89-R-99001

FILED

OCT 24 2023

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PARKER LAWSON, LLP
ATTORNEYS AT LAW

R. Eugene Parker, Jr. (Email: gparker@vpslaw.com)
Penny B. Lawson (Email: plawson@vpslaw.com)
Clifford C. Whitney, III (Email:cwhitney@vpslaw.com)

1110 Jackson St
Vicksburg, MS 39183
Ph. (601) 638-8741
Fax: (601) 638-8666

October 23, 2023

Hon. D. Jeremy Whitmire
Clerk of Mississippi Appellate Courts
Post Office Box 249
Jackson, Mississippi 39205

Re: Proposed Amendment to Rule 26 Regarding Rebuttal Experts

Dear Mr. Whitmire:

I am a practicing attorney who regularly defends doctors and hospitals in medical malpractice actions. I am past President of the Mississippi Defense Lawyers Association, although I am not submitting these comments on behalf of the MDLA.

I cannot support the amendment proposed by the Mississippi Association for Justice (MAJ) to engraft into Mississippi Rule of Civil Procedure 26 specific provisions allowing the designation of rebuttal experts. In my opinion, the proposed amendment does not solve the so-called expert "arms race" discussed by the comments of Messrs. Pitre and Stevens of the plaintiffs' bar. Rather, it would escalate it, to the disadvantage of defendants.

Under the current system imposed by the Mississippi Rules, plaintiffs, as the parties bearing the burden of proof, are charged with coming forward first with ***any and all*** experts which they determine may be needed to support their case. The defendants then know completely what proof will be presented and are able to fully designate their own team of experts whom they determine will be necessary to meet each and every aspect of the plaintiffs' evidence. The proposed amendment would allow plaintiffs to "sandbag" by initially designating only the minimal expert opinions, if any, needed to carry their burden of proof. At that point, the defense would have to decide in the dark whether to bring in experts in fields outside the expertise of the plaintiffs' expert, knowing that the plaintiffs could later inject their own, entirely new witnesses in these fields in the guise of their being "rebuttal experts." It is scant comfort that these new experts would ostensibly be limited only to responding to the opinions of the defendants' experts. In reality, plaintiffs would be free to inject fresh experts with carte blanche to testify about anything and everything raised in the opinions

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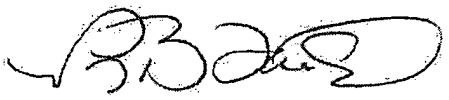
disclosed by the defense experts, even issues not mentioned in the plaintiffs' first disclosures. What are defendants to do next – designate "surrebuttal experts" and escalate the arms race even further?

This proposed procedure would turn on its head the proper order of discovery in civil litigation, in my opinion. Plaintiffs are the ones who elect to bring a lawsuit and to summons defendants into court, and the plaintiffs must bear the expense of proving their claims, even if it means hiring more experts than they would like. It should be the plaintiffs' task to designate ***all*** of their intended experts up front, no matter what the cost, which then gives the defendants a full opportunity to respond. Notwithstanding what the federal courts may have done, we have never had a specific expert rebuttal rule in our state court system, and the litigation process has worked well without it. I fear that adding a specific rebuttal provision will merely invite abuse by plaintiffs and the allowing by courts of overly broad "rebuttal" designations to the detriment of defendants. If plaintiffs desire to submit rebuttal designations, they can and should continue to have to apply to the judge on a case-by-case basis for permission, and the court can assess whether the specific rebuttal opinions are appropriate. If the amendment is granted, defendants get back doored at great prejudice unless it includes a provision for the extension of the discovery rule to provide for surrebuttal of experts by the defense. The amendment proposed by MAJ only adds a potential problem, not a solution.

Thank you for considering my comments.

Sincerely,



Penny B. Lawson