NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

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AHP by GH

2017 CA 1022

BRUNSWICK SEAFOOD, INC. D/B/A DULARGE SEAFOOD PROCESSING AND LENUE GREEN

VERSUS

WILLIAMS LAW GROUP, LLC; SMITKO LAW, A PROFESSIONAL LAW CORPORATION; THE LAW OFFICES OF JERRI G. SMITKO, APLC; NAQUIN & CARMOUCHE, LLC; NAQUIN LAW FIRM, LLC; JOHN J. BEAN, CPA, INC.; CONRAD S. P. WILLIAMS; DAVID ARDOIN; MATTHEW D. ORY; JERRI G. SMITKO; CATHERINE GAUTHIER AND JOHN J. BEAN

Judgment rendered: JAN 08 2019

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On Appeal from the
Thirty-Second Judicial District Court
In and for the Parish of Terrebonne
State of Louisiana
No. 172,288

The Honorable Randall L. Bethancourt, Judge Presiding

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BEFORE: HIGGINBOTHAM, HOLDRIDGE, AND PENZATO, JJ.

Higginbotham, J. dissents.

HOLDRIDGE, J.

The plaintiffs, Brunswick Seafood Inc., d/b/a Dularge Seafood Processing (Brunswick), and Lenue Green (Mr. Green) (sometimes collectively referred to as "the plaintiffs"), appeal a summary judgment dismissing their legal malpractice claims against Smitko Law, APLC; The Law Offices of Jerri G. Smitko, APLC; Smitko & Ory, APLC; Jerri G. Smitko (Ms. Smitko); and Catherine Gauthier (Ms. Gauthier) (sometimes collectively referred to as "the Smitko defendants"). We affirm.

FACTS AND PROCEDURAL HISTORY

Brunswick is a corporation incorporated in North Carolina that is engaged in the business of transporting, selling, and distributing seafood products it harvests from the Gulf of Mexico. Brunswick holds oyster leases in Louisiana and owns wetland properties in Terrebonne Parish abutting the Gulf of Mexico. Mr. Green is the director, sole shareholder, manager, and an employee of Brunswick, and he also personally holds oyster leases in Louisiana. Mr. Green's wife, Vangelynn, owns an oyster company named Green's Oyster Co.

Brunswick's seafood dock and processing facility in Theriot, Louisiana, suffered losses due to the oil spill caused by the Deepwater Horizon explosion on April 20, 2010. On October 21, 2010, Brunswick and Green's Oyster Co. retained the Law Offices of Jerri G. Smitko to pursue their claims.[1] On November 1, 2010, Brunswick received an emergency payment of $284,800 from the Gulf Coast Claims Facility (GCCF), an emergency payment program. Brunswick had additional business economic loss claims (BEL claims), which were submitted to a settlement program administered by the Deepwater Horizon Claims Center (Claims

[1] The petition states that Brunswick and Mr. Green entered into a contract with the Smitko defendants on October 21, 2010, but the contract in the record shows Brunswick and Green's Oyster Co. as the clients with Mrs. Green signing for Green's Oyster Co. and Mr. Green signing for Brunswick.

Center). Brunswick's BEL claim erroneously included a portion of the GCCF payment of $284,800 as seafood sales income for November of 2010, which allegedly grossly inflated the amount of Brunswick's seafood sales for the period after the oil spill. Brunswick received no additional compensation for damages due to the oil spill.

Brunswick and Mr. Green filed a legal malpractice action against the Smitko defendants.[2] The plaintiffs alleged that John J. Bean, a certified public accountant in North Carolina who performed accounting work for Brunswick, was enlisted by the Smitko defendants to prepare calculations for submission of the BEL claim to the Claims Center. The plaintiffs alleged that on March 13, 2013, Ms. Gauthier, an attorney employed with Smitko, was informed by Mr. Bean that at least a portion of the GCCF payment of $284,800 had been erroneously included in the seafood sales accounting records. According to the petition, on April 22, 2013, Ms. Gauthier advised Claims Center administrators that they should contact Mr. Bean with their questions on Brunswick's BEL claim calculations. The plaintiffs alleged that Ms. Gauthier did not advise Brunswick that she referred the Claims Center administrator to Mr. Bean. According to the petition, Mr. Bean was asked questions by the Claims Center administrators and failed to explain the error; Mr. Bean also failed to notify Brunswick of any errors and to reconcile the profit and loss statements with Brunswick's tax returns to provide an optimal result for Brunswick.

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[2] We note that the petition named Matthew D. Ory as a defendant, but requested service on Smitko and Ory, APLC. Smitko and Ory, APLC, answered the suit with the other Smitko defendants. Additional defendants were named in the suit, but they were dismissed prior to the filing of the motion for summary judgment at issue in this appeal. Those defendants included Brunswick's certified public accountant, John J. Bean, who was dismissed on an exception of lack of personal jurisdiction.

The plaintiffs alleged that the Claims Center determined that Brunswick was not entitled to any additional amounts and that the calculation of the BEL claim actually yielded a negative amount; in other words, Brunswick had been overcompensated by the GCCF payment. According to the petition, Ms. Gauthier accepted the determination that the claim was negative without investigating any further. On November 27, 2013, Ms. Gauthier advised Brunswick that the Smitko defendants were no longer representing Brunswick for any claims.

The plaintiffs alleged that due to Ms. Gauthier's negligence in failing to make sure that the GCCF payment was not included as income for the BEL claim and due to her "de facto abandonment" of Brunswick as a client on April 22, 2013 when she referred questions from the Claims Center to Mr. Bean, Brunswick was awarded no additional funds. According to the plaintiffs, if there would have been a proper reconciliation and enlistment of competent accounting assistance, Brunswick's BEL claim would have been exponentially higher. The plaintiffs alleged that Smitko was liable as Ms. Gauthier's employer and for failing to properly supervise and instruct Ms. Gauthier.[3]

The Smitko defendants filed a motion for summary judgment on September 21, 2016, contending that the plaintiffs could not establish the requisite causal element of their legal malpractice claim and that the damages were speculative.[4] The trial court granted the motion for summary judgment and dismissed the plaintiffs' suit as to the Smitko defendants. In its oral ruling on the motion, the trial court stated that it adopted as its reasons the memorandum in support of the

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[3] We note that in addition to the allegations as to the BEL claim, the petition also states that the Smitko defendants failed to properly submit claims for Brunswick's and Mr. Green's leasehold and wetland property damages claims. The parties did not raise any issues regarding these claims in the trial court and also do not raise them on appeal.

[4] We also note that Brunswick previously filed a motion for partial summary judgment seeking a determination that the Smitko defendants were liable; the trial court denied Brunswick's motion.

motion for summary judgment and the argument at the hearing by counsel for the Smitko defendants. The plaintiffs then filed a motion for a new trial, which the trial court denied, adopting as its reasons the Smitko defendants' memorandum in opposition to the motion for new trial and their argument at the hearing. The plaintiffs appeal, asserting error in the trial court's grant of the motion for summary judgment and in the denial of the motion for new trial.

APPLICABLE LAW

A motion for summary judgment is a procedural device used to avoid a full-scale trial when there is no genuine issue of material fact. **Crosstex Energy Services, LP v. Texas Brine Co., LLC**, 2017-0895 (La. App. 1 Cir. 12/21/17), 240 So.3d 932, 935-36, writ denied, 2018-0145 (La. 3/23/18), 238 So.3d 963. After an opportunity for adequate discovery, a motion for summary judgment shall be granted if the motion, memorandum, and supporting documents show there is no genuine issue as to material fact and that the mover is entitled to judgment as a matter of law. La. C.C.P. art. 966A(3).[5]

The burden of proof rests on the mover. Nevertheless, if the mover will not bear the burden of proof at trial on the issue that is before the court on the motion for summary judgment, the mover'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 the absence of factual support for one or more elements essential to the adverse party's claim, action, or defense. The burden is on the adverse party to produce factual support sufficient to establish the existence

[5] In their motion for summary judgment and the plaintiffs' opposition to the motion, the Smitko defendants and the plaintiffs referred to La. C.C.P. art. 966B(2) as it read prior to its amendment by Acts 2015, No. 422. However, because the amendment to article 966 was effective January 1, 2016, and the motion for summary judgment was filed on November 28, 2016, the amended version applies.

of a genuine issue of material fact or that the mover is not entitled to judgment as a matter of law. La. C.C.P. art. 966D(1).

Appellate courts review evidence de novo under the same criteria that govern the trial court's determination of whether summary judgment is appropriate. **Crosstex**, 240 So.3d at 936. Thus, appellate courts ask the same questions: whether there is any genuine issue of material fact and whether the mover is entitled to judgment as a matter of law. **Id.** 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. **Id.**

A claim for legal malpractice is stated when the plaintiff alleges that there was an attorney-client relationship, the attorney was guilty of negligence or professional impropriety in his relationship with the client, and the attorney's misconduct caused the client some loss. **Leonard v. Reeves**, 2011-1009 (La. App. 1 Cir. 1/12/12), 82 So.3d 1250, 1257. To prove factual loss causation, a malpractice plaintiff must show that it suffered a loss that would not have occurred but for its attorney's negligent acts or omissions. **Id.** at 1262. In **Jenkins v. St. Paul Fire & Marine Insurance Co.**, 422 So.2d 1109, 1110 (La. 1982), however, where the defendant attorneys failed to file suit on their client's personal injury claim until two days after prescription had run, the Louisiana Supreme Court clarified that "[a] client [who] has proved that his former attorney ... failed to assert [a] claim timely" is entitled to a presumption of "some loss," thereby shifting the burden to the attorney to disprove the loss. In **Leonard**, this court held that the **Jenkins** rationale applies "only to 'such a situation' as was involved in that case, *i.e.,* the final or complete loss of an opportunity to assert a legal claim (or, conversely, to present a defense) caused by an attorney's negligent failure to comply with the applicable procedural standards." **Leonard**, 82 So.3d at 1259.

The Louisiana Supreme Court in **MB Industries, LLC v. CNA Insurance Co.**, 2011-0303 (La. 10/25/11), 74 So.3d 1173, 1187, also noted that in **Jenkins**, the court reiterated that causation is "an essential element of any tort claim," and that a plaintiff continues to bear the initial burden of "establish[ing] some causal connection" between the negligence and the alleged loss. **Jenkins**, 422 So.2d at 1110.

Thus, in this case, if the Smitko defendants in their motion for summary judgment pointed out to the trial court the absence of factual support for one or more elements essential to the plaintiffs' malpractice claim, such as that the Smitko defendants' alleged negligence caused the plaintiffs' damages, then the burden shifted to the plaintiffs to produce factual support sufficient to establish the existence of a genuine issue of material fact or that the Smitko defendants were not entitled to judgment as a matter of law. La. C.C.P. art. 966D(1).

MOTION FOR SUMMARY JUDGMENT

In their motion for summary judgment, the Smitko defendants contended that the plaintiffs could not show that they failed to obtain more damages because the GCCF payment was improperly included as seafood sales for November of 2010. The entire payment of $284,800 was not misclassified; only $148,650 was improperly included as seafood sales. The Smitko defendants argued that the plaintiffs' accounting expert, Matthew Roger, and the plaintiffs' legal expert, Ernest L. O'Bannon, could not explain why Brunswick received a negative offer. Ralph Litolff, Jr., the Smitko defendants' CPA expert, set forth multiple problems with Brunswick's application that could have led to the negative offer.

In support of the motion for summary judgment, the Smitko defendants submitted Mr. Litolff's affidavit wherein he stated that he provided an expert

report with exhibits attached to the motion for summary judgment.[6] In his report, Mr. Litolff initially stated that Brunswick misrepresented to the Claims Center that it was a single-facility claimant operating a facility solely in Louisiana. Mr. Litolff pointed out that Brunswick was a North Carolina corporation with its principal place of business in North Carolina, where it maintained a physical location. Mr. Litolff determined that in 2010, the amount of seafood products that were harvested from the Gulf of Mexico and that landed at the Brunswick dock in Theriot, Louisiana, approximated $10,087.50. He then stated that this amount was minimal in comparison to the total gross revenues of approximately $1.6 million reported by Brunswick during 2010. According to Mr. Litolff, "[t]his observation, in and of itself, creates a degree of uncertainty with respect to the representations made by Brunswick that their business operations were solely conducted out of a single location in Theriot, Louisiana, which is included within the Gulf Coast Area as defined by the Settlement Agreement." Mr. Litolff stated that the revenues and incurred expenses from outside of the Gulf Coast area should have been excluded to calculate Brunswick's BEL claim.

Mr. Litolff determined that the BEL claim should have been classified as a multi-facility claim since it appeared Brunswick had other facilities that generated revenue and incurred expenses outside of the Gulf Coast area. Mr. Litolff opined that because the BEL claim was not properly classified as a multi-facility claim, the Claims Center might have concluded that Brunswick was not entitled to

[6] In addition to several exhibits concerning calculations involving and comparisons of financial data used by Mr. Roger and financial data used by the Claims Center, the Litolff expert report also had attached to it an analysis of trip ticket activity for November and December of 2010, a copy of Brunswick's BEL claim form dated September 25, 2012 showing it filed as a business with a single location, and a copy of a second BEL claim form dated April 21, 2014 requesting a new calculation removing prior GCCF payments erroneously included. Mr. Litolff also attached an analysis of Deepwater Horizon Policy 495 matching criteria.

compensation because its headquarters were in North Carolina, outside of the economic loss zone covered by the settlement.

Additionally, Mr. Litolff commented that numerous email communications showed that the Claims Center requested a full reconciliation from the monthly profit and loss statements to Brunswick's federal income tax returns because the Claims Center identified variances when comparing the profit and loss statements to the relevant tax returns. In the emails Mr. Litolff reviewed, the Claims Center indicated it could not process the claim unless the sum of the amounts reflected on the monthly profit and loss statements used for claim calculation purposes and related annual totals was consistent with amounts reflected on the federal income tax returns. Mr. Litolff indicated that because there was a negative rather than a positive award amount determined by the Claims Center, the BEL claim was processed even though there were several pending Claims Center inquiries as of the date the notice of the claim was issued. He explained that before a positive award amount is issued, any significant and pending Claims Center inquiries must typically be resolved.

Mr. Litolff also noted that Mr. Bean indicated to the Claims Center that the monthly profit and loss statements provided for the claim calculation did not reflect the year-end adjusting entries, which were posted in the last month of Brunswick's fiscal year-end of August 31. Mr. Litolff factored Mr. Bean's statements into his consideration of the assessments of the plaintiffs' malpractice claim by Mr. Roger. Mr. Litolff determined that one of Mr. Roger's assessments of the BEL claim was dependent on the Claims Center using monthly profit and loss statements which were collectively reconciled to the plaintiffs' federal corporate income tax returns with an adjustment to exclude the GCCF payment. Mr. Litolff stated that using such large year-end adjusting entries in the calculation

of economic damages without consideration of the months to which the activity relates results in a misrepresentation and a gross overstatement of the actual damage alleged. According to Mr. Litolff, the alleged economic damages Mr. Roger calculated were "highly speculative and are not based on sound methodologies or properly 'matched' financial statements." Mr. Litolff reported that the Roger calculations included the entire operating activity of Brunswick for calculation purposes, despite the fact that some portion of Brunswick's revenue and/or expenses appeared to be generated outside the Gulf Coast area, "thereby making the Roger calculations improper, overstated and not in accordance with the terms of the relevant Settlement Agreement."

Lastly, Mr. Litolff considered Deepwater Horizon Policy 495, which included a number of revised economic loss frameworks for BEL claims to properly "match" a claimant's revenues and expenses. Mr. Litolff then calculated the BEL claim applying the Annual Variable Margin methodology of Policy 495 for unmatched claims and determined that an award amount of $84,547 would be produced using the underlying data and methodology Mr. Roger used, assuming all of Brunswick's facilities and/or operations were located within the Gulf Coast area.

In addition to the affidavit of Mr. Litolff and his expert report with exhibits,[7] the Smitko defendants also attached to their memorandum in support of the motion for summary judgment several other documents.[8] The Smitko defendants attached

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[7] See footnote 6.

[8] The documents attached to the Smitko defendants' memorandum include: a document containing provisions as to the Claim Center's duties and the definition of "facility;" a copy of the Claims Center's "Eligibility Notice" dated June 5, 2013 for Brunswick's claim setting forth the negative offer; a document entitled, "Policy 467: Economic Loss: The Definition of 'Facility;'" a copy of Brunswick's North Carolina certificate of incorporation and the articles of incorporation stating that the principal office was in North Carolina; and a copy of a letter from Mr. O'Bannon to the plaintiffs' counsel discussing his expert opinion, which lacks the attachments referred to therein.

a copy of a letter from Mr. Roger to Brunswick's counsel (without the exhibits that Mr. Roger referred to in the letter). They also attached a copy of emails between Ms. Gauthier, Mr. Bean, and an analyst with the Claims Center wherein Mr. Bean stated that the GCCF payment is included in November 2010 sales and the Claims Center analyst noted the "large discrepancy" between the tax returns and the profit and loss statements.

In response to the motion for summary judgment, the plaintiffs contended that Mr. Roger's expert report detailed how the negligent inclusion of the GCCF payment led the GCCF to award nothing on the BEL claim. Mr. Roger also opined that if Brunswick's profit and loss statements had been reconciled to its tax returns, Brunswick would have received $1,312,748 for its BEL claim. The plaintiffs also argued that the Smitko defendants failed to take steps to protect Brunswick's rights to seek review. They contended that Ms. Gauthier claimed in her defense that she discussed the denial of additional compensation with Mrs. Green during a phone call on June 19, 2013, and that Mrs. Green authorized the discontinuance of the claim. The plaintiffs relied on Mr. O'Bannon's letter wherein he stated that Ms. Gauthier's handling of the denial of the claim was negligent. The plaintiffs also challenged the Smitko defendants' claim that they could not show that their negligence caused any damages, arguing that if multi-facility identification was appropriate, Ms. Gauthier had the duty to properly classify Brunswick as a multi-facility claimant.

The Smitko defendants also attached an incomplete affidavit from their counsel stating that the exhibits attached to the affidavit (which are not in the appellate record) are true and correct copies of various original documents and reports. The affidavit refers to Mr. O'Bannon's and Mr. Roger's expert reports and supporting documents, and it also refers to documents forming various parts of the Deepwater Horizon settlement in which the claims process was formulated. The record contains only the first page of the affidavit and does not contain a signature page with notarization.

In opposition to the motion for summary judgment, the plaintiffs submitted Ms. Smitko and Ms. Gauthier's answers to interrogatories wherein they stated that Ms. Gauthier spoke with Mrs. Green on June 19, 2013 for 8.1 minutes to discuss the negative award from the Claims Center. According to the responses, Ms. Gauthier informed Mrs. Green that Brunswick could appeal the negative offer or accept it. Ms. Gauthier also informed Mrs. Green that Brunswick might need to have its financial documents amended and would need to submit them with any appeal. The responses then state that Mrs. Green instructed Ms. Gauthier to accept the negative award.

The plaintiffs also submitted the affidavits of Mrs. Green and Mr. Green. In his affidavit, Mr. Green stated that he was the sole owner of Brunswick and solely authorized to act on its behalf. He stated that the bulk of the seafood Brunswick dealt with was harvested in the Gulf of Mexico. He received correspondence dated November 27, 2013 from Ms. Smitko and her law firm advising him that the Claims Center had denied Brunswick's BEL claim and that Ms. Smitko and her firm declined to further represent Brunswick. According to Mr. Green, the letter did not mention that Mrs. Green approved the discontinuance of the claim. Mr. Green stated that Ms. Smitko and her law firm did not obtain his consent to discontinue Brunswick's claim. Mr. Green attested that Mrs. Green was not a manager, director, or employee of Brunswick; she received no remuneration from Brunswick and was not authorized to make the decision as to whether to continue Brunswick's claims. Mr. Green stated that he did not delegate to Mrs. Green the power to discontinue the BEL claim and that Ms. Smitko and her law firm never communicated with him as to Mrs. Green's authority to discontinue the claim.

In Mrs. Green's affidavit, she made the same attestations as Mr. Green. She also attested that she never received any communications from Ms. Smitko and her

law firm as to whether she could bind Brunswick. Mrs. Green stated that her only attorney-client relationship with Ms. Smitko and her law firm was as to Green's Oyster Co., her solely-owned company in which Mr. Green had no interest. Mrs. Green had no recollection of ever authorizing the discontinuance of Brunswick's claim.

The plaintiffs also submitted other documents in opposition to the motion for summary judgment.[9] Two submissions were the same as were submitted by the Smitko defendants: a copy of emails between Ms. Gauthier, Mr. Bean, and the Claims Center representative and a copy of the Brunswick articles of incorporation.

In our de novo review of whether the trial court should have granted the motion for summary judgment, we must first examine the documents that can be properly considered. Louisiana Code of Civil Procedure article 966A(4) provides that the only documents that may be filed in support of or in opposition to the motion are pleadings, memoranda, affidavits, depositions, answers to interrogatories, certified medical records, written stipulations, and admissions. Louisiana Code of Civil Procedure article 966D(2) further provides that the court shall consider any documents filed in support of or in opposition to the motion for summary judgment to which no objection is made. In this case, neither party objected to the documents submitted by the other party in connection with the motion for summary judgment. The Smitko defendants had previously filed a **Daubert** motion in limine to exclude the testimony of Mr. Roger on October 3,

[9] The documents the plaintiffs submitted included copies of the following: the retainer contract between the Smitko defendants and Brunswick and Green's Oyster Co.; a letter from Ms. Gauthier to Mr. and Mrs. Green dated November 27, 2013 stating that the Smitko firm could not proceed any further on the claim for Brunswick; biographical information for Mr. O'Bannon; the short claim form for Brunswick dated April 18, 2011; a computer screenshot showing that Brunswick's Theriot address was within Economic Loss Zone B; a document entitled, "CAUSATION REQUIREMENTS FOR BUSINESS LOSS ZONES" (footnote omitted); and the first page of Brunswick's 2010 federal income tax form.

2016, which the trial court set for hearing on the same date as the hearing on the motion for summary judgment; however, once the trial court granted the summary judgment motion, it was not considered.

Numerous documents were submitted in this case that are not among those authorized under La. C.C.P. art. 966A(4). The only documents which were proper under article 966A(4) are the affidavits of Mr. Litolff (with its attachments), Mr. Green, and Mrs. Green, and Ms. Smitko's and Ms. Gauthier's responses to interrogatories.[10] A document that is not an affidavit or sworn to in any way, or is not certified or attached to an affidavit, has no evidentiary value on a motion for summary judgment. **Cryer v. Tangi Pines Nursing Ctr.**, 2017-0697 (La. App. 1 Cir. 12/21/17), 240 So.3d 975, 979; **Unifund CCR Partners v. Perkins**, 2012-1851 (La. App. 1 Cir. 9/25/13), 134 So.3d 626, 632. Unsworn or unverified documents, such as letters or reports, annexed to motions for summary judgment or to the opposition to such motions are not self-proving and will not be considered, if objected to. Attaching such documents to a motion for summary judgment or the opposition thereto does not transform them into competent summary judgment evidence. See **Bunge North America, Inc. v. Board of Commerce & Industry and Louisiana Dept. of Economic Development**, 2007-1746 (La. App. 1 Cir. 5/2/08), 991 So.2d 511, 527, writ denied, 2008-1594 (La. 11/21/08), 996 So.2d 1106. While we will consider all documents submitted by either party without objection in our review of the motion for summary judgment, the unsworn or unverified documents submitted by the parties in support of and in opposition to

[10] The affidavit from the Smitko defendants' counsel is incomplete. We also note that attaching documents to the affidavit of an attorney on the case who is not the keeper of the records, and designating the records as a true and correct copy does not authenticate, certify, or make them admissible. See **Labarre v. Occidental Chemical Co. and Texas Brine Co., LLC**, 2017-1370 (La. App. 1 Cir. 6/4/18), 251 So.3d 1092, 1105.

the motion for summary judgment have no evidentiary value. See **Cryer**, 240 So.3d at 979.

On our de novo review, we find that the Smitko defendants established that summary judgment was proper as to the third element of the plaintiffs' legal malpractice claim, loss causation. The plaintiffs assert in their petition that because the Smitko defendants negligently submitted and handled their BEL claim, specifically by including part of the GCCF payment as seafood sales in November of 2010 and in failing to appeal or seek re-review of the negative award, they did not receive a BEL award. In support of the motion for summary judgment, the Smitko defendants submitted the affidavit and report of their expert CPA. Through this report, they established that there were several possible reasons why Brunswick did not receive additional damages from the Claims Center that did not involve the erroneous classification of a portion of the GCCF payment as seafood sales or negligence on the part of the Smitko defendants. At this point, the burden shifted to the plaintiffs to produce factual support sufficient to establish the existence of a genuine issue of material fact that the damages or loss sustained by the plaintiffs were caused by the Smitko defendants' alleged negligence.

We find that the plaintiffs failed to produce any factual support for their damages claim. The plaintiffs have offered no proof as to why the negative offer was issued and whether that negative offer would be reversed with re-review even with proper multi-facility documentation or the correct profit and loss statements submitted. While the plaintiffs assumed that the inclusion of the GCCF money in seafood sales was the basis of the negative award, the plaintiffs did not produce a factual basis to support the assumption. The plaintiffs never propounded discovery on, issued a subpoena duces tecum to, or sought to depose those analysts with the Claims Center who handled Brunswick's BEL claim to determine why the Claims

Center gave Brunswick a negative offer. While the Smitko defendants submitted with their motion for summary judgment the letter of Mr. Roger, the plaintiffs' proposed expert accountant who calculated what he thought Brunswick would have recovered if the proper figures had been used, his calculations do not serve to establish causation.

The plaintiffs' contention that the notice itself of the negative award establishes the basis of the award has no merit. We initially note that, as earlier stated, the notice was not properly submitted in opposition to the motion for summary judgment. Additionally, the notice is a form wherein the appropriate financial figures are inserted to calculate compensation, and not a detailed explanation of why those figures were used. The form also contains an explanation of the method of calculation, but this explanation consists of the formulas used to obtain the proper compensation. Therefore, the plaintiffs failed to produce factual support sufficient to establish that they would be able to support the existence of a genuine issue of fact or that as a matter of law the alleged loss was caused by the alleged legal malpractice of the Smitko defendants. Accordingly, we find that no genuine issues of material fact exist as to whether any alleged malpractice caused the plaintiffs' loss, which is an essential element for a valid legal malpractice action.[11] The trial court properly granted the Smitko defendants' motion for summary judgment, and the plaintiffs' assignment of error regarding the improperly granted summary judgment lacks merit.

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[11] Based on our determination that the plaintiffs could not produce support to satisfy their burden of proving a loss caused by any alleged malpractice, we need not address their contentions that Mrs. Green was not authorized to negotiate the claim and that a written mandate authorizing the discontinuance of the claim was required by **Amitech U.S.A., Ltd. v. Nottingham Construction Co.**, 2009-2048 (La. App. 1 Cir. 10/29/10), 57 So.3d 1043, writs denied, 2011-0866, 2011-0953 (La. 6/17/11), 63 So.3d 1036, 1043. Additionally, while the plaintiffs contend on appeal that the Smitko defendants in their motion for summary judgment did not address the plaintiffs' breach of contract claim asserted in their petition, the plaintiffs did not raise this argument in the trial court. As noted earlier, this court does not consider arguments raised for the first time on appeal. See **Johnson**, 145 So.3d at 422.

MOTION FOR NEW TRIAL

The plaintiffs filed a motion for new trial contending that the trial court's judgment was contrary to the law and evidence, in particular, arguing that the **Jenkins** case applied. See 422 So.2d at 1109. They also urged the motion for new trial on the basis that they had discovered new evidence to defeat the motion for summary judgment that was not available prior to the summary judgment hearing, referring to the deposition of Ms. Gauthier. Attached to the plaintiffs' motion was Ms. Gauthier's deposition and an affidavit by Mr. Roger, in addition to other documents that were previously submitted in support of the motion for summary judgment.[12] Louisiana Code of Civil Procedure article 1972 provides as follows, in pertinent part:

> A new trial shall be granted, upon contradictory motion of any party, in the following cases:
>
> (1) When the verdict or judgment appears clearly contrary to the law and the evidence.
>
> (2) When the party has discovered, since the trial, evidence important to the cause, which he could not, with due diligence, have obtained before or during the trial.

When a motion for new trial is based on La. C.C.P. art. 1972(2), the allegations of fact therein "shall be verified by the affidavit of the applicant." La. C.C.P. art. 1975. Louisiana Code of Civil Procedure article 1973 provides a discretionary basis for a new trial, stating, "A new trial may be granted in any case if there is good ground therefor, except as otherwise provided by law." Louisiana jurisprudence is clear that a new trial should be ordered when the trial court,

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[12] The other documents attached to the motion for new trial (that were previously attached to the motion for summary judgment) were: a letter from Mr. Roger to the plaintiffs' counsel; a letter from Mr. O'Bannon to the plaintiffs' counsel; emails between counsel for the Smitko defendants and the plaintiffs' counsel; the retainer contract between the Smitko defendants, Brunswick, and Green's Oyster Co.; and the Claim Center's "Eligibility Notice" showing the negative BEL award.

exercising its discretion, is convinced by its examination of the facts that the judgment would result in a miscarriage of justice. **Arnouville v. Crowe**, 2016-0046 (La. App. 1 Cir. 9/16/16), 203 So.3d 479, 484. The denial of a motion for new trial, whether on peremptory or discretionary grounds, should not be reversed unless there has been an abuse of the trial court's discretion. **Id.**

As to the plaintiffs' contentions that under the **Jenkins** case, they did not have the burden of proving that the Smitko defendants' alleged negligence caused them loss, we addressed the Jenkins case in our consideration of the burden of proof in this malpractice action. As to the plaintiffs' contractual claim that the Smitko defendants were not entitled to their motion for summary judgment because they breached their contingency fee agreement with the plaintiffs, plaintiffs asserted this specific claim for the first time in their motion for a new trial. Moreover, as in their earlier opposition to the motion for summary judgment, the plaintiffs could not show that if the plaintiffs authorized an appeal of their claim, they would have been awarded additional damages.

The plaintiffs also contended that they were entitled to a new trial based on newly discovered evidence. To meet their burden of proof on a motion for new trial based upon newly discovered evidence, the mover must show that such evidence: 1) is not merely cumulative; 2) would tend to change the result of the case; 3) was discovered after trial; and 4) could not, with due diligence, have been obtained before or during trial. **Slaughter v. Bd. of Supervisors of S. Univ. & Agric. & Mech. Coll.**, 2010-1049 (La. App. 1 Cir. 8/2/11), 76 So.3d 438, 460, writ denied, 2011-2110 (La. 1/13/12), 77 So.3d 970. The plaintiffs did not demonstrate that the "new" evidence would tend to change the result of the case and that it

could not, with due diligence, have been obtained before or during trial.[13] Accordingly, we find no abuse of discretion in the trial court's denial of the motion for new trial. Therefore, the plaintiffs' assignment of error regarding the motion for new trial lacks merit.

CONCLUSION

On our de novo review of the record before us, we find that the trial court properly granted summary judgment dismissing the legal malpractice claims against the Smitko defendants and properly denied the motion for new trial. We therefore affirm the December 19, 2016 summary judgment dismissing the plaintiffs' suit with prejudice and the March 22, 2017 judgment denying the plaintiffs' motion for new trial. All costs of this appeal are cast to the plaintiffs, Brunswick Seafood, Inc. d/b/a Dularge Seafood Processing and Lenue Green.

AFFIRMED.

[13] In this case, the motion for summary judgment was filed on September 21, 2016, over two years after suit was filed. The deposition was taken on October 11, 2016, after the motion was filed, but before the hearing on October 21, 2016. Trial was set to begin on November 28, 2016, and the latest date the motion for summary judgment could be filed was October 14, 2016. While the plaintiffs contend on appeal that pursuant to La. C.C.P. art. 966B(2) the deposition could not be filed, the plaintiffs did not request a continuance of the hearing on the motion for summary judgment so that they could file the deposition. See La. C.C.P. art. 966C(b)(2).