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APPELLANT PRO SE:

ATTORNEY PRO SE:¹

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DANIEL K. WHITEHEAD
Yorktown, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

TIM L. GODBY,)

Appellant-Petitioner,)

vs.)

No. 33A01-0608-CR-325

STATE OF INDIANA,)

Appellee-Respondent.)

APPEAL FROM THE HENRY SUPERIOR COURT

The Honorable Mary G. Willis, Judge

Cause No. 33C01-9512-CF-36

January 31, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

MAY, Judge

¹ Godby filed a “Motion to Compel Attorney to Deliver Over Money” under the same cause number of his criminal case, which is why the State is listed as Appellee. However, the State is not a party, and Daniel K. Whitehead responds as his former attorney and the party to whom the motion was directed.

Tim Godby, *pro se*, appeals the dismissal of his “Motion To Compel Attorney To Deliver Over Money.” The trial court correctly dismissed the motion because it is substantially the same as Godby’s pending legal malpractice proceeding. Accordingly, we affirm.

FACTS AND PROCEDURAL HISTORY

In April 1997, a Henry County jury found Godby guilty of the December 1995 murder of Jeffrey Asberry. Godby filed a motion to correct error alleging his counsel was ineffective and that newly discovered evidence warranted a new trial. After Godby’s motion to correct error was denied, he appealed directly to the Indiana Supreme Court. He did not raise the issue of ineffective assistance of trial counsel. Godby’s conviction was affirmed in October 2000. *Godby v. State*, 736 N.E.2d 252 (Ind. 2000), *reh’g denied*.

Godby filed a petition for post-conviction relief in April 2001. In August 2002, he hired attorney Daniel Whitehead and paid Whitehead a retainer. Whitehead filed an amended petition for post-conviction relief in April 2003. The petition was denied,² and we affirmed. *Godby v. State*, 809 N.E.2d 480 (Ind. Ct. App. 2004), *trans. denied* 822 N.E.2d 973 (Ind. 2004). We held he could not raise the issue of ineffective assistance of trial counsel in a post-conviction relief petition. While it had been raised in the motion to correct error, it had not been raised on direct appeal. Whitehead did not raise the

² No hearing was held. Godby did not object to the summary disposition.

ineffective assistance of direct appeal counsel, who failed to assert trial counsel's ineffectiveness.

Godby filed a legal malpractice claim against Whitehead in the Sullivan Superior Court in November 2004. The complaint was dismissed under Trial Rule 12(B)(6). We reversed and remanded. *Godby v. State*, 837 N.E.2d 146 (Ind. Ct. App. 2005), *trans. denied* 855 N.E.2d 1005 (Ind. 2006). In May 2006, the case was transferred to the Madison Superior Court.

Also in May 2006, Godby filed a motion under Ind. Code § 33-42-1-9 to compel Whitehead to return the unearned portion of the retainer. This motion was filed with the Henry Circuit Court under the cause number for his murder prosecution. Whitehead moved to dismiss under Trial Rule 12(B)(8). The Henry Circuit Court entered an order "striking/dismissing" the motion to compel. (App. at 42.)

DISCUSSION AND DECISION

The trial court dismissed Godby's motion to compel because it concluded the "closed criminal matter" was not the proper forum for recovery of the retainer, (*id.* at 43), and the "parties, subject matter and remedies are substantially the same and it would not be in the interests of judicial economy and efficiency to adjudicate the same matters" under the pending legal malpractice action and the motion to compel. (*Id.*)

Godby's motion to compel requested the return of the retainer under Ind. Code § 33-42-1-9, which provides:

If, on request, an attorney refuses to deliver over money or papers to a person from whom or for whom the attorney has received them, in the course of the attorney's professional employment, the attorney may be

required, after reasonable notice, on motion of any party aggrieved, by an order of the court in which an action, if any, was prosecuted or if an action was not prosecuted, by the order of any court of record, to deliver the money or papers within a specified time, or show cause why the attorney should not be punished for contempt.

Such proceedings have been characterized as “ancillary” to the action giving rise to the dispute. *Smith v. State*, 426 N.E.2d 402, 403 (Ind. 1981). Therefore, the court erred when it concluded Godby’s motion was improper in the “closed criminal matter.”³ (App. at 43.)

Nevertheless, the trial court correctly dismissed Godby’s motion under T.R. 12(B)(8) because his motion is substantially the same as his pending malpractice action.

When an action is pending before a court of competent jurisdiction, other courts must defer to that court’s authority over the case. *State ex rel. Meade v. Marshall Superior Court II*, 644 N.E.2d 87, 88 (Ind. 1994). Courts so defer in the interest of fairness to litigants, comity between and among the courts of this state, and judicial efficiency. *Id.* at 88-89. T.R. 12(B)(8) allows dismissal of an action on the ground that the same action is pending in another Indiana court. *Id.* at 89 (discussing predecessor to T.R. 12(B)(8)); *see also Crawfordsville Apartment Co. v. Key Trust Co. of Fla.*, 692 N.E.2d 478, 479-80 (Ind. Ct. App. 1998). “This rule applies where the parties, subject

³ We note an attorney may not retain the unearned portion of an advance fee. *See* Ind. Professional Conduct Rule 1.16(d) (upon termination of representation a lawyer is required to refund to the client “any advance payment of fee or expense that has not been earned or incurred”). As a result, a trial court does not have the discretion to summarily deny a request for the unearned portion of a retainer fee. *Ferguson v. State*, 773 N.E.2d 877, 880 (Ind. Ct. App. 2002); *see also Johnson v. State*, 762 N.E.2d 222 (Ind. Ct. App. 2002) (request for documents), *reh’g denied*; *McKim v. State*, 528 N.E.2d 484 (Ind. Ct. App. 1988) (same). When a motion to compel the delivery of money or papers is presented, the trial court should provide reasonable notice to the attorney, hold a hearing on the matter, and then rule on the motion. *Smith*, 426 N.E.2d at 404.

matter, and remedies of the competing actions are precisely the same, and it also applies when they are only substantially the same.” *Meade*, 644 N.E.2d at 89.

Although the appeal is filed in the criminal case, the State has no interest in the outcome or the underlying trial court motion Godby filed. *See Smith*, 426 N.E.2d at 404 n.1 (“However, the State of Indiana is a stranger to the present controversy. The matter before the court on Smith’s motion was one between Smith and [his former attorney] Dilworth.”). Therefore, just like the malpractice action, this dispute is between Godby and Whitehead.

In this action, Godby alleges Whitehead did not earn his fee: “Whitehead did not render the best professional skill in his power, and in fact, failed to include the only available ground for relief in the Petition for Post conviction [sic] Relief.” (App. at 23.) His malpractice complaint alleges: “[Whitehead] negligently failed to adequately represent [Godby] by his failure to raise all available grounds for relief in [Godby’s] amended petition for post conviction relief, namely, the ineffective assistance of appellate counsel.” (*Id.* at 32-33.)⁴ Both actions concern Whitehead’s failure to raise an ineffective assistance of appellate counsel claim in the amended post conviction relief petition. The subject matter of the two actions is the same.

In his motion to compel, Godby seeks the return of the unearned retainer. In the malpractice suit, he alleges he has “suffered emotional distress and mental anguish, and

⁴ In its order dismissing the motion to compel, the trial court noted neither Godby nor Whitehead had attached certified copies of the malpractice complaint to the motion to compel. However, Godby included a file-stamped copy of the malpractice complaint in the record on appeal. The Clerk of Henry County verified this complaint was attached as Exhibit 1 to Godby’s motion to compel.

has lost and will continue to lose wages, profits and income” and seeks “damages, cost of this action, [and] prejudgment interest.” (*Id.* at 33.) Although the malpractice suit lists more specific categories, Godby seeks the same type of monetary remedy in both causes of action.⁵ The two causes of action are the same or substantially the same.

CONCLUSION

Because Godby’s motion to compel is substantially the same as his malpractice claim, Whitehead was entitled to dismissal under T.R. 12(B)(8). Accordingly, we affirm.

Affirmed.

BAILEY, J. and RILEY, J. concur.

⁵ To the extent Godby’s malpractice action did not request the return of the retainer, we note Godby could either amend his petition or include the amount in his list of damages.