IN THE CIRCUIT COURT OF MADISON COUNTY, MISSISSIPPI

PHIL BRYANT & DEBORAH BRYANT **PLAINTIFFS**

vs. **Civil Action No. 45CI1:23-CV-238-JM**

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

MEMORANDUM IN SUPPORT OF RESPONSE IN OPPOSITION TO MOTION TO DISMISS SECOND AMENDED COMPLAINT

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[1] Additional articles, publications hyperlinked within articles, and public filings are referenced in and central to the Second Amended Complaint. The pleading contains citations for all materials referenced. The items attached as exhibits to this filing are referenced in the response.

Exhibit 12: Anna L. Wolfe, *Family First: Gov. Phil Bryant Turned to Welfare Officials to Rescue Troubled Nephew*, April 18, 2022, at: https://mississippitoday.org/2022/04/18/phil-bryant-troubled-nephew-welfare-scandal/.

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Exhibit 25: *Miss. Dept. of Human Services v. Mississippi Community Education Center, Inc., et al.*, No. 22-cv-286-EFP (Hinds Cty. Cir. Ct.), *First Amended Complaint* [MEC Doc. #197].

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Exhibit 29: *Phil Bryant et al. v. Deep South Today d/b/a Mississippi Today et al.*, 45CI1:23-cv-238-JM (Madison Cty. Cir. Ct.), *Defendant Mary Margaret White's Responses to Plaintiff Phil Bryant's First Set of Requests for Admissions.*

NOW INTO COURT, by and through undersigned counsel and under UCRCCC 4.02, come former Governor Phil Bryant and former First Lady Deborah Bryant and respond to the motion to dismiss [MEC Doc. #215] the Second Amended Complaint ("Complaint") [MEC Doc. #194] as follows:

INTRODUCTION

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.[2] 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.

PROCEDURAL BACKGROUND

Bryant filed suit against Mississippi Today and White nearly a year ago, on July 26, 2023, alleging defamation and false light invasion of privacy claims [MEC Doc. #1]. He amended his complaint on August 24, 2023, to more precisely state his special damages [MEC Doc. #18]. Bryant moved the court for leave to amend his complaint a second time and add his wife as a plaintiff on

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

March 1, 2024 [MEC Doc. #171]. This court granted him leave to file the amended pleading on April 11, 2024 [MEC Doc. #195]. The Bryants filed the Complaint that day [MEC Doc. #194]. The defendants filed the instant motion two months later, on June 10, 2024 [MEC Doc. #216].

STANDARD OF REVIEW

Miss. R. Civ. P. 12(b)(6) provides that dismissal shall be granted when the plaintiff has failed to state a claim upon which relief can be granted. *Chalk v. Berholf*, 980 So. 2d 290, 293 (Miss. Ct. App. 2007). "In applying this rule, 'a motion to dismiss should not be granted unless it appears beyond a reasonable doubt that the plaintiff will be unable to prove any set of facts in support of the claim.'" *Id.* (quoting *Children's Med. Group, P.A. v. Phillips*, 940 So. 2d 931, 934 (Miss. 2006), which quoted *Missala Marine Servs. v. Odom*, 861 So. 2d 290, 294 (Miss. 2003)).

There are well-established exceptions to the general rule that Rule 12(b)(6) motions "are considered on the face of the pleadings alone." *Id.* (citing *Hartford Cas. Ins. Co. v. Halliburton Co.*, 826 So. 2d 1206, 1211 (Miss. 2001)). Documents referred to in and central to a complaint are appropriately considered, *Pearl River Water Valley Supply District v. Khalaf*, 332 So. 3d 263, 268 (Miss. 2021), and when these documents hyperlink to other publications, the hyperlinked publications may be considered. *Nicosia v. De Rooy*, 72 F. Supp. 2d 1093, 1103 (N.D. Cal. 1999) ("Nicosia argues that the embezzlement accusation must be read in isolation from De Rooy's other articles because the newsgroup posting which contained the allegation did not include any underlying facts. However, the newsgroup posting directed readers to specific articles on De Rooy's website and provided a hyperlink for immediate access to such articles. These articles were at least as connected to the newsgroup posting as the back page of a newspaper is connected to the front. Thus, the Court considers the articles part of the context of the embezzlement accusation."); *Agora, Inc. v. Axxess, Inc.*, 90 F. Supp. 2d 697, 704-05 (D. Md. 2000) (analyzing whether a statement was defamatory in conjunction with a Rule 12(b)(6) motion, the court explained: "The factual basis for the statement that *Taipaonline* satisfies F.com's formulation

of 'unpaid promoter' is confirmable, as acknowledged by Agora, by activating the hyperlink adjacent to *Taipaonline*'s name on The List and accessing *Taipaonline*'s own website."); *Franklin v. Dynamic Details, Inc.*, 116 Cal. App. 4th 375, 379, 10 Cal. Rptr. 3d 429 (2004) ("The emails disclosed the facts upon which the opinions were based by directing the reader to the FCC website and (via a weblink on the FCC website) to another company's website… A reader of the emails could view those websites and was free to accept or reject Axton's opinions based on his or her own independent evaluation."); *Jankovic v. Inter'l Crisis Grp.*, 429 F. Supp. 2d 165, 177 fn. 8 (D. D.C. 2006) (noting that, even if the meaning of the allegedly defamatory statement was unclear, it was clarified by the "two internet links" at the end of the sentence: "What little confusion the sentence could possibly cause is easily dispelled by any reader willing to perform minimal research."). Additionally, the court may take judicial notice of matters of public record. *Jourdan River Estates, LLC v. Favre*, 278 So. 3d 1135, 1145 (Miss. 2019) (quoting *Enroth v. Mem'l Hosp. at Gulfport*, 566 So. 2d 202, 205 (Miss. 1990)); *Hayne v. The Innocence Project*, No. 3:09-cv-218-KS-LRA, 2011 WL 198128 at *2 (S.D. Miss. Jan. 20, 2011).

The Complaint references articles published by Mississippi Today, publications hyperlinked within these articles, and filings made in cases before other courts. At this stage of the proceeding, the court may properly consider all of these items.

ARGUMENT

I. Bryant's claims are not barred by the incremental harm doctrine.

The defendants argue that this court should dismiss several of Bryant's defamation and false light claims under the incremental harm doctrine.[3] There are numerous reasons why it should not, including: (1) Mississippi appellate courts have never recognized the doctrine; (2) application of the doctrine is a question of fact best reserved for a jury; (3) the doctrine does not apply to defamation

[3] MEC Doc. #216 (referred to herein as "Memorandum") at 6-7.

per se or false light claims; and, (4) even if one assumes the doctrine is viable in Mississippi, it would not apply in this case.

A. The incremental harm doctrine is not a viable defense in Mississippi.

"Under the so-called 'libel-proof' doctrine, when a particular plaintiff's reputation for a particular trait is sufficiently bad, further statements regarding that trait, even if false and made with malice, are not actionable because, as a matter of law, the plaintiff cannot be damaged as to that trait." 4 Modern Tort Law: Liability and Litigation § 35:8, *Defamation – Defamatory Statement – Libel-Proof Plaintiff Doctrine* (May 2024 Update) (citing *Armistead v. Minor*, 815 So. 2d 1189 (Miss. 2002)). There are two versions of the libel-proof doctrine – the incremental harm version and the issue-specific version:

- The incremental harm version involves an examination of the challenged communication rather than a finding of a previously damaged reputation. The court evaluates the defendant's communication in its entirety and considers the effects of the challenged statements on the plaintiff's reputation in the context of the full communication. If the challenged statement harms a plaintiff's reputation far less than unchallenged statements made in the same article or broadcast, the plaintiff may be held libel-proof. Finding that the challenged statements could cause no cognizable damage in addition to that presumed to attend the unchallenged part of the communication, the court dismisses the entire libel action.

- Under the issue-specific version, a libel-proof plaintiff is one whose reputation on the matter in issue is so diminished that, at the time of an otherwise libelous publication, it could not be further damaged. The issue-specific version is often applied where the substantial criminal record of a libel plaintiff shows as a matter of law that the plaintiff would be unable to recover other than nominal damages.

Id.; *see also*, Dan B. Dobbs, Paul T. Hayden, and Ellen M. Bublick, The Law of Torts § 575, *Libel-Proof Plaintiffs* (2nd Ed., Apr. 2024 Update) ("The difference between [the incremental harm version] and the issue-specific version is that in the issue-specific version, harm to the plaintiff's reputation had been done before the defendant's publication took place, while in the incremental version, the harm is done by the publication in true or privileged statements so that the untrue and defamatory statements add nothing.").

The U.S. Supreme Court has rejected "any suggestion that the incremental harm doctrine is compelled as a matter of First Amendment protection for speech." *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 523, 111 S.Ct. 2419, 115 L.Ed.2d 447 (1991). Accordingly, state courts are free to accept or reject the doctrine. *Id.* As of this filing, appellate courts in forty-two states have not addressed the issue, and Louisiana, California, and the District of Columbia have rejected the doctrine outright. *Hughes v. Capital City Press, L.L.C.*, 332 So. 3d 1198, 1214 (La. App. 1st Cir. 2021); *Masson v. New Yorker Magazine, Inc.*, 960 F.2d 896, 899 (9th Cir. 1992); *Liberty Lobby, Inc. v. Anderson*, 746 F.2d 1563, 1568 (D.C. Cir. 1984), *vacated on other grounds*, 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). One state has adopted the doctrine, *Carradine v. State*, 511 N.W. 2d 733, 737 (Minn. 1994), and intermediate appellate courts in two states have adopted limited versions of the doctrine. *Sullins v. Raycom Media, Inc.*, 996 N.E. 2d 553, 568 (Ohio Ct. App. 2013); *Anderson v. Colorado Mountain News Media Co.*, No. 18-cv-2934-CMA-GPG, 2019 WL 3321843, at *8 (D. Co. May 20, 2019).

Forty-seven states (including Mississippi), the District of Columbia, and all U.S. territories do not recognize the incremental harm doctrine. An often-cited D.C. Circuit Court of Appeals opinion written by Circuit Judge Antonin Scalia (before ascending to the U.S. Supreme Court) outlines reasons why some courts are reluctant to adopt the doctrine:

> The appellees' second libel-proof theory is somewhat different. They claim that the unchallenged portions of these articles attribute to the appellants characteristics so much worse than those attributed in the challenged portions, that the latter cannot conceivably do any incremental damage. This apparently equitable theory loses most of its equity when one realizes that the *reason* the unchallenged portions are unchallenged may not be that they are true, but only that appellants were unable to assert that they were willfully false.
>
> In any event, the theory must be rejected because it rests upon the assumption that one's reputation is a monolith, which stands or falls in its entirety. The law, however, proceeds upon the optimistic premise that there is a little bit of good in all of us – or perhaps upon the pessimistic assumption that no matter how bad someone is, he can always be worse. It is shameful that Benedict Arnold was a traitor; but he was not a shoplifter to boot, and one should not have been able to make that charge while knowing its falsity with impunity. So also here. Even if some of the deficiencies of philosophy or practice which the appellees' articles are lawfully permitted to attribute to the appellants (which is not necessarily to say they are true) are in fact much more derogatory than the statements under challenge, the latter cannot

> be said to be harmless. Even the public outcast's remaining good reputation, limited in scope though it may be, is not inconsequential. ("He was a liar and a thief, but for all that he was a good family man.")

Liberty Lobby, 746 F.2d at 1568 (emphasis in original). Because most state courts, including Mississippi, have not recognized the incremental harm version of the libel-proof plaintiff doctrine, this court should decline to apply it in this case.

B. If Mississippi recognized the incremental harm doctrine, it would not apply in this case.

1. Application of the incremental harm doctrine is best reserved for a jury.

The Mississippi Supreme Court addressed the issue-specific version of the libel-proof doctrine in *Armistead*. In that case, Rex Armistead filed a defamation action against well-known newsman Bill Minor and several newspapers for statements made in a column. 815 So. 2d at 1191. After the circuit court granted summary judgment in favor of the defendants, Armistead appealed.

The Mississippi Supreme Court held the trial court erred in applying the issue-specific version of the libel-proof doctrine to Armistead's claim at the summary judgment stage, explaining:

> As the trial court noted, some courts have found that granting summary judgment based on the libel-proof doctrine is appropriate. *See Kevorkian v. American Med. Assoc.*, 237 Mich. App. 1, 606 N.W. 2d 233 (1999). Other courts, however, have found that such action is not appropriate because "it requires the Court to make factual findings regarding plaintiff's reputation for a particular trait." [*Church of Scientology Int'l v.*] *Time Warner, Inc.*, 932 F. Supp. [589, 594 (S.D. N.Y. 1996)]. This Court adopts the latter approach, as the libel-proof doctrine requires a look at the plaintiff's current reputation. While it may be said that some reputations are easily assessed, it still requires consideration of credibility issues, and this is not something the trial judge should undertake. *Stegall v. WTWV, Inc.*, 609 So. 2d 348, 352-53 (Miss. 1992); see also, *Zerangue v. TSP Newspapers*, 814 F.2d 1066, 1074 (5th Cir. 1987) ("[S]ummary judgment is not an appropriate stage at which to resolve credibility questions."). Thus, the trial court's finding that Armistead was libel-proof was an abuse of its discretion.

Id. at 1193-94. This court should decline to apply the incremental harm version of the libel-proof plaintiff doctrine for the same reasons. Whether the actionable statements in each offending publication cause more significant harm than the nonactionable statements are questions of fact best reserved for a jury.

2. The incremental harm doctrine does not apply to defamation *per se* claims.

Appellate courts in Ohio and Illinois have refused to apply the incremental harm doctrine to defamation *per se* claims. *Sullins*, 996 N.E. 2d at 568 ("We do not believe the incremental harm doctrine bars a claim for defamation, where, as here, the plaintiff's defamation claim is based on statements that are defamatory *per se*."); *Myers v. The Telegraph*, 773 N.E. 2d 192, 200 (Ill. Ct. App. 5th Dist. 2008) ("[T]he incremental harm defense conflicts with the common law principles governing *per se* actions. Whether the claim is for libel *per se* or slander *per se*, three presumptions arise: a presumption of falsity, a presumption of damage, and a presumption of malice. When asserting the incremental harm defense, a defendant attempts to prove that the defamatory statement, though false, did not injure the plaintiff's reputation. The incremental-harm defense eliminates the presumption of damages and reintroduces a need for the plaintiff to prove special damages."). This court should follow suit and decline to apply the doctrine to Bryant's libel[4] and slander *per se*[5] claims.

3. The incremental harm doctrine does not apply to false light claims.

The incremental harm doctrine "measures the incremental *reputational harm* inflicted by the challenged statements beyond the harm imposed by the nonactionable remainder of the publication." *Masson*, 501 U.S. at 522 (emphasis added). "[F]alse light actions differ from defamation actions because *recovery is for mental distress rather than injury to reputation*." *Prescott v. Bay St. Louis Newspapers, Inc.*, 497 So. 2d 77, 80 (Miss. 1986) (citing *Rinsley v. Brandt*, 700 F.2d 1304, 1307 (10th Cir. 1983)) (emphasis added). Because false light claims do not seek recovery for reputational harm and there is no authority

[4] Counts 1, 7, 9, and 20 allege libel claims. Under Mississippi law, all libel claims are actionable *per se*. *Brewer v. Memphis Pub. Co., Inc.*, 626 F.2d 1238, 1245 (5th Cir. 1980).

[5] Counts 3 and 11 allege slander *per se* claims.

supporting application of the incremental harm doctrine to a false light claim,[6] the court should deny this portion of the motion to dismiss.

4. The incremental harm doctrine does not bar Bryant's allegations because the defendants did not simply report the facts.

If one assumes the incremental harm doctrine is viable in this state, *Jewell v. NYP Holdings, Inc.*, 23 F. Supp. 2d 348 (S.D. N.Y. 1998), illustrates why it would not apply. *Jewell* arose from the New York Post's reporting of a police investigation into the bombing of Centennial Olympic Park in Atlanta. The district court refused to apply the incremental harm doctrine because the reporter's statements –

> did more than report on the status of the investigation and suggest that Jewell was a suspect, *they went one step further and implicitly suggested that Jewell was responsible for the bombing and that evidence to prove that fact was mounting*: (1) the "noose" was tightening around Jewell; (2) "Investigators say they're closing in on 'hero' security guard Richard Jewell[;]" (3) "We're pretty confident it's him[;] (4) "No charges have been filed, but probers say it may just be a matter of time." 'Obviously, his profile is right on,' the source said[;] (5) "[T]he feds continued to build a case against him[;] (6) "On a scale of 1 to 10 of our interest right now, he's still a 10 and will remain a 10 until we find something else of interest [;]" and (7) "Another law enforcement source said Jewell's arrest was not imminent. 'It's at least a matter of days,' the source said. There's a lot of stuff to go through." *To repeat, in contrast to the statements which merely advance the same concept evoked by the non-actionable statements – that Jewell was a "prime" suspect and was being investigated – these statements, on their face, took that concept and brought it to the next level – Jewell is responsible for the bombing and evidence exists to prove it.*

Id. at 396 (emphasis added). In short, the incremental harm doctrine does not apply when a media outlet goes beyond reporting facts and accuses the plaintiff of committing a crime. This is precisely what the defendants have repeatedly done in this case.

Counts 1 & 2: On August 11, 2022, White published an "impact report"[7] summarizing Mississippi Today's year-to-date reporting. White wrote the following:

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[6] The undersigned researched the "All States" and "All Federal" databases in Westlaw for cases applying the incremental harm doctrine to a false light claim. The search did not produce a single case; notably, the defendants did not identify such a case in their brief.

[7] https://mississippitoday.org/2022-impact-report/ (emphasis added). No other portion of the report addresses Bryant.

Anna Wolfe, our poverty and investigative reporter, began publishing her investigative series "The Backchannel," which revealed former Gov. Phil Bryant's role in a sprawling welfare scandal. *Each part of the series delved further into Bryant's misuse and squandering of at least $77 million in federal funds meant to assist nearly 588,000 of the state's poorest residents*.

Our reporting unearthed new evidence in the case and inspired top defendants facing state charges to tell the court about former Gov. Phil Bryant's role in their misspending. Key players were brought to light, patterns of nepotism and coercion gained attention, and soon the proof became damning. The NAACP national president wrote a letter to the U.S. Attorney General demanding an investigation of Bryant based on our reporting, and Congressman Bennie Thompson says he will call for congressional hearings about the scandal. Anna's stories have been cited in national publications, including USA Today, Sports Illustrated, MSN, and Fox News, and the State Auditor, Shad White, credited Anna's reporting as "crucial to our investigation."

As of the week of July 25, the New York Times heartily cited Mississippi Today's story breaking the news that the state had fired the attorney leading the MDHS investigation into the welfare fraud, and reporter Anna Wolfe was featured in an interview on MSNBC's Morning Joe.

Compare the emphasized language to the remainder of the passage:

- Sentence 1: This sentence recounts an uncontested fact. Wolfe did begin publishing "The Backchannel" series in the first half of 2022. "The Backchannel" hyperlinks to a webpage that links to Wolfe's series and other related articles.[8]
- Sentence 3: This sentence claims Wolfe "unearthed new evidence in the case" but does not specify the evidence or its significance. "Tell the court" is hyperlinked to an article by Wolfe discussing disgraced and admitted felon Nancy New's answer to the complaint in the MDHS Action[9] and her unsuccessful motion to stay discovery in that case.[10] This sentence and the hyperlinked article do not accuse Bryant of misusing or squandering $77 million of public funds or anything else rivaling the severity of that accusation.

[8] https://mississippitoday.org/the-backchannel/.

[9] *Miss. Dept. of Human Svs. v. Davis, et al.*, No. 22-cv-286-EFP (Hinds Cty., MS Cir. Ct.) (referred to herein as the "MDHS Action").

[10] https://mississippitoday.org/2022/07/12/phil-bryant-welfare-scandal-nancy-new-filing/.

- Sentence 4: This sentence references "key players" and hyperlinks to an article by Wolfe that discusses Brett Favre;[11] references "nepotism" and hyperlinks to an introductory piece to "The Backchannel;"[12] and claims "the proof became damning," but it does not specify the proof, explain what was damning, or identify the person(s) damned by the unspecified proof. The fourth sentence and hyperlinked articles do not accuse Bryant of misusing or squandering $77 million of public funds or anything else rivaling the severity of that accusation.
- Sentence 5: This sentence recounts investigation requests made by the NAACP national president and U.S. Congressman Bennie Thompson. The sentence does not accuse Bryant of misusing or squandering $77 million of public funds. On the contrary, pointing to investigation requests suggests that Bryant's role, if any, in the misspending of public funds was unknown.
- Sentences 6 & 7: These sentences note that Wolfe's reporting has been cited and quoted and mention that Wolfe appeared on an MSNBC program. They do not accuse Bryant of misusing or squandering $77 million of public funds or anything else rivaling the severity of that accusation.

White's "misuse and squandered" accusation is libelous. L.S. Tellier, Annotation, *Libel and Slander: Actionability of Statement Imputing Incapacity, Inefficiency, Misconduct, Fraud, Dishonesty, or the Like to Public Officer or Employee*, 53 A.L.R.2d 8 at § 8[a] (1957) ("A written or printed charge that a public officer had squandered or made other misuse of public funds, or that he would do so, is libelous."). The harm caused by that accusation is far more substantial than the harm caused by the rest of Wolfe's summary. The court should reject the defendants' argument.

[11] https://mississippitoday.org/2022/04/04/phil-bryant-brett-favre-welfare-scandal-payout/.

[12] https://mississippitoday.org/2022/04/03/phil-bryant-mississippi-welfare-scandal-investigation/.

Counts 3 & 4: White was a panelist in the 16th annual Knight Media Forum on February 22, 2023.[13] During the discussion, White made the following comments relating to the MDHS scandal, Bryant, and his "bureaucratic cronies:"

> But 2022 has just been a wild ride. *We're the newsroom that broke the story about $77 million in welfare funds, intended for the poorest people in the poorest state in the nation, being embezzled by [a] former governor and his bureaucratic cronies and used on pet projects like a state-of-the-art volleyball stadium at Brett Favre's alma mater.* You can't make up the cast of characters. Ex-pro wrestlers are involved, you know. Football stars that have horse ranches. I mean, it's really wild.
>
> But at the end of the day, that reporting really opened up the consciousness of Mississippi and I really think the nation about what's happening. How little do we know about how federal dollars are spent in our local communities? And this investigation had been something we'd been looking into since 2017. Our ace reporter Anna Wolfe was doing some research and realized that like 1.5% of the millions in federal funds that were coming to the state were being spent – only like less than two percent.
>
> So where was the rest of the money going? It was not until 2022 when a source that Anna had worked for years leaked a trove of private communications, text messages, that really revealed the extent of the misspending.
>
> And that was a tremendous and continues to be a tremendous story for the newsroom.

Embezzlement of public funds is a crime of moral turpitude[14] that is punishable by imprisonment in a state institution. Miss. Code Ann. § 97-11-31 ("[i]f any officer, or other person employed in any public office, shall commit any fraud or embezzlement therein, he shall be committed to the department of corrections for not more than ten (10) years, or be fined not more than five thousand dollars ($5,000.00), or both"). Embezzlement accusations are slanderous *per se*. 50 Am. Jur. 2d Libel and Slander § 177, *Embezzlement* (May 2023 Update) ("A charge of embezzlement constitutes slander *per se*."); David Elder, Defamation: A Lawyer's Guide § 1:16, *Slanderous Imputation of Crime* (Oct.

[13] Complaint at 114-116.

[14] *See*, e.g., *Holtrey v. Wiedman*, No. CA2023-01-11, 2023 WL 4553470, at *6 (Ohio Ct. App. July 17, 2023); *Thompson v. Bank One of Louisiana, NA*, 134 So. 3d 653, 662 (La. Ct. App. 4th Cir. 2014); *Richardson v. Mancil*, 706 S.E. 2d 843, at *6 (N.C. Ct. App. 2010); *Lemond v. Viamac, Inc.*, 57 Va. Cir. 25, at *2 (2001).

2022 Update). The emphasized language was White's only harmful statement about Bryant in the panel discussion. The incremental harm doctrine does not apply.

Counts 7 & 8: On May 8, 2023, Mississippi Today published an article[15] that contains the following passage:

> 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.*

Accusing Bryant of steering the spending of "millions of federal welfare dollars" to "benefit" his "family and friends" is tantamount to accusing him of embezzlement. This is the only statement in the entire article that references Bryant. Accordingly, the incremental harm doctrine does not apply.

Counts 9 & 10: Mississippi Today published another article[16] on May 8, 2023, that contains the following passage:

> Mississippi Today reporter Anna Wolfe won the 2023 Pulitzer Prize[17] for Local Reporting for her remarkable investigation "The Backchannel," which exposed former Gov. Phil Bryant's role in the state's welfare scandal.
>
> Wolfe's investigation was the culmination of more than five years of reporting on the Mississippi welfare agency, which is tasked with helping the poorest residents of America's poorest state. When she found in 2017 that only a fraction of Mississippians who applied for direct cash assistance were receiving it, she wondered how, instead, the state was spending hundreds of millions in federal grants designed to help those people.
>
> Through dozens of records requests and hundreds of interviews over the past several years, Wolfe uncovered misspending of those federal funds. And, after a tipster leaked thousands of private, never-before-seen text messages between Bryant and key players in the scandal, Wolfe was able to piece together the former governor's role.
>
> Among the findings of "The Backchannel" investigation:
>
> - *Bryant was set, just days after leaving office, to receive stock in a Favre-affiliated drug company that had received state welfare dollars.*

[15] https://mississippitoday.org/2023/05/08/anna-wolfe-mississippi-today-pulitzer/ (emphasis added).

[16] https://mississippitoday.org/2023/05/08/pulitzer-prize-winning-backchannel/.

[17] The "Anna Wolfe won the 2023 Pulitzer Prize" language hyperlinks to the article published on May 8, 2023, discussed regarding Counts 7 and 8.

- Favre pressed Mississippi welfare officials to steer taxpayer funds to his pet projects[18] — one of which he planned to profit from.

- *Bryant helped Favre secure welfare funding[19] for USM volleyball stadium.*

- Bryant wielded great control[20] over how his appointed welfare director distributed federal funds, even turning to that welfare director to seek help for his troubled nephew.[21]

The "to receive stock" language hyperlinked to an April 4, 2022, article[22] by Wolfe that contains the following language:

- "Bryant was *all set to accept stock in the company after he left office* – then arrests were made."

- "Former Mississippi Gov. Phil Bryant used the authority of his office, the weight of his political influence and the power of his connections to help his friend and retired NFL quarterback Brett Favre boost a fledgling pharmaceutical venture. Then *he tried to cash in on the project when he left office*, text messages show."

- "As governor, Bryant assisted Prevacus, the company at the center of Mississippi's ongoing welfare embezzlement scandal, in finding investors and gaining favor with federal regulators. Then, *two days after he left office, Bryant agreed by text to accept stock in the company*."

- "The scientist and governor did not discuss, at least by text, Bryant investing his own funds into Vanlandingham's venture. *The conversations involved Bryant becoming a shareholder in exchange for the help he provided as governor and planned to provide after his term*."

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[18] This language hyperlinks to an article by Wolfe that Mississippi Today published on April 6, 2022. The article is found at: https://mississippitoday.org/2022/04/06/brett-favre-used-fame-favors-welfare-dollars/. It addresses Brett Favre's efforts to obtain state funding for Prevacus and the USM volleyball stadium.

[19] This language hyperlinks to an article by Wolfe that Mississippi Today published on September 13, 2022. The article can be found at: https://mississippitoday.org/2022/09/13/phil-bryant-brett-favre-welfare/. It addresses a filing that Nancy New made in the MDHS Action seeking to compel Governor Bryant to produce text messages about the USM volleyball stadium. Bryant produced the messages and proved he did not play a role in securing welfare funding for the stadium.

[20] This language hyperlinks to an article by Wolfe that Mississippi Today published on April 7, 2022. The article can be found at: https://mississippitoday.org/2022/04/07/mississippi-welfare-john-davis-phil-bryant/. The article highlights Bryant asking Davis if MDHS could legally fund a children's development clinic at Mississippi State University. Davis replied that it could not.

[21] This language hyperlinks to an article by Wolfe that Mississippi Today published on April 18, 2022. The article can be found at: https://mississippitoday.org/2022/04/18/phil-bryant-troubled-nephew-welfare-scandal/. It addresses the struggles faced by Bryant's great-nephew, Noah McRae.

[22] https://mississippitoday.org/2022/04/04/phil-bryant-brett-favre-welfare-scandal-payout/ (emphasis added).

When considered as a whole, the "overall tone and structure" of the articles strongly implies that Bryant agreed to accept Prevacus stock in exchange for helping the company "find[ ] investors and gain[ ] favor with federal regulators" while governor. This is a crime. Miss. Code Ann. § 97-11-53 ("No public official shall directly or indirectly … agree to receive any … tangible or intangible thing of value as an inducement or incentive for … the accomplishment of any official act or purpose involving public funds or public trust."). The May 8, 2023 article also plainly states that Bryant "helped Favre secure welfare funding for the USM volleyball stadium." This statement is libelous. L.S. Tellier, Annotation, *Libel and Slander: Actionability of Statement Imputing Incapacity, Inefficiency, Misconduct, Fraud, Dishonesty, or the Like to Public Officer or Employee*, 53 A.L.R.2d 8 at § 8[a] (1957). While there are other false statements in the articles, they are far less harmful to Bryant. Accordingly, the incremental harm doctrine does not apply.

Counts 11 & 12: On August 23, 2023, Editor & Publisher published an article[23] that contains the following passage:

> "That really started the efforts of myself and many reporters in trying to get to the bottom of exactly where all this money went, *who was responsible for the misspending*, and just what happened here because the indictments were tailored to a very narrow part of this overall scandal. We would find out that it *totaled at least $77 million* that was just *completely frittered away* here and not used actually to uplift families in poverty," [Wolfe] said.
>
> She said the importance of *examining the role of then-Gov. Phil Bryant in the misspending* was immediately apparent because his office directly oversees the State Department of Human Services.
>
> "There's no effective oversight of that agency besides the governor's office. The governor appoints the director. The governor is the director's boss. The governor can essentially tell the agency how to run its programs. *And from all of our sourcing – people who've worked in the department before – the idea was that this just could not have happened without the governor's knowledge and, more likely, his blessing*," she said.

[23] www.editorandpublisher.com/stories/pulitzer-prize-wins-highlight-successes-of-local-journalism,245300 (emphasis added).

The crux of the emphasized language is that Bryant had advanced knowledge and blessed the "misspending" of "at least $77 million" of welfare funds. Wolfe's statement is slanderous *per se*. David Elder, Defamation: A Lawyer's Guide § 1:15, *Slanderous Imputations as to Business, Trade, Office or Profession* (Oct. 2023 Update) (citing *Restatement (Second) of Torts* § 573 cmt. d (1977) (an accusation that a public official misspent public funds is slanderous *per se* because the statement conveys the official lacks "the qualities or skill that the public [is] reasonably entitled to expect of persons engaged in such a calling"). The emphasized language is the only harmful statement made by Wolfe that is printed in the article. Accordingly, the incremental harm doctrine does not apply.

Counts 20 & 21: In Counts 20 and 21, Bryant alleges defamation and false light claims against Mississippi Today that mirror claims alleged against individual defendants. The claims that have not already been addressed are discussed below.

May 4, 2023: Wolfe wrote the following in this article:[24]

> Within the welfare scandal, much of the focus has been on three projects that received more than $8 million in federal funding because of the alleged involvement of both Bryant and former NFL legend Brett Favre. These include a volleyball stadium at the University of Southern Mississippi, a pharmaceutical startup company called Prevacus, and a $1.1 million promotional contract with Favre himself.
>
> Mississippi Today published its 2022 investigation about Bryant's role in the scandal after receiving and reviewing hundreds of pages of text messages obtained by investigators in the case, including those between Bryant, Favre, and Prevacus founder Jake Vanlandingham. *The texts showed that after Bryant met with former NFL legend Brett Favre about supporting his startup pharmaceutical venture in late 2018, the then-governor promised to "open a hole" for Favre and less than a week later, welfare officials including Davis struck a deal at the athlete's home to funnel $1.7 million of federal grant funds into the project.*
>
> *When the public funds started flowing to the drug company, Favre texted Bryant, "We couldn't be more happy about the funding from the State of MS," though Bryant denies knowing the company received any public funds. Two days after leaving office, Bryant then agreed by text to accept "a company package for all your help," Vanlandingham wrote, but arrests occurred before they were able to meet.*

[24] https://mississippitoday.org/2023/05/04/phil-bryant-missing-text-messages/ (emphasis added).

The May 4, 2023, article is hyperlinked to the previously discussed article by Wolfe that Mississippi Today published on April 4, 2023.[25] When the articles are considered as a whole, Wolfe's message is clear: (1) Bryant instructed former MDHS executive director John Davis and others to pay $1.7 million of welfare funds to Prevacus; (2) Vanlandingham offered and Bryant agreed to accept Prevacus stock in exchange for the $1.7 million payment; and, (3) Davis and the others were arrested, causing Bryant to get cold feet and forgo the stock payment he had previously agreed to accept. This message is libelous, *Restatement (Second) of Torts* § 580A (1977) ("One who publishes a false and defamatory communication concerning a public official or public figure in regard to his conduct, fitness or role in that capacity is subject to liability, if, but only if, if he (a) knows that the statement is false and that it defames the other person, or (b) acts in reckless disregard of these matters"), and far more harmful to Bryant than anything else in the article. Accordingly, the incremental harm doctrine does not apply.

September 22, 2023: In this article,[26] Wolfe wrote, "Mississippi Today has surfaced text messages showing that Bryant planned on entering into business with the Florida-based pharmaceutical company at the center of the initial indictments." The article contains a timeline. The April 4, 2022, timeline entry reads: "Mississippi Today begins publishing its investigative series, 'The Backchannel,' which, for the first time, reveals text messages between Bryant and Favre showing that the athlete offered stock in Prevacus to the governor in exchange for his help growing the company; that Favre told Bryant when Prevacus started receiving funds from the welfare operators; and that Bryant agreed to accept a company package after leaving office, right before the initial arrests in early 2020."

[25] https://mississippitoday.org/2022/04/04/phil-bryant-brett-favre-welfare-scandal-payout/.

[26] https://mississippitoday.org/2023/09/22/federal-welfare-scandal-investigation-update/.

The "entering into business" and "text messages between Bryant and Favre" language hyperlinked to the previously discussed April 4, 2022, article.[27] Considered as a whole, the message of the articles is that Bryant agreed to accept a payoff in exchange for acts undertaken in office, which is a crime. Miss. Code Ann. § 97-11-53. This message is libelous, *Restatement (Second) of Torts* § 580A (1977), and far more harmful to Bryant than anything else in the September 22, 2023, article. Accordingly, the incremental harm doctrine does not apply.

December 19, 2023: Mississippi Today published two articles by Wolfe on this date. In one of the articles,[28] Wolfe wrote:

> But after months of stringing the scientist along, Martin finally told Vanlandingham he would have to first put up $25,000 to help pay for a "geological analysis" for the land that Martin said his overseas investor required.
>
> Vanlandingham tried to find the money, but the scientist's contacts had dried up, and he was experiencing deep personal financial problems, according to his texts. He was forced to sell his family's home to pay the taxes for Prevacus, he said, and ask his mom for a loan to get into a rental. Martin tried to put him at ease by saying things like, "I know what we are doing is pleasing to God."
>
> Vanlandingham tried to get Favre to secure the $25,000 through an investment in Prevacus from one of his fellow professional athletes, but they wouldn't bite.
>
> *Then Favre suggested they ask the then-Mississippi governor for help and offer him stock in the company. Bryant bit. The men met with several others for dinner in Jackson at Walker's Drive-In in late December of 2018.*

Wolfe also wrote, "Bryant, who is suing Mississippi Today for defamation and *has sent threats to the news outlet for continuing to report this story*…." Wolfe similarly wrote in the other article[29] published on December 19, 2023, that "Bryant, who is suing Mississippi Today for defamation, *has sent threats to the news outlet for continuing to report this story, including basic updates about public court documents*."

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[27] https://mississippitoday.org/2022/04/04/phil-bryant-brett-favre-welfare-scandal-payout/.

[28] https://mississippitoday.org/2023/12/19/welfare-funds-ghana-scam-prevacus/ (emphasis added).

[29] https://mississippitoday.org/2023/12/19/court-filing-phil-bryant-directed-welfare-spending/ (emphasis added).

The overall thrust of the first article is that Favre's "fellow professional athletes" would not "bite" on investing $25,000 in Prevacus; Favre told Vanlandingham to offer stock to Bryant in exchange for his investing at least $25,000 in Prevacus; and, when Vanlandingham made the offer, "Bryant bit" – meaning, he agreed to invest at least $25,000 of public funds in Prevacus in exchange for stock in the company. This statement accuses Bryant of a crime, *see* Miss. Code Ann. § 97-11-53, and is libelous. *Restatement (Second) of Torts* § 580A (1977). Additionally, the statements regarding Bryant threatening Mississippi Today are libelous. *Franklin v. Thompson*, 722 So. 2d 688, 692 (Miss. 1998) ("A defamatory statement is "[a]ny written or printed language which tends to injure one's reputation, and thereby expose him to public hatred, contempt or ridicule, degrade him in society, lessen him in public esteem or lower him in the confidence of the community.") (quoting *Fulton v. Mississippi Publishers Corp.,* 498 So. 2d 1215, 1217 (Miss. 1986), which quoted *Ferguson v. Watkins,* 448 So.2d 271, 275 (Miss.1984)). These statements are far more harmful to Bryant than the remaining language in the articles. Accordingly, the incremental harm doctrine does not apply.

February 28, 2024: Wolfe wrote in this article[30] that "[t]exts show Bryant … agreed to accept an interest in [Prevacus] after he left his post," and "[i]n mid-January of 2020, … Vanlandingham … was simultaneously making arrangements with Bryant to give him 'a company package for all your help.' Bryant had just left office; texts indicate he was waiting until that date to enter into business with Prevacus. Shortly after, Bryant joined a new consulting firm and by Feb. 4, 2020, he was confirming a meeting date and location with Vanlandingham."[31] Wolfe then implied that White turned his office's investigative materials over to the Hinds County District Attorney to conceal Bryant's *quid pro quo* arrangement from federal scrutiny.

[30] https://mississippitoday.org/2024/02/28/phil-bryant-texts-withheld-lawsuit/.

[31] Complaint at 157.

The overall tone and structure of the article implies that Bryant agreed to accept a payoff from Prevacus in exchange for directing public funds to the company while governor; the state auditor was aware of the illegal *quid pro quo* arrangement; and, because of his preexisting relationship with the governor, the state auditor concealed the unlawful arrangement from the FBI and U.S. Attorney. This implication is false and defamatory. *Restatement (Second) of Torts* § 580A (1977); *McKimm v. Ohio Elections Comm.*, 729 N.E. 2d 364, 370-72 (Ohio 2000) (accusation that public official committed a crime is libelous).

The remainder of the article summarizes allegations that Jess New, a defendant in the civil action that MDHS filed against numerous individuals and entities in Hinds County Circuit Court, made in a proposed (and ultimately disallowed)[32] third-party complaint against Bryant. These allegations include the ridiculous contention that the state auditor and Hinds County District Attorney concealed evidence from his mother to induce her guilty plea. These statements cause no harm to Bryant. Accordingly, the incremental harm doctrine does not apply.

II. Bryant adequately alleged falsity.

In *Hayne*, Judge Starrett discussed the falsity element of a defamation action as follows:

> "The threshold question in a defamation suit is whether the published statements are false." *Franklin*, 722 So. 2d at 692. The Court may assess the falsity of the alleged defamatory statement prior to any submission to a jury. *Gales v. CBS Broadcasting, Inc.*, 269 F. Supp. 2d 772, 778 (S.D. Miss. 2003), *aff'd*, 124 F. App'x 275 (5th Cir. 2005); see also, *Mitchell* [*v. Random House, Inc.*, 703 F. Supp. 1250, 1256-57 (S.D. Miss. 1988), *aff'd*, 865 F.2d 664 (5th Cir. 1989)] (court assessed the accuracy of an allegedly defamatory statement). A published statement may be technically false – where the fact or facts reported therein are simply untrue. *Journal Publ'g Co. v. McCullough*, 743 So. 2d 352, 360 (Miss. 1999). However, a published statement may also be "substantially false," where "an underlying implication drawn from facially true statements [is] sufficient to render the statements false." *Id.* (citing *McCullough v. Cook*, 679 So. 2d 627, 632 (Miss. 1996)). Such an underlying implication may be created by "the omission of crucial information." *Id.* Furthermore, "the overall tone or structure of a story may so distort the truth as to make the underlying implication of the story false, even where no material omissions are

[32] MDHS Action, *Order Denying Defendant Jesse Steven New, Jr.'s Motion for Leave to File Third-Party Complaint* [MEC Doc. #726].

involved." *Id.* (citing *McCullough*, 679 So. 2d at 632; *Eselin-Bullock & Assocs. Agency, Inc. v. Nat'l Gen. Ins. Co.*, 604 So. 2d 236, 241 (Miss. 1992)).

Hayne, 2011 WL 198128 at *6. When assessing whether Governor Bryant sufficiently alleged falsity, this court should be mindful that no "state or federal court in Mississippi has gone so far as to require that a Plaintiff include specific information which demonstrates the falsity of the allegedly defamatory statement." *Id.* at *7. Instead, Bryant must allege facts "of sufficient particularity so as to give the defendant or defendants notice of the nature of the complained-of statements." *Chalk*, 980 So. 2d at 297. Accordingly, Bryant sufficiently alleged falsity if he stated that (1) a statement is untrue or (2) the implication created by a facially factual statement is untrue because of the omission of crucial information or the overall tone or structure of the publication. Bryant did this in every instance.

A. Bryant adequately pleaded Counts 5-6, 9-10, 13-18, and 20-21.

The defendants make three contentions in the initial portion of their falsity argument: (1) there is a "modest gap" between Bryant accepting a stock offer from Prevacus for the assistance he provided the company while governor and agreeing to listen to a first-time offer after he had left office; (2) Wolfe did not publish that Bryant agreed to invest $1.7 million of public funds in Prevacus in exchange for an ownership interest in the company; and (3) text messages between Bryant and Vanlandingham can be reasonably understood as Bryant accepting a stock offer from Prevacus in exchange for the assistance he provided the company while governor.[33] None of these arguments hold water.

1. There is a substantial difference between Bryant accepting a stock offer from Prevacus for the assistance he provided the company while governor and agreeing to listen to a first-time offer after he left office.

There is a substantial difference between Bryant accepting a stock offer from Prevacus for the assistance he provided the company while governor and agreeing to listen to a first-time offer after he left office. The former is a crime punishable by up to ten years in the state penitentiary and a $5,000.00

[33] Memorandum at 8-10.

fine. Miss. Code Ann. § 97-11-53. In the latter situation, there is no offer, acceptance, mutual assent, or consideration – i.e., no agreement. *Hunt v. Coker*, 741 So. 2d 1011, 1015 (Miss. Ct. App. 1999). This is the difference between a major felony and innocent conduct. The defendants' argument is absurd.

2. Wolfe repeatedly published that Bryant agreed to accept stock from Prevacus in exchange for the assistance he provided the company while governor.

May 4, 2023: Bryant quoted and discussed earlier in this filing the offending language in this article[34] and the April 4, 2022, article[35] hyperlinked within it. When the articles are considered as a whole, Wolfe's message is clear: (1) Bryant instructed former MDHS executive director John Davis and others to pay $1.7 million of welfare funds to Prevacus; (2) Vanlandingham offered and Bryant agreed to accept Prevacus stock in exchange for the $1.7 million payment; and, (3) Davis and the others were arrested, causing Bryant to get cold feet and forgo the stock payment he had previously agreed to accept. Wolfe's message implies that Bryant agreed to an illegal *quid pro quo* arrangement with Vanlandingham. The Complaint alleges this implication is false.[36]

May 8, 2023: Bryant quoted and discussed the offending language within this article[37] and the April 4, 2022, article hyperlinked within it earlier in this filing. When the articles are considered as a whole, their "overall tone and structure" strongly implies that Bryant agreed to accept Prevacus stock in exchange for helping the company "find[ ] investors and gain[ ] favor with federal regulators" while governor. The May 8, 2023 article also states that Bryant "helped Favre secure welfare funding for the USM volleyball stadium." The Complaint alleges that both of these statements are false.[38]

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[34] https://mississippitoday.org/2023/05/04/phil-bryant-missing-text-messages/.

[35] https://mississippitoday.org/2022/04/04/phil-bryant-brett-favre-welfare-scandal-payout/.

[36] Complaint at 10-11, 117-121 and 172-173.

[37] https://mississippitoday.org/2023/05/08/pulitzer-prize-winning-backchannel/.

[38] Complaint at 12-16, 125-127 and 175-176.

September 22, 2023: As previously discussed, Wolfe ensured her readership in this article[39] that Bryant agreed to accept stock in Prevacus in exchange for the assistance he provided the company while governor. The Complaint alleges this statement is false.[40]

December 19, 2023: The underlying implication of this article[41] is that Bryant committed to investing public funds in Prevacus in exchange for company stock. As the Complaint alleges, "Wolfe's claim that 'Bryant bit' is false, intentionally misleading, and defamatory."[42]

February 28, 2024: Bryant quoted the offending language of this article[43] earlier in this filing. The "overall tone and structure" of the article implies that Bryant agreed to accept a payoff from Prevacus in exchange for directing public funds to the company; the state auditor was aware of the illegal *quid pro quo* arrangement; and, because of his preexisting relationship with the governor, the state auditor concealed the unlawful arrangement from the FBI and U.S. Attorney. This defamatory implication renders the article false, as the Complaint alleges.[44]

3. The text messages cannot be reasonably interpreted as Bryant accepting a stock offer from Prevacus in exchange for the assistance he provided the company while governor.

The Complaint quotes verbatim the texts upon which Wolfe relied to illustrate the baselessness of her accusation. The Complaint quotes the following text message from Prevacus founder Jake Vanlandingham to Bryant on December 6, 2018:

> Good evening, Governor – Following up my friend on FDA connections. Also wanted to say Brett and I are hopeful to get a group of investors together perhaps with your help and come up to Jackson. We want you to know we want you on the team and can offer stock. We don't know the rules but are willing to do what is needed to bring you on board. Grateful for your help!!!"

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[39] https://mississippitoday.org/2023/09/22/federal-welfare-scandal-investigation-update/.

[40] Complaint at 136-137, 178-179.

[41] https://mississippitoday.org/2023/12/19/welfare-funds-ghana-scam-prevacus/.

[42] Complaint at 137-138.

[43] https://mississippitoday.org/2024/02/28/phil-bryant-texts-withheld-lawsuit/.

[44] Complaint at 19-20, 182-183.

Favre responded, "Amen to that!!" Bryant replied, "Just let me know and we will call a team meeting at the Governor's Mansion." Vanlandingham did not offer stock to Bryant. He wrote that Prevacus "can offer stock" and admitted that he did not "know the rules." Bryant did not address the stock issue in his reply.[45]

The Complaint next quotes Vanlandingham's text message to Bryant on December 2, 2019. It reads: "Governor, can we bring you onboard with ownership now?" Bryant responded, "Cannot till January 15th. But would love to talk then. This is the type of thing I love to be a part of. Something that saves lives…"[46] Anna Wolfe interviewed Bryant for nearly three hours on April 2, 2022.[47] They addressed the December 2, 2019, texts as follows:

> **Wolfe:** So, going into your last month as governor, Jake [Vanlandingham] offered to bring you on with ownership into Prevacus. You said you wouldn't be able to until January 15th.
>
> **Bryant:** No, I think I said, "Let's talk to me about January 15th."
>
> **Wolfe:** "Governor, can we bring you on board with ownership now?" "Cannot until January 15th, but would love to talk then. This is the type of thing I would love to be a part of. Something that saves lives."
>
> **Bryant:** Right.
>
> **Wolfe:** So, what was the difference between January 14th and January 16th? Why couldn't you do it until –

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[45] *Id.* at 138-39. The Complaint next alleges, "In the early evening of December 26, 2018, representatives from the governor's office picked up Favre and Vanlandingham from the airport and drove them to the Governor's Mansion. Favre, Vanlandingham, and Bryant discussed Prevacus in the mansion. Vanlandingham asked Bryant if he could accept stock in Prevacus during this meeting. Bryant immediately informed Vanlandingham that he could not and would not accept stock in Prevacus for anything he may do while in office. Favre, Vanlandingham, and Bryant subsequently traveled together in a motor vehicle to Walker's Drive-In for a dinner meeting." *Id.* at 139. Because this meeting is not reflected in the text messages, it is only mentioned in this footnote. Testimony will confirm this occurrence if it has not already been confirmed during depositions taken in the MDHS Action.

[46] *Id.*

[47] Mississippi Today published condensed transcripts of the interview on two occasions. The first portion is found here: https://mississippitoday.org/2022/04/04/phil-bryant-brett-favre-prevacus-welfare-scandal/. The second portion is found here: https://mississippitoday.org/2022/04/19/phil-bryant-nephew-welfare-failures-and-successes/.

Bryant: I think the 15th was when I was leaving office. So, I didn't talk to anybody about anything in business until I left office. People would come up to me and say, "We want you to be a part of our business. We want you to come [join our] board. We want you to come in and join our firm." And I would say, "I can't talk to you until after I leave office. I don't even want to talk about it."

* * *

Wolfe: Right. But I'm just wondering why you couldn't do it until January 15th.

Bryant: I didn't say I couldn't do it until January 15th. What I was saying is I can't talk to you until January 15th. I don't even want to talk about it until January 15th. And then you can come in and talk to me.[48]

Over a year later, on January 16, 2020, Vanlandingham texted Bryant: "Now that you're unemployed, I'd like to give you a company package for all your help. Let me know when you come up for air, but know we want and need you on our team!!!" Bryant replied: "Sounds good. Where would be the best place to meet[?] I am now going to get on it hard."[49] The Complaint alleges several points arising from this exchange:

6.251 …First, Vanlandingham did not offer "a company package" in his text. Instead, he wrote that he would "like to give" Bryant a company package. This message suggests Bryant had not previously accepted stock or ownership and that Bryant could reject whatever Vanlandingham may offer.

6.252 Second, Vanlandingham did not specify the terms of the "company package" he would "like to give" Bryant. The absence of specifics suggests a lack of agreement or understanding of the proposed terms. The phrase "company package" is vague, and its meaning is ambiguous.

6.253 Third, Vanlandingham did not specify the "help" he referenced and certainly did not say that he was offering Bryant "a company package" in exchange for services he had already performed. The most reasonable interpretation of the text message is Vanlandingham is attempting to entice Bryant or BSS[50] to accept Prevacus as a client.

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[48] Complaint at 47-48.

[49] *Id.*

[50] "BSS" is an acronym the Complaint uses for BSS Global, a consulting firm founded by Bryant, his former chief of staff, Joey Songy, and his daughter, Katie Snell, after Bryant's tenure as governor. *See*, https://bssglobal.com/.

> 6.254 Fourth, Bryant did not agree to accept a "company package." He instead indicated he would like "to meet" with Vanlandingham to discuss further details. The "get on it hard" language is rhetorical hyperbole.
>
> 6.255 Fifth, as for whether Bryant or BSS could ethically or legally assist Prevacus after Bryant left office, Bryant explained to Wolfe in his three-hour interview that "[b]efore any agreement (with Prevacus hypothetically made), it would have had to go through our internal review here with lawyers, and then we would have asked (Ethics Commission director) Tom Hood, 'Can you review it?' We hired an attorney at Butler Snow to begin to review anything that we were doing so that we made sure. So yeah, it wouldn't have just been, 'OK, let's go to work.' It's just not that easy."[51]

The Complaint next shifts to a telephone discussion involving Bryant, Vanlandingham, and Favre's friend, Poncho James. The Complaint alleges, "Wolfe knows Bryant participated in a telephone call with Vanlandingham and Poncho James on January 22, 2020. Toward the end of the call, Vanlandingham mentioned offering stock in Prevacus to Bryant in exchange for BSS's future services. Bryant told Vanlandingham that they could address the matter at a later time. Bryant told Wolfe about this telephone discussion in his interview with her: 'At the end of the conversation, [Vanlandingham] said, 'And oh by the way we need to talk about some stock.' And I just said, 'Well, you know, we'll get together later on.' And I never called him back.'"[52]

The Complaint alleges that "Bryant did not accept stock, ownership, or a company package from Vanlandingham or Prevacus" and that "Wolfe has no evidence to contradict Bryant's summary of the telephone call."[53] Further, the Complaint alleges that "Bryant's summary is consistent with what Vanlandingham told Wolfe about his dealings with Bryant." The Complaint then quotes verbatim[54] Vanlandingham's comments to Wolfe concerning his dealings with Bryant:[55]

> The governor was always straight up. There was never any stock exchanged. There was never any money exchanged. He just wanted to help. And we never did a deal for him to come on

[51] Complaint at 140-141 and 48-49 (Wolfe-Bryant interview allegations).

[52] *Id.* at 141.

[53] *Id.* at 142.

[54] *Id.*

[55] https://mississippitoday.org/2022/04/04/phil-bryant-brett-favre-welfare-scandal-payout/.

> with his consulting firm and that could be because this (the arrests) happened. We were probably working towards having the governor, post-governorship, help us, and I think that would have been great.

The Complaint alleges that the text messages do not reflect an offer made to Bryant, Bryant's acceptance of an offer, or the parties' mutual assent to an agreement. At most, they reveal that Bryant was willing to meet with Vanlandingham later to hear whatever he may propose – precisely what Bryant told Wolfe during his interview.[56] Bryant's falsity allegation goes well beyond the legal requirement, *Hayne*, 2011 WL 198128 at *7 (no "state or federal court in Mississippi has gone so far as to require that a Plaintiff include specific information which demonstrates the falsity of the allegedly defamatory statement"), and provides detailed reasons why Wolfe's repeated accusation is false. Therefore, the defendants' argument should be rejected.

B. Bryant adequately pleaded Counts 5-6 and 20-21.

The defendants argue that the article published by Mississippi Today on May 4, 2023, did not accuse Bryant "of having 'advance knowledge of and involvement with' an agreement under which the state welfare director and others funneled $1.7 million in welfare funds to Prevacus 'in exchange for … personal stakes in the company."[57] Bryant adopts his earlier argument addressing this matter. The Complaint alleges that Wolfe's implication is false.[58]

C. Bryant adequately pleaded Counts 15-16 and 20-21.

The defendants next argue Wolfe accurately reported on December 14, 2023, that Bryant threatened Mississippi Today "for continuing to report this story, including basic updates about public court documents."[59] This is simply wrong. The "actual communications" reveal that Bryant's attorney,

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[56] Complaint at 47-48.

[57] Memorandum at 10-11.

[58] Complaint at 10-11, 117-121 and 172-173.

[59] *Id.* at 11-12.

William M. Quin II, "reminded Wolfe that he had already warned her about her attempts to obtain information from Bryant through anyone other than his attorneys. Quin told Wolfe and Laird that he would seek sanctions from Mississippi Today if Wolfe ever again attempted to circumvent him and obtain information from Bryant through third-party intermediaries. Quin also explained that Bryant would sue Wolfe for defamation if she reported that Bryant's trip to Ghana was related to Vanlandingham's investment. Quin did not threaten Wolfe or Mississippi Today 'for continuing to report this story,' nor did he threaten Wolfe or Mississippi Today for reporting 'basic updates about public court documents.' Wolfe's mischaracterization of Quin's communications is an outright lie calculated to mislead and garner sympathy from her readership."[60] The Complaint pleads Wolfe's "outright lie" verbatim, demonstrating its baselessness in detail. These allegations far exceed what is necessary to plead falsity under Rule 8.

D. Bryant adequately pleaded Counts 1-4 and 20-21.

White accused Bryant of personally misusing, squandering, and embezzling $77 million of welfare funds.[61] According to the defendants, these accusations are substantially true because former MDHS executive director John Davis "pleaded guilty to fraud and conspiracy charges for misusing welfare funds."[62] This argument is ridiculous.

One of the "strictly enforced" restrictions in defamation is that "the words employed must have been clearly directed toward the plaintiff." *Perkins v. Littleton*, 270 So. 3d 208, 213 (Miss. Ct. App. 2018) (quoting *Ferguson*, 448 So. 2d at 275). The Mississippi Supreme Court stated that a defamatory statement may be directed toward a plaintiff "even if it does not designate the plaintiff by name" and explained:

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[60] *Id.* at 142-145.

[61] *Id.* at 103, 116.

[62] Memorandum at 12-13.

> Extrinsic facts may make it clear that a statement refers to a particular individual although the language used appears to defame nobody. It is not necessary that everyone recognize the [plaintiff] as the person intended; it is enough that any recipient of the communication reasonably understands it.

Id. (quoting *Conroy v. Breland*, 185 Miss. 787, 189 So. 814, 815 (1939), which quoted *Restatement (First) of Torts* § 564 cmt. b. (1938)); see also, *Mitchell*, 703 F. Supp. at 1256; *Gales*, 269 F. Supp. 2d at 780; *McCullough*, 679 So. 2d at 629-30. The court does not need to consider extrinsic facts to resolve this issue. White referenced Bryant by name when accusing him of misusing and squandering "at least $77 million in federal funds." She undoubtedly, and admittedly,[63] referenced Bryant when she accused a "former governor and his bureaucratic cronies" of embezzling "about $77 million in welfare funds." White's statements were clearly directed at Bryant – not Davis or the "welfare department." The court should easily reject White's falsity argument.

III. Bryant adequately alleged actual malice.

Actual malice allegations are subject to Miss. R. Civ. P. 8's notice pleading standard. *Robb v. McLaughlin*, 371 So. 3d 761, 773-74 (Miss. Ct. App. 2023) (quoting *City of Meridian v. $104,960.00 U.S. Currency*, 231 So. 3d 972, 974-75 (Miss. 2017)). In *Penn Nat. Gaming, Inc. v. Ratliff*, 954 So. 2d 427 (Miss. 2007),[64] the Court summarized notice pleading as follows:

> Pleadings under Mississippi Rule of Civil Procedure 8(a) must contain (1) a short and plain statement of the claim showing that the pleader is entitled to relief and (2) a demand for judgment for the relief to which he deems himself entitled. Miss. R. Civ. P. 8(a). All pleadings shall be construed to ensure substantial justice is done. Miss. R. Civ. P. 8(f). In construing our rules, we sometimes look for guidance to the federal cases since the Mississippi Rules of Civil Procedure were patterned after the Federal Rules of Civil Procedure. *White v. Stewman*, 932 So. 2d 27, 39 (Miss. 2006) ("federal practice should be our guide when considering questions arising under the Mississippi Rules of Civil Procedure"); *Bourn v. Tomlinson Interest, Inc.*, 456 So.

[63] *See*, *Defendant Mary Margaret White's Responses to Plaintiff Phil Bryant's First Set of Requests for Admissions*. Request No. 9 asked, "Please admit that the 'former governor' referenced in the quote is Bryant." White responded, "The truth of the matter requested is admitted."

[64] *Ratliff* was superseded by statute on grounds unrelated to its holding addressing Rule 8 pleading standards. *Purdue Pharma L.P. v. State*, 256 So. 3d 1, 6 (Miss. 2018) (Registered Agents Act, Miss. Code Ann. § 79-35-15, "overruled *Ratliff* and its holding that a non-resident defendant 'resides' in the county where its agent for service of process is located").

> 2d 747, 749 (Miss. 1984). A majority of federal circuits have held that "even under the liberal pleading requirements of Rule 8(a), a plaintiff must set forth factual allegations, either direct or inferential, respecting each material element necessary to sustain recovery under some actionable legal theory." *United States ex rel. Karvelas v. Melrose-Wakefield Hosp.*, 360 F.3d 220, 240 (1st Cir. 2004); *see also Varljen v. Cleveland Gear Co.*, 250 F.3d 426, 429 (6th Cir. 2001) ("To survive a motion to dismiss under Fed. R. Civ. P. 12(b)(6), a complaint must contain either direct or inferential allegations respecting all the material elements to sustain a recovery under some viable legal theory."); *Carl Sandberg Vill. Condo. Ass'n No. 1 v. First Condo. Dev. Co.*, 758 F.2d 203, 207 (7th Cir. 1985) ("A complaint must state either direct or inferential allegations concerning all of the material elements necessary for recovery under the relevant legal theory.").

Id. at 432. The court also counseled that "[w]hen considering a motion to dismiss, the allegations in the complaint must be taken as true, and the motion should not be granted unless it appears beyond a reasonable doubt that the plaintiff will be unable to prove any set of facts in support of his claim. Dismissal is proper if the complaint lacks an allegation regarding a required element necessary to obtain relief. Conclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to defeat a motion to dismiss." *Id.* at 430-31 (citing *Harris v. Miss. Valley State Univ.*, 873 So. 2d 970, 988 (Miss. 2004); *Blackburn v. City of Marshall*, 42 F.3d 925, 931 (5th Cir. 1995)).

Holland v. Kennedy, 548 So. 2d 982 (Miss. 1989), provides an example of a complaint that sufficiently pleaded actual malice. In that case, J. Shelvey Holland sued Belhaven College president Dr. Verne Kennedy and others, alleging defamation, civil conspiracy, and tortious interference with contract claims. *Id.* at 983. The Court described Holland's defamation claim in the following way:

> Holland's libel and slander claim arises from alleged actions of the president of the college, Dr. Kennedy, and the other defendants made after Holland's discharge. Specifically, Holland alleges that Kennedy (1) "falsely advised the Mississippi Employment Security Commission that … Holland was a failure and unable to do his job satisfactorily"; (2) "vilified and slandered the plaintiff, by attacking his good name and calling him a liar"; (3) referred to Holland as "incompetent and called him a liar, knowing full well that same was untrue"; and (4) "prepared a memorandum, composed of blatant falsehoods and distortions on his decision to attempt to terminate the employment of the plaintiff and submitted his purported reasons to the Board of Trustees for the purpose of sustaining his unwarranted decision to discharge the plaintiff."

Id. at 986. The defendants filed a general demurrer – the "pre-rules practice … method of testing the legal sufficiency of the plaintiff's allegations." *Id.* at 984. The circuit court sustained the demurrer, and

Holland appealed. *Id.* The Supreme Court reversed, holding that "Holland's allegations of malice and knowing falsehood are sufficient in law…." *Id.* at 987.

Mississippi's district courts have addressed what is required to sufficiently plead actual malice under the more stringent Federal Rules of Civil Procedure.[65] In *Hayne*, Dr. Steven Hayne brought defamation claims against The Innocence Project, its co-director, and one of its staff attorneys arising from representations made in a letter to the Mississippi State Board of Medical Licensure. 2011 WL 198128, at *1. The defendants moved to dismiss the action, arguing Hayne failed to plead actual malice sufficiently. *Id.* Judge Starrett rejected this argument as follows:

> Defendants first argue that Plaintiff's First Complaint does not contain sufficient factual allegations to show actual malice. "Actual malice is defined as a statement made 'with knowledge that it was false or with reckless disregard of whether it was false or not.'" *Armistead*, 815 So. 2d at 1193 (quoting *Masson*, 501 U.S. at 510, 111 S.Ct. 2419, 115 L.Ed.2d 447). Plaintiff alleged that Defendants knew the statements at issue were "inaccurate, misleading, and/or patently false." Plaintiff further alleged that Defendants published the statements "in reckless disregard for the truth or falsity of said allegations." According to Plaintiff, Defendants "edited and distorted the actual facts … so as to maximize the damage and harm to [him], his reputation, and his ability to earn a living in his chosen profession." Plaintiff also alleged that Defendants exhibited actual malice "by ignoring all contrary evidence and/or by editing their publications in such a way as to maximize the false light that was cast on [him]." These allegations – if true – are sufficient to state a plausible claim that Defendants published the statements with actual malice.

Id. at *5. The court addressed the defendants' argument "that the above factual allegations constitute nothing more than bare conclusions of actual malice," explaining the plaintiff "specifically pled that Defendants exhibited actual malice by editing or distorting facts in an effort to maximize the damage done by the publication and that Defendants intentionally omitted facts which would mitigate said damage." *Id.* The court further explained allegations tracking "the language of relevant legal

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[65] One month after the Mississippi Supreme Court decided *Ratliff*, the U.S. Supreme Court substantially reinterpreted federal pleading standards under Fed. R. Civ. P. 8(a). *Bell Atlantic v. Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). The Court refined the standard again two years later in *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009). Mississippi has not adopted the *Iqbal-Twombly* heightened pleading standard. *City of Meridian*, 231 So. 3d at 976-79 (Justice Coleman, joined by Justice Chamberlin, arguing in favor of adopting the heightened pleading standard in his dissenting opinion).

precedents" are not "necessarily … bare legal conclusions. Furthermore, the Federal Rules of Civil Procedure only require that malice and other conditions of mind 'be averred generally.'" *Id.* (quoting Fed. R. Civ. P. 9(b) ("Malice … may be alleged generally"), and citing *Belli v. Orlando Daily Newspapers, Inc.*, 389 F.2d 579, 589 (5th Cir. 1967)).

The court's rejection of the defendants' final argument is distinctly relevant to the case at the bar. Judge Starrett wrote the following when addressing whether "the scope of the [defendants'] investigation is, by itself, sufficient to refute any claim of actual malice:"

> Finally, Defendants argue that the scope of their investigation is, by itself, sufficient to refute any claim of actual malice. They argue: "The fact that the Letter was impeccably sourced and pointed to chapter and verse of the public record demonstrates the extensive investigation that Defendants undertook in an effort to support the Letter's conclusions." However, Defendants provided no binding legal authority to support their argument. *The fact that Defendants attached many exhibits to their letter and provided footnotes to those exhibits is of no consequence if they intentionally misrepresented facts and omitted facts*, as Plaintiff alleged. Compiling information necessarily implies acting as a gatekeeper and determining what information is relevant and accurate. In the present case, Plaintiff specifically alleged that Defendants intentionally omitted and distorted facts to enhance the damage done by their statements. Plaintiff further alleged that some facts in the statement were false, and that Defendants knew they were false. *If Plaintiff's allegations are true, breadth of research and meticulous citation may be of little consequence*. For all the reasons stated above, the Court finds that Plaintiff's Complaint contains sufficient factual allegations to state a plausible claim that Defendants acted with actual malice.

Id. (emphasis added); see also, *Rich v. Cox Media Group Northeast, LLC*, No. 3:18-cv-68, 2019 WL 1371844, at *3 (N.D. Miss. Mar. 26, 2019). With these principles in mind, we turn to the four reasons why the defendants contend Bryant inadequately pleaded actual malice: (1) the statements that Bryant agreed to accept stock in Prevacus in exchange for the assistance he provided the company while governor and that Bryant threatened Mississippi Today for "continuing to report on this story" are plausible interpretations of Bryant's text messages;[66] (2) the statement that Bryant knew about and gave his blessing to $77 million of welfare fund misspending was based on reliable information

[66] Memorandum at 13-15.

supplied by "Carol Burnett, a former division director in the state welfare department;"[67] (3) the statements that Bryant misused, squandered, embezzled, and steered $77 million of welfare funds to family and friends were "minor deviations" from underlying reporting;[68] and, (4) actual malice cannot be proven with evidence of common law malice,[69] refusals to retract,[70] or violations of professional standards.[71] Bryant will refute each argument before outlining why he has adequately pleaded actual malice.

A. Intentionally or recklessly misrepresenting a document's content proves actual malice.

Reporters may not intentionally or recklessly describe underlying documents and then claim they acted in good faith once sued. For instance, in *Young v. Gannett Satellite Information Network, Inc.*, 734 F.3d 544 (6th Cir. 2014), "the Miami Township police department fired Police Sargeant James Young for allegedly forcing sex on a woman he was said to be involved with. However, the termination was overturned by an arbitrator. The arbitrator stated that it was unclear what happened on the day in question, but the police department had not proven its allegations. The arbitrator's report also mentioned that DNA samples from the scene did not match Young and found that the complainant lacked credibility. Thirteen years later, a Gannett newspaper [the Milford-Miami Advertiser] published the statement 'Young had sex with a woman while on the job' in an article commenting on a local debate about the suspension of a different police officer [Russell Kenney]. Young sued Gannett for defamation and obtained a $100,000 verdict." *Id.* at 545. Gannett appealed, and the Sixth Circuit affirmed. *Id.* at 550. The Sixth Circuit explained its basis for upholding the jury's actual malice finding as follows:

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[67] *Id.*

[68] *Id.* at 16.

[69] *Id.*

[70] *Id.* at 17.

[71] *Id.*

> The *Advertiser*'s editor, Herron, reviewed the arbitrator's report. She therefore knew that there was no evidence that Young had forced sex on Phillips, and that it was unclear whether they had ever had sex at all… There was sufficient evidence for the jury to conclude that Herron was well aware that the statement she added to the article was probably false. She nonetheless added the statement to provide context for the story about Officer Kenney. The jury could find reckless disregard of the truth and clear and convincing proof of actual malice… *A newspaper cannot publish an accusation that it knows has no evidence behind it as a fact to fit its desired storyline and then cloak itself in the First Amendment.*

Id. at 547-48 (emphasis added); see also, *Doe v. Doe*, 941 F.2d 280, 291-92 (5th Cir. 1991); *Westmoreland v. CBS Inc.*, 596 F. Supp. 1170, 1174 (S.D. N.Y. 1984) (reporter may be "liable if he knowingly or recklessly misstates … evidence to make it seem more convincing or condemnatory that it is"); *Nader v. de Toledano*, 408 A.2d 31, 52-54 (D.C. 1979); *Buratt v. Capital City Press, Inc.*, 459 So. 2d 1268,1270-71 (La. Ct. App. 1st Cir. 1985); *Davis v. Schuchat*, 510 F.2d 731, 735-36 (D.C. 1975).

Similarly, actual malice is proven when a reporter intentionally uses words capable of defamatory meaning "in the hope of insinuating a false import to the reader" and recklessly disregards the possibility that the average reader would interpret her words as false statements of fact. *Sprague v. American Bar Ass'n*, No. Civ.A 01-382, 2003 WL 22110574, at *1, *4 (E.D. Penn. July 21, 2003); see also, *Rebozo v. Washington Post Co.*, 637 F.2d 375, 382 (5th Cir. 1981) (evidence that newsman resolved "obvious ambiguity … in favor of the most potentially damaging alternative creates a jury question on whether the publication was indeed made without serious doubt as to its truthfulness"); *Catalano v. Pechous*, 419 N.E. 2d 350, 359-60 (Ill. 1980); *Warford v. Lexington Herald-Leader Co.*, 789 S.W. 2d 758, 772-73 (Ky. 1990). Actual malice is also proven when a reporter knows her statement is inaccurate and she "specifically made [the statement] to mislead and injure [the plaintiff's] reputation." *Waste Management of Texas, Inc. v. Texas Disposal Systems Landfill, Inc.*, 434 S.W. 3d 142, 158-59 (Tex. 2014).

In the case at bar, Mississippi Today and Wolfe knowingly or recklessly published that Bryant agreed to accept an ownership interest in Prevacus in exchange for assistance he provided the company while governor, including directing $1.7 million of welfare funds to the company, and that Bryant threatened them for reporting routine updates on the MDHS Action. The Complaint provides

a detailed examination of the communications upon which Wolfe relied and demonstrates the falsity of her claims. Wolfe's intentional or reckless failure to accurately report the communications is evidence of actual malice.

B. Reporting speculation as fact is evidence of actual malice.

Wolfe told Editor & Publisher that Bryant knew about and gave his blessing to $77 million of welfare fund misspending.[72] Wolfe based this comment on information provided by Carol Burnett,[73] founder of the Mississippi Low-Income Child Care Institute and "a division director in the Mississippi Department of Human Services in the early 2000s."[74] Burnett was not involved in relevant events, has no first-hand knowledge of relevant circumstances, and did not work in MDHS during Bryant's tenure.[75] But this did not stop her from offering the following rant speculation to Wolfe:

> I've been saying all along that all of those TANF subgrants that are suspect – Nancy New, all of them – it was the governor who was the wizard behind the curtain… That's my opinion… The thing about TANF and the governor in Mississippi is: it's a huge pot of money and the governor has total control over it. The governor just had to have been involved in those decisions.[76]

A reporter acts with actual malice when she relies on "rootless speculation" as the basis for a false statement of fact. *Prozeralik v. Capital Cities Communications, Inc.*, 626 N.E. 2d 34, 39-40 (N.Y. Ct. App. 1993); *Snowden v. Pearl River Broadcasting Corp.*, 251 So. 2d 405, 411 (La. Ct. App. 1st Cir. 1971).[77] Wolfe's conversion of Burnett's rootless speculation to a statement of fact proves her actual malice.

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[72] www.editorandpublisher.com/stories/pulitzer-prize-wins-highlight-successes-of-local-journalism,245300 (emphasis added).

[73] Memorandum at 15.

[74] https://mississippitoday.org/2022/04/07/mississippi-welfare-john-davis-phil-bryant/.

[75] Complaint at 89.

[76] *Id.*

[77] The authority cited by the defendants, *New York Times Co. v. Connor*, 365 F.2d 567 (5th Cir. 1966), illustrates the baselessness of their argument. In *Connor*, the reporter's sources had first-hand knowledge of events. *Id.* 574-75.

C. White and Ganucheau intentionally or recklessly accused Bryant of a crime.

The Complaint illustrates Wolfe did not report in her nine-part series that Bryant misused, squandered, or embezzled $77 million of welfare funds and did not report that Bryant steered millions of welfare funds to benefit his family and friends.[78] It also compares and contrasts White and Ganucheau's offending statements with statements made in earlier publications to show these defendants altered previous statements to knowingly and willfully accuse Bryant of a crime.[79]

1. White converted Wolfe's statement that the "welfare department" misused and squandered $77 million into Bryant's personal misuse and squandering of $77 million.

In an April 3, 2022, article introducing "The Backchannel" series, Wolfe wrote: "While he was Mississippi's governor, the welfare department that Bryant oversaw misused and squandered at least $77 million in federal funds meant to assist the state's poorest residents – and so far he's skirted all accountability."[80] Four months later, White wrote the following in Mississippi Today's mid-year impact report:[81]

> Anna Wolfe, our poverty and investigative reporter, began publishing her investigative series "The Backchannel," which revealed former Gov. Phil Bryant's role in a sprawling welfare scandal. Each part of the series delved further into Bryant's misuse and squandering of at least $77 million in federal funds meant to assist nearly 588,000 of the state's poorest residents.

White fundamentally changed Wolfe's contention. She did not say that the "welfare department" misused and squandered $77 million in federal funds, and she left no ambiguity regarding the meanings of "oversaw" and "accountability." According to White, Bryant personally misused and squandered $77 million in federal funds.

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[78] Complaint at 83-92, 104-108, 113.

[79] *Id.* at 103, 123-124.

[80] https://mississippitoday.org/2022/04/03/phil-bryant-mississippi-welfare-scandal-investigation/.

[81] https://mississippitoday.org/2022-impact-report/ (emphasis added).

2. Ganucheau converted his vague statement about "powerful Mississippians" appearing to steer millions of welfare funds to themselves and their wealthy friends into Bryant personally steering millions of welfare funds to his family and friends.

Mississippi Today published an "Editor's Note on our Welfare Coverage"[82] on September 28, 2022, in which Ganucheau wrote: "Powerful Mississippians appear to have used the state government system to steer millions away from our neediest residents into their own pockets and the pockets of their wealthy friends." Ganucheau's language was more pointed seven-and-a-half months later when announcing Wolfe's Pulitzer Prize win. He wrote:

> 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.[83]

Ganucheau eliminated ambiguity with his editor's note and accused Bryant of public corruption and outright criminal activity – just as Wolfe did in her radio interview with Shows[84] and White did in her panel discussion at the Knight Media Forum. No longer had a vague group of "[p]owerful Mississippians" steered millions of welfare funds "into their own pockets and the pockets of their wealthy friends." Bryant did so. No longer did it "appear" such had occurred. Ganucheau was sure – it was Bryant.

White and Ganucheau each consciously decided to accuse Bryant of public corruption and criminal conduct. Their statements were not "minor deviations"[85] from Wolfe's earlier reporting. They purposefully modified earlier statements to accuse Bryant of crimes that, much to the defendants'

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[82] https://mississippitoday.org/2022/09/28/editors-note-welfare-coverage/.

[83] https://mississippitoday.org/2023/05/08/anna-wolfe-mississippi-today-pulitzer/.

[84] Complaint at 5-7, 43-45; see also, https://mississippitoday.org/2021/12/23/anna-wolfe-mississippi-welfare-fraud-case/.

[85] Memorandum at 16.

chagrin,[86] federal and state authorities have not prosecuted. This is clear evidence of actual malice. *Westmoreland*, 596 F. Supp. at 1174 (publisher is "liable if he knowingly or recklessly misstates … evidence to make it seem more convincing or condemnatory that it is").

D. Actual malice can be proven with common law malice, refusals to retract, and violations of professional standards.

Contrary to the defendants' argument,[87] the country's leading treatise on defamation law explains that "[u]nder the general rule, common law malice does provide supporting evidence of constitutional actual malice in many ways." David Elder, Defamation: A Lawyer's Guide § 7:3, *Common Law Malice and Constitutional "Actual Malice"* (Oct. 2023 Update). Decisions from state and federal courts –

> generally hold that almost any evidence of common law malice may be *relevant and admissible* evidence on the constitutional actual malice issue – anger; hostility; retaliation or threats to "get" the plaintiff; political partisanship; participation in a scheme to injure plaintiff; personal ill will; coercive purposes or blackmailing attempts; motive to suppress information or intimidate an opponent critical of defendant; economic motivation; sensationalism or "muckraking;" publication with full cognizance of the harm to the plaintiff or heedless of the consequences; prior attempts at deliberate falsification or omissions; prior attempts to harm plaintiff; a preconceived plan to discredit plaintiff; a preconceived view or slant. In the words of the *Restatement (Second) of Torts* such factors "assist in the drawing of an inference that the publisher knew his statement was false or acted in reckless disregard of its falsity." Another thoughtful recent opinion, citing the probative value of motivation, concluded: "[a] newspaper cannot publish an accusation that it knows has no evidence behind it as a fact to fit its desired storyline and then cloak it all in the First Amendment."

Id. (emphasis in original). Mississippi courts have followed this standard for decades. *See*, e.g., *Newson v. Henry*, 443 So. 2d 817, 823 (Miss. 1983); *Stegall*, 609 So. 2d at 352; *Anders v. Newsweek, Inc.*, 727 F. Supp. 1065, 1067-68 (S.D. Miss. 1989).

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[86] *See*, e.g., Complaint at 43-44 (Wolfe telling Shows that "the big questions that I have now … [is] if the people that are investigating this and have the power to do something about it, if they're really going to go after everyone that they should, and everyone who should be held accountable, namely the former governor Phil Bryant"); at 93 (Ganucheau writing that "[t]he stink of the largest public embezzlement scheme in Mississippi history goes all the way to the Governor's Mansion. And two years after the scandal exploded, there's no evidence that those at the highest levels are being held accountable….").

[87] Memorandum at 16-17.

The argument that the defendants' refusals to retract their false and defamatory statements do not provide evidence of actual malice is equally devoid of merit. The Fifth Circuit has repeatedly held that a defendant's failure to retract false and defamatory statements is evidence of actual malice at publication. *National Ass'n of Government Employees, Inc. v. National Fed'n of Federal Employees*, 844 F.2d 216, 221 (5th Cir. 1988); *Golden Bear Distributing Systems of Texas, Inc. v. Chase Revel, Inc.*, 708 F.2d 944, 950 (5th Cir. 1983) (quoting *Restatement (Second) of Torts* § 580A, cmt. D (1977)); *Morgan v. Dun & Bradstreet, Inc.*, 421 F.2d 1241, 1243 (5th Cir. 1970).

The defendants' argument that violations of journalistic professional standards and ethics do not provide evidence of actual malice is similarly wrongheaded. The U.S. Supreme Court has plainly stated that it "cannot be said that evidence concerning care … never bears any relation to the actual malice inquiry." *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 668, 109 S.Ct. 2678, 105 L.Ed.2d 562 (1989). Accordingly, courts routinely allow evidence that reporters have violated journalistic and ethical standards to show actual malice and permit qualified experts to testify. David Elder, Defamation: A Lawyer's Guide § 7:2, *A Subjective Standard* at fns. 87 & 90.10 (Oct. 2023 Update) (citing cases).

E. The Complaint alleges an avalanche of facts in support of the actual malice element of Bryant's defamation and false light claims.

The Complaint alleges at least twenty well-recognized indicators of actual malice, all supported by detailed facts, to support his claims against the defendants. Consider the following:

1. Shad White told Wolfe there was no evidence that Bryant misspent public funds: All defendants accused Bryant of public corruption and criminal conduct despite the state auditor explaining to Wolfe[88] that their claims were unfounded. *Batson v. Time, Inc.*, 298 So. 2d 100 (La. Ct. App. 1st Cir. 1974) (the plaintiff established a genuine issue of material fact concerning a reporter's

[88] Complaint at 38-43.

actual malice by submitting proof that a high-ranking state official investigated the accusation and communicated its meritless nature to the reporter in advance of the publication); *Airlie Foundation, Inc. v. Evening Star Newspaper Co.*, 337 F. Supp. 421 (D. D.C. 1972) (JNOV denied when evidence established that a high-ranking government official told a newspaper editor there was no truth to the story).

2. Bryant and Vanlandingham told Wolfe they did not have a *quid pro quo* agreement: Mississippi Today and Wolfe repeatedly published that Bryant agreed to accept stock in Prevacus in exchange for the assistance he provided the company while governor, despite Bryant and Vanlandingham denying the existence of a *quid pro quo* arrangement and Wolfe having no comment from Favre. *Harte-Hanks*, 491 U.S. at 682-683; *Cape Publications, Inc. v. Adams*, 336 So. 2d 1197, 1199-1200 (Fla. App. 4th Dist. 1976).

3. Wolfe's *quid pro quo* and USM volleyball stadium accusations are not supported by the documents upon which she purported to rely: Mississippi Today and Wolfe repeatedly published that Bryant engaged in an illegal *quid pro quo* arrangement with Prevacus despite knowing Bryant's text messages did not support the accusation. *Young*, 734 F.3d at 547-48; *Doe*, 941 F.2d at 291-92; *Westmoreland*, 596 F. Supp. at 1174; *Nader*, 408 A.2d at 52-54; *Buratt*, 459 So. 2d at 1270-71.

4. The defendants' accusations are inherently improbable: White claimed Bryant misused, squandered, and embezzled $77 million of welfare funds; Ganucheau claimed Bryant steered millions of welfare funds to his family and friends; and Wolfe repeatedly claimed Bryant engaged in an illegal *quid pro quo* arrangement. These claims are "inherently improbable" because (1) Wolfe failed to find a "legal expert" willing to opine that Bryant committed a crime;[89] (2) the state auditor's office investigated and evaluated the welfare scandal for months and concluded Bryant did not misspend

[89] Complaint at 45.

public funds;[90] (3) John Davis, Nancy New, and several others pleaded guilty to state and federal crimes and cooperated with criminal authorities, yet after reviewing all documentary and testimonial evidence no state or federal criminal authority has accused Bryant of wrongdoing; and, (4) MDHS is pursuing a civil suit against numerous individuals and entities seeking to recoup misspent welfare funds, but has not brought a claim against Bryant. *US Dominion, Inc. v. Powell*, 554 F. Supp. 3d 42, 60 (D. D.C. 2021) ("a reasonable juror could conclude that the existence of a vast international conspiracy that is ignored by the government but proven by a spreadsheet on an internet blog is so inherently improbable that only a reckless man would believe it"); *Stern v. Cosby*, 645 F. Supp. 2d 258, 279 (S.D. N.Y. 2009) (accusation that Anna Nicole Smith's former attorney and boyfriend had a homosexual affair was inherently improbable); *Khawar v. Globe Intern., Inc.*, 965 P.2d 696, 710 (Cal. 1998) ("In asserting that Khawar, and not Sirhan, had killed Kennedy, the Morrow book was making the highly improbable claim that the results of the official investigation, Sirhan's trial, and this court's decision on Sirhan's appeal were all fundamentally mistaken").

5. Wolfe's accusations are based on rootless speculation: Wolfe based her statement that Bryant knew about and blessed the misspending of $77 million of welfare funds on the rootless speculation of Carol Burnett, an individual who did not work for MDHS during the Bryant Administration and did not provide Wolfe with first-hand knowledge of relevant events. *Prozeralik*, 626 N.E. 2d at 39-40; *Snowden*, 251 So. 2d at 411.

6. The defendants accused Bryant of directing welfare funding to the USM volleyball stadium project to misdirect public scrutiny away from the role that Ganucheau's mother played in recommending the project to the IHL: Wolfe and Mississippi Today accused Bryant of directing welfare funding to the USM volleyball stadium project to conceal from public scrutiny the

[90] *Id.* at 38-43 (Wolfe-White interview). An abridged version of the interview transcript is found at: https://mississippitoday.org/2022/04/12/shad-white-phil-bryant-welfare-scandal/.

essential role that Ganucheau's mother played in recommending that the Institutes of Higher Learning ("IHL") approve the project. Once another media outlet publicly disclosed her role, Ganucheau misrepresented the scope of her authority and the importance of her recommendation to continue the charade.[91] *Goldfarb v. Channel One Russia*, 663 F. Supp. 3d 280, 309-10 (S.D. N.Y. 2023); *Gazette, Inc. v. Harris*, 325 S.E. 2d 713, 746 (Va. 1985); *Sanborn v. Chronicle Pub. Co.*, 556 P.2d 764, (Cal. 1976) ("The jury could have found that Mongan blamed plaintiff for the loss of the deposited funds, and that Mongan wished to transfer the blame to plaintiff by characterizing plaintiff's efforts as a 'con job,' thereby exculpating himself in the eyes of the press and general public.").

7. The defendants defamed Bryant to impact the upcoming governor's election: The defendants defamed Bryant in the lead-up to the Mississippi governor's election, hoping that their reporting would pull votes away from Governor Tate Reeves' reelection effort.[92] Defamation: A Lawyer's Guide § 7:3, *Common Law Malice and Constitutional "Actual Malice"* at fn. 57 (citing cases).

8. The defendants were motivated by common law malice: The defendants developed a deep-seated hatred of Bryant rooted in their belief that he was "morally corrupt" and should "pay a political price for it."[93] *Id.* at fn. 53-55.

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[91] Complaint at 71-81 (detailing the integral role that Special Assistant Attorney General Stephanie Ganucheau played in recommending that the IHL board approve the USM volleyball stadium project, the reasons why the defendants concealed her involvement, and the several misrepresentations that Adam Ganucheau made in an editor's note attempting to explain why Mississippi Today his mother's involvement).

[92] *See*, e.g., *id.* at 5 (motivated to "influence statewide elections."); at 20 (defendants defamed Bryant "to influence Mississippi politics by sullying former-Governor Bryant's reputation"); at 47 (defendants have sullied Bryant's reputation "to cause him to pay a political price"); at 81 (Mississippi Today a "Democratic SuperPAC"); at 159 (defendants motivated by "potential to influence a governor's election").

[93] *See*, e.g., *id.* at 43-44 (Wolfe told Shows that the FBI and U.S. Attorney's office should hold Bryant "accountable"); at 46 (Wolfe linked her comment that Bryant led a welfare department that "systematically prioritized federal grant spending on pet projects over people" with a quote from Doug Jones, "But it certainly is morally corrupt what they did and people ought to pay a political price for it").

9. The defendants were motivated by financial and professional reasons: Mississippi Today raised nearly $10 million due to Wolfe's false and defamatory narrative and entered several articles for Pulitzer Prize consideration.[94] *Prozeralik*, 626 N.E. 2d at 39-40.

10. The defendants had a preconceived plan to harm Bryant: As evidenced by Wolfe's interviews with State Auditor Shad White and former U.S. Representative Ronnie Shows,[95] the defendants' preconceived plan to destroy Bryant's reputation was formulated well before making the statements giving rise to the claims in the complaint. Defamation: A Lawyer's Guide § 7:3, *Common Law Malice and Constitutional "Actual Malice"* at fn. 69.

11. The defendants had a preconceived view that Bryant should be held accountable: As evidenced by Wolfe's interviews with White, Shows, and Bryant,[96] the defendants had a preconceived view that Bryant should be held accountable for the welfare fraud scandal. *Id.* at fn. 70.

12. The defendants made several prior attempts at deliberate falsification: As evidenced by "The Backchannel"[97] and other publications discussed in the Complaint[98] that preceded the publication of the defamatory remarks giving rise to this action, the defendants made "prior attempts at deliberate falsification or omissions" and "prior attempts to harm" Bryant. *Id.* at fn. 67-68.

13. The defendants knew they would harm Bryant: Given the severity of the accusations, the defendants knew that their remarks would harm Bryant or were heedless of the consequences to Bryant. *Id.* at fn. 65-66.

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[94] *See*, e.g., *id.* at 11, 114.

[95] *Id.* at 38-47.

[96] *Id.* at 47-55.

[97] *Id.* at 55-91, 92-93, 104-08, 113.

[98] See, e.g., *id.* at 93-95 (Ganucheau's editorial), 97-99 (reporting unverified allegations by defendants in the MDHS Action).

14. The defendants made their statements despite Bryant's denial: The defendants published their false and defamatory statements despite Bryant's adamant denial of wrongdoing. David Elder, Defamation: A Lawyer's Guide § 7:17, *Publications After Plaintiff's Denial or Denial by Plaintiff's Superior* (Oct. 2022 Update) ("[S]uch denials, although 'not decisive either way,' are at least evidence to be considered on the issue of constitutional actual malice and may, together with other factors, be highly probative of actual malice.") (citing cases).

15. The defendants' remarks were sensational: The defendants accused Bryant of misusing and squandering "at least $77 million in federal funds," embezzling "at least $77 million in federal funds," giving his "blessing" to $77 million of welfare fund misspending, "steer[ing] the spending of millions of federal welfare dollars … to benefit his family and friends," accepting a stock offer from Prevacus in exchange for assistance provided while governor, and helping Favre "secure welfare funding" for the USM volleyball stadium. These statements were wildly sensational[99] and calculated to generate publicity, fundraising, and professional accolades. *Id.* at fn. 64; *Stern*, 645 F. Supp. 2d at 279 ("Both men, moreover, were key players in the tabloid drama that was Smith's life—Birkhead as the father of one of Smith's children and Stern as her lawyer and companion—and the allegation that they had a sexual relationship was nothing short of explosive. Perhaps too explosive. In other words, printing a claim that Birkhead and Stern had sex would be a way to make it to the top of the bestseller list….").

16. Wolfe's remarks were made in retaliation: Wolfe made her false and defamatory statements regarding purported threats from Bryant to retaliate against him for challenging the

[99] *Id.* at 157-159 (Wolfe's former mentor commenting regarding how disheartening it is to see her engage in baseless sensationalism).

truthfulness of her reporting and filing this lawsuit.[100] Defamation: A Lawyer's Guide § 7:3, *Common Law Malice and Constitutional "Actual Malice"* at fn. 55.

17. The defendants refused to retract their remarks: The defendants refused to retract their false and defamatory statements despite receiving ample notice and requests that they do so.[101] Instead, Ganucheau and Wolfe made numerous misrepresentations during Mississippi Today's podcast, The Other Side,[102] to conceal their wrongdoing and preserve a false appearance of impartiality for themselves and their publication. Adding insult to injury, Ganucheau and Mississippi Today have indignantly attacked this court's thoughtful application of Mississippi law and brazenly attacked the integrity of Mississippi's judiciary in one of the nation's most widely read publications. *National Ass'n of Government Employees, Inc.*, 844 F.2d at 221; *Golden Bear Distributing Systems of Texas, Inc.*, 708 F.2d at 950; *Morgan*, 421 F.2d at 1243.

18. The defendants violated professional and ethical standards: The defendants violated numerous journalistic and ethical standards.[103] David Elder, Defamation: A Lawyer's Guide § 7:2, *A Subjective Standard* at fn. 87 & 90.10.

19. Mississippi Today's stories contained deliberately misleading headlines: Mississippi Today published numerous deliberately misleading headlines as part of a preconceived plan to injure Bryant's reputation.[104] David Elder, Defamation: A Lawyer's Guide § 7:15, *Distorted Headlines as Evidence of "Actual Malice"* (Oct. 2022 Update) (discussing cases).

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[100] *Id.* at 142 (quoting Wolfe linking Bryant's suit and his purported threat to her for continuing to report on this story).

[101] *Id.*, Exhibits 1-16.

[102] *Id.* at 128-131.

[103] *Id.* at 160-169.

[104] *See*, e.g., Anna L. Wolfe, *Mississippi Today Investigation Exposes New Evidence of Phil Bryant's Role in Welfare Scandal*, April 3, 2022, at: https://mississippitoday.org/2022/04/03/phil-bryant-mississippi-welfare-scandal-investigation/; Anna L. Wolfe, *Phil Bryant Had His Sights on a Payout as Welfare Funds Flowed to Brett Favre*, April 4, 2022, at: https://mississippitoday.org/2022/04/04/phil-bryant-brett-favre-welfare-scandal-payout/; Anna L. Wolfe, *"My Governor is Counting on Me": Disgraced Welfare Director Bowed to Phil Bryant's Wishes*, April 7, 2022, at:

20. Mississippi Today's stories were accompanied by artwork and cartoons that conveyed the message that Bryant was corrupt: Mississippi Today published artwork and cartoons that conveyed Bryant was corrupt.[105] *McKimm*, 729 N.E. 2d at 374 (cartoon relevant to actual malice determination); *Newman v. Delahunty*, 293 N.J. Super. 491, 681 A.2d 671 (1994) (cartoon depicting mayor as corrupt relevant to actual malice).

IV. The official proceedings privilege does not apply.

The defendants claim the "official proceedings privilege" immunizes Wolfe from liability because she relied upon filings in the MDHS Action when she published her articles on December 19, 2023, and February 28, 2024.[106] They are wrong. The Southern District has explained that "the official proceedings privilege" protects "publication of defamatory matter concerning another in a report of an official action or proceeding or of a meeting open to the public that deals with a matter of public concern … *if the report is accurate and complete or a fair abridgment of the occurrence reported*… The privilege applies to all reports of 'official action,' *so long as the privilege is not abused by an unfair and inaccurate description of the official action*. That is, so long as the article is a fair and accurate republication of an official report, the article is protected, even if the official report is itself false or inaccurate." *McDonald v. Raycom TV Broadcasting, Inc.*, 665 F. Supp. 2d 688, 690 (S.D. Miss. 2009) (internal quotes omitted)

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https://mississippitoday.org/2022/04/07/mississippi-welfare-john-davis-phil-bryant/; Anna L. Wolfe, *Former Gov. Phil Bryant Helped Brett Favre Secure Welfare Funding for USM Volleyball Stadium, Texts Reveal*, September 13, 2022, at: https://mississippitoday.org/2022/09/13/phil-bryant-brett-favre-welfare/.

[105] Complaint at 56 (artwork bathing Bryant, Davis, and New in red light and sighted by a camera's lens or a rifle's scope); at 92 (artwork depicting Bryant as a master manipulator pulling strings); at 95 (cartoon depicting a mother and child being denied welfare funds and asking, "Then can I at least have some Prevacus stock?"); at 105 (cartoon depicting Bryant and Favre running from "TANF Texts" flying from a hornet's nest); at 106 (cartoon depicting Bryant throwing Favre under a bus bearing the caption, "Texts Released by Phil Bryant"); at 113 (cartoon depicting Bryant and Governor Tate Reeves listening to Santa Clause read from the "DHS TANF Lawsuit" and reveal they are not on "the Naughty List"); at 120 (cartoon conveying that Bryant withheld or destroyed text messages); at 148 (cartoon depicting Bryant as King Kong – who was mortally wounded from aircraft fire in the original story – swatting at an aircraft piloted by Nancy New).

[106] Memorandum at 17-20.

(emphasis added). Courts routinely find that the official proceedings privilege does not apply when the publisher reports matters not found in the official report. *Greenberg v. Spitzer*, 155 A.D. 3d 27, 47-48, 62 N.Y.S. 3d 372 (2nd Dep't 2017); *Snitowsky v. NBC Subsidiary (WMAQ-TV), Inc.*, 696 N.E. 2d 761, 314-15 (Ill. Ct. App. 1st Dist. 1998). Such is the case here.

December 19, 2023: The overall thrust of this article[107] is that Favre's "fellow professional athletes" would not "bite" on investing $25,000 in Prevacus; Favre told Vanlandingham to offer stock to Bryant in exchange for his investing at least $25,000 in Prevacus; and, when Vanlandingham made the offer, "Bryant bit" – meaning, he agreed to invest at least $25,000 of public funds in Prevacus in exchange for stock in the company.

The defendants contend that Mississippi Community Education Center's ("MCEC") counterclaim in the MDHS Action[108] supports Wolfe's defamatory statement. However, MCEC's counterclaim alleges Vanlandingham notified Bryant that he "can offer stock" in Prevacus but does not "know the rules." Bryant responded by proposing a meeting and hosting a dinner.[109] MCEC does not allege that Bryant agreed to invest money in Prevacus in exchange for company stock. Accordingly, the official proceedings privilege does not apply.

February 28, 2024: Wolfe claimed in this article[110] that Bryant agreed to accept an interest in Prevacus while in office, but he was waiting until he left office to consummate the deal. The defendants argue that Jess New's proposed (and ultimately disallowed) third-party complaint in the MDHS action supports Wolfe's claim.[111] New's proposed filing alleges Vanlandingham notified Bryant that he "can

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[107] https://mississippitoday.org/2023/12/19/welfare-funds-ghana-scam-prevacus/.

[108] MDHS Action [MEC Doc. #564].

[109] *Id.* at 52-53; *see also*, Memorandum at 19 (identifying the above-referenced texts).

[110] https://mississippitoday.org/2024/02/28/phil-bryant-texts-withheld-lawsuit/.

[111] Memorandum at 20.

offer stock" in Prevacus but does not "know the rules,"[112] and Bryant responded by proposing a meeting and hosting a dinner.[113] New alleges that Vanlandingham texted Bryant after his term had concluded: "Now that you're unemployed, I'd like to give you a company package for all your help." Bryant replied, "Sounds good. Where would be the best place to meet. I am now going to get on it hard…."[114] New does not allege that Vanlandingham offered stock to Bryant; he does not allege that Bryant accepted a stock offer; and he does not allege that Bryant was waiting until mid-January 2020 "to enter into business with Prevacus." Accordingly, the official proceedings privilege does not apply.

V. The statements made by Wolfe and White are slanderous *per se*.

The defendants claim that White and Wolfe's embezzlement and misspending accusations are not slanderous *per se* because reasonable listeners would not have understood them in a "narrow, legalistic sense."[115] This argument is ridiculous. Slander *per se* is comprised of the following:

> (1) Words imputing the guilt or commission of some criminal offense involving moral turpitude and infamous punishment. (2) Words imputing the existence of some contagious disease. (3) Words imputing unfitness in an officer who holds an office of profit or emolument, either in respect of morals or inability to discharge the duties thereof. (4) Words imputing a want of integrity or capacity, whether mental or pecuniary, in the conduct of a profession, trade or business;" and in this and some other jurisdictions (5) words imputing to a female a want of chastity.

Speed v. Scott, 787 So. 2d 626, 632 (Miss. 2001) (quoting *W.T. Farley, Inc. v. Bufkin*, 159 Miss. 350, 132 So. 86, 87 (1931)). Concerning the first category, the Supreme Court has explained:

> No matter the criminal label, the charge must be a significant one:
>
> > One who publishes a slander that imputes to another conduct constituting a criminal offense is subject to liability to the other without proof of special harm if the offense imputed is of a type which, if committed in the place of publication, would be
> >
> > (a) punishable by imprisonment in a state or federal institution or

[112] MDHS Action [MEC Doc. #679-1 at ¶68].

[113] *Id.* at ¶ ¶ 69, 75.

[114] *Id.* at ¶ ¶ 205-06.

[115] Memorandum at 21.

(b) regarded by public opinion as involving moral turpitude.

Id. at 633 (quoting *Restatement (Second) of Torts* § 571).

Embezzlement of public funds is a crime of moral turpitude that is punishable by imprisonment in a state institution. Miss. Code Ann. § 97-11-31. Embezzlement accusations are uniformly understood to be slanderous *per se*. *See*, e.g., 50 Am. Jur. 2d Libel and Slander § 177, *Embezzlement* (May 2023 Update); David Elder, Defamation: A Lawyer's Guide § 1:16, *Slanderous Imputation of Crime* (Oct. 2022 Update).[116] Similarly, Wolfe's accusation that Bryant knew about and blessed the misspending of $77 million of welfare funds is slanderous *per se*. David Elder, Defamation: A Lawyer's Guide § 1:15, *Slanderous Imputations as to Business, Trade, Office or Profession* (Oct. 2023 Update).

The cases cited by the defendants illustrate the speciousness of their argument. For example, in *CACI Premier Technology, Inc. v. Rhodes*, 536 F.3d 280 (4th Cir. 2008), talk radio host Randi Rhodes made the following remarks during her Air America Radio program addressing the treatment of Iraqi detainees at Abu Ghraib: "[T]he people that are torturing … are not our troops but it's CACI and Titan." *Id.* at 296. The Fourth Circuit analyzed whether Rhodes' "torture" statement was slanderous by looking at dictionary definitions of the term and concluded "a reasonable listener would have understood that Rhodes was not using the word 'torture' in any narrow, legalistic sense but in a broader sense that encompassed the range of severe abuses at Abu Ghraib that had been reported in the media and other sources through photographs and narrative descriptions." *Id.* at 297 (citing *Masson*, 501 U.S. at 515, and noting that a court considers "the meaning a statement conveys to a reasonable reader").

[116] While Mississippi's state and federal courts have not directly addressed whether an embezzlement accusation is slanderous *per se*, they have repeatedly held that theft accusations of even minor amounts are actionable *per se*. *Hobson v. Dolgencorp, LLC*, 142 F. Supp. 3d 487, 491-92 (S.D. Miss. 2015); *Boone v. Wal-Mart Stores, Inc.*, 680 So. 2d 844, 847 (Miss. 1996); *Travis v. Hunt*, 224 Miss. 193, 79 So. 2d 734, 735 (1955). If accusing a private citizen of stealing "minor sundries" is slanderous *per se*, surely accusing a governor of embezzling and intentionally misspending $77 million of public funds is slanderous *per se*.

Applying the "reasonable listener" test here, Merriam-Webster defines "embezzle" as "to appropriate (something, such as property entrusted to one's care) fraudulently to one's own use;"[117] the Cambridge English Dictionary defines "embezzle" as "to secretly take money that is in your care or that belongs to an organization or business you work for;"[118] the Britannica Dictionary defines "embezzle" as "to steal money that you have been trusted with;"[119] and, the Collins English Dictionary explains that "[i]f someone embezzles money that their organization or company has placed in their care, they take it and use it illegally for their own purposes."[120] Merriam-Webster elaborates:

> English is full of verbs that mean "to steal" (such as pilfer, rob, swipe, plunder, filch, and thieve). But when it comes to stealing property (and in this context, money is a kind of property) that has been entrusted to you, *embezzle* wins the prize. The word most often refers to the theft of company or government funds that one has charge of, and embezzlement is, therefore, a hallmark of white-collar crime – that is, crime committed by so-called "white-collar" workers. In the 15th century, around the time that *embezzlement* entered English (the ultimate root is Anglo-French *besiller* "to steal, plunder"), it would have also been possible to say that such plunderers "bezzled" company cash, but *bezzle* is now considered obsolete.

Merriam-Webster defines "blessing" as "approval, encouragement;"[121] the Cambridge English Dictionary defines "blessing" as "approval that someone gives to a plan of action;"[122] the Britannica Dictionary defines "blessing" as "approval that allows or helps you to do something;" and, the Collins English Dictionary explains that "[i]f something is done with someone's blessing, it is done with their approval and support."[123] Any reasonable listener to White and Wolfe's salacious accusations would have understood that they had accused the governor of stealing $77 million of welfare funds and

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[117] www.merriam-webster.com/dictionary/embezzle.

[118] www.dictionary.cambridge.org/us/dictionary/english/embezzle.

[119] www.britannica.com/dictionary/embezzle.

[120] www.collinsdictionary.com/us/dictionary/english/embezzle.

[121] https://www.merriam-webster.com/dictionary/blessing.

[122] https://dictionary.cambridge.org/us/dictionary/english/blessing.

[123] https://www.collinsdictionary.com/us/dictionary/english/blessing.

approving the misappropriation of $77 million of welfare funds. Remarks of this sort are slanderous *per se*, and it is not a close call.

VI. Bryant was not required to plead special damages, but he adequately did so.

The defendants argue that Bryant failed to plead special damages sufficiently.[124] Miss. R. Civ. P. 9(g) provides that "[w]hen items of special damage are claimed, they shall be specifically stated." Fed. R. Civ. P. 9(g) is virtually identical to Miss. R. Civ. P. 9(g). The leading treatise on federal civil procedure explains that "[m]ost courts now take the position that allegations of special damage will be deemed sufficient for the purpose of Rule 9(g) if they are definite enough to notify the opposing party and the court of the nature of the damages and enable the preparation of a responsive pleading. A strict approach to the application of Rule 9(g) has little justification when special damages are sought simply as a supplement to the plaintiff's general damages, as long as the pleading has satisfied the rule's underlying notice function. Additionally, Rule 9(g) merely requires that special damages be 'specifically stated,' not that they be stated 'with particularity' as is required of allegations of fraud and mistake under Rule 9(b) or of denials of conditions precedent under Rule 9(c), a distinction that should be respected as meaningful." Benjamin Spencer, 5A Fed. Prac. & Proc. Civ. § 1311, *Pleading Special Damages – Level of Specificity Required* (4th ed., June 2024 Update); see also, *United States ex rel. Monsour v. Performance Accts. Receivable, LLC*, No. 1:16-cv-38-HSO-JCG, 2018 WL 4682343, at *19 (S.D. Miss. Sept. 28, 2018) (Rule 9(g) does not "require[e] that the plaintiff plead the amount as well as the type of any special damage claim"). The Fifth Circuit has long recognized that "[f]ailure to plead special

[124] Memorandum at 21-22. The defendants also argue that Bryant did not adequately plead slander *per se* claims against White and Wolfe, and as a result, he was required to plead special damages. *Fagan v. Faulkner*, No. 2022-CA-00130-COA, 2023 WL 2884538, at *3 (Miss. Ct. App. Apr. 11, 2023) ("Proof of special damages is not needed for slander *per se* because the law presumes certain types of defamation cause damages from hurt feelings and ruined reputation.") (quoting *Cook v. Wallot*, 172 So. 3d 788, 798 (Miss. Ct. App. 2013), which quoted *McFadden v. United States Fidelity and Guaranty Co.*, 766 So. 2d 20, 23 (Miss. Ct. App. 2000)). In addition, they argue that Bryant cannot recover general damages from White and Wolfe without alleging a viable slander *per se* claim. As previously explained, Bryant adequately pleaded his slander *per se* claims. Therefore, these arguments are meritless.

damages does not bar recovery if the defect can be cured by amendment." *Crosby v. Old Republic Ins. Co.*, 978 F.2d 210, 211 fn. 1 (5th Cir. 1992).

Here, Bryant pleaded his special and general damages with far more specificity than necessary. He alleges special damages arising from losses of existing and prospective clients. David Elder, Defamation: A Lawyer's Guide § 9:3, *Damages – Special Damages* (Oct. 2023 Update) ("Even where not required, plaintiff may, of course, adduce and prove such special damages and hold defendant liable for them… Special damages include such items of specific identifiable losses as lost profits, customers, and referrals, loss of earnings, … [and] future economic losses…."). He alleges general damages arising from losses of "unidentified past and prospective clients, business opportunities, and associated income,"[125] *Id.* at § 9:2, *Damages – General Damages* (Oct. 2023 Update) ("[B]usinesses and businesspersons and professionals … are accorded great flexibility in adducing proof in support of their claim for general damages to their business and/or professional reputations… General damages would include compensation for … evidence of lost referrals or contracts or customers, … or a slump in sales or volume of business… The decisions are quite liberal in allowing such general background testimony even though plaintiff cannot tie the defamatory matter to any specific and identifiable particular losses."), and "impairment of reputation and standing in the local, state, national, and business communities, personal humiliation, mental anguish, suffering, emotional distress, and other recoverable non-economic damages."[126] *Id.* (defamation plaintiff entitled to recover general damages for the listed items). Bryant also demands "punitive damages, attorneys' fees, costs, and pre- and post-judgment interest from all defendants due to the malicious, bad-faith conduct outlined" in the Complaint.[127] *Newson*, 443 So. 2d at 824 (punitive damages available in defamation suit even without

[125] Complaint at ¶ 30.2, 30.3.

[126] *Id.* at ¶ 30.4.

[127] *Id.* at ¶ 30.6.

actual damages awarded by the jury). These allegations exceed the requirements of Rules 8 and 9(g). Accordingly, the defendants' argument should be rejected.

VII. Bryant sufficiently pleaded his false light claims.

The defendants argue that the statements at issue would not be "highly offensive to a reasonable person."[128] The *Restatement (Second) of Torts* explains that the highly offensive element is met "when there is such a major misrepresentation of [the plaintiff's] character, history, activities, or beliefs that serious offense may reasonably be expected to be taken by a reasonable [person] in [such] position that there is a cause of action for invasion of privacy." *Restatement (Second) of Torts* § 652E, cmt. c (1977). Whether a statement would be highly offensive to a reasonable person is a question of fact. *Braun v. Flynt*, 726 F.2d 245, 253 (5th Cir. 1984), *reh'g en banc denied,* 731 F.2d 1205, *cert. denied sub nom.*, *Chic Magazine, Inc. v. Braun,* 469 U.S. 883, 105 S.Ct. 252, 83 L.Ed.2d 189 (1984). The court should make the threshold determination of whether a reasonable person would be highly offended by the false light in which the publication places him. If so, the court should submit the issue to the jury for resolution. *Robb*, 371 So. 3d at 781-82.

Numerous courts have held that public officials satisfied the highly offensive element when accused of public corruption and fiscal mismanagement. *See*, e.g., *Krajewski v. Gusoff*, 53 A.3d 793, 809 (Pa. Super. Ct. 2012); *Chiaravallo v. Middletown Transit District*, 561 F. Supp. 3d 257, 291-92 (D. Conn. 2021); *Kainrath v. Grider*, 115 N.E. 3d 1224, 1238 (Ill. Ct. App. 1st Dist. 2018); *Corey v. Pierce County*, 225 P.3d 367, 373 (Wash. App. Div. 1 2010), *review denied*, 245 P.3d 775 (Wash. 2010); *Haggerty v. Globe Newspaper Co.*, 419 N.E. 2d 844, 845-46 (Mass. 1981). Here, the defendants have accused Bryant of misusing and squandering "at least $77 million in federal funds," embezzling "at least $77 million in

[128] Memorandum at 22-23. The defendants also argue that Bryant's false light claims should fail for the same reasons his defamation claims should fail. Bryant adopts his earlier arguments concerning the viability of his defamation claims in response.

federal funds," giving his "blessing" to $77 million of welfare fund misspending, "steer[ing] the spending of millions of federal welfare dollars … to benefit his family and friends," accepting a stock offer from Prevacus in exchange for assistance provided while governor, and helping Favre "secure welfare funding" for the USM volleyball stadium. It cannot be reasonably contested that these accusations would be "highly offensive" to a reasonable person. Accordingly, the defendants' argument must be rejected.

VIII. Mrs. Bryant has alleged a viable loss of consortium claim.

Short shrift can be made of the argument that Mrs. Bryant has not alleged a viable loss of consortium claim because she does not claim "that a single statement at issue in the complaint is 'clearly directed toward' her."[129] Courts widely recognize that loss of consortium claims may be alleged when a spouse has been defamed. *See*, e.g., *Crowley v. North American Telecommunications Ass'n*, 691 A.2d 1169, 1175 (D.C. 1997); *Maurice v. Snell*, 632 So. 2d 393, 396 (La. Ct. App. 4th Cir. 1994); *Exxon Corp., USA v. Schoene*, 508 A.2d 142, 148 (Md. Ct. App. 1986); *Hudnall v. Sellner*, 800 F.2d 377, 383 (4th Cir. 1986); *Roche v. Egan*, 433 A.2d 757, 765 (Me. 1981). The defendants' argument should be rejected.

IX. Bryant's respondeat superior and injunctive relief claims are viable.

The defendants argue Bryant's injunctive relief claim should be dismissed because he "has failed to show a likelihood of success on the merits."[130] The *Restatement (Second) of Torts* provides that "[w]hen it has been formally determined by a court that a statement is both defamatory and the defendant persists in continuing to publish it, a carefully worded injunction might meet the need and be available against further publication of the statement that has already been determined by the court

[129] Memorandum at 24-25.

[130] *Id.* at 25. The defendants also argue that Bryant's respondeat superior claim should be dismissed because he "failed to state a claim against Wolfe, White, or Ganucheau" on his underlying claims. Bryant adopts his earlier arguments regarding the viability of his underlying claims.

to be false and defamatory." *Restatement (Second) of Torts* § 623, *Special Note on Remedies for Defamation Other Than Damages*, 329 (1977). Numerous courts have issued injunctions when plaintiffs have proven their defamation claims. David Elder, Defamation: A Lawyer's Guide § 9:9, *Injunctive Relief* fns. 8 & 8.10 (Oct. 2023 Update) (citing cases). The Bryants will file a motion for injunctive relief and request a decision at the appropriate time. The defendants' argument is premature unless and until that occurs. It should, therefore, be rejected.

CONCLUSION

This court should deny the present motion and sanction the defendants under Rule 11(b) and the Mississippi Litigation Accountability Act for asserting frivolous arguments without substantial justification for the purpose of delay.

RESPECTFULLY SUBMITTED, on this the __ day of July, 2024.

By: /s/ William M. Quin II

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CERTIFICATE OF SERVICE

I hereby certify that on this day I electronically filed the preceding pleading or other paper with the Clerk of the Court using the MEC system, which sent notification of such filing to all counsel of record in this proceeding.

This is the ___ day of July, 2024.

/s/ William M. Quin II