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October 26, 2023

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

Re: Proposed Amendment to MISS. R. CIV. P. 26 Regarding Rebuttal Experts

Dear Mr. Whitmire:

I have practiced law with Campbell DeLong, LLP, for the past 28 years. I principally handle a broad spectrum of litigated matters, and I write today to express my opposition to the proposal by the Mississippi Association for Justice ("**MAJ**") to amend Rule 26 of the *Mississippi Rules of Civil Procedure* concerning the disclosure of expert rebuttal opinions.

Since the inception of the rules, there have been numerous rule changes to the betterment of the bench and the bar. This is not one of them. Rule amendments should align with the mandate found in Miss. R. Civ. P. 1 – "[t]hese rules shall be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action." This is particularly true in the present-day environment where litigation is rarely, if ever, speedy or inexpensive, and the amendment proposed by the MAJ will make it even less speedy, more expensive, and perhaps most importantly, less just.

The current version of Rule 26 befits a system of justice which squarely places, as it should, the burden of proving all elements of a claim on the party making the claim. A plaintiff, as the master of their claim, is required to designate any experts deemed necessary for their case and to make timely and complete Rule 26(b)(4) expert disclosures so that defendants have fair notice and opportunity to meet that proof. Time and experience has proven this procedure to be just – as Rule 1 mandates. The proposed expert rebuttal disclosure amendment to Rule 26, by comparison, removes the fair notice and opportunity elements inherent in the current rule and invites expert disclosure mischief and gamesmanship, neither of which a rule amendment should facilitate.

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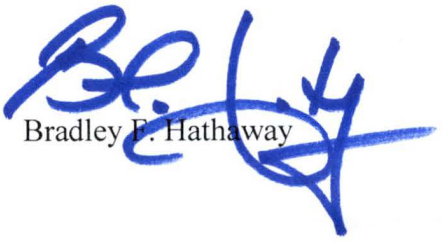
What is more, at least one reasonable interpretation of the rule lends itself to favoring only plaintiffs, which perhaps is not surprising considering the amendment's sponsor, but that is hardly just. On the other hand, if the amendment is interpreted to permit a rebuttal each time the "other party" serves a rebuttal disclosure, that promotes a virtually endless cycle of sur-rebuttals, which is hardly speedy or inexpensive, and the amendment affords no guidance to judges on how to navigate that in a manner which is fair and comports with customary scheduling orders.

I also find the proposed amendments to the Advisory Committee Notes will invite needless pre-trial expert litigation. The notes state that "[r]ebuttal opinions may criticize the methodology used by the opposing expert or raise alternative analyses or relevant facts the opposing party's expert failed to consider," but "[t]he rebuttal opinion may not advance new arguments or new evidence outside the scope of the opposing expert's testimony." I foresee these comments will foster disputes over what constitutes "alternative analyses or relevant facts the opposing party's expert failed to consider" as opposed to what constitutes "new arguments or new evidence outside the scope of the opposing expert's testimony," and our trial judges will have the added task of resolving these disputes on a case-by-case basis.

Rule 26(f), in its current version, already prescribes a duty and permits an opportunity to supplement an expert disclosure in accordance with that provision. The proposed rule amendment offers no improvements to this. The amendment is a solution in search of a problem that does not exist.

Many thanks for your consideration of my comments.

Sincerely,



Bradley F. Hathaway

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