IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

NO. 2015-CA-01596

T. L. WALLACE CONSTRUCTION INC.
THOMAS WALLACE AND JANETTE WALLACE **APPELLANTS**

VS.

MCARTHUR THAMES SLAY AND DEWS, PLLC **APPELLEE**

On Appeal from the Circuit Court
of Marion County, Mississippi
(Civil Action No. 2013-0006(M)

BRIEF OF APPELLANTS T. L. WALLACE CONSTRUCTION INC., THOMAS WALLACE AND JANETTE WALLACE

ORAL ARGUMENT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons or entities have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. T. L. Wallace Construction Inc., Appellant;
2. Thomas L. Wallace, Appellant;
3. Janette Wallace, Appellant;
4. McArthur Thames Slay and Dews, PLLC. Appellee; and
5. Honorable Anthony A. Mozingo, presiding Circuit Court Judge

So certified, this the 16th day of June, 2016.

s/J. Stephen Kennedy
J. Stephen Kennedy (MS Bar #100040)

STATEMENT REGARDING ORAL ARGUMENT

Although a straightforward application of Mississippi law demands reversal of the trial court's judgment below, the appellee has cross-appealed a number of non-dispositive, discovery issues. Oral argument would assist the Court in understanding the factual contexts underpinning the trial court's refusal to order certain discovery and will allow the Court to affirm those rulings and to remand the case for immediate trial.

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STATEMENT OF ASSIGNMENT

Application of well-settled Mississippi law mandates the reversal of the trial court's judgment dismissing this auditing malpractice claim. The trial court's erroneous opinion that expert testimony is necessary to prove causation in all malpractice cases, if left to stand, would have significant and sweeping consequences on every type of professional malpractice claim. Given the potential impact of this appeal on the jurisprudence of the State, the Mississippi Supreme Court should decide the issue.

STATEMENT OF THE ISSUES

1. Does Mississippi law require expert testimony on causation in auditing malpractice cases?

2. If not, did the trial court err in finding that there was no genuine issue of material fact as to causation and granting summary judgment against T. L. Wallace Construction Inc., Thomas L. Wallace, and Janette Wallace where the company's sole shareholder, Mr. Wallace, testified that he would have retaken control of the company and stopped the ongoing fraud and theft committed by his company's management had his auditors informed him or the company's board of directors of the existence of the many significant discrepancies in the company's financials?

3. Did the trial court err in excluding Ralph Summerford's expert causation testimony?

INTRODUCTION

McArthur, Thames, Slay, and Dews, PLLC ("MTSD") negligently audited the financial statements of T. L. Wallace Construction Inc. ("Wallace Construction") for years, thereby allowing millions of dollars of employee theft and fraud to go unnoticed by the company's sole stockholder and board of directors. As a result, Mr. Thomas L. Wallace and his wife, Janette Wallace, lost their company, farm, and life savings. The couple sued MTSD for failing to perform even the most basic duties for which they were hired and paid.

In support of their auditing malpractice claim against MTSD, the Wallaces offered expert testimony on the auditing standard of care, MTSD's breach of that standard, and the resulting damages, which the trial court found "relevant and reliable." The Wallaces also offered Ralph Summerford's expert opinions that the breach was the cause in fact of damages suffered by the Wallaces and that there were no other superseding causes. Mr. Summerford's causation opinions, like the damages opinions the trial court found reliable, were based in part on Mr. Wallace's testimony that, had MTSD notified him of the internal theft and fraud, he would have naturally put an end to it.

The trial court erroneously excluded Summerford's causation opinions because it questioned whether *all* of the Wallaces' damages were caused by MTSD. Then, taking the position that expert testimony was required to prove causation, the trial court further erred by denying the Wallaces any relief whatsoever and dismissing their case in its entirety. But well-settled Mississippi law makes plain that the testimony of Mr. Wallace, standing alone, was sufficient to create a genuine issue of material fact on causation. Accordingly, the trial court's judgment should be reversed and this case remanded for immediate trial.

STATEMENT OF THE CASE

I. Nature of the Case

This is an auditing malpractice case brought by T. L. Wallace Construction Inc., Thomas L. Wallace, and Janette Wallace (collectively "the Wallaces") against MTSD. Mr. Wallace became the sole stockholder of Wallace Construction in 1975, and he worked for the next 32 years to grow his company into a multi-million dollar enterprise. When he retired in 2007, Mr. Wallace entrusted long-time employees to manage the company and relied upon MTSD to audit Wallace Construction's financial statements yearly.

For each year ending December 31, 2007 through December 31, 2011, MTSD issued unqualified audit opinions that the financial statements of Wallace Construction "present fairly, in all material respects, the financial position of" Wallace Construction. In reality, the employees whom Mr. Wallace entrusted to run the company were stealing from him, fraudulently altering account balances, and shifting job costs to cover up their scheme. In the spring of 2012, the true condition of Wallace Construction was discovered when it ran out of money to complete existing jobs.

The Wallaces sold their personal assets and infused millions of dollars into the company in an attempt to save it, but it was too late. The company Mr. Wallace spent a lifetime building was worthless, and the Wallaces, who are in their eighties, lost everything. The damages suffered by the company and the Wallaces could have been avoided had MTSD properly audited the company since Mr. Wallace testified that he would have fired the employees stealing from him and come out of retirement to continue running the company successfully as he had for decades.

II. Course of Proceedings and Disposition in the Court Below

The trial court excluded the testimony of the Wallaces' economic loss expert, Ralph Summerford, on the element of causation. It then granted MTSD's motion for summary judgment because the Wallaces did not have expert testimony to support every element of their auditing malpractice claim. The Wallaces timely appealed.

III. Statement of Facts

A. History of Wallace Construction

The facts relevant to this appeal are straightforward. Although Mr. Wallace only has a fifth grade education (R.14857 at 13[1]), he learned the value of a strong work ethic cutting timber by hand as a fourteen-year-old boy. R.14855 at 8. Mr. Wallace developed a reputation as a hard worker and someone who had a knack for business. At twenty-seven years old, investors in the then-insolvent Dixie Paving Company offered Mr. Wallace an equity interest in the company to turn it around. R.14856 at 12. Not only did Mr. Wallace get the company out of debt, Mr. Wallace was able to purchase the investors' interest and take sole ownership of the company, which he renamed T. L. Wallace Construction Inc. in 1975. R.14856 at 12, R.14857 at 13. In the ensuing decades, Mr. Wallace grew Wallace Construction into a multi-million dollar enterprise.

As Wallace Construction grew, Mr. Wallace handpicked a number of key employees, many of whom he had known for years and went to church with, to help with managerial, administrative, and bookkeeping roles. When he retired in 2007, Mr. Wallace entrusted these key employees to run Wallace Construction. Particularly relevant to this case, Mr. Wallace appointed Jay Carney as President and Chief Operating Officer and Thomas E. Dunaway, Jr. ("T.J.") as Secretary/Treasurer and Chief Financial Officer. Mr. Carney's father is a former

[1] The Clerk's Papers are cited "R.__. " The trial transcript is cited "T.__. " Record Excerpts are cited "R.E.__."

employee of Wallace Construction and was the pastor of the church Mr. Wallace founded and attended. R.14859 at 24, R.14860 at 25. Mr. Wallace had known T.J. since he was a child (R.14903 at 195), and T.J. had kept the books of Wallace Construction since 1990. R.14859 at 22, R.14860 at 26-27. T.J's role was especially important because Mr. Wallace did not know how to keep his own books (R.14858 at 20), and he had never learned to read financial statements. R.14862 at 36. Mr. Wallace trusted these men and never thought that they would eventually steal from him. R.14908 at 216.

B. MTSD's failure to detect internal theft and fraud

For years, Mr. Wallace retained MTSD to audit Wallace Construction's financials. Wallace Construction needed audited financial statements because it was primarily engaged in large construction projects, such as building bridges, highways, and public works projects, that required construction bonds, and bonding companies require audited financial statements to issue a bond. R.14910 at 222. Additionally, the audit allowed Mr. Wallace to keep track of his and his company's financial condition after his retirement.[2] Because Mr. Wallace did not know how to read financial statements (R.14862 at 36), he relied on the representations of MTSD.

For each year ending December 31, 2007 through December 31, 2011, MTSD issued unqualified audit opinions that the financial statements of Wallace Construction "present fairly, in all material respects, the financial position of" Wallace Construction as of each year end and "the results of operations and its cash flows" for each period audited "in conformity with accounting principles generally accepted in the United States of America." R.7364-68. In reality, and unbeknownst to the Wallaces or the company's board of directors[3], top Wallace Construction

[2] In addition to auditing Wallace Construction, MTSD filed the Wallace's personal tax returns and prepared their personal financial statements. These financial statements included the same value of Wallace Construction that was listed on the audited financial statements.

[3] Although T.J. was on Wallace Construction's board of directors, not surprisingly, he did not disclose his own theft and fraud to the rest of the board.

employees, including Jay Carney and T.J. Dunaway, were stealing from the company and having the company pay for personal expenses and personal construction projects.

For example, between 2007 and 2011, approximately $3.7 million of personal expenses were improperly charged to Wallace Construction. R.8460. Those included exorbitant personal purchases on company credit cards that MTSD did not even attempt to review because it was too "cumbersome." R.10085. Had MTSD bothered to even look at the statements, it would have discovered numerous, obviously non-business related charges, such as family vacations to Pebble Beach and $500 steak dinners. R.10084-85. Improper personal expenses were not limited to credit card charges. Just one general ledger account contained over $420,000 in personal expenses, including nearly $60,000 to Bill Jones Pool Construction and other charges to Quality Flooring, Riverwood Home Appliances, and Simmons Furniture. R.10095. There were even invoices for "exotic cow hides" and "lamb skin" shipped directly to "Gigi Dunaway"—T.J.'s wife. R.10096. Those purchases clearly have no relation to road and bridge construction and should have been uncovered by MTSD and reported to Mr. Wallace and the rest of Wallace Construction's board. They were not.

In an attempt to cover up his scheme, T.J. ordered fictitious receivables accounts created,[4] accounts payable underreported, and job costs shifted between jobs to prematurely recognize revenue. Those are precisely the types of shenanigans audits are supposed to uncover. One year, for instance, MTSD simply allowed Wallace Construction to create a $2.4 million account receivable *after* MTSD dated its audit report and without any supporting documentation. R.10081-82. MTSD similarly failed to detect grossly underreported accounts payable, although there were detailed invoices showing the amount reported was off by millions. R.10102.

[4] One employee was instructed to create accounts receivable sufficient to show a gross profit on a job. R.10101. Not surprisingly, those fictitious receivables were later written off as uncollectable. *Id.*

Finally, as early as 2007, hundreds of thousands of dollars of job costs were moved or reclassified "per T.J." R.10092. All of those adjustments were in "round" numbers, such as $300,000 and $600,000, which should have been a tale-tale sign of fraud to the auditors. *Id.* Yet, MTSD either failed to detect or failed to inform Mr. Wallace and the board of directors of its findings.

Although MTSD *never* reported the internal theft and fraud, problems eventually surfaced when the company ran out of money. On Sunday, March 11, 2012, members of Wallace Construction's board went to Mr. Wallace's house to tell him that the company lacked the liquid assets needed to complete outstanding jobs. R.14871 at 69. Mr. Wallace was shocked, to say the least, because MTSD had represented that his company was profitable and worth millions of dollars. Unwilling to give up on the company that he had spent his life building, Mr. Wallace sold a piece of his personal property for $1.3 million in hopes of keeping the company afloat. *Id.* at 72. To Mr. Wallace's horror, it was barely enough to cover the debt to one creditor. *Id.* Mr. Wallace pressed for answers, but company officials (the ones stealing from Mr. Wallace) would not talk to him. *Id.* at 71. Finally, the accounts payable clerk broke down crying and told Mr. Wallace that the company was three months behind on payments to its contractors. R.14872 at 73.

Mr. Wallace called his personal attorney, who retained an independent auditor to examine Wallace Construction's books. R.14872 at 74-75. The results were gut-wrenching. Despite MTSD's representations that Wallace Construction was financially sound, the company had "been broke for three years." *Id.* at 75. Soon thereafter, T.J. resigned amidst the credit card scandal, and news broke that Wallace Construction was on the brink of bankruptcy. *Id.* at 74, 76. Once word got out that Wallace Construction's financials were misstated, Wallace Construction was unable to acquire the bonding necessary to bid on new jobs. *Id.* at 74-75. To make matters

worse, Mr. Wallace had personally indemnified every bond previously secured by the company. R.14924 at 279. When the cash needed to complete scheduled projects ran out, the bonding companies looked to Mr. Wallace for payment. *Id.*

Mr. Wallace sold everything he could to try to save his company, but it was too late. *Id.* at 278. Mr. Wallace's attorney and auditor informed him that there was no way he could work the company out of debt. *Id.* at 281. The numbers just did not add up. Mr. Wallace was forced to sell the company at a loss (he forgave loans the company owed him) to escape the remaining bond obligations. *Id.* at 278-80; R.14925 at 282. As a result of the whole ordeal, Mr. and Mrs. Wallace had several sleepless nights and nervous breakdowns. R14872 at 74. In the end, the Wallaces lost everything:

> I don't have the farm anymore. . . . I don't have the lake anymore. I've had to take that and sell it and pay bills that they incurred. . . . I don't have any money. I don't have anything.

R.14904 at 199.

This tragic end could have been avoided. Mr. Wallace repeatedly testified that had MTSD uncovered and informed him of the employee theft and fraud, he would have fired those employees and come out of retirement to manage the company as he had done successfully for decades. Unfortunately, due to MTSD's malpractice, Mr. Wallace never had that opportunity.

C. The trial court's erroneous exclusion of Ralph Summerford's causation opinions and dismissal of the Wallace's case

On January 10, 2013, the Wallaces filed suit against MTSD for its failure to properly audit Wallace Construction's financials.[5] The parties engaged in extensive discovery and filed dispositive motions in late 2014. Relevant to this appeal, MTSD filed its ninth motion for summary judgment asking the trial court to dismiss the Wallaces' case for failure to support their

[5] The initial complaint was filed by Wallace Construction and Thomas Wallace against MTSD and Raymond Polk. Mr. Wallace's wife, Janette Wallace, was later named as a plaintiff, and Raymond Polk was later dismissed as a defendant.

claims with expert testimony. R.6120-26. MTSD also moved to exclude the Wallaces' auditing standard of care expert, Doug Arnold (R.10050-10598.), and their two damages experts, Ralph Summerford and William Dameworth. R.8236-10049.

The trial court denied MTSD's motion to exclude any of Mr. Arnold's and Mr. Dameworth's opinions, finding them to be "relevant and reliable." R.14094. Mr. Arnold's standard of care and breach opinions need little discussion given the numerous egregious examples of MTSD's negligence, some of which are discussed above. R.10070-10109; R.10110-10132. Indeed, the court-appointed experts agreed with Mr. Arnold, finding MTSD's audit of Wallace Construction to be "shockingly misleading," "very troubling," and "unconscionable." R.14653-54.

Mr. Dameworth's damages opinion, which the trial court accepted in its entirety, offered what the value of Wallace Construction should have been had MTSD done its job properly. R.8407-8649. Using Wallace Construction's actual revenue figures for the years at issue and comparing them to the historical cost figures of the company under Mr. Wallace's leadership, Mr. Dameworth determined Wallace Construction would have been worth $8,400,000 in June 2012. R.8408. This opinion, of course, was based on the assumption that Mr. Wallace would have come out of retirement to salvage his company, as Mr. Wallace testified he would have done. R.8269, R.14919 at 258-61.

The trial court also allowed Mr. Summerford's damages opinions. R.14094; R.E.5. Mr. Summerford compared Mr. Dameworth's $8,400,000 valuation opinion to the *negative* $1,800,000 Wallace Construction actually sold for to render his total loss in value opinion of $10,200,000. R.8271. Additionally, Mr. Summerford calculated lost profits by comparing Wallace Construction's actual revenue figures from April 1, 2008 to December 31, 2011 to the company's historic cost figures under Mr. Wallace's leadership. R.8268-69. Mr. Summerford

concluded that Wallace Construction would have profited $4,490,000 more from April 1, 2008 to December 31, 2011 under Mr. Wallace's leadership and without employee embezzlement. R.8268. Just like Mr. Dameworth, Mr. Summerford's opinion was based on the assumption that Mr. Wallace would have left retirement and managed his company had MTSD notified him of the employees' misconduct. *Id.*

The trial court limited Mr. Summerford's opinions in only one respect: he could not testify "that the defendant's negligence was a cause in fact of the plaintiffs' injuries." R.14065-66; R.E.4. The trial court was primarily concerned with Mr. Summerford's opinion that had Mr. Wallace retaken control of the company in 2008, Wallace Construction would not have failed.[6] R.14072-73, R.14076; R.E.4. Although Mr. Summerford properly considered historic cost and revenue trends under Mr. Wallace's leadership, ruled out other potential causes of the company's downfall, and considered Mr. Wallace's statements about what actions he would have taken to save the company (T.1285-88; R.E.6), the trial court found his opinion speculative and unreliable. R.14073; R.E.4.

In limiting Mr. Summerford's causation opinions, the trial court left open "whether the causation question can reach the jury without expert testimony on that issue." R.14076 at n.32; R.E.4. (citing *Mem'l Hosp. at Gulfport v. White*, 2015 WL 4572983 (Miss. July 30, 2015)). But the trial court noted several ways that Mr. Wallace's lay testimony creates questions of fact on causation:

- "[T]here is sufficient basis in the court record that a jury could find that Wallace was generally unaware of the financial condition of his company in 2008 and that this ignorance could be attributable to the defendant's alleged negligence. Therefore, any arguments related to these disputed facts are questions for jury. In fact, the plaintiffs

[6] The trial court contradicted its own rulings. On one hand, the trial court found Mr. Dameworth's opinion that Wallace Construction should have been worth $8.4 million in June 2012 to be "relevant and reliable." R.14094. On the other hand, the trial court found it speculative that Wallace Construction could have survived past June 2012.

do not need Mr. Summerford to explain Mr. Wallace's awareness of the business's health to the jury."

- "Whether or not Mr. Wallace would have returned to manage the company is a fact that can be determined by a layperson."

- "Whether Mr. Wallace could have saved the company may indeed be a fact in dispute, but it's not one that Mr. Summerford's testimony would assist a jury in deciding."

R.14071-73; R.E.4.

The following day, the Wallaces' counsel sought clarification of the court's order. The trial court responded by expressing concern that its exclusion of "Mr. Summerford's testimony on the issue of causation" threatened the foundation of the Wallaces' case because the trial court believed mistakenly that "Mississippi law requires a claim for damages caused by professional negligence be supported by an expert opinion as to causation." R.14093; R.E.5. Both parties were given five days to address this issue. *Id.* MTSD heeded the trial court's invitation and renewed its ninth motion for summary judgment on the ground that the Wallaces did not have expert testimony to establish every element of their auditing malpractice claim (R.14100-137) and submitted a separate response to the court's inquiry. R.14142-14195.

On September 23, 2015, the Wallaces filed a combined response to the trial court's inquiry and MTSD's renewed motion for summary judgment, addressing the narrow legal issue of "whether expert testimony is required on the element of causation in all professional negligence cases." R.14409. The Wallaces did not dispute that "Mississippi law ordinarily requires expert testimony on the elements of *duty* and *breach* in professional negligence cases." R.14414 (emphasis in original). The Wallaces further did not dispute that expert testimony is often necessary to establish causation in medical malpractice cases. *Id.* However, the Wallaces cited two Mississippi cases that unambiguously confirm that expert testimony is not required to establish causation in auditing and accounting malpractice cases. R.14414-19. (discussing

Travelers Cas. & Sur. Co. of Am. v. Ernst & Young LLP, 542 F.3d 475 (5th Cir. 2008) (applying Mississippi law); *Wirtz v. Switzer*, 586 So. 2d 775 (Miss. 1991)). Significantly, MTSD urged the court to consider these same cases. *See* R.14156, R.14102.

The same day the parties responded to the court's inquiry, the court entered an order granting MTSD's motion for summary judgment "[b]ecause there is no expert testimony to establish causation." R.14928; R.E.2 The trial court explained its holding as follows:

> The Court bases its ruling upon a line of Mississippi Supreme Court and Court of Appeals cases, including, but not limited to *Dean v. Coon*, 419 So. 2d 148 (Miss. 1982); *Hickox v. Holleman*, 502 So. 2d 626 (Miss. 1987); *Powell v. Methodist Healthcare-Jackson Hospitals*, 876 So. 2d 347 (Miss. 2004); and *Crosthwait v. Southern Health Corp. of Houston, Inc.*, 94 So. 3d 1126 (Miss. Ct. App. 2011). These cases hold that "expert testimony is ordinarily necessary to support an action for malpractice of a professional man in those situations where special skills, knowledge, experience, learning or the like are required." *Dean*, 419 So. 2d at 150. More specifically, *Crosthwait* held that malpractice claims require expert testimony to "identify and articulate the requisite standard that was not complied with [and] *establish that the failure was the proximate cause, or proximate contributing cause*, of the alleged injuries." *Crosthwait*, 94 So. 3d at 1130 (¶10) (emphasis added). The Court's language in *Crosthwait* was not limited to medical malpractice.

R.14929; R.E.2. The trial court's opinion did not mention *Travelers* or *Wirtz*. *See* R.14927-30; R.E.2. The trial court further held that Mr. Wallace could not provide the expert testimony it believed necessary. R.14929; R.E.2.

The Wallaces immediately moved for reconsideration. R.14931-15037. As for the necessity of expert testimony on causation, the Wallaces (1) explained why the cases cited by trial court do not create a universal requirement that expert testimony is needed to establish causation in every professional negligence case (R.14933-37), and (2) urged the court to consider the *Travelers* and *Wirtz* cases, which both parties agreed applied. R.14937-38. As for the sufficiency of Mr. Wallace's testimony, the Wallaces explained the issue was not before the court, but even if it was, Mr. Wallace's lay testimony created a genuine issue of material fact on the element of causation that the jury must decide, as the trial court itself previously noted.

R.14939-44. The trial court denied the Wallaces' motion for reconsideration without explanation. R.15039; R.E.3.

SUMMARY OF THE ARGUMENT

The trial court erroneously held that expert testimony is required to establish causation in every professional malpractice case. In so holding, the trial failed to consider two cases, which were cited by both the Wallaces and MTSD, that unambiguously confirm that expert testimony is not required to establish causation in auditing malpractice cases. Moreover, the cases the trial court relied upon do not establish a uniform requirement that causation be established through expert testimony in every type of professional malpractice case.

In auditing and accounting malpractice cases, the evidence typically used to show causation is testimony from the plaintiff about what actions he or she would have taken but for the defendant's negligence. That is precisely the type of evidence the Wallaces presented through the testimony of Mr. Wallace. Had MTSD notified him of the theft and fraud going on at Wallace Construction, as it should have, Mr. Wallace would have fired those employees, thereby avoiding millions of dollars of additional theft and the ultimate destruction of his company. The jury, not the court, must weigh Mr. Wallace's testimony and decide the issue of causation. The trial court's grant of summary judgment deprived the Wallaces of their day in court, allowed MTSD to avoid the repercussions of its negligence, and is reversible error.

Finally, although not necessary to support a malpractice claim, the trial court abused its discretion in excluding the causation testimony of the Wallace's expert, Ralph Summerford, in at least three ways. First, the trial court improperly weighed the credibility of Mr. Wallace's statements, upon which Mr. Summerford's opinions were based. Second, the trial court erred by excluding Mr. Summerford's causation opinion because it was skeptical that Wallace Construction would have survived had Mr. Wallace retaken control of the company in 2008.

MTSD unquestionably caused the Wallaces some harm as a result of its negligent audits. The full extent of that harm (complete failure of the company or some lesser amount) can only be decided by the jury. Third, the court incorrectly characterized Mr. Summerford's opinion as a mere assumption that MTSD caused Wallace Construction's ultimate demise. But in fact, Mr. Summerford considered potential alternative causes in his expert analysis. If the case is remanded for trial as it should be, the Wallaces should be allowed to support and defend their case with the additional expert causation testimony of Mr. Summerford.

ARGUMENT

I. Standard of Review.

A trial court's grant of a summary judgment motion is reviewed *de novo*. *Bennett v. Highland Park Apartments, LLC*, 170 So. 3d 450, 452 (Miss. 2015), *reh'g denied* (Aug. 13, 2015). Decisions to exclude expert testimony are reviewed for abuse of discretion. *See id.* at n.7 (citing *Gales v. State*, 153 So. 3d 632, 638 (Miss. 2014), *reh'g denied* (Jan. 15, 2015)).

II. Mississippi Law Does Not Require Expert Testimony to Prove Causation in All Auditing Malpractice Cases.

The threshold question here is whether Mississippi law requires expert testimony to establish causation in an auditing malpractice case. It does not. Expert testimony is typically required to establish the applicable standard of care and breach, but there is no corresponding requirement for causation. The trial court failed to consider two cases, cited by both the Wallaces and MTSD, that unmistakably demonstrate this point. Furthermore, the cases relied upon by the trial court do not create a *per se* rule that expert testimony is required to establish causation in every type of professional negligence case. Therefore, the trial court's order granting summary judgment in favor of MTSD should be reversed and this case remanded for trial.

A. The trial court failed to consider either *Travelers* or *Wirtz*, both of which unambiguously demonstrate expert testimony is not required to establish causation in an auditing malpractice case.

Both parties cited *Travelers Casualty & Surety Co. of America v. Ernst & Young LLP*, 542 F.3d 475 (5th Cir. 2008) and *Wirtz v. Switzer*, 586 So. 2d 775 (Miss. 1991) as controlling on the issue of whether Mississippi law requires expert testimony to establish causation in an auditing malpractice case. Nevertheless, the trial court did not consider them. These cases confirm that expert testimony is not required.

1. *Travelers Casualty & Surety Co. of America v. Ernst & Young LLP*

The most analogous case is *Travelers*, wherein the Fifth Circuit, applying Mississippi law, affirmed a jury verdict against Ernst & Young for its negligent audit. There, Ernst & Young issued unqualified audited financial statements for an oil rig construction company, FGH, who was required to obtain surety bonds on its construction projects due to their size. 542 F.3d at 479. The plaintiff bonding company, Travelers, initially refused to issue a $225 million bond to FGH because it considered the company "high risk," especially when it had an estimated $60 million loss from a single project known as the Petrodrill project. *Id.* at 479-80. Nevertheless, Travelers ultimately issued a $70 million bond for the smaller Pasha project after FGH launched a successful "liquidity campaign." *Id.* at 480. Shortly thereafter, FGH released new financial statements estimating the loss on the Petrodrill project to be $121 million—double what Travelers believed it to be when it decided to issue the Pasha bond. *Id.* FGH diverted between $17 and $35 million from the Pasha project in an attempt to keep the company viable. *Id.* at 480-81. Such effort was fruitless and FGH filed bankruptcy, leaving Travelers responsible to pay $58 million on the Pasha project. *Id.* at 481. The jury found Ernst & Young proximately caused twenty-five percent of Travelers' damage, and the Fifth Circuit affirmed. *Id.*

The Fifth Circuit held Travelers presented sufficient evidence for a rational jury to conclude that Ernst & Young's negligent audit proximately caused Travelers' harm. *Id.* at 485. Although Travelers' auditing standard of care expert could not testify to what the estimated Petrodill loss should have been, he opined that there was insufficient information for Ernst & Young to represent that the $60 million estimate was reasonable. *Id.* at 486. To prove causation, Travelers underwriters—non-experts—testified "that the Pasha bond would never have been issued if E&Y's audit opinion reflected any qualification, or if E&Y had indicated that there was no reasonable accounting basis for the $60 million Petrodrill loss estimate." *Id.* at 486. Although there was evidence that Travelers' underwriters may have also relied upon FGH management's representations about its improving liquidity, Travelers' underwriters testified that they still would not have issued the bond had the audit contained qualifications. *Id.* at 486-87. Noting that Mississippi law does not require a defendant's negligence to be the sole cause of injury to be considered a proximate cause, *id.* at 486 (citing *Entrican v. Ming*, 962 So. 2d 28, 32 (Miss. 2007)), the Fifth Circuit concluded that "[t]he jury was free to believe this [non-expert] testimony and thus reasonably conclude that E&Y's negligent audit was a cause in fact of Travelers' decision to issue the bond."[7] *Id.* at 487.

2. *Wirtz v. Switzer*

Wirtz, like *Travelers*, did not require expert testimony on causation. In *Wirtz*, the accountant was accused of negligently preparing a schedule that did not include the correct estimated tax liability. 586 So. 2d. at 780. The trial court granted a directed verdict in favor of the accountant. On appeal, the Mississippi Supreme Court quoted the familiar language that

[7] Lest there be any concern that the Fifth Circuit overlooked or misapplied Mississippi law, the *Travelers* opinion went on to confirm that expert testimony is required to establish the standard of care. *See* 542 F.3d at 491-92 (citing *Lovett v. Bradford*, 676 So. 2d 89, 895 (Miss. 1996)). In other words, the Fifth Circuit correctly differentiated between when Mississippi law does, and does not, require expert testimony in a professional negligence case.

expert testimony is required "'to support an action for malpractice of a professional man in those situations where special skills, knowledge, experience, learning or the like are required.'" *Id.* (quoting *Hickox*, 502 So. 2d at 633 (quoting *Dean*, 419 So. 2d at 150))). The Court then properly applied that law to require expert testimony on the elements of duty and breach, but not causation. *Id.* at 780-81.

These two cases—*Travelers* and *Wirtz*—resolve the question of whether expert testimony is required to prove causation in every type of professional negligence case. It is not. Just as the jury in *Travelers* was "free to believe" the testimony from Travelers' underwriters that they would not have issued the bond had Ernst & Young properly audited FGH's financials, the jury here is "free to believe" Mr. Wallace's testimony that he would have fired the employees who were stealing from him and resumed managing the company had MTSD informed him of the theft and fraud. Giving the Wallaces "'the benefit of every reasonable doubt[,]' this is clearly an 'issu[e] of fact sufficient to require denial of a motion for summary judgment.'" *Pollard v. Sherwin-Williams Co.*, 955 So. 2d 764, 773 (Miss. 2007) (citations omitted) (brackets in original).

B. None of the cases relied upon by the trial court mandate causation be proven through expert testimony.

The cases cited by the trial court do not support the proposition that expert testimony is always necessary to establish causation in professional negligence cases. In fact, none of those cases even turned on the issue of causation. In *Dean v. Coon*, the Mississippi Supreme Court affirmed a jury verdict against an attorney for legal malpractice when there was expert testimony on the standard of care and breach, but not causation. 419 So. 2d at 151. *Hickox v. Holleman* did not require expert testimony at all because the lawyer's failure to research the statute of

limitations was malpractice *per se*.[8] 502 So. 2d at 635-36. The case of *Powell v. Methodist Healthcare-Jackson Hospitals* is even further afield. There, the plaintiff had no expert, and the appeal turned on whether she could prove her case through *res ipsa*. 876 So. 2d at 348-49.

The final opinion cited by the trial court was *Crosthwait v. Southern Health Corp. of Houston*—a medical malpractice case. The court relied heavily upon the following quote from *Crosthwait* in reasoning that the Wallaces were required to have an expert on causation.

> Malpractice claims generally must be supported by expert testimony to 'identify and articulate the requisite standard that was not complied with [and] establish that the failure was the proximate cause, or proximate contributing cause, of the alleged injuries.'

94 So. 3d at 1130 (quoting *Hubbard v. Wansley*, 954 So. 2d 951, 957 (¶ 12) (Miss. 2007) (quoting *Barner v. Gorman*, 605 So. 2d 805, 809 (Miss. 1992))). Because the *Crosthwait* Court used the phrase "malpractice claims" generally, the trial court stated *Crosthwait*'s holding "was not limited to medical malpractice." R.14929; R.E.2.

The Court's failure to recognize the limitations of *Crosthwait* led it to err here. To begin, *Crosthwait* was a medical malpractice case, and the two Mississippi Supreme Court cases *Crosthwait* cited were expressly limited to medical malpractice:

> 'When proving these elements ***in a medical malpractice suit***, expert testimony must be used. Not only must this expert identify and articulate the requisite standard that was not complied with, the expert must also establish that the failure was the proximate cause, or proximate contributing cause, of the alleged injuries.'

Hubbard, 954 So. 2d at 957 (quoting *Barner*, 605 So. 2d at 809) (emphasis added). This is significant because medical malpractice actions, by their nature, require expert testimony on causation more often than other types of malpractice claims.[9] Moreover, the *Crosthwait* opinion

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[8] There are several other Mississippi legal malpractice cases, in addition to *Dean* and *Hickox*, that allowed the jury to decide causation without expert testimony. *See, e.g.*, *Pierce v. Cook*, 992 So. 2d 612, 618 (Miss. 2008); *see also Marsh v. Wallace*, 666 F. Supp. 2d 651, 677 (S.D. Miss. 2009).

[9] *See Barnett v. E. Side Jersey Dairy, Inc.*, 2012 WL 1376998, at *1 (N.D. Miss. Apr. 19, 2012) ("'The general rule in Mississippi is that expert testimony is not required where the facts surrounding the alleged

turned on the plaintiff's failure to "offer expert testimony establishing [ ] duty of care or breach of that duty" without ever reaching the issue of causation. 94 So. 3d at 1130. Thus, *Crosthwait*'s language can hardly be said to extend Supreme Court precedent and create a universal requirement that expert testimony is required to establish causation in every professional negligence case.

In sum, the familiar quote that "expert testimony is ordinarily necessary to support an action for malpractice" means that expert testimony is required to establish the standard of care and deviation from the standard of care, but not causation.[10] None of the cases cited by the trial court, and no other line of Mississippi cases, require expert testimony on causation for *all* malpractice claims, especially claims for auditing malpractice. Causation is a question of fact for the jury to decide. *Thompson v. Dung Thi Hoang Nguyen*, 86 So. 3d 232, 235 (Miss. 2012). Mr. Wallace testified that he naturally would have put an end to the theft had MTSD notified him of it. Giving the Wallaces the benefit of every reasonable doubt, as is required when considering motions for summary judgment, a reasonable jury could conclude MTSD caused the Wallaces some harm. *Pollard*, 955 So. 2d at 768-69. Armed with this evidence, it was "not the province of the trial court to grant summary judgment thereby supplanting a full trial with its ruling." *Id.* at 769.

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negligence are easily comprehensible to a jury.' Here, many of the cases relied on by Defendant in its summary judgment motion for the proposition that an expert is necessary involve *medical malpractice actions*, where expert testimony is obviously required. This is not a medical malpractice case; instead, it is what appears to be a legally straightforward case stemming from an automobile accident.") (emphasis in original) (internal citations omitted). *See also Holt v. Summers*, 942 So. 2d 284, 290 (Miss. 2006) (discussing why expert testimony is typically required on causation in medical malpractice cases).

[10] The Wallaces presented expert evidence on the standard of care, breach of the standard of care, and damages, which the trial court found "relevant and reliable."

III. The Trial Court Erred in Holding that the Testimony of Thomas L. Wallace was Insufficient to Create a Genuine Issue of Fact on Causation.

The trial court granted MTSD's motion for summary judgment based on the lack of expert testimony, following its exclusion of Summerford's causation opinions. R.14928; R.E.2. ("Because there is no expert testimony to establish causation, there is no question of material fact concerning the issue of causation. Summary judgment is therefore appropriate."). The court further held that Mr. Wallace could not provide the expert testimony it mistakenly believed required because Mr. Wallace "admittedly knows nothing of accounting or auditing." R.14929; R.E.2. The Wallaces do not dispute that Mr. Wallace is not an expert on accounting or auditing standards. Indeed, Mr. Wallace hired and relied upon MTSD because he is not a sophisticated bookkeeper. But Mr. Wallace's testimony is precisely the type of testimony used in other accounting and auditing malpractice cases to establish causation.

Consistent with the fact that expert testimony is not required to establish causation in auditing malpractice cases, most jurisdictions recognize the appropriateness—if not necessity—of using lay witness testimony to establish proximate causation in accounting and auditing negligence cases.[11] In *Travelers*, for example, the evidence used to establish causation was testimony from the underwriters who decided to issue the bond:

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[11] *See Bd. of Trustees of Cmty. Coll. Dist. No. 508, Cnty. of Cook v. Coopers & Lybrand, L.L.P.*, 775 N.E.2d 55, 62 (Ill. App. Ct. 2002) a*ff'd in part, rev'd in part sub nom. on other grounds Bd. of Trustees of Cmty. Coll. Dist. No. 508, Cnty. of Cook v. Coopers & Lybrand*, 803 N.E.2d 460 (Ill. 2003) (testimony of quorum of plaintiff's board members alone was sufficient to establish causation because "courts have allowed the testimony of board members as to ***what their actions would have been if auditors had informed them of certain inadequacies***") (emphasis added); *Grant Thornton, LLP v. F.D.I.C.*, 535 F. Supp. 2d 676, 714 (S.D.W. Va. 2007) *rev'd on other grounds Ellis v. Grant Thornton LLP*, 530 F.3d 280 (4th Cir. 2008) (proximate cause theory supported by bank board's testimony that certain "***expenses would not have been incurred but for [the auditor's] failure to alert the board of [the bank's] true financial condition***") (emphasis added); *In re CBI Holding Co., Inc.*, 247 B.R. 341, 360-64 (Bankr. S.D.N.Y. 2000) *aff'd in part, rev'd in part*, 529 F.3d 432 (2d Cir. 2008) (testimony of management firm's officer that it would have exercised its right to takeover distributing company and sell it as a going concern for a substantial value had auditing firm identified fraudulent misstatements in distributing company's financial statements was sufficient evidence of causation); *Ario v. Deloitte & Touche LLP*, 2008 WL 6626953, at *8-9 (Pa. Commw. Ct. June 13, 2008) (evidence of causation was sufficient despite

> Travelers' underwriters testified that had they known that no reasonable loss estimate could be generated for Petrodrill (*i.e.*, absent E&Y's negligence), they would not have issued the Pasha bond . . . . The jury was free to believe this testimony and thus reasonably conclude that E&Y's negligent audit was a cause in fact of Travelers' decision to issue the bond.

542 F.3d at 486-87.

Even cases relied upon by MTSD recognize this principal, despite citing generic language that "[e]xpert testimony is usually necessary to establish the requisite standard of care and skill, a departure from that standard, and the causal link between the plaintiff's damages and the accountant's negligence." *Greenstein, Logan & Co. v. Burgess Mktg., Inc.*, 744 S.W.2d 170, 185 (Tex. Ct. App. 1987). In *Greestein*, expert testimony established the auditor's breach of the standard of care, *id.* at 185-86, but causation was established through the plaintiff's testimony "about ***the business decisions he actually made based on inaccurate financial statements and those he would have made if he had been given accurate financial statements***." *Id.* at 188 (emphasis added).

Cases finding such testimony to be insufficient to establish causation have done so, not because the witness was not an expert, but because the witness did not have authority to act on behalf of the company. *See Crowley v. Chait*, 2004 WL 5434953, at *8-9 (D.N.J. Aug. 25, 2004). In *Crowley*, lay testimony sufficiently established causation because "[t]he witnesses, who were actual employees of the Vermont Insurance Commissioner at the time in question, can actually **testify as to what they *would* have done if circumstances had been different**." *Id.* at *8 (italics in original) (emphasis added). In so holding, the court distinguished another case where causation was found to be lacking when a single member of a board did not unilaterally have authority to act in response to an audit. *Id.* at *9 (citing *Drabkin v. Alexander Grant & Co.*,

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no expert testimony); *Paulding Cnty. Hosp. v. Clark, Shaefer, Hackett & Co.*, 2005 WL 2129292, at *2 (Ohio Ct. App. Sept. 6, 2005) (once sufficient expert testimony was presented on standard of care, the subsequent "question of proximate cause depends upon whether the trier of fact finds that the alleged breach contributed to the damages").

905 F.2d 453 (D.C. Cir. 1990)). In contrast, the plaintiff in *Crowley*, like Mr. Wallace here, had authority to take action "single-handedly." *Id.* The court concluded that "any disputes as to the evidence regarding causation are issues that must be decided by a jury and are not proper for summary judgment." *Id.*

Mr. Wallace's testimony about what he would have done had MTSD notified him of the internal theft and fraud, as it should have, creates a genuine issue of fact on causation precluding summary judgment. Indeed, the trial court acknowledged as much in its order excluding Summerford. R.14071-73; R.E.4.

"[T]he court cannot try issues of fact on a Rule 56 motion; it may only determine whether there are issues to be tried." *Daniels v. GNB, Inc.*, 629 So. 2d 595, 599 (Miss. 1993) (quoting *Brown v. Credit Ctr., Inc.,* 444 So. 2d 358, 362 (Miss. 1983)) (emphasis added by court). Causation is a fact question, and Mr. Wallace's testimony admittedly creates triable issues of fact about causation. Therefore, the trial court erred in granting MTSD's motion for summary judgment.

IV. The Trial Court Erred in Excluding the Expert Causation Testimony of Ralph Summerford.

Although Mr. Wallace's testimony is enough, standing alone, to establish causation, the trial court erred in excluding Mr. Summerford's expert causation testimony. The trial court's exclusion of Mr. Summerford was primarily based on its belief that Mr. Summerford's opinion, that Wallace Construction would not have completely failed under Mr. Wallace's leadership, was speculative:

> Beyond his assurances that, in his expert opinion, the company would have survived if Mr. Wallace had stepped back in to save it, he provided no basis for his belief that Mr. Wallace could have stepped back in – beyond Wallace's own assurances that he would have done so. More problematically, he offers only conjecture and speculation that the company had any likelihood of surviving if Wallace had returned.

R.14076; R.E.4. In so holding, the trial court misapplied the law in at least two respects and, therefore, abused its discretion. *See In re Volkswagen of Am., Inc.*, 545 F.3d 304, 310 (5th Cir. 2008) (a trial "court abuses its discretion if it: . . . (2) relies on erroneous conclusions of law; or (3) misapplies the law to the facts") (citation omitted); *see also Aransas Project v. Shaw*, 775 F.3d 641, 664 (5th Cir. 2014) (reversing district court because it abused its discretion when it misapplied the law).

First, Mr. Summerford was permitted to base his expert opinion on statements of Mr. Wallace. *See* MISS. R. EVID. 703; *See Treasure Bay Corp. v. Ricard*, 967 So. 2d 1235 (Miss. 2007). Just as the court cannot assess the credibility of Mr. Wallace's testimony, it cannot assess the credibility of the statements Mr. Summerford relied upon.

> To be consistent with the rule of law, this Court may not reject an expert's opinion simply because the opinion is based in part on a statement of fact which the Court does not find credible. This Court must not invade the fact-finder's province, and should not use the concepts of credibility and reliability interchangeably.

Treasure Bay, 967 So. 2d at 1239 "[W]hether or not the facts relied upon are credible is a matter for cross-examination and collateral attack at trial." *Id.* at 1240.

Second, it was not for the trial court to decide whether Wallace Construction would have ultimately survived. "'Where it is reasonably certain that damage has resulted, mere uncertainty as to the amount will not preclude the right of recovery or prevent a jury decision awarding damages.'" *Warren v. Derivaux*, 996 So. 2d 729, 737 (Miss. 2008) (quoting *Cain v. Mid–South Pump Co.*, 458 So. 2d 1048, 1050 (Miss. 1984)). Had MTSD informed Mr. Wallace of the theft and fraud in 2008 when it should have, Mr. Wallace would have fired those employees and continued running his company as he had for decades. R.14903-04 at 197-200. At a minimum, such action would have allowed Mr. Wallace to avoid much of the $3.7 million in personal expenses charged to the company. R.8460. Also, Mr. Wallace could have made different management and financial decisions before Wallace Construction literally ran out of

money to complete existing jobs and lost bonding capacity to accept future jobs. R.14872. Unquestionably, MTSD caused the Wallaces harm. Mere uncertainty as to the amount (*i.e.*, complete destruction of the company or some lesser amount) does not render Mr. Summerford's opinion speculative and is a question the jury must ultimately decide. *See Warren*, 996 So. 2d at 737.

Further, Mr. Summerford did not simply assume MTSD was the sole cause of Wallace Construction's destruction as the trial court suggested. To the contrary, he "looked at anything that could cause this company's demise, could cause lost profits" and included them in formulating expert opinions. T.1286; R.E.6. Mr. Summerford's methodical exclusion of possible alternative causes is precisely what an expert should do. *See Thompson v. Echostar Commc'ns Corp.*, 89 So. 3d 696, 699-700 (Miss. Ct. App. 2012). And the trial court did not find Mr. Summerford's alternative cause opinions to be unreliable. *See generally* R.14065-14076; R.E.4. Mr. Summerford's causation opinions are reliable, and the Wallaces are entitled to present and defend[12] their claims with his testimony at trial. By weighing the credibility of Mr. Wallace's testimony and by deciding jury questions on causation and damages, the trial court misapplied the law and consequently abused its discretion in limiting Mr. Summerford's causation opinions.

CONCLUSION

For all of the foregoing reasons, the trial court's grant of summary judgment in favor of MTSD should be reversed and the case remanded to trial.

This 16th day of June, 2016.

[12] If the case is remanded for trial, MTSD will undoubtedly try to discredit Mr. Dameworth's and Mr. Summerford's damages opinions by pointing to other potential causes of financial difficulties between 2008 and 2011. The Wallaces are entitled to challenge such defenses with Mr. Summerford's testimony.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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I further certify that I have served a copy of Brief of Appellants to the following by U. S. Mail:

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