently false assertion that Mississippi

Today and White’s petition is frivolous because they never pressed a “confidential informant” privilege in the circuit court. Mot. 4 & n.5. Bryant sows confusion by claiming that the “confidential informant” privilege belongs to the *government*, which may shield the identity of law enforcement sources. *Id.* This is plainly not the same privilege Mississippi Today and White are pressing in this case, where they have asked the Court to recognize a *reporter’s* privilege that protects information received from confidential and non-confidential sources—as a majority of Mississippi’s sister states have already done. *See* Pet. 1. Because this petition is far from frivolous, this Court should deny Bryant’s vexatious motion for damages under Mississippi Rule 38.

### **BACKGROUND**

In April 2022, Mississippi Today and reporter Anna Wolfe published a five-part, Pulitzer Prize-winning series called the Backchannel that described “the depth” of Bryant’s “involvement within a sprawling welfare scandal that plagued his administration.” Dkt. 215-1.<sup>1</sup> Bryant brought defamation and false light claims targeting not this reporting, which falls outside the statute of limitations, but rather Mississippi Today’s (or its journalists’) public commentary about that reporting. Dkt. 18 ¶¶ 5.10, 5.21, 5.40.

Although none of the counts in Bryant’s first or second amended complaint targets the Backchannel series, Bryant has relentlessly sought discovery into Wolfe’s sources and newsgathering techniques for that reporting. *See, e.g.*, Dkts. 35, 217. After Mississippi Today and White objected to these discovery requests on multiple grounds—including that were irrelevant, immaterial, unduly burdensome, and

---

<sup>1</sup> Unless otherwise noted, docket citations are to the circuit court docket.

sought documents protected by the reporter’s privilege—Bryant moved to compel. Dkts. 34–35, 61–64. These defendants in turn moved for a protective order. Dkt. 66. On May 16, 2024, the circuit court held the motion for protective order in abeyance and directed Mississippi Today and White to produce documents over which they claimed a First Amendment “confidential informants” privilege for in camera review, accompanied by a privilege log. Dkt. 207, at 2–3. Defendants then filed a petition for interlocutory review asking this Court to recognize a reporter’s privilege under either the First Amendment or state law. Defendants simultaneously logged and submitted to the circuit court copies of the text messages received from a confidential source that provided support for the Backchannel series. *See* Dkts. 208, 211. This source was simply a conduit for documents and did not provide an interview.

After Mississippi Today and White sought interlocutory review in this Court, Bryant filed a flurry of pleadings in the circuit court. Bryant first moved for a suppression order that would prevent Mississippi Today and its journalists from speaking or writing about this case, including in their own publication. Dkt. 234. One day later, Bryant moved to hold Mississippi Today and White in contempt for supposedly violating the circuit court’s order to submit newsgathering materials for in camera review.<sup>2</sup> Dkt. 235. Bryant then opposed defendants’ motion to dismiss the second amended complaint with a 55-page brief that was more than twice the length

---

<sup>2</sup> Bryant faults Mississippi Today and White for failing to submit a log that lists *all* items it contends are shielded by the reporter’s privilege, the attorney-client privilege, and the work product doctrine, Mot. 3—even though the circuit court’s order directed these defendants to submit only materials over which they claimed a “confidential informants” privilege, Dkt. 207, at 3. Bryant likewise has not submitted a log of documents he has withheld on the basis of attorney-client or other privileges.

of defendants’ motion and more than twice the allotted page limit under the uniform circuit court rules. Dkts. 237–38. Bryant then capped this spate of briefing with a motion asking this Court to impose damages on Mississippi Today and White for their supposedly “frivolous” petition for interlocutory review. Evidently believing the petition was anything but frivolous, the circuit court entered an order staying the case pending resolution of the petition by this Court. Dkt. 240.

### LEGAL STANDARD

An appellee is entitled to an award of damages and costs only when “an appeal is frivolous.” Miss. R. App. P. 38. “An appeal is frivolous when the appellant has no hope of success.” *In re Est. of Cole*, 256 So. 3d 1156, 1160 (Miss. 2018); see *McDowell v. Zion Baptist Church*, 203 So. 3d 676, 688 (Miss. Ct. App. 2016) (same). The Court’s “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.” *Dean v. Slade*, 164 So. 3d 468, 474 (Miss. Ct. App. 2014).

### ARGUMENT

#### **I. Bryant Does Not Come Close to Satisfying the Rule 38 Standard to Impose Damages for a Frivolous Appeal.**

This Court should deny Bryant’s motion for damages because he does not come close to showing that Mississippi Today’s and White’s petition for interlocutory review has “no hope of success.” *In re Est. of Cole*, 256 So. 3d at 1160. Bryant, indeed, does not even attempt to make this showing and instead describes a litany of grievances unrelated to the merits of the petition. Bryant then misrepresents the arguments Mississippi Today and White raised in support of interlocutory review, falsely claiming that these defendants asserted a “confidential informant” privilege



available only to the government when their petition plainly asked this Court to recognize a reporter’s privilege, as a majority of states have done.

**A. The Alleged “Press Offensive” of Which Bryant Complains Does Not Provide Any Basis for Damages Under Rule 38.**

The Rule 38 standard focuses on the “objective” legal merits of an appeal, *Dean*, 164 So. 3d at 474, allowing for an award of damages only when the appeal is “frivolous,” Miss. R. App. P. 38; see *Nationwide Mut. Ins. Co. v. Evans*, 553 So. 2d 1117, 1121 (Miss. 1989) (finding “no basis for sanction” under an “objective frivolousness standard”). Rather than address the substance of Mississippi Today’s and White’s arguments for review, Bryant attacks what he describes as a “nationwide public relations campaign” by Ganucheau and Wolfe—who are not even parties to the petition pending before this Court.<sup>3</sup> See Mot. 1, 16, 20. Bryant devotes seven pages of his motion to describing opinion pieces published by Ganucheau and statements he or Wolfe made to NBC News and National Public Radio. Mot. 6–13. Not only do these extra-judicial statements have no bearing whatsoever on the merits of the petition for interlocutory review; they are also fully protected by the First Amendment. Bryant may find this alleged “press offensive” irksome or distasteful, *id.* at 1, 16, but he cannot obtain damages from Mississippi Today or White based on constitutionally protected statements that Ganucheau or Wolfe made in the press.

---

<sup>3</sup> Bryant had not yet named Ganucheau and Wolfe as defendants in this case or served them with discovery requests when he filed his motion to compel discovery. They therefore are not parties to the petition for interlocutory review of the circuit court’s order directing Mississippi Today and White to submit material over which they claim a “confidential informants” privilege for in camera review. Dkt. 207.

*See Snyder v. Phelps*, 562 U.S. 443, 461 (2011) (shielding defendants from tort liability for protected speech activity).

Bryant argues that Ganucheau and Wolfe’s public statements are designed “to improperly influence potential jurors” and “to strong-arm this Court into granting the petition.” Mot. 6. But he offers no support for these arguments beyond rank speculation. A less pejorative explanation is that Ganucheau and Wolfe are engaged in garden-variety journalistic activity, speaking and writing on a lawsuit that holds significant interest for both the public and other journalists. Notably, Bryant’s counsel has done the same, commenting on this case on X (formerly Twitter) and appearing on the same NBC News segment for which he criticizes defendants. *See* Mot. 10 (referencing NBC interview); Dkt. 231-1 (excerpting Bryant’s counsel’s tweets). Even assuming that public statements by Mississippi Today or White could somehow sway the jury pool at an eventual trial—which no doubt remains years away—Bryant’s remedy is the voir dire process, a change of venue, and/or jury instructions, not a motion for damages made for the first time in an appellate court. *See, e.g., In re Murphy-Brown, LLC*, 907 F.3d 788, 798 (4th Cir. 2018) (observing that “[p]ublicity often accompanies trials, including trials in which the public has a keen and understandable interest,” and that courts may secure an impartial jury through voir dire).

**B. Bryant’s Analysis Under the Litigation Accountability Act Is Inapposite.**

Bryant inexplicably asks this Court to evaluate his motion for damages using an 11-factor test under the Litigation Accountability Act, Miss. Code Ann. § 11-55-5.

See Mot. 18–22. But that statute has no relevance here because Bryant moved for damages under a different law—Mississippi Rule of Appellate Procedure 38. See, e.g., Mot. 1, 15–16, 23 (moving “under Miss. R. App. P. 38”). Even if he had moved under the Litigation Accountability Act, Bryant cannot show Mississippi Today or White’s petition was “frivolous” or brought in “bad faith.” *Randolph v. Lambert*, 926 So. 2d 941, 944 (Miss. Ct. App. 2006); see also *Miller v. Provident Advert. & Mktg., Inc.*, 155 So. 3d 181, 196 (Miss. Ct. App. 2014) (requiring moving party to satisfy a frivolousness standard under the Litigation Accountability Act).

Bryant’s claim that the petition is frivolous—either under Rule 38 or the Litigation Accountability Act—is at odds with the circuit court’s own orders in this case. The petition asks this Court to recognize the existence of the reporter’s privilege and delineate its scope in a case where the news media is named as a party—pure questions of law that remain unresolved in this state. The circuit court’s order itself all but invited this Court’s review, observing 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.” Dkt. 207, at 2. And the circuit court then went on to stay proceedings while this Court decided whether to grant the petition—a signal that the circuit court itself would benefit from the guidance this Court could provide.

Bryant suggests the petition is frivolous only by deliberately confusing the question presented. Bryant argues that “the confidential informant privilege . . . cannot possibly apply in this case” because it “refers to the government’s privilege to withhold from disclosure the identity of persons who furnish information of violations

of law to officers.” Mot. 4 n.5 (citing *Willis v. City of Hattiesburg*, No. 14-cv-89, 2016 WL 918038, at \*5 (S.D. Miss. Mar. 10, 2016)). That clearly is not the privilege Mississippi Today or White invoked. The U.S. Court of Appeals for the Fifth Circuit, which hears appeals from federal courts in Mississippi, and multiple other federal and state courts have recognized a reporter’s privilege over (among other things) information received from confidential sources. *See Miller v. Transamerican Press, Inc.*, 621 F.2d 721, 725 (5th Cir. 1980) (“a reporter has a First Amendment privilege which protects the refusal to disclose the identity of confidential informants”). That is the privilege to which the circuit court referred in its order and on which Mississippi Today and White sought review in this Court. Bryant’s feigned confusion on this score in no way suggests the petition for interlocutory review is frivolous.

Bryant further argues that the petition was “premature and unripe” because the circuit court has simply ordered in camera privilege of confidential source documents. Mot. 17. But Mississippi Today and White cited cases in their petition noting that even an in camera inspection of newsgathering documents can chill the reporting process. Pet. 13 (quoting *Dall. Morning News Co. v. Garcia*, 822 S.W.2d 675, 679 (Tex. Ct. App. 1991), and citing *United States v. Cuthbertson*, 630 F.2d 139, 148 (3d Cir. 1980)). Bryant has no basis to argue that the petition for interlocutory review was objectively frivolous when at least two appellate courts *agree* with defendants that in camera review invades a journalist’s interest in the privacy of her newsgathering materials. Nor does their petition ask this Court to render an “advisory” opinion, as Bryant claims. Mot. 17. The parties have a live dispute over

the existence and scope of the reporter’s privilege that this Court could resolve through interlocutory review.

This case is a far cry from the rare instances where Mississippi courts have found that an appeal has no hope of success. In *Alexander v. Pitts*, 229 So. 3d 1073, 1076–77 (Miss. Ct. App. 2017), for example, the appellant’s arguments were raised “for the first time on appeal” and “ha[d] nothing to do with” proceedings below. In *Foster v. Foster*, 788 So. 2d 779, 784 (Miss. Ct. App. 2000), the appellant sued “merely to harass her ex-husband” and argued that “she should have custody” of her daughter “when she, in fact, did actually have custody.” In a similar vein, *Young v. Benson*, 828 So. 2d 821, 824 (Miss. Ct. App. 2002), involved claims that were “clear[ly]” time-barred.

Here, by contrast, Mississippi Today and White have asked this Court to resolve an unresolved question of law—whether the First Amendment or state law supplies a reporter’s privilege—that would bring Mississippi into line with the majority of states that have recognized such a privilege. Even if Bryant disagrees that this issue is worthy of this Court’s review, he does not come close to establishing that the petition is objectively frivolous. This Court should reject his motion for damages, as it has done in the mine-run of cases. *See, e.g., In re Est. of Cole*, 256 So. 3d at 1160; *Garner v. Smith*, 277 So. 3d 536, 542 (Miss. 2019); *Perkins v. McAdams*, 234 So. 3d 413, 420 (Miss. 2017); *Coleman v. Triplett*, 725 So. 2d 217, 220 (Miss. 1998); *Panola Cnty. Tax Assessor v. Oak Inv. Co.*, 297 So. 3d 1122, 1124 (Miss. Ct. App. 2020); *Forrest v. McCoy*, 996 So. 2d 158, 161 (Miss. Ct. App. 2008); *Check Cashers Exp., Inc. v. Crowell*, 950 So. 2d 1035, 1044 (Miss. Ct. App. 2007); *Asanov v. Hunt*,

914 So. 2d 769, 774 (Miss. Ct. App. 2005); *Vice v. Hinton*, 811 So. 2d 335, 339 (Miss. Ct. App. 2001).

## CONCLUSION

This Court should deny Bryant's frivolous motion for damages.

Dated: July 31, 2024

Respectfully submitted,

Katherine Moran Meeks\*  
GIBSON, DUNN & CRUTCHER LLP  
1050 Connecticut Avenue, N.W.  
Washington, DC 20036  
(202) 955-8500  
kmeeks@gibsondunn.com

Sasha Dudding\*  
GIBSON, DUNN & CRUTCHER LLP  
200 Park Ave.  
New York, NY 10166  
(212) 351-4000  
sdudding@gibsondunn.com

/s/ Henry Laird  
Henry Laird (MSB 1774)  
WISE CARTER CHILD & CARAWAY, P.A.  
2510 14th Street, Suite 1125  
Gulfport, MS 39501  
(228) 867-7141  
hfl@wisecarter.com

Theodore J. Boutrous, Jr.\*  
GIBSON, DUNN & CRUTCHER LLP  
333 South Grand Avenue  
Los Angeles, CA 90071  
(213) 229-7000  
tboutrous@gibsondunn.com

*Counsel for Petitioners Deep South  
Today d/b/a Mississippi Today and  
Mary Margaret White*

\*Admitted *pro hac vice*

## CERTIFICATE OF SERVICE

I hereby certify that on this day I caused a true and correct copy of the above and foregoing Opposition to Bryant's Motion for Damages to be served by email on counsel for plaintiff-respondent Phil Bryant:

William M. Quin II  
W. Thomas McCraney III  
McCraney Montagnet Quin & Noble, PLLC  
602 Steed Road, Suite 200  
Ridgeland, MS 39157  
(601) 707-5725  
wquin@mmqnlaw.com  
tmccraney@mmqnlaw.com

/s/ Henry Laird  
Henry Laird