NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2010 CA 1651

NEIGHBORHOOD SHIPPING, INC.

VERSUS

**A & B INDUSTRIES OF MORGAN CITY, INC.
AND CHUBB GROUP OF INSURANCE COMPANIES**

Judgment Rendered: May 6, 2011

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**Appealed from the
16th Judicial District Court
In and for the Parish of St. Mary
State of Louisiana
Case No. 110517**

The Honorable William D. Hunter, Judge Presiding

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Matthew L. Pepper **The Woodlands, Texas**	**Counsel for Plaintiff/Appellant** **Neighborhood Shipping, Inc.**
Machale A. Miller **Sean D. Kennedy** **New Orleans, Louisiana**	**Counsel for Defendant/Appellee** **A&B Industries of Morgan City, Inc.**

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BEFORE: CARTER, C.J., GAIDRY AND WELCH, JJ.

GAIDRY, J.

In this case involving a contract to build and install a ramp on a barge, the plaintiff appeals a trial court judgment dismissing its claims with prejudice. We affirm.

FACTS AND PROCEDURAL HISTORY

In April of 2002, Mr. Roy Rodgers, as the owner of Neighborhood Shipping, Inc. ("Neighborhood Shipping"), purchased a deck barge, the Russell R., and tug, Debbie R. Mr. Rodgers, through his Louisiana boat broker Raleigh Bourg, sought bids from shipyards to install a bin wall and ramp on the barge. Mr. Rodgers and Raymond Scully, vice-president of A&B Industries of Morgan City, Inc. ("A&B"), engaged in negotiations regarding the design of the ramp and the cost, and ultimately entered into a contract on April 24, 2002. This contract provided that A&B would furnish the labor, materials, and equipment as directed by Mr. Rodgers to fabricate and install a ramp per the sketch sent to A&B by Mr. Rodgers. Mr. Rodgers and Mr. Scully later negotiated an agreement for additional work for the addition of a kingpost assembly. After the installation of the ramp and kingpost assembly by A&B, Mr. Rodgers had the barge and ramp towed to Bourg Dry Dock for the installation of a hydraulics system and some additional work. When the ramp was lowered at Bourg Dry Dock, it was discovered that the hingepins were twisted. Mr. Rodgers requested that A&B pay for the repairs to the hinges, but they did not do so, so the repairs were done at Bourg Dry Dock. In addition to repairing the hinges on the ramp installed by A&B, Bourg Dry Dock added additional hinges and inserted larger pins into A&B's hinges. After the repairs were complete, Mr. Rodgers began using the barge to transport sand and gravel in the Caribbean.

After several months of use, the ramp and kingpost assembly fell off of the barge and sunk in the ocean.

Neighborhood Shipping filed a suit in redhibition and, alternatively, in negligence and breach of warranty, against A&B and their insurer. Neighborhood Shipping's petition alleged that the design, manufacture, and installation of the ramp was of A&B, and further that the pins on the hinges on the ramp were defective in that they were inadequately designed for the loads involved and they were misaligned when they were installed by A&B. Neighborhood Shipping alleged that they immediately notified A&B of the redhibitory defect, but A&B denied liability for any defects and refused to remedy them. Neighborhood Shipping also sought damages for negligent manufacture and breach of express and implied warranties.

After a trial, the court rendered judgment in favor of A&B, dismissing all of Neighborhood Shipping's claims with prejudice. The trial court gave extensive reasons for judgment, including the detailed fact-findings and conclusions of law upon which its judgment was based. The court concluded that under the facts of this case, general maritime law, rather than Louisiana law, applies. Furthermore, the court concluded that Neighborhood Shipping failed to carry its burden of proving, by a preponderance of evidence, faulty workmanship by A&B. The trial court also noted that even if Louisiana law applied, Neighborhood Shipping failed to carry its burden of proof. The court found that the contract between the parties was a contract to build rather than a contract of sale, and as such the law of redhibition is inapplicable. Furthermore, as the contract was one to build, A&B would be immune from liability under La. R.S. 9:2771 because Neighborhood Shipping furnished the plans or specifications and the damage was due to those plans or specifications.

Neighborhood Shipping appealed, assigning the following trial court errors:

1. The trial court erred in failing to find that the design plans were furnished by A&B.
2. The trial court erred in finding that the hinges that failed were the ones installed by Bourg Dry Dock instead of the ones installed by A&B.
3. The trial court erred in finding that there was no warranty as to workmanship applicable.
4. The trial court erred in finding that there was no misalignment of the hinges installed by A&B.
5. The trial court erred in finding that mechanical engineer Louis Routier was hired by Neighborhood Shipping.
6. The trial court committed manifest error in referring to A&B owner and vice-president Ray Scully's testimony as the testimony of A&B's yard superintendant.
7. The trial court erred in failing to apply the applicable warranty law.
8. The trial court erred in failing to apply redhibition law.
9. The trial court erred in applying La. R.S. 9:2771 under the facts of this case.
10. The trial court erred in failing to apply warranty law where there were no limitations on warranty expressed in writing in the contract drafted by A&B.
11. The trial court erred in finding that Neighborhood Shipping did not allege breach of warranty.

DISCUSSION

It is well settled that a court of appeal may not set aside a trial court's or a jury's finding of fact in the absence of "manifest error" or unless it is "clearly wrong," and where there is conflict in the testimony, reasonable evaluations of credibility and reasonable inferences of fact should not be disturbed upon review, even though the appellate court may feel that its own evaluations and inferences are as reasonable. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be manifestly erroneous or clearly wrong. *Rosell v. ESCO*, 549 So.2d 840, 844 (La. 1989).

In its first assignment of error, Neighborhood Shipping claims that the trial court's factual finding that Neighborhood Shipping supplied the design for the ramp and kingpost assembly was manifestly erroneous. In finding that the design was that of Neighborhood Shipping, the trial court noted the following: Mr. Rodgers sent Mr. Scully two sketches prepared by his son, an engineer, of what he wanted, along with photographs of another barge with a ramp to demonstrate the design of the ramp. A&B prepared a quotation dated April 9, 2002 based upon the design sketches provided by Neighborhood Shipping and the conversations between Mr. Rodgers and Mr. Scully. A revised quotation was sent on April 24, 2002. Mr. Rodgers accepted A&B's offer by signing the April 24, 2002 quotation, which stated that the ramp would be fabricated and installed per sketch provided by Mr. Rodgers. The contract made no mention of A&B providing any design or engineering services. Mr. Rodgers and Mr. Scully later discussed the kingpost assembly, and Mr. Rodgers sent Mr. Scully more photographs of the type of kingpost assembly he wanted. A&B prepared a quotation for the kingpost assembly on May 23, 2002. Mr. Rodgers declined the proposal to

have the two upright stanchions of the kingpost assembly penetrate the deck due to the additional expense, and a revised offer for the kingpost assembly was sent to Neighborhood Shipping on May 30, 2002. Mr. Rodgers requested that A&B send him sketches of the revised kingpost assembly, and after reviewing them, he accepted the offer.

Neighborhood Shipping argues that the trial court's conclusion regarding who provided the design for the ramp and kingpost assembly is manifestly erroneous. They argue that while Mr. Rodgers sent Mr. Scully sketches of what he wanted and pictures of other barges, he never sent a design with enough detail to be considered a design. Rather, they argue that he was simply telling A&B what he wanted his barge to look like and that the size, type of steel, and dimensions were all determined by A&B.

The trial court was presented with two conflicting views of the evidence on this issue. The trial court obviously rejected Mr. Rodgers testimony that he never intended his design sketches and photographs to be an actual design and that he was relying on A&B's expertise in designing the ramp and kingpost assembly. Based upon our review of the evidence in the record, we cannot say that the trial court's conclusion that Neighborhood Shipping supplied the design was manifestly erroneous or clearly wrong. This assignment of error has no merit.

In its second assignment of error, Neighborhood Shipping alleges that the trial court's finding that some of the hinges installed by Bourg Dry Dock failed is manifestly erroneous. In its reasons for judgment, the trial court stated that:

> The photographs taken after the loss of the ramp during the Russell R's voyage on February 23, 2003, show that the hinges installed by "A&B" failed when the pins pulled through them. However, the holes in the tongues had been enlarged when the 3" pins were substituted for the original pins at Bourg

> Dry Dock. The photographs also show that some of the four additional hinges installed by Bourg Dry Dock pulled completely loose from the headlog.

Neighborhood Shipping alleges that the trial court must have confused the five hinges installed by A&B with the four hinges installed by Bourg Dry Dock because the photographs show that only one of the Bourg Dry Dock hinges came off, not "some" of the hinges, as stated by the court. Neighborhood Shipping claims that this mix-up caused the court to erroneously conclude that it was not the A&B hinges that caused the failure.

It appears from the evidence, and A&B concedes, that the court should have said "one of" Bourg Dry Dock's hinges pulled loose, not "some" of them. It is well settled, however, that appeals are taken from the judgment of the trial court, not its written reasons for judgment, and if the trial court reached the proper result, the judgment should be affirmed. *Elliott v. Elliott*, 10-0755, p. 14 n. 3 (La.App. 1 Cir. 9/10/10), 49 So.3d 407, 416 n. 3, *writ denied*, 10-2260 (La. 10/27/10), 48 So.2d 1088. Neighborhood Shipping's assertion that this error caused the court to conclude that the failure was not caused by the A&B hinges is not supported by the record. First, the trial court noted that the hinges installed by A&B failed. Additionally, the trial court's written reasons for judgment make it clear that the trial court did not base its conclusion that Neighborhood Shipping failed to carry its burden of proof that the failure of the ramp was caused by A&B on which hinges fell off. The court noted that there was "strong evidence" that the hinges were in alignment when the barge left A&B and that the ramp raised smoothly at A&B. Further, the court noted that Neighborhood Shipping did not present any evidence of the route taken to Bourg Dry Dock or the circumstances of the voyage to Bourg Dry Dock. Finally, the court noted that Neighborhood Shipping did not call an

eyewitness to the lowering of the ramp at Bourg Dry Dock where the hinges and pins were twisted. Thus, we find no manifest error in the trial court's conclusion that Neighborhood Shipping failed to carry its burden of proving, by a preponderance of the evidence, that the failure of the ramp was caused by A&B. This assignment of error is also without merit.

In its next assignment of error, Neighborhood Shipping argues that the trial court erred in failing to mention in its findings of fact that there existed "an express warranty of six months on workmanship" in this case. Neighborhood Shipping notes that Mr. Scully admitted to the existence of a six-month warranty on workmanship in his testimony and it was error for the court to omit it from its fact findings.

Initially, we note that Neighborhood Shipping does not mention this supposed express warranty in either its petition or its amended petition. Furthermore, Neighborhood Shipping mischaracterizes Mr. Scully's testimony. Mr. Scully did not admit that a six-month warranty on workmanship was applicable in this case; rather, Mr. Scully testified that although A&B *generally* provides a six-month warranty on new construction, that warranty was *not applicable* in this case because he did not consider the work done on Neighborhood Shipping's barge to be "new construction." Neighborhood Shipping points to no other evidence supporting the existence of an express warranty. Furthermore, Neighborhood Shipping did not prove poor workmanship by A&B. Thus, the trial court did not err in failing to note the existence of an express warranty in its fact findings. This assignment of error is without merit.

In its fourth assignment of error, Neighborhood Shipping alleges that the trial court's conclusion that the hinges were not misaligned was manifestly erroneous in light of the uncontroverted opinion of Perry Beebe,

a marine surveyor, that the pins were in fact misaligned. Although Mr. Beebe did conclude in his report that the hinges were misaligned, Mr. Beebe did not inspect the ramp until after it had been lowered at Bourg Dry Dock and the hinges and pins were twisted. The trial court had ample evidence to support its conclusion that the hinges were not misaligned when the barge left A&B, *i.e.*, the fact that A&B used piano wire to align the hinges, the fact that the pins went smoothly into the hinges, the opinion of expert witness John H. Leary that there were other things that could have caused the hinge failure, such as the voyage from A&B to Bourg Dry Dock with the ramp unsecured, and Mr. Leary's opinion that the ramp would not have raised smoothly at A&B if the hinges were misaligned. Because there were conflicting views of the evidence, the trial court's choice between them cannot be clearly wrong. This assignment of error is without merit.

In Neighborhood Shipping's next assignment of error, they allege that the trial court erred in stating in its written reasons for judgment that a witness called by Neighborhood Shipping, mechanical engineer Louis E. Routier, III, was hired by Neighborhood Shipping to investigate the hinge damage, when in fact Mr. Routier was retained by Gale Fox, the hydraulics installer. Neighborhood Shipping alleges that the fact that Mr. Routier was hired by an unrelated party lends his opinion more credibility, and as a result, the court's error prejudiced its fact findings against them.

Mr. Routier testified at trial that he became involved in the matter when he received a call from Gale Fox, asking him to come take a look at the ramp and offer an opinion as to why the pin connections failed. When Mr. Routier arrived, the hinges had already been repaired by Bourg Dry Dock. He testified that "I had a couple photographs and it was all assembled so I couldn't really – I measured what I could as far as the pin connection

area, and then he gave me the rest of the information to use in my forming an opinion. . . . I never got to see the damage at the time when I formed this opinion. I only saw it assembled. Later on I seen [*sic*] the pictures." Mr. Routier's opinion was that the hinges were out of alignment, which caused extreme twisting when the ramp was raised or lowered.

Neighborhood Shipping cites no authority for its proposition that the trial court judgment should be overturned because the trial court mistakenly stated in its written reasons for judgment that Mr. Routier was hired by Neighborhood Shipping. As noted above, appeals are taken from the judgment of the trial court, not its written reasons for judgment, and if the trial court reached the proper result, the judgment should be affirmed. *Elliott*, 10-0755 at p. 14 n. 3, 49 So.3d at 416 n. 3. The trial court noted the fact that Mr. Routier investigated the cause of the hinge damage and the methods he used to do so, including the fact that Mr. Routier was not able to take measurements in rendering an opinion. The trial court also noted Mr. Routier's opinion that the damage was caused by misalignment. The court then noted the opinion of defense expert Mr. Leary as to the possible causes of the damage. The court was faced with conflicting evidence as to the cause of the evidence, and concluded that Neighborhood Shipping did not carry its burden of proving that the damage was caused by misalignment of the hinges by A&B. A review of the record reveals that this conclusion is supported by the evidence and not clearly wrong, and any misstatement as to who hired Mr. Routier was clearly irrelevant. This assignment of error has no merit.

In its next assignment of error, Neighborhood Shipping argues that the trial court judgment should be reversed because the trial court referred to Mr. Scully at one point in its written reasons for judgment as A&B's yard

superintendant rather than as its owner and vice-president. The offending sentence in the reasons for judgment states, "A&B's yard superintendent testified that his personnel strung a piano wire when aligning the hinges during installation." This statement came from the testimony of Mr. Scully, who stated that he was present throughout the installation and "we ran a piano wire and we attached the tongues and welded the tongues out to the head log." That the trial court referred to Mr. Scully as the yard superintendant in its reasons for judgment is insignificant; Neighborhood Shipping cites no authority for its proposition that the judgment should be reversed because of this error in the written reasons for judgment. Since the result reached by the trial court is correct and supported by the evidence contained in the record, it should be affirmed, despite the misstatement in the written reasons for judgment. *Elliott*, 10-0755 at p. 14 n. 3, 49 So.3d at 416 n. 3. This assignment of error is without merit.

In its next assignment of error, Neighborhood Shipping alleges that Louisiana law, not maritime law, should apply to this matter, but that even if maritime law is applicable, it may be supplemented by Louisiana law of redhibition. Neighborhood Shipping alleges that the trial court erred as a matter of law in failing to apply Louisiana's law of redhibition.

The settled law in the United States is that jurisdiction of admiralty in matters of contract depends upon the subject matter of the contract. *Hinkins S.S. Agency v. Freighters, Inc.*, 351 F.Supp. 373, 374 (1972). If the subject matter of the contract is the repair or refitting of a ship, the contract unquestionably falls within the Court's maritime jurisdiction. *Id.* In concluding that general maritime law was applicable to the contract at issue herein, the trial court noted that the contract entered into by the parties "to add a ramp, bin wall, break wall, and kingpost to an existing vessel that was

in service when Neighborhood bought it" was maritime in nature. We find no error in this conclusion.

Regardless of the applicability of maritime law, the trial court noted that even if it were to apply Louisiana law, Neighborhood Shipping failed to carry its burden of proof on any Louisiana law claims because the contract between the parties was a contract to build, as opposed to a contract of sale, making redhibition inapplicable, and as a contractor under a contract to build, A&B would be immune from liability under La. R.S. 9:2771 where the work was done according to plans or specifications furnished by Neighborhood Shipping.

The Louisiana law of redhibition, La. C.C. art. 2520-2548, applies to contracts of sale, not contracts to build. *See, Conmaco, Inc. v. Southern Ocean Corp.*, 581 So.2d 365, 369 (La.App. 4 Cir.), *writs denied*, 586 So.2d 533, 534, (La. 1991). There are three major factors to consider in determining whether a contract is a contract of sale or a contract to build. First, in a contact to build, the "buyer" has some control over the specifications of the object. Second, the negotiations in a contract to build take place before the object is constructed. Third, and perhaps most importantly, a building contract contemplates not only that one party will supply the materials, but also that that party will furnish his skill and labor in order to build the desired object. *Id.*

In determining that the contract between Neighborhood Shipping and A&B was one to build, rather than of sale, the court noted that Neighborhood Shipping had at least some control, if not ultimate control, over the specifications. Mr. Rodgers submitted his engineer son's sketches of the ramp and hinge design to A&B, provided photographs of another barge's design to A&B, and requested approval of the drawings. The

contract between Neighborhood Shipping and A&B stated that A&B would fabricate and install a ramp per sketch provided by owner, Mr. Rodgers, and did not mention the provision by A&B of any design or engineering services. Regarding the second factor, the court noted that the parties negotiated the details prior to the execution of the contract and construction of the ramp. Finally, the court noted that A&B supplied all the materials, skill, and labor in building and installing the ramp. Based upon the evidence in the record, as noted by the court in its reasons for judgment, we find no error in the trial court's conclusion that the contract between the parties is a contract to build rather than a contract of sale. As such, Louisiana's law of redhibition is inapplicable in this case.

Additionally, the court found that Neighborhood Shipping failed to carry its burden of proof that the failure of the ramp was due to any faulty workmanship by A&B. But even if the court had not made this finding, the court noted that under a contract to build, A&B would be immune from liability under La. R.S. 9:2771 for its work performed according to the plans or specifications furnished by Neighborhood Shipping. Louisiana Revised Statutes 9:2771 provides:

> No contractor . . . shall be liable for destruction or deterioration of or defects in any work constructed, or under construction, by him if he constructed, or is constructing, the work according to plans or specifications furnished to him which he did not make or cause to be made and if the destruction, deterioration, or defect was due to any fault or insufficiency of the plans or specifications. This provision shall apply regardless of whether the destruction, deterioration, or defect occurs or becomes evident prior to or after delivery of the work to the owner or prior to or after acceptance of the work by the owner. The provisions of this Section shall not be subject to waiver by the contractor.

Based upon the court's finding, which we have already found to not be error, that the plans or specifications for the building of the ramp were furnished to

A&B by Mr. Rodgers, A&B would be immune from liability for damage to the ramp as long as it was constructed in accordance with the plans or specifications furnished to it. Thus, we find no error in the trial court's conclusion that Neighborhood Shipping failed to carry its burden of proof on any available Louisiana law claims.

Neighborhood Shipping's next assignment of error is that the contract between the parties was a sale, not a contract to build, and as such it has a claim in redhibition. Neighborhood Shipping's argument on this issue is premised primarily on its assertion that Neighborhood Shipping did not provide the design and specifications. For the reasons outlined above, we disagree with this assertion and with Neighborhood Shipping's conclusion that this was a contract of sale.

In their next assignment of error, Neighborhood Shipping argues that the trial court erred in applying La. R.S. 9:2771 because A&B provided the plans and specifications, not Neighborhood Shipping. Again, we have already concluded that the trial court did not err in finding that Neighborhood Shipping provided the plans and specifications for the work. This assignment of error is without merit.

In its final two assignments of error, Neighborhood Shipping argues that the trial court erred in failing to find that it did not waive express or implied warranties. However, since redhibition is inapplicable and the court found that Neighborhood Shipping failed to carry its burden of proof that the failure was caused by A&B's workmanship, any waiver of warranty is irrelevant and there was no reason for the court to explicitly make a finding that Neighborhood Shipping did not waive any express or implied warranties. These assignments of error are without merit.

CONCLUSION

The judgment dismissing Neighborhood Shipping's claims with prejudice is affirmed. Costs of this appeal are assessed to Neighborhood Shipping, Inc.

AFFIRMED.