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Mississippi Supreme Court
Rules Committee on Civil Practice and Procedure
c/o Clerk of Appellate Courts
Post Office Box 249
Jackson, Mississippi 39205

FILED

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OFFICE OF THE CLERK
SUPREME COURT
COURT OF APPEALS

Re: Comments on Proposed Amendments to Rule 26 of the Mississippi Rules of Civil Procedure (Rebuttal Experts)

Dear Supreme Court Rules Committee:

Please accept this response to the proposed amendments to M.R.C.P 26, which were posted for public comment. I am a practicing attorney who regularly defends doctors and hospitals in medical malpractice cases. While I believe most civil defense attorneys share the following concerns, the comments below are mine alone and are not sent on any other attorney's behalf.

I do not support the amendments to Rule 26 proposed by the Mississippi Association for Justice (MAJ), as written.

While the proposed amendments appear unnecessary, given that Rule 26(f) already provides for mandatory, timely supplementation of a prior-designated expert's opinions, I am concerned about the practice of some state court judges allowing for the use of rebuttal reports, or even requiring them in scheduling orders, without any direction or safeguards.

Thus, I believe the best approach for Rule 26, as it pertains to expert reports, is for M.R.C.P. 26 to echo the language in its federal counterpart. Federal Rule 26 expressly defines rebuttal expert opinions as those that are "intended solely to contradict or rebut evidence on the same subject matter identified by another party under Rule 26(a)(2)(B) or (C)." Fed. R. Civ. P. 26(a)(2)(D)(ii) (emphasis added). Following the federal rule, M.R.C.P. 26 should clearly provide—in the text of the Rule itself—that "rebuttal" expert opinions are permitted only if they are "intended solely to contradict or rebut evidence on the same subject matter identified by another party's expert."

To add the proposed amendments to Rule 26 without this definition would unfairly prejudice civil defendants and those attorneys representing them. Even if the proposed amendments do not intend to provide plaintiffs the unrestricted ability to disclose entirely new opinions regarding different subject matter, or even designate entirely new expert witnesses with

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attachment

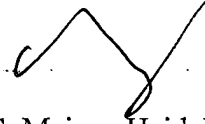
new opinions and subject matter, I have concerns this may be the result. There is no language in the text of Mississippi Rule 26, or in the proposed amendment, to indicate prohibition against this practice.

Inserting language into Mississippi Rule 26 that tracks the federal rule in terms of expressly defining “rebuttal opinions,” will provide guidance to judges and litigators alike, because then both the plain language of the rule (and eventually, the case law interpreting such) will be clear as to the limited situations in which rebuttal reports should be utilized, if at all.

Thank you for considering these comments.

Respectfully submitted,

Heidelberg Patterson Welch Wright

A handwritten signature in black ink, appearing to read "C. Maison Heidelberg". The signature is stylized with a large, sweeping initial "C" and a long, thin horizontal stroke extending to the right.

C. Maison Heidelberg

CMH:cpr