



## Case Summary and Issue

Tim Godby appeals the trial court's grant of summary judgment in favor of Daniel Whitehead, Godby's former attorney, on Godby's legal malpractice claim. On appeal, Godby raises one issue, which we restate as whether the trial court properly granted summary judgment in favor of Whitehead. Concluding the trial court's grant in favor of Whitehead was proper, we affirm.

## Facts and Procedural History

In April 1997, Godby was convicted of murder and sentenced to sixty years with the Indiana Department of Correction. Following trial, Godby filed a motion to correct error that included a claim of ineffective assistance of trial counsel. The trial court denied the motion, and Godby appealed to our supreme court.<sup>1</sup> Godby's appellate counsel, however, omitted the ineffective assistance of trial counsel claim, and our supreme court affirmed Godby's conviction. See Godby v. State, 736 N.E.2d 252, 259 (Ind. 2000).

In August 2002, after initially filing a pro se petition for post-conviction relief, Godby retained Whitehead to represent him in the post-conviction proceedings. On April 28, 2003, Whitehead filed an amended petition on Godby's behalf, which included a claim of ineffective assistance of trial counsel. The post-conviction court summarily denied this claim, and this court affirmed the denial, holding that the ineffective assistance of trial counsel claim was waived because Godby initially raised the claim in his motion to correct error, but failed to pursue it on direct appeal. See Godby v. State, 809 N.E.2d 480, 483 (Ind.

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<sup>1</sup> At the time of Godby's conviction and sentence, our supreme court had exclusive jurisdiction over criminal appeals where the sentence for a single offense exceeded fifty years. See Ind. Appellate Rule 4(A)(7)

Ct. App. 2004), trans. denied.

With his direct appeal and post-conviction remedies against the State having been exhausted, Godby focused his efforts on obtaining relief from Whitehead by filing a legal malpractice complaint on November 17, 2004. In his complaint, Godby alleged in relevant part 1) that Whitehead breached his duty when he failed to raise a claim of ineffective assistance of appellate counsel based on appellate counsel's failure to pursue a claim of ineffective assistance of trial counsel on direct appeal and 2) that but for Whitehead's breach, Godby would have prevailed on his claim of ineffective assistance of appellate counsel and received post-conviction relief. Whitehead successfully moved the trial court to dismiss Godby's complaint, but this court reversed that dismissal. See Godby v. Whitehead, 837 N.E.2d 146, 148 (Ind. Ct. App. 2005), trans. denied. Following remand, Whitehead filed a motion for summary judgment, which the trial court granted, finding, among other things, that "[t]he undisputed material facts . . . negate the elements of proximate cause and fail to show . . . that [Whitehead] failed to exercise ordinary skill and knowledge." Appellant's Appendix at 67. Godby now appeals.

## Discussion and Decision

### I. Standard of Review

Summary judgment is appropriate only if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Ind. Trial Rule 56(C). When we determine the propriety of an order granting summary judgment, we use the same standard of review as the trial court. Ryan v. Brown, 827 N.E.2d 112, 116 (Ind. Ct. App.

2005). “The party moving for summary judgment has the burden of making a prima facie showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law.” Id. at 117. If the moving party meets these two requirements, then the burden shifts to the non-moving party to show the existence of a genuine issue of material fact by setting forth specifically designated facts. Id. “We must accept as true those facts alleged by the nonmoving party, construe the evidence in favor of the nonmoving party, and resolve all doubts against the moving party.” Id. In cases such as this one where the trial court enters findings of fact and conclusions of law with its judgment, the entry of findings and conclusions does not alter our standard of review, as we are not bound by them. Rice v. Strunk, 670 N.E.2d 1280, 1283 (Ind. 1996). Instead, the findings and conclusions merely aid our review by providing us with a statement of reasons for the trial court’s actions. Id.

## II. Propriety of Trial Court’s Decision

Godby argues the trial court improperly granted Whitehead’s motion for summary judgment because there are genuine issues of material fact regarding whether Whitehead committed legal malpractice. To prove a claim of legal malpractice, the client is required to establish the following elements by a preponderance of the evidence: 1) employment of an attorney, which establishes a duty to the client; 2) failure of the attorney to exercise ordinary skill and knowledge, which establishes a breach of the duty; and 3) that the breach caused 4) damage to the client. Van Kirk v. Miller, 869 N.E.2d 534, 540-41 (Ind. Ct. App. 2007), trans. denied. This court has stated repeatedly that it is appropriate for a trial court to grant an attorney summary judgment on a legal malpractice claim if the designated evidence

negates at least one of these elements. See, e.g., id.; Oxley v. Lenn, 819 N.E.2d 851, 855 (Ind. Ct. App. 2004). In this respect, we put to the side the first, second, and fourth elements of Godby's legal malpractice claim and conclude that Godby's designated evidence on the third element – that Whitehead's alleged breach caused Godby damage – is lacking.

To prove causation, the client must show that the outcome of the underlying litigation would have been more favorable but for the attorney's breach. Price v. Freeland, 832 N.E.2d 1036, 1043 (Ind. Ct. App. 2005). In the context of a summary judgment proceeding, the question becomes whether the designated evidence permits a reasonable trier of fact to make such a finding. As noted above, Godby alleged in his complaint 1) that Whitehead's failure to raise a claim of ineffective assistance of appellate counsel constituted a breach of duty and 2) that but for Whitehead's breach, Godby would have prevailed on his claim of ineffective assistance of appellate counsel and received post-conviction relief. The ineffective assistance of appellate counsel claim was based on appellate counsel's failure to raise a claim of ineffective assistance of trial counsel on direct appeal. Thus, assuming a breach by Whitehead, the issue of causation turns on whether Godby would have prevailed on his claim of ineffective assistance of appellate counsel, the resolution of which requires initially determining whether he would have prevailed on a claim of ineffective assistance of trial counsel. Such a theory of causation is certainly cognizable (though a bit unwieldy to describe, as the foregoing discussion demonstrates), but the problem for Godby is that he has not designated any evidence to permit a reasonable trier of fact to find that he would have prevailed on a claim of ineffective assistance of trial counsel. The closest Godby comes to

permit such a finding is his designation of the amended petition for post-conviction relief. In the petition, Godby alleges that his trial counsel was ineffective for, among other reasons, failing to provide Godby with discovery materials, failing to object to the admission of evidence, and failing to conduct an adequate pre-trial investigation. Godby, however, did not designate any evidence to support these allegations,<sup>2</sup> and mere allegations do not constitute properly designated evidence. Cf. Ind. Trial Rule 56(E) (“When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.”).

Thus, we are left with a situation where Godby has not designated any proper evidence to support his claim of ineffective assistance of trial counsel. Because he has not designated any such evidence, it follows Godby cannot establish that he received ineffective assistance of appellate counsel, which in turn compels a conclusion that Godby cannot establish the causation element of his legal malpractice claim. In reaching this conclusion, we recognize the well-established rule that causation is generally a question of fact for the trier of fact to decide, see Solnosky v. Goodwell, 892 N.E.2d 174, 182 (Ind. Ct. App. 2008), but that rule must yield where the client fails to designate any evidence upon which the trier

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<sup>2</sup> We note as an aside that the type of evidence typically designated to support such instances of ineffective assistance of trial counsel would include the trial transcript, deposition testimony or an affidavit from trial counsel, and an affidavit from the client. Godby did include his affidavit with his designation, but it does not contain any statements regarding the conduct of his trial counsel.

of fact can make such a decision.

Conclusion

The trial court properly granted summary judgment in favor of Whitehead on Godby's legal malpractice claim.

Affirmed.

NAJAM, J., and MAY, J., concur.