IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-10898
Summary Calendar

ALICIA MARTINEZ, etc., ET AL., Plaintiffs,

ALICIA MARTINEZ, o/b/o Felisha Marie Martinez, o/b/o Tracy Martinez, o/b/o Fernando Alexis Martinez, Plaintiff-Appellant,

versus

UNION CARBIDE CORP., LINDE DIV., ET AL. Defendants,

AIR PRODUCTS & CHEMICALS, INC., Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Texas
(6:93 CV 093)

June 29, 1995

Before JONES, BARKSDALE and BENAVIDES, Circuit Judges.

PER CURIAM:*

Plaintiff-Appellant Alicia Martinez ("Martinez") appeals the district court's order denying her motion for leave to designate her expert witnesses out of time and for reconsideration of that order, and she appeals the court's granting of summary judgment in favor of Defendant-Appellee Air Products & Chemicals, Inc. ("Air

---

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Pursuant to that Rule, the Court has determined that this opinion should not be published.

Products"). Because we find that the district court did not abuse its discretion in denying Martinez's motion to file her expert witness designation out of time and that no genuine issue of material fact exists as to causation in this toxic tort action, we affirm the judgment of the district court.

FACTS AND PROCEDURAL HISTORY

While Martinez was employed from 1974 to 1988 at Ethicon, a medical products manufacturing facility located in San Angelo, Texas, she was allegedly exposed to various chemicals including isopropyl alcohol, silicone and ethylene oxide. As a result of her exposure, Martinez alleges that she has sustained injuries including, but not limited to, peripheral neuropathy, psychoorganic syndrome of solvent workers, central nervous system dysfunction and possibly malignant tumors, all of which have resulted in her total disability since October 1988.

Martinez, along with several other employees since dismissed from this cause of action, filed suit *pro se* on October 22, 1993 in Texas state court against Defendants for personal injuries caused by exposure to toxic chemicals in the workplace. Defendant Johnson and Johnson removed the case to federal court based upon diversity jurisdiction. After discovery was commenced, Plaintiffs filed motions seeking to postpone their depositions, to limit interrogatories and to extend time for answering discovery. The district court granted Plaintiffs various extensions to respond to discovery. Then on April 6, 1994, the district court entered its pre-trial notice and order setting a trial date of September 19, 1994, and setting a date for Rule 26(a)(3) information exchange

thirty days before trial. Pursuant to Local Rule 8.1(c), the parties were required to designate experts 90 days before the trial date, which was June 21, 1994.

In May 1994, Plaintiffs mentioned a list of physicians in answering an expert interrogatory submitted by Defendants, but they did not answer as to any expert opinions and stated no facts regarding such opinions as requested by the interrogatories. Then on June 1, 1994, Air Products filed a motion for summary judgment as to six of the plaintiffs because they worked for Ethicon after Air Products ceased to supply chemicals there, as to one plaintiff on the grounds of causation and limitations and as to Martinez on the ground of limitations. On August 18, 1994, the district court denied Air Products' summary judgment motion as to Martinez on the basis of the discovery rule.[1]

On July 18, 1994, prior to the district court's ruling on Air Products' motion for summary judgment, Martinez filed a motion for leave to late-designate experts, in which she named eighteen health care providers. Because she failed to file the motion in proper form under the local rules, the court ordered the motion stricken. Martinez refiled her motion on July 21, 1994. The court denied the motion on August 16, 1994.

On August 23, 1994, the district court entered an order stating that it would entertain additional motions for summary judgment if filed before August 31, 1994. Air Products filed a

[1] All other plaintiffs except Martinez were dismissed by order of August 16, 1994, so the court only considered the motion with regard to Martinez.

renewed motion for summary judgment, asserting medical causation as to Martinez, which the court granted on August 30, 1994.[2]

EXCLUSION OF EXPERTS

The district court's order denying Martinez's motion to late-designate her expert witnesses "involves both the enforcement of a scheduling order and the enforcement of local rules." *Geiserman v. MacDonald*, 893 F.2d 787, 790 (5th Cir. 1990). Thus, we review the district court's order for an abuse of discretion. *Id.* (citations omitted). In reviewing the court's exercise of discretion, we consider the following four factors: (1) Martinez's reason for failing to identify her experts; (2) the importance of the expert's testimony; (3) the potential prejudice in allowing the expert's testimony; and (4) the availability of a continuance to cure such prejudice. *Id.* at 791 (citing *Bradley v. United States*, 866 F.2d 120, 125 (5th Cir. 1989) (internal citations omitted)).

Martinez's reason for failing to file her designation within the time limitation under Local Rule 8.1(c) is that she was acting *pro se*, and that she did not have legal representation so that she was unable to adequately handle the very extensive and complicated paperwork in the case. She argues that as a *pro se* litigant burdened with physical and economic hardship she should not be held to the literal requirements of the local or federal rules absent

[2] In July 1994, Defendants Johnson and Johnson, Environmental Tectonics Corporation and all Union Carbide defendants filed motions for summary judgment asserting lack of evidence of medical causation as to Martinez and the other plaintiffs. The court granted Johnson and Johnson's motion on August 19, 1994, and the remaining motions were granted on August 22, 1994. Martinez does not appeal these motions.

intentional or willful conduct on her part.

Although *pro se* litigants are provided more latitude by the courts, they are not excused from complying with federal and local procedural rules. *See Birl v. Estelle*, 660 F.2d 592, 593 (5th Cir. 1981). The district court specifically stated in its pre-trial scheduling order entered April 6, 1994 that all parties not represented by counsel were expected to comply with the order. Additionally, Martinez concedes that she was aware that Local Rule 8.1(c) plainly imposes a deadline to designate expert witnesses at least 90 days before trial. "One does not require a legal degree to count back 90 days from the scheduled trial date of [September 19], which the pre-trial order contained." *Geiserman*, 893 F.2d at 791.

We next consider the importance of Martinez's expert testimony. As Martinez asserts, the testimony of Dr. Teitelbaum concerning the medical causation of her injuries is the only evidence she was able to obtain. Therefore, we can assume that the expert testimony is significant to her case. However, because Martinez does not argue that the remaining seventeen experts would provide useful information with regard to causation, we conclude that the testimony of the remaining excluded experts is unimportant.

Martinez argues that her delay in designating Dr. Teitelbaum would not have caused any prejudice because Dr. Teitelbaum was known to Air Products well before the deadline to designate experts. Specifically, Martinez contends that Dr. Teitelbaum was listed as an expert in her answers to Air Products'

interrogatories, which she served on Air Products in May 1994, over a month before the deadline. In addition, Dr. Teitelbaum's report was discussed at Martinez's deposition on April 4, 1994. Air Products argues that the delay would have been quite significant and prejudicial because Martinez sought to designate eighteen experts with no other discovery responses of documents to assist in trial preparation and no time to adequately complete discovery. Although Air Products might not suffer any prejudice from the designation of only Dr. Teitelbaum, the district court has wide discretion to exclude Martinez's last-minute efforts to designate eighteen "experts" listed without supporting documentary evidence.

Finally, we must consider the possibility of a continuance. Martinez argues that her motion for continuance filed August 29, 1994 should have been granted so that any prejudice against Air Products could have been relieved and the case could have been decided on the merits. However, we find that while a continuance would have allowed Air Products more time to conduct discovery on Martinez's new experts, it would have also resulted in more delay and expense for Air Products. The district court had already granted several discovery deadline extensions to Martinez. "Moreover, a continuance would not deter future dilatory behavior, nor serve to enforce local rules or court imposed scheduling orders." *Id.* at 792 (citing *Bradley*, 866 F.2d at 126).

Although we find the proposed testimony of Dr. Teitelbaum important to Martinez's proof of causation, it "cannot singularly override the enforcement of local rules and scheduling orders." *Id.* Consequently, the district court's denial of Martinez's motion

to late-designate eighteen expert witnesses was not an abuse of discretion.

SUMMARY JUDGMENT

The district court determined that Martinez failed to provide proper summary judgment evidence in support of her toxic tort claims. Having unsuccessfully objected to the court's evidentiary rulings on appeal, Martinez has also failed to direct this Court to any other summary judgment evidence in the record with respect to causation to support her claims. Therefore, we find that Martinez has failed to create a fact issue on the element of causation of injury for her toxic tort action.[3] Accordingly, the district court's order granting Air Product's motion for summary judgment was proper. *See Geiserman*, 893 F.2d at 794.

CONCLUSION

For the reasons articulated above, the judgment of the

---

[3] Martinez also argues that the district court abused its discretion in denying her motion for leave to file a surreply to Air Products' first motion for summary judgment on the issue of causation and for denying her an opportunity to file a response to Air Products' renewed motion for summary judgment. Having already addressed the issue of causation in her response to Air Products' first motion for summary judgment, we find no abuse of discretion in denying her motion for leave to file a surreply. We also find any error on the part of the district court in denying Martinez the opportunity to file a response to Air Products' renewed motion for summary judgment harmless in light of the district court's consideration of the evidence previously submitted by Martinez on the issue of causation, including the letter from Dr. Teitelbaum, and Martinez's failure to identify any additional evidence to this Court on appeal. *See Powell v. United States*, 849 F.2d 1576, 1582 (5th Cir. 1988). "The law allows a district judge to grant summary judgment on the basis of facts shown by competent evidence in the record, even if those facts are not highlighted in the motion for summary judgment." *United States v. Houston Pipeline Co.*, 37 F.3d 224, 227 (5th Cir. 1994).

district court is AFFIRMED.