

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF LOUISIANA

IN RE: KATRINA CANAL BREACHES  
CONSOLIDATED LITIGATION

CIVIL ACTION  
NUMBER: 05-4182 "K"(2)  
JUDGE DUVAL  
MAG. WILKINSON

PERTAINS TO: *Robinson*  
(No. 06-2268)

**PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION  
TO DEFENDANT'S MOTION IN LIMINE TO EXCLUDE EVIDENCE OF  
MENTAL ANGUISH AND INCONVENIENCE (DOC. NO. 18437)**

**I. INTRODUCTION**

The Defendant's Motion in Limine to Exclude Evidence of Mental Anguish and Inconvenience claims that this Court should exclude all evidence concerning the mental anguish and inconvenience sustained by Plaintiffs on the grounds that that such damages are not recoverable in the circumstances presented. The United States concludes that the Plaintiffs are not entitled to damages for mental anguish and/or inconvenience arising from the damage to their respective properties based on very selective excerpts from the depositions of the Plaintiffs.

However, a motion *in limine* is not the proper vehicle for obtaining what amounts to a summary judgment on an element of damages based on selective use of deposition transcripts. All the procedural safeguards of a Rule 56 motion have been removed. Moreover, the Government's statement of the law is incomplete. Under the law of vicinage, which is recognized by Louisiana and has been specifically pled by the Plaintiffs, mental anguish is potentially available as an element of damages.

The Government's motion should be denied for the following reasons.

## II. ARGUMENT

### A. Damages Are More Suited for Summary Judgment, Not a Motion *in Limine*

The present motion is effectively a motion for partial summary judgment on one element of damages. The motion seeks to dispose summarily of an issue in the case based on a highly selective recitation of the facts and incomplete statement of the relevant law. Granting this motion literally on the eve of trial would deprive Plaintiffs of their right to a trial on the merits.

Federal courts have long held that a motion *in limine* cannot be used as a substitute for a motion for summary judgment because it dispenses with the procedural safeguards of Rule 56 and is not meant to serve as a vehicle for determining disputed facts. *See* concurrently filed Plaintiffs' Objection to Seven Motions in Limine. In particular, "a motion *in limine* should not be used as a vehicle to resolve factual disputes. . . . Nor should a motion *in limine* be used to argue... that *an item of damages may not be recovered*. . . . That is the function of a motion for summary judgment, with its accompanying and crucial procedural safeguards." *C&E Services, Inc. v Ashland, Inc.*, 539 F.Supp.2d 316, 323 (D.C. Cir. 2008) (emphasis added). Accordingly, because this motion is highly prejudicial as it deprives Plaintiffs of the significant procedural protections afforded by Rule 56 it should be denied.

### B. Damages For Mental Anguish Are Available Under Louisiana's Law of Vicinage

The Government's statement of Louisiana tort law is accurate, but incomplete. Defendant totally ignores an avenue through which the Plaintiffs would clearly be entitled to recover damages for mental anguish under Louisiana tort law: the law of vicinage. *Rizzo v. Nichols*, 867 So.2d 73, 78 (La. App. 2004).

There is no disagreement that Louisiana law provides that damages for mental anguish arising from property damage are awardable to persons whose property was damaged by

intentional or illegal acts, or by acts giving rise to strict or absolute liability, or by acts amounting to a continuing nuisance, or where the property owner was present when or shortly after the damage was negligently inflicted and suffered a psychic trauma similar to a physical injury as a direct result of the incident. *Simmons v. Board of Commissioners of Bossier Levee District*, 624 So.2d 935, 954 (La. App. 2d Cir 1993) citing *Farr v. Johnson*, 308 So.2d 884, 885 (La. App. 2d Cir. 1975).

The parties also agree that Plaintiffs claims for damages are governed by Louisiana law. However, the Government fails to mention all the claims under which the Plaintiffs are seeking recovery. In addition to the traditional tort causes of action, the Plaintiffs are also making a claim under Article 667 of the Louisiana Civil Code. In *Graci v. United States*, 435 F.Supp. 189, 195 (E.D. La. 1977), the Court specifically held that the United States as grantee of the right of way, builder and maintainer of the MR-GO assumed a high standard of care with relations to damages caused by the works to neighboring lands and individuals. According to the Court, this conclusion is based on Article 667 of the Louisiana Civil Code.

Article 667 is one of the three articles that comprise the obligations of vicinage. These articles are 667, 668 and 669 and are legal servitudes imposed on the owner of property. These provisions embody a balancing of rights and obligations associated with the ownership of immovables. As a general rule, the landowner is free to exercise his rights of ownership in any manner he sees fit. He may even use his property in ways which occasion some inconvenience to his neighbor. However, his extensive rights do not allow him to do real damage to his neighbor. *Rodriguez v. Copeland*, 475 So.2d 1071, 1077 (La. 1985).

Louisiana Civil Code Articles 667 through 669 are often referred to as the obligations of vicinage. They set out the relationship between the owners or properties in the same vicinity.

Whether an owner of property is liable to his neighbors under the Civil Code Articles of vicinage, is a determination to be made by the trier of fact based upon the reasonableness of the conduct in light of the circumstances. Such an analysis requires consideration of factors such as the neighborhood's character, the degree of intrusion privacy, and the activity's effect on the health and safety of the neighbors. *Barrett v. T.L. James & Co.*, 671 So.2d 1186, 1191 (La. App. 1996), *writ denied*, 674 So.2d 973 (1976).

Louisiana Courts and commentators sometimes use the word "nuisance" in describing the type of conduct which violates the pronouncements embodied in Articles 667 through 669. *inter alia*, *Barret v. T. L. James & Co.* 671 So.2d 1186 (La. App. 1996). The determination of the existence of a "nuisance" pursuant to the articles setting out the obligations of vicinage is a question of fact based on the nature of the intrusion into the neighbors property, plus the extent or degree of the damage. *Hero Lands Co. v. Texaco, Inc.*, 310 So.2d 93, 98 (La. 1975); *Begnaud v. Camel Contractors, Inc.* 721 So.2d 550, 554 (La. App. 1998); *Schulker v. Roberson*, 676 So.2d 684, 688 (La. App. 1996); *Acadiana Heritage Realty, Inc. v. City of Lafayette*, 434 So.2d 182, 185 (La. App. 1983) *writ denied* 440 So.2d 733 (La. 1983).

Assuming they are able to prove those elements, a plaintiff in a vicinage cause of action may recover damages for mental anguish, discomfort, irritation, anxiety, and loss of use and/or enjoyment of his property in addition to general damages. *Rizzo v. Nichols, supra*, 867 So.2d 73, 77; *Cf. Branch v. City of Lafayette*, 663 So.2d 216, 222 (La. App. 1995). (Article 667 enables injured party to recover general damages for his loss of enjoyment of their property, mental anguish, irritation, anxiety and discomfort.); *Arnold v. Town of Ball*, 651 So.2d 313, 321 (La. App. 1995) (same). If Plaintiffs are able to meet their burden of proof with regard to the

Defendant's breach of the obligations of vicinage, Louisiana law provides that they can recover for damages for mental anguish and inconvenience.

### **III. CONCLUSION**

For the foregoing reasons, the Corps motion should be denied.

Dated: April 7, 2009

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I, Pierce O'Donnell, hereby certify that on April 7, 2009, I caused to be served **PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT'S MOTION IN LIMINE TO EXCLUDE EVIDENCE OF MENTAL ANGUISH AND INCONVENIENCE (DOC. NO. 18437)**, upon Defendants' counsel, Robin D. Smith, George Carter, Keith Liddle, and Richard Stone by ECF and email at robin.doyle.smith@usdoj.gov; george.carter@usdoj.gov, keith.liddle@usdoj.gov, and richard.stone@usdoj.gov.

/s/ Pierce O'Donnell