IN THE SUPREME COURT OF MISSISSIPPI

No. 2007-IA-01458-SCT

**INVESTOR RESOURCE SERVICES, INC.,
A FLORIDA CORPORATION;
BARBARA ARCHULETTA MORELLI,
and THE ESTATE OF BERNECE RIGIROZZI,** **APPELLANTS**

VS.

**MARVIN CATO, CHARLES CATO,
LAVERNE CATO, and RAINBOW
ENTERTAINMENT, INC.** **APPELLEES**

ON INTERLOCUTORY APPEAL FROM THE CIRCUIT COURT OF WASHINGTON COUNTY, MISSISSIPPI (Civ. Action No. CI-2004-251)

APPELLANTS' REPLY BRIEF

ORAL ARGUMENT REQUESTED

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Introduction

A. The Context of the Expert Witness Controversy

At the time that the Minority Shareholders, Plaintiffs below and Appellants here, filed their original Complaint in Intervention, they were aware that their corporation, Rainbow Entertainment, Inc. ("Rainbow"), had received millions of dollars of payments from Greenville Riverboat , LLC in profit distributions from the operation of the Lighthouse Point Casino in Greenville. The Minority Shareholders also knew that they had been paid only a pittance of those distributions. The dominant (and for most of Rainbow's history, only) members of the Board of Directors, Marvin Cato, his wife Laverne, and their adult son Charles, refused to respond to inquiries about the financial affairs of the corporation.

The Minority Shareholders served a First Amended Complaint by leave of Court, and commenced discovery against the three Catos and Rainbow. They obtained boxes of checks and invoices but no general ledgers. But, largely as a result of painstaking study

of those documents by Dr. Glenda B. Glover, Ph.D, an attorney and Certified Public Accountant, the true history of Rainbow's finances came to light.

It was not a pretty picture. From 2001 until March, 2007, Greenville Riverboat has generated positive earnings, resulting in fairly regular distributions (generally paid monthly) to Rainbow in respect of its 20% interest in the range of $2 million per year. Receipt of these reserves requires no on-going management activity on the part of Rainbow, which is, by the terms of the Greenville Riverboat LLC Agreement, required to be an inactive member of that company.

Greenville Riverboat has paid Rainbow at least $12.1 million in distributions between January, 2001 and December 2006. R. 341, 346-48, R.E. Tab 5. Rainbow has declared and paid dividends of just under $2 million, of which Charles and Marvin Cato received approximately $1.15 million due to their ownership of 60% of Rainbow stock. During that period of time, then, Rainbow received income of over $9 million beyond the distributions to the shareholders. R. 341, R.E. Tab 5.

Almost all of that $9 million was paid for or on behalf of Marvin and Charles Cato, in the form of salaries for positions that required no work, repayments of purported loans with no record of funds being advanced to the company, payments for corporate jet travel, corporate vehicles, a skybox at the Tampa Bay Buccaneers' stadium, club memberships, and other similar expenses. R.E. Tab 5.

Dr. Glover detailed these facts in a report which analyzed Rainbow's payments to and for the Marvin and Charles Cato in the context of the claims pled in the First Amended Complaint. That pleading sought, in the first instance, reimbursement of funds paid by Rainbow that constituted "directors' self interested transactions" under the

Mississippi Business Corporation Act ("the Act"). A second set of claims sought damages for fraud and misrepresentation, based on false statements made to the Minority Shareholders to induce them to invest in Rainbow. Those misrepresentations included statements to potential investors (a) that the corporation would be a passive investor in Greenville Riverboat LLC; (b) that no salaries would be paid, with the directors and officers being compensated through their dividend distributions.

Given Dr. Glover's detailed and persuasive analysis, it was to be expected that the Catos and Rainbow would seek to exclude her testimony under Miss.R.Evid. 702 and *Miss. Transp. Comm'n v. McLemore*, 863 So. 2d 31, 38 (Miss. 2003). The Circuit Court granted the motion to exclude Dr. Glover's testimony on two grounds: first, that she did not understand the nature and procedure of derivative shareholder suits; and second, that by letting her certification as a CPA lapse, Dr. Glover was not qualified as an expert. This appeal followed.

B. In Their Brief, Rainbow and the Catos Have Not Responded to the Minority Shareholders' Arguments or Authorities.

The brief submitted by the defendants, the Catos and Rainbow, Appellees in this interlocutory appeal, fails on several grounds to respond to that filed by the Minority Shareholders. The more egregious (but by no means the only) such lapses include the following:

First, at least one third of the Brief of Appellees (Appellees Brief at 3-11) is devoted to a discussion of general principles governing Miss.R.Evid. 702 which are not at issue here.

Second, Rainbow and the Catos fail to cite, discuss, or distinguish *Watts v. Lawrence*, 703 So. 2d 236, 238-39 (Miss. 1997), in which this Court expressly held that

an expert witness who is not certified to practice his or her profession in Mississippi is not thereby unqualified under Rule 702. Likewise, they make no mention of the fact that Dr. Glover's CPA certification has been restored; she is now in good standing once again. R. 652-53, Appellants' Record Excerpts at Tabs 6 and 7.

Third, they make no response to the Minority Shareholders' argument that, at a minimum, Dr. Glover should be allowed to testify to the work she performed in taking the boxes of cancelled checks, invoices, receipts and tax returns produced in discovery by Rainbow, and creating summaries, schedules, and a general ledger of those documents. As the Minority Shareholders have repeatedly demonstrated, the admissibility of Dr. Glover's testimony on these matters does not turn on her status as a CPA. *See Funderburk v. Johnson*, 935 So. 2d 1084, 1107-08 (Miss. Ct. App. 2006); *Gulley v. State*, 779 So. 2d 1140 (Miss. Ct. App. 2001).

Fourth, Rainbow and the Catos rely on the internet encyclopedia "Wikipedia" to define the parameters of a shareholders' derivative suit, and fail to cite (much less distinguish) the Mississippi cases cited by the Minority Shareholders that govern the damages allowable when shareholders of a closely held company bring such an action. *Derouen v. Murray*, 604 So. 2d 1086, 1091 n.2 (Miss. 1992) ("in the case of a closely held corporation . . . the court in its discretion may treat an action raising derivative claims as a direct action, exempt it from those restrictions and defenses applicable only to derivative actions, and order an individual recovery"); *Era Franchise Systems, Inc. v. Mathis*, 931 So. 2d 1278, 1281 (Miss. 2006) (same). *See also Fought v. Morris*, 543 So. 2d 167 (Miss. 1989) (establishing that majority shareholder's actions in a close corporation must be "intrinsically fair" to minority shareholders).

Fifth, they fail to acknowledge that the First Amended Complaint in Intervention pleads, in addition to derivative claims, direct claims against the Cato Defendants for fraud and misrepresentation. Likewise, they do not cite, discuss, or distinguish *Nichols v. Tri-State Brick and Title Co., Inc.*, 608 So. 2d 324, 329-30 (Miss. 1992), which authorizes an award of damages to individual investors for breach of representations to them by the corporation or its management.

These failures are fatal to the arguments of Rainbow and the Catos. They have offered no response or rebuttal to the central authorities cited by the Minority Shareholders, and for good reason: those authorities cannot be distinguished, and faithful adherence to them would dictate that the Circuit Court's order be vacated.

LAW AND ARGUMENT

A. The Claims in the Complaint in Intervention

The Minority Shareholders seek money damages and other relief with respect to the injuries perpetrated upon Rainbow (the nominal corporate defendant) by the three Catos. In their First Amended Complaint, filed by leave of the Circuit Court on March 6, 2006 (R. 5), the named Plaintiffs, on behalf of all minority shareholders of Rainbow asserted both derivative claims on behalf of Rainbow as well as direct claims on behalf of the Minority Shareholders individually. Marvin and Charles Cato own approximately 60% of the shares of Rainbow's stock; Marvin, Laverne and Charles Cato have, with a few brief and minor exceptions, served as the only directors and officers of Rainbow since it was incorporated in 1993. Marvin and Laverne Cato are husband and wife; Charles Cato is their adult son.

1. ***Self-Dealing Transactions.*** One set of claims involves self-dealing transactions between Rainbow and Charles and Marvin Cato, or the conferring of improper financial benefits upon one or more of the Catos at the expense of Rainbow. Because the Marvin, Laverne, and Charles Cato were, at all times, the majority and/or the only directors of Rainbow, any transaction between them and/or their affiliated companies and Rainbow would be a "director's conflicting interest transaction" under the Mississippi Business Corporation Act. Miss. Code Ann.§§ 79-4-8.60 *et seq.* Also, under *Fought v. Morris*, 543 So. 2d 167 (Miss. 1989), the majority shareholders' actions in a close corporation must be "intrinsically fair" to minority shareholders.

As discussed above, under Mississippi law, where an action is brought with respect to a closely-held corporation like Rainbow, damages can be awarded directly to the Minority Shareholders. *Derouen v. Murray*, 604 So. 2d 1086, 1091 n.2 (Miss. 1992); *Era Franchise Systems, Inc. v. Mathis*, 931 So. 2d 1278, 1281 (Miss. 2006).

2. ***Fraud Claims.*** The First Amended Complaint also pleads two separate categories of fraud claims. It is well established Mississippi law that these are claims that may be brought directly by the shareholders against Rainbow and the Catos.

First, the Minority Shareholders allege that the Defendants made promises or representations about Defendants' future conduct which they had no present intention to perform. *Crystal Springs Ins. Agency, Inc. v. Commercial Union Ins. Co.*, 554 So. 2d 884, 886 (Miss. 1989) (fraud claim may be based on a representation of future conduct "made with the present undisclosed intention of not performing it"). This Court has expressly

applied this principle to the promises of a corporation to current or future investors. *Nichols v. Tri-State Brick and Tile Co., Inc.*, 608 So. 2d 324, 329-30 (Miss. 1992).

Second, the First Amended Complaint pleads a claim under the law of "fraudulent concealment," *Marrone Company v. Barbour*, 241 F.Supp.2d 683, 688 n.9 (S.D. Miss. 2002), *citing Davidson v. Rogers*, 431 So. 2d 483, 485 (Miss. 1983), or "failure to disclose material facts," *Blackwell v. Metropolitan Life Ins. Co.*, 190 F. Supp. 2d 911, 915 (S.D. Miss. 2001), *citing Spragins v. Sunburst Bank*, 605 So. 2d 777, 780 (Miss. 1992), and *Mississippi Bar v. Mathis*, 620 So. 2d 1213 (Miss. 1993).

In the case of either of these fraud claims, the damages would be assessed on behalf of, and awarded directly to, the shareholders – not to the corporation.

These claims are the important context for determining whether Dr. Glover's expert testimony is admissible under Rule 702 and *McLemore*.

B. The Expert Designation and Report

In this Court, Rainbow and the Catos continue their tactic of mischaracterizing the fields in which Dr. Glover was offered as an expert. They were successful in misdirecting the Circuit Court, which held that "Ms. Glover lacks sufficient education, experience, or training in the area of derivative actions." R. 629, R.E. Tab 3 at 2.

The Minority Shareholders never tendered Dr. Glover as an expert in "derivative actions." Instead, she was designated as an expert in two areas:

(1) the duties owed by the directors, officers, and majority shareholders of a closely held corporation to the corporation's Minority Shareholders, and

(2) the damages suffered by the corporation and its Minority Shareholders as a result of the Cato Defendants' breaches of said duties, and also as a result of fraudulent

misrepresentations made by the Cato Defendants to the Minority Shareholders. R. 324-25; R.E. Tab 5.

Additionally, Dr. Glover's testimony would authenticate the summaries and schedules she prepared from the voluminous financial records, including cancelled checks, invoices, receipts and tax returns produced by Rainbow, its banks, and its vendors. R. 344-391, R.E. Tab 5. Rainbow admitted, in response to a series of Rule 36 Requests, that these documents were authentic. R. 408-19.

Dr. Glover's summaries and schedules were necessary because, despite extensive discovery requests, Rainbow did not produce any general ledgers or check ledgers which would have served to summarize the transactions made by Rainbow, and because the financial statements by Rainbow's accountants did not describe the underlying transactions with specificity.

The methodology used by Dr. Glover in reaching her opinions was that provided by the Act. For each set of transactions that would be considered "directors' conflicting interest transactions," Dr. Glover studied whether (a) the transactions were, in fact, approved by a majority of disinterested directors taken in the manner required by the Act, (b) the transactions were, in fact, approved by a majority of disinterested shareholders taken in the prescribed manner, or (c) the transactions, judged according to the circumstances at the time of commitment, were established to have been fair to the corporation.

Under this test, because Marvin and Charles Cato, as officers and/or directors of Rainbow, caused the company to disburse money to themselves, or to their benefit, without the approval of non-interested officers or directors, they bear the burden of proof

that the disbursements are "intrinsically fair" to the company. So, for example, when Dr. Glover reports that large cash disbursements were made "with no explanation," R. 328, R.E. Tab 5, that is a sufficient basis under the Act for a conclusion that the disbursements were improper.

Indeed, the expert proffered by Rainbow and the Catos at the *McLemore* hearing, Professor Barbara Aldave from the University of Oregon, acknowledged that these provisions, which mirror those of the Model Business Corporation Act that she helped draft, place the burden of proof on the Catos to justify payments made by Rainbow to themselves or related parties (or payments made on behalf of the Catos), if those payments were not approved by two or more disinterested directors or a majority of disinterested shareholders. R. 426-28, 441-42, 451-53.

Thus, Professor Aldave expert agreed that in the absence of (1) proof that any "directors' self-interested transactions" were approved by a majority of disinterested directors or shareholders, or (2) any justification for payments to or on behalf of Marvin Cato or Charles Cato, those transactions are improper under the Act.

In this connection, Rainbow and the Catos continue to complain that Dr. Glover did not account for all of the directors of the corporation. Appellees' Br. at 20. This point is specious. Dr. Glover acknowledged in her deposition that some other persons were named in the minutes as directors. But as she explained, most of these persons appeared at one or, at most, a few Board meetings, without any other indication of how they were elected to the Board (in the case of some minutes, it is not even clear that the non-Cato attendees are serving as directors). R. 282. The three Catos have always had a controlling vote in Rainbow's Board of Directors. And ever since Rainbow started

receiving payments from the earnings of the Lighthouse Point Casino, the three Catos have been the only members of the Board. *Id.*

More importantly, none of the self-dealing transactions between Rainbow and the Catos have ever been approved by a majority (but at least two) disinterested directors as required by the Act.

Try as they might, Rainbow and the Catos cannot show any infirmity in either the facts relied upon by Dr. Glover or the methodology employed by her. The facts were supplied by Rainbow itself, and the methodology was reaffirmed by Professor Aldave, the expert retained by rainbow and the Catos. That, in and of itself, establishes the reliability of Dr. Glover's expert testimony under Rule 702. "Absent other grounds to exclude, an expert's testimony is presumptively admissible when relevant and reliable." *Poole v. Avara*, 908 So. 2d 716, 724 (Miss. 2005).

C. The Circuit Court's Order

Contrary to the "shotgun" attack employed in the Brief of Appellees, the Circuit Court gave only two reasons for granting the motion *in limine* and excluding Dr. Glover's testimony: (1) that Dr. Glover was not an expert in "derivative actions" and that her report "demonstrates a failure to understand how damages in a derivative action are calculated" and (2) that Dr. Glover was no longer certified as a CPA and therefore allowing her testimony "would be allowing her to commit a crime . . . [t]he Court cannot accept expert opinion testimony rendered in violation of the laws of this State." R. 628-30, R.E. Tab 3.

1. The Court's "Expert on Derivative Actions" Rationale Was An Abuse of Discretion.

The Minority Shareholders accept that the standard of review in this case requires a showing that the Circuit Court abused its discretion or committed legal error. But the Circuit Court's rationale that Dr. Glover was not an "expert on derivative actions" and "did not understand how damages in a derivative action are calculated" requires reversal under either standard.

First of all, Dr. Glover was not tendered as an "expert in derivative actions." Her report described the duties of corporate officers and directors and calculated damages to Minority Shareholders and the corporation suffered by the breach of those duties.

The "damages allowed in derivative actions" is a question of law, not fact. Thus, the applicability of her s testimony to the jury's consideration of the damages, if any, to be awarded to the Minority Shareholders or to Rainbow as a corporation, would be a subject for the Court's instructions at the close of the case. Dr. Glover's expert testimony establishes the factual basis for such damages, not their legal cognizability.

This is borne out by the specific attacks made by Rainbow and the Catos. They claim that Dr. Glover ignored the general rule that damages in shareholder derivative actions are awarded to the corporation, not to the shareholders individually. Appellees' Br. at 20-22.

But in doing so, they gloss over the fact that Dr. Glover's Final Report explicitly discusses "the damages suffered by Rainbow Entertainment, Inc. . . . and the Minority Shareholders," R. 324, R.E. Tab 5; "the nature and extent of damages incurred by Rainbow Entertainment, Inc. and its Minority Shareholders, R. 325, R.E. Tab 5.

To be sure, Rainbow and the Catos claim that this is a modification not found in the original report. But Dr. Glover's June 2007 report is a supplementation of discovery permitted under Miss.R.Civ.P. 26(f)(1)(B); the report as supplemented, not the original report, is the proper focus of the Court's inquiry. *See Square D Co. v. Edwards*, 419 So. 2d 1327, 1328-29 (Miss. 1982) (reviewing supplemented expert discovery to determine admissibility).

And in any event, as previously discussed, Mississippi law explicitly allows the Court to award damages directly to the minority shareholders of a closely-held corporation like Rainbow. *Derouen v. Murray*, 604 So. 2d 1086, 1091 n.2 (Miss. 1992); *Era Franchise Systems, Inc. v. Mathis*, 931 So. 2d 1278, 1281 (Miss. 2006). How can Dr. Glover be excluded for "lack of understanding of derivative actions" when this Court has itself approved damages paid directly to Minority Shareholders of a close corporation in such actions?

Additionally, the First Amended Complaint also pleads two separate categories of fraud claims that may be brought directly by the shareholders against Rainbow and the Catos. *See, e.g., Nichols v. Tri-State Brick and Tile Co., Inc.*, 608 So. 2d 324, 329-30 (Miss. 1992). Damages for these torts would be awarded to the persons defrauded; that is, the Minority Shareholders individually.

The Brief of Appellees does not even attempt to distinguish these authorities. Dr. Glover's methodology follows Mississippi law. She cannot be excluded as an expert for her "lack of understanding of derivative actions."

2. Dr. Glover's Lapse of CPA Certification.

Likewise, the Brief of Appellees makes no effort to distinguish *Watts v. Lawrence*, 703 So. 2d 236 (Miss. 1997), which is directly contrary to the Circuit Court's reasoning.

Watts controls on these issues: (1) that the lapse in Dr. Glover's CPA registration does not disqualify her as an expert witness, and (2) that Dr. Glover may testify, whether or not she currently holds a license, without being subject to criminal sanctions under Miss. Code Ann. §§ 73-33-1 and 13 (1972). The Circuit Court's ruling that Dr. Glover was excluded as an expert witness because she is no longer actively licensed as a CPA must be reversed under *Watts*.[1]

Additionally, Dr. Glover need not be accepted as an expert to authenticate her summaries and schedules. *See Funderburk v. Johnson*, 935 So. 2d 1084, 1107-08 (Miss. Ct. App. 2006); *Gulley v. State*, 779 So. 2d 1140 (Miss. Ct. App. 2001).

Moreover, Dr. Glover's certification as a CPA in "Goodstanding" has been reinstated in both Mississippi and Tennessee. R. 652-53; R.E. Tabs 6 and 7. This was easily done, because her lapse was a technical one, and was not the result of any misconduct or disciplinary proceedings. The Brief of Appellees ignores this re-certification.

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[1] It should be noted that *Watts* was cited to the Circuit Court in the Minority Shareholders' Motion to Reconsider. This was necessary because the lapse in Dr. Glover's CPA certification was not presented in the motion to exclude her testimony, R. 136; instead, it came out at the hearing. R. 575-627. Although this Court expressly allowed the Minority Shareholders to proceed in the Circuit Court on the Motion for Reconsideration, the lower court ruled that "[t]he Mississippi Rules of Civil Procedure do not recognize a 'Motion to Reconsider' or a 'Motion for Reconsideration.'" R. 654, R.E. Tab 4. On the contrary, however, Rule 54(b) clearly provides that any interlocutory order is "subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all of the parties."

3. Appellees' "Red Herrings" Can Be Ignored.

The remaining arguments presented to this Court by Rainbow and the Catos are classic "red herrings" that were not relied upon by the Circuit Court and have no factual support. Three of these many misdirected arguments are worthy of note, although they have been anticipated and debunked in the Minority Shareholders' principal brief:

a) Representations that Rainbow would be a passive investment company and would pay no salaries. Appellees again claim that Dr. Glover "relied on the Private Placement Memorandum" to support the argument that the Cato Defendants misled investors about Rainbow's corporate purposes and business plan. Dr. Glover stated that (1) the Catos represented to investors that no officer or director would be paid a salary, but instead all investors would be paid only through dividend distributions; (2) the basis for this representation was the Catos' concession that they had no special expertise in gaming management and would have to hire a management company, or partner with an existing gaming entity, to own a casino; and (3) that Rainbow would be a passive investor in the casino to be operated in Greenville.

These representations were evidenced by a Private Placement Memorandum circulated by the Catos in 1993, R. 35, but were also the subject of oral representations made by them to prospective investors after the Private Placement memorandum offering had expired.

As Dr. Glover explained,

> Payments were made for salaries for Charles Cato and Marvin Cato, notwithstanding the fact that, **according to the sworn testimony of the Minority Shareholders**, the Catos promised that no salary payments would be made by Charles Cato or Marvin Cato. These oral promises were consistent with the terms of the Private Placement Memorandum, written by the Catos to solicit investments.

> At page 37 of the Memorandum, it specifically states, "It is not anticipated that any principal officer will receive a salary or other compensation from the Company, other than dividends . . ." This is particularly significant inasmuch as the Private Placement Memorandum also states on page 9, that the "Company officers and directors . . . have no experience in managing casinos, hotels, or restaurants." It is therefore outlandish that Charles Cato and Marvin Cato paid such substantial amounts of the shareholders' money to themselves as salaries knowing that they lacked the expertise or knowledge of the very job they were paying themselves to perform.

R. 329, R.E. Tab 5 (emphasis added).

In her deposition, Dr. Glover identified the "sworn testimony of the Minority Shareholders" discussed above as the deposition testimony of Frank Morelli and Charles Arnold. R. 283-84. That testimony clearly states that Charles Cato made the same oral representations to prospective shareholders – that no salaries would be paid to officers – as were set forth in writing in the Private Placement Memorandum. R. 471, 511 (Charles Arnold); R. 556 (Frank Morelli). They were also told that, if they committed resources to saving Rainbow's lease, that Rainbow would be a passive investment company only and would not seek other business. R. 508 (Arnold); R. 545-46 (Morelli).[2]

Dr. Glover also pointed out that the factual representations in the Private Placement Memorandum about the Cato Defendants' lack of experience to operate a casino, if true when made in 1993, would not have been any less true simply because the offering had expired. R. 272; 274; 280; 294-95.

These representations are relevant to two separate opinions rendered by Dr. Glover. First, she concluded that the salaries to Charles Cato ($120,000 annually, increased recently by a Board consisting only of the Catos, to $180,000 annually) and

[2] Professor Aldave also recognized that Mr. Morelli and Mr. Arnold alleged that they had received oral representations similar to those made in the Private Placement Memorandum. R. 433.

Marvin Cato ($96,000 annually, increased to an amount that none of the Catos claimed to know) are excessive in relationship to the duties they have performed as officers of Rainbow. R. 329, R.E. Tab 5.

Second, Rainbow's financial records show a pattern of expenditures for automobiles, travel, and entertainment that are clearly excessive in light of the representations made to investors about Rainbow's actual business activities. Dr. Glover's report details expenditures in excess of $1 million on private air charters alone, in addition to a sky box at Raymond James Stadium (home of the Tampa Bay Buccaneers and various bowl games, including the most recent Super Bowl), company cars, and other expenses for which neither Rainbow or the Catos have suggested any colorable corporate justification. R. 331, R.E. Tab 5. In addition, Rainbow's bank records reflect hundreds of thousands of dollars in checks made payable to cash. Rainbow and the Catos have produced no records to justify these transactions. Nor is there any proof that they were approved by a majority of disinterested directors or a majority of the disinterested shareholders. Thus, Dr. Glover's report correctly considers these expenses to be unjustified and unapproved.

b) The "loan repayments." Dr. Glover found that $3.1 million in disbursements to the Cato Defendants as of December 31, 2004, designated as "loan repayments" had no basis in fact, in that there is no evidence that Marvin, Laverne or Charles Cato ever invested such sums into the corporation. The Brief of Appellees argues that Rainbow was allowed to repay loans made to it by the Cato Defendants. But this is an entirely different (and irrelevant) point.

c) Corporate Taxes. As in the Circuit Court, Rainbow and the Catos argue here that Dr. Glover's report did not take into account the fact that, if Rainbow had not treated the payments to and/or on behalf of the Catos as corporate expenses, it would have had to declare additional income on its corporate tax returns, resulting in tax liabilities. But Rainbow and the Catos have not, either in the Circuit Court or here, cited any legal authority that such calculations are required in the computation of damages in a shareholders' derivative suit or a fraud/misrepresentation case. in support of this proposition. There is a good reason for the lack of authority: the argument is absurd on its face. If the jury in this case finds that the Catos must repay Rainbow the amounts spent in directors' self-dealing transactions, and a judgment to recoup those expenses is actually satisfied, then the corporation can (and must) decide whether any of its prior tax returns must be amended. It defies reason to suggest that the offending officers should get the benefit of what they contend would otherwise have gone to pay taxes.

In any event, such an argument is classic inquiry on cross-examination, not a grounds to exclude testimony under Rule 702.

d) Circuit Court Lack of Reliance. The Circuit Court disregarded these "red herrings," and for the reasons set forth above, this Court should do likewise.

CONCLUSION

Dr. Glenda Glover is a Ph.D., has earned a law degree and is Dean of the Business School at Jackson State University. She was for an extended period of time, and is now again, a Certified Public Accountant certified in Mississippi and Tennessee. In this case, she relied upon documents provided by Rainbow, and undertook the exact analysis suggested by the Mississippi Business Corporation Act and this Court's cases on closely held corporations. She is also the testimonial sponsor of summaries of voluminous

documents which, if admitted into evidence, will be of great benefit to the jury in this case. It was manifest error for the Circuit Court to exclude Dr. Glover's testimony under Rule 702. This Court should vacate the *in limine* order, and remand this case for further proceedings.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, James W. Craig, do hereby certify that I have this day served a true and correct copy of the above and foregoing by United States Mail, postage prepaid, to the following:

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