NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2013 CA 2115

UNITED FIRE GROUP, as subrogee,
AND PARISH OF TANGIPAHOA, STATE OF LOUISIANA

VERSUS

CATERPILLAR, INC., LOUISIANA MACHINERY, LLC,
ABC INSURANCE COMPANY, AND XYZ INSURANCE COMPANY

Judgment Rendered: AUG 1 8 2014

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On Appeal from the
21st Judicial District Court
In and for the Parish of Tangipahoa
State of Louisiana
No. 2010-0002496

The Honorable Wayne Ray Chutz, Judge Presiding

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* * * * *

BEFORE: PARRO, GUIDRY, AND DRAKE, JJ.

DRAKE, J.

Appellant, United Fire Group (United Fire),[1] the subrogee of the Parish of Tangipahoa, State of Louisiana (Tangipahoa Parish), appeals the judgment of the trial court, granting summary judgment in favor of appellee, Caterpillar, Inc. (Caterpillar) and dismissing United Fire's claims. We affirm.

FACTUAL AND PROCEDURAL HISTORY

United Fire, in its capacity as subrogee of the named insured, Tangipahoa Parish, filed a petition against Caterpillar, seeking damages resulting from a fire that took place in a 2008 826H trash compactor (compactor) manufactured by Caterpillar and owned by Tangipahoa Parish. The compactor was purchased in October 2007 by Tangipahoa Parish. The compactor was used at a landfill to push garbage. On the date of the fire, an employee of Tangipahoa Parish put the compactor in reverse and noticed smoke coming from the right section of the engine compartment. United Fire sought compensation for the insurance proceeds it paid to Tangipahoa Parish following a fire that took place on June 19, 2009, which caused the compactor to sustain severe damage. United Fire also named Louisiana Machinery, LLC (Louisiana Machinery),[2] the seller of the compactor, as a defendant. United Fire asserted that Caterpillar was liable for breach of warranty agreements, for violating the Louisiana Products Liability Act (LPLA), La. R.S. 9:2800.51, *et seq.*, and for redhibition under La. C.C. art. 2520, *et seq.*

Caterpillar filed a motion for summary judgment, claiming that the LPLA did not apply to cases in which redhibition applies, that United Fire did not carry its burden as to the redhibition claim, and that United Fire had insufficient

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[1] The correct name of the plaintiff is "United Fire and Casualty Company," which was mistakenly named as "United Fire Group" in the petition. Plaintiff filed a supplemental and amending petition to correctly identify itself as "United Fire Casualty Company" in the petition and caption. Despite the supplemental and amending petition, the record before us, including the caption and judgment, contains "United Fire Group" as the plaintiff.

[2] "Louisiana Machinery Company, LLC" answered the lawsuit asserting that it had been incorrectly identified as "Louisiana Machinery, LLC."

evidence that the compactor had a defect. A hearing was held on the motion for summary judgment on July 1, 2013, and the trial court found there were no issues of material fact, because the plaintiff could not prevail on the merits given the testimony of its experts. The trial court granted the summary judgment in open court and signed a judgment in accordance with its oral ruling on July 25, 2013. It is from this judgment that United Fire appeals.

DISCUSSION

Exception of Res judicata

Caterpillar filed an exception of res judicata for the first time in the appellate court, following the trial court's granting of summary judgment in favor of co-defendant, Louisiana Machinery, on September 23, 2013. The appellate court may consider a peremptory exception, such as res judicata, raised for the first time in the appellate court if the "proof of the ground of the exception" appears in the record. La. C.C.P. art. 2163; *Smith v. State, Dep't of Transp. & Dev.*, 04-1317 (La. 3/11/05), 899 So. 2d 516, 530.

The doctrine of res judicata is set forth in La. R.S. 13:4231. The statute states:

> Except as otherwise provided by law, a valid and final judgment is conclusive between the same parties, except on appeal or other direct review, to the following extent:
>
> (1) If the judgment is in favor of the plaintiff, all causes of action existing at the time of final judgment arising out of the transaction or occurrence that is the subject matter of the litigation are extinguished and merged in the judgment.
>
> (2) If the judgment is in favor of the defendant, all causes of action existing at the time of final judgment arising out of the transaction or occurrence that is the subject matter of the litigation are extinguished and the judgment bars a subsequent action on those causes of action.
>
> (3) A judgment in favor of either the plaintiff or the defendant is conclusive, in any subsequent action between them, with respect to any issue actually litigated and determined if its determination was essential to that judgment.

The statute, as amended in 1990, embraces both claim preclusion (traditional res judicata) and issue preclusion (collateral estoppel). *Gabriel v. Lafourche Parish Water Dist.,* 12-0797 (La. App. 1 Cir. 2/25/13), 112 So. 3d 281, 285, *writ denied,* 13-0653 (La. 4/26/13), 112 So. 3d 848. Under issue preclusion or collateral estoppel, resolution of an issue of fact or law essential to the determination of the dispute precludes relitigation of the same issue in a different action between the same parties. *Gabriel,* 112 So. 3d at 285. In general, the doctrine of res judicata, as set forth in La. R.S. 13:4231, bars a subsequent action when all of the following elements are satisfied in a prior action: (1) the judgment is valid; (2) the judgment is final; (3) the parties are the same; (4) the cause or causes of action asserted in the second suit existed at the time of the final judgment in the first litigation; and (5) the cause or causes of action in the second suit arose out of the transaction or occurrence that was the subject matter of the first litigation. *Burguieres v. Pollingue,* 02-1385 (La. 2 /25/03), 843 So. 2d 1049, 1053.

In the present case, element three does not appear to be satisfied. Caterpillar asserts that since the trial court dismissed Louisiana Machinery, a co-defendant, the court found that the compactor was not defective at the time it left the seller; therefore, the compactor could not have been defective at the earlier time of manufacture by Caterpillar. Louisiana Revised Statute 13:4231 requires that the parties be the same for res judicata to apply. It is undisputed that Caterpillar and Louisiana Machinery are two different parties. Caterpillar was the manufacturer and Louisiana Machinery the seller of the compactor. Therefore, the exception of res judicata is denied.

Standard of Review

A motion for summary judgment is a procedural device used to avoid a full-scale trial when there is no genuine issue of material fact. *All Crane Rental of*

Georgia, Inc. v. Vincent, 10-0116 (La. App. 1 Cir. 9/10/10), 47 So. 3d 1024, 1027, *writ denied,* 10-2227 (La. 11/19/10), 49 So. 3d 387. Summary judgment is properly granted if the pleadings, depositions, answers to interrogatories, and admissions, together with affidavits, if any, admitted for purposes of the motion for summary judgment, show that there is no genuine issue of material fact and that the mover is entitled to judgment as a matter of law. La. C.C.P. art. 966B(2). Summary judgment is favored and designed to secure the just, speedy, and inexpensive determination of every action. La. C.C.P. art. 966A(2).

When reviewing a judgment granting a motion for summary judgment, appellate courts review evidence *de novo* under the same criteria that govern the trial court's determination of whether a summary judgment is appropriate. *All Crane,* 47 So.3d at 1027. On a motion for summary judgment, the burden of proof is on the mover. La. C.C.P. art. 966C(2). However, if the mover will not bear the burden of proof at trial on the matter that is before the court on the motion, the mover's burden does not require that all essential elements of the adverse party's claim, action, or defense be negated. Instead, the mover must point out to the court that there is an absence of factual support for one or more elements essential to the adverse party's claim, action, or defense. Thereafter, the adverse party must produce factual evidence sufficient to establish that he will be able to satisfy his evidentiary burden of proof at trial. If the adverse party fails to meet this burden, there is no genuine issue of material fact, and the mover is entitled to summary judgment as a matter of law. La. C.C.P. art. 966C(2); *All Crane,* 47 So.3d at 1027.

Louisiana Products Liability Act and Redhibition

It is undisputed that United Fire has filed suit for damage to the compactor and the economic loss that resulted from the loss of its use. There are no allegations of injury to any other person or property. Caterpillar argued at both the trial court level and on appeal that the LPLA does not apply to the present case,

because the LPLA excludes in its definition of damage any "damage to the product itself and economic loss arising from a deficiency in or loss of use of the product." La. R.S. 9:2800.53(8). Caterpillar relied upon *Monk v. Scott Truck & Tractor*, 619 So. 2d 890, 893 (La. App. 3 Cir. 1993). In *Monk,* the owner of a crane filed a third party demand against the manufacturers of the crane and a safety device, seeking indemnification or contribution for damages the owner owed to a worker injured in an industrial crane accident. The Third Circuit upheld the trial court's finding that the owner had no cause or right of action for contribution or indemnification, but it found that the owner did have a cause of action for redhibition against the manufacturers under LSA-C.C. art. 2545, and could amend his third party demand to seek such recovery. *Monk,* 619 So.2d at 893. The court further determined that the LPLA would not preclude recovery in redhibition for the owner's economic loss. *Monk,* 619 So.2d at 893; *Draten v. Winn Dixie of Louisiana, Inc.*, 94-0767 (La. App. 1 Cir. 3/3/95), 652 So. 2d 675, 677.

However, Caterpillar's argument that United Fire does not have a claim under the LPLA is misplaced. In *Monk,* the manufacturers argued that the exclusive theory of liability for manufacturers for damage caused by their products was the **LPLA**, and that the plaintiff was precluded from seeking damages in **redhibition**. The trial court in *Monk* stated:

> The LPLA was never intended to eliminate redhibition as a means of recovery against a manufacturer. We hold that the Act is exclusive only for the recovery against the manufacturer for "damage" as defined by La.R.S. 9:2800.53(5). This definition is:
>
> > (5) 'Damage' means all damage caused by a product, including survival and wrongful death damages, for which Civil Code Articles 2315, 2315.1 and 2315.2 allow recovery. 'Damage' includes damage to the product itself and economic loss arising from a deficiency in or loss of use of the product only to the extent that Section 3 of Chapter 6 of Title VII of Book III of the Civil Code, entitled 'Of the Vices of the Thing Sold,' does not allow recovery for such damage or economic loss. Attorneys'

> fees are not recoverable under this Chapter. (footnote designation omitted)
>
> The thinking of scholars who have written on this subject is that "redhibition survives only for economic loss. To the extent that the damage is compensable in redhibition, it is not damage under the Act. Hence, the Act's exclusivity provision does not prevent recovery for economic loss in redhibition." Galligan, *The Louisiana Products Liability Act: Making Sense of it All,* 49 La.L.Rev. 629, 645 (1989). The right to sue in redhibition for economic loss still exists. Kennedy, *A Primer on the Louisiana Products Liability Act,* 49 La.L.Rev. 565, 580-81 (1989).

Monk, 619 So. 2d at 893. In the present case, Caterpillar is attempting to construe the LPLA to mean that **redhibition** is the exclusive remedy for damages to products and the LPLA does not apply at all when redhibition is applicable. In *Bearly v. Brunswick Mercury Marine Div.,* 39,069 (La. App. 2 Cir. 10/27/04), 888 So. 2d 309, 312, the court determined that a boat, which the boat manufacturer allegedly assembled with an incompatible motor that was manufactured by another corporation, could be considered "unreasonably dangerous," within the meaning of the LPLA, even though no personal injury resulted from the boat's use by the boat buyer. The appellate court stated:

> [A]lthough [plaintiff] is claiming no personal injury from the defective product, the LPLA provides that damage under the Act "includes damage to the product itself and economic loss arising from a deficiency in or loss of use of the product only to the extent that Chapter 9 of Title VII of Book III of the Civil Code, entitled 'Redhibition,' does not allow recovery for such damage or economic loss." La. R.S. 9:2800.53(5). Although this provision and its relation to a claim in redhibition has been questioned by commentators concerning its clarity, **all seem to agree that the consumer will have a right to recover against the manufacturer for purely economic loss, whether under the LPLA or in redhibition.** Thomas C. Galligan, Jr., *The Louisiana Products Liability Act: Making Sense of It All,* 49 La. L.Rev. 629 (1989); William Crawford, *The Louisiana Products Liability Act,* 36 La. B.J. 172 (1988); John Kennedy, *A Primer on the Louisiana Products Liability Act,* 49 La. L.Rev. 565 (1989); Revision Comments, La. C.C. art. 2545.

Bearly, 888 So. 2d at 312 (emphasis added).

The LPLA makes clear that it is the exclusive remedy for damages unless redhibition is also claimed. The LPLA does not say that redhibition is the

exclusive remedy when redhibition applies. Caterpillar cites no cases where a redhibition claim is the exclusive remedy. Therefore, this court must determine if summary judgment was appropriate for either a LPLA claim or a redhibition claim.

Motion for Summary Judgment

United Fire asserts a products liability claim under the LPLA and a claim in redhibition under La. C.C. art. 2520.[3] Under the LPLA, a plaintiff must establish four elements: (1) that the defendant is a manufacturer of the product; (2) that the claimant's damage was proximately caused by a characteristic of the product; (3) that this characteristic made the product "unreasonably dangerous"; and (4) that the claimant's damage arose from a reasonably anticipated use of the product by the claimant or someone else. *See* La. R.S. 9:2800.54(A); *Jack v. Alberto-Culver USA, Inc.*, 06-1883 (La. 2/22/07), 949 So. 2d 1256, 1258.

Louisiana Revised Statutes 9:2800.54(B) provides:

> A product is unreasonably dangerous if and only if:
>
> (1) The product is unreasonably dangerous in construction or composition as provided in R.S. 9:2800.55;
>
> (2) The product is unreasonably dangerous in design as provided in R.S. 9:2800.56;
>
> (3) The product is unreasonably dangerous because an adequate warning about the product has not been provided as provided in R.S. 9:2800.57; or
>
> (4) The product is unreasonably dangerous because it does not conform to an express warranty of the manufacturer about the product as provided in R.S. 9:2800.58.

A product is unreasonably dangerous in construction or composition if, at the time the product left its manufacturer's control, the product deviated in a material way from the manufacturer's specifications or performance standards for

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[3] Although United Fire also asserts in its petition breach of warranty claims, as discussed above, the LPLA is the exclusive remedy available other than for the redhibition claims.

the product or from otherwise identical products manufactured by the same manufacturer. La. R.S. 9:2800.55. A product is unreasonably dangerous in design if, at the time it left the manufacturer's control, there existed an alternative design that was capable of preventing the claimant's damage and the likelihood and gravity of that damage outweighed the burden on the manufacturer of adopting the alternative design and any adverse effect on the product's utility. *See* La. R.S. 9:2800.56; *State Farm Mut. Auto. Ins. Co. v. Ford Motor Co.,* 04-1311 (La. App. 1 Cir. 6/15/05), 925 So.2d 1, 11. Alternatively, liability may be imposed on a manufacturer, pursuant to La. R.S. 9:2800.57, because an adequate warning about the product was not provided, or pursuant to La. R.S. 9:2800.58, because an express warranty was not complied with by the manufacturer.

To maintain an action in redhibition, the plaintiff must prove that the thing sold contained a hidden vice or defect, not apparent by ordinary inspection, which subsequently rendered the thing unfit for use, that the vice existed at the time of sale, and that the vendor did not advise the purchaser of it. *Edelman Sys., Inc. v. Capitol GMC, Inc.,* 345 So. 2d 99, 101 (La. App. 1 Cir.), *writ denied,* 347 So. 2d 250 (La. 1977). In addition, the defect must be of such a nature as to render the object purchased so inconvenient or imperfect that it gives rise to a presumption the buyer would not have bought it, had he known of that defect. *Dupuy v. Rodriquez,* 620 So. 2d 397, 400 (La. App. 1 Cir.), *writ denied,* 629 So. 2d 352 (La. 1993).

In order to establish a prima facie case of redhibition, a purchaser must show that a non-apparent defect existed at the time of the sale. *See* La. C.C. art. 2520 and 2530; *Cazaubon v. Cycle Sport, LLC,* 11-0289 (La. App. 1 Cir. 11/9/11), 79 So. 3d 1063, 1065 (finding the trial court erred in its determination that a defect existed in a motorcycle when the evidence was that the plaintiff did not know if there was a defect in the engine).

A plaintiff suing a manufacturer on the basis of a claimed injury resulting from a defect in a product has the burden of proving the product was defective and the defect caused plaintiff's injury. *Weber v. Fidelity & Casualty Insurance Co. of N.Y.,* 259 La. 599, 250 So. 2d 754 (1971). A plaintiff in a products liability action must prove that the product was defective, i.e., unreasonably dangerous to normal use; that the product was in normal use at the time the injury occurred; that the defect caused the injury; and that the condition existed when the product left the control of the manufacturer or supplier. Plaintiff must prove each of these elements by a preponderance of the evidence. *Johnson v. Lowes of Louisiana, Inc.,* 627 So. 2d 177 (La. App. 1 Cir.), *writ denied,* 625 So. 2d 167 (La. 1993). A preponderance of the evidence exists when the evidence, direct or circumstantial, taken as a whole shows that the fact of causation sought to be proved is more probable than not. *Jordan v. Travelers Insurance Company,* 257 La. 995, 245 So. 2d 151 (1971).

United Fire contends on appeal that the compactor was unreasonably dangerous due to a defect in the design of the engine, not that the gas leak was the defect. United Fire has neither briefed nor argued any claims related to breach of warranty agreements. Therefore, we deem those claims abandoned. La. Uniform Rules—Courts of Appeal, Rule 2-12.4; *Huang v. Louisiana State Board of Trustees for State Colleges and Universities,* 99-2805 (La. App. 1 Cir. 12/22/00), 781 So. 2d 1, 3 n.2. Under either the LPLA or redhibition, the plaintiff has the burden of proving a defect. Summary judgment is appropriate under either a LPLA claim or a redhibition claim if there is no evidence a product is defective. *See Loconte Partners, LLC v. Montgomery and Assoc., Inc.,* 116 So. 3d 904, 908 (La. App. 4 Cir. 5/15/13).

In support of its motion for summary judgment, Caterpillar presented the petition for damages; Caterpillar's responses to interrogatories; Louisiana

Machinery's responses to interrogatories and requests for production of documents; United Fire's responses to interrogatories of Caterpillar; and the depositions of Glen Strecker and George Casellas, experts for United Fire. The evidence submitted on behalf of Caterpillar was sufficient to point out an absence of factual support for one or more elements essential to United Fire's claim. Therefore, the burden shifted to United Fire to produce evidence sufficient to establish that it would satisfy its evidentiary burden of proof at trial. To support its position, United Fire submitted the petition for damages, the deposition of Mr. Casellas, and the deposition of Mr. Strecker.

Mr. Casellas, an expert in fire and explosion investigation, testified as to the cause of the fire as follows:

> I think the most likely cause was a fuel leak somehow. A fuel hose, fitting as I call it. Most likely mode of failure was a compromised diesel fuel hose, plug, valve, o-ring or fitting atomizing fuel into a hot surface basically and causing the fire.

Mr. Casellas also opined that the fire was concentrated on the right side of the machine, which is where all the fuel hoses and fittings were located. He also pointed out that the fuel pressure regulator assembly with all the hoses was totally gone, because it was consumed by the fire. Therefore, he concluded, "[w]here this particular component would have been located was pretty much the center point of the origin area of the fire in my opinion." Mr. Casellas determined that the ignition of diesel fuel was the most likely mode of failure. He ruled out an electrical ignition of the fire. Mr. Casellas believed that fuel in the form of a fine mist or spray may have made contact with an adjacent surface of some type to start the fire. Mr. Casellas also testified as to the cause of the fire:

> I would say more probable than not it was a fuel fire with the engine running. And then more probable than not it was fuel spray landing on a hot surface. And more probable than not also one of the fittings, hoses, or even the assembly itself ... the fuel pressure regulator assembly.

When asked to identify the surface on which the fuel ignited, he responded:

> The surface is – I've done hundreds of these diesel fuel fires where typically it's the manifold. It's the exhaust manifold, your turbocharger. It gets hot enough to ignite a mist of diesel fuel every time.

While Mr. Casellas testified where the fire started and how he thought the fire occurred, he offered no testimony as to a defect of the compactor. He attributed the fire to a fuel leak, but responded as follows during his deposition testimony:

> Q. Are you able at all to say with any degree of certainty or that more likely than not whatever caused whatever component we're talking about to leak could be attributable to some sort of [inherent] defect that existed in the machine at the time of its manufacture?
>
> A. I cannot specifically say what it could have been. Whether it was a manufacturing defect or whether it was a component defect.
>
> Q. Could it have been—
>
> A. Something that might have just come loose in the ordinary course of its operation from the vibrations.

United Fire contends in its brief that it can be deduced from Mr. Casellas's testimony that the defect was not the gas leak itself, but Caterpillar's engine design. We agree with Caterpillar that Mr. Casellas did not testify that the engine was defective due to a lack of wrap or insulation, as Untied Fire asserts. He did testify that the manifold of the compactor was wrapped, but that it had burned away in the fire. He also explained that the wrapping is to protect people who may touch the manifold and get burned, not to keep fuel from landing on the manifold.

Finally, Mr. Casellas agreed that he **could not** say that the fire resulted from an inherent defect that existed in the machine at the time it left Caterpillar. Furthermore, he could not identify the component part which failed. Mr. Casellas admitted that fires occur in equipment that is powered by diesel engines, and those fires can result from many different things. He further agreed that fuel leaks can

occur and do occur all the time due to the operation or vibration of a diesel engine. He also conceded that a fuel leak which occurs in a diesel engine does not render the product defective in design. Mr. Strecker, an expert in the cause and origins of fires, also could not say that an inherent defect existed in the compactor at the time it left Caterpillar. Therefore, there is no direct evidence that the fire was caused by a defect in the design of the compactor.

The LPLA requires a claimant to establish that an alternative design existed at the time the product left the manufacturer's control which would have prevented the alleged injury and that the risk avoided by the alternative design outweighed the burden of its adoption. *See* La. R.S. 9:2800.56; *Seither v. Winnebago Industries, Inc.*, 02-2091 (La. App. 4 Cir. 7/2/03), 853 So. 2d 37, 40, *writ denied,* 03-2797 (La. 2/13/04), 867 So. 2d 704. United Fire offered no evidence as to an alternative design for the compactor. Furthermore, although United Fire's experts opined concerning possible causes of the fire and where the fire started, they did not testify as to a defect in the compactor.

United Fire claims that there is circumstantial evidence that the fire was caused by a defect. United Fire claims that it presented a prima facie case as to a defect in the compactor, and that it properly invoked the doctrine of *res ispa loquitur* to meet its evidentiary burdens on causation.

The existence of a defect cannot be inferred solely from the fact that an accident occurred. *Lawson v. Mitsubishi Motor Sales of Am., Inc.*, 05-0257 (La. 9/6/06), 938 So. 2d 35, 48; *Ashley v. General Motors Corp.*, 27,851 (La. App. 2 Cir. 1/24/96), 666 So. 2d 1320; *see Blue Ridge Ins. Co. v. Belle Alliance Homes, Inc.*, 408 So. 2d 417, 422 (La. App. 1 Cir. 1981)(refusing to infer a defect solely from fact that a fire occurred); *Laconte,* 116 So. 3d at 910 (fact that roof leaked insufficient to establish a defective roof and defeat summary judgment); *Western Cas. & Sur. Co. v. Adams,* 381 So. 2d 923, 925 (La. App. 3 Cir. 1980). However,

a manufacturing defect may be established by circumstantial evidence under the evidentiary doctrine of *res ispsa loquitur. Lawson,* 938 So. 2d at 48 (citing *Williams v. Emerson Elec. Co.,* 909 F.Supp. 395, 398 (M.D. La. 1995); *Randolph v. General Motors Corp.,* 93-1983 (La. App. 1 Cir. 11/10/94), 646 So. 2d 1019, 1024, *writ denied,* 95-0194 (La. 3/17/95), 651 So. 2d 276; *State Farm Mut. Auto. Ins. Co. v. Wrap-On Co., Inc.,* 626 So.2d 874 (La. App. 3 Cir.1993), *writ denied,* 93-2988 (La.1/28/94), 630 So.2d 800; *see also Rey v. Cuccia,* 298 So. 2d 840, 842-43 (La. 1974)(statutorily overruled on other grounds).[4] The *res ispsa loquitur* doctrine means that the circumstances surrounding an accident are so unusual as to give rise to an inference of negligence or liability on the part of the defendant. Under such circumstances, the only reasonable and fair conclusion is that the accident resulted from a breach of duty or omission on the part of the defendant. *Lawson,* 938 So. 2d at 48. The purpose of *res ipsa loquitur* is evidentiary, as it does not create a cause of action. *Id.*

The theory of *res ipsa loquitur* has been applied in a products liability context when the court is presented with circumstantial evidence that excludes other reasonable hypotheses with a fair amount of certainty. *Williams,* 909 F.Supp. at 398; *Wrap-On Co., Inc.,* 626 So. 2d at 877. It is a rule of circumstantial evidence that should be sparingly applied. *Spott v. Otis Elevator Co.,* 601 So. 2d 1355, 1362 (La. 1992).

United Fire relies upon *Williams* and asserts that circumstantial evidence can be used to prove a manufacturing defect. While we agree with that statement, there is no circumstantial evidence in the present case that rises to the level that "the only reasonable and fair conclusion is that the accident resulted from a breach of duty or omission on the part of the defendant." *Jurls v. Ford Motor Co.,* 32,125 (La. App. 2 Cir. 1/6/00), 752 So. 2d 260, 265. Unlike *Williams,* where the product

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4 *See* 1993 La. Sess. Law Serv., Act 841.

was virtually brand new, the compactor at issue was a year and a half old, had been used approximately 3107 hours, and had maintenance performed on it by Tangipahoa Parish prior to the fire. While Mr. Casellas testified that debris in the engine should have been removed with maintenance, there is no evidence in the record that this was done on the compactor. Mr. Casellas believed that the fire was caused by a compromised diesel fuel hose fitting, valve ring, or O-ring, but he could not say that whichever component failed was original to the machine. Mr. Casellas also agreed that a leaking fuel hose was not necessarily indicative of an inherent defect. Given the record before us, this court finds that the evidence does not support the unusual circumstance required for application of *res ipsa loquitur*. Therefore, United Fire failed to negate any other reasonable causes of the fire.

There is no evidence that Caterpillar's design was unreasonably dangerous in normal use or contained a redhibitory defect. United Fire's own expert agreed that fuel leaks occur in diesel engines from causes other than a defect in design or manufacture. At trial, United Fire would have the burden of proving by a preponderance of evidence that a characteristic of the compactor made it unreasonably dangerous or defective. The only circumstantial evidence offered by United Fire is that a fire occurred in the compactor. The record does not contain sufficient evidence from which a reasonable fact-finder could conclude that more probably than not the fire was caused by a defective condition of the compactor. Consequently, we cannot say that the trial court erred in granting summary judgment.

CONCLUSION

For the reasons set forth above, the summary judgment against United Fire Group, dismissing its claims against Caterpillar, Inc., is affirmed. Costs of the appeal are assessed against United Fire Group.

AFFIRMED.