

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 REVIEW OF AND OBJECTION TO  
THE UNITED STATES MAGISTRATE JUDGE'S [348]**

**EXPEDITED RULING RESPECTFULLY REQUESTED**

COMES NOW the Plaintiff, HELEN J. POLITZ, by and through her attorneys of record, DENHAM LAW FIRM, pursuant to Rule 72(a) of the Federal Rules of Civil Procedure and Rule 72.1 of the Uniform Local Rules of the United States District Courts for the Northern District of Mississippi and the Southern District of Mississippi, and submit herewith her Application for Review of and Objection to the United States Magistrate Judge's [348] Order, and, in support thereof, show the following:

I.

Plaintiff respectfully requests that the Honorable District Court Judge vacate, reverse and/or modify the United States Magistrate Judge's [348] Order because the findings upon which it is based are clearly erroneous, and/or because the United States Magistrate's Ruling is clearly erroneous or contrary to the law. Plaintiff is filing this Application for Review and Objection in a timely manner, within ten (10) days of service of the Honorable Magistrate Judge's Order. Further, as the date on which the requested examination is to take place (June 25, 2009) rapidly approaches, Plaintiff would respectfully request that the Court expedite its ruling on this issue.

## II.

On May 26, 2009, Nationwide filed its [344] Nationwide's Motion for Mental Examination of Plaintiff Pursuant to Federal Rule of Civil Procedure 35, and on June 1, 2009, pursuant to the Court's order limiting time to respond Plaintiff filed her [347] Response to Nationwide's Motion for Mental Examination of Plaintiff Pursuant to Federal Rule of Civil Procedure 35. The June 1, 2009, [348] Order states "Plaintiff shall present herself at the offices of Watkins Ludlam Winters and Stennis, 2510 14<sup>th</sup> Street, Suite 1125, Gulfport, MS, at 10:00 a.m. on June 25, 2009, for mental examination by Dr. Mark Webb of the Mississippi Neuropsychiatric Clinic". For the Court's convenience, a copy of the Magistrate Judge's [348] Order is attached as "Exhibit A".

## III.

The Magistrate Judge's ruling is clearly is clearly erroneous, because it is contrary to the express facts in this case. Discovery was reopened by this Court in light of the limited issues discussed in the pretrial conference in this matter. Designating brand new experts was not one of those issues. There was no mention whatsoever of giving additional time to designate new expert witnesses, and the expert deadlines were not apparently reopened.<sup>1</sup> In fact, Nationwide has not, even now, designated Mark Webb as an expert witness, nor moved for leave to do so. Nationwide now, at the eleventh hour of this litigation, attempts to use a "back door" to bring in a brand new expert regarding Plaintiff's mental health. There is simply no reason whatsoever why Nationwide could not have done this prior to the previous expert deadlines. Nationwide has known since day one that Plaintiff was making a claim for mental and emotional damages caused by Nationwide. Plaintiff served Nationwide with the Complaint in this cause on February 4, 2008. (Dkt. [3]) Plaintiff's Complaint alleges "Plaintiffs are entitled to recover damages for pain

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<sup>1</sup> If this was the Court's intent, Plaintiff would ask leave to designate her own expert in mental health.

and suffering, emotional distress, mental anguish, loss of consortium, loss of enjoyment of life and such other extra-contractual damages as may be appropriate”. (Plaintiff’s Complaint Paragraph 84). Even knowing Plaintiff’s allegations, Nationwide made no attempts to designate any expert on the issue of mental health in this case, and the deadline for doing so ended on September 10, 2008. Nor has Nationwide sought to move for leave to designate a new expert in the *eight months* since then. Nationwide should not be entitled to do so at this late juncture. It is more than obvious that Nationwide is simply attempting to completely change its strategy on this issue in light of having its motions on the issue denied. This should not be permitted.

#### IV.

Dr. Babo, Mrs. Politz’s general physician, **will not be rendering an expert opinion** on Mrs. Politz’s condition, and has not been designated as an expert witness by the Plaintiff. As things currently stand, Plaintiff does not intend to call Dr. Mark Babo as a witness at all, though he is listed on the pretrial order in the “may call” list in an abundance of caution. Further, Nationwide has now deposed Dr. Mark Babo a total of **three times**, during which he made clear that he had *no* expert opinion on Mrs. Politz’s mental health issues with relation to Nationwide. Accordingly, there is nothing in his testimony for Nationwide to “rebut,” as it claims.

#### V.

Nationwide now, *years* into this litigation, seeks to introduce a new “expert,” presumably to testify that Mrs. Politz is either lying about suffering stress and mental anguish as a result of the denial of her claim, or that she does not know how she felt. This is an obviously ludicrous position. Judge Senter has already made clear in his ruling that Mrs. Politz will not be allowed to testify that she suffered from “clinical depression,” or any other medical condition absent corroborating medical testimony, but may only offer her **lay** testimony as to how Nationwide’s

conduct made her feel. See [293] Memorandum Opinion and Order Granting Plaintiff's Motion for Clarification and/or Reconsideration. Accordingly, it is unclear why Nationwide feels it is entitled, this late in the proceedings, to get a new expert witness to attempt to rebut *lay* testimony. Mr. Webb could not conceivably rebut Mrs. Politz's **subjective**, lay testimony as to how Nationwide's conduct made her feel. Again, she is not offering a medical opinion, and has been prohibited from doing so by this Court. Nationwide has known since day one that Plaintiff seeks damages for emotional distress and mental anguish. Only now, after having its motions regarding Mrs. Politz's emotional distress claim substantially *denied*, does Nationwide seek to add a new expert to this litigation. Nationwide was given several additional months in which to explore the emotional distress, mental anguish, anxiety and stress caused by Nationwide's conduct of Mrs. Politz while Plaintiff was disallowed from simultaneously engaging in further discovery. Nationwide did so, and deposed Mrs. Politz's physicians ad nauseum, as well as deposing Mrs. Politz for a second time. Further, it is anticipated that Nationwide will be deposing Mrs. Politz yet a *third* time, based on its representations in the pretrial conference. Nationwide has simply presented no new information and no argument as to why it should be entitled to a new expert now, eight months after the expiration of the original expert deadline.

## VI.

Nationwide has failed to make the requisite "**good cause**" showing required by Rule 35. Rule 35 states that a district judge "**may**" order a mental examination only upon a showing of "good cause." Fed. Rule Civ. Pro. 35(a)(2)(A). Nationwide has pointed to no new information which would make the requisite showing for good cause as to why it only now, eight months after the expiration of the original expert deadline and almost two years into this litigation, seeks a mental examination of Mrs. Politz. Plaintiff's Complaint made clear that she sought damages

for mental anguish and emotional distress. One factor reviewed by courts in making a “good cause” determination is “whether the plaintiff plans to prove [her] claim through the testimony of [her own] expert witnesses.” *Lahr v. Fulbright & Jaworski, LLP*, 164 F.R.D. 196, 200 (N.D. Tex. 1995).<sup>2</sup> Clearly, Plaintiff has no expert witness designated in this area.<sup>3</sup> The purpose of ordering a Rule 35 examination is to “preserve the equal footing of the parties” on the issue of evaluation of the plaintiff’s mental state. *Id.* (citation omitted). Ordering it in this case would actually do the opposite, as long as Plaintiff has no expert of her own on the issue.

According to the Fifth Circuit, there also need not be a mental examination where the party seeking the examination has adequate **alternative discovery procedures** available, such as having the opportunity to explore the issue through documents, interrogatories and depositions. *See Acosta v. Tennessee Oil Co.*, 913 F. 2d 205, 209 (5th Cir. 1990) (holding that where defendants had deposed plaintiff and submitted interrogatories and document requests, defendant had sufficient information to support its position without an examination). There is no question that Nationwide has had such opportunities here, and, indeed, continues to have such opportunities available (as the Court has reopened discovery for an additional sixty days).

Nationwide has had the opportunity to examine Mrs. Politz’s emotional distress and mental anguish claims ad nauseum, now through two depositions (with a third to come) and by deposing all of her treating physicians (including deposing her primary physician three times), none of which was a mental health professional, and none of which has been designated as an expert in this case. Nationwide has explored all of Plaintiff’s medical records. Again, as there is

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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.

<sup>3</sup> Again, if the Court is inclined to order Mrs. Politz to be evaluated by Nationwide’s mental health expert, Plaintiff asks that she be allowed to designate (and be evaluated by) her own mental health professional. Plaintiff will otherwise be severely prejudiced and on unequal footing from Nationwide.

no “expert opinion” in this action testifying as to what Mrs. Politz subjectively felt as a result of Nationwide’s denial of her claim, there is no medical expert opinion to “rebut” as Nationwide contends. Allowing Nationwide to have speculative “expert” testimony at this late juncture would thus serve to severely prejudice Mrs. Politz, who has no such expert of her own, and will be relying on her own lay testimony.

## VII.

None of the Defendant’s arguments in favor of obtaining the requested evaluation in the instant Motion are newly discovered information. The *only* thing that Mrs. Politz forgot to divulge to either Nationwide or to her attorneys until her first deposition more than six months ago, in November 2008, was the fact that she had been prescribed anti-depressants by Dr. Mark Babo. Dr. Babo has stated that he has **no opinion** on her mental health issue with regard to Nationwide’s denial of her claim. Nationwide is simply trying for a second (or third) bite at the apple on the issue of emotional distress, and is attempting to change its strategy six months after learning of Mrs. Politz’s antidepressant prescription by adding a “hired gun” mental health professional to somehow get up and testify that Mrs. Politz is lying about how she felt when her claim was denied. Not only would such “expert” testimony be completely speculative and completely incapable of disproving Mrs. Politz’s subjective claim for mental anguish, but it would add additional expense, including the necessity of Plaintiff being put in the position to have to designate her own new mental health expert.

## VIII.

The court reopened discovery in this cause on for Defendant to explore very specific issues, not to go out and hire new experts in an effort to reframe Nationwide’s arguments. It would likely be impossible for Mr. Webb to disprove Mrs. Politz’s claim, as it is a **subjective**

claim of emotional distress, mental anguish, anxiety and stress. Quite literally, how Nationwide's conduct made her feel and react. Mr. Webb's testimony will add nothing whatsoever, and will merely serve to confuse the issues in this cause, as well as adding significant expense. Mr. Webb's testimony has no probative value to the issues in this cause, and would be prejudicial because it would tend to confuse the jury, and would be completely speculative. There is absolutely no way that Mr. Webb could rebut Mrs. Politz's **lay** testimony as to what she subjectively felt when Nationwide denied her claim. All he could testify to would be the **medical** issues such as clinical diagnoses of, e.g., clinical depression, which this Court has already held that Mrs. Politz will **not** be allowed to testify to absent corroborating medical testimony. This is a red herring, and would simply add an "expert" stamp to speculation testimony, severely prejudicing Plaintiff unless she is able to designate her own mental health expert.

## IX.

Nationwide's Motion appears to be nothing more than harassment of Mrs. Politz. It is trying to make litigation so uncomfortable and expensive for her that she loses the heart for it. Nationwide should not be allowed to cause further harm to Plaintiff. Nationwide has failed to provide any argument as to what new information justifies its addition of a mental health professional this late in the litigation, and has accordingly failed to make the "good cause" showing required by Rule 35. Allowing Nationwide to obtain a psychological evaluation of Mrs. Politz will add additional unnecessary expense to this litigation and will force Mrs. Politz to obtain an independent evaluation by her own expert. It would be completely unnecessary, as

there is **no** mental health expert designated by Plaintiff at this point in time.<sup>4</sup> Granting Defendant's Motion would be unduly prejudicial to Plaintiff, and outside the ambit of what the Court apparently set out to do in extending the discovery deadline. Again, the expert and other deadlines simply were not apparently extended, and there is no reason to add Mr. Webb this long after the original deadline, especially as Nationwide is just coming up with this idea eight months after the first deadline expired.

X.

Clearly, Nationwide should not be allowed to add a new expert to this litigation at this time. However, in the event that the Court is inclined to allow the Defendant to add a new expert to examine the Plaintiff, Plaintiff would ask that she be allowed to designate her own expert in the field of mental health. To the extent that Nationwide seeks to dub Dr. Mark Webb an "independent" expert (which he is anything but; he has a reputation for testifying to exactly what insurance companies want him to), Plaintiff heavily disputes this issue. He would be nothing more than an expert hired by Nationwide to say exactly what it wants him to say. To the extent Nationwide seeks Court appointment of an "independent" physician, Plaintiff would submit that, if the Court agrees that such appointment is necessary, a *truly independent* mental health expert be appointed, and not a hired gun of Nationwide's. The Court is not required to accept the defendant's proposed physician as the examining physician. *Stinchcomb v. United States*, 132 F.R.D. 29 (E.D. Pa.1990). Dr. Mark Webb has a reputation in the legal community for testifying favorably for whoever hires him, though, as he has only been disclosed by Nationwide through its Motion, Plaintiff's have not had the opportunity to acquire documentation to demonstrate the fact.

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<sup>4</sup> In the event that the Court is inclined to allow the experts to both parties, Plaintiffs would be prepared to expeditiously have Mrs. Politz evaluated (subject to the physician's availability) and submit a full expert designation to Nationwide.

XI.

Because of the foregoing, the Magistrate's Judge's [348] Order should be reversed and/or modified.

WHEREFORE, PREMISES CONSIDERED, Plaintiff respectfully requests that this Honorable Court will Review the [348] Order of the United States Magistrate Judge, and enter its Order setting aside and reversing the Honorable Magistrate Judge's Order as clearly erroneous and/or contrary to the law; together with such other relief as may be deemed appropriate by this Honorable Court.

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 3<sup>rd</sup> day of June, 2009.

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NATIONWIDE MUTUAL FIRE  
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DEFENDANTS

**ORDER**

Before the Court is [344] Nationwide's May 26, 2009 motion for mental examination of plaintiff pursuant to Fed. R. Civ. P. 35. Pursuant to the Court's order expediting time for response to the motion, Plaintiff filed [347] her response on June 1, 2009. The Court has reviewed prior proceedings, particularly the orders of the District Judge ruling that although Mrs. Politz will not be allowed to "venture her opinion that she suffered the medical condition of clinical depression," she would not be precluded from testifying "about the effect the defendant's conduct had on her emotionally and mentally." [293] It therefore appears that Plaintiff's mental distress claim remains viable, although unsupported by expert medical evidence. That being the case, the Court finds that Nationwide's motion for mental examination should be granted. It is therefore,

**ORDERED**, that Plaintiff shall present herself at the offices of Watkins Ludlam Winters and Stennis, 2510 14<sup>th</sup> Street, Suite 1125, Gulfport, MS, at 10:00 a.m. on June 25, 2009, for mental examination by Dr. Mark Webb of the Mississippi Neuropsychiatric Clinic.

**SO ORDERED**, this the 1<sup>st</sup> day of June, 2009.

*1st Robert H. Walker*

ROBERT H. WALKER  
UNITED STATES MAGISTRATE JUDGE

