

UNITED STATES COURT OF APPEALS  
For the Fifth Circuit

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No. 93-8626  
Summary Calendar

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CHARLES A. SHORT, SR. and  
PATRICIA LORETTA SHORT

Plaintiffs-Appellants,

versus

FORD MOTOR COMPANY,

Defendant-Appellee.

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Appeal from the United States District Court  
for the Western District of Texas  
(W-92-CV-259)

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(April 19, 1994)

Before JOLLY, WIENER, and Emilio M. GARZA, Circuit Judges.

PER CURIAM:\*

In this products liability case arising from the automobile accident in which the plaintiffs' daughter was killed, Plaintiffs-Appellants Charles Short, Sr., and his wife, Patricia Loretta Short

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\*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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

(collectively, Plaintiffs or the Shorts), appeal the district court's denial of several of Plaintiffs' interlocutory motions, its grant of Defendant-Appellee Ford Motor Co.'s Motion to Reconsider Plaintiffs' Request for Leave to File Plaintiffs' Second Amended Complaint, and its grant of Ford's Motion for Summary Judgment. Finding no reversible error, we affirm.

I

FACTS AND PROCEEDINGS

Patricia Lynn Short (Ms. Short) was killed in a one-car accident when her vehicle, a Ford Bronco II, overturned several times. The instant action was initiated by Ms. Short's parents, Plaintiffs herein.

The summary judgment proof presented by Ford establishes that the vehicle in question is a 1984 Ford Bronco II. Mr. Short was the third owner of the vehicle; he bought it from Frontier Ford Sales, Inc. (Frontier) in May 1989. The following year Mr. Short transferred title to the vehicle to Ms. Short. During a visit with her parents while she was home from school in late May 1990, Ms. Short apparently complained of handling problems with the Bronco. The vehicle was taken to Frontier for repairs on May 30. The work order included the notation, "steering loose."

Ms. Short picked up the Bronco from Frontier on Tuesday, June 5, 1990, six days after it had been taken in for repairs. That same day, she began her trip back to school in the Bronco, traveling from Houston to Dallas. The day was clear and sunny. Sometime after 6:00 p.m., she stopped at an Exxon station in

Buffalo, Texas. When she left the station, Ms. Short did not return to Interstate 45, but continued northward on the service road. One mile north of Buffalo, Ms. Short apparently missed a right-hand curve in the road and crossed into the southbound lane. The Bronco left the roadway on the southbound side; Ms. Short presumably jerked the wheel to the right in an effort to get the vehicle back on the road, and also applied her brakes. The Bronco then rolled over approximately five times, landing upside down. Ms. Short was ejected from the vehicle and died at the scene. There were no witnesses to the accident.

The investigating officer indicated that several factors contributed to the wreck, including excess speed, unfamiliarity with the terrain, improper off-road recovery, and alcohol consumption. The officer estimated that Ms. Short was travelling between 60 to 70 miles per hour. The posted speed limit on the service road was 45 miles per hour; at the curve, it was 35 m.p.h. Ms. Short was not wearing a seat belt. Additionally, she had a blood alcohol level of 0.05. An ice chest containing a capped but broken bottle of Heineken beer was discovered in the wreckage of the Bronco, and two empty, uncapped Heineken bottles were discovered beside the vehicle. The officer further indicated that he had noticed no mechanical problems with the vehicle that would have contributed to the wreck.

After the accident, the vehicle was stored in Buffalo at Glick's Automotive, a wrecker yard owned by Michael Glick. Within a week after the accident, Mr. Short, along with his attorney,

viewed the vehicle at Glick's Automotive. Plaintiffs never hired an expert, a mechanic, or anyone else to view or to examine the vehicle. Glick's Automotive stored the Bronco for approximately 240 days. Despite repeated requests for payment, Plaintiffs failed to secure the continued storage of the Bronco, so Glick sold the vehicle for salvage. Mr. Glick had even sent certified letters to Mr. Short and to Plaintiffs' attorney, stating that the vehicle would be sold for salvage if the storage charges were not paid. Deposition testimony of Plaintiffs' son, Charles Short, Jr., indicates that his father consciously decided to allow the Bronco to be sold. Mr. Short was apparently so distraught over the death of his daughter that he wanted nothing more to do with the vehicle.

On June 5, 1992, just short of the expiration date of the two-year limitation period, Plaintiffs filed suit against Ford in Texas state court. They alleged that the Bronco was defective, unsafe, unreasonably dangerous, and the producing cause of the accident. They asserted claims against Ford under theories of strict liability, breach of express and implied warranties, and negligence in designing, manufacturing, and marketing the vehicle, including an alleged negligent failure to warn of a defect. As the procedural history of this case figures so prominently in the issues presented on appeal, we recount that history in more detail than might otherwise be appropriate.

Ford timely removed the case to federal court and obtained a change of venue to Waco, Texas. The district court entered a docket control order on October 1, 1992. That order imposed a

December 28, 1992, deadline for expert designations and motions for leave to file amended pleadings; a January 25, 1993 cutoff for discovery and dispositive motions; and a February 22, 1993 deadline for the joint pre-trial order. Trial was scheduled for March 22, 1993. Ford commenced discovery.

On January 25, 1993, the discovery and motion deadline, Ford filed a Motion for Summary Judgment or for Dismissal. Ford sought summary judgment on all of Plaintiffs' claims—strict liability, negligence, and breach of warranty—because discovery revealed that it would be legally impossible for Plaintiffs' to show (1) the existence of any defect that is (2) causally connected to the accident, especially in light of Plaintiffs' decision to allow destruction of the accident vehicle and their failure to name any expert witnesses. Ford also sought dismissal or judgment as a matter of law for Plaintiffs' spoliation of crucial evidence, and because their warranty claims were barred by the applicable statute of limitation under Texas law.

According to local rules, Plaintiffs were required to file a response to Ford's motion within ten days.<sup>1</sup> Plaintiffs allowed this time to pass. Three weeks after that deadline had passed, in light of Ford's pending Motion for Summary Judgment, the trial court extended the February 22, 1993 deadline for the joint pre-trial order, allowing the parties 10 days from the date of the ruling on the motion for summary judgment to file the pre-trial order.

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<sup>1</sup>W.D. Tex. Rule CV-7.

On February 24, 1993, less than one month before the scheduled trial date and while Ford's as yet unopposed Motion for Summary Judgment was pending, Plaintiffs filed a barrage of motions: their first Motion for Continuance; a belated Response to Ford's Motion for Summary Judgment; a request for leave to file that response; and in the alternative, a Motion to Dismiss Without Prejudice. All four motions asserted the same two arguments: first, that Plaintiff Charles Short, Sr. was "incompetent," that his "incompetence" excused Plaintiffs' failure to prosecute their claims, and that a 270-day continuance was needed to have a guardian appointed; and second, that there was "newly discovered evidence" from the deposition of a representative of the salvage yard (Mr. Glick) and that a "reconstruction analysis" had been performed on the accident vehicle before it was destroyed.

Plaintiffs requested more time to complete discovery concerning this newly discovered evidence so that they could use it to meet their evidentiary burden. Plaintiffs also moved the court almost two months past the deadline for leave to file a first amended complaint setting forth their allegations against Ford in greater detail and adding "new" claims against Ford, which were labeled (1) "Misrepresentation/ Nondisclosure" and (2) "Fraudulent Concealment." (Plaintiffs also assert that they alleged for the first time a "Negligent Failure to Warn" theory; but Plaintiffs had already alleged in their Original Complaint that Ford had negligently failed to warn users that the vehicle might roll over under expected conditions of use by an average user.)

Over Ford's objection, on March 10, 1993, the court granted Plaintiffs' request for a continuance. Although the court found no basis on which to believe that Mr. Short was incompetent, it determined that the possibility of locating someone who might have inspected the vehicle could form the basis for the expert testimony "necessary" information on which Plaintiffs could establish Ford's liability for the accident.<sup>2</sup> On that ground, the court granted the continuance and provisionally denied Ford's Motion for Summary Judgment with the understanding that Ford could move for its reinstatement if Plaintiffs were unable to obtain such evidence.

On March 31, 1993, while Plaintiffs' motion to file a first amended complaint was pending, they filed a motion for leave to file a second amended complaint to add Frontier, an authorized Ford dealership, as a party defendant. In their request for leave, Plaintiffs alleged that (1) Frontier had improperly repaired the steering of the Bronco under an express warranty, (2) Frontier had performed the "reconstruction analysis" to which Glick had testified in his January 7 deposition on the vehicle, and (3) Frontier was Ford's agent. The Second Amended Complaint alleged "new" theories of recovery against Ford theories which Plaintiffs admit "sound[] in negligence and breach of warranty."<sup>3</sup>

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<sup>2</sup>That inference was based on Glick's deposition, taken January 7, 1993 over two weeks before Ford filed its summary judgment motion. Six weeks that Plaintiffs could have used for discovery had already elapsed by the time Plaintiffs requested their first continuance to perform such discovery.

<sup>3</sup>These claims included improper repair by Frontier and alleged that Ford was liable because of a principal-agent relationship between Ford and Frontier.

Plaintiffs urged joint and several liability. They were thus attempting to add Frontier, a non-diverse party<sup>SO</sup>and these "new" claims<sup>SO</sup>almost three years after the accident, almost 10 months after the lawsuit was originally filed in state court, over three months after the December 28, 1992 deadline to file amended pleadings,<sup>4</sup> and three days after the date originally set for trial<sup>SO</sup>March 28, 1993.

Plaintiffs also filed their designation of expert witnesses on March 31, 1993, over three months after the December 28 deadline for expert designations. (None of the experts listed appeared to be the unidentified "reconstructionist" who had purportedly examined the wrecked Bronco and whom the Shorts had been given a continuance in order to locate.)

On April 6, 1993, Ford moved to reinstate its motion for summary judgment and to strike Plaintiffs' designation of expert witnesses. On April 8, the district court granted Plaintiffs' request for leave to file their First Amended Complaint, which they filed the same day. The district court denied Ford's unopposed Motion to Strike Plaintiffs' Designation of Expert Witnesses, but on May 4 reinstated Ford's Motion for Summary Judgment. The court ordered Plaintiffs to respond to Ford's Motion for Summary Judgment by May 20.

Four days after the May 20 deadline passed with no response, Ford filed an Application requesting that the court proceed to rule on the reinstated motion. On that same day, May 24, 1993, after

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<sup>4</sup>The original docket control order was still in effect.



unsuccessful attempts to involve Plaintiffs in the preparation of the Joint Pre-Trial Order, Ford filed its own Defendant's Pre-Trial Order as required. On the following day, May 25, 1993, Plaintiffs filed their response to Ford's Motion for Summary Judgment five days late. They argued that they could make out a prima facie case against Ford because they were alleging that the accident was caused by a design defect common to all Bronco IIs and that they could show the existence of that defect through other vehicles, other accidents, statistical evidence, and the testimony of experts. Plaintiffs maintained that they needed more time to allow their experts to examine the scene of the accident and for that reason Ford's Motion for Summary Judgment should be denied.<sup>5</sup>

On May 28, 1993, the district court granted Plaintiffs leave to file Plaintiffs' Second Amended Complaint, ordered the parties to brief the question whether the court retained jurisdiction over the action, and delayed its ruling on Ford's reinstated Motion for Summary Judgment pending resolution of the jurisdictional issue.

On June 1, 1993, more than a week after their pre-trial order was due, Plaintiffs filed a Second Motion for Continuance asking for an additional 270 days because the experts that they had named two months earlier could not "begin their investigation and preparation of the data until the week of July 5, 1993." At the same time, and on the same grounds, Plaintiffs moved to quash

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<sup>5</sup>Plaintiffs also argued that they should not be penalized under any theory of spoliation there was no court order or discovery request in effect when they allowed the vehicle to be destroyed.

Ford's pending depositions of five of those experts. The court granted this continuance in part, on June 22, 1993, when it extended the discovery deadline to August 16 and required the parties to file a joint pre-trial order by September 16. The court contemplated a trial setting sometime after October 1.

In its response to the jurisdictional issue, Ford admitted that the addition of Frontier as a defendant destroyed complete diversity. But Ford moved the district court to reconsider its order granting Plaintiffs leave to amend their complaint, insisting that Ford was thereby prejudiced. Plaintiffs did not respond to the motion to reconsider, but instead filed a motion to remand on June 24, 1993, urging the court to remand the case to state court.

By order dated July 7, 1993, the district court noted that complete diversity no longer existed. But in the same order, the court granted reconsideration of its prior order granting leave to amend the complaint, then denied Plaintiffs' request for leave. In a separate order entered six days later, on July 13, the district court (1) denied as moot Plaintiffs' pending Motion to Remand, (2) struck the Plaintiffs' Second Amended Complaint, and (3), with respect to Ford's pending Motion for Summary Judgment, directed the parties to submit any additional briefs or summary judgment proof before July 27, 1993.

Neither Plaintiffs nor Ford submitted any further briefing or proof, and on August 12, the district court granted Ford's motion for summary judgment and rendered judgment for Ford on grounds that Plaintiffs had failed to raise an issue of material fact regarding

the cause of the accident in question.

Plaintiffs appeal the district court's (1) grant of Ford's Motion to Reconsider the district court's grant of leave to Plaintiffs to file a second amended complaint, (2) denial of that request for leave, (3) order to strike Plaintiffs' Second Amended Complaint, (4) denial of Plaintiffs' Motion to Remand, and (5) grant of summary judgment in favor of Ford.

## II

### ANALYSIS

#### A. Motion to Reconsider/Denial of Leave to Amend<sup>6</sup>

##### 1. Standard and Scope of Review

We review the district court's grant of Ford's Motion to Reconsider for abuse of discretion.<sup>7</sup> The district court had to consider the record as it existed at the time of the motion for reconsideration, not just as it existed at the time of the initial ruling, so our review of its ruling comprehends the entire record up to the point of Ford's Motion for Reconsideration.<sup>8</sup>

The same standard of appellate review applies to our review of the district court's denial of leave to file an amended complaint. We review the district court's denial of such a motion for abuse of

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<sup>6</sup>This court's review of the district court's final order encompasses all prior orders leading up to it, including the district court's reconsideration order. Xerox Corp. v. Genmoora Corp., 888 F.2d 345, 349 (5th Cir. 1989).

<sup>7</sup>Id.; Zimzores v. Veterans Admin., 778 F.2d 264, 266-67 (5th Cir. 1985).

<sup>8</sup>Xerox Corp., 888 F.2d at 349.

discretion.<sup>9</sup>

## 2. No Abuse of Discretion

Although Rule 15(a) of the Federal Rules of Civil Procedure provides that leave to amend pleadings "shall be freely given when justice so requires,"<sup>10</sup> such leave is not automatic.<sup>11</sup> That standard is "tempered by the necessary power of a district court to manage a case."<sup>12</sup>

In exercising its discretion, the court may consider such factors as undue delay,<sup>13</sup> bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by previous amendments, undue prejudice to the opposing party, and futility of the amendment.<sup>14</sup> A court must scrutinize an amendment that would

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<sup>9</sup>Daly v. Sprague, 675 F.2d 716, 723 (5th Cir. 1982), cert. denied, 460 U.S. 1047, 103 S. Ct. 1448, 75 L. Ed. 2d 802 (1983); Griggs v. Hinds Jr. College, 563 F.2d 179, 180 (5th Cir. 1977).

<sup>10</sup>Addington v. Farmer's Elevator Mut. Ins. Co., 650 F.2d 663, 666 (5th Cir.), cert. denied, 454 U.S. 1098, 102 S. Ct. 672, 70 L. Ed. 2d 640 (1981).

<sup>11</sup>Layfield v. Bill Heard Chevrolet Co., 607 F.2d 1097, 1099 (5th Cir. 1979), cert. denied, 446 U.S. 939, 100 S. Ct. 2161, 64 L. Ed. 2d 793 (1980).

<sup>12</sup>Shivangi v. Dean Witter Reynolds, Inc., 825 F.2d 885, 891 (5th Cir. 1987).

<sup>13</sup>Leave to amend may properly be withheld "if the moving party knew the facts on which the claim or defense sought to be added were based at the time the original pleading was filed and there is no excuse for his failure to plead them." 6 CHARLES A. WRIGHT ET AL., Federal Practice and Procedure, § 1487, at 651 (1990).

<sup>14</sup>Foman v. Davis, 371 U.S. 178, 182, 83 S. Ct. 227, 230, 9 L. Ed. 2d 222 (1962). The district court denied leave to file because it found that Plaintiffs' allegations against Frontier were too tenuous to outweigh the prejudice that Ford would suffer brought about in large part by the dilatory actions of

add a non-diverse party more closely than an ordinary amendment under Rule 15(a).<sup>15</sup> "Because the court's decision will determine the continuance of its jurisdiction, the addition of a non-diverse party must not be permitted without consideration of the original defendant's interest in the choice of forum."<sup>16</sup>

After reviewing the record and the procedural history of this case, we cannot say that the district court abused its discretion either in granting Ford's Motion to Reconsider or in denying Plaintiffs' Motion for Leave to File Plaintiffs' Second Amended Complaint. Up to the point of the Motion to Reconsider, Plaintiffs had failed on numerous occasions to meet court-ordered deadlines, deadlines imposed by relevant rules of procedure, and discovery order deadlines. Plaintiffs repeatedly endeavored to delay or avoid the district court's disposition of Ford's well-founded Motion for Summary Judgment.

Although Plaintiffs assert that their decision to sue Frontier was justifiably delayed for lack of evidence until they learned that an unidentified person had inspected the vehicle before it was destroyed<sup>SO</sup>which inspection might provide the proof necessary to support Plaintiffs' allegations of improper repair<sup>SO</sup>the record refutes their contention. After learning of the "reconstructionist," Plaintiffs<sup>SO</sup>in their Motion for Continuance,

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Plaintiffs.

<sup>15</sup>See Hensgens v. Deere & Co., 833 F.2d 1179, 1182 (5th Cir. 1987).

<sup>16</sup>Id.

their Motion to Dismiss without Prejudice, and in their belated Response to Ford's Motion for Summary Judgment to complete discovery requested a 270-day continuance within which to complete discovery. Two weeks later being two months after this "newly discovered evidence" was revealed they sought leave to file a First Amended Complaint that said nothing about Frontier or improper repair. Plaintiff Charles Short was aware of the repair work done by Frontier to the Bronco's steering mechanism and the front-end suspension at the time it was done. Moreover, Plaintiffs admit that their factual claims apply equally to Ford and Frontier after all, Frontier had sold the vehicle to Mr. Short.<sup>17</sup>

As for the Plaintiffs' purportedly "new" claims against Ford asserted in their Second Amended Complaint, those claims simply were not new; they were merely relabeled strict liability, negligence, and breach of warranty claims, which had already been asserted in Plaintiffs' original and first amended complaints against Ford. In fact, this truth demonstrates the futility of the amendment as to Frontier, for Plaintiffs admit that they assert claims against Frontier that are identical to and share the same factual basis as those asserted against Ford: products liability and negligence.<sup>18</sup> The identity of the claims against Ford and

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<sup>17</sup>Plaintiffs state that their claims against Frontier are germane to the subject matter of the suit and are no more tenuous than their claims against Ford. We note that we find no evidence to support their claims against Ford.

<sup>18</sup>Although Plaintiffs represent that their Second Amended Complaint asserts breach of warranty claims against Frontier, it does not. It is only Plaintiffs' Motion for Leave to File Plaintiffs' Second Amended Complaint which alleges that Frontier

Frontier leads us to conclude that Plaintiffs' claims against Frontier suffer from the same defects that we acknowledge to exist in Plaintiffs' claims against Ford. No probative summary judgment evidence of an unreasonably dangerous or unsafe product and no such evidence that such a condition or defect in the Bronco caused the accident. The only non-duplicative claim asserted against Frontier is one of improper repair. Certainly the plaintiffs' permitted destruction of the accident vehicle also destroys virtually any possibility that Plaintiffs could prove causation against Frontier.<sup>19</sup>

Ford, on the other hand, consistently and in timely fashion complied with court orders, engaged in discovery, and prepared the case for trial. Its Motion for Summary Judgment had been on file for over seven months, yet Plaintiffs still did not produce evidence in opposition to the motion. The delay orchestrated by Plaintiffs through their attempt to add Frontier would only subject Ford to the added burden of further discovery, preparation, and expense, prejudicing its right to speedy disposition of this case on the merits. Neither the district court's reconsideration of Plaintiffs' request for leave to amend nor its denial of that leave was an abuse of discretion.

As the district court properly denied leave to amend, it did

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repaired the Bronco II under an express warranty.

<sup>19</sup>As Ford notes, any claim for improper repair against Frontier is probably barred by the statute of limitations. If the instant suit were remanded to state court, Frontier would be dismissed and the case would be subject to removal once more.

not err in striking Plaintiffs' Second Amended Complaint, by which Plaintiffs sought to add Frontier as a party defendant. Neither did the district court err in denying as moot Plaintiffs' Motion to Remand. Plaintiffs were not allowed to join Frontier and so diversity of citizenship was not destroyed.

C. Summary Judgment

1. Standard of Review

The grant of a motion for summary judgment is reviewed de novo, using the same criteria employed by the district court.<sup>20</sup> This court must "review the evidence and inferences to be drawn therefrom in the light most favorable to the nonmoving party."<sup>21</sup> Nonetheless, when a properly supported motion for summary judgment is made, the adverse party may not rest upon the mere allegations or denials of its pleadings, but must set forth specific facts showing that there is a genuine issue for trial to avoid the granting of the motion for summary judgment.<sup>22</sup>

The party seeking summary judgment bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file,

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<sup>20</sup>U.S. Fidelity & Guaranty Co. v. Wigginton, 964 F.2d 487, 489 (5th Cir. 1992); Walker v. Sears, Roebuck & Co., 853 F.2d 355, 358 (5th Cir. 1988).

<sup>21</sup>U.S. Fidelity & Guaranty Co., 964 F.2d at 489; Baton Rouge Building & Construction Trades Council v. Jacobs Constructors, Inc., 804 F.2d 879, 881 (5th Cir. 1986).

<sup>22</sup>Fed. R. Civ. P. 56(e); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250, 106 S. Ct. 2505, 2511, 91 L. Ed. 202 (1986).



together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact.<sup>23</sup> Once that is done, the non-movant must provide specific proof and may not rely simply upon the pleadings filed in the case.<sup>24</sup>

## 2. No Material Facts to be Tried

Any claim of strict liability requires proof that (1) the product contained a defect that rendered it unreasonably dangerous and (2) this defect caused the plaintiffs' injury.<sup>25</sup> Any claim of negligence requires proof that (1) the manufacturer breached a duty to the consumer and (2) this breach was the proximate cause of the injury.<sup>26</sup> Similarly, claims for breach of warranty require proof of a defect in the vehicle.<sup>27</sup> Consequently, Plaintiffs' theories of recovery—even those alleged in their First Amended Complaint—require them to establish both a design defect and the cause of the accident.<sup>28</sup> By pointing to the absence of proof from

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<sup>23</sup>Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S. Ct. 2548, 2553, 91 L. Ed. 2d 265 (1986).

<sup>24</sup>Id. at 324.

<sup>25</sup>Syrie v. Knoll Int'l, 748 F.2d 304, 306 (5th Cir. 1984); Lucas v. Texas Indus., Inc., 696 S.W.2d 372, 377 (Tex. 1984).

<sup>26</sup>Knoll Int'l, 748 F.2d at 307.

<sup>27</sup>Lujan v. Tampo Mfg. Co., 825 S.W.2d 505, 510-11 (Tex. App. El Paso 1992, no writ) (citing Plas-Tex, Inc. v. United States Steel Corp., 772 S.W.2d 442, 443 (Tex. 1989)).

<sup>28</sup>Plaintiffs assert that their First Amended Complaint, the operative complaint when summary judgment was rendered, added claims of "misrepresentation/nondisclosure," "fraudulent concealment," and "negligent failure to warn" that were not addressed by either Ford in its motion or by the district court in its order.

Plaintiffs' position is untenable. In its Motion for

Plaintiffs on those two issues, and by identifying record evidence which it believed demonstrated that the accident was caused by factors unrelated to the Bronco, thereby establishing the absence of a genuine issue of material fact, Ford shifted the burden to Plaintiffs to come forward with sufficient evidence to establish a genuine issue of material fact on both of those issues.

After a careful review of the summary judgment record, we conclude that the grant of summary judgment was proper. Ford's Motion for Summary Judgment, filed January 25, 1993, notified Plaintiffs that the record reflected no evidence of either (1) a defect in the Bronco or (2) the cause of the accident. Although Plaintiffs had ample opportunity to present such evidence approximately six months they introduced none. There is no record evidence of a design defect in the Bronco. Neither is there evidence that a design defect caused the accident. The only causes of the accident reflected in the summary judgment record are excess speed, improper off-road recovery, and alcohol consumption.

Plaintiffs' response focuses on Ford's failure to demonstrate

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Summary Judgment, Ford notified Plaintiffs that they had no evidence of two issues relevant to all of Plaintiffs' theories: (1) a defect that rendered the vehicle unreasonably dangerous or unsafe, and (2) that such a defect caused the accident. Ford asked for summary judgment on those two issues and thus on all of Plaintiffs' claims. While Plaintiffs assert that the claims are not theoretically dependent upon proof of a design defect, the alleged fact that gives rise to those "new" claims unreasonable risk of rollover is the alleged result of the alleged design defect that Plaintiff contends exists in the Bronco II. Plaintiffs' negligent failure to warn claim like its misrepresentation/nondisclosure and fraudulent concealment claims are thus based on a defect in the Bronco II. On that basis, summary judgment on all of Plaintiffs' claims were proper.

that the Bronco was not defective. They ignore the "burdens" imposed on the respective parties in the summary judgment context. Ford, as the movant, had no duty to negate the existence of any problem or defect in the vehicle, or to disprove Plaintiffs' theory of causation, or to refute any other contention on which Plaintiffs would bear the burden of proof at trial. It was enough for Ford simply to point out to the district court the basis for its motion and the portions of the record that supported its motion; and it did so.

Plaintiffs apparently chose to ignore the clear message of the Supreme Court's 1986 trilogy of summary judgment cases.<sup>29</sup> The tenor of Plaintiffs' belated May 30, 1993 response to Ford's motion reflects a tacit concession that they submitted no proof that the Bronco was defective in any way. Instead of pointing to any such proof in the record, Plaintiffs seek to excuse its absence. They assert that Ford's Motion for Summary Judgment never shifted the burden to them because Ford failed to present any affidavit or depositions "indicating that the design of the Bronco II was reasonably safe," or any testimony refuting the allegations that Ford "had documents and other knowledge in its possession"

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<sup>29</sup>Celotex Corp., 477 U.S. at 322 ("[T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial."); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986).

indicating that the vehicle was dangerous and that Ford had "suppressed or destroyed this relevant evidence." Plaintiffs also represented that summary judgment was improper at that time because they needed additional time to develop expert testimony. Their named experts would not be able to view the scene until late June 1993 or early July 1993.<sup>30</sup> Plaintiffs' were given until July 27, 1993 to present evidence to support the existence of a design defect in the Bronco and evidence that such design defect caused Ms. Short's accident. They failed totally to do so.

Plaintiffs' response contained nothing more than the bare, conclusionary claim that the Bronco was unreasonably dangerous because it had a design defect and that this design defect caused the accident. Their response was supported only by equally conclusionary interrogatory answers from the Shorts themselves. Even though Plaintiffs assert the bald conclusion that the design of the Bronco II is unreasonably dangerous, they present nothing by way of specific support for that conclusion beyond their own opinions and beliefs. Plaintiffs were required to produce some evidence, expert or otherwise, that Ms. Short's death was caused by some specific defect or defects in the vehicle. There is no expert testimony regarding the alleged design defects of the Bronco II, if any, or how such defects might have caused or contributed to Ms. Short's death. Consequently, Plaintiffs have raised no material issue of fact as to a defect in the vehicle or the cause of the

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<sup>30</sup>In this vein, Plaintiffs' response reads more like a request for a continuance than a response to a motion for summary judgment.

accident.

In marked contrast, Ford's summary judgment evidence does support with particularity the proper allegations contained in Ford's Motion for Summary Judgment. Such allegations, if uncontroverted, were more than sufficient to show that there was no genuine issue of material fact and that Ford was entitled to judgment as a matter of law. As such duly supported allegations went uncontroverted, the district court's grant of summary judgment in favor of Ford was proper.

### III

#### CONCLUSION

For the foregoing reasons, the judgment of the district court is in all respects

AFFIRMED.