NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2014 CA 0857

RYAN KEITH WILLIAMS AND VICKI WILLIAMS

VERSUS

GENUINE PARTS COMPANY AND JEFFREY D. BOONE

Judgment Rendered: JAN 08 2015

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Appealed from the
21st Judicial District Court
In and for the Parish of Tangipahoa, Louisiana
Trial Court No. 2013-0001914

Honorable Brenda Bedsole Ricks, Judge Presiding

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BEFORE: McDONALD, CRAIN, AND HOLDRIDGE[1], JJ.

Crain, J. concurs. by GH

[1] **Holdridge, J.,** serving as Supernumerary Judge *pro tempore* of the Court of Appeal, First Circuit, by special appointment of the Louisiana Supreme Court.

McDonald, J. concurs, but would not remand to amend as I do not believe they can state a cause of action against Boone.

HOLDRIDGE, J.

Plaintiffs-Appellants, Ryan Keith Williams and Vicki Williams, appeal a judgment of the trial court sustaining peremptory exceptions raising the objections of prescription, peremption, no cause of action, and no right of action, and the dilatory exception of vagueness, and dismissing their claims against defendants-appellees, Genuine Parts Company and Jeffrey D. Boone. For the following reasons, we reverse in part, affirm in part, and remand for further proceedings.

FACTUAL AND PROCEDURAL BACKGROUND

On April 20, 2006, Ryan and Vicki Williams entered into a contractual agreement with Genuine Parts Company ("GPC") whereby the plaintiffs would reopen and operate a NAPA Auto Parts store ("NAPA store") in Ponchatoula, Louisiana, which had closed in 2000. The plaintiffs invested approximately $60,000.00 into the venture, and the balance of the start-up funding was provided by a loan guaranteed by GPC. The term of this loan was six years.

During the plaintiffs' operation of the Ponchatoula NAPA store, another NAPA store was open and operational in Hammond, Louisiana. In 2011, the Hammond store disassociated from NAPA. Looking to regain its Hammond foothold, GPC approached plaintiffs to see if they were interested in operating the Hammond store in addition to the Ponchatoula store. After plaintiffs declined GPC's offer to operate the Hammond store, GPC contracted with Jeffrey Boone to operate the Hammond store. Mr. Boone was familiar with the operation of NAPA stores as he already maintained stores in Boutte, Covington, Mandeville, and Slidell, Louisiana. In 2011, Mr. Boone reopened the NAPA store in Hammond.

On June 4, 2012, GPC informed the plaintiffs that their financing would not be renewed because of their NAPA store's declining performance. On June 23, 2012 the plaintiffs' loan matured, GPC acquired the note and security, and

proceeded to liquidate the plaintiffs' inventory. The plaintiffs' last day of operation was July 16, 2012.

On June 21, 2013, the plaintiffs filed suit for damages, alleging that they had suffered an ascertainable monetary loss as a result of the employment of unfair and deceptive practices by GPC and Mr. Boone. GPC responded by filing an answer and reconventional demand, simultaneously filing its peremptory exceptions of prescription, peremption, and no right of action, and dilatory exception of vagueness. On August 27, 2013, Mr. Boone also filed peremptory exceptions of prescription, peremption, no right of action, and no cause of action, and a dilatory exception of vagueness. Mr. Boone also adopted the exceptions filed by GPC.

On September 25, 2013, a telephone conference was held by the trial court, in which all counsel participated, whereby it was agreed that arguments regarding the exceptions would be submitted to the trial court via memoranda, and would be decided on same, without a hearing. The plaintiffs submitted oppositions to the exceptions in October, 2013. The trial court granted all of the defendants' shared exceptions of prescription, peremption, no right of action, and vagueness, as well as Mr. Boone's exception of no cause of action, and dismissed the plaintiffs' petition by judgment signed November 27, 2013.

The plaintiffs appealed this judgment, urging in a single assignment of error that the trial court erred in granting the exceptions and dismissing the petition.

DILATORY EXCEPTION OF VAGUENESS

The purpose of the dilatory exception of vagueness is to place the defendant on notice of the nature of the facts sought to be proved so as to enable him to identify the cause of action, thus preventing its future relitigation after a judgment is obtained in the present suit. *Vanderbrook v. Jean,* 2006–1975 (La. App. 1st Cir. 2/14/07), 959 So.2d 965, 968. However, the objection of vagueness does not entitle the defendant to demand exactitude and detail of pleading beyond what is

necessary to fulfill these aims. *Vanderbrook*, 959 So.2d at 968. If the plaintiff's petition fairly informs the defendant of the nature of the cause of action and includes sufficient substantial particulars to enable the defendant to prepare its defense, then the exception of vagueness will be denied. *Id.*

The petition is vague, in its failure to define the term "trade area" without explanation or definition of what plaintiffs meant by that phrase. We will therefore sustain the exception of vagueness filed by defendants, and order that the petition be properly amended in the above respect, within the delay allowed by the trial court, or be dismissed for noncompliance with this order, in accordance with La. C.C.P. art. 933.

PEREMPTORY EXCEPTION OF PRESCRIPTION

At the trial of a peremptory exception of prescription, evidence may be introduced to support or controvert the defense of prescription, if its grounds do not appear from the petition. See La. C.C.P. art. 931. Generally, in the absence of evidence, the objection of prescription must be decided based upon the facts alleged in the petition, which must be accepted as true. *Kirby v. Field,* 2004–1898 (La. App. 1st Cir. 9/23/05), 923 So.2d 131, 135, *writ denied,* 2005–2467 (La. 3/24/06), 925 So.2d 1230.

Ordinarily, the party pleading the exception of prescription bears the burden of proving the claim has prescribed. *Hogg v. Chevron USA, Inc.,* 2009–2632 (La. 7/6/10), 45 So.3d 991, 998. However, if prescription is evident on the face of the pleadings, the burden shifts to the plaintiff to show the action has not prescribed. *Williams v. Sewerage & Water Bd. of New Orleans*, 611 So.2d 1383, 1386 (La. 1993). Thus, unless prescription is evident from the face of the pleadings, the party raising the plea of prescription bears the burden of proof. *Guillot v. LECC–Baton Rouge Inc.,* 2005–2537 (La. App. 1st Cir. 12/28/06), 952 So.2d 42, 44. If evidence is introduced at the hearing on the peremptory exception of prescription,

the district court's findings of fact are reviewed under the manifest error-clearly wrong standard of review. *Southern Ins. Co. v. Metal Depot*, 2010-1899 (La. App. 1st Cir. 6/10/11), 70 So.3d 922, 925, *writ denied*, 2011-1763 (La. 10/14/11), 74 So.3d 215. If no evidence is introduced, the appellate court's role is to determine whether the trial court's ruling was legally correct. *Onstott v. Certified Capital Corp.*, 2005-2548 (La. App. 1st Cir. 11/3/06), 950 So.2d 744, 746.

PEREMPTORY EXCEPTION OF PEREMPTION

An objection of peremption is raised by peremptory exception. See La. C.C.P. art. 927(A)(2). The rules that govern the burden of proof as to prescription likewise govern peremption. *Rando v. Anco Insulations, Inc.*, 2008–1163 (La. 5/22/09), 16 So.3d 1065, 1082. As such, the party who raises an exception of peremption ordinarily bears the burden of proof at trial on the exception. *Id.* However, when peremption is evident on the face of the petition, the burden is on the plaintiff to prove that his action is not perempted. *Id.*

When a peremptory exception is pleaded prior to trial, the parties may introduce evidence to support or controvert the objection pleaded, when the grounds thereof do not appear from the petition. See La. C.C.P. art. 932. When evidence is introduced, the trial court's factual conclusions are reviewed under the manifest error-clearly wrong standard. *Rando*, 16 So.3d at 1082; *Southern Insurance Company v. Metal Depot and United Fire and Casualty Company,* 2010-1899 (La. App. 1st Cir. 6/10/11), 70 So.3d 922, 925, *writ denied*, 2011-1763 (La. 10/14/11), 74 So.3d 215. However, when no evidence is introduced at the hearing on the exception of peremption, all allegations of the petition are to be accepted as true. *Cichirillo v. Avondale Industries, Inc.*, 2004–2894 (La. 11/29/05), 917 So.2d 424, 428.

PEREMPTORY EXCEPTION OF NO RIGHT OF ACTION

Generally an action can only be brought by a person having a real and actual interest that he asserts. La. C.C.P. art. 681. The objection of no right of action tests whether the plaintiff who seeks relief is the person in whose favor the law extends a remedy. See *Howard v. Administrators of Tulane Educational Fund,* 2007-2224 (La. 7/1/08), 986 So.2d 47, 59. A peremptory exception pleading the objection of no right of action tests whether the plaintiff has any interest in judicially enforcing the right asserted. La. C.C.P. art. 927A(6); *Louisiana State Bar Ass'n v. Carr and Associates, Inc.,* 2008-2114 (La. App. 1st Cir. 5/8/09), 15 So.3d 158, 165, *writ denied,* 2009-1627 (La. 10/30/09), 21 So.3d 292. The objection of no right of action assumes that the petition states a valid cause of action for some person and questions whether the plaintiff in the particular case is a member of the class that has a legal interest in the subject matter of the litigation. *Taylor v. Babin,* 2008-2063 (La. App. 1st Cir. 5/8/09), 13 So.3d 633, 637, *writ denied,* 2009-1285 (La. 9/25/09), 18 So.3d 76.

Evidence supporting or controverting an objection of no right of action is admissible; however, in the absence of evidence to the contrary, the averments of fact in the pleadings will be taken as true. See La. C.C.P. art 931; *Niemann v. Crosby Development Co., L.L.C.*, 2011-1337 (La. App. 1st Cir. 5/3/12), 92 So.3d 1039, 1046; *Horrell v. Horrell*, 99-1093 (La. App. 1st Cir. 10/6/00), 808 So.2d 363, 368, *writ denied*, 2001-2546 (La. 12/7/01), 803 So.2d 971. Generally, the party raising a peremptory exception bears the burden of proof. *Falco Lime, Inc. v. Plaquemine Contracting Co., Inc.,* 95-1784 (La. App. 1st Cir. 4/4/96), 672 So.2d 356, 359. To prevail on a peremptory exception pleading the objection of no right of action, the defendant must show that the plaintiff does not have an interest in the subject matter of the suit or legal capacity to proceed with the suit. *Jones v. McDonald's Corp.,* 618 So.2d 992, 995 (La. App. 1st Cir. 1993). Whether a

plaintiff has a right of action is ultimately a question of law; therefore, it is reviewed *de novo* on appeal. *Jackson v. St. Helena Parish Sheriff's Dept.*, 2001-2792 (La. App. 1st Cir. 11/8/02), 835 So.2d 842, 844.

Regarding prescription, peremption, and no right of action, we resolve these issues without reaching the merits of the parties' respective positions. Louisiana Code of Civil Procedure article 929(B) provides that, when a peremptory exception is filed after the answer, but at or prior to the trial of the case, it "*shall be tried* and disposed of either in advance of or on the trial of the case." (Emphasis added.) Louisiana Code of Civil Procedure article 931 provides that, at the trial of a peremptory exception pleaded at or prior to the trial, "evidence may be introduced to support or controvert any of the objections pleaded, when the grounds thereof do not appear from the petition."

The record before us contains memoranda in support of GPC and Mr. Boone's exceptions, to which various exhibits were attached. However, the record contains no evidence, because there was no trial on the exceptions. Evidence not properly and officially offered and introduced cannot be considered, even if it is physically placed in the record. *Denoux v. Vessel Management Services, Inc.*, 2007-2143 (La. 5/21/08), 983 So.2d 84, 88. Pursuant to La. C.C.P. art. 2164, an appellate court shall render any judgment which is just, legal, and proper upon the record on appeal. The record on appeal is that which is sent by the trial court to the appellate court and includes the pleadings, court minutes, transcript, jury instructions, judgments and other rulings, unless otherwise designated. See La. C.C.P. arts. 2127 and 2128; *Niemann*, 92 So.3d at 1044. An appellate court cannot review evidence that is not in the record on appeal and cannot receive new evidence. *Our Lady of the Lake Hosp. v. Vanner,* 95-0754 (La. App. 1st Cir. 12/15/95), 669 So.2d 463, 465. A court cannot consider exhibits filed into the record as attachments to a memorandum, because such attachments are not

evidence. Since such attachments are not evidence, they are not properly part of the record on appeal.[2] *Satterthwaite v. Byais,* 2005-0010 (La. App. 1st Cir. 7/26/06), 943 So.2d 390, 395.

In the absence of evidence, the objections of prescription and peremption must be decided upon the facts alleged in the petition, and all allegations thereof are accepted as true. *Capital Drilling Co. v. Graves,* 496 So.2d 487, 488 (La. App. 1st Cir. 1986). In this case, the claims of the plaintiffs are not prescribed or perempted on the face of the petition. The burden was on GPC and Mr. Boone to prove the facts to support their exceptions of prescription and peremption in this procedural posture. *Trainer v. Aycock Welding Co.*, 421 So.2d 416, 417 (La. App. 1st Cir. 1982). On the face of the record before us, GPC and Mr. Boone have failed to carry that burden.

Furthermore, GPC and Mr. Boone had the burden of proving that the plaintiffs did not belong to the class of persons to whom the law grants the cause of action asserted in the suit. Because we are not authorized by law to consider GPC's attachments to its memorandum in support of its exception of no right of action, and because the record before us contains no evidence submitted by GPC or Mr. Boone to support their exceptions of no right of action, we find that GPC and Mr. Boone failed to meet their burden of proof in this matter. Thus, the trial court was in error in sustaining the exceptions of prescription, peremption, and no right of action. Because the denial of a peremptory exception is an interlocutory judgment, the movers may re-urge these peremptory exceptions if they can present the evidence necessary to carry their burden of proof. *McIntyre v. The St. Tammany Parish Sherriff*, 2002-0700 (La. App. 1st Cir. 3/28/03), 844 So.2d 304, 308.

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[2] In contrast, when deciding a motion for summary judgment, a court can treat certain attached documents as properly admitted evidence. See La. C.C.P. art. 967.

PEREMPTORY EXCEPTION OF NO CAUSE OF ACTION

The peremptory exception raising the objection of no cause of action questions whether or not the law affords any remedy to the plaintiff under the allegations of the petition. *White v. State, Department of Public Safety and Corrections, Office of Motor Vehicles,* 569 So.2d 1001, 1002 (La. App. 1st Cir. 1990) (per curiam). If a remedy is provided, the objection must be overruled. *Id.* The exception is triable solely on the face of the petition and any attached documents. See La. C.C.P. art. 931. All well-pleaded facts are accepted as true, and any doubts are resolved in favor of the sufficiency of the petition. *White*, 569 So.2d at 1002. The issue at the trial of the exception is whether, on the face of the petition, the plaintiff is legally entitled to the relief sought. *In re Interdiction of Coulon*, 2012-1429 (La. App. 1st Cir. 3/22/13), 116 So.3d 688, 690. The standard for granting an exception of no cause of action is as follows:

> The burden of demonstrating that no cause of action has been stated is upon the mover or exceptor. In deciding the exception of no cause of action, the court must presume all factual allegations of the petition to be true and all reasonable inferences are made in favor of the non-moving party. In reviewing a trial court's ruling sustaining an exception of no cause of action, the court of appeal and [the supreme] court should subject the case to de novo review because the exception raises a question of law and the lower court's decision is based only on the sufficiency of the petition. (Citations omitted.)

City of New Orleans v. Board of Com'rs, 93–0690 (La. 7/5/94), 640 So.2d 237, 253.

The thrust of the plaintiffs' claims against Mr. Boone is that he took over a previously existing NAPA store in Hammond, Louisiana, at which he was able to sell his merchandise at a lower price than the plaintiffs, and that he solicited NAPA store customers; thus, according to the plaintiffs, Mr. Boone violated the Louisiana Unfair Trade Practices Act (LUTPA) because his conduct was unfair and deceptive.

The LUTPA creates a cause of action available to "[a]ny person who suffers any ascertainable loss of money or movable property ... as a result of the use or employment by another person of an *unfair or deceptive method, act, or practice....*" La. R.S. 51:1409(A). (Emphasis added.) This legislation is broadly and subjectively stated and does not specify particular violations. *Levine v. First Nat'l Bank of Comm.*, 2006-394 (La. 12/15/06), 948 So.2d 1051, 1065. A practice is unfair when it offends established public policy and when the practice is unethical, oppressive, unscrupulous, or substantially injurious. *Id.* A trade practice is "deceptive" for purposes of LUTPA when it amounts to fraud, deceit, or misrepresentation. *United Group of Nat. Paper Distributors, Inc. v. Vinson,* 27,739 (La. App. 2d Cir. 1/25/96), 666 So.2d 1338, 1346. However, the unfair trade practices law does not prohibit sound business practices, the exercise of permissible business judgment, or appropriate free enterprise transactions. *Inka's S'Coolwear, Inc. v. School Time, L.L.C.*, 97-2271 (La. App. 1st Cir. 11/6/98), 725 So.2d 496, 501.

In the case before this Court, Mr. Boone took over a NAPA store in Hammond that had existed during the duration of the plaintiffs' operation of the Ponchatoula store. The mere operation of a store which had always been in existence is not a practice that offends established public policy. Furthermore, Mr. Boone's ability or choice to sell auto parts in Hammond at a lower price than the plaintiffs in Ponchatoula, to an overlapping set of customers merely constitutes retail competition which is appropriate free enterprise and which does not amount to fraud, deceit, or misrepresentation within the meaning of La. R.S. 51:1409. See *Inka's S'Coolwear, Inc.*, 725 So.2d at 501. Moreover, the petition does not allege that Mr. Boone's actions were immoral, unethical, oppressive, unscrupulous, or substantially injurious to the plaintiffs nor facts that would support such allegations. Accordingly, we find no error in the trial court's judgment granting

Mr. Boone's exception of no cause of action and dismissing the plaintiffs' LUTPA claim against him.

Louisiana Code of Civil Procedure article 934 provides that when the grounds of objection pleaded by a peremptory exception, such as no cause of action, may be removed by amendment of the petition, the judgment sustaining the exception "shall order such amendment within the delay allowed by the court."

In *Alexander and Alexander, Inc. v. State, through the Div. of Admin.*, 486 So.2d 95, 100 (La. 1986), the Supreme Court stated:

> Under the provisions of La.Code of Civ.Proc. art. 934, it is *mandatory* that the trial judge permit an amendment to the petition when the grounds of the objection pleaded by the exception are of such a nature [as] might be removed by amendment.
>
> As a general rule, the first 'shall' in La.Code of Civ.Proc. art. 934 requires that the adverse party be given an opportunity to amend *where there is a conceivable possibility that a cause of action may be stated.* However, the right to amend is not so absolute as to permit the same when such amendment would constitute a vain and useless act.
>
> The judgment maintaining the exception of no cause of action in this case contains no order granting plaintiffs leave to amend their petition. We are of the opinion that, given the opportunity to amend, *there is a possibility that plaintiff may be able to state a cause of action against defendants,* and that the trial judge should have allowed such amendment. We will remand with the instructions that an order issue permitting plaintiffs to amend their petition, if they can, to state a cause of action, within a delay deemed reasonable by the trial court. (Citations omitted and emphasis added.)

We cannot say that there is no *conceivable* possibility that the petition cannot be amended to state a cause of action against Mr. Boone. Therefore, the case shall be remanded to the trial court with the instruction that an order be issued affording the plaintiffs the opportunity to amend their petition to state a cause of action, if they can, within a delay deemed reasonable by the trial court.

CONCLUSION

For the foregoing reasons, we reverse that portion of the trial court's November 27, 2013 judgment sustaining the exceptions of prescription,

peremption, and no right of action and dismissing the suit with prejudice. We affirm the portion of the trial court's judgment sustaining the exceptions of no cause of action and vagueness, and remand for further proceedings consistent with this opinion.

Appeal costs are assessed against defendant-appellee, Genuine Parts Company.

AFFIRMED IN PART; REVERSED IN PART; REMANDED.