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Via U.S. Mail and E-mail to sctclerk@mssc.state.ms.us

D. Jeremy Whitmire
Clerk of Appellate Courts
P.O. Box 249
Jackson, MS 39205

RE: Comments on Proposed Amendments to Rule 26

Dear Mr. Whitmire:

I am writing in support of the proposed change to MRCP 26 with regards to rebuttal expert opinions. This change would clarify the limitations on use of rebuttal experts; promote fairness; and promote judicial economy.

Establishing the procedure as set forth in the proposed change to MRCP 26 would promote fairness in litigation. In my personal injury practice, it is oftentimes the case that experts are the single largest expense in a case and are frequently unhelpful to the tier of fact. Nevertheless, if either the plaintiff or defendant has an expert while the other does not, the party who retained such expert has significant advantage in front of a jury, irrespective of the genuine helpfulness of an expert. Therefore, as the current state of the rules do not provide for rebuttal experts, litigants face a conundrum: 1) to incur significant expense in retention of an expert in fear that the defense will hire an expert, even where such expert will be largely unhelpful to the tier of fact; or 2) to risk their case by foregoing incurring the expense of an expert, whether said expert would be helpful or not.

This rule change also promotes judicial economy. As an example, I was involved in a simple negligence case where a scheduling order had been entered which required designation of plaintiff's experts thirty (30) days prior to the deadline for the designation of the defendant's experts, as is common practice and is defended across the bar by citing that the additional time is afforded to defendant for the purpose of designation of rebuttal experts. In said case, plaintiff designated several doctors; however, plaintiff did not designate any accident reconstructionist; meanwhile, defendant waited until the deadline for plaintiff's designation had passed to designate an accident reconstructionist. Thereafter, Plaintiff filed a motion for leave to designate a rebuttal expert which was heard and granted, and the trial date was reset.

Since this experience, I have been unable to agree to any scheduling order which fails to contain a provision regarding rebuttal expert designation by the plaintiff. While this "rebuttal expert provision" is

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infrequently agreed to by the defendant, it is becoming increasingly common that same is approved by various judges, usually citing fairness as the premise.

Had this rule change been in effect at the time of the example case referenced herein, no additional motions or hearings would have been required, and the trial date would have, more than likely, been maintained.

Those opposing this rule change will likely cite that the burden of proof is on the plaintiff and that this rule change seeks to lessen the burden on the plaintiff. However, in absence of a scheduling order, this rule change would equally serve both parties—preventing either party from making last-minute designations for purpose of advantage. Likewise, in my experience, judges are becoming more inclined to grant provisions in scheduling orders which serve a similar purpose as this rule without the additional safeguards that this rule provides; therefore, this rule would serve to grant several additional safeguards to avoid any abuse or misuse by specifically defining what qualifies as "rebuttal expert opinions" and expanding the duty to supplement to include rebuttal opinions.

I support the proposed rule change referenced herein.

Sincerely,

E. Nicholas Cerra