IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-30551
Summary Calendar

DORIS T. DUDENHEFER, wife of/and
EUGENE L. DUDENHEFER,

Plaintiffs-Appellants,

v.

DAVOL, INC.,

Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of Louisiana
(CA 93 3197 F)

April 14, 1995

Before KING, JOLLY, and DEMOSS, Circuit Judges.

PER CURIAM:[*]

Doris and Eugene Dudenhefer appeal from the district court's denial of their motion for reconsideration or relief from judgment and from the district court's denial of their request to continue discovery. We affirm the judgment of the district court.

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

I. FACTUAL AND PROCEDURAL BACKGROUND

On July 27, 1993, a Dome Subcutaneous Port with Attachable Groshong Venous Catheter -- a medical device manufactured by Davol, Inc. -- was implanted into Doris Dudenhefer's chest. The device is designed to facilitate the continued intravenous administration of medication for patients with heart conditions. After the implantation, Mrs. Dudenhefer experienced swelling and bleeding in the implantation area. It was later determined that the catheter had broken or separated a few inches from the port. On September 1 and September 3, 1993, the catheter was removed in surgical procedures.

On September 3, 1993, Dudenhefer and her husband filed a state court lawsuit against Davol, Inc. On September 29, 1993, Davol removed the suit to federal court on the basis of diversity of citizenship. Davol answered the Dudenhefer's complaint and propounded interrogatories and requests for production in late October of 1993. The Dudenhefers did not answer Davol's discovery requests until March of 1994. In mid-March, the Dudenhefer's counsel, Leonard Cline, associated Robert Becnel as co-counsel on the Dudenhefer's case. Becnel withdrew as trial counsel on August 8, 1994 pursuant to an ex parte "Motion to Withdraw as Co-Counsel of Record" that was granted by the district court.

On July 26, 1994, Davol filed a motion for summary judgment, and the district court granted the motion on September 2, 1994. In its September 2 order, the district court noted that no opposition papers had been filed by the Dudenhefers, and the court stated that

"[t]he record is devoid of any evidence that will establish that the device in question or its component parts were unreasonably dangerous within the meaning of the Louisiana Products Liability Act." The court also observed that the doctrine of *res ipsa loquitur* was unavailing for the Dudenhefers, and the court concluded that "[a]t this juncture, no genuine issue of material fact remains for trial."

The Dudenhefers filed a belated opposition to Davol's summary judgment motion on September 6, 1994. On that same day, the Dudenhefers also filed a motion to continue Davol's summary judgment motion. The continuance motion was denied, and judgment for Davol was signed on September 6, 1994. On September 8, 1994, the Dudenhefers filed a motion for relief from or reconsideration of the district court's September 2 ruling of summary judgment for Davol. As part of the motion, the Dudenhefers sought more time to conduct discovery.

The district court denied the motion, treating it as a Rule 59(e) motion to alter or to amend the judgment. The court observed that "[d]espite [Cline's] status as the less active co-counsel, he remained responsible for meeting Court deadlines." Moreover, the court stated that:

> [b]ecause [Mrs. Dudenhefer] failed to conduct discovery within the scheduled time frame and has neither discovered, presented, nor noted her intent or request to discover or present any evidence bearing on the device's product specifications, performance standards, alternative designs, or package inserts or warnings, plaintiff still would not be able to prove her case under the Louisiana Products Liability Act.

Accordingly, the court denied the motion for reconsideration or relief from judgment, as well as the request to continue discovery. The Dudenhefers appeal from this ruling, essentially arguing that the trial court erred in denying the motion for reconsideration and in failing to grant a continuance of the summary judgment motion.

II. ANALYSIS AND DISCUSSION

A. The Motion for Reconsideration

The Dudenhefers argue that the trial court erred in denying reconsideration of its grant of summary judgment because of "significantly important factors" that were not considered by the district court. They assert that the district court should not have ruled for Davol on summary judgment, and they couch their request for reconsideration and relief from judgment as a Rule 60(b) motion.

We have consistently stated that a motion for reconsideration, "provided that it challenges the prior judgment on the merits, will be treated as either a motion `to alter or amend' under Rule 59(e) or a motion for `relief from judgment' under Rule 60(b)." Lavespere v. Niagara Mach. & Tool Works, Inc., 910 F.2d 167, 173 (5th Cir. 1990). As we noted, "[i]f the motion is served within ten days of the rendition of judgment, the motion falls under Rule 59(e); if it is served after that time, it falls under Rule 60(b)." Id. Because the Dudenhefers filed their motion for reconsideration on September 8, 1994 -- two days after the district court's September 6, 1994 entry of judgment -- we evaluate their claims in the context of a Rule 59(e) motion. The district court has

considerable discretion in deciding whether to alter a judgment pursuant to a motion for reconsideration, and as a consequence, we review the district court's denial of a motion for reconsideration under an abuse of discretion standard. See id. at 174-75.

We find no abuse of discretion in the district court's refusal to grant relief from the summary judgment. First, the Dudenhefers argue that they failed to timely oppose or to seek a continuance of Davol's summary judgment motion because of the abrupt withdrawal of trial counsel Becnel on August 8, 1994, and because of the out-of-town business and trial schedule of their remaining counsel, Leonard Cline. Cline maintains that he was not the trial counsel, and because he took a less active role in the litigation, he contends that he was unaware of approaching deadlines. Moreover, he claims that it was only after the granting of the summary judgment motion that he learned that the Dudenhefers' expert, Dr. Owen, had not completed an expert report because of the absence of a piece of the catheter.

Cline's "less active" role, however, does not relieve him of responsibility for the timely prosecution of his clients' case. On March 21, 1994, the Dudenhefers moved to enroll Becnel as an additional "co-counsel of record" -- not to substitute him for Cline. As a co-counsel, Cline is responsible for adhering to court deadlines. See, e.g., Kagan v. Caterpillar Tractor Co., 795 F.2d 601, 608-09 (7th Cir. 1986); Pryor v. United States Postal Serv., 769 F.2d 281, 287 (5th Cir. 1985). The withdrawal of Becnel, even if abrupt, does not mitigate this responsibility. Cline remained

a counsel of record, and he continued to sign pleadings and to receive court orders and notices. As such, Cline is charged with knowledge of the pre-trial deadlines -- he attended the scheduling conference and he was served with or mailed all motions and correspondence. Furthermore, in this case, Becnel withdrew from the case on August 8, 1994,[1] and opposition to Davol's summary judgment motion was not due until August 30, 1994. During this time, Cline neither requested a continuance from the district court nor informed the district court of his scheduling problems. As the Seventh Circuit explained in Kagan:

> Any attorney bears the ethical obligation to advise his client and the trial court of problems that arise in the course of representing the client, and an attorney beset by conflicts in scheduling should in a timely fashion ask leave of the court and his client to: (1) be relieved of the obligation to represent his client; (2) arrange for substitute counsel; or (3) request an adjournment.

795 F.2d at 609. Even though it is understandable that Cline was relying upon Becnel's assistance, Cline did not pursue any of these options after learning that Becnel had withdrawn. Cline remained a counsel of record, and accordingly, the Dudenhefers remain bound by Cline's inaction. See, e.g., Pryor, 769 F.2d at 288-89 ("[I]t has long been held, particularly in civil litigation, that the mistakes of counsel, who is the legal agent of the client, are

[1] According to the certificate of service attached to Becnel's motion to withdraw, Cline was served with the motion. In addition, Cline was listed as a party to be notified on the withdrawal order entered by the district court.

chargeable to the client, no matter how `unfair' this on occasion may seem." (citation omitted)).[2]

Second, the Dudenhefers seem to contend that the district court should have examined Dr. Owen's expert report and other allegedly "recently uncovered" evidence before ruling on the summary judgment motion. As will be explained further below, if the Dudenhefers encountered problems in their discovery efforts, they should have filed for a continuance under Rule 56(f) prior to the district court's ruling on the summary judgment motion. In addition, the evidence that the Dudenhefers claim to have uncovered relates to causes of action against various doctors and hospitals, but not to their products liability claim against Davol.

With regard to the expert report, there is no merit to the Dudenhefers' contention that the district court erred in deciding the summary judgment motion before their expert report was completed. A draft protective order was forwarded to Cline on January 19, 1994, and even though Cline made no changes to the proposed order, he did not execute and return the protective order for filing until May 31, 1994 -- the day before the deadline for submitting expert reports. If not for the delay, the Dudenhefers'

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[2] Under Rule 2.06 of the Uniform District Court Rules, a motion to withdraw as counsel does not require a memorandum or hearing by either the movant or the respondent. Becnel withdrew on August 8, 1994, and Cline does not deny being timely served with the motion to withdraw and the order of withdrawal. At that time, three weeks remained before opposition to Davol's summary judgment motion was due, and a motion for continuance could have been filed if necessary. Despite the Dudenhefers' requests, we refuse to impose any additional obligations on the procedures for a motion to withdraw, as we find that the procedures followed in this case were sufficient.

expert could have performed his inspection of the catheter much earlier, and any problems with missing pieces could have been resolved within the trial court's deadlines. The expert report that the Dudenhefers now seek time to complete, ***post-judgment***, would be based upon information that was fully available to the plaintiffs prior to the date of judgment, and the district court did not abuse its discretion in refusing to amend the judgment. See King v. Cooke, 26 F.3d 720, 726 (7th Cir. 1994) ("The district court correctly ruled that [the plaintiffs] could not use a Rule 59 motion to present new theories, request additional discovery time or submit previously available evidence."); Russ v. Int'l Paper Co., 943 F.2d 589, 593 (5th Cir. 1991) (approving the Third Circuit's reasoning that "the unexcused failure to present evidence which is available at the time summary judgment is under consideration constitute[s] a valid basis for denying a motion to reconsider").

Finally, even if the Dudenhefers had submitted a belated expert report based solely upon an examination of the catheter, such a report would be insufficient to overcome summary judgment for Davol. Because the Dudenhefers failed to discover or to present (or even to request to discover or to present) any evidence related to the catheter's product specifications, performance standards, alternative designs, or package inserts or warnings, they could not establish a prima facie case premised on any cognizable theory under the Louisiana Products Liability Act. See Stayton v. Smith & Nephew Richards, Inc., Civ. A. No. 93-0563, 1993

WL 459929, at *6-9 (E.D. La. Oct. 29, 1993), aff'd, 30 F.3d 1490 (5th Cir. 1994); id. at *7-8 ("It is simply not enough to say that because the prescription plate developed a fatigue fracture after it was implanted in the plaintiff, it was defective in composition construction and/or design. In the absence of any evidence of a defect, there is no material issue of fact remaining for trial."); Spott v. Otis Elevator Co., 601 So.2d 1355, 1364 (La. 1992) ("Defects are not presumed to be present by the mere happening of an accident."). Indeed, during the pendency of the case, no depositions were noticed by the Dudenhefers and no written discovery was propounded by them. Davol, however, submitted evidence indicating that the catheter was severed as a result of "pinch-off syndrome" -- a condition stemming from the improper placement of the catheter when implanted -- rather than as a result of any defect in the catheter. In sum, we conclude that the Dudenhefers had ample time to conduct discovery to oppose Davol's summary judgment motion. The Dudenhefers, however, failed to conduct adequate discovery, and they missed well-documented discovery deadlines without alerting the court to any problems. We find no abuse of discretion in the district court's denial of the Dudenhefer's motion to reconsider.[3]

[3] We also agree with the district court's concern that Davol "has already undertaken extensive discovery and would be required to incur further expenditures in responding to a continuance of plaintiff's discovery." As the Supreme Court noted in Link v. Wabash Railroad Co., 370 U.S. 626, 634 n.10 (1962), "keeping this suit alive merely because plaintiff should not be penalized for the omissions of his own attorney would be visiting the sins of plaintiff's lawyer upon the *defendant*."

B. The Motion for Continuance

The Dudenhefers argue that the district court erred in not granting their motion for continuance. They argue that the court should have used its discretionary powers to grant a continuance based upon the discovery difficulties and counsel changes encountered by the plaintiffs.

Rule 56(f) of the Federal Rules of Civil Procedure gives district courts discretion to grant motions to continue in the context of summary judgment proceedings. It provides that under appropriate circumstances, the district court "may refuse the application for [summary] judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just." Fed. R. Civ. P. 56(f). In order to obtain a continuance for discovery, a party must:

> (i) request extended discovery ***prior to the district court's ruling on summary judgment***, (ii) put the district court on notice that further discovery pertaining to the summary judgment motion is being sought, (iii) demonstrate to the district court specifically how the requested discovery pertains to the pending motion, and (iv) diligently pursue relevant discovery.

Chevron, U.S.A., Inc. v. Traillour Oil Co., 987 F.2d 1138, 1155-56 (5th Cir. 1993) (emphasis added); accord Wichita Falls Office Assoc. v. Banc One Corp., 978 F.2d 915, 919 (5th Cir. 1992). The grant or denial of a continuance pursuant to Rule 56(f) will be disturbed on appeal only if the district court abused its discretion. See Traillour Oil, 987 F.2d at 1156.

We cannot say that the district court abused its discretion in denying the Dudenhefers' motion for continuance. The summary judgment motion was served on July 26, 1994, and Cline was served with notice of Becnel's withdrawal on August 8, 1994. Opposition to the summary judgment motion and a motion for continuance were not filed until September 6, 1994 -- four days after the district court's September 2, 1994 ruling on the summary judgment motion, and seven days after the August 30, 1994 deadline for opposition papers to be filed. There was simply no reason that the request for extended discovery time could not have been made before the September 2, 1994 ruling.

Moreover, the Dudenhefers failed to diligently pursue relevant discovery. As mentioned, during the pendency of the case, no depositions were noticed by the Dudenhefers and no written discovery was issued by them. In Barrow v. New Orleans Steamship Ass'n, 932 F.2d 473, 476 (5th Cir. 1991), the hearing on a summary judgment motion was set for July 11, and the plaintiff, on July 6, requested an extension of time to conduct discovery in response to the summary judgment motion. Because the July 11 hearing was set for one week after the discovery cutoff, however, and because these dates had been established by the court for months, we concluded that "[t]he district court allowed [the plaintiff] adequate time to complete his discovery and did not abuse its discretion in denying [the plaintiff's] motion for continuance on the hearing." Id. Similarly, in the instant case, we find no abuse of discretion in

the district court's denial of the Dudenhefers' motion for continuance.[4]

III. CONCLUSION

For the foregoing reasons, the judgment of the district court is AFFIRMED.[5]

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[4] The Dudenhefers seem to imply that because the court granted Davol's ex parte motion to set the summary judgment hearing date after the deadline, the court should have similarly granted their request for a continuance. The circumstances, however, are not the same. Davol timely submitted its summary judgment motion on July 26, 1994, and the pre-trial order specified that August 20, 1994 was the deadline for hearings. Apparently, no August hearing dates were available in the district court, and therefore, Davol moved for leave to set the motion for hearing on the earliest possible date. The hearing was set for September 7, 1994 -- past the August 20 deadline, but on the first available date. The Dudenhefers did not oppose the motion, and the district court granted it. Unlike the Dudenhefers' situation, an effort was made by Davol to comply with the trial court's deadlines. Moreover, the Dudenhefers were certainly not prejudiced by the later hearing date, as they were effectively provided with more time to respond to the summary judgment motion.

[5] The Dudenhefers' bill of costs argument is frivolous. Davol, as the prevailing party, was awarded costs by the trial court. Davol timely filed the application to have costs taxed on the district clerk's form, and an affidavit was submitted by Davol indicating the expense amounts and the fact that the expenses were necessarily incurred. The Dudenhefers did not object to the cost amounts in the district court, and we see no reason to disturb the district court's award.