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OFFICE OF THE CLERK
SUPREME COURT
COURT OF APPEALS

VIA HAND-DELIVERY

Mississippi Supreme Court
Rules Committee on Civil Practice and Procedure
c/o Hon. Jeremy Whitmire
Clerk of Appellate Courts
P.O. Box 249
Jackson, MS 39205

RE: Public Comments: Proposed Amendments to Miss. R. Civ. P.26

Dear Mr. Whitmire and Members of the Supreme Court Rules Committee:

I and the co-signing litigation shareholders in my law firm write to oppose the proposed amendment to Rule 26 of the Mississippi Rules of Civil Procedure related to so-called “rebuttal experts.” The change is unnecessary and unfair to defendants.¹ Further, the proposed amended rule would prolong discovery, delaying trials even further.

First, the change is not necessary, because the rules not only permit but require parties to supplement their expert opinions. In addition, in the rare case where a plaintiff may need a true rebuttal expert, the rules permit that plaintiff to seek leave of the trial court, and review in the appellate court if necessary.

Second, and by contrast, allowing plaintiffs to designate new experts – or new opinions – after the defendant’s disclosure deadline will invariably lead to trial by ambush. Mississippi Courts “do not condone trial by ambush.” *Hyundai Motor Am. v. Applewhite*, 53 So. 3d 749, 759 (Miss. 2011). Plaintiffs in civil litigation bear the burden of proof, and in certain classes of case must even obtain expert review pre-suit. They should retain the burden of presenting their theories first, with defendants having the right to respond.

¹ Of note, I and other shareholders signing this letter handle plaintiff’s cases in addition to handling defense cases.

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Third, permitting a rebuttal will lead to further delay in proceedings, and delay itself places an additional and unfair burden on defendants. *AIG Eur., Ltd. v. Caterpillar, Inc.*, 831 F. App'x 111, 116 (5th Cir. 2020) (recognizing prejudice inherent in extending period of expert discovery); *West v. Drury Co.*, No. 2:07-CV-215-P-A, 2008 WL 5169682, at *3 (N.D. Miss. Dec. 9, 2008), *aff'd*, No. CIV.A. 2:07CV215-P-A, 2009 WL 1586898 (N.D. Miss. June 3, 2009) (testimony that could "necessitate additional discovery by the defendant" after discovery deadline was prejudicial).

We encourage you to reject this amendment.

Sincerely,

BAKER, DONELSON, BEARMAN,
CALDWELL & BERKOWITZ, PC



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