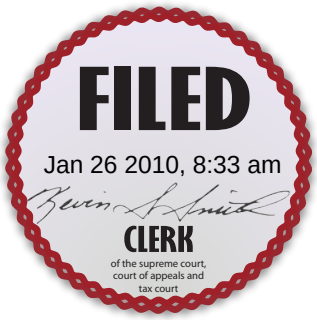

ATTORNEY FOR APPELLANT:

JAMES E. FOSTER
Hammond, Indiana

ATTORNEY FOR APPELLEE:

EDWARD P. GRIMMER
Crown Point, Indiana

IN THE
COURT OF APPEALS OF INDIANA

MARK E. McDILLON,	)	
	)	
Appellant-Plaintiff,	)	
	)	
vs.	)	No. 45A03-0903-CV-93
	)	
NORTHERN INDIANA PUBLIC SERVICE COMPANY,	)	
	)	
	)	
Appellee-Defendant.	)	

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable Sheila Moss, Judge
The Honorable Kathleen Belzeski, Magistrate
Cause No. 45D08-0010-CP-04436

JANUARY 26, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

SULLIVAN, Senior Judge

Mark McDillon appeals the trial court's grant of summary judgment in favor of Northern Indiana Public Service Company's (NIPSCO) on NIPSCO's cross motion.

We affirm.

McDillon raises the following issues for our review:

1. Whether the trial court erred in granting summary judgment in favor of NIPSCO on its cross motion; and

2. Whether the trial court erred in denying McDillon's request in his counterclaim for attorney fees pursuant to Ind. Code § 34-52-1-1.

At approximately 5:00 a.m. on August 22, 1999, McDillon telephoned the Hammond Police Department to report that his vehicle had been stolen from a gas station. Approximately fifteen minutes later, an unidentified person contacted the Hammond Police Department to report that a vehicle had collided with a utility pole. There was a power outage in the area as a result of the collision.

McDillon informed police officers at the scene of the accident that although he was the owner of the vehicle, he was not driving it at the time of the collision. McDillon explained to the officers that he had reported the vehicle stolen earlier that morning. No one was ever apprehended for the theft.

NIPSCO owned the utility pole involved in the collision. The collision resulted in damage to three transformers, which caused NIPSCO to incur $6,822.79 in repair costs. In accordance with company policy, NIPSCO attempted to recover its losses resulting from the collision. NIPSCO first sent McDillon three separate demand letters. When McDillon failed to respond to the letters, NIPSCO turned the matter over to a collections

attorney. NIPSCO then filed suit against McDillon alleging that 1) McDillon negligently operated his vehicle; 2) McDillon's conduct was willful and wanton; and 3) McDillon trespassed on NIPSCO's easement.

A summons was personally served on McDillon but he failed to appear for the hearing. In November 2000, the trial court entered a default judgment against McDillon for the court's jurisdictional limit of $10,000.00. The court also ordered McDillon to pay $2,274 in attorney fees as well as $100 in costs. After receiving notice of proceedings supplemental, McDillon filed a motion to set aside the default judgment, claiming excusable neglect as well as a meritorious defense.

The trial court granted McDillon's motion, and he subsequently filed an answer, a counterclaim, and a demand for jury trial. In his answer, McDillon asserted that he was not operating the vehicle at the time of the collision. In his counterclaim, McDillon alleged that NIPSCO's action was both frivolous and pursued in bad faith within the meaning of Ind. Code § 34-52-1-1 because NIPSCO knew or should have known that McDillon was not operating the vehicle at the time of the collision. McDillon sought damages to cover his costs of litigation, including attorney fees pursuant to Ind. Code § 34-52-1-1, and punitive damages.

At trial, McDillon testified that he was not driving his vehicle at the time it collided with the pole. He explained that the vehicle was stolen while he was inside the gas station getting a cup of coffee, and that he promptly called the police to report the theft. Hammond Police Department Officer Salvidor Bermudez testified that as he was taking information from McDillon about the theft, the officer heard a report on his radio

about a vehicle being driven recklessly. The vehicle described in the report matched the vehicle McDillon reported as stolen. Moments later, there was a power outage.

Following the presentation of evidence, the trial court instructed the jury on nonparty liability under the Indiana Comparative Fault Act. The jury returned a $12,440.29 verdict against McDillon. Because of its jurisdictional limits, the trial court entered judgment in favor of NIPSCO for $10,000 plus judgment interest. McDillon filed a motion to correct error wherein he alleged that the trial court erroneously instructed the jury and that the jury verdict was excessive. The trial court denied McDillon's motion. He appealed and argued that the trial court erroneously instructed the jury on the nonparty affirmative defense. NIPSCO cross-appealed, and argued that the trial court erroneously set aside the default judgment and then allowed the case to be tried to a jury when McDillon waived his right to a jury trial by failing to make a timely request for it.

In July 2004, this court determined that NIPSCO waived its default judgment argument when it failed to appeal the trial court's order setting aside the default judgment within thirty days. *McDillon v. Northern Indiana Public Service Company*, 812 N.E.2d 152, 157 (Ind. Ct. App. 2004), *trans. granted*.[1] We also concluded that McDillon timely filed his jury demand and did not waive that right. *Id.* at 158. Lastly, we held that McDillon was correct that the trial court erroneously instructed the jury on the nonparty

[1] Our supreme court granted transfer to resolve an apparent conflict in Indiana cases regarding the application of Indiana Trial Rule 6(E). *See McDillon v. Northern Indiana Public Service Company*, 841 N.E.2d 1148 (Ind. 2006). After clarifying the application of this rule, the court concluded that the trial court correctly found McDillon's jury trial demand was timely filed. *Id.* at 1152. The Indiana Supreme Court summarily affirmed our opinion in all other respects. *Id.*

affirmative defense. *Id.* at 157. We therefore reversed and remanded the case to the trial court. *Id.* at 158.

On remand, McDillon filed a summary judgment motion wherein he alleged that the uncontroverted facts showed that he was not driving the vehicle at the time of the collision. NIPSCO responded that there were material issues of fact that precluded summary judgment. Specifically, NIPSCO pointed out evidence existed that gave rise to the inference that McDillon was driving his car home at the time of the collision.

NIPSCO also filed a cross motion for summary judgment wherein it argued that, as a matter of law, it had a reasonable basis to pursue its claim for damages upon its claim that McDillon was driving his car when it hit the pole. Specifically, NIPSCO designated evidence that Mary Lechowicz, the NIPSCO employee that evaluated claims and decided whether to proceed with collection litigation, considered the following undisputed facts in proceeding with litigation against McDillon: 1) the proximity of the collision to McDillon's home on a route a thief would not likely have taken; 2) no forced entry into the car's ignition; 3) the nearly undrivable condition of the car; 4) the lack of any witness to the theft; and 5) McDillon's failure to respond to collection efforts or to tell NIPSCO his car had been stolen when he had insurance to cover the accident and defend him.

In December 2008, after a hearing on the motions, the trial court granted McDillon's motion for summary judgment on his counterclaim as well as NIPSCO's cross motion for summary judgment. In addition, the trial court denied McDillon's

request for attorney fees. McDillon appeals the trial court's grant of NIPSCO's cross motion as well as the trial court's denial of his request for attorney fees.[2]

McDillon first argues that the trial court erred in granting summary judgment in favor of NIPSCO on NIPSCO's cross motion. Specifically, McDillon first claims that NIPSCO's designation of evidence in support of its summary judgment motion was not sufficiently specific.

Indiana Trial Rule 56(C) requires each party to a summary judgment motion to designate all parts of pleadings and any other matters on which it relies for the purposes of its motion. *Dinsmore v. Fleetwood Homes of Tennessee, Inc.*, 906 N.E.2d 186, 189 (Ind. Ct. App. 2009). Although the Trial Rule does not mandate the degree of specificity required, it does require sufficient specificity to identify the relevant portions of a document. *Filip v. Block*, 879 N.E.2d 1076, 1081 (Ind. 2008). In *Dinsmore*, we found that a detailed specification supplying line numbers and page numbers complied with the Rule. *Dinsmore*, 906 N.E.2d at 189. Here, as in *Dinsmore*, NIPSCO's detailed specification supplying line numbers and page numbers complied with the Rule and constituted a sufficiently specific designation.

McDillon further argues that even if the designation was sufficiently specific, the trial court erred in granting summary judgment in favor of NIPSCO on NIPSCO's cross motion. Our standard of review for a trial court's grant of summary judgment is well settled. Summary judgment is appropriate only where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Mangold v.*

[2] NIPSCO does not appeal the trial court's grant of McDillon's summary judgment motion.

Indiana Department of Natural Resources, 756 N.E2d 970, 973 (Ind. 2001). The party appealing the grant of summary judgment bears the burden of persuading this court that the trial court's ruling was improper. *AutoXchange, Inc. v. Dreyer and Reinbold, Inc.*, 816 N.E.2d 40, 47-8 (Ind. Ct. App. 2004).

McDillon's counterclaim alleged that NIPSCO's action against him was both frivolous and pursued in bad faith within the meaning of Ind. Code § 34-52-1-1 because NIPSCO knew or should have known that McDillon was not operating the vehicle at the time of the collision. A claim is frivolous within the meaning of Ind. Code § 34-52-1-1 if it is taken primarily for the purpose of harassment; if the attorney is unable to make a good faith rational argument on the merits of the claim; or if counsel is unable to support the action with a good faith rational argument for extension, modification, or reversal of existing law. *Garage Doors of Indianapolis, Inc. v. Morton*, 682 N.E.2d 1296, 1303 (Ind. Ct. App. 1997), *trans. denied.* Further, bad faith within the meaning of Ind. Code § 34-52-1-1 means affirmatively operating with furtive design or ill will. *Figg v. Bryan Rental Inc.*, 646 N.E.2d 69, 76 (Ind. Ct. App. 1995), *trans. denied.* NIPSCO alleged in its cross motion for summary judgment that as a matter of law, it had a reasonable basis to pursue its claim for damages upon its claim that McDillon was driving his car when it hit the pole.

Our review of the evidence reveals that NIPSCO designated the following evidence in support of its argument that it had a reasonable basis for pursuing its claim against McDillon: Mary Lechowicz, the NIPSCO employee who evaluated claims and decided whether to proceed with collection litigation, considered the following facts in

proceeding with litigation against McDillon: 1) the proximity of the collision to McDillon's home on a route a thief would not likely have taken; 2) no forced entry into the car's ignition; 3) the nearly undrivable condition of the car[3]; 4) the lack of any witness to the theft; and 5) McDillon's failure to respond to collection efforts or to tell NIPSCO his car had been stolen when he had insurance to cover the accident and defend him. McDillon has failed to designate evidence that NIPSCO's claim was taken primarily for the purpose of harassment or that NIPSCO was affirmatively operating with furtive design or ill-will, and that NIPSCO's decision to pursue this claim was therefore unreasonable. Accordingly, McDillon has failed to meet his burden of persuading this court that the trial court's ruling was improper. We find no error in the trial court's grant of summary judgment in favor of NIPSCO on its cross motion.

Lastly, McDillon argues that the trial court erred in denying the request in his counterclaim for attorney fees pursuant to Ind. Code § 34-52-1-1, which provides in relevant part that under specific circumstances in a civil action, the court may award attorney's fees as part of the cost to the prevailing party. A prevailing party under the statute is defined as a party that successfully prosecutes his claim or asserts his defense. *Allstate Insurance Company v. Axsom*, 696 N.E.2d 482, 486 (Ind. Ct. App. 1998), *trans. denied*. For example, a party that was granted summary judgment is a "prevailing party" for purposes of awarding statutory attorney fees. *Figg*, 646 N.E.2d at 76. Here, however, the trial court granted summary judgment in favor of NIPSCO on its cross motion

[3] We observe that the investigating officer concluded that the car had been driven some distance with tire and/or rim damage. We do not conclude, however, that this differing conclusion from that of Mary Lechowicz dilutes NIPSCO's position that McDillon did not demonstrate ill-will on the part of NIPSCO.

regarding McDillon's counterclaim. McDillon therefore failed to successfully assert his defense and does not qualify as a prevailing party under the statute. The trial court did not err in denying his request for attorney fees pursuant to Ind. Code § 34-52-1-1.

Affirmed.

FRIEDLANDER, J., and VAIDIK, J., concur.