UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-3404

MARK DEAN,

Plaintiff-Appellant,

VERSUS

CHRYSLER CORPORATION AND/OR CHRYSLER MOTOR CORPORATION, MORTON INTERNATIONAL, INC., THIOKOL CORPORATION, TAKATA, INC., AND TRW, INC.,

Defendants-Appellees.

Appeal from the United States District Court for the Middle District of Louisiana
(CA-90-993 H-4)

(October 4, 1994)

BEFORE WISDOM AND BARKSDALE, Circuit Judges, and HARMON, District Judge.[1]

MELINDA HARMON, District Judge:[2]

Plaintiff-appellant Mark Dean (Dean) appeals the district court's grant of summary judgment to defendants-appellees Chrysler Corporation, Morton International, Inc., Thiokol Corporation, Takata, Inc., and TRW, Inc. in this products liability action asserting injuries enhanced by a defective airbag system during a head-on collision of Dean's 1989 Dodge Daytona. Also at issue on appeal, aside from the merits of the summary judgment, is the content of the record. Carried with the case and pending before this panel are Dean's motion to supply

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[1] District Judge of the Southern District of Texas, sitting by designation.

[2] 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 Pursuant to that Rule, the court had determined that this opinion should not be published.

omissions in the record on appeal, appellee Takata, Inc.'s motion to strike portions of Dean's original brief to delete facts not presented to the district court, and appellees Morton International, Inc. and Thiokol Corporation's motion to strike portions of Dean's reply brief that raise the issue of res ipsa loquitur for the first time on appeal. We deny the motion to supplement, grant the motions to strike, and affirm the summary judgment.

I.

On October 12, 1989, as Dean was driving eastbound on Louisiana Highway 1026 in Livingston Parish, Louisiana in his new Dodge Daytona, a drunk driver traveling the other direction crossed the center line and hit Dean's vehicle. Dean's air bag allegedly failed to inflate fully, caught fire, spewed scalding toxic chemicals from the steering column into Dean's face, and filled the automobile with smoke. Claiming that the airbag system was defective in failing to deploy fully and in venting hot fumes, Dean initially sued Chrysler Corporation, which manufactured the car, and later the manufacturers of various components of the airbag system, Morton International, Inc., Thiokol Corporation, Takata, Inc., and TRW, Inc. He asserts that the defective system resulted in injury to his right knee and in chronic, acute bronchitis from exposure to the emitted chemicals and smoke.

The suit, originally filed in Louisiana state court under Louisiana law, was properly removed on October 10, 1990 by Chrysler Corporation to the United States District Court for the Middle District of Louisiana on diversity grounds. Dean subsequently added the remaining defendants and asserted three grounds for recovery under the Louisiana Products Liability Act, La. Rev. Stat. Ann. §§ 9:2800.53 et seq.: the airbag mechanism was unreasonably dangerous in construction and composition,[3] in design,[4] and in inadequate warnings.[5]

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[3] La. Rev. Stat. Ann. § 9:2800.55 (West 1991) provides,

> A product is unreasonably dangerous in construction or composition if, at the time the product left its manufacturer's control, the product deviated in a material way from the manufacturer's specifications or

On February 18, 1993, approximately two months before the trial setting, defendants Chrysler Corporation, TRW, Inc., Thiokol Corporation, and Morton International, Inc.[6] filed a motion for summary judgment asserting that Dean could not demonstrate that the airbag restraint system was unreasonably dangerous or defective, nor establish a causal relationship between his claimed injuries and the alleged unreasonably dangerous deployment of the airbag. Defendants relied on the testimony of expert witness and long-term Chrysler employee Craig R. Love ("Love"),[7] who testified that the system deployed properly and

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> performance standards for the product or from otherwise identical products manufactured by the same manufacturer.

[4] La. Rev. Stat. Ann. § 9:2800.56 provides,

> A product is unreasonably dangerous in design if, at the time the product left its manufacturer's control:
>
> (1) There existed an alternative design for the product that was capable of preventing the claimant's damage; and
>
> (2) The likelihood that the product's design would cause the claimant's damage and the gravity of that damage outweighed the burden on the manufacturer of adopting such alternative design and the adverse effect, if any, of such alternative design on the utility of the product. An adequate warning about such a product shall be considered in evaluating the likelihood of damage when the manufacturer has used reasonable care to provide the adequate warning to users and handlers of the product.

[5] La. Rev. Stat. Ann. § 9:2800.57(A), incorrectly cited in Dean's brief as 9:2800.58, provides,

> A product is unreasonably dangerous because an adequate warning about the product has not been provided if, at the time the product left its manufacturer's control, the product possessed a characteristic that may cause damage and the manufacturer failed to use reasonable care to provide an adequate warning of such characteristic and its danger to users and handlers of the product.

[6] Although Takata, Inc. had filed a separate motion for summary judgment and did not participate in this one, Judge Duplantier granted summary judgment for Takata, Inc. on the same basis as for the movants. Takata, Inc.'s motion was thereby mooted.

[7] Dean's amended brief, at 10, describes Love as "a 21-year administrative employee of Defendant Chrysler, who admittedly was not a chemistry expert nor an electronics expert, and who admittedly had no awareness of the temperature testing of the Daytona airbag." Dean challenges the court's reliance on an expert's opinion for summary judgment as well as Love's qualifications.

performed as designed, and an affidavit of one of Dean's two treating pulmonologists, Dr. James Benedict, expert in medicine, biomechanics, occupant kinematics, and injury causation, who concluded that the system did not cause or enhance Dean's injuries.

By telephone on March 15, 1993, Dean obtained continuances for both the submission date of the motion for summary judgment and the trial setting to permit further discovery. A status hearing was set for April 1, 1993, at which time the court indicated that it would consider all pending motions. Nevertheless, because the judge became ill, that hearing was not held, nor was it reset. The record reflects that Dean did not supplement the record prior to the April 1st setting.

Then on May 10, 1993, before Dean had an opportunity to depose Dr. Benedict, the district court granted summary judgment, finding that defendants had satisfied their burden of showing an absence of a genuine issue of material fact through Love's testimony that the airbag had deployed correctly and functioned as it was designed to do, and that even if it had not, that Dean had failed to prove causation of the alleged injuries to his knee and lungs. Without filing a motion to reconsider to argue that he was denied an opportunity to complete the record and to respond fully to the motion for summary judgment, Dean appealed.

Dean's amended brief on appeal[8] on the merits argues (1) that the district court used the wrong standard for summary judgment because it made factual and credibility determinations that are the province of the jury, (2) that the district court improperly and unreasonably relied upon Love's unsubstantiated expert testimony, (3) that the judge determined without proof, and in contravention of Dean's eyewitness deposition testimony[9] and of the evidence, that the airbag deployed properly and therefore did not cause or enhance Dean's

[8] As pointed out by Judge Barksdale at oral hearing, Dean failed to raise the issue of inadequate summary judgment procedure in his original or amended brief on appeal.

[9] Judge Duplantier discounted the significance and sufficiency of this evidence because Dean had not shown that he was anything but a layman in regard to the complex airbag device. The court further stated that there was no evidence that the appearance of Dean's airbag was any different from that of a fully inflated airbag, or that it deviated from the manufacturers' specifications, or that there was an alternative design that could have been used.

injuries, and (4) and that the district court erred in finding that Dean failed to show that the airbag was designed to prevent or was responsible for Dean's knee injury or that the release of hot caustic chemicals caused Dean's bronchitis.[10]

Asserting that he had submitted complete copies below which are missing now, Dean has moved to supplement the record on appeal with the complete deposition transcripts of Mark Dean (taken July 19, 1991 and February 11, 1993), of Craig Love, and of Dr. John Salvaggio to counter defendants' summary judgment evidence. The appellants argue that only excerpts of those depositions, which were attached to their memorandum in support of their motion for summary judgment, were before the district court. They contend that while Dean's memorandum in opposition referenced and quoted from Dean's two deposition transcripts, neither the complete depositions nor the cited excerpts submitted by defendants were identified by Dean as accompanying exhibits. They have moved to strike those parts of Dean's original brief that rely on those matters which are outside the record reviewed by the district court. They also seek to strike that part of Dean's reply brief that asserts the doctrine of res ipsa loquitur for the first time on appeal.

II.

First the Court examines the threshold issue of the contents of the record on appeal. The existing record on its face includes only excerpts from the depositions of Dean and of defendants' expert witness on the design and operation of airbags. These excerpts were attached to and filed with defendants' memorandum in support of their motion for summary judgment. Dean's attorney argues that copies of the complete depositions were filed with his opposition but that parts of them are missing from the record. Because Judge Adrian Duplantier of the Eastern District of Louisiana was appointed to hear this case, which arose in the Middle

[10] Judge Duplantier relied on the deposition testimony of Dean's treating physician, also a pulmonologist, Dr. John Salvaggio, that he was unable to assert that anything in the airbag was the probable cause of the bronchitis. Order and Reasons at 4-5 (May 6, 1993). Moreover the judge noted that Dr. Roberts causally connected Dean's bronchitis to the accident but not specifically to the deployment or the burning of the airbag. Id.

District, Dean speculates that in the transfer of the record in the instant action and of approximately 120 others, portions of these depositions may have been lost.

This court's review is limited to the record before the district court at the time that it granted the summary judgment. Dean cannot add depositions, affidavits or exhibits that were not reviewed by the district court to support his position on appeal. Topalian v. Ehrman, 954 F.2d 1125, 1131-32 n.10 (5th Cir.), cert. denied, ___ U.S. ___, 113 S. Ct. 82, 121 L.Ed.2d 46 (1992); Nissho-Iwai American Corp. v. Kline, 845 F.2d 1300, 1307 (5th Cir. 1988).

We are not persuaded by Dean's insistence that the depositions in their entirety were submitted to the district court. There is no evidence that the complete depositions were in the record before the district judge, nor any proof that Dean ever submitted them to the district court. The depositions are not attached to Dean's memorandum in opposition to the motion for summary judgment, as required by Fed. R. Civ. P. 56(e). There is no copy of a cover letter to the clerk indicating their filing, no request for a file-stamped copy of the pleading and attachments from the clerk, and no affidavit from anyone stating that he personally took such instruments to the courthouse. During oral argument counsel represented only that his firm's normal practice was to deliver complete depositions to the court, but was unable to represent what actually occurred on this occasion. Moreover appellees indicated during oral argument that they were never served with copies of this summary judgment evidence. We further observe that Judge Duplantier's opinion refers only to those excerpts[11] attached to defendants' memorandum in support of their motion for summary judgment and currently in the record. Had the district court read the complete depositions, he presumably would have responded to the arguments now made by Dean in regard to the disputed portions.

[11] Attached to defendants' memorandum in support of their motion for summary judgment are excerpts from the depositions of Craig Love, Dean, Dr. Floyd Roberts, and Dr. John Salvaggio. They also submitted an affidavit from Dr. James Benedict.

Therefore Dean's motion to supplement is denied and Takata, Inc.'s motion to strike those parts of Dean's original brief relying on facts not in the record is granted.

III.

Dean's reply brief raises for the first time before this panel the question of inadequate due process in the summary judgment procedure below and the application of the doctrine of res ipsa loquitur to the facts of this case. Because the opposing party has had no opportunity to respond, we ordinarily do not review arguments raised for the first time in a reply brief absent a showing of manifest injustice. NLRB v. Cal-Maine Farms, Inc., 998 F.2d 1336, 1342 (5th Cir. 1993); United States v. Winn, 948 F.2d 145, 157 (5th Cir. 1991), cert. denied, _ U.S. __, 112 S. Ct. 1599, 118 L. Ed.2d 313 (1992). United States v. Clinical Leasing Service Inc., 982 F.2d 900, 902 n.4 (5th Cir. 1992).

Manifest injustice is not the case here. First we find no inadequacy in the opportunity to be heard afforded Dean below. Dean contends that defendants' motion for summary judgment, filed on February 18, 1993, two months before trial, was "late" and that he did not have sufficient time to respond, to complete further discovery, and to supplement the record. We must note that, with discovery ongoing for over two years and several months and with trial imminent, the argument that further discovery and supplementation of the record were necessary to defeat the motion for summary judgment is weak.[12] Following Dean's telephonic request for a continuance of the submission date for defendants' motion for summary judgment, the docket sheet indicating the court's ruling, entry #218, dated 3/15/93, reads, "The trial presently scheduled for 4/19/93 is continued to a date to be selected at a status conf, to be held on 4/1/93 @ 8:30. All trial counsel are to attend the conf All pending motion will be conisderated at the status conf. . . . [sic]"

[12] Indeed in their appellate brief at 4-6, Chrysler Corporation and TRW detail the persistent delays and continuing failure of Dean's attorneys to retain or name expert witnesses or submit any expert reports.

We note that the hearing provision of Fed.R. Civ. P. 56(c) requires only that "the motion [for summary judgment] shall be served at least 10 days before the time fixed for the hearing." This Rule does not mandate that an oral hearing be held, but only that if there is an oral hearing, at least ten days' advance notice must be given. If there is no hearing, the opposing party must have at least ten days to respond to the motion before the motion is taken under advisement. See Enplanar, Inc. v, Marsh, 11 F.3d 1284, 1293 (5th Cir. 1994)("As long as the nonmovants have sufficient notice of the pending summary judgment motion, the district court may rule on that motion based solely on the pleadings and evidence on file without a formal conference with the parties."), petition for cert. filed, No. 93-2053, June 13, 1994; Cowgill v. Raymark Industries, Inc., 780 F.2d 324, 329 (3d Cir. 1985)(court has no duty to notify nonmovant that a motion for summary judgment will be resolved on a particular day; "[w]here a party has filed a motion for summary judgment, the opposing party is under an obligation to respond to that motion in a timely fashion and to place before the court all materials it wishes to have considered when the court rules on the motion."; Daniels v. Morris, 746 F.2d 271, 274 (5th Cir. 1984). Here Judge Duplantier indicated that the motion would be considered by the court at the April 1 status conference. The panel would expect Dean to have supplemented his opposition or filed a motion for continuance of the submission date by that time. Moreover Dean has shown no reason why he could not have argued to Judge Duplantier through a motion to reconsider the alleged inadequacy of the summary judgment procedure accorded him. He further fails to explain why he did not raise the issue in his original or amended appellate brief.

The issue of res ipsa loquitur was raised in regard to the motion for summary judgment below, and despite Judge Duplantier's clear reliance on Love's expert testimony, Dean also failed to present this issue in his original or amended brief on appeal.

We therefore grant the motion to strike portions of appellant's reply brief and decline to review these issues on appeal.

IV.

We review the district court's summary judgment de novo using the same standards that it applied under Fed. R. Civ. P. 56. Graham v. Amoco Oil Co., 21 F.3d 643, 645 (5th Cir. 1994). Summary judgment is appropriate where, after viewing all the facts in a light most favorable to the nonmovant, the court determines that no material issue of fact exists and the movant is entitled to judgment as a matter of law. Id. Where the nonmovant bears the ultimate burden of persuasion at trial, as here, the moving party has the initial burden of production to demonstrate a prima facie case that it is entitled to summary judgment. Willis v. Roche Biomedical Laboratories, Inc., 21 F.2d 1368, 1371 (5th Cir. 1994). The movant can satisfy its burden (1) by showing the absence of any genuine issue of material fact for trial on an element of its opponent's claim or defense through submission of documentary evidence, i.e. portions of the pleadings, depositions, answers to interrogatories, and admissions or (2) by demonstrating that there is insufficient evidence to support an essential element of the nonmovant's claim or defense. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986); Id. The burden then shifts to the opposing party to set forth specific facts and competent summary judgment evidence to raise a genuine issue of material fact on each essential element of any claim on which he bears the burden of proof at trial. Fed. R. Civ. P. 56(c). The substantive law governing the suit identifies the essential elements of the claims at issue and therefore indicates which facts are material. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). The non-moving party may not rest on mere allegations or denials in its pleadings but must produce affirmative evidence and specific facts. Anderson, 477 U.S. at 256-57. It meets this burden only if it shows that "a reasonable jury could return a verdict for the non-moving party." Id. at 254. A mere scintilla of evidence will not preclude granting of a motion for summary judgment. Id. at 252.

All reasonable inferences must be drawn in favor of the non-moving party. Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574. 587-88 (1986), citing United States v. Diebold, 369 U.S. 654, 655 (1962). Once the burden of proof has shifted

to the non-movant, it "must do more that simply show that there is some metaphysical doubt as to the material facts." Id. at 586.

Defendants met their threshold burden of production by demonstrating through the testimony of Craig Love that the airbag system was not unreasonably dangerous or defective and through the affidavit of Dr. James Benedict and the depositions of Dr. Floyd Roberts and Dr. John Salvaggio that there was no evidence that its deployment caused or enhanced injury to Dean.

Dean's amended brief contends that the district court erred under Louisiana law in granting a summary judgment based on expert testimony. We disagree. The applicable procedural rule here is not Article 966 of the Louisiana Code of Civil Procedure, but Rule 56 of the Federal Rules of Civil Procedure, which allows summary judgments based solely upon expert testimony. Although opinion testimony is usually evaluated by the factfinder as to credibility of the expert and the weight it should be given, "if the only issue is one of the kind on which expert testimony must be presented, and nothing is presented to challenge the affidavit of the expert, summary judgment may be proper." 10A Charles A. Wright, Arthur R. Miller & Mary K. Kane, Federal Practice and Procedure § 2738, at 503-04 and n.50 (2d ed. 1983), citing Webster v. Offshore Food Service, Inc., 434 F.2d 1191 (5th Cir. 1970)[, cert. denied, 404 U.S. 823, 92 S. Ct. 44, 30 L. Ed.2d 50 (1971)]. Our examination in reviewing the summary judgment would therefore normally focus on the admissibility and reliability of the expert opinion. Indeed Dean now challenges Love's qualifications as an expert witness on driver's-side airbags. Nevertheless Dean's failure to object below to Love's qualifications as an expert witness and to defects in his affidavit as summary judgment evidence in Dean's opposition to the motion for summary judgment waives Dean's right to raise that challenge on appeal. Donaghey v. Ocean Drilling & Exploration Co., 974 F.2d 646, 650 (5th Cir. 1992).

Even if he had timely objected, the record supports Love's qualifications in terms of education and work experience to testify on the complexities of airbag deployment. Moreover the information and evidence that he reviewed, including Dean's own deposition

testimony, bolster the dependability of his conclusion that the system deployed as designed and was not defective or unreasonably dangerous. The district court has "unusually wide" discretion in deciding whether a witness is qualified to testify as an expert. United States v. Cronn, 717 F.2d 164, 170 (5th Cir. 1983), cert. denied, 468 U.S. 1217, 104 S. Ct. 3586, 82 L.Ed.2d 884 (1984). A trial judge's determination about the admissibility of expert testimony will not be disturbed absent an abuse of discretion. Shipp v. General Motors Corporation, 750 F.2d 418, 422 (5th Cir. 1985). No such abuse is apparent in Judge Duplantier's reliance on Love's opinion. In contrast, as determined by the district judge, despite the complexity of an airbag/restraint system that requires technical expertise, other than photographs of the deflated bag following deployment Dean presented only his own, necessarily self-serving, and, more importantly, layman's view of what happened to the sophisticated system. The district court properly found such evidence insufficient to raise a genuine issue of material fact for trial. We agree.

Similarly Dean failed to satisfy his burden of proof on the district court's alternative ground for awarding summary judgment, causation. The evidence reviewed by the district court does not support a causal connection between the chemicals in the airbag and Dean's bronchitis, but only a temporal link between the accident and his injuries. The testimony of Dean's primary[13] treating physician Dr. Floyd Roberts, who admitted that his opinion was based on the medical history that he took from Dean, links the bronchitis to the automobile accident, but not to the deployment, burning, or chemicals of the airbag. As noted by Takata, Inc., there is no certain medical evidence that the airbag is a more probable cause of the bronchitis than the impact of the crash.

Defendants below also proffered the affidavit of Dr. James Benedict, an expert in medicine, biomechanics, injury causation, and occupant kinematics. In Dr. Benedict's opinion, Dean's knee injuries were not enhanced by the deployment of the airbag. As noted by

[13] Dean's other pulmonologist, Dr. John Salvaggio, testified that after extensive testing of Dean, he was unable to conclude that the airbag deployment was related to Dean's pulmonary complaints.

the district court, Dean failed to present any evidence that the system was designed to protect against the type of knee injury he sustained or that it caused or enhanced his knee injury.

We conclude that the district court did not err on either ground in granting summary judgment.

For the foregoing reasons the district court's judgment is **AFFIRMED**.

AFFIRMED