

ROGER P. WILLIAMS	*	NO. 2017-CA-1049
VERSUS	*	COURT OF APPEAL
KELLY WOOD AND	*	FOURTH CIRCUIT
MICHAEL R. WOOD, ABC	*	STATE OF LOUISIANA
INSURANCE COMPANY,	*	
PAUL DILEO AND A HOME	*	
CHECK BY PAUL DILEO, LLC	*	
	*	

LEDET, J., DISSENTING IN PART WITH REASONS

I agree with the majority’s decision in all but one respect. I disagree with the majority’s decision to reverse the trial court’s judgment sustaining the peremptory exceptions of no cause of action and no right of action as to Mr. Williams’ professional negligence claim against Mr. Woods in his capacity as an engineer. In support of their peremptory exceptions to this claim, the Woods asserted the following two contentions in the trial court: (i) there was no contract between Mr. Williams and Mr. Woods to provide engineering services; and (ii) as Mr. Williams alleges to have sustained no damage other than a purported defective performance of a non-existent contract, he has not stated a cause of action in tort. Finding this argument persuasive, the trial court granted the exceptions.

On appeal, Mr. Williams challenges this finding. His position is that the alleged defectively performed work is Mr. Wood’s defective design and that the defects alleged in his petition are the damages he sustained as a result of Mr. Wood’s defective design. The majority finds that Mr. Williams has stated a cause of action and a right of action. Contrary to the majority, I find the allegations in the petition are insufficient to state a tort claim against Mr. Wood. Rather, as the trial court found, the petition fails to allege any damages apart from those related to the defective performance.

Illustrating the distinction between damages related to defective performance and damages caused by the defective performance, this court in *Lumber Products, Inc. v. Hiriart*, 255 So.2d 783, 787-88, n. 7 (La. App. 4th Cir. 1971), cited the following three cases: *Marine Ins. Co. v. Strecker*, 234 La. 522, 100 So.2d 493 (1957); *Kendrick v. Mason*, 234 La. 271, 276, 99 So.2d 108, 110 (1958); and *Truxillo v. Gentilly Med. Bldg., Inc.*, 225 So.2d 488, 489 (La. App. 4th Cir. 1969). This court observed the following regarding each of those cases:

- In *Strecker*, “the tenant could not have sued for the repair of defectively hung cabinets, but she was allowed to sue for the damage caused by this defect,” which was damage to the tenant’s property (loss of glassware broken when the cabinet fell). *Lumber Products*, 255 So.2d at 786;
- In *Kendrick*, “the plaintiff could not have sued the contractor for the cost of remedying defects in the installation of the town sewer system, but his tort action against the contractor was allowed for damage to his come caused by defects in the installation of the sewer system even though he was no privy to the contract.” *Lumber Products*, 255 So.2d at 787; and
- In *Truxillo*, “the business visitor to a building could not have sued the building’s janitorial contractor for breach of contract in failing to properly eliminate excess cleaning water from a hallway, but his suit against that contractor was allowed when the excess water precipitated his fall and caused him bodily injury.” *Lumber Products*, 255 So.2d at 787-88.

In this case, as the trial court reasoned, “[t]he only damages alleged in the petition relate to defective design of the plans and specifications by Mr. Woods” and not to “any damages that were sustained, other than those related to the defective performance by Mr. Wood.” Thus, I agree with the trial court that the facts alleged in the petition fail to state a cause of action against Mr. Wood for professional negligence.

Additionally, “[w]hen, as here, the petition fails to state a cause of action, there can be no right of action.” *Chisesi*, 16-0599, p. 12, 206 So.3d at 1021 (citing *NOLA 180 v. Harrah's Operating Co., Inc.*, 12-0072, p. 7 (La.App. 4 Cir. 5/16/12), 94 So.3d 886, 890). Thus, I would affirm the trial court’s judgment granting the

exceptions of no cause and no right of action as to the professional negligence claim.

For these reasons, I dissent in part.