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VIA U.S. Mail

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 write in opposition to the proposed amendments to Miss. R. Civ. P. 26, which would establish a new standard of parties designating "rebuttal" experts during the civil discovery process in our State. I oppose this prospect because it would upend the orderly civil discovery process and lead to frequent expert discovery disputes.

The proposed amendments to Rule 26 allow plaintiffs to designate entirely new experts. The normal practice under the existing Miss. R. Civ. P. 26 is that plaintiffs designate experts first and defendants second. Even so, plaintiffs are not left without an opportunity to respond to the opinions of defendants' experts. It is a routine practice that plaintiffs' experts review the opinions of defendants' experts and disclose their "rebuttal" opinions. This process ensures both parties' experts have the benefit of responding to what which the other experts will say. In my opinion, this process is neat, orderly, and fair. Allowing for a designation of entirely new experts after defendants designate experts would be an unwise change in Mississippi's civil procedures.

Federal district courts in our State disfavor the allowance of rebuttal experts because it upends the ordinary tiered process of designating experts on its head. The late Honorable William Barbour addressed federal court practice and the propriety of "rebuttal" experts in his decision in *In Estate of Vaughn v. KIA Motors Am., Inc.*, Civil Action No. 3:05-CV-38BS, 2006 WL 1806454, at *1, *2 (S.D. Miss. 2006). Judge Barbour noted that the expert designation process is ordinarily controlled by court order but establishing an expert practice that regularly allows for rebuttal experts is disfavored:

> The Court can foresee very few situations when a rebuttal witness designation would be necessary. In the vast majority of cases, a plaintiff has no reason to designate a new rebuttal expert after the defendant's expert is designated. Ordinarily, where rebuttal expert testimony is necessary, a plaintiff will choose to use the same expert that plaintiff originally designated to rebut the defendant's expert, in which case a new designation is

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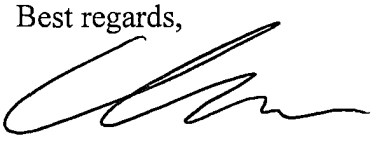
> unnecessary. Under these circumstances, the plaintiff's expert can simply supplement his report as required by Rule 26(e)(1). Only when the defendant's expert raises new issues in his report that were not raised in the plaintiff's expert's report and the plaintiff must call a new expert to rebut that information is there a need for a rebuttal expert designation. **Because a new rebuttal expert designation by a plaintiff is rarely necessary, the Court sees no reason why it should depart from its customary practice regarding designation of experts.**

Id. (emphasis added). Judge Barbour is right. While I might could advocate for a rule that requires a litigant to move for leave of court to designate a rebuttal expert and only in circumstances that show an "extreme need", I cannot endorse the proposed amendment to Rule 26 as presented here.

With adoption of the proposed amendments to Miss. R. Civ. P. 26, you will see parties "bolstering" opinions because of concerns that the plaintiff's original expert's opinions are methodologically flawed. *See Nelson v. Tenn. Gas Pipeline Co.*, 243 F.3d 244, 250 (6th Cir. 2001) ("[F]airness does not require that a plaintiff, whose expert witness testimony has been found inadmissible under Daubert, be afforded a second chance to marshal other expert opinions and shore up his case."). Other federal courts routinely hold that rebuttal expert testimony should be limited to "new unforeseen facts brought out in the other side's case." *Marmo v. Tyson Fresh Meats, Inc.*, 457 F.3d 749, 759 (8th Cir. 2006) (citation omitted). *See United States v. Lamoreraux*, 422 F.3d 750, 755 (8th Cir. 2005) ("The principal objective of rebuttal is to permit a litigant to counter new, unforeseen facts brought out in the other side's case."). I cannot support the proposed amendment as written. I urge that if there is appetite to address rebuttal experts in Miss. R. Civ. P. 26 that the amendments be rewritten to note that it will only be a rare situation where such experts are allowed.

Best regards,



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