SLG
Stevens Law Group

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October 11, 2023

Clerk of Appellate Courts
Post Office Box 249
Jackson, Mississippi 39205.

Re: Advisory Committee's Proposed Amendments to Rule 26

Dear Colleagues:

Please accept this as my comment to the proposed amendment to Rule 26 which sets out a procedure for "rebuttal experts." I believe this is a long overdue, sorely needed amendment.

In the absence of Local Rules which would allow such a designation, counsel for a plaintiff (in all areas of litigation—commercial, personal injury, domestic, in particular) are left to guess what experts a defendant (or group of defendants) might find necessary on what they believe to be a relevant point warranting substantial resources. On numerous occasions, this is an impossible task. On even more occasions, a plaintiff may earnestly believe that no experts are needed, as the lay testimony sets out the case for both sides in a thorough manner. Here is a frequent quandary my personal injury practice poses.

An easy intersection accident. A defendant allegedly ran a stop sign. Elements of alleged contributory negligence include a failure to keep a reasonable lookout and excessive speed. Both parties are alive to testify. Each has a (very impressionable) passenger to testify. Two eyewitnesses exist to provide competing versions of the facts. The investigating officer took statements and provided all the appropriate background information in the police report. That's plenty, right?

But a gun shy plaintiff may well feel the necessity of hiring an accident reconstructionist simply because the defendant might hire such an expert. But will it be a simple time/distance kind of testimony? Or a trucking operation/FMCSR expert? Perhaps a mechanic who inspected the braking mechanisms of the vehicles. Or will they try to manipulate the ECM/black box information to their expert advantage? What about a roadway design expert or one who tested the traffic signal at the intersection and found flaws? The plaintiff may well begin an expert's "arm's race," where a race never existed, by designating two experts to cover the two most likely scenarios. The defendant, who usually has the advantage of overwhelming resources, might designate three experts to establish superiority. That is an extra day and a half of trial and likely tens of thousands in extra litigation expenses.

MOTION# 2018-2403 Attachment

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Or let's look at the flip side. The plaintiff designates no one because there is plenty of lay testimony. The defense designates an ECM/black box experts whose interpretation of the data is absurd (in the absence of the plaintiff having an expert to counter). The plaintiff needs and deserves a rebuttal expert on that exact issue.

This sort of cat-and-mouse game is simply a part of trial strategy and it plays out in virtually every cause of action beyond the mundane collection lawsuit. Child custody/visitation. Trademark infringement. Will contests. Anti-trust litigation. Products liability.

Why not establish a rule which deters this expert arm's race and, at the same time, provides a level playing field for the party who makes efforts to avoid unnecessary experts? This proposed amendment appears to address this moderately complex issue in a simple fashion.

I support the proposed rule change which allows the designation of rebuttal expert witnesses.

Kindest regards,

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