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IN THE
COURT OF APPEALS OF INDIANA

RHONDA DAMMEYER,	)	
	)	
Appellant-Plaintiff,	)	
	)	
vs.	)	No. 49A04-0609-CV-503
	)	
JERALD MILLER,	)	
	)	
Appellee-Defendant.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Kenneth H. Johnson, Judge
Cause No. 49D02-0503-CT-9818

August 28, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

SHARPNACK, Judge

Rhonda Dammeyer appeals the trial court's grant of summary judgment to Jerald Miller. Rhonda raises two issues, which we revise and restate as:

I. Whether the trial court erred by granting Miller's motion for summary judgment; and

II. Whether the trial court erred by failing to consider the application of Indiana Trial Rule 6(B)(2) to Rhonda's belated response to Miller's motion for summary judgment.

Because we conclude, based upon Miller's designated evidence, that the trial court erred by granting Miller's motion for summary judgment, we need not address the second issue. We reverse and remand.

The relevant facts follow. In July 1999, Kevin Dammeyer, Rhonda's husband, signed a promissory note promising to pay his father, Bruce Dammeyer, $290,000. In March 2000, Kevin promised to pay the estate of Bruce Dammeyer $300,000 in exchange for thirty shares of the common capital stock of Dammeyer Motors, Inc.

On July 18, 2002, Kevin filed a petition for dissolution of marriage in Florida. Kevin's petition stated that Kevin "has a special equity claim in the funds in the sum of about $155,000 held in the Cape Coral National Bank money market account and the funds in the sum of about $450,000 held in the MFS Investment account and all funds and assets that resulted from the nonmarital inheritance received by [Kevin] from his father's estate." Appellant's Appendix at 41. On December 9, 2002, Rhonda filed a petition for dissolution in Indiana. At some point, Miller began representing Rhonda.

In September 2003, Kevin filed a petition for release of estate funds in the Indiana dissolution action. Kevin argued that Rhonda placed a "Stop Transactions Order" on an account with MFS Investment Management, the account was "the repository of the proceeds of a loan made to [Kevin] by the Estate of Bruce Dammeyer," the "loan [was] evidenced by a promissory note in the amount of $605,683.28," and the balance of the note was "approximately $449,678.35." Id. at 50. Rhonda, represented by Miller, filed an objection to the release of the estate funds and argued that a previous hearing failed to allow Rhonda to present evidence to show that the money in the M.F.S. Investment Management account "was derived from the sale of stock owned by Kevin." Id. at 80.

On July 7, 2004, Rhonda and Kevin reached a settlement agreement, which the Indiana trial court approved. In part, the agreement stated that Kevin would pay Rhonda $146 per week for child support, "[f]rom the proceeds of the current MFS/Futureshare Financial Account . . . [Rhonda] will receive the sum of One Thousand Twenty Four [sic] Dollars ($124,000.00)" and the "balance, after paying [Rhonda]'s attorney fees from said MFS/Futureshare Financial Account . . . shall be the property of [Kevin]." Id. at 112.

On March 14, 2005, Rhonda filed a complaint against Miller alleging negligence and breach of contract. Specifically, Rhonda alleged that "[t]he representation provided by [Miller] was substandard and did not conform to the conduct of a reasonably prudent attorney representing a client in a Dissolution of Marriage matter," and that Miller failed to "be prepared for trial" and "provide adequate and competent representation." Id. at 8-9.

On April 17, 2006, Miller filed a motion for summary judgment. In support of his motion, Miller designated Rhonda's objection to release of estate funds, portions of the deposition of Brian Zoeller, Rhonda's expert, Rhonda's response to Miller's Interrogatory #4, and a portion of Rhonda's deposition. Miller stated as an undisputed fact that "[o]nce Mr. Miller began his representation, the main issue that could not be resolved between the parties was the question of whether [Kevin]'s inheritance from his father . . . and the funds that were held in an M.F.S. Investment Management Account . . . were funds that should be included in the marital estate subject to division." Id. at 17. Miller also stated as an undisputed fact that "child support was awarded to Rhonda . . . in the amount of $146.00 per week, based upon an assumed annual income for Kevin . . . of $48,000.00." Id. at 20.

Miller addressed each of Rhonda's specific allegations of breaches of the standard of care. Specifically, Miller argued that: (1) he performed within the standard of care with regard to the handling and enforcement of the preliminary agreement; (2) conducted appropriate and adequate discovery relative to the parties' assets and with regard to Kevin's interest in his father's trust; (3) performed within the standard of care in his representation of plaintiff in matters of child support; and (4) Rhonda's allegation that the settlement agreement should have contained a provision for life insurance on Kevin's support obligation was incorrect.

On May 12, 2006, Rhonda requested a thirty day extension in which to respond to Miller's motion for summary judgment, which the trial court granted. On June 12, 2006,

Rhonda requested an additional thirty day extension allowing her "to and including July 17, 2006," which the trial court granted. Id. at 158. On July 19, 2006, Rhonda filed a third request for an extension of time to respond to Miller's motion for summary judgment allowing Rhonda "to and including July 27, 2006," which the trial court granted on July 24, 2006. Id. at 163.

Miller filed an objection to Rhonda's request for an extension of time and argued that Rhonda failed to timely move for an extension beyond the previous deadline of July 17, 2006. On July 27, 2006, Rhonda filed a response to Miller's motion for summary judgment. Miller responded by filing a motion to strike Rhonda's response to his motion for summary judgment and by arguing that Rhonda's response was not timely filed and could not be considered by the trial court. After the trial court held a hearing on Miller's motion for summary judgment, Rhonda filed a response to Miller's motion to strike and argued, among other things, that the trial court had discretion to permit filing after the deadline pursuant to Ind. Trial Rule 6(B)(2). The trial court granted Miller's motion to strike and motion for summary judgment. The trial court's order stated, in part:

* * * * *

> [Miller]'s motion to strike the response of [Rhonda] is here [sic] granted and the court finds that it was without jurisdiction to grant [Rhonda]'s third request for extension of time. [Miller]'s designations demonstrate that there are no genuine material issue of facts in relation his [sic] motion and that he is entitled to judgment as a matter of law.

* * * * *

Id. at 6.

I.

The first issue is whether the trial court erred by granting Miller's motion 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. Mangold, 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.

To prove a legal malpractice claim, a plaintiff-client must show: (1) employment of an attorney (duty); (2) failure by the attorney to exercise ordinary skill and knowledge (breach); (3) proximate cause (causation); and (4) loss to the plaintiff (damages). Rice v. Strunk, 670 N.E.2d 1280, 1283-1284 (Ind. 1996); Picadilly, Inc. v. Raikos, 582 N.E.2d 338, 344 (Ind. 1991). A defendant is entitled to judgment as a matter of law when undisputed material facts negate at least one element of a plaintiff's claim. Douglas v. Monroe, 743 N.E.2d 1181, 1184 (Ind. Ct. App. 2001). Expert testimony is not necessarily required to oppose a summary judgment motion. Thomsen v. Musall, 708 N.E.2d 911, 912 (Ind. Ct. App. 1999), reh'g granted in part, 713 N.E.2d 900, trans. denied. It was Miller's burden to establish the absence of any genuine issue of material

fact. Id. Until such burden was met, Rhonda was not required to come forward with any evidence. Id.

Rhonda cites to portions of Miller's designated evidence and argues that because "much of this evidence was properly before the trial court, summary judgment should have been denied regardless of whether [Rhonda] filed a timely response." Appellant's Brief at 20. Consequently, we first analyze whether summary judgment was proper based upon Miller's designated evidence. The parties' arguments to the trial court and on appeal center upon whether Miller breached his duty and whether any breach caused Rhonda damages.[1]

A. Breach

We first must examine whether Miller breached his duty by failing to exercise ordinary skill and knowledge. Whether a particular act or omission is a breach of a duty is generally a question of fact. Stephenson v. Ledbetter, 596 N.E.2d 1369, 1372 (Ind. 1992). It can, however, be a question of law when the facts are undisputed and only a single inference can be drawn from the facts. Id. We must liberally construe all designated evidentiary matter in favor of the nonmoving party and resolve any doubt against the moving party. Stryczek v. Methodist Hospitals, Inc., 656 N.E.2d 553, 554 (Ind. Ct. App. 1995), reh'g denied, trans. denied. Even if it appears that the nonmoving party will not succeed at trial, summary judgment is inappropriate where material facts

[1] We note that neither party disputes that Rhonda employed Miller, thus creating a duty.

conflict or undisputed facts lead to conflicting inferences. Id. In negligence cases, summary judgment is rarely appropriate because "negligence cases are particularly fact sensitive and are governed by a standard of the objective reasonable person – one best applied by a jury after hearing all of the evidence." Rhodes v. Wright, 805 N.E.2d 382, 387 (Ind. 2004).

Miller's motion for summary judgment stated that Rhonda's "purported expert, Brian Zoeller, finds fault on [the issue of handling and enforcement of the preliminary agreement] based solely upon his discussions with [Rhonda]" and "[e]ven if the court assumes [Rhonda]'s allegations regarding the Preliminary Agreement are true, [Rhonda] has failed to come forward with any admissible evidence tending to prove the amount of damages she sustained as a result." Appellant's Appendix at 24. Thus, Miller focuses his argument regarding this allegation on the lack of damages and not on the breach of duty. Thus, we cannot say that Miller established the absence of any genuine issue of material fact regarding his breach of this particular duty.

Miller also argued in his motion for summary judgment that Rhonda's allegation that the settlement agreement should have contained a provision for life insurance on Kevin's support obligation is incorrect. Miller relied on a statement by Mother's expert that the law does not require life insurance protection and the affidavit of Miller's expert and argued that there were no damages related to the claim. However, Miller conceded that Mother's expert stated that "every competent practicing family law attorney provides for life insurance protection for support orders." Id. at 140-141. Construing all

reasonable inferences drawn from the facts in Rhonda's favor, we conclude that a question of fact exists regarding whether Miller's failure to include a provision for life insurance on Kevin's support obligation constituted a breach.

Miller argues that "no genuine issue exists with respect to the fact that Mr. Miller met the applicable standard of care in conducting discovery in [Rhonda]'s divorce proceeding and is entitled to judgment as a matter of law on this specific allegation." Appellee's Brief at 16-18. On this issue, Miller designated portions of Zoeller's deposition and the deposition of his own expert. Miller cites the affidavit of his expert and argues that this affidavit was undisputed. Miller argues that Rhonda's expert, Zoeller, reached the conclusion that Miller failed to conduct adequate discovery because Zoeller failed to review depositions and that "[u]pon learning of the facts, Zoeller essentially conceded that this contention was without merit." Id. at 16. Miller appears to cite the following exchange in Zoeller's deposition to support Zoeller's concession:

> [Q] . . . Maybe we can cut to the chase a little bit here. When you say you think it was litigated, what we're talking about here really is the $600,000 or thereabouts that [Kevin] obtained from the sale of the car dealership and a corresponding 600,000-dollar promissory note that he had from his father's estate, which would, if you agree – if you've got a 600,000-dollar asset and a 600,000 liability, they would pretty much cancel each other out and net you nothing in terms of their value to the marital pot. Wouldn't you agree with that?
>
> A I would if that were the circumstances. Now I don't know that those are the circumstances here.
>
> Q. Perfect. I couldn't agree with you more; but in terms of evaluating as an expert what the circumstances are here, you didn't read the

deposition of [Kevin] to see what his position was with respect to these liabilities he had to his father's estate, did you?

A I was not presented with a copy of his deposition. And if memory serves me correctly, Rhonda – I think that Rhonda was not given a copy because – and again, I could be wrong about this – Jerry Miller was refusing to pay for a copy or something or pay the court reporter, but I'm not sure – I've never seen one. She never gave me his deposition.

Q How about – nor did you see the deposition of Scott Longardner, the trust officer who is the executor of the estate and who is the person most knowledgeable about issues relating to liabilities [Kevin] had to his estate, did you?

A No. I never saw his deposition.

Q You're the expert, sir. When you are arriving at a number like $700,000 as being a reasonable number or an accurate number or in your expert opinion the number that this estate should be valued at, wouldn't you agree that it would be a good idea to see information related – relating to liabilities in the amount of $600,000?

A It's important to consider all of the information, and the information I had was that [Kevin] filled out a financial disclosure form just several months before the divorce was filed saying, "I'm worth $700,000."

Appellant's Appendix at 124-125.

Rhonda points to Exhibit K of Miller's designated evidence, which is a portion of Zoeller's deposition and contains the following exchange:

Q Just to make sure it's absolutely clear, tell me, counsel, did you evaluate any damages that flowed from the allegations of malpractice that you raise in this first bullet point that we've just been talking about?

A Not a specific dollar amount, but I do believe that it is part and parcel of why [Rhonda] agreed to the terms she agreed to. This very

> poor handling of the preliminary matters put stress upon [Rhonda] because there were things that should have been covered that weren't covered. The child support was too low. I could go on and on.
>
> And when a client is put in that position where they're operating under a less than favorable preliminary agreement, they then have an impetus to settle beyond that which they would have had a more appropriate and proper preliminary agreement been arrived at.
>
> So again, to answer your question, I did not calculate specific damages; but I do believe that damages did arise out of this malpractice.

Appellant's Appendix at 128-129. Construing all reasonable inferences drawn from the facts in Rhonda's favor, we cannot say that Zoeller conceded that his contention that Miller breached his duty of care was without merit. See, e.g., Sanders v. Townsend, 509 N.E.2d 860, 863 (Ind. Ct. App. 1987) (holding that "[w]ithout considering every possible alleged breach, the material before the trial court establishes genuine issues of material fact which, if true, a reasonable fact finder could conclude constitutes the breach of the duty owed by an attorney to his client"), aff'd in relevant part by, 582 N.E.2d 355, 358 (Ind. 1991).

Miller argued in his motion for summary judgment that he performed within the standard of care in his representation of Rhonda in matters of child support because the estimate of $48,000 for Kevin's salary was appropriate. On appeal, Miller argues that Rhonda's "expert, did not know what her husband's income was at the time the child support calculation was made and, therefore, had no basis for claiming it was

inadequate." Appellee's Brief at 17. The following exchange occurred during Zoeller's deposition:

> Q Do you know how much [Kevin] was making at the time that calculation was made?
>
> A. No. As I said before, no, I do not.
>
> Q And you can't put a support order on someone that in its effect would require them to pay more than they earn, can you?
>
> A Sure you can. . . .
>
> * * * * *
>
> Q . . . But wouldn't you agree in terms of drawing a conclusion that the $48,000 was a number that suggests to you that he was underemployed, as you put it, that it would be a good idea to read his deposition or at least see what his side of the story is on that before drawing that conclusion?
>
> A Again, if I had his deposition, I certainly would have read his deposition before making a recommendation in that regard; but I didn't have his deposition.
>
> Q Well, even if his deposition wasn't taken wouldn't you agree with me in this malpractice case there's nothing precluding you from going to the lawyer who hired you, although I'm not sure who hired whom, to be honest, and say, "Hey, why don't you get out and depose this guy, get his tax returns. Let's see what he's been doing for the last five years or six years job wise and income wise" before jumping to a conclusion that $48,000 was too low of a number to be using in this regard?
>
> A I have his previous tax returns. I know what he was making historically and I know -- and again, based upon what Rhonda indicated he was doing at the time, I felt comfortable in making that recommendation that 48,000 was lower than what should have been agreed to.

> Q What is the number that you think should have been used? What is your opinion on the appropriate number that should have been utilized in arriving at child support?
>
> A Again, something closer to his historical average as a manager at the dealership. It looked like he was, you know, making in the range of 80 to $100,000 a year.

Appellant's Appendix at 135-138. Construing all reasonable inferences drawn from the facts in Rhonda's favor, we conclude that a question of fact exists regarding whether Miller breached his duty of care in his representation of Rhonda in matters of child support by estimating Kevin's salary to be $48,000. See, e.g., Sanders, 509 N.E.2d at 863 (holding that "[w]ithout considering every possible alleged breach, the material before the trial court establishes genuine issues of material fact which, if true, a reasonable fact finder could conclude constitutes the breach of the duty owed by an attorney to his client").

B. Damages

We next address damages, which presents the issue of whether, in the absence of attorney negligence, the settlement would have been greater for Rhonda. See Sanders, 509 N.E.2d at 864. Any evidence tending to establish that Rhonda's case had a settlement value of more than what she accepted would create an issue of fact. See id. Miller argues that he was entitled to summary judgment as a matter of law because "he negated the 'damages' elements" of Rhonda's claim and Rhonda "has provided no evidence to the effect that she has suffered damages as a consequence of Miller's acts or omissions." Appellee's Brief at 18.

Specifically, Miller argues that Rhonda's claim that she should have received a cash settlement in excess of $124,000 "ignores the undisputed fact that her husband had a corresponding obligation to repay a $605,000 promissory note to the estate of her father-in-law, which was being administered for the benefit of the father-in-law's creditors and heirs." Id. Miller points to Zoeller's deposition in which he stated that "assuming for purposes of your question that the net marital estate was 700,000 but it had a 600,000 liability against it, then [Rhonda] got a hell of a deal." Appellant's Appendix at 144. However, Miller also designated a portion of Rhonda's deposition in which the following exchange occurred:

> [Q] . . . [A]nd that promissory note was between [Kevin] and [his father's] estate and allowed him to get the additional money he needed to buy additional shares in the business; isn't that right?
>
> A I wasn't there for that, so I can't say that's what happened.
>
> Q That's fine. You do understand, ma'am, that at the time your divorce was finalized you signed a settlement agreement; you put your signature on the final agreement in terms of who got what, correct?
>
> A Yes.
>
> Q And at the time that was done, you understand that there was a single promissory note now because the two had been combined, which required your husband to repay his father's estate $605,000; isn't that right?
>
> A No, that was not my understanding.
>
> Q Well, what was your understanding.

A That money was never to be repaid. That money was in our names. It was used as a joint asset. I used it for whatever I wanted to use it for. He used it for whatever he wanted to use it for. This so-called promissory note loan, no payments were ever made. It was never requested that we ever pay and he has said he is not working.

Appellant's Appendix at 151-152. Construing the facts and reasonable inferences in favor of Rhonda, we conclude that a genuine issue of fact exists regarding whether the $605,000 needed to be repaid.

Rhonda cites to Exhibit L of Miller's designated evidence, which is her response to one of Miller's interrogatories. Exhibit L states, in part:

> As a result of [Miller]'s misrepresentation on my behalf, I have sustained damages in a variety of manners. First and foremost, the Agreed Provisional Order that was executed on my behalf by Jerald Miller, which Order was only to be valid for thirty (30) days according to Mr. Miller, set me up for failure in a variety of ways. Not only did Mr. Miller misrepresent the terms of the Agreed Provisional Order to me, he misrepresented the fact that the Order would be in force during the entire pendency of my divorce. Accordingly, from April 10, 2003 thru the finalization of my divorce on July 7, 2004, I was forced to use my credit cards for food, gas, utilities, phone bill, my tuition and education expenses, child care expenses, medical bills, clothing expenses, and other miscellaneous expenses. I estimate my credit card bills for these expenses to be approximately $20,000. In addition, Jerry Miller failed to fully evaluate the worth of my ex-husband, Kevin Dammeyer, during the divorce proceedings, leaving me with a much smaller percentage of the marital assets than I should have been entitled to. Jerry Miller's failure to fully and properly evaluate the extent of the marital estate (valued at approximately $700,000.00 as testified by my ex-husband, Kevin Dammeyer), I have incurred damages in the range of $230,000 based upon my entitlement to approximately one-half of the net value of the marital estate. Because Jerry Miller failed to accurately evaluate the marital estate, I was forced to settle for a lump sum of $124,000. I further incurred damages as a result of the terms of the Settlement which set my ex-husband's, Kevin Dammeyer, child support obligation in the amount of $146.00 per week. Based upon my ex-husband's prior tax returns, and access to additional funds through

his trust and inheritance, Jerry Miller inappropriately assigned my ex-husband, Kevin Dammeyer, an annual gross salary of approximately $49,000, a salary far less than Kevin's prior tax returns depict he earned and/or is capable of earning. (I now believe a salary of approximately $100,000 was appropriate). As a result of the deficiency in the child support amount suggested by Jerry Miller and entered in the Settlement Agreement, I have sustained damages and will continue to incur damages until my daughter is 21 years old in the amount of $103,168.00. The difference in child support of $270/week vs. $146 = $124 x 832 weeks (16 years, retroactive to [M.] at age 5 x 52/wks a year) = $103,168.00. Additionally, as a result of Jerry Miller's failure to secure my ex-husband's child support payments by a life insurance policy, there is no life insurance policy in place for my daughter and it will be my responsibility to petition the court requesting the addition of a life insurance provision to the Settlement Agreement. The anticipated amount of attorney's fees to enforce this action are undetermined at this time. Further, in the event the court would not grant this amendment to the Settlement Agreement, I will incur further damages by being liable for the costs of a life insurance policy for my daughter, a cost which is again undetermined at this time. Further, Jerry Miller failed to insert a provision in the Settlement Agreement for child care expenses, although requested several times on my behalf, which expenses are estimated at approximately $75/week for the summer months and $150/week for the school year. I am currently responsible for all daycare expenses and will continue to be until my daughter, [M.], is at least thirteen years old. If the child care expenses are calculated retroactively at age 5 from the original date of the divorce proceedings, thru age 13, these damages are estimated at approximately $23,220 with the expenses referenced above. A calculation is as follows: (4.3 weeks x 3 months for summer months = 12.9 weeks a summer x 8 summers = 103.20 weeks x $150/week for summer months = $15,480 (4.3 weeks x 9 months for school year = 38.7 weeks each school year for 8 school years = 309.60 weeks x $75.00/week = $23,220. Total child care expenses for the next 8 years will be approximately $38,700 of which I should only have been ordered to be responsible for 30% or 40% of these expenses given my income ratio with my ex-husband as opposed to 100% of the expenses which I am currently responsible for now. As a result of Jerry Miller's failure to provide a provision for child care expenses in the Settlement Agreement, I will incur damages in the approximate amount of $23,200 for my ex-husband's share of child care expenses if given a 60/40 split. Since I was not employed at the time of the divorce or at the time of the divorce's finality, I believe this would have been an extremely fair split for child care expenses if Jerry

> Miller would have appropriately requested such a split. However, Mr. Miller failed to do so. As an additional part to my claim for damages, Jerry Miller failed to include a provision in the Settlement Agreement for my daughter, [M.]'s, [sic] extracurricular activities including but not limited to: gymnastics, cheerleading, art, soccer, and any other extracurricular activities [M.] may become involved in over the years until the age of 18. Although I requested a provision be inserted in the Settlement Agreement, again Mr. Miller failed to comply with my request. I estimate the cost of these extracurricular activities to be approximately $150.00 per month. Calculating the extracurricular activities' expense retroactive to age 5 for [M.], I estimate damages in the amount of $23,400 (13 years of extracurricular activities at $150/month = 156 months x $150 month = $23,400). If this amount would have listed as a provision in the Settlement Agreement, I would have only been responsible for 30%-40% of these expenses. If given 40% responsibility, my share would have been $9,360, as opposed to $23,400, which I am now responsible for at 100%. Accordingly, I calculate these damages to be $14,040 which is the difference of 40% of $23,400 vs. 100% of $23,400. Lastly, had Jerry Miller provided adequate representation during my divorce proceedings, I would not had to hire an expert witness in a legal malpractice suit to help me recover the monies lost in my divorce. To date, I have paid Brian Zoeller approximately $3,500 for his services in this lawsuit. In summary, I estimate my damages to be approximately $390,428.00 as referenced above.

Appellant's Appendix at 146-148. Construing the facts and reasonable inferences in favor of Rhonda, we conclude that a genuine issue of fact exists regarding whether she suffered damages. See Indianapolis Public Housing Agency v. Aegean Const. Services, Inc., 755 N.E.2d 237, 240 (Ind. Ct. App. 2001) (holding movant's designated evidence presented questions of fact existed regarding whether nonmovant was owed damages).

In summary, we conclude, based upon Miller's designated evidence, that questions of fact exist as to whether Miller committed attorney malpractice. Thus, the trial court erred by granting summary judgment to Miller. Because we conclude that the trial court

erred by granting summary judgment to Miller based on the designated evidence, we need not address Rhonda's argument that the trial court erred by failing to consider the application of Indiana Trial Rule 6(B)(2) to Rhonda's belated response to Miller's motion for summary judgment.

For the foregoing reasons, we reverse the trial court's grant of summary judgment to Miller and remand for proceedings consistent with this opinion.

Reversed and remanded.

MAY, J. and BAILEY, J. concur