

**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

**DEFENDANT’S RESPONSE IN OPPOSITION TO PLAINTIFF’S
MOTION FOR LEAVE TO DESIGNATE MENTAL HEALTH EXPERT**

Defendant Nationwide Mutual Fire Insurance Company (“Nationwide”), by and through counsel, hereby files this Response In Opposition To Plaintiff’s Motion for Leave to Designate Mental Health Expert. In opposition to Plaintiff’s motion, Nationwide states as follows:

1. Plaintiff Helen Politz, together with her late husband, John Politz, owned a residence located at 116 Winters Lane, in Long Beach, Mississippi, which is merely 190 yards from the Gulf of Mexico. Although the single-story residence was reduced to its slab foundation during Hurricane Katrina, and Plaintiff concedes that at least 9.2 feet of storm surge reached above the ground elevation of her property, Plaintiff insists that the home was destroyed solely by wind before the storm surge arrived.

2. Nationwide has paid Plaintiff over \$38,000 under her homeowners policy. Nevertheless, Plaintiff filed a lawsuit on January 17, 2008, and continues to pursue this action against Nationwide, alleging that Nationwide breached its contractual obligations by failing to pay the full coverage limits under Plaintiff’s homeowners policy. In her Complaint, Plaintiff seeks not only contractual damages, but also damages for emotional distress she alleges to have suffered as a result of Nationwide’s partial denial of her insurance claim. Specifically, Plaintiff

has alleged that “Defendant’s failure to pay the claim for the loss of [her] home contributed to the stress, emotional upheaval, depression and other health problems that [she] suffered after the hurricane.” (See June 18, 2008 Pls.’ Answers to First Set of Interrogs. Propounded by Def., Nationwide Mut. Fire Ins. Co., at Resp. to No. 26 (Ex. 1).)

3. Notwithstanding the fact that Plaintiff has alleged — as part of her case-in-chief — that she has suffered emotional distress as a result of Nationwide’s partial denial of her insurance claim, she now seeks to designate a mental-health expert nearly a year and a half after filing her complaint. But there is no reason why Plaintiff could not have retained and identified an expert to support her claim for emotional-distress damages within the time provided in the Court’s original expert-disclosure period. Under that framework, Plaintiff’s experts were due on or before July 16, 2008 — nearly a year ago. During that time, Plaintiff had all the information she needed to decide whether to use expert testimony. She knew her own mental-health history; indeed, she was the *only* party in this action who could have known when she visited her physicians and when she began taking antidepressant medications.¹

4. Nationwide, on the other hand, did not have access to this information until recently. This was not because Nationwide had not actively sought this information. Instead, back in June 2008, in her initial responses to Nationwide’s interrogatory requests, Plaintiff affirmatively testified that she had not sought treatment for emotional distress. (See *id.*) Only on November 14, 2008 — the day discovery was originally set to close in this case — did Plaintiff reveal that she had in fact sought treatment for emotional distress. (See Nov. 20, 2008 Mot. To Strike Pl’s. Claim for Emotional Distress (Dtk. 110).) Over the next several months, Nationwide

¹ The record in this case demonstrates that Plaintiff was taking antidepressant medications as early as February 2008, little more than a month after filing this action and well in advance of any expert disclosure deadline.

worked diligently to secure Mrs. Politz's medical records and depose her treating physicians. But none of that discovery revealed that Mrs. Politz's alleged emotional distress was caused by Nationwide. (*See* Apr. 7, 2008 Nationwide's Supplemental Mot. For Summ. J. (Dkt. 258).)

5. Nevertheless, Plaintiff still sought to pursue her claim for emotional-distress damages — without the support of expert testimony and with only her (and potentially her treating physician's) testimony to support the claim. Nationwide therefore believes that Mrs. Politz will attempt to create the impression that she sought treatment for emotional injuries from her treating physician, Dr. Mark Babo, and that he prescribed her antidepressant medication as a result of Nationwide's adjustment of her claim. Indeed, Plaintiff has listed Dr. Babo as a "may call" witness on the parties' proposed pretrial order. (*See* May 11, 2009 Proposed Pretrial Order at 38 (Ex. 2).)

6. As such, Nationwide filed a motion for leave to have Mrs. Politz undergo a Rule 35 mental evaluation. (*See* May 26, 2009 Nationwide Mut. Fire Ins. Co. Mot. For Mental Examination of Pl. Pursuant to Fed. R. Civ. P. 35 (Dkt. 344).) As Nationwide argues separately in its Response to Plaintiff's Motion For Review and Objection To Magistrate's Order, it sought this examination solely to rebut Mrs. Politz's allegation that Nationwide caused or contributed in any way to her alleged emotional distress. And this examination is the only way, in light of the history of discovery in this case, Nationwide believes that it will get an accurate and complete picture of Plaintiff's mental health. After briefing from the parties, this Court granted Nationwide's motion on June 1, 2009.² But the fact that Nationwide has sought, and the Court

² Plaintiff has filed a Motion For Review of Magistrate's Order on June 3, 2009 ("Motion for Review,") which Nationwide responded to on June 15, 2009. Nationwide incorporates all of its arguments made in support of that Response here.

has granted, a Rule 35 evaluation is not a basis to grant *Plaintiff's* motion to disclose her own mental-health expert now.

7. *First*, as previously mentioned, Plaintiff (not Nationwide) had all the relevant information about her treatment and use of antidepressant medications in order to properly retain and disclose a mental-health expert. Moreover, she had all of this information at the time she filed this action and, thus, well in advance of the Court's original expert deadline. Nationwide's request for a Rule 35 evaluation does not change that fact.

8. *Second*, Nationwide's motion to seek a Rule 35 evaluation was not untimely, as Plaintiff has argued in her Motion for Review. Nationwide intends to use the testimony of Dr. Mark Webb (to the extent Dr. Webb actually makes such a conclusion after evaluating Mrs. Politz) only to impeach and/or rebut any claim Mrs. Politz makes that Nationwide caused or contributed to her emotional distress. Under this Court's longstanding rules of practice, parties are not obligated to disclose rebuttal witnesses even as late as the pretrial order. (*See Proposed Pretrial Order* ¶ 13 (“The following is a list of witnesses Defendant anticipates calling at trial (*excluding witnesses to be used solely for rebuttal or impeachment*).”).³ Moreover, there is no provision within Rule 35 that delineates the timing for seeking a mental evaluation. Nationwide timely sought consent from Plaintiff merely four days after the Court reopened discovery during the pretrial conference on May 18. (*See* May 22, 2009 E. Locke Email to K. Carter (Ex. 3).) And nothing in the Court's May 18 Order that extended discovery in any way limited Nationwide's ability to request a Rule 35 evaluation or to add an additional rebuttal witness. The minute entry on the docket from that order simply states that “[d]iscovery for both parties is re-

³ Emphasis added unless otherwise indicated.

opened for 60 days, followed by 15 days in which to file any further motions to the Court.” (See May 18, 2009 Minute Entry, http://ecf.mssd.uscourts.gov/cgi-bin/DktRpt.pl?428943292913645-L_801_0-1.)

9. Any argument that Nationwide should have disclosed its intent to use Dr. Webb within the Court’s expert-disclosure period under the scheduling order in this case cannot be the basis for denying Nationwide’s request now. Indeed, Nationwide *could not* have disclosed its intent to use Dr. Webb as an expert at that time precisely because Plaintiff had not: (i) disclosed that she ever sought treatment for emotional distress, (ii) identified her own treating physician from which Nationwide could seek her medical records for an expert to review, and (iii) provided Nationwide any indication that she would use her own mental-health expert in the first instance.

10. *Third*, as set out more fully in Nationwide’s Response to Plaintiff’s Motion for Review, Nationwide has shown “good cause” to seek a Rule 35 evaluation. But that good cause is a result of Plaintiff’s repeated discovery violations. As Nationwide has repeatedly argued, it has been unable — due to the various discovery abuses by Plaintiff — to secure this information. Indeed, the record in this case is replete with instances where Nationwide has sought, but Plaintiff has refused access, to relevant, discoverable information. For example, Plaintiff has not properly supplemented her response to Nationwide’s interrogatory No. 26 to include her complete medical history regarding her claim for emotional distress.⁴ Instead, Nationwide has

⁴ Specifically, that request asks Plaintiff to “[i]dentify all medical personnel ... from whom you have sought advice and/or treatment for any emotional distress ... and *describe any related diagnoses and/or prognoses*.” (See May 19, 2008 First Set of Interrogs. Propounded by Def. Nationwide Mut. Fire Ins. Co., at Request No. 26 (Ex. 4).) Only after the Court’s January 27, 2009 Order (Dkt. 170) did Plaintiff comply with that request *in part* by providing a list of Mrs. Politz’s treating physicians. Still, Plaintiff has not provided a history of her treatment for mental-health issues, including her use of antidepressant medications.

attempted to piece this information together by issuing subpoenas for, and searching through, literally hundreds of pages of Mrs. Politz's medical records. Plaintiff has also been unable during her depositions to answer specific questions about her use of antidepressant medications. For example, she was unable to identify the names of her medications. (*See* Nov. 13, 2008 Dep. of Helen Politz at 245-46 (Ex. 5); March 24, 2009 Dep. of Helen Politz at 34 (Ex. 6).) She was also unable to explain precisely when she began taking those medications. (*See* Mar. 24, 2009 Politz Dep. at 31-33.) She also was unable to remember if one of her doctors prescribed her antidepressant medications at all. (*See id.* at 35-36.)

11. Plaintiff also has a history of providing "newly discovered" information late into discovery, thereby attempting to prevent Defendant from securing more information about these new disclosures. For example, in her *second* deposition on March 24, 2009, Plaintiff revealed for the first time that she may have been prescribed antidepressant medications by an OB-GYN who had not been previously disclosed. This revelation was, of course, in direct violation of the Court's January 27, 2009 Order mandating that "[o]n or before February 2, 2009, Plaintiff shall provide to Nationwide the names and addresses of *all* treating physicians of plaintiff Helen Politz." (Jan. 27, 2009 Order at 1.) Moreover, on *May 14, 2009 Plaintiff revealed for the first time* in her response to Nationwide's Motion *In Limine* No. 10 that she is currently taking Lexapro. (*See* May 14, 2009 Pl.'s Resp. to Nationwide's [287] Mot. in *Limine* No. 10 to Preclude Pl.'s Test., Argument, Evidence & Op. re *Allege Emotional Distress* by Nationwide at 2 (Dkt. 313).) As Nationwide argued in its reply brief in support of that motion, Plaintiff had only revealed in discovery that she had taken Prozac, Klonopin, and Celexa — none of which are generic forms for Lexapro. (*See* May 15, 2009 Nationwide's Reply In Supp. of Mot. in *Limine* No. 10 at 1-2 (Dkt. 322).) In short, the facts of this case and the discovery abuses by Plaintiff

demonstrate that, although Nationwide has attempted to secure the complete basis for Plaintiff's claim that Nationwide caused her emotional distress, it has been unable to do so. Dr. Webb's evaluation of Plaintiff's mental condition is a reasonable solution to help Nationwide pursue that discovery. Thus, this factual history is what led Nationwide to seek a Rule 35 evaluation. But it should not be the basis upon which the Court permits Plaintiff to disclose a new expert to support her case-in-chief.

12. *Fourth*, Plaintiff will not be prejudiced by Nationwide's use of a rebuttal witness to counter her claim that Nationwide caused her emotional distress. Pursuant to the Court's original expert-disclosure framework, Plaintiff was obligated to disclose whether she would be using expert testimony *in advance* of Nationwide's disclosure. Thus, even if Nationwide had disclosed the fact that it was seeking a Rule 35 mental evaluation, it could have done so after Plaintiff's decision not to secure an expert to support her case. And under that scenario, Plaintiff would not have had the opportunity to re-designate her own expert after failing to do so in the first instance. It too would have been untimely. Therefore, Plaintiff is in no worse position now than she would have been if Nationwide had disclosed its intent to retain Dr. Webb during the Court's initial expert-disclosure period.

13. *Fifth*, to the extent Plaintiff claims that she is prejudiced by the Rule 35 evaluation, it is the result of her own discovery abuses. Although Plaintiff has claimed in her Motion for Review that Nationwide is merely seeking a second bite at the apple to reframe its litigation strategy, such an allegation is belied by the extensive procedural history of this case. (*See* June 3, 2009 Mot. for Review of and Objection to the U.S. Magistrate Judge's [348] at 6 (Dkt. 350).) Nationwide's preference was to go to trial in this case long ago — indeed, it was “Nationwide [who] was virtually forced to file its own [71] Motion to Extend Discovery and

Reset Motions Deadline because of difficulties it encountered in scheduling discovery,” and it was Nationwide who opposed Plaintiff’s December 3, 2008 Motion to Extend Discovery. (Jan. 26, 2009 Order (Dkt. 166); *see* Dec. 17, 2008 Opp. To Pl’s. Mot. to Supplement PreDisc. Disclosures and for an Extension of the Disc. Deadline (Dkt. 150).) The only reason the parties have not already gone to trial is because Plaintiff has repeatedly provided late disclosures, refused to cooperate with Defendant’s discovery requests, and sought extensions of the discovery deadline. (*See, e.g.*, June 12, 2008 Pls.’ Unopposed Mot. For Extension of Deadlines (Dkt. 13) (requesting an extension of the expert-disclosure deadline); Sept. 8, 2008 Pls.’ Unopposed Mot. for Extension of the Disc. Deadline (Dkt. 36); Oct. 29, 2008 Pls.’ Supplement to Pre-Disc. Disclosure of Core Information (Ex. 7) (disclosing several additional fact witness only sixteen days before the initial close of discovery); Nov. 3, 2008 Nationwide’s Mot. To Compel Pl. To Sign Privacy Act Release For U.S. Small Business Administration Disc. (Dkt. 66); Nov. 5, 2008 Nationwide’s Mot. To Extend Disc. and Reset Mots. Deadline (Dkt. 71) (which this Court recognized that “Nationwide was virtually forced to file ... because of difficulties it encountered in scheduling discovery”); Nov. 14, 2008 Pls.’ Supplement to Pre-disc. Disclosures of Core Information (Ex. 8) (revealing for the first time on the day discovery closed two additional fact witnesses); Nov. 18, 2008 Pls.’ Mot. To Supplement Expert Report (Dkt. 108) (seeking to supplement Ted Bidy’s expert report); Dec. 3, 2008 Pls.’ Mot. To Supplement Pre-disc. Disclosures and For an Extension of the Disc. Deadline (Dkt. 136); Dec. 9, 2008 Pls.’ Supplement to Pre-disc. Disclosures of Core Information (Ex. 9) (serving hundreds of additional pages of documents three weeks after the close of discovery); May 8, 2009 Pl’s. Mot. to Stay Proceedings (Dkt. 278) (seeking a stay of this action pending the outcome of the *Corban* case). The Court, therefore, should not reward Plaintiff now by permitting her to retain a new expert

where, unlike the position Nationwide was in, there was no reason preventing her from doing so within the Court's original scheduling order.

14. *Sixth*, Plaintiff should not be permitted to retain an expert now that discovery has revealed that Mrs. Politz's primary treating physician is unable to conclude that Nationwide's partial denial of her claim caused or contributed to her emotional distress. (*See* Apr. 1, 2009 Dep. of Mark Babo at 44-46 ("Q. Is it fair to say that based on the documents we've reviewed today that you never actually diagnosed Mrs. Politz with clinical depression; is that correct? A. Yes. Q. Instead you characterized Mrs. Politz's symptoms as a grief reaction, correct? A. Yes. Q. And that grief reaction was a result of her husband's health condition and subsequent death; is that correct? A. Yes. ... Q. (By Mrs. Locke) Is it fair to say that based on the documents we've reviewed today you never referred her to a specialist for emotional health; is that right? A. That's correct. Q. And there's no indication that she needed psychiatric therapy, correct? A. Correct. ... Q. (By Mrs. Locke) There's certainly no indication that Nationwide caused Mrs. Politz's anxiety, correct? ... A. There's nothing indicated in the medical records. ... Q. (By Mrs. Locke) Is it fair to say that you developed no professional opinion that Nationwide's partial denial of Mrs. Politz's insurance claim caused her anxiety? A. Correct.") (Ex. 10).) Indeed, Plaintiff expressly disclaimed that she was going to identify Dr. Babo as an expert in this case. Thus, Plaintiff simply seeks to retain a new expert, who has no history of treating Plaintiff, to rebut her own treating physician's testimony. But she should not be permitted to avoid the unfavorable testimony of her own doctor by designating a new expert — nearly a year after the expert-disclosure deadline.

15. *Finally*, unlike Plaintiff, Nationwide will be prejudiced if the Court permits Plaintiff to add a new expert to support her case-in-chief. Nationwide will be forced to spend

additional time and money to have Dr. Webb review and respond to Plaintiff's expert report, as well as the time and cost associated with deposing the newly-disclosed expert. Nationwide has already incurred considerable expense in deposing Mrs. Politz's treating physicians and reviewing her medical records in light of Plaintiff's last request of an extension of the discovery deadline. The equities simply do no favor yet another delay on behalf of Plaintiff.

16. Because all the relevant legal authorities have been provided in this Response, Nationwide respectfully requests that the Court waive its usual requirement that a separate memorandum of authorities to be filed. *See* Unif. Local Rule 7.2.

17. In further Support of its Motion, Nationwide attaches and incorporates by reference the following exhibits:

Exhibit 1: June 18, 2008 Pls.' Answers to First Set of Interrogs. Propounded by Def. Nationwide Mut. Fire Ins. Company

Exhibit 2: May 11, 2009 Proposed Pretrial Order

Exhibit 3: May 22, 2009 E. Locke Email to K. Carter

Exhibit 4: May 19, 2008 First Set of Interrogs. Propounded by Def. Nationwide Mut. Fire Ins. Co

Exhibit 5: Nov. 13, 2008 Dep. of Helen Politz

Exhibit 6: March 24, 2009 Dep. of Helen Politz

Exhibit 7: Oct. 29, 2008 Supplement to Pre-Disc. Disclosure of Core Information for Pls.

Exhibit 8: Nov. 14, 2008 Supplement to Pre-disc. Disclosures of Core Information for Pls.

Exhibit 9: Dec. 9, 2008 Supplement to Pre-disc. Disclosures of Core Information for Pls.

Exhibit 10: Apr. 1, 2009 Dep. of Mark Babo

WHEREFORE, PREMISES CONSIDERED, Nationwide requests that this Court deny Plaintiff's Motion for Leave To Designate Mental Health Expert.

THIS, the 15th day of June, 2009.

Respectfully submitted,

NATIONWIDE MUTUAL FIRE
INSURANCE COMPANY, Defendant

By Its Attorneys,
WATKINS LUDLAM WINTER & STENNIS, P.A.

By: /s/ Laura Limerick Gibbes
LAURA LIMERICK GIBBES
lgibbes@watkinsludlam.com

H. Mitchell Cowan (MSB No.7734)
Laura Limerick Gibbes (MSB No. 8905)
F. Hall Bailey (MSB No. 1688)
Janet D. McMurtray (MSB No. 2774)
April D. Reeves (MSB No. 100671)
Christopher R. Shaw (MSB No. 100393)
Laura L. Hill (MSB No. 102247)
WATKINS LUDLAM WINTER & STENNIS, P.A.
190 East Capitol Street, Suite 800 (39201)
Post Office Box 427
Jackson, MS 39205
Telephone: (601) 949-4900
Facsimile: (601) 949-4804

Of Counsel:

Daniel F. Attridge, P.C. (Bar No. 44644)
Thomas A. Clare, P.C. (Bar No. 44718)
Christian D. Schultz (Bar No. 44747)
Robert B. Gilmore (Bar No. 44997)
Elizabeth M. Locke (Bar No. 45000)

KIRKLAND & ELLIS LLP
655 15th Street, N.W., Suite 1200
Washington, DC 20005
Telephone: (202) 879-5000
Facsimile: (202) 879-5200

CERTIFICATE OF SERVICE

I hereby 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:

Kristopher W. Carter, Esq.
Earl Denham, Esq.
Denham Law Firm
424 Washington Avenue
Post Office Drawer 580
Ocean Springs, MS 39566-0580

Crockett Lindsey
U.S. Attorney's Office
1575 20th Ave.
Gulfport, MS 39501
Tel: (228) 563-1560
Fax: (228) 563-1571
crockett.Lindsey@usdoj.gov

This, the 15th day of June, 2009.

/s/ Laura Limerick Gibbes
LAURA LIMERICK GIBBES
lgibbes@watkinsludlam.com