NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2013 CA 1879

JOHN AND MARY WILLIAMS

VERSUS

JOHN B. DUNLAP, III AND CARLETON, DUNLAP, OLINDE, MOORE & BOHMAN, LLC

Judgment Rendered: June 6, 2014

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Appealed from the
19th Judicial District Court
In and for the Parish of East Baton Rouge
State of Louisiana
Case No. 600094

The Honorable Wilson Fields, Judge Presiding

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Higginbotham, J. Concurs in the result.
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BEFORE: KUHN, HIGGINBOTHAM, AND THERIOT, JJ.

THERIOT, J.

The plaintiffs-appellants, Dr. John and Mary Williams (the Williams), seek reversal of the summary judgment in favor of the defendants-appellees, John B. Dunlap, III (Dunlap) and Carleton, Dunlap, Olinde, Moore, and Bohman, LLC (the law firm),[1] which dismissed their petition for damages with prejudice. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

This is an appeal of a legal malpractice suit filed by the Williams against Dunlap and the law firm of which he is a partner, stemming from a breach of construction contract lawsuit filed by the Williams.[2] The underlying suit, filed August 25, 2006, by a law firm other than Dunlap's law firm, involved a newly-constructed home for the Williams which allegedly contained various defects upon completion of construction. The Williams prayed for relief under the New Home Warranty Act[3], breach of contract, and declaratory judgment that the defendants were not entitled to extra compensation as was requested.

On or about August 17, 2007, the Williams ended the attorney-client relationship with the original law firm and retained Dunlap. Dunlap and his law firm agreed to provide legal representation to the Williams in the aforementioned lawsuit. Dunlap's first appearance in the record is a supplemental and amending petition for damages, filed February 8, 2008, in which he named the architect who designed the Williams's home as a defendant. Dunlap filed a second supplemental petition for damages on January 21, 2010, in which he named three insurance companies and a roofing company that allegedly constructed the roof for the Williams's home

[1] The record title had misspelled "Dunlap" as "Dublap" in the name of the law firm; however, throughout the rest of the record, the name is spelled correctly.
[2] The lawsuit is titled *John and Mary Williams v. Custom Homes by Jim Fussell, Inc., et al,* no. 546,682, Nineteenth Judicial District, Parish of East Baton Rouge.
[3] La. R.S. 9:3141, et seq.

as additional defendants. Dunlap filed these supplemental petitions to remedy what he felt was a failure by the Williams's previous attorneys to name necessary defendants. A settlement conference was scheduled for March 25, 2010.

Prior to the settlement conference, the attorney for one of the defendants in the underlying suit sent a settlement offer to Dunlap's law firm. On March 17, 2010, Dunlap forwarded a copy of the settlement offer to the Williams. Dunlap and the Williams found the proposed offer did not adequately address repairs to the home, and the offer was rejected.

The parties met at the courthouse for the March 25, 2010 settlement conference. Dr. Williams was not present for all of the attorneys' discussions concerning the settlement, as he had to leave the conference early to perform an elective surgery on one of his patients.[4] Mrs. Williams, however, remained and was present for the reading of a negotiated settlement in open court.

The settlement read into the record included payment of damages by the defendants to the Williams, specific performance by the defendant contractor to make repairs on the home, payment of court costs incurred by the Williams to be paid by the defendants, and all claims to be dismissed with prejudice. Specifically to the repairs, which are at the core of the malpractice claim, was that the district court retained jurisdiction over the issue of repairs and appointed the Williams's engineering expert, Mr. Mike Stein, to oversee and assess the repairs, "regarding any disagreements regarding the manner of completion of the work[.]" No actual cost of the repairs was determined on the day the settlement was read into the record.

[4] Dr. Williams is a plastic surgeon.

This settlement was formalized as a stipulated judgment and signed by the district court on April 29, 2010.

Because the Williams would not comply with the settlement, the law firm filed a motion to enforce settlement on January 10, 2011. The district court granted the motion, and the Williams did not move for a new trial nor appeal the district court's order.

The Williams filed a petition for damages against Dunlap and the law firm on March 16, 2011, in which it is alleged that the law firm committed legal malpractice in its representation of the Williams. Specifically, the Williams aver that the law firm "negligently agreed to settle" the underlying suit, then insisted that the Williams accept the settlement without first explaining its terms. After gaining an understanding of those terms, the Williams aver that they never gave their consent to the law firm to accept that settlement. The Williams claim the previously rejected settlement offer formed the basis of the stipulated judgment. The Williams also claim that the settlement terms with respect to repairing their home are inadequate, and as such their home will remain with unrepaired defects that will result in further expenses to be incurred by the Williams. Further, the Williams claim they have incurred additional legal fees to undo the settlement.

With the settlement finalized, the law firm moved to withdraw its fee from the district court registry, and on October 29, 2012, the district court ordered the release of $48,177.28 from the registry to satisfy the law firm's fees and costs, and the judgment so ordering the release was signed on November 2, 2012. The order of the district court to disburse the funds to the law firm was not appealed by the Williams.

Dunlap and the law firm filed a motion for summary judgment, claiming the Williams failed to mitigate their damages by not seeking a new

trial or appellate review of the motion to enforce the settlement or the disbursement of settlement proceeds to the law firm. The law firm also claims that the Williams did not retain a legal expert to determine the law firm's standard of care or link a breach of that standard of care to damages they have incurred. Further, the law firm contends that any evidence to be adduced from oral communication during the mediation of the settlement is statutorily inadmissible.[5] As such, the law firm contends that the Williams are barred from making a malpractice claim and/or have not presented a genuine issue of material fact in their petition for damages.

After a hearing on May 13, 2013, the district court granted the law firm's summary judgment. The judgment was signed July 18, 2013, dismissing the Williams's claim of legal malpractice with prejudice. The Williams filed a motion for the instant appeal on July 31, 2013, and the district court granted the motion on August 6, 2013.

ASSIGNMENT OF ERROR

The Williams state simply in one assignment of error that the district court erred in granting summary judgment for Dunlap and the law firm.

STANDARD OF REVIEW

Louisiana Code of Civil Procedure art. 966(C)(2) provides:

> The burden of proof on a motion for summary judgment remains with the movant. However, if the movant will not bear the burden of proof at trial on the matter that is before the court on the motion for summary judgment, the movant's burden on the motion does not require him to negate all essential elements of the adverse party's claim, action, or defense, but rather to 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, if the adverse party fails to produce factual support sufficient to establish that he will be able to satisfy his evidentiary burden of proof at trial, there is no genuine issue of material fact.

[5] "Except as provided in this Section, all oral and written communication and records made during mediation… are not subject to disclosure, and may not be used as evidence in any judicial or administrative proceeding." La. R.S. 9:4112(A).

> In determining whether summary judgment is appropriate, appellate courts review summary judgment *de novo* under the same criteria that govern the trial court's determination of whether summary judgment is appropriate. Furthermore, an appellate court asks the same questions as does the trial court in determining whether summary judgment is appropriate: whether there is any genuine issue of material fact, and whether the mover is entitled to judgment as a matter of law. Because it is the applicable substantive law that determines materiality, whether a particular fact in dispute is material can be seen only in light of the substantive law applicable to the case.

Brassette v. Exnicios, 2011-1439 (La. App. 1 Cir. 5/14/12), 92 So.3d 1077, 1081, writ denied, 2012-1583 (La. 11/9/12), 100 So.3d 831 (citations omitted).

DISCUSSION

In order to establish a valid legal malpractice claim, a plaintiff must show, by evidence sufficient to convince a reasonable trier of fact: (1) the existence of an attorney-client relationship; (2) negligent representation by the attorney; and (3) loss caused by that negligence. *Brassette*, 92 So.3d at 1082. It is undisputed in the record that an attorney-client relationship existed between the Williams and the law firm at the time the settlement was made. In their petition for damages, the Williams claim the law firm "negligently agreed to settle the [underlying lawsuit] and then insisted that John and Mary Williams accept the settlement even though they did not know or understand the terms of the settlement." The Williams further claim in the petition the law firm was "negligent in that they did not give the Williams the information they needed to give informed consent for the settlement." The Williams argue in their brief that the settlement did not fully resolve all the issues of the case, and in particular, the issue of repairs.

We find that the stipulated judgment, as written, adequately satisfied the issue of repairs. It names the contractor as responsible for completing the repairs to the Williams home, and the repairs to be made are listed in an exhibit attached to the judgment. That exhibit happens to be the

correspondence of the original settlement offer that the Williams initially rejected; however, when the judgment was read into the record, Dunlap referred to the filing of that correspondence into the record in the presence of Mrs. Williams in open court, and she raised no objection. The stipulated judgment goes on to state that the repairs will be monitored by the Williams's own hired expert, Mr. Stein, who would keep the district court informed of the progress of the repairs. In effect, the district court retained jurisdiction over the repairs until they were completed. As the district court had accepted a method by which the repairs to the Williams' home would be completed, that issue had been resolved.

If the Williams were dissatisfied with the settlement as written, they made no effort to remedy or mitigate whatever loss they perceived it caused them. Although their failure to pursue a new trial or an appeal did not automatically waive their right to file a malpractice claim, a client does have a duty to take reasonable steps to mitigate damage caused by the attorney's negligent actions. See *MB Industries, LLC v. CNA Ins. Co.*, 2011-0303 (La. 10/25/11), 74 So.3d 1173, 1182-83. All Mrs. Williams would have had to do was indicate to Dunlap in open court that she was not satisfied with the settlement. Whether Dunlap continued on with the reading of the settlement or not, the district court would have noted and the record would have indicated her dissatisfaction with the settlement.

We are not impressed by the Williams' contention that Dunlap "insisted" they accept the settlement and that they were not sufficiently informed by their attorneys to enable them to give consent to the settlement. Excerpts from their depositions, submitted in connection with the motion for summary judgment, indicate otherwise. After Dr. Williams had left court to perform the surgery, he advised Dunlap and the judge over the phone that

they had authority to settle the case, along the lines, in Dr. Williams's words, "that the home would be repaired and that in fact there was going to be some settlement by the insurance companies, some financial settlement." The settlement, as written, reflects these intentions by Dr. Williams. Mrs. Williams admitted to ultimately relying upon the advice of Mr. Stein, who is not an attorney and who is not affiliated with Dunlap or the law firm, to accept the settlement offer.

The law firm cited numerous defects with the underlying lawsuit, such as failing to sue necessary parties, failing to meet certain statutory requirements to make a successful claim under the NHWA, and, in the law firm's estimation, an unrealistic assessment by the Williams of the costs of necessary repairs to the home. These alleged defects to the underlying lawsuit existed before the Williams retained the law firm.

Upon being retained, Dunlap filed supplemental petitions for damages to include the necessary parties that had not been previously sued, and he advised the Williams that their claims against some of those parties could have prescribed. After his assessment of the case, Dunlap concluded, in his own legal opinion, that it was in the best interest of the Williams to settle the case. In his deposition, submitted in connection with the motion for summary judgment, Dunlap testified that the Williams ran the risk of having the court dismiss certain parties from the case if they refused to settle. He further stated that the settlement was more advantageous to the Williams than he had expected, and that he expected them to receive no money if they had refused to settle. "I didn't see a downside," Dunlap stated, "and I recommended to both Dr. and Mrs. Williams that they take it[.]"

In determining whether incorrect advice rises to actionable legal malpractice, the question is not whether or not the advice given was, by

hindsight, correct, but rather whether or not the advice given was the result of the proper exercise of skill and professional judgment under the conditions existing at the time the advice was given. *Leonard v. Reeves,* 2011-1009 (La. App. 1 Cir. 1/12/12), 82 So.3d 1250, 1262. After viewing the circumstances of the underlying suit and reviewing Dunlap's assessment of those circumstances and his resulting legal opinion, we find that his legal advice was appropriate under the circumstances existing at the time the advice was given. We do not have to visit the question of whether or not it was correct.

While we do not find the actions of Dunlap and the law firm to be negligent, we will nevertheless examine the third element of the legal malpractice claim, i.e., whether the actions of Dunlap and the law firm caused an actual loss to the Williams. Initially, we note the language of the Williams' petition, where they indicate that damages and expenses "will be incurred" to repair their home. The plain meaning of that part of their petition is that, at the time the Williams filed the petition, they had not suffered any damages with respect to repairs that had to be made to their home resulting from the actions of the law firm. The mere statement of an indeterminate future loss is not factual support for a claim of damages. See *Costello v. Hardy,* 2003-1146 (La. 1/21/04), 864 So.2d 129, 139.

The Williams neither hired a legal expert to determine the law firm's legal negligence or their loss. While not hiring an expert is not fatal to the Williams' claim, the Williams have not proven to the district court or this Court any obvious, gross error by Dunlap or the law firm that would supersede the necessity for an expert witness. See *MB Industries,* 74 So.3d at 1184-85.

The Williams also make a claim for additional legal expenses related to their effort to undo the March 25, 2010 settlement. As we find that the settlement is binding on the Williams and not legally deficient, Dunlap and the law firm cannot be held liable for additional expenses the Williams took upon themselves to set aside an otherwise valid settlement. We see no causal link between the actions of the law firm and these additional expenses incurred by the Williams.

CONCLUSION

The law firm made a proper showing that no genuine issue of material fact exist in the Williams' legal malpractice claim. The law firm proved that there is no evidence to show negligence in either Dunlap's or the law firm's representation of the Williams, and also proved that the Williams presented no proof of damages or loss related to the actions of Dunlap or the law firm. Once the burden of proof shifted to the Williams, they did not present any evidence of negligence or loss related to the law firm's legal representation. The district court was therefore correct to grant Dunlap's and the law firm's motion for summary judgment.[6]

DECREE

The motion for summary judgment granted in favor of the appellees, John B. Dunlap, III and Carleton, Dunlap, Olinde, Moore, and Bohman, LLC, is affirmed. The petition for damages filed by the appellants, Dr. John and Mary Williams, is dismissed with prejudice. All costs for this appeal are assessed to John and Mary Williams.

AFFIRMED.

[6] We therefore find it unnecessary to address the issue of whether certain statements made during the mediation proceedings are inadmissible under La. R.S. 9:4112.