

IN THE UNITED STATES DISTRICT COURT
EASTERN DIVISION OF MISSOURI
EASTERN DIVISION

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IN RE GENETICALLY MODIFIED RICE)	4:06 MD 1811 CDP
LITIGATION)	
)	TRIAL COMMENCING
)	JANUARY 18, 2011

**PLAINTIFFS’ OPPOSITION TO THE BAYER DEFENDANTS’
MOTION IN LIMINE TO PRECLUDE CLAIMS BY PLAINTIFFS
FOR EMOTIONAL DAMAGES AND TO EXCLUDE EVIDENCE
AND ARGUMENT REGARDING EMOTIONAL DISTRESS**

Bayer moves in limine to preclude claims for emotional distress damages, and to exclude all evidence and argument relating to mental anguish. Bayer’s motion should be rejected on a number of grounds. As an initial matter, Bayer’s use of the *in limine* procedure as a substitute for a dispositive motion to preclude Plaintiffs from seeking emotional distress damages is improper. *See, e.g., Provident Life & Acc. Ins. Co. v. Adie*, 176 F.R.D. 246, 250 (E.D. Mich. 1997) (“Motions *in limine* typically involve matters which ought to be excluded from the jury’s consideration due to some possibility of prejudice or as a result of previous rulings by the court.” Party desiring to preclude a claim or defense should file appropriate dispositive motion). Bayer’s motion otherwise is without merit.

A. Plaintiffs Were Not Required To Plead A Separate Tort Of Outrage.

Bayer asserts that Mississippi does not permit damages for mental anguish without asserting a separate tort of outrage, i.e., intentional infliction of emotional distress. *See* Mot. at 3. Bayer is incorrect. Mississippi recognizes the separate tort of intentional infliction of emotional distress and negligent infliction of emotional distress, but neither limit recovery of distress-type damages to that action. Generally, under the law of Mississippi, recovery can be had for emotional distress, as part

of compensatory damages and without a requirement of physical injury, especially where there is some sort of willful, wanton, reckless or outrageous behavior on the part of the defendant. *See, e.g., Leaf River Forest Prods., Inc. v. Williams*, 662 So.2d 648m 659 (Miss. 1995).

In *Sears, Roebuck & Co. v. Devers*, 405 So.2d 898 (Miss. 1981), cited by Bayer, the court similarly stated the general rule in Mississippi that “there can be no recovery for mental pain and suffering from the mere negligent act of another unaccompanied by physical or bodily injury” but went on to say:

Where there is something about the defendant's conduct which evokes outrage or revulsion, done intentionally -or even unintentionally yet the results being reasonably foreseeable -Courts can in certain circumstances comfortably assess damages for mental and emotional stress, even though there has been no physical injury. In such instances, it is the nature of the act itself-as opposed to the seriousness of the consequences-which gives impetus to legal redress....

Id. at 902.

In *Adams v. U.S. Homecrafters, Inc.*, 744 So.2d 736, 743 (Miss. 1999), Mississippi began to move away from the requirement of proof of physical manifestation for claims of emotional distress. In *Adams*, the Mississippi Supreme Court noted::

The rule once was that, to recover damages for emotional distress, the plaintiff had to prove either (a) an intentional or at least grossly negligent tort or (b) negligence accompanied by physical impact. The Court has relaxed this rule in a long series of cases.... *The upshot of these cases in the present rule is a plaintiff may recover for emotional injury proximately resulting from negligent conduct, provided only that the injury was reasonably foreseeable by the defendant.*

Adams v. U.S. Homecrafters, Inc., 744 So.2d 736, 743 (Miss. 1999) (quoting *Strickland v. Rossini*, 589 So.2d 1268, 1275 (Miss.1991)) (emphasis original). Where “the defendant's conduct amounts to simple negligence, [the Mississippi Supreme Court has] 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. *Id.*

See also *Cherry Bark Builders v. Wagner*, 781 So.2d 919, 923-24 (Miss. App. 2001) (upholding award of distress damages in breach of contract case). Recovery for mental anguish is allowed without physical injury where the defendant's conduct is in some way “outrageous.” *Wilson v. General Motors Acceptance Corp.* 883 So.2d 56, 65 (Miss. 2004). See also, e.g., *Jordan v. Wilson*, 5 So.3d 442, 449 n.5 (Miss. App. 2008) (plaintiff could prevail on negligence claim in light of medically cognizable mental and/or emotional injuries).

Finally, the Mississippi Supreme Court held that even in contract actions, recovery may be had for emotional distress even though there was no physical manifestation, as long as such damages were reasonably foreseeable. *University of Southern Mississippi v. Williams*, 891 So.2d 648, 659 (Miss. 1995)(emotional distress recoverable in contract actions without proof of physical manifestations). In this case, Plaintiffs have alleged that Bayer’s conduct was outrageous and in reckless disregard for their rights.¹

Further, under Arkansas law, a plaintiff may recover what is known as “disruption damage” for injury to property rights. This includes “[l]oss of use and enjoyment, fear and fright, loss of

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See Master Consolidated Amended Class Action Complaint filed Jan. 5, 2009 at ¶ 65 (Bayer knew it could not completely isolate the LLRICE); ¶ 66 (“Bayer was aware that its generically-modified rice could easily contaminate the entire U.S. rice crop”); ¶ 69 (“Bayer was on notice of the dangers of improper testing and handling of unapproved genetically modified seed traits and the foreseeable-indeed inevitable-effects of supply chain contamination arising therefrom”); ¶ 74 (“Despite this knowledge ... Defendants caused the contamination of the U.S. rice supply”) ¶¶ 110-112 (despite knowledge of risks, “Bayer tested its LLRICE without adequate safeguards”); ¶ 116 (“such wrongful, and at a minimum, reckless conduct by Bayer lead directly to the contamination”); ¶ 125 (Bayer’s conduct was “egregious”); ¶ 156 (Bayer’s conduct was committed with conscious or reckless disregard of the rights of the Arkansas Plaintiffs ... and was grossly negligent”); ¶ 202 (Bayer’s conduct regarding Arkansas Plaintiffs was “in reckless disregard of or conscious indifference to [the] consequences”); ¶¶ 256, 258 (same-Mississippi nuisance claim); ¶ 267 (same-Mississippi negligence claim).

peace of mind and impact to plaintiffs' quiet use and enjoyment of their property" as well as "[d]isruption and inconvenience to quality of life[.]" *Felton Oil Co., L.L.C. v. Gee*, 182 S.W.3d 72, 76 (Ark. 2004). This is simply one element of recovery to which the plaintiff is entitled. *See id.* at 76 ("Discomfort and annoyance to an occupant of the land and to the members of the household are distinct grounds of compensation for which in ordinary cases the person in possession is allowed to recover in addition to the harm to his proprietary interests.") (quoting Restatement (Second) of Torts §929, comment e). Mississippi allows similar damages in nuisance actions, although Mississippi Courts do not use the term "disruptive damages." . *See, e.g., Cooper Tire & Rubber Co., v. Johnson*, 106 So.2d 889, 891 (Miss.1958)(annoyance, inconvenience and discomfort recoverable for damage caused by nuisance); *Shaw v. Owen*, 90 So.2d 179 (Miss. 1956)(in nuisance action, plaintiff may recover for discomfort, annoyance and inconvenience alone). There is no requirement that Plaintiffs assert a separate cause of action for intentional infliction of emotional distress in order to recover distress-type damages.²

B. Pleading Rules Do Not Preclude Recovery

Bayer next complains that Plaintiffs' pleading is insufficient under Fed. R. Civ. P. 8(a) and 9(g) for Plaintiffs to recover distress-type damages. Neither of these Rules aids Bayer's argument. Rule 8(a) requires only "a short and plain statement of the claim showing that the pleader is entitled to relief," and "a demand for the relief sought, which may include relief in the alternative or different types of relief." In their Complaint, Plaintiffs assert all the requisite elements of negligence and nuisance under Arkansas and Mississippi law. They also assert a demand for relief encompassing

² Bayer argues that a claim for outrage requires evidence that the emotional distress was "so severe that no reasonable person could be expected to endure it," and says that Plaintiffs do not have sufficient evidence for summissibility. Mot. at 5 n.1 (citing Arkansas cases). This argument, of course, assumes that Plaintiffs are required to assert an action for outrage, which they are not.

“[a]ll monetary and compensatory relief to which they are entitled and will be entitled at the time of trial.” Master Consolidated Amended Class Action Complaint, filed Jan. 5, 2009, Part VII Demand for Judgment. There is no requirement in Rule 8(a) that damages be itemized.

Rule 9(g) does not apply because distress-type damages in this case are not “special.” The Eighth Circuit has defined “special damages” as a type of damage that “are not usually associated with the claim in question.” *Tipton v. Mill Creek Gravel, Inc.*, 373 F.3d 913, 922 n.10 (8th Cir. 2004). The Court held that plaintiff was not required to request attorneys fees in his complaint because in a shareholder derivative suit, attorneys fees are not “special damage” within the meaning of Rule 9(g). *See also, e.g., Greater New York Auto. Dealers Ass'n v. Environmental Systems Testing, Inc.*, 211 F.R.D. 71, 78 (E.D.N.Y. 2002) (special damages “are damages that are unusual for the type of claim in question—that are not the natural damages associated with such a claim.” Loss of business and loss of good will are directly related to breach of contract claim and are not “special” recovery).³ In regard to the rule on pleading special damages, “[t]he tendency is liberalization.” The purpose of the rule “is to give notice; the more natural are the damages, the less pleading is needed.” *Suarez Matos v. Ashford Presbyterian Community Hosp., Inc.*, 4 F.3d 47, 51 (1st Cir. 1993). When defendants have notice of the general nature of the claims against them, “[t]he preferred course is to encourage the use of discovery procedures to apprise the parties of the factual basis of the claims made in the pleadings,” rather than to require plaintiffs to more specifically plead their causes of action.” *Greater New York Auto. Dealers*, 211 F.R.D. at 77. In their claim for relief, Plaintiffs put Bayer on notice that they would seek all damages “to which they are entitled.”

³ Bayer cites *Goods v. Horace Mann Life Ins. Co.* and *Smith v. DeBartoli* in support of its argument that distress is a “special” item of damage. These cases are inapposite. In *Goods*, plaintiffs alleged that the life insurance policies issued by defendants provided coverage different than what was represented. Citing *Smith*, the court held that emotional distress was special damage, and that defendants “had no notice” of that claim. 2006 WL

Plaintiffs are entitled to distress damages under both Arkansas and Mississippi law, and distress damages are not unusual in regard to the claims asserted.

Bayer had every opportunity to seek information about the damages Plaintiffs sought in discovery. Bayer chose to request information via Plaintiff Fact Sheets, which set out specified questions to each plaintiff. Bayer also served interrogatories. In neither case did Bayer ask Plaintiffs to itemize the categories of damages sought. As recently as December 21, 2009 (two days after it filed the instant motion) the parties came before the Court on Bayer's request for additional discovery. Bayer sought additional discovery only in regard to future damages; it did not request discovery regarding distress-type damages. If Bayer was not on notice that Plaintiffs would seek distress damages before the first Bellwether trial, it certainly was put on notice during that trial, where the issue was specifically discussed and counsel expressly stated that the decision to not seek distress damages pertained to the Bell Plaintiffs and J.H. Hunter Farms only. Bayer has no credible argument that it lacked notice that the Plaintiffs in this bellwether trial may seek distress damages. If Bayer chose not to pursue discovery on this issue, it has no one but itself to blame.

C. Evidence Regarding Plaintiffs' Distress Is Relevant and Admissible

Bayer's argument to exclude evidence relating to Plaintiffs' distress is based entirely on its argument that Plaintiffs "may not claim emotional damages." Mot. at 5. Even assuming for the sake of argument that Plaintiffs were not entitled to distress-type damages, evidence relating to the effect of the contamination on Plaintiffs' lives is wholly proper. Among other things, Plaintiffs' nuisance claim includes interference with Plaintiffs' use *and enjoyment* of their property, which clearly encompasses annoyance, inconvenience, and discomfort. *See, e.g., Biglane v. Under The Hill Corp.*, 949 So.2d 9, 14, 15 (Miss. 2007) (private nuisance is a nontrespassory invasion of another's interest "in the use and enjoyment of his property" and can injure plaintiff through "annoyance,

inconvenience and discomfort”); *Howard v. Etchieson*, 310 S.W.2d 473, 474 (Ark. 1958) (funeral home in residential area nuisance in part because it was “a constant reminder of death and very depressing.”).

For all these reasons, Bayer’s motion should be denied.

Respectfully submitted,

CHAPMAN, LEWIS & SWAN PLLC

By: /s/ Ralph E. Chapman
Ralph E. Chapman
Sara B. Russo

CHAPMAN, LEWIS & SWAN

501 First Street
P. O. Box 428
Clarksdale, Mississippi 38614
Tel: (662) 627-4105
Fax: (662) 627-4171

Plaintiffs’ Executive Committee

GRAY, RITTER & GRAHAM, P.C.

Don M. Downing, Bar # 41786
Gretchen Garrison, Bar # 3189
Jason D. Sapp, Bar #5218238
701 Market Street, Suite 800
St. Louis, Missouri 63101-1826
Tel: (314) 241-5620
Fax: (314) 241-4140
ddowning@grgpc.com
ggarrison@grgpc.com
jsapp@grgpc.com
*Plaintiffs’ Designated Co-Lead Counsel and
Liaison Counsel*

**WOLF HALDENSTEIN ADLER
FREEMAN & HERZ LLC**

Adam J. Levitt
Stacey T. Kelly

55 West Monroe Street, Suite 1111
Chicago, Illinois 60603
Tel: (312) 984-0000
Fax: (312) 984-0001
levitt@whafh.com
*Plaintiffs' Designated Co-Lead Counsel and
Liaison Counsel*

HARE, WYNN, NEWELL & NEWTON LLP

Scott A. Powell
Donald P. McKenna, Jr.
Massey Building, Suite 800
2025 Third Avenue North
Birmingham, Alabama 35203
Tel: (205)-328-5330
Fax: (205)-324-2165

Richard J. Arsenault
John Randall Whaley
Jennifer M. Hoekstra
NEBLETT BEARD & ARSENAULT, LLP
2220 Bonaventure Court, P.O. Box 1190
Alexandria, Louisiana 71301
Tel: (800) 256-1050
Fax: (318) 561-2591
Plaintiffs' Executive Committee

Scott E. Poynter
EMERSON POYNTER LLP
500 President Clinton Avenue, Suite 305
Little Rock, Arkansas 72201
Tel: (501) 907-2555
Fax: (501) 907-2556
Plaintiffs' Executive Committee

Stephen A. Weiss
Diogenes P. Kekatos
James A. O'Brien III
SEEGER WEISS LLP
One William Street
New York, New York 10004
Tel: (212) 584-0700
Fax: (212) 584-0799

Plaintiffs' Executive Committee

Joe R. Whatley Jr.
Deborah Clark Weintraub
Adam P. Plant
WHATLEY DRAKE & KALLAS LLP
2001 Park Place North, Suite 1000
Birmingham, Alabama 35203
Tel: (205) 328-9576
Fax: (205) 328-9669

Plaintiffs' Executive Committee

William Chaney
James L. Reed
William J. French
Michael Kelsheimer
Drew York
LOOPER REED & MCGRAW
1601 Elm Street Suite 4100
Dallas, Texas 75201
Tel: (214) 237-6403
Fax: (214) 953-1332

Plaintiffs' Executive Committee

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that I have this 7th day of January, 2011, electronically filed a copy of the foregoing with the Clerk of the Court to be served by operation of the Court's electronic filing system upon the parties of record.

/s/ Ralph E. Chapman