

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF TEXAS

United States District Court
Southern District of Texas

Giovanna Bulox, *et al*,

Plaintiffs,

versus

CooperSurgical, Inc., *et al*,

Defendants,

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Civil Action H-21-2320

ENTERED

July 22, 2022

Nathan Ochsner, Clerk

Order Denying Reconsideration

1. *Background.*

Utah Medical Productions, Inc., and Femcare, Ltd., manufacture products for medical use. They were added as defendants in this products liability case for their association with Filshie Clips.

They filed 12(b)(2) motions challenging the court’s jurisdiction. The court denied the motions because they were unpersuasive. Utah and Femcare moved for reconsideration of jurisdiction, preemption, and the statute of limitations

2. *Analysis.*

An unexcused failure to present available evidence is a valid basis for denying a motion for reconsideration.¹ A motion for reconsideration is not the “proper vehicle for rehashing evidence, legal theories, or arguments that could have been offered or raised before the entry of [an order.]”²

Utah and Femcare filed motions for reconsideration that include additional facts and arguments that they did not include in their earlier motions. On reconsideration, Utah says that it did not acquire Femcare until 2011, after Bulox and Merlo had their surgeries. Both Utah and Femcare say that they do

¹ See *Templet v. HydroChem Inc.*, 367 F.3d 473, 479 (5th Cir. 2004).

² *Simon v. United States*, 891 F.2d 1154, 1159 (5th Cir. 1990).

not own any property or operate any facilities in Texas. Utah and Femcare also add sworn statements by Kevin Cornwell and Paul Hill that reiterate that neither entity owns property nor operates facilities in Texas.

All of these facts and arguments are omitted from the earlier motions. These facts were readily available to both entities when they filed their respective motions. They cannot now rehash the evidence and present new legal theories in order to have a second attempt at a motion to dismiss. These facts should have been submitted to the court when the entities filed their motions.

3. *Preemption.*

Utah and Femcare say that federal law preempts Bulox from bringing her claims. They say that the Medical Device Amendments to the FDCA preempt these claims because the Filshie Clip is a Class III medical device registered with the FDA.

This argument is not raised in the original motions to dismiss by either Utah or Femcare. The court need not address the parties' additional arguments because they may not present new facts that were available to them at the time of the original motions.

4. *Statute of Limitations.*

Utah and Femcare say that the statute of limitations has expired. They insist that the second amended complaint on October 21, 2021, is outside the two year period to bring a claim.

Bulox timely filed her first complaint in July 2021. She properly amended her complaint to add Utah and Femcare and asserted a claim that arose out of the same transaction as the pleadings.

Merlo's claim is also timely. On January 21, 2020, Merlo had a radiology exam showing that her Filshie Clips had migrated. Bulox amended her complaint on October 18, 2021 to add Merlo as a party. The statute of limitations expired on January 21, 2022.

Merlo's claims are well within the statute of limitations.

5. *Change of Counsel.*

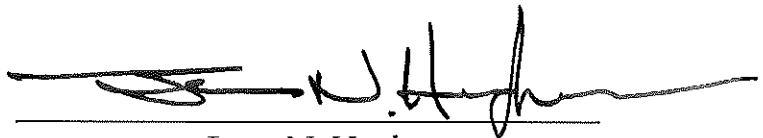
Utah and Femcare say that the court should reconsider the arguments made because they have acquired new counsel in the current action. They claim that they now have new information that the court should consider.

New counsel does not warrant reconsideration because these facts could have been discovered by their previous counsel, but it was not. A change in representation can hardly be a basis for allowing a motion to reconsider. Allowing finding new counsel to serve as a justifiable basis to reconsider any decision would cause an endless attack on all decisions and drastically drive up the cost of litigation and destroy judicial efficiency.

6. *Conclusion.*

Utah Medical and Femcare have not presented any additional facts that warrants reconsideration of their earlier motions. Utah's and Femcare's motions for reconsideration are denied. (59)(60)

Signed on July 21, 2022, at Houston, Texas.

A handwritten signature in black ink, appearing to read 'L. N. Hughes', is written over a horizontal line.

Lynn N. Hughes
United States District Judge