ATTORNEY FOR APPELLANT:

EDWARD P. GRIMMER
Crown Point, Indiana

ATTORNEY FOR APPELLEE:

MICHAEL E. O'NEILL
PATRICK P. DEVINE
Hinshaw & Culbertson
Schereville, Indiana

IN THE
COURT OF APPEALS OF INDIANA

MICHAEL R. McGILL,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 64A03-0704-CV-172
	)	
CLARK HOLESINGER,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE PORTER SUPERIOR COURT
The Honorable Mary R. Harper, Judge
Cause No. 64D05-0212-CT-10561

November 26, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

SHARPNACK, Judge

Michael R. McGill appeals the trial court's grant of summary judgment to Clark Holesinger regarding McGill's attorney malpractice complaint against Holesinger.[1] McGill raises two issues, which we restate as:

I. Whether the trial court erred by granting summary judgment to Holesinger with respect to his representation of McGill in McGill's Age Discrimination in Employment Act ("ADEA") claim; and

II. Whether the trial court erred by granting summary judgment to Holesinger with respect to his representation of McGill in McGill's tax liability claim.

We affirm.

The relevant facts follow. In 1993, Holesinger started providing legal services to McGill. In general, Holesinger prepared McGill's tax returns and represented McGill regarding a tax liability owed by McGill to the Internal Revenue Service. Holesinger negotiated an agreement that McGill owed $11,267.09 for 1991 taxes with a $523.00 penalty and $10,624.34 for 1992 taxes with a $775.00 penalty.

McGill alleges that, between 1993 and 2001, he paid $25,307.46 directly to Holesinger and gave Holesinger $5,434 in checks made payable to the IRS. Holesinger

[1] We remind McGill that Ind. Appellate Rule 46(A)(6)(a) provides that facts in the Statement of Facts "shall be supported by page references to the Record on Appeal or Appendix in accordance with Rule 22(C)." McGill's statement of facts does not contain page references to his Appendix, requiring this court to search the record. We have previously held that an appellant waives review of a trial court's summary judgment ruling by failing to provide citations to the record in support of its claim. See, e.g., Estate of Taylor ex rel. Taylor v. Muncie Medical Investors, L.P., 727 N.E.2d 466, 472 (Ind. Ct. App. 2000) ("In fact, it has provided no citations to the record in support of this claim. On review of summary judgment, we will not search through the record to determine if a material dispute of fact exists. . . . Therefore, the Estate has waived its challenge to this claim of error."), trans. denied. Despite McGill's failure to provide citations to the record, we will attempt to address his arguments.

alleges that he received $28,273.00 from McGill between 1993 and 2001 and that he then paid $14,210 to the IRS on McGill's behalf.

In 1999, McGill's employer, Premier Refractories, Inc., ("Premier") was sold to Vesuvius USA, Corp. ("Vesuvius"), and McGill's employment was terminated due to a reduction in force ("RIF"). McGill retained Holesinger to file a claim in federal court against Vesuvius and Premier under the ADEA and various state law claims. McGill's former employers filed a motion for summary judgment, alleging that McGill had been terminated because he had little experience selling Vesuvius's products and his salary was substantially higher than the person who serviced the same account after McGill's termination. Holesinger responded to the motion for summary judgment with a four-page memorandum that contained only three short paragraphs of argument. As evidence in opposition to the motion for summary judgment, Holesinger submitted only portions of McGill's deposition, an affidavit from McGill, and "Defendants Exhibit B."[2] Appellant's Appendix at 37.

The district court noted that McGill was required to "establish a prima facie case by showing evidence for which a reasonable jury could find that: (1) Plaintiff was at least 40 years old at the time of discharge; (2) Plaintiff was performing his job satisfactorily; (3) Plaintiff was discharged; and (4) that other substantially younger and similarly situated employees received more favorable treatment." Appellee's Appendix at 14. On the fourth requirement, the district court held:

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[2] Defendants' Exhibit B is not included in Appellant's Appendix.

> [McGill] has not pointed to any other examples of younger individuals who were similarly situated, and treated more favorably than [McGill]. Even if [McGill] had shown that he and Coros [the employee that replaced McGill] were similarly situated, it has been noted that "arguably, one employee is insufficient to satisfy the fourth element, even under the less stringent RIF prima facie case." The evidence before this Court indicates that younger individuals were treated just like [McGill]. Therefore, this Court finds that [McGill] has failed to raise a genuine issue of material fact with regard to the fourth requirement of the prima facie case. On this basis alone, Defendants' Motion for Summary Judgment must be GRANTED.

Id. at 17 (internal citations omitted). Moreover, the district court held that, even if McGill had established a prima facie case, Vesuvius established a legitimate business reason for terminating McGill and McGill did not "produce[] sufficient evidence of pretext to overcome summary judgment." Id. at 20. Specifically, the district court held:

> [McGill] asserts that the stated reason of emphasizing Vesuvius' products because they are more profitable is pretextual. However, [McGill] has failed to produce any evidence to support this assertion. [McGill] admitted that he had no knowledge of Vesuvius' profit margins in his deposition, but then states "[t]hat it is my belief based on conversations with clients at Inland Steel that the profit margins of Premier were similar to those of Vesuvius." The portions of Defendants' [sic] affidavit that contradicts [sic] his deposition testimony must be struck. [McGill] has therefore produced no admissible evidence on this point, and cannot establish that this stated reason that he lacked substantial experience with Vesuvius products is pretextual.
>
> [McGill] also asserts that the stated reasons of his salary being higher than other salespeople's salaries is pretextual. The uncontradicted evidence is that [McGill] made over $170,000 per year and that Coros earned an annual salary of $72,000 at the time of [McGill's] termination. [McGill] suggests that [McGill's] base salary is actually less than Coros' base salary. Although that may be true, the fact remains that [McGill's] annual salary was significantly greater than Coros' annual salary.
>
> [McGill] further alleges that the reason of salary is a pretext because he was not given an option to remain on the payroll at a reduced salary. [McGill] asserts that option was provided to other Premier employees, but not to him. This assertion must be struck from the declaration because it is

> a conclusory allegation lacking the particularity needed to demonstrate that [McGill] had a personal knowledge of this fact and was competent to testify about it. Even if the statement were not struck, [McGill] has failed to provide any information about the individuals who were offered this opportunity that would permit an inference that the failure to offer this opportunity to him was a pretext for age discrimination.

Id. at 21-22 (internal citations omitted).

McGill then filed a complaint against Holesinger alleging legal malpractice with respect to the tax matters and the ADEA matter. On March 19, 2004, Holesinger filed a motion for partial summary judgment with regard to the ADEA matter. McGill filed a memorandum in opposition to the motion for summary judgment and Holesinger's deposition. McGill then moved for additional time to respond, and the trial court granted an extension of time until July 19, 2004. On August 6, 2004, McGill filed an affidavit of Lee McDonald. Holesinger filed a motion to strike the McDonald affidavit, and after a hearing, the trial court granted Holesinger's motion to strike the untimely affidavit and granted the motion for summary judgment as follows:

* * * * *

> [McGill] must present sufficient evidence that the outcome of the underlying action would have been more favorable but for Holesinger's negligence. McGill has failed to meet this burden, as he has presented this court with no evidence to create a genuine issue of material fact that had Holesinger conducted the appropriate discovery, taken the appropriate depositions, etc. . . . he would have been able to establish a prima facie case for age discrimination and would have been able to refute the employer's articulated nondiscriminatory reasons for his termination.
>
> McGill's affidavit alleged that unnamed older workers, "who were in a similar situation," were permitted to "restructure their contracts" and remain employed following the RIF. This affidavit, however, contradicts his deposition testimony that he did not know who was being retained following the RIF, and that he did not know the compensation paid to his

> fellow employees. Further, McGill has failed to identify any of these older employees, and has made no attempt to identify similarly situated younger employees who were treated more favorably than he was as part of the RIF. Not even the affidavit of Lee McDonald provides evidence that McGill was treated differently than substantially similarly situated employees or that he was not terminated for legitimate business reasons. The Affidavit merely indicates that Holesinger did not contact Lee McDonald about his knowledge as a potential witness in the underlying age discrimination claim against Vesuvius. As the District Court in the underlying case previously determined, without a showing that McGill was treated differently than substantially similarly situated employees or that he was not terminated for legitimate business reasons, summary judgment is appropriate. Accordingly, the elements of causation and damages are absent in this action, and Holesinger is entitled to summary judgment as a matter of law.
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> * * * * *

Id. at 20-21.

Holesinger later filed a motion for summary judgment regarding the tax matters. McGill filed a response and designation of evidence in response to Holesinger's motion for summary judgment. After a hearing, the trial court granted Holesinger's motion for summary judgment as follows:

> * * * * *
>
> McGill has not come forward with any expert evidence that Attorney Holesinger breached the standard of care in accounting and applying payments. Under Indiana law, expert testimony is required to prove breach of the standard of care in a legal malpractice case. McGill has not presented any expert testimony that Holesinger's time records were inadequate or improper – he has merely submitted evidentiary documents and his own sworn statements that he personally felt Holesinger's records and invoicing procedures did not meet his expectations (which does not meet the standard of the law, but nevertheless is not the subject of present controversy).
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> * * * * *

Id. at 30 (internal citations omitted). Moreover, the trial court noted that McGill had taken a tax deduction for legal fees each year between 1993 and 1999, that McGill had advised the IRS under oath that the amount of fees declared was accurate, and that McGill had admitted making the tax deductions in his responses to requests for admissions. The trial court found that McGill could not contradict his prior, sworn affirmations regarding Holesinger's fees. The attorney fees claimed as deductions on his income tax returns totaled $24,315.00 and Holesinger paid $14,210.00 to the IRS on McGill's behalf for a total of $38,525.00. However, McGill only contended that he paid Holesinger a total of $30,741.46. Consequently, the trial court found that "McGill has no proof of any damage by the application of his payments under his own admissions; since the total amount he admits was paid to the IRS and the amounts he deducted as attorney's fees on his tax returns ($38,525) exceeds the amount in controversy ($30,741.46)." Id. at 31.

McGill appeals the trial court's grant of Holesinger's motions for summary judgment. Our standard of review for a trial court's grant of a motion for 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. Ind. Trial Rule 56(c); Mangold ex rel. Mangold v. Ind. Dep't of Natural Res., 756 N.E.2d 970, 973 (Ind. 2001). All facts and reasonable inferences drawn from those facts are construed in favor of the nonmovant. 756 N.E.2d at 973. Our review of a summary judgment motion is limited to those materials designated to the trial court. Id. We must

carefully review a decision on summary judgment to ensure that a party was not improperly denied its day in court. Id. at 974.

Where a trial court enters findings of fact and conclusions thereon in granting a motion for summary judgment, as the trial court did in this case, the entry of specific findings and conclusions does not alter the nature of our review. Rice v. Strunk, 670 N.E.2d 1280, 1283 (Ind. 1996). In the summary judgment context, we are not bound by the trial court's specific findings of fact and conclusions thereon. Id. They merely aid our review by providing us with a statement of reasons for the trial court's actions. Id.

Both of the issues in this case concern McGill's claim of attorney malpractice. "The elements of attorney malpractice are: (i) employment of an attorney which creates the duty; (ii) the failure of the attorney to exercise ordinary skill and knowledge (the breach of the duty); and (iii) that such negligence was the proximate cause (iv) of damage to the plaintiff." Rice, 670 N.E.2d at 1283-1284. "To prove causation and the extent of the harm, the client must show that the outcome of the underlying litigation would have been more favorable but for the attorney's negligence. This proof typically requires a 'trial within a trial.'" Picadilly, Inc. v. Raikos, 582 N.E.2d 338, 344 (Ind. 1991).

I.

The first issue is whether the trial court erred by granting summary judgment to Holesinger with respect to his representation of McGill in McGill's ADEA claim. As noted above, in an attorney malpractice case, the client must show that the outcome of the underlying litigation would have been more favorable but for the attorney's negligence.

See id. Thus, McGill was required to demonstrate a genuine issue of material fact regarding whether the outcome of the ADEA litigation would have been more favorable but for Holesinger's negligence.[3] According to McGill, the outcome of the ADEA litigation would have been different if Holesinger had argued the disparate-impact theory of liability, conducted discovery, interviewed more than one witness, performed more research, and filed an adequate response to the employers' motion for summary judgment.

We begin by discussing ADEA claims in general. The ADEA makes it unlawful for an employer "to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. § 623. After the federal district court granted summary judgment to McGill's employers, the United States Supreme Court made clear that an employer may be held liable for violating the ADEA under both disparate treatment and disparate impact theories of liability. Smith v. City of Jackson, 544 U.S. 228, 235-240, 125 S.Ct. 1536, 1542-1544 (2005). Because McGill argues that Holesinger should have presented both theories to the district court, we will address both theories.

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[3] McGill invites us to make an exception to the requirement that McGill demonstrate that the outcome of the ADEA litigation would have been more favorable but for Holesinger's negligence. According to McGill, the rule is unfair in this case because Holesinger failed to conduct any discovery or interview witnesses, making it difficult for McGill to demonstrate a more favorable outcome. However, this legal malpractice requirement was articulated by the Indiana Supreme Court. "We may not overrule the decisions of our supreme court." Liberty Mut. Ins. Co. v. OSI Industries, Inc., 831 N.E.2d 192, 205 (Ind. Ct. App. 2005), trans. denied. Consequently, we decline McGill's invitation to make an exception to the requirement.

A. Disparate Treatment.

A plaintiff bringing a disparate treatment claim under the ADEA may attempt to prove his case directly or through the burden-shifting method first established by the Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-805, 93 S.Ct. 1817, 1824-1825 (1973). Olson v. Northern FS, Inc., 387 F.3d 632 (7th Cir. 2004). McGill relied upon the burden-shifting (or indirect) method.

To make out a prima facie case in a typical reduction-in-force context, plaintiff must show that (1) he was in the protected age class (40 to 70 years of age); (2) he was meeting his employer's legitimate expectations; (3) he was discharged; and (4) similarly situated but substantially younger employees were treated more favorably. Michas v. Health Cost Controls of Illinois, Inc., 209 F.3d 687, 693 (7th Cir. 2000); Cianci v. Pettibone Corp., 152 F.3d 723, 728 (7th Cir. 1998); see also Bellaver v. Quanex Corp., 200 F.3d 485, 493-94 (7th Cir. 2000). A prima facie case creates a rebuttable presumption of discrimination and shifts the burden of production to the defendant to articulate lawful reasons for the plaintiff's discharge. Bellaver, 200 F.3d at 494. If the defendant articulates a nondiscriminatory reason for its actions, then the burden shifts back to the plaintiff to prove that the defendant's proffered reasons are pretextual. Denisi v. Dominick's Finer Foods, Inc., 99 F.3d 860, 864 (7th Cir. 1996). The plaintiff can establish pretext by showing either that a discriminatory reason more likely than not motivated the employer or that the employer's proffered explanation is not credible. Jackson v. E.J. Brach Corp., 176 F.3d 971, 983 (7th Cir. 1999).

The district court held that McGill failed to demonstrate a genuine issue of material fact regarding the fourth element of a prima facie case, i.e. that similarly situated but substantially younger employees were treated more favorably. In the legal malpractice case, McGill was required to show that, but for Holesinger's failure to perform appropriate discovery and failure to file an adequate response to the motion for summary judgment, he would have had a more favorable outcome in the ADEA case. To do so, McGill must present evidence establishing a genuine issue of material fact that similarly situated but substantially younger employees were treated more favorably. In an attempt to demonstrate a genuine issue, McGill submitted his own affidavit, which provided:

* * * * *

> 5. Younger sales staff of my employer, Premier, had less familiarity with Vesuvius sales people they replaced. In that lesser familiarity, they were similarly situated with me. The Vesuvius people that they replaced were older than the Premier sales persons kept by Vesuvius.
> 6. The only persons older than me that were kept by Vesuvius included Lee McDonald. He was not similarly situated with me because he had supervisory responsibilities over the sales force that I did not have.
> 7. The only other persons older than me that were kept by Vesuvius and were just sales like me and who had high earnings because of our commission based compensation package were offered an opportunity to restructure their compensation before the RIF.
> 8. In that way, the older persons who were in a similar situation to mine were treated in a way that made the articulated reason a pretext. Vesuvius used the threat to terminate older employees to gain compensation concessions and, just as important, gain a statistical "cover" so that they could claim that the effect of the RIF was not effectively discriminatory.

* * * * *

Appellee's Appendix at 97.

This affidavit contained no details concerning the other employees. In ruling on the employers' motion for summary judgment, the district court noted that McGill was required to "affirmatively demonstrate, by specific factual allegations, that there is a genuine issue of material fact which requires trial." Id. at 8 (citing Beard v. Whitley County REMC, 840 F.2d 405, 410 (7th Cir. 1988)); accord Stephenson v. Ledbetter, 596 N.E.2d 1369, 1371 (Ind. 1992) ("The burden is on the moving party to prove there are no genuine issues of material fact and he is entitled to judgment as a matter of law. Once the movant has sustained this burden, the opponent must respond by setting forth specific facts showing a genuine issue for trial; he may not simply rest on the allegations of his pleadings."). Again, McGill has failed to provide any specific factual allegations to demonstrate that similarly situated but substantially younger employees were treated more favorably. Consequently, McGill has failed to demonstrate that, but for Holesinger's negligence, he would have had a more favorable outcome in the ADEA litigation. See, e.g., Otto v. Park Garden Associates, 612 N.E.2d 135, 139 (Ind. Ct. App. 1993) (holding that property owner failed to establish a genuine issue of material fact to preclude summary judgment when they "merely asserted in their reply (without providing any evidence) that at the time they received Park Gardens' acceleration notice, [they] were not in default" and "[t]hey did not include cancelled checks or any other evidence which would have allowed the trial court to find that the issue of default should be decided at trial"), reh'g denied, trans. denied.

B. Disparate Impact.

At the time McGill's ADEA action was filed, the federal circuits were split on whether a disparate impact theory was allowed in an ADEA claim, and the Seventh Circuit had specifically held that "disparate impact is not a theory available to age discrimination plaintiffs in this circuit." Adams v. Ameritech Services, Inc., 231 F.3d 414, 422 (7th Cir. 2000) (citing Maier v. Lucent Technologies, Inc., 120 F.3d 730, 735 & n. 4 (7th Cir. 1997); EEOC v. Francis W. Parker School, 41 F.3d 1073, 1077-78 (7th Cir. 1994); Blackwell v. Cole Taylor Bank, 152 F.3d 666, 672 (7th Cir. 1998)), reh'g denied and reh'g en banc denied. Despite the fact that the Seventh Circuit had, at that time, rejected the application of disparate impact theories in ADEA cases, McGill argues that Holesinger should have argued this theory in his response to the motion for summary judgment.

Even if Holesinger had argued the disparate impact theory, given the Seventh Circuit's rejection of the theory, a more favorable outcome of the litigation was unlikely. McGill cites no authority for the proposition that Holesinger was negligent by failing to anticipate a change in the law.[4] We note that McGill presented no evidence that Holesinger's failure to argue the disparate impact theory was a failure to exercise ordinary skill and knowledge. See Oxley v. Lenn, 819 N.E.2d 851, 857 (Ind. Ct. App. 2004) (holding that "expert testimony is usually required in a legal malpractice action to

[4] In the criminal defense context, "appellate counsel cannot be held ineffective for failing to anticipate or effectuate a change in existing law." Reed v. State, 856 N.E.2d 1189, 1197 (Ind. 2006).

establish the standard of care by which the defendant attorney's conduct is measured"). As a result, McGill failed to establish a genuine issue of material fact that, but for Holesinger's negligence in failing to argue disparate impact, he would have had a more favorable outcome in the ADEA litigation.

In summary, we conclude that McGill failed to demonstrate a genuine issue of material fact regarding his legal malpractice claim against Holesinger as a result of Holesinger's representation in the ADEA claim. The trial court did not err by granting Holesinger's motion for summary judgment. See, e.g., Legacy Healthcare, Inc. v. Barnes & Thornburg, 837 N.E.2d 619, 645 (Ind. Ct. App. 2005) (holding that the trial court did not err by granting summary judgment on the client's legal malpractice claim), reh'g denied, trans. denied.

II.

The next issue is whether the trial court erred by granting summary judgment to Holesinger with respect to his representation of McGill in McGill's tax liability claim. McGill alleges that, between 1993 and 2001, he paid $25,307.46 directly to Holesinger and gave Holesinger another $5,434 in checks made payable to the IRS. According to McGill, the majority of the $25,307.46 was also to be paid to the IRS by Holesinger but Holesinger misappropriated the money by applying it to his attorney fees instead. McGill contends that Holesinger produced only two invoices, that the invoices contained inaccurate entries, that he was billed the wrong hourly amount, that the ADEA action was a contingency fee action, and that the attorney fees claimed by Holesinger do not

correspond to the money paid by McGill. Holesinger, on the other hand, alleges that he received $28,273.00 from McGill between 1993 and 2001 and that he then paid $14,210 to the IRS on McGill's behalf. Holesinger claims that the remaining funds were used to pay his attorney fees. McGill does not dispute that Holesinger paid $14,210.00 to the IRS on his behalf.

The trial court noted that McGill had failed to present any expert testimony that Holesinger's time records were inadequate or improper, that McGill affirmed on his income tax returns that he had paid $24,315 in attorney fees between 1993 and 1999 and took this amount as deductions, and that McGill failed to demonstrate a genuine issue of material fact that he was damaged by Holesinger's alleged negligence.

We first note that McGill again presented no evidence that Holesinger's billing and accounting practices were a failure to exercise ordinary skill and knowledge. See Oxley, 819 N.E.2d at 857 (holding that "expert testimony is usually required in a legal malpractice action to establish the standard of care by which the defendant attorney's conduct is measured"). We acknowledge that "[t]here is no need for expert testimony when the question is one within the common knowledge of the community as a whole or when 'an attorney's negligence is so grossly apparent that a lay person would have no difficulty in appraising it.'" Hacker v. Holland, 570 N.E.2d 951, 953 n.2 (Ind. Ct. App. 1991) (quoting Barth v. Reagan, 564 N.E.2d 1196, 1200 (Ill. 1990)), reh'g denied, trans. denied. The trial court properly noted that "it is quite clear that Holesinger's invoicing and record-keeping were flawed." Appellant's Appendix at 29. Even if Holesinger's

negligence in his billing and accounting practices could be considered grossly apparent, we conclude that the trial court still properly granted Holesinger's motion for summary judgment.

McGill's designated evidence demonstrates that he paid a total of $30,741.46 to Holesinger. It is undisputed that Holesinger paid $14,210.00 to the IRS, leaving $16,531.46 in payments to Holesinger that are at issue. Although McGill claims that some of these funds should have also been paid to the IRS, a nonmovant may not create a genuine issue of fact by contradicting his own prior testimony or affidavit. See Cox v. Northern Indiana Public Service Co., Inc., 848 N.E.2d 690, 698 (Ind. Ct. App. 2006) (holding that the nonmovant could not create a genuine issue of material fact by submitting an interrogatory response that contradicted his prior deposition testimony); King v. Ebrens, 804 N.E.2d 821, 825 (Ind. Ct. App. 2004) ("A party cannot create an issue of fact by submitting an affidavit that contradicts prior deposition testimony."). McGill answered requests for admissions under oath and admitted that he claimed $24,315.00 in attorney fees as a deduction on his income tax returns. McGill cannot create a genuine issue of material fact by now claiming that some of the $16,531.46 should have been paid to the IRS instead of to Holesinger for attorney fees because he has previously claimed under oath that he paid $24,315.00 in attorney fees to Holesinger. McGill has failed to demonstrate that the money should have been paid to the IRS rather than to Holesinger as attorney fees.

We conclude that McGill failed to establish a genuine issue of material fact that he was damaged by Holesinger's alleged negligence in his billing and accounting practices. Consequently, the trial court properly granted Holesinger's motion for summary judgment. See, e.g., Indianapolis Podiatry, P.C. v. Efroymson, 720 N.E.2d 376, 382 (Ind. Ct. App. 1999) ("Summary judgment for the attorney is appropriate in a legal malpractice case where the plaintiff is not damaged by an attorney's handling of his case."), trans. denied; Cox, 848 N.E.2d at 698 (holding that the nonmovant failed to demonstrate a genuine issue of material fact and the trial court properly granted summary judgment to the movant).

For the foregoing reasons, we affirm the trial court's grant of summary judgment to Holesinger.

Affirmed.

RILEY, J. and FRIEDLANDER, J. concur