

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI  
SOUTHERN DIVISION

HELEN POLITZ

PLAINTIFF

VERSUS

CIVIL ACTION NO.:1:08CV18-LTS-RHW

NATIONWIDE MUTUAL FIRE INSURANCE COMPANY, ET AL

DEFENDANTS

**MOTION FOR CLARIFICATION AND/OR RECONSIDERATION**

COMES NOW the Plaintiff, HELEN J. POLITZ, by and through her attorneys of record, DENHAM LAW FIRM, and would move the Court to clarify and/or reconsider the rulings in its [252] Memorandum Opinion on Defendant's Motions For Summary Judgment and to Strike Plaintiffs' Claims for Emotional Distress and [253] Order on same, and in support thereof would show as follows:

Plaintiff seeks clarification from the Court on issues addressed in the Courts [253] Memorandum and [253] Order as outlined herein. Depending upon the Court's clarification of the issues, Plaintiff seeks reconsideration thereof.

Plaintiff is preparing a proof of loss for the personal property and an affidavit with an itemized list of the receipts for additional living expenses. Same will be provided to Defendant within the time ordered by the Court.<sup>1</sup>

**Plaintiff's claims for anxiety, mental anguish and emotional distress**

Plaintiffs would ask the Court to clarify and/or reconsider its ruling regarding Mrs. Politz's claim for damages for anxiety, emotional distress, mental anguish. The Court, in its

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<sup>1</sup> Plaintiff did, indeed, provide Defendant with a hand written list of personal property/contents loss list with her December 9, 2008, supplement to disclosures, as well as numerous receipts for ALE. The previous contents list was Exhibit "N" to Plaintiff's [169] Response to Defendant's Motion for Summary Judgment and Nationwide's Supporting Memorandum. Defendant recently deposed Mrs. Politz for the second time, delving into the contents list and receipts.

March 27, 2009, [252] Memorandum Opinion, stated that it “will not permit Mrs. Politz to express the opinion that Nationwide’s refusal of her claim for storm damage contributed to her heart condition and to her ‘depression’ in the absence of corroborating medical testimony.” The Court further stated that it would “limit the evidence that will be admitted in support of the plaintiffs’ claims for emotional distress.” The Court’s [253] Order goes even farther than the Court’s [252] Memorandum Opinion, stating that the Defendant’s [110] Motion to strike the Plaintiffs’ claims for emotional distress will be granted “as to any evidence that Mrs. Politz’s heart condition or ‘depression’ was caused by Nationwide’s actions in adjusting the Politzs’ claim and as to any evidence that Nationwide’s actions caused Mr. Politz’s hypertension, diabetes, anxiety, claustrophobia, depression, or his death from osteomyelitis.” As this Court has already ruled that Mr. Politz’s damages are not recoverable since he is deceased, that portion of the ruling appears to be moot and will not be addressed in this Motion. However, it is unclear whether, in its ruling, the Court is stating that *Mrs.* Politz may not recover damages for mental anguish, emotional distress and other such damages absent corroborating medical testimony. Certainly, a plaintiff such as Mrs. Politz can suffer mental anguish, stress, anxiety, depression and other such mental and emotional damages without seeking medical treatment and taking medication for same. A plaintiff can additionally provide her own subjective opinion as to her suffering of these damages. Mississippi law is clear on these issues, and the Court has previously ruled contrarily to what it apparently states in its [252] Memorandum Opinion and [253] Order.

Plaintiffs would concede that Mrs. Politz cannot provide a medical opinion as to her heart troubles being a result of Nationwide’s conduct, even though she may subjectively believe this to be the case. However, Mrs. Politz can most assuredly testify regarding her damages for mental

anguish, stress, anxiety and emotional distress stemming from Nationwide's conduct, and corroborating medical testimony as to those damages is **not required** under Mississippi law. Any layperson can testify as to the effect of the conduct of another on the way that they feel mentally and emotionally. If someone's dog gets run over by a tortfeasor driver, that person can testify that it made them feel depressed and caused them to suffer mental anguish. Medical expertise simply is not needed to testify to such an obvious lay conclusion. Indeed, such damages are similar to pain and suffering damages in a personal injury suit; no medical testimony is necessary for a plaintiff to testify that being in a wreck caused them pain, and that they suffered from it.

As this Court has previously ruled, damages such as mental anguish and emotional distress are recoverable upon a showing of simple negligence if they were foreseeable to an insurer as a result of its negligent conduct. *See Sanders v. Nationwide Mutual Fire Ins. Co.*, 1:07-cv-00988-LTS-RHW, [211] Opinion and Order, denying Nationwide's Motion in Limine to Exclude Evidence of Emotional Distress. Exhibit "A" attached hereto. A plaintiff is not required to seek medical treatment or have any medically diagnosed condition whatsoever in order to recover such damages. She need show only "**demonstrable harm**" stemming from the negligent conduct of the insurer.

Mrs. Politz should certainly be able to testify as to the suffering, anxiety, anguish, stress and depression she has experienced as a result of Nationwide's negligent denial of her valid insurance claim. Corroborating medical testimony is not required.

The Mississippi Supreme Court, in *Adams v. U.S. Homecrafters, Inc.*, 744 So. 2d 736, 743 (¶21) (Miss. 1999)<sup>2</sup> (cited by this Court in its [252] Memorandum Opinion), held:

It is undisputed that under Mississippi law, a plaintiff asserting a claim for mental anguish, whether as a result of simple negligence or an intentional tort, must always prove that the emotional distress was a reasonably foreseeable result of the defendant's conduct. In cases of intentional infliction of emotional distress, where the defendant's conduct was "malicious, intentional or outrageous," the plaintiff need present no further proof of physical injury. **Where, as here, the defendant's conduct amounts to simple negligence, we take this opportunity to clarify that we have moved away from the requirement of proving some physical injury in addition to the proof of reasonable foreseeability. Our language in the previously cited cases, adopting the term "demonstrable harm" in place of "physical injury," indicates that the proof may solely consist of evidence of a mental injury without physical manifestation.**

(emphasis added).

Further, the Mississippi Court unanimously reasserted the law on this issue in *United American Ins. Co. v. Merrill* in 2007, wherein it explained:

This Court traditionally held that emotional distress and mental anguish damages are not recoverable in a breach of contract case in the absence of a finding of a separate independent intentional tort. (citations omitted).

In recent years this Court has moved away from this requirement.

...

In *Universal Life Ins. Co. v. Veasley*, 610 So.2d 290 (Miss.1992), we applied this rule to **breach of contract** cases stating:

Some justices on this court have suggested that extra-contractual damages ought be awarded in cases involving a failure to pay on an insurance contract without an arguable reason even where the circumstances are not such that punitive damages are proper.

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<sup>2</sup> Plaintiff has incorporated supporting law and authorities in this response and therefore respectfully requests that the Court waive the requirement of filing a separate memorandum brief in support of this Motion, and that the Court will consider this to be Plaintiff's Motion with supporting memorandum brief.

[citations omitted]. **Applying the familiar tort law principle that one is liable for the full measure of the reasonably foreseeable consequences of her actions, it is entirely foreseeable by an insurer that the failure to pay a valid claim through the negligence of its employees should cause some adverse result to the one entitled to payment. Some anxiety and emotional distress would ordinarily follow, especially in the area of life insurance where the loss of a loved one is exacerbated by the attendant financial effects of that loss. Additional inconvenience and expense, attorneys fees and the like should be expected in an effort to have the oversight corrected. It is no more than just that the injured party be compensated for these injuries. *Veasley*, 610 So.2d at 295.**

*Merrill*, 978 So. 2d 613, 630 (¶84)(Miss.,2007) (citation omitted) (emphasis added); *see also Stewart v. Gulf Guar. Life Ins. Co.*, 846 So.2d 192, 200 (Miss.,2002) (“Clearly, Stewart demonstrated **compensable** damages for **mental anguish and emotional distress**. *See Universal Life Ins. Co. v. Veasley*, 610 So.2d 290 (Miss.1992) (**worry, anxiety, insomnia, depression, difficulty coping with daily life as compensable damages**”) (emphasis added).

In *Merrill*, the plaintiff was allowed to recover for such damages based simply upon her testimony that she was “**under great stress**” and had “‘seen’ a doctor” because of “**stress**” and “**nervousness**”; that she had “further **suffered anxiety** when [the defendant insurer] sent two agents to her home *after her claim had been denied* to tell her that her policy had lapsed due to unpaid premiums.” *Merrill*, 978 So. 2d at 624 (¶51) (emphasis in original). She was further allowed to testify in support of such damages that the *lawsuit itself* “was **upsetting** her.” *Id.* (emphasis added.) There was **no corroborating medical testimony whatsoever** in *Merrill* and the plaintiff’s testimony itself was sufficient to support her damages. The Mississippi Supreme Court in *Merill* found such testimony constituted proper evidence for compensation for emotional distress. *Id.* at 630 (¶85). Again, this was a unanimous decision by the Mississippi Supreme Court, so there is no ambiguity in the law as to this issue.

As the law makes clear, there is no requirement of medical testimony in order for a plaintiff to recover damages for emotional distress, mental anguish, anxiety and other such damages foreseeable to a defendant as a result of wrongful denial of insurance proceeds. To the extent that the Court's opinion is in conflict with this, Plaintiff would ask the Court to reconsider its opinion and order. To the extent that it is not in conflict with these rulings, Plaintiff would respectfully request that the Court clarify its opinion and order.

Plaintiff respectfully requests that the Court amend and/or clarify its Order as to this issue. While Plaintiff certainly will not be giving expert medical opinions regarding her beliefs as to the causation of her physical and mental conditions following Hurricane Katrina, she is entitled to give her lay opinions as to how she felt because of Nationwide's conduct, and why. Any person is certainly capable of telling a jury how the actions of another made them feel. If Nationwide's conduct made Mrs. Politz feel depressed, stressed out and anxious, as she contends, certainly she may testify to that whether she sought medical treatment for it or not. While Mrs. Politz may not be able to testify that she suffered from the medical condition of "clinical depression," she can certainly testify as to her *subjective* feelings of depression, anxiety and stress as a result of Nationwide's denial of her claim. As the Court in *Merrill* stated, emotional distress and anxiety would even be *expected* in the wake of an insurance company's denial of a valid claim. *Merrill*, 978 So. 2d at 630 (¶84). Lack of medical corroboration as to depression or anxiety goes only to the weight of the testimony rather than its admissibility. If the Court deems it necessary, the jury can certainly be instructed that Mrs. Politz's opinion and subjective testimony that she was "depressed" or "anxious" is not a clinical diagnosis or expert opinion. Common sense dictates that conduct such as Nationwide's would cause in an insured some degree of depression, stress, anxiety or mental anguish.

Prior to Hurricane Katrina, Mrs. Politz and her husband were retired, living on the Mississippi Gulf Coast. When Hurricane Katrina hit, they lost everything they owned. Even then, they would have been able to move on, had Nationwide acted in good faith and paid their claim. It paid them virtually nothing for two years. As a result of its conduct, Mr. and Mrs. Politz were forced to take out two SBA loans (one for the slab where their home used to be, one for the house they had to purchase many months later to get them out of the FEMA trailer). They were eventually forced to file suit against Nationwide to pursue their claim, and fought vehemently for almost three years. Mr. Politz then died not knowing whether Nationwide would ever pay what it owed, and without knowing whether his wife would ever be taken care of. Mrs. Politz, still stuck with Nationwide refusing to pay her claim, even after suit had been filed, even after her husband died, had to go back to work to make ends meet at sixty-seven years of age. All the while, she has continued to fight Nationwide to get what she is duly owed. It would be an absolute shock to any layperson if Nationwide's conduct *did not* cause her some degree of anxiety, depression, mental anguish, stress and emotional distress. It did, however, and Mrs. Politz should be allowed to testify to such.

Mrs. Politz can testify to her own experiences and what she witnessed first hand. Pursuant to Rules of Evidence Rule 701, a lay witness may give an opinion based upon the witness's personal observation or knowledge. Rule 701 specifically states:

If the witness is not testifying as an expert, the witness's testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to the clear understanding of the testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

Plaintiff respectfully requests that the Court clarify and/or reconsider its ruling on this issue.

WHEREFORE, PREMISES CONSIDERED, the Plaintiff respectfully requests the Court to reconsider and/or clarify its [252] Memorandum Opinion on Defendant's Motions For Summary Judgment and to Strike Plaintiffs' Claims for Emotional Distress and [253] Order with reference to same in accordance with this Motion.

Respectfully submitted,  
HELEN J. POLITZ  
BY: DENHAM LAW FIRM

BY: s/Kristopher W. Carter  
KRISTOPHER W. CARTER  
MS Bar No. 101963

CERTIFICATE

I, KRISTOPHER W. CARTER, do hereby certify that I electronically filed the above and foregoing document with the Clerk of the Court utilizing the ECF system, which provides notification of said filing to the following:

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SO CERTIFIED on this the 6<sup>th</sup> day of April, 2009.

*s/Kristopher W. Carter*  
KRISTOPHER W. CARTER

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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF MISSISSIPPI  
SOUTHERN DIVISION

BILLY DALE SANDERS and JUDY DIANNE SANDERS PLAINTIFFS

V. CIVIL ACTION NO.1:07CV988 LTS-RHW

NATIONWIDE MUTUAL FIRE INSURANCE COMPANY DEFENDANT

OPINION AND ORDER

The Court has before it the following motions *in limine* filed by Nationwide Mutual Insurance Company (Nationwide) seeking to exclude:

Evidence Testimony or Argument Relating to (1) Plaintiffs, Claim for Emotional Distress and (2) Opinion Testimony of Linda Holder [151];

Any and All Testimony, Evidence and Argument regarding Plaintiff Billy Sanders' alleged conversations with Independent Engineer Paul Holman [153];

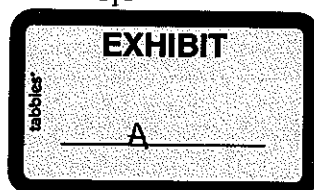
**Evidence of Plaintiffs' Emotional Distress and the Testimony of Linda Holder Motion [151]**

Nationwide asserts that Plaintiff Judy Diane Sanders (Sanders) should not be allowed to present evidence of her mental or emotional distress. Nationwide contends that if this claim is based on a theory of negligence, the lack of any physical manifestation of injury precludes recovery under *American Bankers' Ins. Co. of Fla. v. Wells*, 819 So.2d 1196 (Miss.2001). Nationwide asserts that there is insufficient evidence of any deliberate misconduct, i.e. bad faith in adjusting the plaintiffs' claim, to support a recovery for this type of damage.

Linda Holder (Holder) is a social worker who interviewed Sanders, and she has been identified by the plaintiffs as a witness who may testify concerning her impressions during this interview. Nationwide objects to Holder's testimony on the grounds that she will be giving an expert opinion which has not been properly disclosed during discovery.

The Mississippi Supreme Court has long relied on a rule that simple negligence, without proof of bodily injury, would not support a recovery of damages for mental and emotional distress. This rule allowed for an award of damage for mental and emotional distress without bodily injury only in cases of deliberate misconduct. In *Wilson v. GMAC*, 883 So.2d 56, 66 (Miss.2004), the Court stated:

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*. . . unless the facts show that either Defendant's conduct was outrageous, evoked revulsion, done intentionally with a reasonably foreseeable result, and done for the purpose of causing hardship, a claim for emotional distress cannot recover.*

The Court went on to find:

*There is not evidence that Defendants did anything intentionally with a foreseeable result of harm to the Plaintiff. There is not evidence that the Defendants did anything that would be seen as extreme or outrageous. And except for Plaintiff's complaint that she lost sleep, was upset and had bad dreams, there is not evidence that would support a judgment for emotional distress. Under Gamble, Morrison, and American Bankers', this Court holds that a judgment for emotional distress cannot rest upon just those things.*

Just a year ago, in *Hudson v. Palmer*, 977 So.2d 369, at 384 (Miss. Ct. App. 2007), the Mississippi Court of Appeals interpreted the *Wilson* decision:

*First, the trial court noted that the law of this state requires a plaintiff seeking emotional distress damages from ordinary negligence show some physical manifestation of injury or demonstrable physical harm, and found that Hudson failed to sufficiently allege any physical injury. While there have been two lines of thought followed on this issue, the supreme court has recently stated that a plaintiff seeking emotional damages as a result of ordinary negligence must show some resulting demonstrable harm. [citing *Wilson v. GMAC*].*

It is against this background that a unanimous Court in *United American Insurance Company v. Merrill*, 978 So.2d 613, at 624 (Miss.2007), held that a plaintiff in an action for breach of a life insurance contract was entitled to an award of damages for mental and emotional distress based upon this evidence:

*At trial, Natalie [the plaintiff] testified that because of the denial of her claim, she was forced to take out a loan to pay Robert's [the insured] burial expenses of \$5,583.00. Natalie made payments of \$136.82 a month on the loan, and at the time of trial had paid \$369.47 in interest. She stated she paid this loan for a period of forty-eight months. Natalie testified that it was necessary for her to work to pay off the loan. Natalie, age 71 at the time of trial, worked the graveyard shift at the Boomtown Casino from 11:30 p.m. to 7:30 a.m. Natalie testified she worked forty hours a week at the casino. Natalie testified she was "under great stress" trying to pay her bills and that she had seen a doctor because of "stress" and "nervousness." Natalie testified she further suffered anxiety when United sent two agents to her home after her claim had been denied to tell her that her policy had lapsed due to unpaid premiums. Natalie testified it made "her feel bad because they didn't pay me in the first place, and*

*then they come sending their men to my door.” Natalie further testified this lawsuit caused her anxiety and was “upsetting her.”*

The Court determined, at page 630: “. . . Natalie presented proper evidence for compensation of emotional distress.”

In *Merrill*, the Court framed the defendant’s potential liability for mental and emotional distress in terms of foreseeability, and the Court quoted at length (at page 630) from *Universal Life Ins. Co. v. Veasley*, 610 So.2d 290 (Miss.1992). Ultimately, the Court in *Merrill* held that the plaintiff’s mental and emotional distress were the foreseeable consequences of the breach of the life insurance policy at issue. Because the claims in this case are, like the claims in *United American Insurance Company v. Merrill*, 978 So.2d 613 (Miss.2007), based upon allegations of negligence in the payment of insurance benefits, I will follow the *Merrill* ruling and hear the evidence concerning the plaintiff’s emotional distress.

Holder will not be allowed to express her opinion concerning the plaintiff’s mental and emotional state beyond the restriction of Rule 701 of the Federal Rules of Evidence, but I will hear her testimony concerning her observation of the plaintiff at the time they conversed.

Nationwide’s motion [151] to exclude this evidence will be **DENIED**.

**Plaintiff Billy Sanders’ Account of His Conversation with Paul Holmes  
Motion [153]**

Nationwide seeks to exclude Plaintiff Billy Sanders’ (PBS) testimony concerning a telephone conversation he claims to have had with Paul Holman (Holman), an engineer based in Jackson, Mississippi, and retained by Nationwide to inspect the insured property. Holman did not inspect the plaintiffs’ property, and Nationwide ultimately sent another engineer to do the inspection.

Before Nationwide decided to send the second engineer, PBS claims to have had a telephone conversation with Holman, and from this conversation PBS inferred that Holman had declined Nationwide’s request to conduct an inspection because in his (Holman’s) opinion there was more wind damage in the vicinity of the plaintiffs’ property than Nationwide was willing to admit, concluding that he (Holman) had a conflict with Nationwide’s assessment of the cause of damage in this area.

PBS testified about this conversation very briefly during his deposition: *The first engineer was from Jackson, Mississippi, and I had his name for a long time, but I forgot it. He denied to even come after 30 days of me waiting on him. He said there was too much wind damage in there, and it would be conflicts between his–this–what actually happened, and it y’all’s – it was Nationwide’s engineer.*

Nationwide asserts that Holman's reference to "too much wind damage in there" refers to the amount of wind damage in the Jackson area that precluded Holman's taking the assignment to inspect the plaintiffs' dwelling. Nationwide seeks exclusion of PBS's account of this conversation on two grounds: 1) it is hearsay inadmissible under Federal Rules of Evidence 801(c) and 802; and 2) the probative value of the testimony is outweighed by the risk that it will cause unfair prejudice to Nationwide, relying on Federal Rules of Evidence 403. Holman's statements are inadmissible hearsay unless they are admissions by an agent of Nationwide. There is insufficient evidence before me to determine whether Holman was acting as a representative of Nationwide at the time he made the statements PBS recalls. Accordingly, I will deny Nationwide's motion at this time and await the evidence on Holman's status at the time of his conversation with PBS. Nationwide's motion to exclude the plaintiff's testimony concerning his conversation with Holman is **DENIED** [153].

**SO ORDERED** this 18<sup>th</sup> day of December, 2008.

s/ L. T. Senter, Jr.  
L. T. SENTER, JR.  
SENIOR JUDGE