NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2006 CA 0767

SHELLEY L. BROWN

VERSUS

TROY A. HUMPHREY, WINSTON G. DECUIR, SR., LINDA LAW CLARK AND DECUIR & CLARK, L.L.P.

Judgment Rendered: JUN – 8 2007

Appealed from the
Nineteenth Judicial District Court
In and for the Parish of East Baton Rouge, Louisiana
Suit Number 1523,055

Honorable R. Michael Caldwell, Judge Presiding

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Larry Dersona **Baton Rouge, LA**	**Counsel for Plaintiff/Appellant,** **Shelley L. Brown**
Troy A. Humphrey **Baton Rouge, LA**	**Defendant, in proper person**
Paul H. Spaht **Baton Rouge, LA**	**Counsel for Defendants/Appellees,** **Decuir & Clark, L.L.P., Winston G. Decuir, Sr., and Linda Law Clark**

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BEFORE: CARTER, C.J., WHIPPLE, KUHN, McDONALD, AND McCLENDON, JJ.

Whipple, J. dissents and assigns reasons.

Carter J dissents for reasons assigned by Whipple J.

McDONALD, J.

This matter is before us on an appeal by a plaintiff in a legal malpractice suit from a judgment granting the motion for summary judgment filed by certain defendants and dismissing her claims against those defendants. For the following reasons, we affirm the judgment of the trial court.

FACTS AND PROCEDURAL HISTORY

The pleadings, deposition excerpts, and exhibits establish the following facts: On April 2, 2000, plaintiff, Shelley Brown was struck by an automobile driven by Thong Tran and suffered serious injuries, initially requiring three months of hospitalization. On April 9, 2000, Brown signed a Retainer Agreement with Troy Anthony Humphrey of DeCuir and Clark, L.L.P., Attorneys at Law to represent her in her claims arising out of the accident. By letter dated April 20, 2000, Humphrey informed USAgencies, the automobile liability insurer for Tran, that he represented Brown and contended, based on the accident report, that Tran was responsible for Brown's damages and injuries. Shortly thereafter, on April 27, 2000, the Bone and Joint Clinic of Baton Rouge, Inc. sent USAgencies by facsimile a Notice of Privilege over Proceeds for services in the amount of $7,140.00 provided to Brown as a result of the accident.

In response, USAgencies forwarded to DeCuir & Clark a check dated April 28, 2000, in the amount of $10,000.00, the "per person" liability limits for Tran's policy, made payable to Brown, the Bone and Joint Clinic, and DeCuir & Clark, attorneys at law, in an attempt to settle Brown's claims against USAgencies and Tran. However, the check was never negotiated.

On April 2, 2001, DeCuir & Clark, L.L.P. ("DeCuir & Clark"), through Humphrey, filed a petition for damages on behalf of Brown, naming

as defendants Tran and USAgencies. Service of process was not requested on Tran, and service on USAgencies was requested through "Walter 'Fox' McKeithen" at the "State Archives Building." However, the Louisiana Secretary of State sent a letter dated April 12, 2001, to the Clerk of Court for the Nineteenth Judicial District Court, rejecting the service of process on the basis that the Secretary of State was not the agent for service of process for any domestic insurance company. This letter rejecting service was filed into the suit record. However, no additional or amended service was requested on either defendant.

Thereafter, in February of 2003, Humphrey left his employment with DeCuir & Clark to start his own practice, and he took Brown's file with him. Humphrey sent a letter to USAgencies dated January 16, 2004, stating that he continued to represent Brown and requesting that USAgencies reissue the $10,000.00 check. USAgencies responded to Humphrey by letter dated January 21, 2004, indicating that it was "not in a position to resolve this case." Specifically, USAgencies noted that service of the suit had never been effected on any party. USAgencies indicated that it intended to file an exception raising the lack of service and undue delay in follow-up service attempts.

After receiving the January 21, 2004 letter from USAgencies, Humphrey discussed with Brown the difficulties he was having in settling the matter with USAgencies and indicated to her that he may have to go back to court to get the check reissued. However, Humphrey did not thereafter file any other pleadings with the court.

Subsequently, by letter dated April 5, 2004, Brown advised Humphrey that his legal services were no longer needed and requested a complete copy of her file. Brown then filed the instant suit for damages for legal

malpractice on August 4, 2004, naming as defendants Humphrey; DeCuir & Clark; Winston DeCuir, Sr.; Linda Law Clark; and Continental Casualty Company. Brown contended that the defendants were liable to her for legal malpractice for failure to serve the correct agent for service of process for USAgencies within ninety days as required by LSA-C.C.P. art. 1201(C) and failure to make any type of service of process on Tran, thereby causing her case to prescribe.

DeCuir & Clark, DeCuir, Clark and Continental Casualty Company ("the DeCuir & Clark defendants") filed a motion for summary judgment, contending that there was no genuine issue of material fact and that they were entitled to dismissal of Brown's claims against them with prejudice. Specifically, the DeCuir & Clark defendants contended that they no longer represented Brown as of February 14, 2003, when Humphrey left DeCuir & Clark to start his own firm and took Brown's file with them and that Brown was aware that they no longer represented her. They further contended that the timely filing of the petition for damages on behalf of Brown on April 2, 2001 had interrupted prescription even though the defendants in that suit were not served within the ninety-day time period set forth in LSA-C.C.P. art. 1201. The DeCuir & Clark defendants contended that on February 14, 2003, when their representation of Brown was terminated, Brown's suit was still pending and still viable, in that Brown could have requested service, amended the petition or re-filed the suit.

Following a hearing on the motion, the trial court agreed with the DeCuir & Clark defendants, finding that Brown knew that DeCuir & Clark did not represent her after February 2003, that no efforts to have the suit dismissed for failure to properly request service had been made at that point, that the three-year abandonment period had not yet run at that point, and,

thus, that Brown's suit was still viable at the time DeCuir & Clark discontinued representation of her. Accordingly, the trial court granted the DeCuir & Clark defendants' motion for summary judgment and dismissed Brown's claims against them with prejudice. From this judgment, Brown appeals.

LAW AND ANALYSIS

A motion for summary judgment is properly granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to material fact and that the mover is entitled to judgment as a matter of law. LSA-C.C.P. art. 966(B).

Pursuant to LSA-C.C.P. art. 966(C)(2), if the moving party will not bear the burden of proof on the issue at trial and points out that there is an absence of factual support for one or more elements essential to the adverse party's claim, action or defense, then the non-moving party must produce factual support sufficient to establish that he will be able to satisfy his evidentiary burden of proof at trial. If the opponent of the motion fails to do so, there is no genuine issue of material fact and summary judgment will be granted. Keller v. Case, 99-0424 (La. App. 1st Cir. 3/31/00), 757 So. 2d 920, 922, writ denied, 2000-1874 (La. 9/29/00), 770 So. 2d 354. Moreover, as consistently noted in jurisprudence, the opposing party cannot rest on the mere allegations or denials of his pleadings, but must present evidence which will establish that material facts are still at issue. Hunter v. Tensas Nursing Home, 32,217 (La. App. 2nd Cir. 10/27/99), 743 So. 2d 839, 841, writ denied, 99-3334 (La. 2/4/00), 754 So. 2d 228.

In determining whether summary judgment is appropriate, appellate courts review evidence de novo under the same criteria that govern the trial

court's determination of whether summary judgment is appropriate. 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 this case. Keller, 757 So. 2d at 922.

To establish a claim for legal malpractice, a plaintiff must prove: (1) the existence of an attorney-client relationship; (2) negligent representation by the attorney; and (3) loss caused by that negligence. Costello v. Hardy, 2003-146 (La. 1/21/04), 864 So. 2d 129, 138. Thus, to establish their entitlement to summary judgment, the DeCuir & Clark defendants had to establish an absence of factual support for one of these elements, and they relied upon the alleged absence of an attorney-client relationship at the time Brown suffered any loss.[1]

The jurisprudence recognizes that the existence of an attorney-client relationship turns largely on the client's subjective belief that it exists. In re LeBlanc, 2004-0681 (La. 10/14/04), 884 So. 2d 552, 557. In determining whether an attorney-client relationship existed or has been terminated, the entire relationship between the attorney and client must be examined. Succession of Smith v. Kavanaugh, Pierson and Talley, 565 So. 2d 990, 995 (La. App. 1st Cir.), writ denied, 567 So. 2d 1125 (La. 1990).

On appeal, Brown challenges the trial court's finding that any duty owed to Brown by DeCuir & Clark arising from the attorney-client

[1]The DeCuir & Clark defendants relied upon the Louisiana Supreme Court case of Bordelon v. Medical Center of Baton Rouge, 2003-0202 (La. 10/21/03), 871 So. 2d 1075 in support of their position that Brown had not suffered any loss as of February 2003, the date which they contend was the termination date of the attorney-client relationship. In Bordelon, the Court held that a lawsuit, although not timely served, interrupts prescription unless the failure to request service was in bad faith and that a subsequent petition filed prior to a judgment of dismissal of the first petition would thus be timely. Bordelon, 871 So. 2d at 1083-1084. Relying on Bordelon, the DeCuir & Clark defendants contended that as of February 2003, when the attorney-client relationship between them and Brown terminated, Brown's suit was still viable, and Brown or Humphrey could have requested service, amended the petition or re-filed the suit.

relationship terminated when Humphrey left the firm in February 2003. Brown also challenges the court's finding that Brown knew that her relationship with DeCuir & Clark had terminated. In so finding, the trial court relied upon Brown's deposition testimony, in which the following exchange occurred:

> Q: What did [Humphrey] tell you about the case during those two or three occasions?
>
> A: He basically just told me he had left the company and that he – it was at that time he said he didn't know too much about my case because certain parts he didn't know nothing [sic] about.
>
> Q: He told you he had left the Decuir firm, correct?
>
> A: Yes.
>
> Q: And he had taken the file with him?
>
> A: Yes.
>
> Q: **And so you knew that the Decuir firm was no longer representing you, correct?**
>
> **A: Yes.** (Emphasis added).

In this exchange, Brown acknowledges that DeCuir & Clark no longer represented her after Humphrey left the firm. We conclude that Brown's testimony, taken as a whole shows that she reasonably believed they no longer represented her.

Brown's subjective belief that the DeCuir firm was no longer representing her was confirmed by her actions. After Humphrey left the firm in February 2003, she never communicated with DeCuir. In fact, the only time she ever spoke with him was at a meeting shortly before Humphrey filed her suit in April 2001. She never spoke with Clark at all. In January of 2004, she received a letter dated January 5, 2004, from a law firm attempting to collect medical expenses on behalf of Our Lady of the

Lake Regional Medical Center that they incurred as a result of her accident. She informed the law firm that her attorney was Troy Humphrey and she took the letter to Humphrey, not the DeCuir firm. Considering all of these facts, it is clear that Brown did not believe that Decuir & Clark represented her. Once Humphrey left the law firm and took the file with him, Decuir and Clark no longer had the right or ability to take any action on behalf of his client, Brown. To attempt to hold Decuir & Clark liable now for not taking action that as a practical and ethical matter they could not take at the time is untenable. We agree with the trial court that in the absence of an attorney-client relationship, Brown cannot maintain a claim for legal malpractice against Decuir & Clark.

Further, in order to have an action dismissed for failure to effect proper service in accordance with La. C. C. P. art. 1201, it is necessary for the trial court to make a judicial determination that no good cause existed for not effecting service. La. C.C.P. art. 1672. This issue was not adjudicated prior to the suit being abandoned and thus, was not the cause of damage to Brown.

The trial court's written reasons for judgment succinctly set out the facts and the law relevant to a determination of the merits of this matter. After careful review of the entire record, we find no error by the trial court. Therefore, the judgment appealed is affirmed. Costs of this appeal are assessed to the appellant, Shelley L. Brown.

AFFIRMED.

SHELLY L. BROWN

VERSUS

TROY A. HUMPHREY, WINSTON G. DECUIR, SR., LINDA LAW CLARK AND DECUIR & CLARK, L.L.P.

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WHIPPLE, J., dissenting.

I respectfully dissent from the majority's conclusion that the DeCuir & Clark defendants proved their entitlement to summary judgment as a matter of law. As the majority correctly notes, the existence of an attorney-client relationship turns largely on the client's subjective belief that it exists. In re LeBlanc, 2004-0681 (La. 10/14/04), 884 So. 2d 552, 557. Additionally, and perhaps more importantly here, where the question is when, if ever, the attorney-client relationship ended, if a lawyer seeks to terminate his relationship with a client, the lawyer shall take steps to the extent reasonably practicable to protect a client's interests, **such as giving reasonable notice to the client**, allowing time for the employment of other counsel, **surrendering papers and property to which the client is entitled** and refunding any advance payment of a fee that has not been earned. Louisiana Rules of Professional Conduct, rule 1.16. In determining whether an attorney-client relationship has been terminated, the entire relationship between the attorney and client must be examined. Succession of Smith v. Kavanaugh, Pierson and Talley, 565 So. 2d 990, 995 (La. App. 1st Cir.), writ denied, 567 So. 2d 1125 (La. 1990).

I agree that in the portion of Brown's testimony quoted in the majority opinion, she appears to acknowledge that DeCuir & Clark no longer represented her after Humphrey left the firm. However, when her testimony is considered **as a whole**, there are clearly genuine issues of material fact

that remain, both as to when Brown reasonably determined that DeCuir & Clark no longer represented her and whether the firm actually continued to do so, given that the firm continues to possess the check representing settlement funds. Specifically, (although not noted by the majority) when questioned earlier in her deposition about her communications with Humphrey and DeCuir & Clark, Brown testified as follows:

> Q. But you knew that he had left and he had set up his own office?
>
> A. Yes. When I called the lady, she said he had moved out and she just gave me a number.
>
> Q. Okay. Now, did you ever talk to Winston Decuir, Sr.?
>
> A. When I called there and after I couldn't get in contact with [Humphrey], I called and asked, **is there anyone that's over him that I could speak with, and the lady who answered the phone gave me the name of Ms. Clark**, but she said Ms. Clark couldn't speak to me at the time so she would take my number and Ms. Clark would never call me back, either.

Additionally, later in Brown's deposition, the following colloquy took place:

> Q. Did you ever try to call the Decuir firm after Troy left that firm and took his file with him?
>
> A. Nobody returned my call.
>
> Q. But you didn't try to call them thereafter; you thought Mr. Humphrey was your lawyer, correct?
>
> A. **No, I hired Troy Humphrey of Decuir and Clark. That meant they was [sic] representing me, too.** (Emphasis added).

Moreover, in her affidavit, Brown attested that prior to the termination letter she sent Humphrey on April 5, 2004, she never rescinded the retainer agreement with DeCuir & Clark signed on April 4, 2000.

Considering the evidence in this summary judgment proceeding in its entirety, the undisputed facts of record are that Brown signed a retainer

agreement on April 9, 2000 with Humphrey "of DeCuir and Clark, L.L.P."; that Humphrey left the firm of DeCuir & Clark in February 2003 and took Brown's file with him; that Brown did not execute a second contract to retain Humphrey exclusively or individually after he left the firm of DeCuir & Clark; that DeCuir & Clark did not contact Brown when Humphrey left the firm to notify her of his departure, to tender the purported settlement check, to modify the retainer agreement with her or to disengage the firm from its representation of her; and that DeCuir & Clark did not file any pleadings in the suit record for Brown's suit to indicate that the firm was no longer connected with the matter.

Moreover, I note that while the majority states that Brown never communicated with DeCuir after Humphrey left the DeCuir firm in February 2003, it is undisputed that Brown was **unable to** obtain direct contact with DeCuir or Clark after Humphrey left the firm. However, she did attempt to contact the DeCuir firm after Humphrey's departure. In fact, DeCuir acknowledged that Brown contacted the firm regarding her file after Humphrey departed. Brown's testimony also sets forth that she **attempted** to contact DeCuir & Clark, but that no one returned her calls. Under the facts herein, I would conclude that the issues of whether Brown subjectively believed that DeCuir & Clark continued its representation of her and of whether the attorney-client relationship was actually terminated are both disputed and material.

Additionally, I reject the DeCuir & Clark defendants' contention that they did not commit any **actionable** negligence, and are thus entitled to summary judgment, because Humphrey or Brown herself could have corrected their errors after Brown's relationship with DeCuir & Clark allegedly ended. Notably, the DeCuir & Clark defendants do not contend

that an attorney-client relationship never existed between them and Brown, nor do they even allege that Brown's suit was not negligently handled during that relationship. The proper method of determining whether an attorney's malpractice is **a** cause in fact of damage to his client is whether the performance of that act (here, among other things, a proper request for service on the named defendants and the timely negotiation of the settlement check tendered by USAgencies) would have prevented the damage. Prestage v. Clark, 97-0524 (La. App. 1st Cir. 12/28/98), 723 So. 2d 1086, 1091, writ denied, 99-0234 (La. 3/26/99), 739 So. 2d 800. While it is true that the mere breach of a professional duty, causing only nominal damages, speculative harm, or the threat of future harm not yet realized, does not suffice to create a delictual action, Braud v. New England Insurance Company, 576 So. 2d 466, 468 (La. 1991), where the client does subsequently suffer harm, fault should be apportioned to all attorneys whose negligent actions, if any, contributed to that harm. LSA-C.C. art. 2323; see also Hendrick v. ABC Insurance Company, 97-0546 (La. App. 1st Cir. 5/12/00), 760 So. 2d 650, 675, reversed on other grounds, 2000-2403 (La. 5/15/01), 787 So. 2d 283.

Accordingly, on the record before us, I would likewise conclude that the evidence does not establish "an absence of factual support" for any of the elements of Brown's legal malpractice claim. Thus, in my view, the trial court erred in finding that the DeCuir & Clark defendants established their entitlement to summary judgment dismissing Brown's claims against them as a matter of law. For these reasons, I respectfully dissent.