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OFFICE OF THE CLERK
SUPREME COURT
COURT OF APPEALS

October 26, 2023

Hon. D. Jeremy Whitmire
Clerk of Appellate Courts
Post Office Box 249
Jackson, MS 39205

Re: Proposed Amendments to Rule 26 Regarding Rebuttal Experts

Dear Mr. Whitmire:

I write to oppose the amendment to Rule 26 as proposed by the "Mississippi Association for Justice" that seeks to add to the Rule and Comments to the Rule itself an expressed provision for the allowance of Rebuttal Experts by the Plaintiff.

This proposal [Rule and Comments] is not in keeping with Mississippi law and such a procedural outcome seeks to shift the burden of demonstrating the existence of "rebuttal" evidence to the defendant-where it does not belong in this context. The word "rebuttal" has long been improperly used to define something in "response to" or in "reply." Rebuttal under Mississippi law has been defined by our Supreme Court as an issue, witness, or an evidentiary development that was a "surprise" or "unanticipated" to the party sponsoring rebuttal proof. *Banks v. Hill*, 978 So.2d 663 (Miss. 2008). See also, *Morgan v. Commercial Union*, 606 F.2d 554 (5th Cir. 1979); *Harris v. General Host*, 503 So.2d 795 (Miss. 1986); *Clark v. Toyota*, 108 So.2d 407 (Miss. Ct.App. 2011).

When confronted with a "surprise" beyond a deadline, the trial courts will typically entertain arguments from the party sponsoring the "rebuttal" as to why the need for new or additional proof should be allowed. The burden of proof is [and should be] on the sponsoring party to demonstrate why the "rebuttal" proof should be allowed. Banks v. Hill, supra. There is no "right" to put on "rebuttal" evidence or witnesses, and the sponsoring party is required to demonstrate why the issue, witness, or evidence was or could not have been known or discovered. See, *Mills v. State*, 813 So.2d 688 (Miss. 2002); *Rubenstein v. State*, 941 So.2d 735 (Miss. 2006). Since the party with the burden of proof has the responsibility to meet that burden, it is incumbent upon that party to assure that all elements of the claim are met and cannot "hold anything back". *Morley v. JRA*, 632 So.2d 1284 (Miss. 1994); *Banks v. Hill*, supra.

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While the concept of "rebuttal" proof can certainly have more than one application, the most egregious use of the concept of "rebuttal" is within a court form scheduling order pertaining to the designation of experts. The plaintiffs bar has been unrelenting in their efforts [for years] to convince local trial court judges that they are entitled to designate "rebuttal" experts after the defendant has identified their experts. In the overwhelming majority of instances, the designation of "rebuttal" experts by the plaintiff after the defendants designation, is to identify new or additional opinions that should have been given before. The reasons for failing to do so are multi-factorial ranging from a genuine misunderstanding of technical proof right down to outright laziness. There might be instances where a genuine misunderstanding of technical data would justify a "rebuttal", but those instances are rare and would easily meet the truest definition of "surprise" (or unanticipated) enough to support the "discretionary" decision of a judge to allow "rebuttal."

Unfortunately, more often than not, the plaintiff wants to build a scheduling order that gives them a "back door" and as a matter of "right" which allows for a rebuttal designation (whether of proof or even a new witness). This is not true "rebuttal" under Mississippi law since it removes the concept of "surprise" or "unanticipated" from the need for the proof itself.

I believe that the better practice is to remain in accord with the vast body of Mississippi law defining "rebuttal" evidence and stay your hand on any amendments that incorporate the concept of "rebuttal" for anything. Mississippi law already provides for a mechanism that will allow for the admission of "rebuttal" proof. Quite simply, if the party that wants to admit "rebuttal" evidence has the justification of "surprise" for doing so, then it may very well be an abuse of discretion for the court not to allow it. But the responsibility of justifying admission or designation is nonetheless squarely on the party that desires its admission. The burden should not be on the respondent to say why it is not genuine "rebuttal" evidence.

If the committee allows for the designation of "rebuttal" proof as a matter of right under the Rules, then the Rule will completely guts nearly every Mississippi case that discusses the concept of "rebuttal" evidence or testimony. If the committee does not adopt the proposal requested by the Plaintiff's Bar, then the responsibility for advocating the genuine nature of "rebuttal" remains upon the proponent-not the respondent. There is a mechanism in existence now under Mississippi law that allows for "rebuttal" evidence or witnesses when appropriate, but it is not as a matter of "right" as the Plaintiffs Bar would request.

Rule 26 should not be amended to include any change that allows for the admission or designation of "rebuttal" evidence as a matter of right nor should the Rule be specifically amended to justify the inclusion of a "rebuttal" designation period for the Plaintiff in a scheduling order. Alternatively, if the Rule is amended, then a period of "surrebuttal" should be allowed as proscribed by Mississippi law. *Mills v. State*, supra; *Gilmore v. State*, supra, *Dungan v. Presley*, 765 So.2d 592 (Miss. Ct. App. 2000).

The current concept of "rebuttal" evidence is simply not in need of "repair" either by Rule or Comment. The Rule is not broken and the proponent of "surprise" or "unanticipated" evidence has a remedy that is fairly easy to invoke. The request of the MAJ to amend the Rule to provide for "rebuttal" as a matter of right is nothing more than a request to alter the tactical paradigm of case development to the advantage of the Plaintiffs Bar. This is not a sufficient reason to amend the Rule and it should not be altered simply to effectively shift the burden from one party to another. Rule 26 should not be changed to alter the burden shifting mechanism that already exists under Mississippi law.

As for the Comment, it is fairly clear that the Committee seeks to provide some reassurance that will assuage any concerns that the Rule change does not mean what the change to the Rule actually provides. The Comments to the Rule are not "the Rule." The Rule provides outright for the allowance of "rebuttal" designations as a matter of right and Courts will apply the Rule as stated and are not bound by the Comments. If the Rule is intended to be somehow modified by the Comment, then the Rule needs to be modeled to provide for the clarification that the Comment seeks to clarify. In the final analysis, there is no need for a Rule change nor the clarification provided by the Comment. The topic of "rebuttal" has already been addressed for litigants under Mississippi law and the additional clarification found in the Comment are likewise unnecessary as provided for in the Comment.

I do not contend that in the right circumstance, "rebuttal" witnesses or proof, might not be necessary. But each case deserves to be considered on its own merits and the Rule change should be rejected in favor of allowing the litigation process to be developed as provided now by law.

Please reject the proposed change to the Rule and the clarifying Comment.

Sincerely,

William E. Whitfield III

WILLIAM E. WHITFIELD III

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