

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA**

KATHLEEN MOLLER	*	CIVIL ACTION NO. 24-0228-WBV-DPC
	*	ALL CASES
	*	
VERSUS	*	JUDGE WENDY B. VITTER
	*	
MARTIAN SALES, INC; JOPEN, LLC,	*	MAGISTRATE DONNA PHILLIPS
a Texas limited liability company;	*	CURRAULT
JOHNSON FOODS, LLC, a Wyoming	*	
limited liability company; NUZA, LLC, a	*	
Wyoming limited liability company;	*	
CALIBRE MANUFACTURING, LLC, a	*	
Wyoming limited liability company; LP	*	
IND., LLC, a Wyoming limited liability	*	
company; CAG HOLDINGS, LLC, a	*	
Wyoming limited liability company;	*	
RMH HOLDINGS, INC., a Wyoming	*	
corporation; FMK GROUP, INC., a	*	
Wyoming corporation; PNW	*	
HOLDINGS, LLC, a Wyoming limited	*	
liability company; CC US HOLDINGS,	*	
LLC, a Wyoming limited liability	*	
company; PEYTON SHEA PALAIO;	*	
MARK JENNINGS; EYAL DAVID	*	
GABBAY; and MARK REILLY.	*	
*****	*	

**MEMORANDUM IN SUPPORT OF PLAINTIFF’S MOTION FOR PARTIAL
SUMMARY JUDGMENT REGARDING COMPARATIVE FAULT**

COMES NOW, Plaintiff, Kathleen Moller, respectfully moves this Court pursuant to Rule 56 of the Federal Rules of Civil Procedure for partial summary judgment against Defendants, Martian Sales, Inc., JOpen, LLC, Johnson Foods, LLC, Nuza, LLC, Calibre Manufacturing, LLC, LP IND., LLC, CAG Holdings, LLC, RMH Holdings, Inc., FMK Group, Inc., PNW Holdings, LLC, CC US Holdings, LLC, Peyton Shea Palaio, Mark Jennings, Eyal David Gabbay, and Mark Reilly (hereafter collectively “Defendants”) precluding any claim of comparative fault from this

matter, as there is genuine issue of fact that Harmony Moller could have. In support, Plaintiff states as follows:

I. INTRODUCTION & PROCEDURAL HISTORY

Plaintiff filed an initial Complaint on January 24, 2024. Dkt. No. 1. A Second Amended Complaint was filed on February 6, 2024, to address deficiencies regarding Defendants' corporate citizenship noted by the Court. Dkt. No. 7. Almost all initially named Defendants moved to dismiss the Second Amended Complaint on May 9, 2024. Dkt. No. 31.¹ On July 16, 2024, this Court entered an Order denying the motions to dismiss and ordered the parties to engage in jurisdictional discovery, in part to explore the single business enterprise and alter ego theories asserted in Plaintiff's Complaint. Dkt. No. 54.

The parties engaged in jurisdictional discovery, including the depositions of Martian Sales, LP, CAG, RMH, and Johnson Foods. Defendants also responded to written discovery.

Plaintiff filed a Third Amended Complaint on March 24, 2025, adding Nuza, Calibre, FMK, PNW, CC US, Palaio, Jennings, Gabbay, and Reilly as named parties. Dkt. No. 100. Defendants filed renewed motions to dismiss on May 23, 2025, arguing lack of personal jurisdiction and failure to state a claim. Dkt. No. 122. Plaintiff filed oppositions thereto on June 30, 2025. Dkt. No. 130. Plaintiff also filed a Motion for Partial Summary Judgment for a determination of veil piercing for jurisdictional purposes on June 30, 2025. Dkt. No. 132. Defendant's motions to dismiss and Plaintiff's Partial Motion for Summary Judgment remain pending. However, the parties are engaged in fact and expert discovery and now submit pre-trial motions.

While no answer has been filed by any Defendant, discovery makes clear that Defendants will seek to reduce Plaintiff's potential recovery by asserting comparative fault against Harmony

¹ Johnson Foods, LLC filed a motion to dismiss on May 28, 2024. Dkt. No. 45.

Moller. However, under Louisiana law, comparative fault cannot be imposed in the absence of evidence that the decedent acted unreasonably or misused the product in a manner not reasonably anticipated by the manufacturer.

There is no evidence that Harmony Moller misused the kratom product, ignored warnings, acted unreasonably, altered the product, or used it in a manner inconsistent with its intended purpose. The product contained no warnings regarding the risk of death, drug-drug interactions, or cardiac adverse effects. Because Defendants cannot raise a genuine issue of material fact concerning comparative fault, it must be excluded from this matter.

II. LEGAL STANDARD

“The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56. Materiality is a matter of substantive law, and “[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). “A fact is considered material when its existence or nonexistence may be essential to plaintiff’s cause of action under the applicable theory of recovery.” *Smith v. Our Lady of the Lake Hospital, Inc.*, 639 So. 2d 730, 751 (La. 1994). “A genuine issue is one about which reasonable persons could disagree.” *Hines v. Garrett*, 876 So. 2d 764, 765 (La. 2004). In determining whether a genuine issue of material fact exists, the court must view all evidence in the light most favorable to the nonmoving party. *Scott v. Harris*, 550 U.S. 372, 380 (2007). The party asserting that a material fact “cannot be or is genuinely disputed” must support the assertion by either:

- (1) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including

those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or

- (2) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

Fed. R. Civ. P. 56(c)(1)(A)–(B).

If the moving party has carried its burden, the non-movant must “come forward with ‘specific facts showing that there is a genuine issue for trial.’” *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). The nonmoving party, however, cannot satisfy his summary judgment burden with conclusory allegations, unsubstantiated assertions, or only a scintilla of evidence. *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994) (en banc). “One of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses[.]” *Celotex Corp. v. Catrett*, 477 U.S. 317, 323–24 (1986). If a party bears the burden of proof “to establish the existence of an element essential to that party’s case,” but fails to make a sufficient showing, “Rule 56(c) mandates the entry of summary judgment” against the party. *Id.* at 322.

Under Louisiana law, fault may only be allocated where there is evidence of negligent conduct that was a legal cause of the harm. La. C.C. Art. 2323.

Defendants cannot establish such a standard of care when their packaging and disclaimers fail to state any risk of kratom use associated to cardiac conditions and fail to state any risk of death whatsoever.²

Comparative fault is not appropriate where:

² There can be no assumption of risk in this matter as well. The Louisiana Supreme Court in *Murray v. Ramada Inns, Inc.*, 521 So.2d 1123 (La. 1988) held that assumption of risk does not serve as a total bar to recovery, and the doctrine should be eliminated entirely from Louisiana tort law. Louisiana courts have consistently reaffirmed the abolition of assumption of risk in recent decisions. See e.g., *Doe v. McKesson*, 2021-00929 (La. 3/25/22), 339 So. 3d 524 and *Richardson v. Louisiana-1 Gaming*, 10-262 (La. App. 5 Cir. 12/14/10), 55 So. 3d 893.

1. The alleged conduct constitutes normal product use;
2. The manufacturer failed to provide adequate warnings; or
3. The alleged “fault” is merely the consumer’s use of the product as marketed.

See, *Watson v. State Farm Fire and Cas. Insu. Co.*, 469 So.2d 967 (La. 1985) (explaining that comparative fault requires unreasonable conduct).

III. UNDISPUTED MATERIAL FACTS

The following facts are undisputed:

1. Harmony Moller ingested OPMS Green Vein Maeng Da Silver kratom capsules and powder.
2. The product was manufactured, marketed, and sold by Defendants.
3. The product label did not warn of risk of sudden death, risk of fatal toxicity, any lethal dosing threshold, drug-drug interactions, or adverse cardiac risks.
4. There is no evidence that Harmony altered the product, used it in a manner inconsistent with its intended purpose; or ignored any warning.

IV. ARGUMENT

A. A consumer cannot be comparatively at fault for failing to heed to warnings that do not exist.

Under Louisiana law, failure to warn liability turns on whether the manufacturer provided adequate warnings regarding known or reasonably known risks. (See L.P.L.A. 9:2800.54 (B)(3), see also, *Marks v. OHMEDA, Inc.*, 871 So.2d 1148, 2003-1446 (La.App. 3 Cir. 3/31/04)(“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.”))

Where no warning exists, a consumer cannot be comparatively at fault for failing to avoid an undisclosed danger. Comparative fault requires some negligent act or omission by the plaintiff. La. C.C. art. 2323. A consumer cannot be negligent for failing to avoid a risk that was never disclosed.

The undisputed evidence establishes that the OPMS kratom product consumed by Harmony Moller contained no warnings that the product could cause serious cardiovascular effects or death. See photos of the products Harmony consumed, attached as **Exhibits 1 & 2**. The labels likewise provided no dosing instructions, maximum use guidance, instructions for safe consumption, warnings regarding drug-drug interactions, risk of death, or risk of cardiac adverse events. *Id.*

The death certificate and autopsy report conclude that Harmony died as a result of abnormally high left coronary ostia takeoff exacerbated by mitragynine use. Autopsy Report, attached as **Exhibit 3**. The very mechanism of harm involves a pharmacological risk associated with kratom consumption. Precisely the type of risk that would require an adequate warning.

Defendants and their own experts acknowledge that kratom consumption is associated with significant adverse effects, including death. In his report, Dr. Jack Henningfield cites to NIDA materials stating that “deaths have been linked to kratom products.” See Henningfield’s report, attached as **Exhibit 4** at pg. 13. He further identifies numerous adverse effects associated with kratom use, including addiction, psychotic symptoms, tachycardia, seizures, hepatotoxicity, and other serious health consequences. *Id.* Yet none of these risks appear on the OPMS product label.

Defendants’ corporate representatives concede the importance of warning consumers of known risks. On October 8, 2025, Mark Reilly, owner of the OPMS trademark, testified in his individual capacity that manufacturers selling products for human consumption should

communicate instructions for safe use and disclose significant health risks, including a risk of death if one exists. See Excerpt from Reilly's Deposition, attached as **Exhibit 5** at 32:1–23.

Similarly, JOpen, LLC, the distributor of OPMS kratom products, testified that products should include warnings regarding known risks and that companies should stay current with scientific and medical research concerning kratom's safety. See Excerpt from JOpen's Deposition, attached as **Exhibit 6** at 29:15–25.

Defendant Mark Jennings further acknowledged that if kratom adversely affects the cardiovascular system, that risk should be disclosed to consumers. See Excerpt from Jennings' Deposition, attached as **Exhibit 7** at 46–47.

Defendants' experts focus on Harmony's underlying, and unknown to her, cardiac condition. **Exhibits 4, 11 – 14**. Given the condition was unknown and Defendants' failure to warn of any cardiac risk for kratom, Harmony's underlying cardiac condition cannot and should not be used as a factor for placing blame upon Harmony. **Exhibits 1 & 2**. Such evidence would only invite the trier of fact to speculate without an appropriate factual basis.

Notably, although the OPMS label contains no such warnings, the disclaimer on the OPMS website, which is controlled by JOpen, acknowledges serious potential side effects associated with kratom, including seizures, liver damage, addiction, withdrawal, abuse, and death. See Website Disclaimer, attached as **Exhibit 8**, see **Exhibit 6**, 111: 23 – 24. This admission underscores Defendants' awareness of serious risks while simultaneously failing to warn consumers.

Since no warning regarding cardiovascular risk or death appeared on the product Harmony consumed, she cannot, as a matter of law, be comparatively at fault for failing to heed a warning that was never given.

B. There is no evidence that Harmony Moller misused the product.

Comparative fault also fails because there is no evidence that Harmony misused the OPMS product.

Kratom ingestion was the precise purpose for which Defendants manufactured, marketed, and sold OPMS kratom. Defendants testified that they themselves have used kratom, in various forms, and the OPMS kratom package suggests that the manufacturers and sellers of the product and intend for it to be consumed. **Exhibits 1, 2,** and **Exhibit 6** at 92:1–21.

1) Defendants sold OPMS kratom for human consumption, in other words, they knew consumers would ingest their products.

a. **Exhibit 9** (Martian Deposition) at 97:19 - 22 & **Exhibit 5** (Reilly Deposition) at 37:2-12

b. **Exhibit 10**, JOPEN RFA, No. 9.

There is no evidence in the record that Harmony consumed the product in an abnormal, reckless, or unforeseeable manner. Moreover, the record contains no evidence that she ingested an unusual or excessive quantity. (See, LSA-R.S. 9:2800.5, stating that, “even when product misuse occurred, manufacturer was still required to give adequate warnings if misuse was reasonably foreseeable.”) Indeed, multiple experts opine that the level of mitragynine in Harmony Moller’s system was low. See Reports drafted by Boyer, McCurdy, Huestis, and Paustenbach, attached as **Exhibits 11 - 14**. Where a product is sold for ingestion, provides no dosing guidance, and carries no warnings of serious health risks, a consumer’s ordinary use of that product cannot constitute misuse or comparative fault.

C. Speculation regarding other substances cannot create comparative fault.

Toxicology revealed the presence of diphenhydramine and promethazine. **Exhibit 3**. However, neither the death certificate nor the autopsy attributes death to these medications. *Id.*

Defense experts have also focused on photos of Harmony's room at the time of her passing, speculating and insinuating that substances found in her room, but not in her system at the of death, somehow played a role in her death. **Exhibits 11, 13 – 14**. There is no support for such a speculative and baseless proposition.

For instance, Dr. Boyer, Dr. Huestis, Dr. Paustenbach, and Dr. McCurdy all mention the presence of diet pills and prescription pill bottles in Harmony's room, yet none of the substances they reference are present in the operative toxicology report. See **Exhibits 3, 11, 13, and 14**. In short, to the extent any evidence of Harmony's use of dietary supplements and the presence of other medications or alcohol in her room are entered into evidence (which they should not be pursuant to Plaintiff's simultaneously filed motion in limine for exclusion of evidence, incorporated herein by reference)³, such evidence should not be considered in relation to any claim for comparative negligence as there no record evidence that any such substances were used by Harmony preceding her death, as they are not in the relevant toxicology report.

Absent expert testimony establishing causation, the mere presence of commonly used antihistamine and anti-emetic medications cannot create a triable issue of fact for comparative fault.

Speculation regarding polypharmacy cannot defeat summary judgment.

D. Comparative fault will improperly undermine the purpose of the eggshell plaintiff rule.

In this case allowing the defense to submit to the jury that Harmony Moller's underlying

³ Pursuant to FRE 403, even relevant evidence should be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, undue delay, waste of time, or needless presentation of cumulative evidence.

cardiac condition caused her death or that she contributed to her own death is inconsistent with Louisiana's long-standing eggshell plaintiff rule that the defendant takes their plaintiff as they find them. See *Lasha v. Olin Corp.*, 625 So.2d 1002, 1003 (La. 1993) (“a defendant takes his victim as he finds him; when the defendant's tortious conduct aggravates a pre-existing injury or condition, he must compensate the victim for the full extent of this aggravation”); see also, Louisiana Civil Code Article 2315 (Stating “every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it.”) The court in *Lasha*, emphasized that “the defendant's liability for damages is not mitigated by the fact that the plaintiff's pre-existing physical infirmity was responsible in part for the consequences of the plaintiff's injury by the defendant.” *Lasha v. Olin Corp.*, 625 So.2d 1002, 1005 (LA. 1993).

In *Latulippe v. Braun*, the court stated “it is well-settled that a tortfeasor takes his victim as he finds him and when a defendant's tortious conduct aggravates a pre-existing condition, the defendant must compensate the victim for the full extent of the aggravation.” *Latulippe v. Braun*, 18-83 (La. App. 5 Cir. 8/10/18), 253 So. 3d 820, 833 (citing, *Maranto v. Goodyear Tire & Rubber Co.*, 94-2603 and 94-2615, p. 3 (La. 2/20/95), 650 So.2d 757, 759.)

Federal courts applying Louisiana law in diversity cases consistently recognize and apply Louisiana's eggshell plaintiff doctrine. The Fifth Circuit Court of Appeals addressed the doctrine's application under federal diversity jurisdiction in *Dahlen v. Gulf Crews, Inc.*, confirming that Louisiana's eggshell skull doctrine “requires a defendant to compensate a plaintiff for unforeseeable injuries flowing from some pre-existing physical condition.” *Dahlen v. Gulf Crews, Inc.*, 281 F.3d 487, 495 (5th Cir. 2002) (Finding Louisiana's doctrine consistent with federal law and the Restatement (Second) of Torts § 461); see also, *Koch v. United States*, 857 F.3d 267, 274 (5th Cir. 2017) (“this court and district courts within our circuit have expressed approval and

acceptance of the ‘thin skull,’ ‘eggshell skull,’ or ‘defendant takes the victim as found’ rule without limiting its application to latent or unmanifested preexisting conditions”).

Notably this is exactly such an eggshell skull case, as the St. Tammany Parish Coroner’s office, via medical examiner, Dr. Defatta, determined the cause of Harmony’s death was left coronary ostia takeoff *exacerbated* by mitragynine [kratom] (emphasis added). **Exhibit 3.** Further every proposed expert has opined that Harmony’s cardiac condition played a role in her death, recognizing the important role of Harmony’s eggshell status due to her underlying cardiac condition. **Exhibits 11 - 14.**

In short, any argument of comparative fault based upon Harmony’s underlying cardiac condition, failure to follow packaging instructions or warnings, and the photos, videos, and evidence of substances in her room at time of death cannot be used to support a claim of comparative fault as there is no genuine issue of fact regarding such a claim.

V. CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that this Court grant partial summary judgment dismissing any affirmative defense alleging comparative fault of decedent Harmony Moller and precluding Defendants from presenting such argument at trial.

Dated March 2, 2026

Respectfully submitted,

/s/ Michael Cowgill

MICHAEL J. COWGILL (FL Bar # 1010945)

Pro Hac Vice

TAMARA J. SPIRES (FL Bar # 127625)

Pro Hac Vice

MCTLAW

1515 Ringling Blvd., Suite 700

Sarasota, Florida 34236

Telephone 888.952.5242
mcowgill@mctlaw.com
tspires@mctlaw.com

-and-

WAGAR HICKMAN, LLC

NELSON W. WAGAR, III (No. 13136)
SARAH WAGAR HICKMAN (No. 35823)
JENNIFER SEILER AVALONE (No. 35613)
1401 West Causeway Approach
Mandeville, Louisiana 70471
Telephone (985) 888-8740
cwagar@wagarhickman.com
shickman@wagarhickman.com
javallone@wagarhickman.com

Attorneys for Plaintiff, Kathleen Moller