NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2006 CA 2218

JOYCELYN O'SHAUGHNESSY, WIFE OF/AND
MICHAEL O'SHAUGHNESSY

VERSUS

ACUDERM, INC., ST. PAUL FIRE & MARINE
INSURANCE COMPANY, AND
CHEMINOVA AMERICA CORPORATION

Judgment Rendered: September 19, 2007

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Appealed from the
22nd Judicial District Court
In and for the Parish of St. Tammany, Louisiana
Case No. 99-13954

The Honorable Peter J. Garcia, Judge Presiding

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Derek D. Gambino New Orleans, Louisiana	Counsel for Plaintiffs/Appellants Jocelyn O'Shaughnessy, wife/of and Michael O'Shaughnessy
Joseph B. Morton, III Metairie, Louisiana	Counsel for Defendants/Appellees Acuderm, Inc., and St. Paul Fire & Marine Insurance Company

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BEFORE: GAIDRY, MCDONALD, AND MCCLENDON, JJ.

GAIDRY, J.

In this products liability suit, the plaintiffs appeal a summary judgment dismissing their claims against two defendants. We affirm.

FACTS AND PROCEDURAL HISTORY

Plaintiffs, Joycelyn O'Shaughnessy and Michael O'Shaughnessy, filed a suit for damages after Mr. O'Shaughnessy suffered injuries allegedly caused by an unreasonably dangerous product. The product, called "Skin-Cap," was sold by Acuderm, Inc. ("Acuderm"), a foreign corporation authorized to do business in Louisiana.

Acuderm and its insurer, St. Paul Fire & Marine Insurance Company ("St. Paul"), filed a motion for summary judgment. In support of their motion, Acuderm and St. Paul filed the affidavit of Acuderm president, Charles Yeh, and copies of the Skin-Cap product labels showing the manufacturer and distributor information. In opposition to the motion for summary judgment, the plaintiffs filed a May 10, 1996 letter from the National Psoriasis Foundation ("NPF") to Cheminova America Corporation ("Cheminova America"), an August 8, 1997 FDA warning, and an August 12, 1997 Acuderm invoice for a sale to Mr. O'Shaughnessy.

After a hearing, the trial court granted the motion for summary judgment and dismissed the plaintiffs' claims against Acuderm and St. Paul with prejudice. The plaintiffs filed a motion for new trial, which was denied, and this appeal followed.

DISCUSSION

A motion for summary judgment is a procedural device used to avoid a full-scale trial when there is no genuine factual dispute. *Sanders v. Ashland Oil, Inc.*, 96-1751, p. 5 (La. App. 1 Cir. 6/20/97), 696 So.2d 1031, 1034, *writ denied*, 97-1911 (La. 10/31/97), 703 So.2d 29. Summary

judgment is properly granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue of material fact, and that mover is entitled to judgment as a matter of law. La. C.C.P. art. 966(B). Summary judgment is favored and "is designed to secure the just, speedy, and inexpensive determination of every action." La. C.C.P. art. 966(A)(2).

The mover has the burden of proving that he is entitled to summary judgment. However, if the mover will not bear the burden of proof at trial on the subject matter of the motion, he need only demonstrate the absence of factual support for one or more essential elements of his opponent's claim, action, or defense. La. C.C.P. art. 966(C)(2). If the moving party points out that there is an absence of factual support for one or more elements essential to the adverse party's claim, action, or defense, then the nonmoving party must produce factual support sufficient to establish that he will be able to satisfy his evidentiary burden at trial. La. C.C.P. art. 966(C)(2).

In determining whether summary judgment is appropriate, appellate courts review evidence *de novo* under the same criteria that govern the trial court's determination of whether summary judgment is appropriate. *Sanders*, 96-1751 at p. 7, 696 So.2d at 1035. Because it is the applicable substantive law that determines materiality, whether a particular fact in dispute is material can be seen only in light of the substantive law applicable to the case. *Walker v. Phi Beta Sigma Fraternity (RHO Chapter)*, 96-2345, p. 6 (La. App. 1 Cir. 12/29/97), 706 So.2d 525, 528.

A manufacturer is liable for damages caused by his unreasonably dangerous product, but a seller of such a product is not responsible for damages absent a showing that he knew or should have known the product was defective and failed to declare it. La. R.S. 9:2800.54; *Jackson v. Sears*

Authorized Retail Dealer Store, 36,166 pp. 4-5 (La.App. 2 Cir. 6/12/02), 821 So.2d 590, 593. However, a seller of a product may be a manufacturer for products liability purposes if it: (1) labels a product as its own or otherwise holds itself out to be the manufacturer of the product; (2) exercises control over or influences a characteristic of the design, construction or quality of the product that causes damage; (3) incorporates into the product a component or part manufactured by another manufacturer; (4) is the seller of a product of an alien manufacturer and is in the business of importing or distributing the product for resale and is the alter ego of the alien manufacturer.[1] La. R.S. 9:2800.53.

Accordingly, in order for Acuderm to be liable for Mr. O'Shaughnessy's injuries, the plaintiffs would have to prove that Acuderm was a manufacturing seller under La. R.S. 9:2800.53(1) or that Acuderm knew or should have known the Skin-Cap products were defective and failed to declare it.

The following statements contained in Mr. Yeh's affidavit establish that Acuderm was not a manufacturing-seller of Skin-Cap products under La. R.S. 9:2800.53(1) and that Acuderm had no knowledge of any defect in the products: Yeh has been the President of Acuderm since 1983; Acuderm was a distributor of Skin-Cap products for a limited time; Acuderm did not prepare or modify the Skin-Cap products; Aucderm did not exercise control over or influence any characteristic of the design, construction, or quality of the Skin-Cap products; the label on the Skin-Cap products identified the

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[1] La. R.S. 9:2800.53(1)(d) provides that the following factors will be considered by the court in determining whether the seller is the alter ego of the alien manufacturer:

> . . . whether the seller is affiliated with the alien manufacturer by way of common ownership or control; whether the seller assumes or administers product warranty obligations of the alien manufacturer; whether the seller prepares or modifies the product for distribution; or any other relevant evidence.

manufacturer as Laboratorios Cheminova Internacional, S.A.; Acuderm placed labels on the Skin-Cap products which stated "Dist. By: Acuderm, Inc." but did not hold itself out to be the manufacturer of the Skin-Cap products; Acuderm did not assume or administer any product warranty obligation of the Skin-Cap products; Acuderm has never been affiliated with the manufacturer of the Skin-Cap products through common ownership or control; Acuderm had no knowledge of any alleged defect in the Skin-Cap products at the time it distributed them; and Acuderm did not contribute to the alleged defective condition of the Skin-Cap products.

Once Acuderm and St. Paul pointed out the absence of factual support for one or more elements essential to the O'Shaughnessys' claim, the O'Shaughnessys were required to produce factual support sufficient to establish that they will be able to meet their burden of proof at trial. However, the evidence put on by the O'Shaughnessys in opposition to the motion for summary judgment was not sufficient to prove that Acuderm was a manufacturing seller or that they had actual or constructive knowledge of a defective condition of the products and failed to disclose it.

The May 10, 1996 letter from the NPF to Cheminova America requested that Cheminova America communicate with its distributors regarding their advertising practices because the NPF was only aware of the identity of two of the U.S. distributors of Skin-Cap (Nova Medical and Net Nova). The letter from the NPF also expressed concern that there was a "secret ingredient" in Skin-Cap products, but did not allege that the products were dangerous.

The August 8, 1997 FDA warning alerted consumers that the Skin-Cap products contain prescription-strength corticosteroids, which may pose

a health hazard, including worsening of psoriasis. The warning states, in part:

> Skin-Cap is imported from Spain. . . .
>
> [T]he FDA issued a nationwide import alert for detention of these products at all border entries, and the state of Florida stopped distribution of Skin-Cap from the primary distributor.
>
> The agency has previously expressed concern about the marketing of these unapproved products in two warning letters sent to two U.S. distributors of these products earlier this year.

The Acuderm invoice filed by the O'Shaughnessys in opposition to the motion for summary judgment is for three Skin-Cap products and lists Michael O'Shaughnessy as the purchaser. However, the invoice filed into the record does not appear to be an actual invoice for Mr. O'Shaughnessy's purchase. The invoice is dated August 12, 1997, but the petition alleges that Mr. O'Shaughnessy purchased the Skin-Cap products from Acuderm on approximately July 21, 1997. Furthermore, the box for the invoice number is marked "REPLACEMENT" and the box for the amount due is blank.

In written reasons for judgment, the court stated that summary judgment was appropriate in this case because Acuderm and St. Paul successfully pointed out that there is an absence of factual support for an element essential to the O'Shaughnessys' claim, *i.e.*, that Acuderm, a non-manufacturing seller of an allegedly defective product, knew or should have known that the product was defective. The court found that the evidence offered by the plaintiffs in opposition to the motion was insufficient to establish that they would be able to satisfy their evidentiary burden at trial. We agree. No evidence was put on which would prove that Acuderm was a manufacturing seller. Furthermore, the evidence that was introduced to show that Acuderm had actual or constructive knowledge of the defect was not sufficient to show that plaintiffs would be able to carry their evidentiary

burden at trial. The letter from the NPF does not prove anything with regard to Acuderm; it specifically states that the only U.S. distributors of Skin-Cap products the NPF knew of were Nova Medical and Net Nova. The FDA warning mentioned previous discussions about the danger of the product with two U.S. distributors, but does not name Acuderm as one of those distributors. While Acuderm arguably should have known of the dangerous condition once the FDA warning was issued, the approximate date of the purchase as alleged in the petition was several weeks *before* the FDA warning was issued, and although the invoice filed into evidence by the plaintiffs is dated after the FDA warning, it does not appear to be the actual invoice for Mr. O'Shaughnessy's purchase, as stated above. After reviewing the record, it is clear that the O'Shaughnessys simply failed to put on sufficient evidence, in response to Acuderm and St. Paul's motion for summary judgment, to establish that they will be able to meet their evidentiary burden at trial. Thus, summary judgment was appropriate in this case.

DECREE

The judgment granting summary judgment in favor of Acuderm and St. Paul and dismissing the plaintiffs' claims against them with prejudice is affirmed. Costs of this appeal are assessed to the plaintiffs.

AFFIRMED.