STATE OF LOUISIANA

COURT OF APPEAL

JEW

FIRST CIRCUIT

* * * * * * *

2019 CA 1165

EXPERT RISER SOLUTIONS, LLC

VERSUS

TECHCRANE INTERNATIONAL, LLC

JUDGMENT RENDERED: DEC 3 0 2020

* * * * * * *

Appealed from the
Twenty-Second Judicial District Court
In and for the Parish of St. Tammany • State of Louisiana
Docket Number 2017-11295 • Division "E"

The Honorable William H. Burris, Judge Presiding

* * * * * * *

Lawrence R. DeMarcay, III
New Orleans, Louisiana

ATTORNEY FOR APPELLANT,
PLAINTIFF—ExPert Riser
Solutions, LLC

J. Scott Loeb
Lauren Fajoni Bartlett
Mandeville, Louisiana
and
Sam J. Collet, III
Bailey D. Morse
Covington, Louisiana

ATTORNEYS FOR APPELLEE,
DEFENDANT—Techcrane
International, LLC

* * * * * *

BEFORE: WHIPPLE, C.J., MCCLENDON, WELCH, HIGGINBOTHAM, AND HOLDRIDGE, JJ.

VGW C.J. by JEW
PMc by JEW
TMH
Whipple C.J. concurs and assigns reasons.
McClendon J. concurs and assigns reasons
Higginbotham, J. concurs with reasons assigned by J McClendon.
Holdridge J. concurs with reasons

WELCH, J.

The plaintiff, ExPert Riser Solutions, LLC ("ExPert"), appeals a trial court judgment sustaining the peremptory exception raising the objection of no cause of action filed by the defendant, Techcrane International, LLC ("Techcrane"), and dismissing ExPert's claims against Techcrane, with prejudice. For reasons that follow, we reverse the judgment of the trial court.

FACTUAL AND PROCEDURAL HISTORY

We borrow from our earlier opinion in this matter, **ExPert Riser Solutions, LLC v. Techcrane International, LLC**, 2018-0612 (La. App. 1st Cir. 12/28/18), 270 So.3d 655, 658-659:

> ExPert ... supplies marine risers to the oil and gas industry. In December 2012, ExPert entered a contract with Weatherford wherein ExPert agreed to provide dockside facilities and services to Weatherford at Ex[P]ert's facility in Port Fourchon, Louisiana. ExPert further agreed to have a dedicated crane to support the services outlined in the Weatherford contract. Because it did not have a crane that met the contract's load requirements, ExPert solicited bids from several crane manufacturers, including ...Techcrane ... to have a new crane constructed.
>
> Techcrane issued a written proposal to ExPert in January 2012 for the production and installation of an API 2C Monogramed Crane Model L300-160 Pedestal Mounted Hydraulic Marine Crane for the price of $1,699,000. As set forth in the proposal, a standard L-300-160 model crane includes a main hoist equipped with an 80-ton traveling block and a maximum lifting weight of 140,000 pounds (70 tons) using a four-part line. According to ExPert, the parties agreed that the crane would be constructed to accommodate an eight-part line with a 150-ton traveling block (purchased separately)[,] which would allow the crane to lift 100 tons. According to the petition, "Expert's operational needs required a crane at its facility that [was] capable of lifting 100 tons due to the weight of telescopic joints of riser that are routinely handled at the facility." The crane was to be built in accordance with industry requirements and standards, including all welds, and have a minimum design life of 25 years.
>
> ExPert accepted Techcrane's proposal in March 2012 [("the contract")] and installation and commissioning began in April 2013. Almost immediately, ExPert began experiencing mechanical and technical problems with the crane, including "popping" noises emanating from the crane's rotating gears and twisted bridle sheaves. Techcrane advised ExPert that the twists in the bridle were normal and explained that the noise was caused by the rotating gears

"seating" with each other. Techcrane assured ExPert the noise would subside once the gears were fully "seated."

Soon after installation in 2013, ExPert learned that the crane could not be fitted with an eight-part line and, therefore, could not reach the agreed-upon 100-ton lifting capacity. At the time, Techcrane's service mechanics advised ExPert that the boom tip on the crane was too small and too narrowly designed to accommodate the eight-part reeving. The crane was also damaged during Techcrane's effort to retrofit the crane and, as a result, its lifting rating was reduced to 75 tons.

The mechanical problems with the crane persisted, including hydraulic fluid overheating and leaks, which caused the hydraulic motors, pumps, brakes, and clutches to fail prematurely. As a result of the on-going problems with the crane, and at Expert's request, Southern Crane and Hydraulics, LLC performed an inspection of the crane in October 2013 and provided ExPert with a list of items that required repair and/or further investigation. Significantly, in October 2013, Southern Crane advised ExPert that the pendent line twisting problems and the noise from the rotating gears or bearings needed further investigation. Southern Crane also identified several parts of the crane that were improperly installed and items that were included in Techcrane's proposal but not actually delivered or installed by Techcrane. According to ExPert, it was "unaware that it had been shortchanged by Techcrane until receiving the Southern Crane report."

Problems with the crane continued, resulting in periods of extensive down time and costing ExPert thousands of dollars in maintenance expenses over the next two years. In October 2016, ExPert retained Oil States Skagit Smatco, LLC [("Oil States")] to perform an inspection and engineering study on the crane to determine whether it was defective. Oil States concluded that the crane was constructed improperly and was unfit for service. Among other things, Oil States identified the roller bearing as the cause of the crane's on-going rotation problems, not "seating" of the rotating gears, and observed signs of defective or damaged welds, some of which were determined to be structural cracks. After the cracks and welds were repaired, the crane was placed back into service, but its capacity was downgraded to light duty operations. Oil States further advised that the crane's rotating bearing needed to be repaired before the crane could be used reliably. However, in lieu of spending $1 million to fix the rotating bearing, ExPert elected to replace the crane in October 2016.

ExPert filed suit against Techcrane on March 20, 2017. The petition specifically identified eight causes of action: breach of contract, redhibition, negligent misrepresentation, fraud/fraudulent inducement, breach of express warranties, tort negligence, and the Louisiana Unfair Trade Practices Act [("LUTPA")].

> In response to Ex[P]ert's petition, Techcrane asserted exceptions raising the objections of no cause of action and prescription. In its exception of no cause of action, Techcrane argued that Expert's claims were governed by the [Louisiana Products Liability Act, La. R.S. 9:2800.52, *et seq.*, ("LPLA")] and redhibition, and as a result, the exclusivity provisions of the LPLA barred the remaining causes of action asserted by ExPert. In its exception of prescription, Techcrane asserted that Expert's redhibition and LPLA causes of action were prescribed because ExPert was aware of the alleged defects in the crane more than one year before filing suit.
>
> ExPert opposed both exceptions. In response to the exception of no cause of action, ExPert maintained that the LPLA did not apply because its claims were not based on damages caused *by* Techcrane's products. Accordingly, ExPert argued that its additional theories of recovery were not barred by the LPLA and, instead, may proceed along with a claim for redhibition. With regard to the exception of prescription, ExPert contended that it was not aware that the crane was defective until it received Oil States' report in April 2016. Prior to that time, ExPert believed the crane was a "repair headache" but was unaware of the extent of the defects in the crane.
>
> A hearing on the exceptions took place on October 26, 2017. The trial court [sustained] the [objection] of prescription, pretermitted consideration of the [objection] of no cause of action, and dismissed Ex[P]ert's suit with prejudice. ... ExPert timely [appealed] ....

On appeal, this Court affirmed that portion of the judgment sustaining Techcrane's objection of prescription and dismissing ExPert's claims in redhibition. However, this Court reversed that portion of the judgment dismissing the suit with prejudice. This Court reasoned that because there was no ruling by the trial court on the objection of no cause of action, those causes of action that were not dismissed by Techcrane's objection of prescription were still pending. Therefore, the matter was remanded for further proceedings. See **ExPert Riser Solutions, LLC**, 270 So.3d at 663-64.[1]

On remand, Techcrane's objection of no cause of action was reset for hearing. Following a hearing on March 8, 2019, the trial court sustained the objection, stating in its oral reasons, "I think the LPLA is the exclusive remedy.

[1] Notably, in **Expert Riser Solutions, LLC**, 270 So.3d at 663-664, other than determining that ExPert's claims in redhibition were properly dismissed on the basis of prescription, this Court made no express determination as to what claims of ExPert were still pending. For reasons set forth below in footnote 2, we find that ExPert's claims for breach of express warranties and tort negligence sound in redhibition.

There are a couple [of] exceptions to that. I don't think any of the exceptions apply here." On March 15, 2019, the trial court signed a judgment in accordance with its oral ruling, sustaining the objection of no cause of action and dismissing ExPert's suit, with prejudice.

ExPert has again appealed, arguing that the trial court erred in sustaining the objection of no cause of action and in dismissing its suit with prejudice because its remaining claims were separate and distinct claims that were not prohibited by the LPLA.

LAW AND DISCUSSION

No Cause of Action

An exception of no cause of action tests the legal sufficiency of the petition by determining whether the law extends a remedy against the defendant to anyone under the factual allegations of the petition and is triable on the face of the petition alone. **ExPert Riser Solutions, LLC**, 270 So.3d at 663. No evidence may be introduced to support or controvert the objection of no cause of action. La. C.C.P. art. 931. Therefore, the court reviews the petition and accepts well-pleaded allegations of fact as true. **Everything on Wheels Subaru, Inc. v. Subaru South, Inc.**, 616 So.2d 1234, 1235 (La. 1993). If the allegations of the petition state a cause of action as to any part of the demand, the exception must be overruled. **Pitre v. Opelousas General Hospital**, 530 So.2d 1151, 1162 (La. 1988).

An exception of no cause of action should be granted only when it appears beyond doubt that the plaintiff can prove no set of facts in support of any claim that would entitled him to relief. **ExPert Riser Solutions, LLC**, 270 So.3d at 663. Every reasonable interpretation must be accorded the language used in the petition in favor of maintaining its sufficiency and affording the plaintiff the opportunity of presenting evidence at trial. *Id.* If there are two or more items of damages or theories of recovery that arise out of the operative facts of a single transaction or

occurrence, a judgment sustaining a partial objection of no cause of action should not be rendered to dismiss an item of damages or theory of recovery. *Id.* If the petition states a cause of action on any ground or portion of the demand, the exception should generally be overruled. *Id.*

An appellate court conducts a *de novo* review of a trial court's ruling sustaining a peremptory exception raising the objection of no cause of action because the exception raises a question of law and the trial court's decision is based only on the sufficiency of the petition. **Industrial Companies, Inc. v. Durbin**, 2002-0665 (La. 1/28/03), 837 So.2d 1207, 1213.

In Techcrane's objection of no cause of action, it contends that since it is a manufacturer, the LPLA sets forth the exclusive theories of liability that may be asserted against it for its products, and that ExPert's remaining claims fail to state a cause of action against it under the LPLA. However, ExPert maintains that while some of the claims asserted in its petition involve defects with the crane, its remaining claims[2] are not based on the defective nature of the crane, but rather concern Techrane's actions (or inactions) related to the marketing, negotiating, delivery, and installation of a crane that failed to meet the specifications for the crane provided by the contract. Therefore, ExPert argues that the LPLA does not apply to such claims, that its remaining claims or causes of action are not barred by

[2] As previously set forth, ExPert's petition asserted claims against Techcrane for breach of contract, redhibition, negligent misrepresentation, fraud/fraudulent inducement/misrepresentation, breach of express warranties, tort negligence, and violations of LUTPA. In **ExPert Riser Solutions, LLC**, 270 So.3d at 663-664, this Court determined that ExPert's claims in redhibition have prescribed. With respect to ExPert's claims for breach of express warranties and negligence in the design, construction, and installation of the crane, we note that ExPert's factual allegations with regard to those claims focus on defects or deficiencies in the crane and the resulting economic damages caused by the crane. As such, we find that those claims sound in redhibition. See La. C.C. arts. 2520 and 2545, and the comments therein. Accordingly, we interpret the dismissal of the redhibition claims on the basis of prescription in **ExPert Riser Solutions, LLC**, 270 So.3d at 663-664, as inclusive of ExPert's redhibition-based claims of breach of express warranties and negligence. Therefore, herein, we consider ExPert's remaining claims to be breach of contract, negligent misrepresentation, fraud/fraudulent inducement/misrepresentation, and violations of LUTPA.

the LPLA's exclusivity provision, and the objection of no cause of action should have been overruled.

The LPLA was enacted by the Louisiana Legislature in 1988. See 1988 La. Acts, No. 64, §1, eff. Sept. 1, 1988. Although the LPLA contains no statutorily stated purpose, it was drafted with two objectives in mind: (1) to strike an equitable balance between the right of a claimant who is in injured in a product-related accident to just compensation and the right of the product's manufacturer to be judged fairly, and (2) to bring added clarity, precision, and certainty to Louisiana's products liability doctrine. Kennedy, *A Primer on the Louisiana Products Liability Act*, 49 La. L.Rev. 571, 626 (1989).[3]

The LPLA "establishes the exclusive theories of liability for manufacturers *for damage caused by their products*. A claimant may not recover from a manufacturer for *damage caused by* a product on the basis of any theory of liability that is not set forth in" the LPLA. La. R.S. 9:2800.52 (Emphasis added). The scope of the LPLA is "that a products liability plaintiff may no longer recover in Louisiana from a manufacturer on the basis of any theory of *tort liability* that is not set forth in the LPLA." Kennedy, *A Primer on the Louisiana Products Liability Act*, 49 La. L.Rev. at 571 (Emphasis added).

The LPLA defines "damage" as follows:

> "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 Chapter 9 of Title VII of Book III of the Civil Code, entitled "Redhibition," does not allow recovery for such damage or economic loss. Attorneys fees are not recoverable under this Chapter.

[3] The author of this law review article, John Kennedy, along with former professor H. Alston Johnson, III, drafted the LPLA. During the session in which the Louisiana Legislature enacted the LPLA, Mr. Kennedy worked for its passage as Special Counsel to then Governor Buddy Roemer. Kennedy, *A Primer on the Louisiana Products Liability Act*, 49 La. L.Rev. at 565 n.1.

La. R.S. 9:2800.53(5) (Emphasis added).[4] "In other words, the LPLA governs products liability *in tort* and recovery under the statute will normally be limited to recovery for personal injury and damage to property other than the product itself, which properly are the subject of a products liability *tort claim*." Kennedy, *A Primer on the Louisiana Products Liability Act*, 49 La. L.Rev. at 580 (Emphasis added). "Recovery for damage to the product itself or economic loss arising from a deficiency in or loss of use of the product will normally not be compensable under the LPLA, because those items of damage properly are the subject of a claim in redhibition for breach of implied warranty." *Id.*[5] Thus, the LPLA is the exclusive form of recovery against a manufacturer only for those damages as defined by the Act. However, the Act does not preclude recovery from a manufacturer for damages for economic loss due in a redhibition claim. **Draten v. Winn Dixie of Louisiana, Inc.**, 94-0767 (La. App. 1st Cir. 3/3/95), 652 So.2d 675, 678; **Monk v. Scott Truck & Tractor**, 619 So.2d 890, 893 (La. App. 3rd Cir. 1993). See also **Morris v. United Services Auto. Ass'n**, 32,528 (La. App. 2nd Cir. 2/18/00), 756 So.2d 549, 561; **United Fire Group v. Caterpillar, Inc.**, 2013-2115 (La. App. 1st Cir. 8/18/14) (*unpublished*), 2014 WL 4067756 at *4.

Redhibition claims are governed by Chapter 9 of Title VII of Book III of the Louisiana Civil Code, *i.e.*, La. C.C. arts. 2520, *et seq.* A defect is redhibitory when it renders the thing useless, or its use so inconvenient that it must be presumed that a buyer would not have bought the thing had he known of the defect. La. C.C. art. 2520. A defect is also redhibitory when, without rendering the thing totally useless, it diminishes its usefulness or its value so that it must be presumed that a

---

[4] Louisiana Revised Statutes 9:2800.54 sets forth both a manufacturer's responsibility under and the burden of proof in an LPLA claim.

[5] If, however, a claimant cannot proceed in redhibition for some reason (*i.e.* there was no sale and the consumer acquired the product by donation0, he can recover his damages in redhibition under the LPLA. Kennedy, *A Primer on the Louisiana Products Liability Act*, 49 La. L.Rev. at 580, fn. 70.

buyer would still have bought it but for a lesser price. *Id.* See also **ExPert Riser Solutions, LLC**, 270 So.3d at 660. A manufacturer is presumed to know the defects in its products and is liable to the buyer for all damages caused by the defects under La. C.C. art. 2545.

As previously determined in **ExPert Riser Solutions, LLC**, 270 So.3d at 663-664, ExPert's claims in redhibition have prescribed. ExPert argues that its remaining claims are unrelated to damages *caused by* Techcrane's product and/or are not a liability action that could potentially fall within the scope of La. C.C. arts. 2315, 2315.1, and 2315.2; thus, the LPLA is inapplicable to such claims. Stated differently, ExPert contends that its remaining claims against Techcrane are not based on personal injury tort claims (or based on a product-related accident) or damage to property that would fall under either the exclusivity provisions of the LPLA or under redhibition. While ExPert acknowledges that it made allegations of a defect in the crane to support its redhibition claims, its other claims are separate and distinct from the claims of a defective product and are based on different facts. We agree.

With respect to breach of contract, which has a ten-year prescriptive period pursuant to La. C.C. art. 3499, ExPert points out that such claim is not based on damage caused by or to the crane but, rather, relate to the requirements of the contract and whether Techcrane delivered a crane that met the requirements of that contract. According to the petition, the parties contracted for the production and installation of an API 2C Monogramed Crane Model L300-160 Pedestal Mounted Hydraulic Marine Crane ("L300-160 model crane"). While a standard L300-160 model crane includes a main hoist equipped with a 75-ton traveling block and a maximum lifting weight of 140,000 pounds (70 tons) using a four-part line, the L300-160 model crane that Techcrane was to construct and install for ExPert included an upgrade with a main hoist equipped with a 150-ton traveling block and

a maximum lifting weight of 100 tons using an eight-part line. ExPert required a dedicated crane with this maximum lifting weight or load requirement so that it could meet its contractual obligations for dockside facilities and services to Weatherford. The L300-160 model crane constructed and installed by Techcrane did not contain the upgrade of an eight-part line and could not lift 100 tons. When Techcrane's efforts to retrofit the crane with the upgrade failed, the crane lifting capacity was further reduced. These allegations—that the crane actually constructed and installed by Techcrane did not meet the requirements of the crane set forth in the contract (*i.e.* it was not fitted with an eight-part line and could not lift 100 tons)—are unrelated to the allegations concerning the defective nature of the crane.

In addition to an action in redhibition, a buyer enjoys remedies in contract. **Kite Bros. LLC v. Alexander**, 2019-488 (La. App. 3rd Cir. 12/18/19), 286 So.3d 1170, 1174. Louisiana Civil Code article 2524, although appearing in Chapter 9 of Title VII of Book III concerning redhibition, affords the buyer additional remedies by providing:

> The thing sold must be reasonably *fit for its ordinary use.*
>
> When the seller has reason to know the particular use the buyer intends for the thing, or the buyer's particular purpose for buying the thing, and that the buyer is relying on the seller's skill or judgment in selecting it, the thing sold must be *fit for the buyer's intended use or for his particular purpose.*
>
> If the thing is not so fit, the buyer's rights are governed by the general rules of conventional obligations.

(Emphasis added).

Under this article when the thing sold is not fit for its ordinary use, even though it is free from redhibitory defects, the buyer may seek dissolution of the sale and damages, or just damages, under the general rules of conventional obligations. The buyer's action in such cases is one for breach of contract and not

the action arising from the warranty against redhibitory defects. La. C.C. art. 2524, 1993 Revision Comment (b).

Additionally, La. C.C. art. 2529 provides that "[w]hen the thing the seller has delivered, though in itself free from redhibitory defects, is not of the kind or quality specified in the contract or represented by the seller, the rights of the buyer are governed by other rules of sale and conventional obligations." "Things do not conform to the contract when they are different from those selected by the buyer or are of a kind, quality, or quantity different from the one agreed." La. C.C. art. 2603.

Therefore, in cases where claims against a seller for breach of contract are available, such claims are governed by the general rules of sales and obligations. See **LaPlace Concrete, Inc. v. Stallings Const. Co., Inc.**, 01-0131 (La. App. 4th Cir. 12/5/01), 803 So.2d 1015, 1017 (plaintiff's breach of contract claim for concrete that failed to meet the specifications for a particular job was a claim for breach of contract for delivering a product that was not the product contracted for, not that the product that was contracted for and delivered was faulty). However, if the action arises from damages caused by the defective nature of the product, then purchaser's remedy is either the LPLA or redhibition. See **Bottinelli Real Estate, L.L.C. v. Johns Manville, Inc.**, 2019-0619 (La. App. 4th Cir. 12/27/19), 288 So.3d 179, 185 (plaintiff's breach of contract claim relating to defendant's violation of roofing guarantees based on claims of a defective roof was a claim in redhibition) and **Stewart Interior Contractors, L.L.C. v. MetalPro Industries, L.L.C.**, 2013-0922 (La. App. 4th Cir. 1/8/14), 130 So.3d 485, 489, writ denied, 2014-0466 (La. 4/17/14), 138 So.3d 630 (plaintiff's breach of contract claim based on defects in metal studs for drywall was a claim in redhibition).

In cases where there is both a claim for breach of contract and a claim in redhibition, the cases are less clear as to whether the breach of contract claim can

survive independently of a claim in redhibition. In **American Zurich Ins. Co. v. Caterpillar, Inc.**, 2012-270 (La. App. 3rd Cir. 10/3/12), 99 So.3d 739, 743, regarding an LPLA claim, the third circuit, citing the federal case of **Hollybrook Cottonseed Processing, LLC v. Carver, Inc.**, No. 09-0750, 2010 WL 892869 at *6 (W.D. La. 3/11/10), stated that "courts have been inconsistent and unclear in determining when and if a buyer can bring a breach of contract claim against a manufacturer." The court continued:

> While the exclusivity provision of the LPLA leaves no doubt breach of contract claims against manufacturers for *damages caused by their products* are subsumed by the LPLA, in cases where a specific *part of the injury is caused only by the breach of contract, and not by the product itself,* a buyer *might* be able to bring both types of claims against a manufacturer. The Court holds that in the limited circumstances where a buyer sues a manufacturer for economic damages not covered in redhibition and not caused by the product itself, it may bring a breach of contract claim for those damages, on its own or in addition to a claim for other damages under the LPLA or redhibition.

American Zurich Ins. Co., 99 So.3d at 743 (emphasis added)(citing **Hollybrook Cottonseed Processing, LLC**, 2010 WL 892869 at *7). See also **Jack B. Harper Contractor, Inc. v. United Fiberglass of America, Inc.**, No. 11-20, 2012 WL 2087394 at *2 (E.D. La. 6/8/12)(finding that "in cases where a specific part of the injury is caused only by the breach of contract and not by the product itself, a buyer may be able to bring both types of claims [(*i.e.*, claims for damages under LPLA or redhibition and claims for breach of contract under La. C.C. art. 2524 and/or 2529)] against a manufacturer.") In other words, when a part of a buyer's injuries or damages are caused by the product or are covered in redhibition and part of its injuries are a result of a breach of contract, a buyer may bring both a breach of contract claim for those damages on its own or in addition to a claim for other damages under the LPLA or redhibition. Indeed, it would defy common sense and logic to find that a buyer does not have a breach of contract claim

against a manufacturer for its failure to deliver a thing specified by a contract merely because the thing was also defective.

In this case, there is no dispute that ExPert's petition alleges damages covered by redhibition and that those claims are prescribed. However, ExPert's petition does not allege personal injury tort damages caused by the crane itself, such that its claims would fall under the LPLA. Rather, as set forth above, ExPert's petition alleges that Techcrane constructed and delivered or installed a crane that did not meet the requirements of the contract—the crane was not fitted with the upgrade of an eight-part line and could not lift 100 tons nor could it be retrofitted for such upgrade. ExPert also alleged that as a result of Techcrane's failure to provide such a crane that met its requirements, ExPert had to purchase a new crane (a Nautilus 1500L) at a cost significantly more than the Techcrane L300-160 crane in order to meet its contractual obligations to Weatherford. Thus, ExPert alleged that as a result of Techcrane's breach of contract, it sustained economic damages not covered by redhibition and that were not caused by the product itself. Therefore, accepting all of the allegations of fact set forth in ExPert's petition as true, we find that ExPert has stated a cause of action for breach of contract.

Furthermore, we find that ExPert's claims of negligent misrepresentation, fraud/fraudulent inducement/misrepresentations, and violations of LUTPA, arise out of the same operative facts (or factual allegations) as ExPert's breach of contract claim (*i.e.*, misrepresenting that the design capacity of the L300-160 model crane sold and delivered to ExPert met the specifications of the contract when it did not or that it could be upgraded to meet such specifications when it could not). Therefore, Techcrane's peremptory exception raising the objection of no cause of action should have been overruled and we reverse the judgment of the trial court sustaining Techcrane's objection of no cause of action and dismissing

ExPert's claims with prejudice. See **State ex rel. Caldwell v. Takeda Pharmaceuticals America, Inc.**, 2015-1413 (La. App. 1st Cir. 4/15/16), 2016 WL 1545845 at *3; **John River Cartage, Inc. v. Louisiana Generating, LLC**, 2018-1611 (La. App. 1st Cir. 12/19/18), 2018 WL 6629472 at *6, writs denied, 2019-0122 and 2019-0111 (La. 4/15/19), 267 So.3d 1122 and 1129.[6]

CONCLUSION

For all of the above and foregoing reasons, we reverse the March 15, 2019 judgment of the trial court. All costs of this appeal are assessed to Techcrane International, LLC.

REVERSED.

[6] Since we have determined herein that the trial court erred in sustaining the objection of no cause of action and in dismissing ExPert's claims against Techcrane, we need not address the trial court's failure to give ExPert the opportunity to amend its petition as required by La. C.C.P. art. 934.

VGW

EXPERT RISER SOLUTIONS, LLC **STATE OF LOUISIANA**

COURT OF APPEAL

VERSUS

FIRST CIRCUIT

TECHCRANE INTERNATIONAL, LLC **NUMBER 2019 CA 1165**

WHIPPLE, C.J., concurring.

In its petition, the plaintiff specifically alleges that the crane was to be delivered within six months of acceptance of the agreement and commissioned within one week of its delivery. The plaintiff further alleges that the crane was delivered four months after its promised delivery date and that plaintiff is seeking damages for the costs and lost revenue associated with the delay in delivery of the crane. These allegations are listed under Count I, breach of contract, in the petition for damages and, in my view, are not claims in redhibition. See LSA-C.C. art. 1994, found in Title IV, Conventional Obligations or Contracts, Book III, Of the Difference Modes of Acquiring the Ownership of Things ("An obligor is liable for the damages caused by his failure to perform a conventional obligation. A failure to perform results from nonperformance, defective performance, or delay in performance."). Thus, because this appears to be one of those "limited circumstances" where a claim may exist for breach of contract (and resulting damages arising from delay in delivery), I agree that the trial court erred in sustaining the exception raising the objection of no cause of action. Thus, I agree with the majority that the judgment of the trial court should be reversed.

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2019 CA 1165

EXPERT RISER, LLC

VERSUS

PMc dwg TCW **TECHCRANE INTERNATIONAL, LLC**

****

McClendon, J., concurring.

Although ExPert Riser has alleged not only that the crane was defective, but also that the crane itself did not meet the requirements set forth in the sales contract, it is undisputed that all of the claims asserted by ExPert Riser in this matter arise from the sale of the same crane. The majority concludes that Expert Riser is entitled to seek recovery under both redhibition and breach of contract.

A plain reading of the language of the LPLA demonstrates that the LPLA, and by reference Chapter 9 of Title VII of Book III of the Civil Code, entitled "Redhibition," "establishes the exclusive theories of liability for manufacturers for damage caused by their products. A claimant may not recover from a manufacturer for damage caused by a product on the basis of any theory of liability not set forth in [the LPLA]." The LPLA defines "damage" as all damage caused by a product. Further, "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 Chapter 9 of Title VII of Book III of the Civil Code, entitled "Redhibition," does not allow recovery for such damage or economic loss. LSA-R.S.9:2800.52.

Of particular importance in this matter are Articles 2524 and 2529, located in the chapter on redhibition in the Civil Code. Article 2524 provides:

> The thing sold must be reasonably fit for its ordinary use.
>
> When the seller has reason to know the particular use the buyer intends for the thing, or the buyer's particular purpose for buying the thing, and that the buyer is relying on the seller's skill or judgment in

> selecting it, the thing sold must be fit for the buyer's intended use or for his particular purpose.
>
> If the thing is not so fit, the buyer's rights are governed by the general rules of conventional obligations.

Addditionally, Article 2529, also located in Chapter 9 of Title VII of Book III of the Civil Code, entitled "Redhibition," provides:

> When the thing the seller has delivered, **though in itself free from redhibitory defects**, is not of the kind or quality specified in the contract or represented by the seller, the rights of the buyer are governed by other rules of sale and conventional obligations.

(Emphasis added). The comments to this article provide that "where a thing of a different kind or quality from that specified in the contract is delivered, but the thing is free of redhibitory defects, the rights of the buyer are governed by other rules of sales and conventional obligation but not by the Articles on redhibition." Article 2529, Comment (b).

In the context of the LPLA, federal courts have addressed Articles 2524 and 2529 more frequently than Louisiana courts. In **Jack B. Harper Contractor, Inc. v. United Fiberglass of America, Inc.**, 2012 WL 2087394, at *2 (E.D. La. 2012), the court agreed with previous federal cases that, in general, the exclusivity provision of the LPLA subsumes breach of contract claims against manufacturers for damages caused by their products. The court also recognized, however, citing **Hollybrook Cottonseed Processing, LLC**, 2010 WL 892869, at *7, that in cases where a specific part of the injury is caused only by the breach of contract and not by the product itself, a buyer may be able to bring both types of claims against a manufacturer. **Jack B. Harper**, 2012 WL 2087394, at *2. See also **In re Duramax Disel Litigation**, 2018 WL 3647047, at *12 (E.D. Mich. 2018) ("the LPLA might not be the exclusive avenue for relief when the plaintiff's damage is *solely* attributable to a breach of contract").

The court in **Jack B. Harper** then referenced Louisiana Civil Code Articles 2524 and 2529, pointing out that the comments to both articles make clear that these claims are governed by the rules of sales and conventional obligations and not the articles on redhibition. The court stated that the text and comments of the articles also make clear that the causes of action under these articles are available only when redhibition under

Article 2520 is not available or appropriate. **Jack B. Harper**, 2012 WL 2087394, at *3.[1]

In the **Hollybrook** case, which involved the sale of cotton gin equipment, the court stated that courts have interpreted Comment (b) to Article 2524 to mean that a breach of the warranty of fitness claim is subsumed by the breach of the warranty against redhibitory defects when there is a redhibitory defect in the thing sold. The court also stated that Article 2529 clarifies that claims for breaches of terms or express warranties in contracts can be brought under the law of obligations when there is no redhibitory defect in the thing sold. If there are redhibitory defects in the thing sold, by its own terms article 2529 does not apply. **Hollybrook**, 2010 WL 892869, at *8. The court further stated that the drafters of the redhibition chapter in the Civil Code made it clear that they wished to distinguish causes of action based on breach of the warranty against redhibitory defects and causes of action based on breach of implied or express warranties not involving redhibitory defects, stating that causes of action under articles 2524 and 2529 are available only when redhibition under article 2520 is not. **Id.**[2]

Given that ExPert Riser has pled that the crane had redhibitory defects and that the crane delivered did not meet the requirements of the sales contract, and because the case is before us on an exception of no cause of action, I respectfully concur in the result reached by the majority.

---

[1] The court determined that because there was an issue as to whether the multi-cell conduit product had redhibitory defects, summary judgment was inappropriate.

[2] Ultimately, the district court denied Hollybrook's motion for summary judgment, finding that there was an issue of fact as to whether the equipment Hollybrook bought from Carver had redhibitory defects. The court stated that if it did have redhibitory defects, then Hollybrook's claims under article 2524 and 2529 are subsumed by its claim under article 2520 for breach of the warranty against redhibitory defects, and if the equipment was free of redhibitory defects, Hollybrook's claims under article 2524 and 2529 are subsumed by the LPLA to the extent Hollybrook claims damages caused by Carver's products. **Hollybrook**, 2010 WL 892869, at *8.

EXPERT RISER SOLUTIONS, LLC	**STATE OF LOUISIANA**
	COURT OF APPEAL
VERSUS	
	FIRST CIRCUIT
TECHCRANE INTERNATIONAL, LLC	**NO. 2019 CA 1165**

HOLDRIDGE, J., concurs.

I respectfully concur with the report. I believe the better approach would have been to grant the peremptory exception raising the objection of no cause of action and allow the plaintiff to amend its petition (La. C.C.P. art. 934) to succinctly state any cause of action which may still be viable. While I agree with the majority opinion that there may be "limited circumstances" present in this case where a claim for breach of contract may still exist, the plaintiff's petition also contains claims which are no longer valid. This court should grant the peremptory exception raising the objection of no cause of action in part as to those claims, demands, or issues which are not viable. See La. C.C.P. art. 1915(B).