

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

**HELEN POLITZ**

**Plaintiff**

**V.**

**CIVIL ACTION NO. 1:08cv18-LTS-RHW**

**NATIONWIDE MUTUAL FIRE INSURANCE  
COMPANY, U.S. SMALL BUSINESS  
ADMINISTRATION, AND  
JOHN DOES 1 THROUGH 10**

**Defendants**

**NATIONWIDE MUTUAL FIRE INSURANCE COMPANY’S RESPONSE TO  
PLAINTIFF’S MOTION FOR CLARIFICATION AND/OR RECONSIDERATION**

COMES NOW Defendant Nationwide Mutual Fire Insurance Company (“Nationwide”), by and through counsel, and hereby files its Response to Plaintiff’s Motion for Clarification and/or Reconsideration. In support thereof, Nationwide would show unto the Court the following:

1. Through the Motion for Clarification and/or Reconsideration, Plaintiff Helen Politz seeks clarification and/or reconsideration as to this Court’s ruling with regard to her claim for “anxiety, emotional distress [and] mental anguish.” (Apr. 6, 2009 Mot. for Clarification and/or Reconsideration at 1 (Dkt. 257) (“Mot. for Clarification”).) Plaintiff correctly notes that this Court ruled in its March 27, 2009 Memorandum Opinion 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.” ((Mot. for Clarification at 2), quoting Mar. 27, 2009 Mem. Op. on Def.’s Mot. for Summ. J. and to Strike Pls.’ claims for Emotional Distress (Dkt. 252) (“Mem. Op.”).) Plaintiff also references language within this Court’s March 27, 2009 Order, which states that the Defendant’s Motion to

strike the Plaintiff's 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 Politz's claim and as to any evidence that Nationwide's actions caused Mr. Politz's hypertension, diabetes, anxiety, claustrophobia, depression, or his death from osteomyelitis." (Mar. 27, 2009 Order Granting in Part and Denying in Part the Def.'s Mots. for Summ. J. and to Strike Pls.' Claims for Emotional Distress (Dkt. 253) ("Mar. Order").) After noting that she is not questioning the impact of this Court's ruling on the damages recoverable on behalf of Mr. Politz based upon a prior ruling by this Court making this issue moot, Plaintiff Helen Politz states that "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." (Mot. for Clarification at 2) (emphasis in original).

2. Defendant believes the Memorandum Opinion and Order are clear and need no clarification. Moreover, to the extent the Plaintiff's Motion seeks reconsideration of the Court's Memorandum Opinion and Order, such request should be denied because this Court's ruling is based upon applicable facts and supported by Mississippi law.

3. Before reviewing the applicable case authorities, it should be noted first that the Court's ruling was in response to not only Defendant's January 7, 2009 Motion for Summary Judgment (Dkt. 158) seeking to exclude plaintiff's claims for mental and emotional distress experienced by the plaintiff, but also to its November 11, 2009 Motion to Strike Plaintiff's Claim for Emotional Distress (Dkt. 110) ("Mot. to Strike") seeking to exclude any testimony by Helen Politz as to her heart condition and treatment for depression as a discovery sanction. Accordingly, although the applicable case authorities may allow recovery for emotional distress under certain limited situations, this Court was authorized to depart from those various principles

based upon its decision to grant the Motion to Strike in part. *See* Fed. R. Civ. P. 37(c)(1) (court may disallow use of information or ability of witness to testify where party fails to timely provide information or identify witness as required by Federal Rule of Civil Procedure 26(a) or (e).)

4. The crux of this Court's ruling can be found within two paragraphs on Page 5 of the Memorandum Opinion. The first paragraph states as follows:

While Mrs. Politz may, in good faith, have the subjective belief that Nationwide's refusal of her claim for storm damage contributed to her heart condition and to her "depression," I will not permit her to express that belief in the absence of corroborating medical testimony.

(Mem. Op. at 5).

The ruling by this Court clearly and concisely concludes that Helen Politz will not be allowed to express her subjective belief 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. Based upon this holding, Mrs. Politz will not be allowed to take the witness stand in this action to offer testimony through which she concludes that her heart condition is related to Nationwide's handling of her homeowner's claim in the aftermath of Hurricane Katrina. Nor will Mrs. Politz be allowed to take the witness stand and opine that she is suffering from depression as a result of Nationwide's handling of her homeowner's claim following Hurricane Katrina and/or that she has sought medical care for her depression. Such cause and effect testimony is reserved for medical experts and in the absence of such corroborating testimony by a properly designated medical expert, the testimony will not be allowed. *Compare Scafidel v. Crawford*, 486 So. 2d 370, 372 (Miss. 1986) (concluding that two doctors who were not listed as expert witnesses pursuant to pre-trial discovery rules, but who testified that the patient was anemic, did not cross the impermissible line between fact witnesses and expert witnesses because

they did not opine about the cause or effect of the patient's anemia), *with Foster v. Noel*, 715 So. 2d 174, 183 (Miss. 1998) (holding that treating physician "rendered improper expert witness testimony when he stated that [the] arrest exacerbated [Plaintiff's] pre-existing depression"); *see also* Local Rule 26.1(A)(2)(d) ("A party shall designate treating physicians as experts pursuant to this rule, but is only required to provide the facts known and *opinions held* by the treating physician(s) and a summary of the grounds therefore.").

5. In addition to this ruling being supported by Mississippi case authorities, the ruling by this Court was appropriate based upon the Plaintiff's discovery abuses detailed within Nationwide's Motion to Strike. (*See* Motion to Strike; *see also* Jan. 26, 2009 Order at 2 (noting that "Nationwide was virtually forced to file its own [71] Motion to Extend Discovery and Reset Motions Deadline because of difficulties it encountered in scheduling discovery") (Dkt. 166).) As noted within Nationwide's Motion to Strike, although Nationwide served Plaintiff with written discovery requests in which it specifically asked Plaintiff to detail any mental anguish, emotional distress, and pain and suffering for which she sought compensation, Mrs. Politz affirmatively represented that she did not seek mental health treatment. (*See* Motion to Strike at 1-2.) Then, when Mrs. Politz was deposed on November 13, 2008, the day before discovery was scheduled to end, she revealed that she had sought treatment for depression and anxiety from Dr. Mark Babo, which was in direct conflict with her discovery responses. (*Id* at 3.) Indeed, even after Plaintiff was ordered by this Court "[o]n or before February 2, 2009, [to] provide to Nationwide the names and addresses of *all* treating physicians of plaintiff Helen Politz," Nationwide discovered during Mrs. Politz's second deposition that she failed to identify another treating physician who may have prescribed her antidepressant medication. (*See* Jan. 27, 2009 Order at 1 (Dkt. 170) (emphasis added); *see also* Mar. 24, 2009 Deposition of H. Politz, at 35-36

“Q. Do you see a gynecologist regularly? A. Yes, I do. Q. Does your gynecologist prescribe antidepressant medications for you? A. Not normally. Q. Do you have any recollection of your gynecologist ever prescribing antidepressant medications for you? A. I think possibly one time he might have prescribed something. Because I think Dr. Babo was out of the country or something and I saw him and I was having a problem. Seems like maybe once he did. ... Q. At this point again we -- this name wasn't revealed to us in supplemental disclosures and so -- A. I hadn't thought about it. ... And I'm not even sure it happened. Q. -- Just to make the record clear. If there's a possibility that you were prescribed antidepressants by your gynecologist, ... that's something that we have requested and are allowed to know under the rules....” (Ex. 1.)

6. The second portion of this Court's ruling questioned by the Plaintiff's Motion states as follows:

In Mississippi cases involving only ordinary negligence and resulting in no bodily injury, damages for mental or emotional distress are allowed if this type of damage is foreseeable. *Adams v. U.S. Homecrafters, Inc.*, 744 So.2d 736 (Miss.1999); *Universal Life Ins. Co. v. Veasley*, 610 So.2d 290 (Miss. 1992). Damages for mental and emotional distress are also recoverable where there has been reckless, grossly negligent, or deliberate misconduct. Because this action encompasses both claims for negligence and for bad faith, I will decline Nationwide's invitation to grant summary judgment on this issue at this time. Any discussion of mental or emotional distress will be excluded from evidence during the first phase of this trial when the issue of contract damages alone will be decided.

(Mem. Op. at 5).

Through this portion of the ruling, this Court announces that it declines “Nationwide's invitation to grant summary judgment on this issue at this time”<sup>1</sup> and, accordingly, holds that the

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<sup>1</sup> Nationwide currently has pending before the Court a Supplemental Motion for Summary Judgment, which incorporates the additional evidence gathered through the extended discovery period provided by the Court within its Memorandum Opinion. (See Apr. 7. 2009 Nationwide's Supp. Mot. for Summ. J. and Mem. of Auth. in Supp. (Dkts. 258, 259).)

Court will not allow any testimony regarding mental or emotional distress unless and until the Court allows a second phase of trial through which the Plaintiff seeks extra contractual damages as authorized by the *Veasley* decision. *Universal Life Ins. Co. v. Veasley*, 610 So.2d 290, 295 (Miss. 1992); *see also Medical Plaza, LLC v. U.S. Fid. and Guar. Co.*, No. 1:07CV98-LTS-RHW, 2008 WL 4446524 (S.D. Miss. Sept. 22, 2008) (endorsing a “three phase” trial process through which only contractual damages would be considered during the first phase; second and third phases, if authorized by Court, would be reserved for extra-contractual and punitive damages, respectfully).

In the event the trial reaches this second phase (and subject to Nationwide’s Supplemental Motion for Summary Judgment), the Plaintiff will not be permitted to support her claim for emotional distress by offering testimony as to her subjective belief 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. No further clarification as to the meaning of the Court’s Memorandum Opinion is needed.

7. The language within this Court’s March 27, 2009 Order is consistent with the ruling set forth within the March 27, 2009 Memorandum Opinion. Through that Order, the Court grants Nationwide’s Motion to Strike “as to any evidence that Mrs. Politz’s heart condition or ‘depression’ was caused by Nationwide’s actions in adjusting the Politzs’ claim ....” (Mar. Order). As noted above, Mrs. Politz is not able to offer this opinion testimony “in the absence of corroborating medical testimony.” (Mem. Op. at 5). The fact that Plaintiff has not designated any medical experts to testify as witnesses at the trial of this matter solidifies the Court’s Order that Plaintiff will not be allowed to offer any evidence that Mrs. Politz’s heart condition or

depression was caused by Nationwide's actions in adjusting the Politz homeowner's claim following Hurricane Katrina.

8. In further support of its Motion, Nationwide attaches and incorporates by reference the following exhibit:

Exhibit 1: Mar. 24, 2009 Deposition of Helen Politz

WHEREFORE, PREMISES CONSIDERED, Nationwide respectfully requests that Plaintiff's Motion for Clarification and/or Reconsideration be denied.

This, the 23rd day of April, 2009.

Respectfully submitted,  
NATIONWIDE MUTUAL FIRE INSURANCE  
COMPANY, Defendant

By Its Attorneys,  
Watkins Ludlam Winter & Stennis, P.A.

By: /s/ Laura L. Gibbes

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**CERTIFICATE OF SERVICE**

I certify that I have this day electronically filed the foregoing with the Clerk of the Court using the ECF system which sent notification of such filing to the following :

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This, the 23rd day of April, 2009.

By: /s/ Laura L. Gibbes

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