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

APPELLEE'S BRIEF
(Oral Argument is Requested)

On Interlocutory Appeal from the Circuit Court of Washington County, Mississippi
(Civil Action No. CI-2004-251)

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CERTIFICATE OF INTERESTED PARTIES

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

1. **Plaintiffs/Appellants:** Investor Resource Services, Inc., a Florida corporation; Barbara Archuletta Morelli and the Estate of Bernece Rigirozzi.

2. **Aligned with Plaintiffs/Appellants:** Minority shareholders of Rainbow Entertainment, Inc., who, to the best of the Plaintiff's knowledge, are the following: Michael Less, Joseph Getz, Clifton Lipman, O. T. Marshall, Pinson & Associates PA, Richard L. Macy, Rudy Marich, Richard M. Greene, Stephanie Arnold, Tracia Arnold Fields, Arlen Schultz, Dan Bland, Dr. Robert Fedor, Dr. Fred Leslie, Edward Immon, H. Frank Martin, the Estate of Hamp Bass, John Hill, Lynette Schultz, Mal Kretchmar, Phil Schoettle and Rich McBride.

3. **Attorneys for Plaintiffs/Appellants:** Fred L. Banks, Jr., Jerome C. Hafter, James W. Craig, Elizabeth Jane Hicks, Lyle B. Robinson and the law firm of Phelps Dunbar LLP; Robert N. Hunter, Jr., Greensboro, North Carolina.

4. **Defendants/Appellees:** Marvin Cato, Lavern Cato and Charles Cato ("Cato Defendants") and Rainbow Entertainment, Inc. ("Rainbow").

5. **Attorneys for Cato Defendants and Rainbow:** John H. Daniels, III and the law firm of Dyer, Dyer, Jones & Daniels; Willie Bailey and the law firm of Bailey & Griffin.

6. **Separate Counsel for Rainbow:** James P. Streetman, III, David Lee Gladden, Blayne T. Ingram and the law firm of Scott, Sullivan, Streetman & Fox.

7. Honorable W. Ashley Hines, Circuit Judge, Fourth Circuit District.

So Certifed, this the 4th day of December, 2008.

JOHN H. DANIELS, III, [redacted]
Attorney for Appellees

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STATEMENT OF ISSUES

The Appellants' Statement of the Issues is incorrect.

The question is not as the Appellants have framed it; the question is whether Glover is qualified to serve as an expert witness and did the lower court in excluding Glover abuse its judicial discretion when ruling upon an evidentiary question.

STATEMENT OF THE CASE AND FACTS

We are before this Court on one single issue, one issue alone. That issue is whether or not Glenda B. Glover ("Glover") is qualified to give expert opinion in a shareholder's derivative action. The simple and straight forward answer to the question is an unqualified "NO."

Before we can and do explore the issues of Glover's admission as an expert there are several points that need to be made and addressed. The first, and not the least of which is the lower court's Order of August 20, 2007, excluding Glover as Appellants' derivative expert. R. 628-30; R.E. 1.

The Circuit Court of Washington County, Mississippi was presented with the Defendants/Appellees' Motion In Limine and/or to Exclude Plaintiffs' Expert Witness, Glenda B. Glover. R. 136-395; R.E. 6 (Motion only, no exhibits). Following the filing of the Appellees' In Limine Motion, the Appellants/Plaintiffs filed their response (R. 396-574) after which a hearing was conducted over a two-day period, August 13 and August 17, 2007. R.575-627.

Concluding a comprehensive examination of Appellees' and Appellants' Motions with attachments, after full disclosure and oral argument of the legal principles existing, the Circuit Court in its Order of August 20, 2007, concluded "...Glover is not qualified to

give expert testimony in the present case." R.628-30; R.E. 1.

The lower court judge opined as follows:

> Having reviewed Glenda B. Glover's qualifications, this Court finds that although Ms. Glover's testimony may be relevant, Ms. Glover is not qualified to give expert testimony in the present case. This decision is based on Ms. Glover's lack of education, experience, and training in derivative actions, the lack of reliability of Ms. Glover's testimony, and the fact that Ms. Glover has held herself out to be a Certified Public Accountant in violation of Miss. Code Ann. §73-33-1.
>
> ***
>
> The Court finds Ms. Glover lacks sufficient education, experience, or training in the area of derivative actions. This fact is evidenced by her deposition testimony and in her reports in which she demonstrates a failure to understand how damages in derivative actions are distributed. This indicates a fundamental failure to grasp the very nature of a derivative action. The Court finds the *(sic)* Ms. Glover's lack of knowledge regarding derivative actions makes her testimony and opinions in this case unreliable.
>
> ***
>
> Based on the above determinations, the Court finds Ms. Glover fails to meet the standards set out *McLemore* and shall be excluded from giving expert testimony in this case.
>
> It is, therefore:
>
> ORDERED that the Defendants' Motion in Limine and/or to Exclude Plaintiffs' Expert Witness, Glenda B. Glover shall be and is hereby GRANTED.

R. 628-630; R.E. 1.

Immediately following the Circuit Court's decision, the Appellants filed a requested reconsideration of Judge Hines' ruling of August 20, 2007; after which the lower court denied the reconsideration (R. 654-655; R.E. 4) and thereafter the Appellants requested and were granted an interlocutory appeal to this Court on an

evidentiary finding.

We now find ourselves before this Court on the (single) issue of Glover's ability to serve as an expert witness in this cause; which – this writer would add is an extremely complicated piece of litigation arising out of an alleged derivative claim brought by minority shareholders of Rainbow Entertainment, Inc. ("Rainbow").

There are a number of considerations that this Court must keep in mind when determining questions of this type and kind.

Appellees will set forth the litany of those questions with supporting authority; after which an exhaustive review of Glover's qualifications and testimony (deposition and expert report) will be taken up.

SUMMARY OF THE ARGUMENT AND LAW

STANDARD OF REVIEW

The standard of review for the admission or suppression (exclusion) of evidence/testimony is abuse of discretion (emphasis ours); *Floyd v. City of Crystal Springs,* 749 So.2d 110 (Miss. 1999); *Whitten v. Cox*, 799 So.2d 1 (Miss. 2000); *Haggerty v. Foster,* 838 So.2d 948 (Miss. 2002); *Crane v. Kitzinger*, 860 So.2d 1196 (Miss. 2003); *Mississippi Transportation Commission v. McLemore*, 863 So.2d 31 (Miss. 2004); *Tunica County v. Matthews,* 926 So.2d 209 (Miss. 2006); *International Paper v. Townsend,* 961 So.2d 741 (COA Miss. 2007); *Canadian National, et al v. Hall*, 953 So.2d 1084 (Miss. 2007) and *Watts v. Radiator Specialty,* 990 So.2d 143 (Miss. 2008).

In testing this "abuse of discretion" the decisions of our trial judges will stand "...unless [this court] concludes that the discretion was arbitrary and clearly erroneous,

amounting to an abuse of discretion. (Insert and emphasis ours). *Puckett v. State*, 737 So.2d 322 (Miss. 1999) and *Mississippi Transportation Commission v. McLemore*, 863 So.2d 31 (Miss. 2004); see also *Crane v. Kitzinger,* 860 So.2d 1196 (Miss. 2003) and *Roberts v. Grafe*, 701 So.2d 1093 (Miss. 1997).

POSITION OF THE TRIAL COURT – GREAT DEFERENCE

This Court places a heavy burden on trial judges in review of issues of this nature. On appeal this Court "...[will] give great deference to the discretion of the trial judges." (Insert ours). *Tunica County v. Matthews,* 926 So.2d 209 (Miss. 2006); *Crane v. Kitzinger*, 860 So.2d 1196 (Miss. 2003).

This "great deference" afforded trial judges, while being a heavy burden to bear, is necessary given that trial judges are charged with providing a "filter" of information that ultimately might be imparted to the trier of fact. Moreover, this "great deference" is afforded trial judges as they are uniquely connected and able to weigh and judge the demeanor of witnesses and the impact that such testimony may have on the litigants and the ultimate outcome of the litigation.

EXPERT TESTIMONY

The reasoning behind these standards and the deference afforded trial judges by this Court is because of the position held by experts at trial, and the "sway" (if you will) that they (expert witnesses) have over the finder of fact – the jury.

A long history of this consequence is apparent in this Court's decisions; and, the net effect that a person of (alleged) greater educational standing may have over an average juror is clear, as well as the cautious nature of courts in preventing just anyone

from stepping up the "plate" and giving their opinion.

Eloquently stated the following is true:

> Juries are often in awe of expert witnesses because, when the expert witness is qualified by the court, they hear impressive lists of honors, education and experience. An expert witness has more experience and knowledge in a certain area than the average person. Therefore, juries usually place greater weight on the testimony of an expert witness than that of a lay witness.
>
> *Edmonds v. State*, 955 So.2d 787, 792 (Miss. 2007). Being no exception, Dr. Levy's testimony about his education and experience covered five pages of transcript. This included his testimony that he attended Tufts College in Boston and Cornell Medical School in New York, and that he obtained a master's degree in public health from the Harvard School of Public Health. Because of the weight that is given to expert testimony, it is imperative that trial judges remain steadfast in their role as gatekeepers under the *Daubert* standard.

Watts v. Radiator Specialty, 990 So.2d 143, 147 (Miss. 2008).

GATEKEEPER

As such we have given our trial judges a new title, The Gatekeepers. In this role our (circuit) trial court judges are afforded wide latitude and again much deference over their decisions to either admit or to exclude expert testimony.

For the Court to be the arbiter of the validity of a given scientific theory is indeed a heavy burden. As Judge Kozinski observed:

> Our responsibility....unless we badly misread the Supreme Court's opinion [in *Daubert*], is to resolve disputes among respected, well-credentialed scientists about matters squarely within their expertise, in areas where there is no scientific consensus as to what is and what is not 'good science,' and occasionally to reject such expert testimony because it was not 'derived by the scientific method.'

> Mindful of our position in the hierarchy of the federal judiciary, we take a deep breath and proceed with this heady task.

Daubert v. Merrell Dow Pharmaceuticals, Inc., 43 F.3d 1311, 1316 (9th Cir. 1995).

Ultimately, the Court must "ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable." *Daubert v. Merrell Dow Pharmaceutical,* 509 U.S. 579 (1993). As such, the Court is the gatekeeper charged with determining whether the expert's testimony is reliable and relevant enough to not be junk science or mere paid for opinions. (Emphasis ours).

Moreover, and as amplified in *Mississippi Transportation Commission v. McLemore*, 863 So.2d 31 (Miss. 2004):

> The trial court's role as gatekeeper is not intended as a replacement for the adversary system. The admission of expert assessment of value must be cautiously determined because of the expert's critical role in the evaluation of the strong interests of both property owners and governments in just compensation.
>
> ***
>
> The Supreme Court clearly recognizes the gate keeping responsibility of the trial court to determine whether the expert testimony is relevant and reliable.
>
> ***
>
> The gatekeeping function of the trial court is consistent with the underlying goals of relevancy and reliability in the Rules.

In addition and as further amplified in *Watts v. Radiator Specialty,* 990 So.2d 143 (Miss. 2008) "because of the weight that is given to expert testimony, it is imperative that trial judges remain steadfast in their role as gatekeepers under the *Daubert* standard." *Watts* at 147. (Emphasis ours).

RULE 702, M.R.E.

In reviewing an expert's testimony, which may or can be accomplished in a number of methods, the trial judge is not only guided but constrained by our Rules of Evidence, Rule 703, MRE.

Mississippi adopted Rule 702, Mississippi Rules of Evidence, which states as follows:

> Testimony by Experts.
>
> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case. (Emphasis ours).

In addition, and very important to the inquiry, would be the official comments to Rule 702 which state in part:

> It is important to note that Rule 702 does not relax the traditional standards for determining that the witness is indeed qualified to speak an opinion on a matter within a purported field of knowledge, and that the factors mentioned in *Daubert* do not constitute an exclusive list of those to be considered in making the determination. (Emphasis ours).

DAUBERT AND ITS PROGENY

The *Daubert* decision and Rule 702 must be considered in tandem – together. The purpose of *Daubert* is to provide a "filter" for the gatekeeper (trial judge) in construing an expert's testimony such as Glover and to conclude is the testimony reliable, is it relevant, is the expert qualified; so forth and so on. The *Daubert* decision

and those decisions following *Daubert* have consistently been upheld by this Court. It is, therefore, the "gold standard."

In considering *Daubert* a trial judge has many factors that he or she can consider as the gatekeeper. These factors do not constitute an exhaustive list but should be consulted as the lower court judge did in the matter at bar.

Many factors must be considered in whether to open the gate to an expert. These factors can be gathered in a review of Rule 26, M.R.C.P. as well as the primary factor supported or suggested by Rule 702 M.R.E. As an aide in construing the essentials of the aforementioned rules, and the requirements of *Daubert,* a number of factors should be considered.

(1) Did the expert submit a report?

(2) Does the expert's report contain one or more of the following:

(a) a statement of opinions?
(b) basis and reasons therefor?
(c) data considered in forming the opinion?
(d) exhibits?
(e) qualifications?
(f) publications authored?
(g) compensation?
(h) other cases in which the expert has testified?

(3) Is the witness qualified by knowledge, skill, experience, training or education? (Emphasis ours).

(4) Is the testimony based on sufficient facts?
(5) Is the testimony the product of reliable methods?

(6) Did the witness supply those methods to the facts?

(7) Can the theory or technique be challenged, or rather is it subjective, conclusory approach?

(8) Has it been tested by other experts?

(9) Is there a sufficient gap between the facts and the opinion proffered?

(10) Was the expert as careful as he or she could be if applying the same theories and/or opinions to their regular work?

This analysis, while not complete, is a traditional analysis that would be applied in any Court, Mississippi or otherwise when testing an expert's opinion under Rule 702 (or otherwise) for relevancy, reliability (trustworthiness) and assistance to the trier of fact. See generally *Mississippi Transportation Commission v. McLemore*, 863 So.2d 31 (Miss. 2004).

> The testimony must be based upon sufficient facts or data; the testimony must be the product of reliable principles and methods; and, the witness must have applied the principles and methods reliably to the facts of the case.

Richard J. Poole, et al v. William T. Avara, M.D., et al, 908 So.2d 716 (Miss. 2005).

Generally *Daubert* challenges appear in cases of scientific or highly technical subjects; subjects which have not been tested or areas of scientific specialty not generally accepted in their respective discipline. However, *Daubert* is likewise applied not only in these fields but in areas identical to the case-at-bar. See generally *Mississippi Transportation Commission v. McLemore,* 836 So.2d 31 (Miss. 2004), *Robert W. Webb, Jr., et al v. Chris Braswell, et al*, 930 So.2d 387 (Miss. 2006). Conclusively *Daubert* is applied to all areas of expert inquiry of reliability, relevancy and qualification.

BURDEN UPON THE OFFERING PARTY

In keeping with this Court's jurisprudence, it is the burden of the offering party who must sustain the admission of their expert witness.

> The party offering the testimony must show that the expert based his opinion not on opinions or speculation, but rather on scientific methods and procedures.

Mississippi Transportation Commission v. McLemore, 863 So.2d 31, 36 (Miss. 2004); *Tunica County v. Matthews,* 926 So.2d 209, 213 (Miss. 2006).

Therefore, in the case-at-bar the Appellants were saddled with the burden of satisfying the trial court that its expert witness was qualified, and that her opinions were relevant and reliable.

In the matter presently before the Court the Appellants did not sustain that burden and therefore the lower court was correct in excluding Glover as Appellants' expert witness.

STANDARD OF REVIEW AS TO QUALIFICATIONS OF THE EXPERT

The trial judge must pass upon whether or not the expert is qualified. Legions of decisions of this Court and the Court of Appeals have confirmed this point; none better, however, than the decision reached in *International Paper Company v. Townsend,* 961 So.2d 741, 758 (Miss. 2007) stating as follows:

> The qualification of an expert witness is left to the sound discretion of the trial judge, and his determination will not be reversed unless it clearly appears that the witness was not qualifed. *General Motors Corp. v. Pegues,* 738 So.2d 746, 752 (Miss.Ct.App.1999) (citing *Wilson v. State,* 574 So.2d 1324, 1334 (Miss.1990); *Smith v. State,* 530 So.2d 155, 162 (Miss.1998)). Even before the amendment to Rule 702, however, the Mississippi Supreme Court recognized that "under the guidelines of the Mississippi Rules of Evidence Rule 702, the trial judge serves as 'a gatekeeper' in ruling on the admissibility of expert testimony." *APAC-Mississippi, Inc. v. Goodman,* 803 So.2d 1177, 1185 (Miss.2002). Thus, the sufficiency of foundational facts or evidence on which an expert bases his opinion is a question of law which must be

> determined by the trial judge. *Janssen Pharmaceutica v. Bailey,* 878 So.2d 31, 60 (citing *Gulf Ins. Co. v. Provine,* 321 So.2d 311, 314 (Miss.1975)). "These facts must afford a 'reasonably accurate basis' for the expert's conclusion." *Id.* (citing *Provine,* 321 So.2d at 314.) Therefore, our courts have held that the trial judge, as the gatekeeper, is required to examine the reliability of expert testimony. See *Bailey,* 878 So.2d at 60. (Emphasis ours).

See also *Tunica County v. Matthews,* 926 So.2d 209 (Miss. 2006).

EVALUATION OF GLOVER'S TESTIMONY, EXPERT REPORTS AND QUALIFICATIONS

Appellants contend in their Brief before this Court that Glover is uniquely qualified to give expert testimony before the lower court – qualified because she holds various degrees/licenses and because of her lifetime experience in the "corporate world." While these experiences, educational achievements and licenses may serve Glover well in some areas of the "corporate world," they do not make her uniquely qualified in this cause; a matter of extreme complication in the area of derivative shareholder litigation. The fact of the matter is that Glover has no experience in this area of corporate litigation, nor does she have any clue (as evidenced by her expert reports and deposition) of the inner workings of a derivative cause.

While it is not necessary to describe what a derivative suit is, it may be helpful to explore this definition and then apply it, *juxtaposed* to Glover's testimony and expert reports.

An internet Wikipedia search definition of "a shareholder derivative suit" is defined as:

> ...a law-suit instigated by a shareholder of a corporation, not

> on the shareholder's own behalf, but on behalf of the corporation. The shareholder brings an action in the name of the corporation against parties allegedly causing harm to the corporation...Any proceeds of a successful action are awarded to the corporation. (Emphasis ours).

During the pretrial process of this litigation Appellants designated their expert witness, followed by their expert witness' report (opinions, etc.) in keeping with our rules of procedure, Rule 26 M.R.C.P.

Appellants' expert produced her first report under cover dated November 29, 2006 (R. 152-251). This report was titled "Investor Resource Service, Inc. Analysis of Damages Associated With the Actions of the Majority Shareholder and Directors of Rainbow Entertainment, Inc."[1] While the title to the expert report may be a bit benign – the impact of this report is not, it represents a clear misunderstanding by Glover of the substance and purpose of a derivative claim, as well as the damages that could be awarded in a derivative claim.

CRITIC OF GLOVER'S FIRST REPORT

The commencement of Glover's first report gives us an "overview," followed by her qualifications and experiences in the corporate world. Most prominent is her reference to her law degree, as well as to the fact that she is a Certified Public Accountant ("CPA"). A factor which shall be addressed in the latter part of this Brief (R. 153).

Glover then moves to a description of the assignment for which she undertook in

[1]Glover's first report of 11/29/06 was followed by a second report which was generated following her deposition by Appellees in February of 2007; this second report was an attempt by Glover to correct numerous glaring errors committed in her first report – her efforts in the second report were not successful.

rendering her opinion – "This report analyzes the damages incurred by Investor Resources, Inc. and the other minority shareholders from the actions and omissions of the majority shareholders and directors of Rainbow Entertainment, Inc." R. 155.

In the "Description of the Assignment," Glover contends that the damages, if any, which would be assessed in this cause would flow to Investor Resource Service, Inc. and the minority investors of Rainbow. This assumption by Glover represents a clear misunderstanding of derivative claims, as we know damages in a derivative claim flow to the corporation and for the benefit of the shareholders.

Glover then launches into an overview of Greenville Riverboat, LLC and its various owners. After which she details the ownership of the minority and majority shareholders of Rainbow.

Moving then into the substance of her report, Glover completes an Analysis of Damage Transactions; starting first with her contention that:

> ...As a 20% owner, Rainbow received 20% of the net profits of Greenville Riverboat. Similarly, Rainbow should have distributed these payments to its equity partners based also on their equity ownership interest in Rainbow. As an alternative to a dividend distribution, the directors of Rainbow could have managed those funds in ways that satisfy the business judgment rule or meet the business requirements and expectations of the minority shareholders. Directors Marvin Cato, Lavern Cato and Charles Cato neither managed nor disbursed these profits in this manner. R. 158-159.
>
> ***
>
> These payments are discussed later in this report. Investor Resource Service and the other minority shareholders were damaged financially by not receiving their share of the profits from Rainbow when Rainbow received profits from Greenville Riverboat. R. 159.

Again, a significant misunderstanding is evidenced in Glover's first report – in Mississippi a corporation is not compelled to make distributions – to pay dividends.

Thereafter, Glover continues to analyze various payments made by Rainbow directors, payments which Glover contends were either not explained, ill-explained or which had (presumably) no specific corporate purpose. Moving through the analysis Glover refers to a Private Placement Memorandum that Rainbow issued in 1993 and suggested that this Private Offering would bind in some way Rainbow and all of its future activities. R. 160.

Again, a clear misunderstanding of the facts and the application to the facts. Rainbow through its Minutes of the corporation authorized the payment of salaries and other expenditures; including repayment of loans. Moreover, the Private Placement Memorandum which Glover relied upon expired on its face 30 days after its issuance. R. 160-161; R. 580-590, see also Exhibit D-1 to the hearing of August 13, 2007.

Glover then criticizes the financial statements which contained alleged incorrect reporting transactions as well as suggested that in some way the directors mismanaged or misused corporate funds.

First, of course, Rainbow has always employed a certified public accountant and made no transaction for the preparation of financial statements without the benefit or reliance upon their CPA. R. 586-588. As well, and to the suggestion that the directors of Rainbow mismanaged or misused corporate funds, Appellees' expert Professor Barbara Aldave addressed that very issue during her cross-examination by Appellants' counsel, Jim Craig.

Q. Okay. Now, is it your opinion that none of the defendants

in this case has wasted corporate assets in that the expenditures which have been questioned were reasonably necessary and had a necessary business function to promote the business of Rainbow and to further additional ventures in which Rainbow might engage in the future?

A. I have not seen any evidence indicating any of these expenses fell outside the ordinary and necessary rubric.

***

Q. I see. And you're aware that there was, as Mr. Hafter was saying earlier today, two years worth of a sky box at the Tampa Bay Buccaneers Stadium –

A. Yes.

Q. – paid for by Rainbow funds?

A. Yes.

Q. And it's your understanding that that's what – is reasonably necessary and had a necessary business function to promote the business of Rainbow?

A. I think it could very well. I go to football games if and only if I am invited to sit in the sky box, and I suspect that there are some successful business people who act similarly. I mean, I consider that one of the perks of my position is that my benefactress has the second biggest sky box at the Autzen Stadium.

Q. Well, you said "could." Do you have any reason to think that the sky box was used for that purpose?

A. I do not know, and I do not know whether it was used simply as another display of success that could be helpful to someone in Mr. Cato's position. R. 439-440.

Most assuredly, these opinions by Glover are outside her stated qualifications in analyzing derivative claims; not to mention the fact that Glover's assumption are not only inaccurate but not supported by the facts of this cause.

Next Glover takes up the charge in her report of criticizing Rainbow for "improperly...[making] payment of dividends and ...other disbursements." R. 163. Her support for this portion of the report is (using Glover's words) the outlandish assumption that some way Rainbow had (1) a legal obligation to pay dividends and (2) that Rainbow was merely a "passive investor" in Greenville Riverboat.

For her reliance on this position, Glover stated:

> Rainbow had a responsibility to pay dividends because the company had only a single business purpose, and that was to be an investor in Greenville Riverboat and receive the profits from the firm. Greenville Riverboat obtained the license to operate and manage a casino in Greenville, Mississippi...
>
> ***
>
> Thus, Rainbow had no management purpose as it relates to the Greenville Riverboat business venture. Rainbow was only to receive profits and distribute them to the individuals who had invested for the purpose of receiving profit distributions. Any other business purpose of Rainbow had to be approved by the shareholders, and no such approval or authorization was recorded in the minutes. R. 164.

Nothing could be further from the truth. Rainbow is a Mississippi corporation, qualified to do and doing business in the State of Mississippi. A viable entity charged with the payment of taxes and permitted to venture into any form of business legally sanctioned by this state. It is, therefore, very difficult to understand Glover's rationale. Presumably she contends that because Rainbow had no active participation in the management of the casino (Greenville Riverboat), then it (Rainbow) was nothing more than a passive corporation, a conduit to receive profits and to pay dividends to its shareholders.

Anyone with a rudimentary understanding of corporate law could not reach this conclusion. Moreover, the law in the State of Mississippi will not and does not support the assumption that a corporation is to make distributions to its shareholders. Corporate directors are only obliged to see to the well being of the corporation and its debts; not to make distributions to shareholders. Miss. Code Ann. §79-4-6.40 (2007).

Toward the end of Glover's first report, she then takes issue with the Catos' management of Rainbow, an alleged violation of the By-Laws of the corporation as well as some action which she contends constituted "bad faith" – all in the vain of analyzing damages, acting as a "damages expert."

First, of course, Glover uses the term "GAAP" – an acronym for Generally Accepted Accounting Practices. Yet, she does not cite any provision of GAAP nor does she show in detail what provision of GAAP was breached – merely continued rhetoric without substance. Then she criticizes the corporation for its failure to hold (as an example) annual meetings or to insure proper management of Rainbow's cash; followed by some description of the majority shareholders' bad faith to the corporate structure.

There is no provision in Mississippi law making it a violation of one's corporate duty to fail to hold annual meetings or to follow with specificity By-Laws – but if there is, or if there was, a remedy is in place by enforcing such malfeasance through the Chancery Courts of our state. Again, Glover demonstrates an inadequate understanding of corporate function and derivative lawsuits. However, Glover's conclusion represents her worst misgiving and display what the lower court concluded was Glover's failure of qualification to act in such an expert capacity.

Glover contends that Rainbow received some $8,000,000 in profits from

Greenville Riverboat through 4/1/05. That minority shareholders in Rainbow had a 40% equity interest and that of the some $8,000,000 disbursed the minority shareholders' portion of the profits would have exceeded $3,000,000. Therefore, less dividends paid of $500,000 to the minority shareholders their damages should be in the neighborhood of $3,000,000.

Glover opines that for the bad faith and other actions of Marvin and Charles Cato – as it pertains to Investor Resource Service, Inc. and the other minority shareholders, they are owed in damages $3,000,093,229.00. In addition, the actions of the Catos were abusive, outrageous and oppressive – therefore, an additional award of punitive damages would be appropriate. R. 170.

First, this writer is unsure that an expert witness can give an opinion about the issuance of punitive damages, in light of Miss. Code Ann. §11-1-65 (2006). However, and notwithstanding the issue of punitive damages, Glover's compensatory damage calculations are seriously flawed and again represent what the lower court found was her inability to act as a competent and qualified derivative expert.

First, of course, and as stated time and time again, damages in derivative actions do not flow to the individual shareholders.

Second, Glover's compensatory damage assessment does not take into account the normal and reasonable expenditure of Rainbow. That is, the normal expenses of overhead in operating a corporation. This sum cannot be avoided; all businesses are required to pay and incur reasonable and necessary expenses.

Third, and the most glaring error in Glover's damage assessment is her failure to account for the payment of taxes. Rainbow is a "C-corporation" and is therefore

required to pay at least a tax rate of some 40%; 35% federal and 5% state. Taxes cannot be avoided in any damage calculation/assessment. Oddly Glover does not account for this most important point.

CRITIC OF GLOVER'S DEPOSITION

In its Order granting the Appellees' Motion in Limine and/or to Exclude Plaintiffs' Expert, the lower court found that "Ms. Glover lacks sufficient education, expertise, or training in the area of derivative actions." R. 628-30; R.E. 1. The court went on to state "[t]his fact is evidenced by her deposition testimony and in her reports in which she demonstrates a failure to understand how damages in derivative actions are distributed." R. 629; R. E. 1. A review of Glover's deposition testimony clearly corroborates the lower court's accurate findings and conclusions of law.

After the production of Glover's first report, dated November 29, 2006, Appellees took her deposition on February 28, 2007. R. 252-320. Through a litany of erroneous statements, misstatements concerning the facts of the instant matter, and a complete misunderstanding of shareholder derivative litigation, Glover's deposition testimony further highlights (as the lower court accurately termed) her "fundamental failure to grasp the very nature of a derivative action." R. 629; R.E. 1.

As previously stated, the lower court found that Glover lacked the education, expertise or training to give expert testimony in this matter. In addition to her reports, this fact is illustrated through a review of the early portions of her deposition wherein Glover erroneously held herself out as a "certified public accountant" (R. 253) (this issue will be further discussed, *infra*), admitted that she had failed to author any articles or treatises related to the issue of derivative claims (R. 255-256), and that she had not

attended any training seminars nor taken any continuing education classes that dealt with derivative claims. R. 261.

Glover's deposition testimony additionally illustrates her lack of an understanding of the facts of the instant matter. As an example, Glover was asked about a portion of her report in which she stated that Charles Cato, Laverne Cato and Marvin Cato have comprised the entire board of directors since the inception of Rainbow. Specifically, Glover was asked about where the information came from that formed the basis for the statement. Glover stated that the information came from reading the documents that she had at the time of her report. R. 281. The Rainbow board of directors meeting minutes clearly show that other people served on the board in addition to those referenced in Glover's report.[2] When questioned about the documents Glover reviewed that showed additional directors, Glover was resigned to "accept that there are others who have been on the board of directors." R. 281. She further admitted that it was important to know of the additional board members "[b]ecause the board of directors sets the direction for the company." R. 281.

One of the most glaring deficiencies in Glover's deposition testimony related to her lack of a general understanding of derivative actions. She was initially unsure of

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[2]Glover's reports and her deposition testimony attempt to avoid the fact that persons other than the Catos have served as officers and/or members of the Board of Directors of Rainbow. In fact, Messrs. Holmes Petty, Richard Greene and others have served in these most prominent positions in the life of Rainbow. (R. 580-81). Richard Greene served on Rainbow's board and at one time as Rainbow's legal counsel. Oddly enough, Mr. Greene is or was at one time a law partner of Robert Hunter (R. 581) and as the Court can see Mr. Hunter is one of the attorneys who is representing the Appellants before this Court and before the Circuit Court of Washington County, Mississippi – the same group that is complaining of all manner of misdeeds as allegedly committed by the Catos and/or Rainbow; people and a corporation that at one time were represented by Mr. Hunter's law partner, Mr. Greene.

whether shareholders in such an action sue a corporation or bring suit on behalf of the corporation (R. 269) before correctly stating that the shareholders sue on behalf of the corporation. R. 270. Thereafter, Glover was asked about the damages in a derivative action and to whom they would flow. Glover testified that "[t]he shareholders are suing for the damages that they think are owed to them." R. 270. She was then asked the following line of follow-up questions:

Q: What is your understanding of the damages that are assessed in derivative cases and to whom they are assessed?

A: Well, my understanding is, shareholders sue in a derivative action. And they sue for damages – well, they sue for damages or some element that they feel is owed.

Q: To whom? What is your understanding?

A: To whom?

Q: Yes, ma'am. To whom do the damages flow, if they are successful?

A: To shareholders.

Q: To the shareholders?

A: Uh-huh (affirmative).

Q: Not to the corporation, but to the shareholders; that's your understanding?

A: Well, the shareholder – the shareholders sue on behalf of the corporation.

Q: Okay. Is that what you have said in your report?

Mr. Craig: Object to the form, because the report speaks to itself – speaks for itself. Pardon me.

Mr. Daniels: That's okay.

Q: Who do you conclude, based on your report, Exhibit 2, should receive damages in this case if the plaintiffs are successful?

A: The minority shareholders.

Q: The minority shareholders?

A: Yes.

R. 270-271. Glover reiterated her position later in the deposition when she was asked about the portion of her report that dealt with the assessment of damages in this matter. Glover testified that it was her opinion that she had calculated the amount that due and owing to the minority shareholders (not the corporation). R. 282. This testimony clearly shows Glover's utter lack of even an elementary knowledge of the subject matter in which she is purporting to be an expert. Glover clearly lacks the education, expertise or understanding that would qualify her to give any sort of expert testimony in this action.

CRITIC OF GLOVER'S SECOND REPORT

Glover's second report is, in the opinion of this writer, no better than the first. The second report (R. 321-343) dated June 26, 2007, is an additional attempt to correct errors committed in the first report and after the benefit of being deposed by the Appellee.[3]

[3]Again, like the first report, Glover states that she is a Certified Public Accountant (R. 322).

The second report also brings into question many factors and again glaring errors evincing Glover's unqualified state – as the lower court so held.

While Glover characterizes herself as a "damages expert," she gives an opinion concerning alleged breach of duties of the Catos. (R. 324). Glover again in her second report speaks of the Private Placement Memorandum and then alludes to some guaranty executed by Charles Cato in his corporate capacity, a right that the corporation had in the pursuit of additional ventures.

In Glover's second report (R. 328), Glover makes reference to alleged improper payments to the Catos or by way of loan repayments. The minutes of the corporation clearly permitted such repayments and had Glover satisfied due diligence she would have known that the Minutes of the corporation accommodated the repayment of such expenditures/loans. R. 580-590, Exhibit D-1.

Incredibly and even after Glover's deposition in February of 2007, Glover continued to quote the terms of the Private Placement Memorandum. (R. 329). When a cursory review of that Private Offering would have shown that it expired shortly after its issuance. Had Glover acted in a responsible fashion, she would have recognized that the terms of the Offering had expired and in no way would bind Rainbow.

Glover suggests (R. 329) that the payments (loan repayments, salaries, etc.) made to Marvin and Charles Cato were some scheme, a method of reducing the net profits of Rainbow and therefore reducing the available cash that would otherwise be declared as a dividend. There is no support for this position. Again the Minutes of the corporation acknowledge the repayment of debt and Mississippi corporations have no obligation to make disbursements, to pay dividends. R. 580-590; Ex. D-1.

Not unlike the first report, again Glover (R. 337-339) discusses GAAP. But, fails to direct us to the specific provisions of GAAP for which she contends Rainbow and/or the Catos reached.

In conclusion, and in the second report Glover makes the same error that she did in the first, she makes no accommodation for the payment of reasonable expenditures to manage/run the corporation nor does she accommodate the payment of taxes from the distribution of profits earned by Rainbow and from Greenville Riverboat.

It is uncanny that a Certificate Public Accountant, or at least one who holds him or herself out as a CPA would commit such an error. R. 341-342.

DECISION OF THE TRIAL COURT

This Court cannot say that the Circuit Court of Washington County, Mississippi abused its discretion in disqualifying Glover. The Appellants cannot sustain their burden in this cause and demonstrate that the decision of the trial court was arbitrary or clearly erroneous.

There are more than ample facts to demonstrate beyond all doubt that Glover is not qualified to testify as a derivative expert in this cause.

Moreover, and while not required in all cases, that is, for an expert to be duly licensed in a particular field of expertise – in this cause Glover's reputation and licensor as a CPA was a significant part of not only her qualifications as a derivative/damage expert, but a central and pivotal part of the alleged validity/qualification of her ability to serve as an expert in this cause.

Numerous representations were made by Glover as being a CPA, her first report (R. 153), her deposition (R. 253 - "I am a Certified Public Accountant") and in her second

report (R. 322).

CONCLUSION

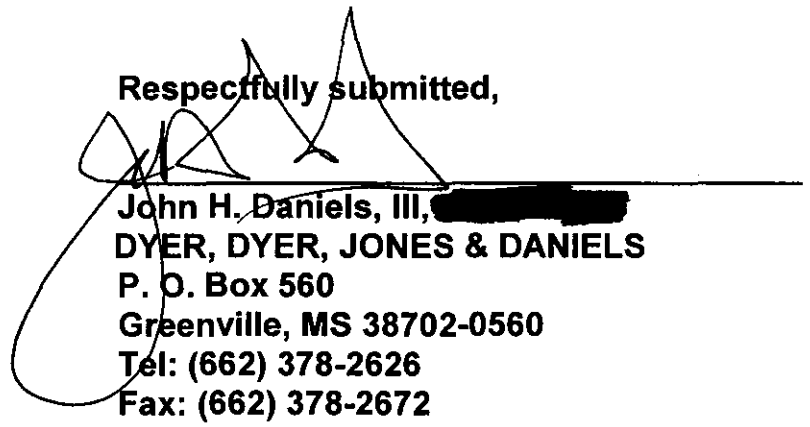
The trial court clearly made the correct decision in sustaining the Appellees' Motion *in Limine*.

The trial court was "justified" in its finding that Glover was not qualified to tender an expert opinion before the Circuit Court of Washington County, Mississippi; not to mention an opinion which would be carried on the representation of Glover as a CPA. Glover's representation that she was a CPA (a representation which she never attempted to qualify) was untrue. Moreover, Appellants cannot "gloss over" this fact by their reliance upon cases sanctioned by this Court in permitting un-licensed individuals to render expert opinions. Those cases are distinguishable from the one at bar; Glover (the Chairman of the Business School at Jackson State University) made affirmative representations of her status as a CPA in support of her findings and conclusions as an expert who was "qualified" to render an opinion in this cause. Neither this Court, nor the Circuit Court of Washington County, Mississippi, should permit an expert to render an opinion supported upon inaccurate or false representations of certain qualifications.

Notwithstanding, however, the lower court went further in its findings in sustaining Appellees' Motion *in Limine* and therefore excluding Glover as Appellants' expert. The lower court relied upon the *Daubert* decision and *McLemore*, *supra,* and as the "gatekeeper" concluded that Glover should not serve in such capacity. This Court cannot find that the lower court abused its discretion and if this Court is to vest such a "high office" upon our trial judges in making such decisions, then this Court should not

disturb the excellent and well-considered opinion of the Circuit Court of Washington County, Mississippi.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, **JOHN H. DANIELS, III**, 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:

Honorable W. Ashley Hines
Circuit Judge, Fourth Circuit District
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THIS, the 4 day of December, 2008.

JOHN H. DANIELS, III