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Reply To

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OFFICE OF THE CLERK
SUPREME COURT
COURT OF APPEALS

VIA HAND DELIVERY

Hon. D. Jeremy Whitmire
Clerk of Mississippi Appellate Courts
450 High Street
Jackson, Mississippi 39201

Re: Proposed Amendments to Rule 26

Dear Mr. Whitmire:

We are attorneys with McAngus, Goudelock, and Courie writing on behalf of the firm's Mississippi litigation practice group concerning proposed amendments to Rule 26 of the Mississippi Rules of Civil Procedure.

We are concerned the proposed amendments to Rule 26 will invite improper "rebuttal" designations, cause delay, and increase litigation costs. We are also concerned that applying the amended rule in conjunction with other rules will leave insufficient time to properly prepare for trial.

I. The Proposed Amendments Unnecessarily Invite Improper Designations.

Although Rule 26(a)(2)(D)(ii) of the Federal Rules of Civil Procedure allows rebuttal designations, district courts across the country have struggled to address plaintiffs' improper "rebuttal" designations.¹

Under the federal rule, parties must provide the "lion's share" of their expert disclosures within the initial designation deadline.² Rebuttal designations are not

¹ *Bell v. Progressive Select Ins. Co.*, No. 8:22-cv-1054-KKM-TGW, 2023 U.S. Dist. LEXIS 162633 (M.D. Fl. Jan. 22, 2023); *Cook v. Cnty. Of Los Angeles*, No. CV 19-2417-JVS, 2022 U.S. Dist. LEXIS 90354, 2022 WL 1470574 (C.D. Ca. March 21, 2022); *Lake v. City of Vallejo*, No. 2:19-cv-1439-KJM-KJN, 2021 U.S. Dist. LEXIS 97140, 2021 WL 2042584 (E.D. Ca. May 21, 2021); *In re Toy Asbestos*, No. 19-cv-00325-HSG, 2021 U.S. Dist. LEXIS 52228, (N.D. Ca. March 19, 2021); *Zaragoza v. Hartford Fire Ins. Co.*, 18-6150, 2019 U.S. Dist. LEXIS 9904 (E.D. La. Jan. 22, 2019).

² *White v. State Bd. of Election Comm'rs*, No. 4:22-cv-62-SA-JMV, 2023 U.S. Dist. LEXIS 65692 at *11 (N.D. Miss. Apr. 14, 2023) (citation omitted).

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intended to bolster a plaintiff's case in chief.³ An improper rebuttal designation, "speaks directly to an issue on which [the offering party] bear the burden of proof."⁴

Instead, rebuttal designations must address only unexpected and unanticipated portions of the opposing party's case in chief.⁵ Rebuttal experts are allowed to rebut, "new unforeseen facts brought out in the other side's case."⁶ Rebuttal experts may not address defense theories that plaintiffs, "knew about or reasonably could have anticipated."⁷

A Florida District Court noted:

A plaintiff's rebuttal expert may not simply raise evidence that goes to the plaintiff's prima facie case and logically belongs in his case in chief, which is particularly true when a plaintiff knows the defendant intends on contesting that issue. Otherwise the plaintiff could reverse the order of proof, in effect requiring the defendants to put in their evidence before the plaintiff put in his.⁸

Letters submitted by attorneys supporting the proposed amendments suggest plaintiffs could refrain from initially designating accident reconstructionists and later designate these experts to rebut experts designated by defendants. Possibly, in some unusual cases, a rebuttal expert could be allowed under those circumstances.

In our experience, attorneys handling cases necessitating accident reconstructionists know such experts are needed. Plaintiffs can rarely credibly claim defendants' designation of a reconstructionist is "unexpected and unanticipated." If the

³ *Pace v. State Farm Fire & Cas. Co.*, No. 2:23-cv-00019-HSO-BWR, 2023 U.S. Dist. LEXIS 186959 (S.D. Miss. Oct. 18, 2023) (citing *Cates v. Sears, Roebuck & Co.*, 928 F.2d 679, 685 (5th Cir. 2019); *Sierra Club, Lone Star Chapter v. Cedar Point Oil Co. Inc.*, 73 F.3d 546, 571 (5th Cir. 1996); *McAfee v. Murray Ohio Mfg., Inc.*, 66 F. App'x 523 (5th Cir. 2003)).

⁴ *In re Toy Asbestos*, 2021 U.S. Dist. LEXIS 52228 at *18 (citation omitted).

⁵ *Koch v. Koch Indus.*, 203 F.3d 1202, 1224 (10th Cir. 2000); *Lake*, 2021 U.S. Dist. LEXIS 97140 at *5 (citations omitted); *Cook*, 2022 U.S. Dist. LEXIS 90354 at *9 (citations omitted).

⁶ *In re Toy Asbestos*, 2021 U.S. Dist. LEXIS 52228 at *16 (citations omitted).

⁷ *Koch*, 203 F.3d at 1224.

⁸ *Bell*, 2023 U.S. Dist. LEXIS 162633 at *8 (internal quotations omitted) (citing *Braun v. Lorillard, Inc.*, 84 F.3d 230, 237 (7th Cir. 1996); *Cates v. Sears Roebuck & Co.*, 928 F.2d 679, 685 (5th Cir. 1991)) (additional citations omitted).

strategy were allowed, there would be no reason for plaintiffs to designate any experts by the initial deadline.⁹

A Mississippi District Court recognized the rare propriety of rebuttal experts:

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 unnecessary. Under these circumstances, the plaintiff's expert can simply supplement his report as required by Rule 26(e)(1).¹⁰

We suspect the proposed amendments may invite plaintiffs to provide minimal initial expert designations, if any, await defendants' designations, then designate the "lions share" of their expert information in "rebuttal." As noted by federal courts, the sequence of proof would thereby shift, requiring presentation of defendants' evidence first.

If the amendments are approved, we expect substantial litigation regarding whether "rebuttal" designations are appropriate. Courts will be saddled with determining whether plaintiffs should have expected or anticipated defendants' designations, whether the opinions speak to plaintiffs' burden of proof, whether the opinions address the same subject matter as defendants' designations, etc.

The trial courts will face difficulty when determining whether rebuttal designations are appropriate because many of the phrases in the rule's comments are undefined. As an illustration, comments to the proposed amendments and the federal rule state rebuttal opinions are permitted, "solely to contradict or rebut evidence on the same subject matter" in the other party's expert disclosure. Federal courts have noted the comments do not define the phrase "same subject matter" as used in the comment and there is little case law interpreting this phrase.¹¹

⁹ *Id.*

¹⁰ *Estate of Vaughan v. Kia Motors Am., Inc.*, No. 3:05-CV-38BS, 2006 U.S. Dist. LEXIS 45899 at *6 (S.D. Miss. June 29, 2006).

¹¹ *Spring Creek Exploration & Prod. Co., LLC v. Hess Bakken Inv. II, LLC*, No. 14-cv-00134-PAB-KMT, 2016 U.S. Dist. LEXIS 53488 at *10 (D. Col. Apr. 21, 2016); *Edwards v. Fla. Dep't of Corr.*, No. 1:15cv17-MW/GRJ, 2015 U.S. Dist. LEXIS 179417 at *3 (N.D. Fla. Nov. 18, 2015).

Instead of adopting a new, potentially confusing rule that may be difficult to interpret and administer, the committee should recognize the rarity with which rebuttal designations are appropriate. A new rule is unnecessary to address these rare circumstances.

II. The Proposed Amendments will Cause Delays and Increased Expenses.

The purpose of discovery is to avoid trial by ambush and allow parties a reasonable time to prepare for trial.¹² If plaintiffs designate rebuttal experts, trials will likely be delayed to allow discovery on plaintiffs' newly disclosed opinions and experts. At least one federal court in Mississippi recognized this issue and allowed such additional discovery.¹³

Additional discovery necessitated by rebuttal designations will delay trials and increase litigation costs for all parties.

Plaintiffs bear the burden of proving the essential elements of their claims.¹⁴ If plaintiffs are permitted to designate rebuttal experts, defendants will undoubtedly seek leave to designate surrebuttal experts to challenge plaintiffs' opinions.¹⁵ Courts will be required to address these requests.

Designation of surrebuttal experts would also cause delay and increase litigation expenses for all parties.

III. The Proposed Amendments are Incompatible with other Rules.

Rule 4.03 of the Uniform Circuit and County Court Rules provides, "the court will not allow testimony at trial of an expert witness who was not designated . . . at least sixty days before trial."

Under the rule, defendants could choose to designate experts 60 days before trial. Based on the proposed amendments, plaintiffs would be allowed to designate experts 30 days later (30 days before trial). Defendants would be unable to conduct meaningful discovery, file appropriate expert-related motions, or properly prepare for trial within 30 days.

¹² *Thomas v. Lewis*, 289 So. 3d 734, 739 (Miss. 2019) (citations omitted).

¹³ *Midwest Feeders, Inc. v. Bank of Franklin*, No. 5:14cv78-DCB-MTP, 2016 U.S. Dist. LEXIS 100219 at *9 (S.D. Miss. July 29, 2016).

¹⁴ *Alonso v. Ross*, 223 So. 3d 194, 197 (Miss. Ct. App. 2017) (citation omitted).

¹⁵ *Midwest Feeders, Inc. v. Bank of Franklin*, No. 5:14cv78-DCB-MTP, 2016 U.S. Dist. LEXIS 100219, (S.D. Miss. July 29, 2016).

If the proposed amendments are approved, we respectfully suggest Rule 4.03 should also be amended to require plaintiffs to designate experts first, defendants second, and rebuttal last, with all designations completed at least 60 days before trial.

IV. The Rule Needs Additional Comments.

Comments to the proposed amendments fail to explicitly state that rebuttal designations must only address defendants' unexpected and unanticipated portion of the other party's case in chief. The comments should clarify this requirement.

Unlike the federal rules, the comments could further define phrases used therein, such as "same subject matter."

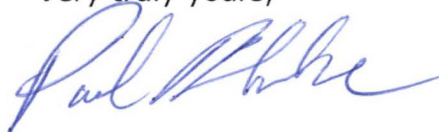
These additions to the comments, and perhaps others, would guide trial courts' application of the amended rule, guide practitioners concerning the rule's limitations, and hopefully avoid some of the delays and increased costs we anticipate if the rule amendments are adopted.

V. Conclusion

We appreciate your consideration of this letter and the committee's work on this and other rule changes.

Should you have any questions, please feel free to contact us.

Very truly yours,



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