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OFFICE OF THE CLERK
SUPREME COURT
COURT OF APPEALS

Hon. D. Jeremy Whitmire
Clerk of Mississippi Appellate Courts
Post Office Box 249
Jackson, Mississippi 39205
sctclerk@courts.ms.gov

RE: Proposed Amendment of Rule 26 of the MRCP

Dear Mr. Whitmire,

This letter is being sent in response to the invitation for comments on the proposed amendments to Rule 26 of the Mississippi Rules of Civil Procedure.

I am writing to object to and oppose the proposed amendments to Rule 26. For brevity's sake, I incorporate by reference the written response already submitted by Penny Lawson, Esquire and would add to that the enclosed MDLA Article written by Stephen Peresich, Esquire.

It is my understanding that Mr. Peresich and others are in the process of submitting their own comments and opposition to the proposed amendments by Monday.

Thank you for the opportunity to provide our comments pertaining to the proposed amendments to Rule 26. With kind regards, I am

Sincerely yours,

DUKES, DUKES, KEATING & FANECA, P.A.

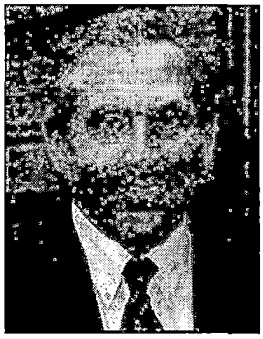
/s/ W. Edward Hatten, Jr. (MSB# 8859)

WEH/ap
Enclosures

MOTION# 2018 2403
attachment

Rebuttal Expert Deadline - Beware!!

By Stephen G. Peresich



Stephen G. Peresich is a senior partner with Page, Mannino, Peresich & McDermott PLLC, with offices in Biloxi and Madison. He has practiced law for 41 years primarily in the areas of medical malpractice defense, hospital law, insurance defense and corporate litigation. He graduated in 1981 from the University of Mississippi School of Law.

1. Introduction

Many plaintiff attorneys are now pushing for the inclusion of a rebuttal expert deadline in scheduling orders and case management orders. Even in garden variety, minor accident cases, agreeing to such a deadline carries risks.[1] Some plaintiffs conveniently lose sight of the fact that they have the burden of proof on the elements of negligence, causation and damages; but, nevertheless, for some reasons, plaintiffs feel a need for an automatic rebuttal expert deadline to shore up any experts they should have retained at the outset.

Well, let's dive right into the discussion. You have designated your Rule 26 retained experts to counter plaintiff's experts, and you are suddenly surprised when the plaintiff designates a new expert in a new field of expertise applying evidence-based Rules 702 and 703-methodology which you had not contemplated. *See also, Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). The discovery deadline expires in thirty days. You quickly check the scheduling order and find it contains a rebuttal expert deadline which you had not recalled.

Your options are limited. Hopefully, your expert can muster counter opinions and you are able to supplement before the discovery deadline. Granted, you may face a motion to strike. Alternatively, a simultaneous motion for leave to designate a defense sur-rebuttal expert or counter expert may be necessary, but remember it is subject to the judge's discretion.

This article advocates that caution should be taken before agreeing to a rebuttal expert deadline. Currently, in Mississippi, the procedural rules in state and federal court do not require a rebuttal expert deadline. Plaintiff lawyers, however, are frequently pushing courts to include a rebuttal expert deadline and a few trial judges around the state already require that their scheduling orders contain such a deadline.

To avoid the above scenario, any effort by plaintiff to include a rebuttal expert deadline as a matter of course should be resisted early on. Otherwise, you risk finding yourself in an uncomfortable predicament. If plaintiff won't agree to a scheduling order without inclusion of a rebuttal expert deadline, a hearing will be necessary to resolve the conflict. There are several arguments the defense can use to resist the inclusion of a rebuttal expert deadline in scheduling orders.

A plausible argument is that a plaintiff should be required to move for leave to add a rebuttal expert upon a showing of "need" and "good cause" after the defense designates expert witnesses. That way, the court can test whether the contemplated rebuttal expert merits the court permitting a late designation. Otherwise, if a rebuttal expert deadline is automatically included at the outset, a defendant might be forced into a defensive posture that may require a motion to strike or leave to add a sur-rebuttal expert. Such a defense motion would occur late in the schedule after the defense expert deadline and likely at a time when the discovery deadline is about to expire.

2. In Federal Court, a Rebuttal Expert Deadline in a Case Management Order is Unnecessary

More frequently, plaintiffs have been urging at the Telephonic Case Management Conference or insisting by a motion that they should be entitled to have a rebuttal expert deadline included in the Case Management Order ("CMO")-scheduling order. Typically, the plaintiff fails to explain any complexity to their case warranting a rebuttal expert designation deadline nor any "need" therefore. Generally, it would be appropriate to object to the automatic inclusion of a second designation of experts. Should the plaintiff later demonstrate a "need" or show "good cause" or "substantial justification" for a true rebuttal expert, then after the defendant designates experts, plaintiff should then be required to move for leave of court to show a "need" or "good cause." If the plaintiff should find a need for such a motion, which ordinarily is doubtful, plaintiff should explain why they should be entitled to do so, and the defendant should be allowed an opportunity to resist such a motion. Defense counsel should, therefore, be cautious when a plaintiff asks for a rebuttal expert deadline at an early stage of the case.

We have all too often seen attempts by plaintiffs to designate a rebuttal expert or rebuttal testimony when the designation should have been made on or before plaintiff's

[1] In the words of District Judge William Barbour in *Estate of Vaughan v. KIA Motors Am., Inc.*, 2006 WL 1806454, at *1-2 (S.D. Miss. June 29, 2006), "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."

original designation deadline. A plaintiff should not be allowed a second bite of the apple.

3. Mississippi Law Defines Plaintiff's Required Elements of Proof

The plaintiff carries the burden of proving the elements of their case, including damages. *McRee v. Raney*, 493 So.2d 1299 (Miss. 1986); *Barkley v. Miller Transporters, Inc.*, 450 So.2d 416 (Miss. 1984). Whatever type of expert the plaintiff may need to prove the elements of the claims made against a defendant, whether it be a liability expert, accident reconstruction expert, biomechanical expert, products expert, rehab expert, economist, a damages expert, or other type expert, the plaintiff is obligated and compelled to make that decision and to designate those experts on or before the plaintiff's expert designation deadline; otherwise, plaintiff should suffer the consequences if they fail to do so. One argument raised by plaintiff attorneys is that they should not be required to incur the expense of an expert they might not need, and that they won't know whether they need a rebuttal expert until the defendant designates the defense experts. Plaintiff attorneys apparently think that the "out of pocket expense" excuse somehow guides whether a plaintiff is obligated to designate experts to prove their case-in-chief. No rule states a plaintiff can delay designating experts because of "expense."

4. Current Case Management Form 1 (ND/SD Miss. Jan. 2021)

The current CMO Form 1 (ND/SD Miss. Jan. 2021)[2] is the current standard format which the Mississippi federal courts use to set forth the case management deadlines for designating experts. Form 1 does not include an automatic second deadline for the plaintiff to designate rebuttal experts. As customarily scheduled, the CMO sets forth a plaintiff's expert deadline and a defendant's expert deadline. *See* CMO Form 1, Section 7. E.

5. The format of CMO Form 1 - Section 7. E. provides for:

> **E. Experts.** The parties' experts must be designated by the following dates:
>
> 1. Plaintiff(s): _____.
>
> 2. Defendant(s): _____.

There is no category on CMO Form 1 - Section 7. E. for automatically setting a rebuttal expert deadline.

6. Federal Rule of Civil Procedure 26(a)(2)(D)(ii) Does Not Imply that the Plaintiff is Automatically Allowed a Second Rebuttal Expert Deadline in the Case Management Order

Specifically, Federal Rule of Civil Procedure 26(a)(2)(D)(ii) states:

> D) Time to Disclose Expert Testimony. A party must make these disclosures at the times and in the sequence that the court orders.

Contrary to what a plaintiff might insist, Rule 26(a)(2)(D)(ii) makes no reference to the inclusion of a rebuttal expert deadline in the CMO. It is likely that the drafters purposefully left out any such entitlement as they could easily envision a downside to a needless and unnecessary automatic extension of the scheduling order for new rebuttal experts beyond the customary designation of plaintiff's experts followed by the defendant's designation of experts thirty (30) days later.[3] Thus, it would be premature to automatically allow a plaintiff to have a *carte blanche* rebuttal expert designation deadline in the CMO.

7. The Plaintiff Must Articulate a Specific "Need" for a Rebuttal Expert

In a typical case, does a plaintiff automatically "need" a rebuttal expert deadline? The answer is "no" because the plaintiff usually cannot even articulate at the outset who that rebuttal expert might be or why he would need a rebuttal designation and can only speculate as to possibilities. Often the same holds true in complex cases. The plaintiff's request or motion for the inclusion of a rebuttal expert deadline should not be considered plausible or reasonable, particularly where the plaintiff cannot articulate a concrete "need" for a particular rebuttal expert.

Regardless of whether the plaintiff wants to spend money to retain and designate a particular type of expert to prove the elements of their case-in-chief, if they need expert testimony to support their claims or to challenge a defendant's affirmative defenses, they are required by the CMO and Rule 26 to so designate experts on or before the plaintiff's expert deadline. The plaintiff is not permitted to sandbag experts, and then claim surprise when they should have contemplated what experts may be needed at the start of

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[2] Last Updated: January 2021.

[3] If the plaintiff automatically gets a rebuttal expert deadline included in the CMO, surely the defendant should get a sur-rebuttal expert deadline as well.

their case. Rebuttal experts, even when allowed after a good cause is demonstrated, are not intended to allow a plaintiff to designate an expert needed to prove their case-in-chief. If that were the case, a plaintiff could withhold an expert until after the defendant designates its expert and then designate an expert under the guise of "rebuttal experts" when such expert should have been designated originally.

8. Rebuttal and Sur-Rebuttal Expert Deadlines in the CMO Cause Delay

Inherently problematic with the plaintiff's approach to setting rebuttal expert deadlines is the fact that if plaintiff is automatically and without a showing of need or good cause allowed a rebuttal expert deadline, then does the defendant not automatically get a sur-rebuttal expert deadline? Both suggestions are unnecessary and will inevitably lead to the waste of time, confusion, delay, needless extension of the discovery deadline, and would most likely lead to a round of motions to strike. There may indeed be a case that warrants the inclusion of a rebuttal expert deadline and a sur-rebuttal expert deadline in a CMO, but that should be a rarity and the exception not the rule.

9. *Estate of Vaughan v. KIA Motors Am., Inc.*, 3:05 CV 38BS, 2006 WL 1806454, at *12 (S.D. Miss. June 29, 2006).[4]

In the case of *Estate of Vaughn*, the plaintiffs objected to Magistrate Sumner's ruling that the discovery deadline should not be extended to allow for the designation of rebuttal experts. In an Opinion and Order reviewing the magistrate's ruling, District Judge William H. Barbour, Jr. explained that "it has long been the practice in this Court to set a deadline in the case management order for plaintiff's designation of expert(s) and a deadline for defendant's designation of expert(s) thirty days after plaintiff's deadline. Plaintiffs are now essentially asking the Court to change this practice and allow them to make a second designation of experts to rebut Defendants' experts." *Vaughn,* 2006 WL 1806454, *2.

District Judge Barbour went further and pointed out that:

> 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). 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 rebuttal expert designation deadline is rarely necessary, the court saw no reason why it should depart from its customary practice regarding designation of experts. The court believed that the prudent course of action was for the plaintiff to move for leave of court to designate a new rebuttal witness if such expert is necessary. *Id.*

Judge Barbour concluded that Magistrate Sumner correctly determined that the plaintiffs were not entitled to a second designation of rebuttal experts without leave of court.

10. *McReynolds v. Matthews*, 1:16CV318HSOMTP, 2017 WL 5573194, at *35 (S.D. Miss. Nov. 20, 2017.[5]

In the *McReynolds v. Matthews* case, a Southern District of Mississippi decision by District Judge Halil S. Ozerden, the CMO did not include a rebuttal expert deadline for the plaintiff. In the customary fashion, the CMO set forth a deadline for the plaintiff to designate experts followed by a deadline for the designation of defense experts. Judge Ozerden found that after the defendant's designation of experts, plaintiff McReynolds designated John C. Corlew, Esq. as an expert[6] beyond the plaintiff's original expert deadline. The court observed that "McReynolds did not request an extension of her deadline, nor did she move for leave to designate a new expert out of time." *McReynolds* at *3. The court also ruled that Corlew was not a rebuttal expert at all because his opinions were necessary for the plaintiff's caseinchief and should have been disclosed in plaintiff's original designation. Relying on *Scott v. Chipotle Mexican Grill, Inc.*, 315 F.R.D. 33, 44 (S.D.N.Y. 2016), Judge Ozerden held that "[a] rebuttal expert report is not the proper place for presenting new legal arguments, unless presenting those arguments is substantially justified and causes no prejudice." *McReynolds* at *4. The Court further commented that "'it is well settled that an expert's rebuttal statement is not an opportunity for a correction or filling in the gaps of the party's caseinchief, particularly where those gaps are revealed through the opposing party's summary judgment motion.'" *McReynolds* at *4, quoting *Engler v. MTD Prod., Inc.*, 304

[4] *Estate of Vaughn* is a pre-2007 amendment to Federal Rule of Civil Procedure 26(a)(2)(D) decision which gives guidance.

[5] *McReynolds* is a post - 2007 amendment to FRCP 26(a)(2)(D) decision.

[6] Corlew was designated on the issue of reasonableness of attorney's fees, which was an element of plaintiff's damages claim in *McReynolds.*

F.R.D. 349, 356 (N.D.N.Y. 2015) (citation and quotation marks omitted)."

The net result in *McReynolds,* according to Judge Ozerden, was that since Corlew was designated out of time and was not a rebuttal expert, the plaintiff should have either requested an extension of her deadline or moved for leave to designate a new expert out of time.

11. Mississippi Court Rules

The Mississippi Rules of Civil Procedure do not affirmatively require trial courts to enter scheduling orders or case management orders in civil cases. In Mississippi, the state trial courts have the discretion to require a scheduling order. Where there is a request for a discovery conference by a party, however, Mississippi Rule of Civil Procedure 26(c) requires the trial court to conduct such a conference. Following any discovery conference, the trial courts are required to enter an order fixing the issues, establishing a plan and schedule for discovery, and setting limitations upon discovery, if needed. M.R.C.P. 26(c).

More locally, the local rules of Mississippi Circuit Court Districts First, Fourth and Fifth, which includes Mississippi counties Alcorn, Itawamba, Lee Monroe, Pontotoc, Prentiss, Tishomingo, Leflore, Sunflower, Washington, Attala, Carroll, Choctaw, Grenada, Montgomery, Webster, and Winston all require scheduling orders to be entered in civil matters. Separately, Hinds County Circuit Court Judge Adrienne Wooten and Judge M. James Chaney of Warren, Sharkey, and Issaquena counties have specific forms for scheduling orders in civil matters. In Harrison, Hancock and Stone counties, Circuit Court Judge Lisa Dodson has a specific form for scheduling orders in civil matters. Usually, the parties negotiate the terms of the proposed scheduling order, including expert witness disclosure deadlines, and jointly submit the proposed order to the trial court.

The inclusion of a rebuttal expert witness disclosure deadline in a scheduling or case management order at the start of case can be problematic because it carries the prospect that a plaintiff may try to avoid the submission of primary expert witness disclosure and instead disclose a rebuttal expert after having the defendant's expert disclosures in hand. This improperly allows a plaintiff to wait until the last possible moment before the discovery deadline to disclose the expert opinions on which the plaintiff intends to rely upon at trial. Such a practice can leave a defendant short-handed or could derail the scheduling order and trial date by requiring the defendant to seek the extension of the discovery deadline or continuance of the trial date.

There are other cases and rules to keep in mind when the issue of rebuttal expert witnesses' surfaces.

"Trial courts have considerable discretion in discovery matters, and ... will not be overturned unless there is an abuse of discretion." *Beck v. Sapet*, 937 So. 2d 945, 948 (Miss. 2006). *See also Bowie v. Montfort Jones Mem'l Hosp.*, 861 So. 2d 1037, 1042 (Miss.2003) ("[o]ur trial judges are afforded considerable discretion in managing the pretrial discovery process in their courts, including the entry of scheduling orders setting out various deadlines to assure orderly pretrial preparation resulting in timely disposition of the cases"; the court excluded expert not designated until nine weeks after deadline in scheduling order).

In *Clark v. Toyota Motor Sales U.S.A., Inc.*, 108 So. 3d 407 (Miss. Ct. App. 2011), Mississippi Court of Appeals found that the circuit court did not abuse its discretion in declining to allow plaintiff in products liability action to call an expert as a rebuttal witness following the testimony of manufacturer's expert where plaintiff's counsel never provided the manufacturer with the rebuttal expert's name or opinions prior to trial.

If no scheduling order is in effect, you may want to keep in mind that Uniform Local Rule for Circuit and County Court Practice 4.03(A) provides that "Absent special circumstances the court will not allow testimony at trial of an expert witness who was not designated as an expert witness to all attorneys of record at least sixty days before trial. See *Six Thousand Dollars ($6,000) v. State ex rel. Mississippi Bureau of Narcotics*, 179 So. 3d 1, 6 (Miss. 2015).

This paper advocates that a better practice would be to object to the automatic inclusion of a rebuttal expert witness deadline in scheduling orders, and instead, require a plaintiff to seek permission of the court based on good cause before being allowed to submit any rebuttal expert witness opinions.

12. Conclusion

Usually, a plaintiff's request for insertion of a rebuttal expert deadline in a CMO or scheduling order is premature, unnecessary, and a waste of time. The federal court CMO already permits plaintiffs to designate experts needed to prove their case-in-chief. But if a plaintiff truly desires to designate and introduce a new expert in a new field of expertise, with new opinions or theory and a new methodology, after the original designation deadline, the plaintiff should be required to move for leave of court to do so. And in that motion for leave, the plaintiff should be required to explain why, and in the words of Judge Ozerden in the *McReynolds* case, demonstrate a "substantial justification" for the alleged need for rebuttal experts; and give the defendant an opportunity to respond. ■