IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-3519
Summary Calendar

NORMAN VICTOR AND CARLA VICTOR,

Plaintiffs-Appellants,

v.

MITSUBISHI MOTOR SALES OF AMERICA, INC.

Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of Louisiana
(CA-91-1078 "N")

(November 19, 1992)

Before KING, DAVIS and WIENER, Circuit Judges.

PER CURIAM:[*]

Norman Victor and his wife, Carla Victor, appeal from the district court's entry of summary judgment for Mitsubishi Motor Sales of America, Inc. ("MMSA"), in a products liability diversity action in federal district court in Louisiana. Plaintiffs also appeal the district court's refusal to grant them

[*]Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

leave to amend their complaint in order to substitute Mitsubishi Motor Company ("MMC") as a defendant. We affirm in all respects.

I.

On September 16, 1990, Norman Victor, a security guard employed by a Louisiana hospital, was making his rounds in one of the hospital's parking decks. As usual, he was driving one of the hospital's security vehicles, a 1990 Mitsubishi "Mighty Max" pick-up truck. According to Victor, as he was driving, the brakes of the truck suddenly failed at the very time that the vehicle self-accelerated. Victor, who was not wearing a seat belt, crashed into a concrete column in the parking garage and was injured. Invoking diversity jurisdiction, he and his wife brought a products liability action against MMSA, the truck's distributor, in federal court in Louisiana in March 1991.

In May 1991, MMSA filed its answer, denying that the truck was defective either in its brakes or its acceleration device.[**] MMSA also specifically denied the Victors' allegation that MMSA "manufactured" the truck. An initial conference was thereafter held by the district court, and certain pre-trial deadlines were scheduled. Among them, the Victors were given until November 7, 1991, to substitute or add parties and were given until February 24, 1992, to complete discovery. The trial was scheduled to

[**] MMSA, supported by expert testimony, claims that Victor simply pressed down on the accelerator pedal, believing it was the brake pedal. MMSA specifically points to a significant imprint in the carpet below the accelerator.

begin on April 20, 1992. Between May 1991 and February 1992, the Victors failed to conduct any discovery. Finally, on February 17, 1992 -- almost a year after their complaint was filed and seven days before the February 24th deadline to complete discovery -- the Victors propounded interrogatories and requests for production of documents to MMSA. On March 18, MMSA responded, repeating its earlier assertion that it was not the manufacturer of the truck. MMSA pointed out that it was simply the distributor and that MMC was the manufacturer.

MMSA moved for summary judgment, contending that the Victors had failed to prove an essential element of their case under the Louisiana Product Liability Act, La. Rev. Stat. Ann. § 9:2800.54 (West 1991 & Supp. 1992) -- that the pickup truck was defective in any way. MMSA also argued that the Victors' reliance on the doctrine of res ipsa loquitur was misplaced. MMSA supported it motion with affidavits and testimony from a hospital employee who removed the truck from the accident scene, a mechanic who repaired the damaged truck, and an expert engineer retained by MMSA.

On March 23, 1992, the Victors filed a motion in response to MMSA's motion for summary judgment. The Victors' sole ground of opposition was that the doctrine of res ipsa loquitur applied. On March 25, the Victors moved to compel additional discovery responses from MMSA, requesting information about all complaints filed against MMSA involving alleged brake failures or sudden, unexplained acceleration in the operation of Mighty Max trucks.

In early April, the district court held a final pre-trial conference and heard argument on various motions, including MMSA's motion for summary judgment. A federal magistrate heard argument on the Victors' motion to compel additional discovery and ordered MMSA to produce any records of prior complaints of brake failure or unexplained acceleration. MMSA revealed that two civil complaints had been filed in other states in which owners had alleged that the Mighty Max had experienced "spongy" or "squealing" brakes; however, these were not complaints of brake "failure," such as that alleged by the Victors. Nor, it was revealed, had there been any complaints of sudden acceleration.

On April 8, the district court advised the Victors that by April 10 they should file any final memoranda in opposition to MMSA's motion for summary judgment. The court warned that if they failed to establish a genuine issue of material fact, summary judgment would be entered forthwith. Rather than filing what the court requested, on April 9, the Victors filed a motion for leave to amend their complaint to add MMC as a defendant. They also filed a motion for continuance of the April 20th trial date. On April 10, the Victors also filed additional papers opposing MMSA's motion for summary judgment. Again, rather than producing any new evidence controverting MMSA's claims, the Victors simply re-urged their res ipsa loquitur theory.

On April 28, the district court entered summary judgment for MMSA, thereby dismissing all of the Victors pending motions,

including its motion to amend its complaint in order to add MMC as a defendant. The Victors appeal from the entry of summary judgment and the district court's denial of their motion to add MMC as a defendant.

II.

a. Summary Judgment

i) No evidence of a defect

The Victors argue that summary judgment was improper. In reviewing a grant of summary judgment, this Court applies the same standard as the district court. That is, the pleadings, depositions, answers to interrogatories, and admissions, together with any affidavits or other evidence, must show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Dorsett v. Board of Trustees for State Colleges and Universities, 940 F.2d 121, 123 (5th Cir. 1991); Fed. R. Civ. Pro. 56(c).

The district court held that the Victors had failed to prove an essential element in their case -- that the Mighty Max truck was defective under Louisiana law. See Louisiana Product Liability Act, La. Rev. Stat. Ann. § 9:2800.54 (West 1991 & Supp. 1992). "A complete failure of proof on an essential element renders all other facts immaterial because there is no longer a genuine issue of material fact. Rule 56(c) requires the district court to enter summary judgment if the evidence favoring the non-moving party is not sufficient for the jury to enter a

verdict in his favor." Washington v. Armstrong World Industries, Inc., 839 F.2d 1121, 1122-23 (5th Cir. 1988). The non-movant may not establish a genuine issue of material fact by resting on bare allegations made in the pleadings, but must produce sufficient evidence to demonstrate that a genuine issue of material fact exists. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986). A claim that further discovery or a trial might reveal facts of which the plaintiff is currently unaware is insufficient to defeat the motion. Washington, 839 F.2d at 1123.

The instant case is a textbook example of a proper entry of summary judgment. The district court "'intercept[ed] [a] factually deficient claim . . . in advance of trial.'" Professional Managers, Inc. v. Fawer, Brian, Hardy & Zatzkis, 799 F.2d 218, 223 (5th Cir. 1986) (citation omitted). The Victors simply did not present evidence of a manufacturing or design defect in the Mighty Max pick-up truck driven by Norman Victor. The Victors instead simply made bare allegations of a defect. They had engaged in practically no discovery within weeks of trial and were left to rely on two civil actions filed by other parties in which allegations were made that the Mighty Max truck had "spongy" or "squealing" brakes. However, these civil complaints did not allege (or prove) outright brake failure; nor did they even allege any type of unexplained acceleration. Rather, the two cases were simple breach-of-warranty actions in which the disappointed buyers of Mighty Max

trucks listed the minor brake problems as one aspect of MMSA's alleged breach of warranty.

More importantly, MMSA offered testimony and affidavits from two fact witnesses and an expert which strongly tended to refute the Victors' bare allegations. The maintenance worker who drove the truck away from the accident scene stated that the brakes were in proper working order. The mechanic who examined the truck after the accident stated that his inspection revealed no indications of any defect in either the truck's brakes or its accelerator mechanism. A mechanical engineer who was employed as a defense expert opined that an imprint from the throttle linkage on the truck's carpet revealed that the gas pedal, not the brake pedal, was being pressed at the moment of impact. Based on the pleadings and evidence offered, the district court was correct in entering summary judgment.

ii) Res ipsa loquitur

Rather than offering any hard evidence of a design defect, the Victors instead invoked the doctrine of res ipsa loquitur in their arguments against summary judgment. The district court held that, as a matter of law, the tort doctrine was inapplicable to the instant case. The court, therefore, refused to permit the Victors to amend their complaint in order to allege res ipsa loquitur.

The district court held that the Victors failed to prove any of the three elements of res ipsa loquitur. Those three elements are:

> 1) The circumstances surrounding the accident must create a presumption of negligence on the part of the defendant;
> 2) Control and management of the instrumentality which caused the accident must have been vested exclusively in the defendant; and
> 3) The plaintiff's position must be such that they are unable to obtain information regarding the cause of the accident.

Smith v. Xerox Corp., 866 F.2d 135, 140 (5th Cir. 1989) (Louisiana diversity case); Dorman v. T. Smith & Sone, Inc., 64 So.2d 833, 835 (La. 1953).

We agree with the district court. First, we note that the simple fact of an auto accident, standing alone, by no means creates a presumption that the vehicle was defective, cf. Cangelosi v. Our Lady of the Lake Medical Center, 564 So.2d 654, 667 (La. 1989), because the possibility of human error by the driver cannot be ruled out. Second, we observe that the Mighty Max truck was owned and controlled by the hospital which employed Mr. Victor, not MMSA. Finally, the Victors were not in a position where they were unable to obtain information about what caused the accident. Rather, as noted supra, they failed to engage in meaningful discovery in order to determine whether or not there was a defect in the truck.

b. The district court's refusal to permit an amendment of the complaint in order to add MMC as a defendant

The Victors also contend that the district court erred by failing to permit them to amend their complaint in order to add MMC as a defendant. We hold that the district court's refusal was proper for two reasons. First, adding MMC, the manufacturer of the Mighty Max truck, would not have prevented the entry of summary judgment. As discussed in supra Part II.A., summary judgment was granted because the Victors totally failed to prove that there was any type of defect in the truck. Thus, whether or not MMC was named as a defendant was immaterial to the district court's entry of summary judgment.

Second, even if adding MMC would have made any difference, the district court did not abuse its discretion by forbidding the amendment of the complaint pursuant to Rule 15(a) of the Federal Rules of Civil Procedure in view of the undue delay by the Victors in to making the motion. See Davis v. United States, 961 F.2d 53, 57 (5th Cir. 1991) (abuse of discretion standard applied to district court's application of Rule 15(a)); Guthrie v. J.C. Penny Co., 803 F.2d 202, 210 (5th Cir. 1986 (same); see also Foman v. Davis, 371 U.S. 178, 182 (1962) (party's undue delay relevant to court's decision to grant leave to amend the pleadings); Addington v. Farmer's Elevator Mutual Insurance Co., 650 F.2d 663, 666-67 (5th Cir. 1981) (leave to amend is by no means automatic under Rule 15(a)).

The deadline set by the district court for adding parties was November 7, 1991 -- many months prior to the Victors' request. The Victors were on notice that MMC was the manufacturer as early

as May 1991, when MMSA filed its answer, explicitly denying that it was the manufacturer of the Mighty Max. Furthermore, an examination of the truck itself would have revealed that MMC was the manufacturer. Additionally, on March 18, 1992, MMSA, in its answers to the Victors' interrogatories, again stated that it was not the manufacturer and was merely the distributor. Only on April 9, 1992 -- less than two weeks before trial and one day before the imminent entry of summary judgment -- did the Victors seek to amend their complaint in order to add MMC as a defendant. The district court was correct in denying the motion and in denying a related motion seeking a continuance.

III.

In view of the foregoing reasons, we AFFIRM the district court in all respects.