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IN THE COURT OF APPEALS OF INDIANA

MIDWEST PSYCHOLOGICAL CENTER, INC., and DR. SHELVY KEGLAR,	)	
Appellants/Plaintiffs,	)	
vs.	)	No. 49A05-0910-CV-586
SYLVIA FUNK, DENNIS OSBORNE, CHARLOTTE ALLSTATT, PATRICIA CAREW-CEESAY, SHELLY HARRIS, And SHARI E. KINNAIRD, all individually And in their capacity as employees or agents of the Indiana State Department of Disability Aging and Rehabilitative Services, Disability Determination Bureau,	)	
Appellees-Defendants.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Patrick L. McCarty, Judge
Cause No. 49D03-0307-MI-001212

August 19, 2010

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

Midwest Psychological Center, Inc. and Dr. Shelvy Keglar (collectively "Midwest") appeals the Marion Superior Court's entry of summary judgment in favor of Silvia Funk, Dennis Osborne, Charlotte Allstatt, Patricia Carew-Cessay, Shelly Harris, and Shari E. Kinnaird, individually, and in their capacity as employees or agents of the Indiana State Department of Administration, and/or the Division of Disability, Aging and Rehabilitative Services, Disability Determination Bureau (collectively "the State"). Midwest raises the following arguments on appeal, which we restate as:

> I. Whether the State was collaterally estopped from raising the issues argued in its motion for summary judgment;
>
> II. Whether the trial court erred when it concluded that Midwest lacked standing to bring a Section 1981 claim against the State; and,
>
> III. Whether the trial court erred when it granted the State's motion for summary judgment.
>
> We affirm.

Facts and Procedural History

This is the second appeal resulting from this litigation, and the following facts were set forth in Midwest Psychological Center, Inc. et al. v Indiana State Department of Administration, et al., No. 49A02-0706-CV-468 (Ind. Ct. App. Feb. 20, 2008):

> Midwest is an African-American owned business. This appeal arises from Midwest's bid for a state psychological service contract known as RFP-41. Three entities, Indiana Disability Determination Consultants ("IDDC"), Metro RPL, Inc, and Midwest, submitted competing bids for psychological work to be performed for the State. The State reviewed the bids and, on February 28, 2003, recommended IDDC, a non-minority-owned business, be awarded the RFP-41. On April 2, 2003, the State notified Midwest that the RFP-41 had been awarded to IDDC.

> Midwest sent a "Letter of Protest" to the Indiana Department of Administration ("IDA"). The State denied the protest. Midwest then requested an appeal from the IDA. David Perlini, commissioner of the IDA and a member of the Commission on Minority and Women's Business Enterprises, informed Midwest that he was without authority to provide a remedy. On July 7, 2003, Midwest petitioned the trial court to review the administrative decisions. In its petition, Midwest alleged that the RFP-41 was awarded in violation of 42 U.S.C. § 1981. Particularly, Midwest alleged that RFP-41 would be paid with State monies and that those entities awarding the contract acted under the color of state law. Midwest contended that its bid was superior to and less costly than that of IDDC. Midwest further complained that its staff had experience in the psychiatric field and, yet, the State evaluators gave a zero out of a possible twenty-five percentage points in the area of experience.
>
> The State filed a motion to dismiss Midwest's petition. On February 25, 2005, Midwest filed a motion for leave to amend its complaint to dismiss the claims and to state a claim against the State evaluators in their individual capacity. On March 2, 2005, before any ruling on its first motion, Midwest again moved for leave to amend its complaint to add other State evaluators. On March 4, 2005, without a ruling from the trial court, Midwest filed an amended complaint for damages with the required summonses to the added parties. The State moved to strike the amended complaint, and three days later, the trial court heard argument on the issue. On May 17, 2005, the trial court struck the March 4, 2005 amended complaint as premature and granted Midwest thirty days to file an amended complaint and perfect service. Three days later, Midwest filed its amended complaint and summonses. On September 12, 2005, the State filed its motion to dismiss contending that the plaintiff's claim was barred by the two-year statute of limitations applicable to § 1983 claims. On May 18, 2007, the trial court dismissed Midwest's amended complaint.

On the first appeal, our court reversed the trial court's dismissal of the complaint after concluding that the amended complaint was not filed outside the two-year statute of limitations. Id. at *7.

On May 15, 2009, after the case was remanded to the trial court, the State filed a motion for summary judgment. On June 22, 2009, Midwest filed a motion to strike the State's motion for summary judgment and a response to the summary judgment motion. A hearing was held on July 2, 2009, at which the State moved to strike Shelvy Keglar's affidavit. The trial court granted the motion and concluded that the affidavit did not comply with Trial Rule 56. Appellant's App. p. 13. Shortly after the hearing, Midwest filed a motion for summary judgment.

The trial court issued an order granting the State's motion for summary judgment on July 10, 2009, and found the following:

> [Midwest] failed to designate to the court each material issue of fact which they claimed precludes summary judgment as required by Trial Rule 56(C) of the Indiana Rules of Trial Procedure. Accordingly, the statement of facts set forth by Defendants is taken as true and the Court finds that the facts are as follows.
>
> In 2003, the Indiana Family and Social Services Administration sought a contractor to provide review and evaluation of Social Security Disability and Supplemental Security Income claims relating to mental health. The Request for Proposal was known as RFP 3-41. The Indiana Department of Administration oversees the contract process for the State.
>
> In 2003, Shelley Harris, a defendant, was the RFP Manager at the Indiana Department of Administration. Through Harris, notices soliciting bid for REP 3-41 were issued. As RFP Manager, Shelley Harris handled the procedural aspects of the bid process such as notice to prospective bidders, collection of bids and distribution of bids for evaluation and recommendation.
>
> An evaluation team was assembled by the [Indiana Disability Determination Bureau ("IDDB")] consisting of 3 employees to review and evaluate the bid proposals submitted in connection with RFP 3-41. The team of reviewers consisted of Defendants Sylvia Funk, Dennis Osborne and Charlotte Allstatt.

Sylvia Funk is a Unit Supervisor at the IDDB. Charlotte Allstatt is a Quality Support Supervisor at the IDDB. Dennis Osborne is a Quality Support Program Specialist at the IDDB. Patricia Carew-Cesay is an African-American female who is employed by the [IDDB] as a Deputy Director.

The three evaluators, Allstatt, Funk and Osborne, were given three bid proposals (from Midwest, Indiana Disability Determination Consultants [IDDC] and Metro RPh), evaluation forms and instructions for the evaluation. None of the 3 evaluators met or conferred with either of the other two evaluators in evaluating the competing bids.

The evaluation forms identified 4 criteria upon which review of the proposals was to be based: Cost, Experience, Management Ability and Workload. Midwest's score on the cost factor was the highest of the three bidders but it scored lower on the other three factors than did IDDC. Based upon their review of the four criteria, IDDC scored highest of the three firms bidding for RFP 3-41.

Carew-Cesay, an African-American woman, independently reviewed the work of the 3 evaluators and prepared a recommendation to the Indiana Department of Administration that IDDC be selected as the successful bidder for RFP 3-41.

Shelley Harris played no part in the evaluation and recommendation concerning the winning bidder on the contract. The race of the prospective bidders and actual bidders played no part in Harris' actions with regard to RFP 3-41. The unsuccessful bidders were notified that the contract was awarded to another party on April 2, 2003.

Carew-Cesay, Allstatt, Funk and Osborne were not aware that Midwest was a minority-owned business at the time they completed their evaluations and recommendation. Race did not play any part in Carew-Cesay's, Allstate's, Funk's or Osborne's evaluations of recommendations regarding awarding of the RFP 3-41 contract.

At the time of consideration of Request for Proposals 3-41 in 2003, Shari E. Long (then Kinnaird) was Director of Contracting at the Indiana Department of Administration. Midwest filed a protest concerning the selection of IDDC as successful bidder on the project. Long reviewed the RFP 3-41 process including the evaluations and the recommendation. Based upon her review, Long sent out a letter to Midwest, advising it that the RFP 3-41 evaluation process complied with applicable requirements and denied the appeal. This was Long's only involvement with the RFP 3-

> 41 bid process. Long did not consider race in making her evaluation and reaching her conclusions.

Id. at 13-15.

The trial court granted summary judgment in favor of the State after concluding that 1) Midwest did not have standing to challenge the award of a public contract to a competitor, 2) the defendants, being sued in their official capacities as state employees, are not subject to liability under Section 1981, 3) Midwest did not establish a prima facie case of racial discrimination, 4) the defendants are immune from liability based upon the principles of qualified immunity, and 5) there is no private right of action for Midwest's claims for violations of the Indiana Constitutional law. Id. at 15-16. Midwest subsequently filed a motion to correct error, which the trial court denied on September 8, 2009. Midwest now appeals. Additional facts will be provided as needed.

Standard of Review

Summary judgment is appropriate only when there are no genuine issues of material fact and the moving party is entitled to a judgment as a matter of law. Ind. Trial Rule 56(C). Our standard of review is well settled:

> In reviewing a trial court's ruling on summary judgment, this court stands in the shoes of the trial court, applying the same standards in deciding whether to affirm or reverse summary judgment. Thus, on appeal, we must determine whether there is a genuine issue of material fact and whether the trial court has correctly applied the law. In doing so, we consider all of the designated evidence in the light most favorable to the non-moving party. The party appealing the grant of summary judgment has the burden of persuading this court that the trial court's ruling was improper.

Perryman v. Motorist Mut. Ins. Co., 846 N.E.2d 683, 687 (Ind. Ct. App. 2006) (citations omitted). Furthermore, our review is not altered where a trial court enters findings of fact and conclusions of law thereon in granting a motion for summary judgment. Decker v. Zengler, 883 N.E.2d 839, 842 (Ind. Ct. App. 2008), trans. denied. In such context, we are not bound by the trial court's specific findings and conclusions, although they aid our review by providing us with a statement of reasons for the trial court's action. Id.

Discussion and Decision

Midwest raises several arguments on appeal challenging the trial court's entry of summary judgment in favor of the State.

A. *Collateral Estoppel*

First, Midwest claims that the State was collaterally estopped from raising the issues argued in their motion for summary judgment. Specifically, Midwest claims that "[a]ll of the issues adjudged on summary judgment were raised as part of the [State's] argument in its Motion to Dismiss Dr. Keglar's original complaint. . . . If the [State's] arguments were not sufficient to warrant a dismissal five years ago, then permitting a second bite of the litigation apple, . . . is an abuse of discretion." Appellant's Br. at 18.

Midwest seems not to understand that there are different procedural junctures during the pendency of litigation. Arguments made unsuccessfully at the early motion practice stage of dismissal under Trial Rule 12(B)(6) are not subject to the defense of estoppel at the motion practice stage of summary judgment under Trial Rule 56. As the trial court noted, "the pending summary judgment addresses issues which would have

been inappropriate for ruling at [the motion to dismiss] stage because of the need for discovery to develop the facts." Appellant's App. p. 13.

Furthermore, collateral estoppel, or issue preclusion, "bars subsequent litigation of a fact or issue which was adjudicated in previous litigation if the same fact or issue is presented *in a subsequent lawsuit*." Fitz v. Rust-Oleum Corp., 883 N.E.2d 1177, 1182 (Ind. Ct. App. 2008), trans. denied (emphasis added). "[A] trial court has the inherent power to reconsider any of its previous rulings so long as the action remains in fieri." Stephens v. Irvin, 734 N.E.2d 1133, 1135 (Ind. Ct. App. 2000), trans. denied. An action is "in fieri" if it is "pending resolution" and remains on the court's docket. See Pond v. Pond, 700 N.E.2d 1130, 1135 (Ind. 1998). Collateral estoppel is not applicable in this case because the trial court's denial of the State's 12(B)(6) motion was not a final adjudication of the issues raised by the parties.

B. *Standing*

Next, Midwest argues that the trial court erred when it concluded that it lacked standing to challenge the award of a public contract to a competitor. Specifically, the trial court determined that "the only remedy available to Midwest would have been to seek injunctive relief rather than the damages which it seeks to recover." Appellant's App. p. 15. Midwest argues that the authority relied upon by the trial court applies only to an unsuccessful bidder alleging that the selected bidder is not the lowest responsible and responsive bidder. Appellant's Br. at 19-20 (citing Shook Heavy & Envtl. Constr. Group v. City of Kokomo, 632 N.E.2d 355, 362 (Ind. 1994)).

The Shook court concluded that "an unsuccessful bidder who cannot or does not proceed pursuant to Ind. Code Ann. 34-4-17 or Ind. Code Ann. 24-1-2-7 does not have a cause of action under Indiana law for an injunction prohibiting a city from awarding a public contract to another bidder if the unsuccessful bidder's legal theory is that the selected bidder is not the lowest responsible and responsive bidder as required under Ind. Code Ann. 36-1-9-3[.]" 632 N.E.2d at 361. Midwest's legal theory, i.e. that it was subject to racial discrimination during the bidding process for the contract at issue, is distinct from the challenges raised to the bidding process in Shook. Accordingly, we agree that the trial court erred when it concluded that Midwest lacked standing to bring a section 1981 claim.[1]

C. *Genuine Issues of Material Fact*

Finally, Midwest argues that the trial court erred when it concluded that there were no genuine issues of material fact and granted summary judgment in favor of the State. First, Midwest claims that the trial court improperly determined that Midwest's "only means to establish prima facie discrimination was to prove personal, purposeful, and intentional discrimination on the part of" the State, citing Behnia v. Shapiro, 961 F.Supp. 1234, 1237 (N.D. Ill. 1997). Appellant's Br. at 24. Midwest argues that this standard is not applicable to its claim.

In Behnia, the Iranian plaintiff alleged "ancestry discrimination" in violation of section 1981 of the Civil Rights Act. 42 U.S.C. § 1981. One of the defendants, who was a faculty member at the Northwestern University Medical School, moved to dismiss

[1] We also observe that the State did not respond to Midwest's "standing" argument in its Appellee's brief.

Behnia's complaint under Rule 12(b)(6). Id. at 1237. The court granted the motion to dismiss because Behnia's complaint was "devoid of any allegations" that the defendant "participated himself in any acts of discrimination against Behnia." Id. The court observed that "[i]ndividual liability under section 1981 can be found only where the individual himself has participated in the alleged discrimination against the plaintiff[] [and] . . . [i]n order to state a claim under section 1981 against the defendant in his individual capacity, the plaintiff must sufficiently allege that the defendant himself possessed an 'intent to discriminate on the basis of race.'" Id. (citations omitted).

Midwest argues that, contrary to the Behnia holding relied upon by the trial court, "Indiana law does not require direct person defendant participation to establish liability in civil rights cases." Appellant's Br. at 24. Instead, Midwest argues, the United States Supreme Court's opinion in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) controls.

In McDonnell Douglas, the Court held that a complainant in a Title VII action "must carry the initial burden under the statute of establishing a prima facie case of racial discrimination." Id. at 802. Specifically, the plaintiff must show:

> (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

Id.

The burden then shifts to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection. Id. If the employer satisfies that

burden, then the employee must "be afforded a fair opportunity to show that [the employer's] stated reason for [the employee's] rejection was in fact pretext." Id. at 804. "That is, the plaintiff may attempt to establish that he was the victim of intentional discrimination 'by showing that the employer's proffered explanation is unworthy of credence.'" Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 143 (2000) (quoting Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 256 (1981)). "It is important to note, however, that although the McDonnell Douglas presumption shifts the burden of *production* to the defendant, '[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff.'" St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 507 (1993) (emphasis in original and citation omitted).

"The shifting burdens of proof set forth in McDonnell Douglas are designed to assure that the 'plaintiff [has] his date in court despite the unavailability of direct evidence.'" Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 121 (1985) (citation omitted). See also Harris v. Hays, et al., 452 F.3d 714, 717 (8th Cir. 2006) ("The McDonnell Douglas burden-shifting framework applies to motions for summary judgment in cases arising under [section] 1981 where there is no direct evidence of discrimination."). Although McDonnell Douglas did not involve a claim brought under section 1981, the Supreme Court later held that the McDonnell Douglas "scheme of proof should apply in [section] 1981 cases[.]" Patterson v. McLean Credit Union, 491 U.S.

164, 186 (1989).[2] Section 1981 itself prohibits the refusal to enter into a contract with someone based on race. Gonzalez v. Ingersoll Milling Mach. Co., 133 F.3d 1025, 1034 (7th Cir. 1998). Specifically, section 1981 provides:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kinds, and to no other.

42 U.S.C. § 1981.

We agree with Midwest that the trial court should have applied the burden-shifting framework of McDonnell Douglas. See W.S.K. v. M.H.S.B., 922 N.E.2d 671, 686 (Ind. Ct. App. 2010) (citing Filter Specialists, Inc. v. Brooks, 906 N.E.2d 835, 839 (Ind. 2009)). Relying on McDonnell Douglas, Midwest argues that genuine issues of material fact exist concerning whether Midwest established a prima facie case of discrimination.

In its order granting the State's motion for summary judgment, the trial court found that Midwest failed to designate to the trial court "each material issue of fact which they claimed precludes summary judgment as required by Trial Rule 56(C)[.]" The court therefore accepted the State's statement of facts as true.

In its response to the State's motion for summary judgment, Midwest designated exhibits without citing to specific pages or paragraphs of the exhibit to support its

[2] In the Civil Rights Act of 1991, Congress added section 1981(b), which defines the term "make and enforce contracts" to include "the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." Therefore, the Patterson's Court's holding that section 1981 "does not apply to conduct which occurs after the formation of a contract" has been superseded by the Civil Rights Act of 1991. Partee v. Metro. Sch. Dist. of Washington Twp., 954 F.2d 454, 457 n.1 (7th Cir. 1992).

statement of facts.[3] Although Trial Rule 56(C) does not mandate either the form of designation or its placement, the Rule "does compel parties to identify the 'parts' of any document upon which they rely." Filip v. Block, 879 N.E.2d 1076, 1081 (Ind. 2008). "The Rule thus requires sufficient specificity to identify the relevant portions of a document, and so, for example, the designation of an entire deposition is inadequate." Id. Designating page numbers is usually sufficient, but a more detailed specification is preferred. Id.

Just as the trial court may only consider properly designated evidence, in our appellate review, we may only consider evidence that was properly designated to the trial court. Dinsmore v. Fleetwood Homes of Tennessee, Inc., 906 N.E.2d 186, 189 (Ind. Ct. App. 2009). Finally, Trial Rule 56(H) provides that "no judgment rendered on the motion shall be reversed on the ground that there is a genuine issue of material fact unless the material fact and the evidence relevant thereto shall have been specifically designated to the trial court."

Midwest did not adequately designate the material issues of fact it believed precluded the entry of summary judgment for the State, as required by Trial Rule 56(C).[4]

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[3] We also observe that Midwest included its response to the State's motion for summary judgment in its appendix, but the exhibits designated to the trial court with the response are re-lettered and scattered throughout the Appellant's Appendix.

[4] Nearly two months after the State filed its motion for summary judgment, and six days after the hearing on the State's motion for summary judgment, Midwest filed its own motion for summary judgment. Midwest did properly designate evidence in the statement of facts in its own motion for summary judgment. However, we will not consider that properly designated evidence because Midwest's motion for summary judgment was not timely filed. See Borsuk v. Town of St. John, 820 N.E.2d 118, 124 n.5 (Ind. 2005) ("When a nonmoving party fails to respond to a motion for summary judgment within 30 days by filing a response, requesting a continuance under Trial Rule 56(I), or filing an affidavit under Trial Rule 56(F), the trial court cannot consider summary judgment filings of that party subsequent to the 30-day period."). See also Miller v. Yedlowski, 916 N.E.2d 246, 250-51 (Ind. Ct. App. 2009), trans. denied.

On the other hand, the State properly designated the issues and evidence it relied upon in its motion for summary judgment by citing specific paragraphs of its designated affidavits and exhibits. See Appellant's App. pp. 125-132. Under these circumstances, the trial court properly concluded that the State's evidence could be considered as undisputed fact, and we will do likewise.

RFP 3-41 "sought a contractor to perform medical review and signoff on Social Security Disability claims in which the allegedly disabling condition relates in whole or in part to mental health issues." Appellee's App. p. 11. The State does not dispute that Midwest is a minority owned company that bid on RFP 3-41. Further, it is undisputed that the contract was awarded to a competing non-minority contractor.

Patricia Carew-Casey, who is African-American and the deputy director of the Indiana Disability Determination Bureau, was the supervisor of the three evaluators reviewing the bid proposals.[5] Id. Carew-Casey independently reviewed the work of the three evaluators and their assessment of the bid proposals. In her affidavit, which was designated to the trial court in support of the State's motion for summary judgment, Carew-Casey stated, "the evaluators were to consider each bidder's experience in evaluating Social Security Disability claims for mental impairments. Indiana Disability Determination Consultants was the only bidder with Social Security Claims Disability experience so they received the highest rating in this category." Id. at 12. Carew-Casey

[5] Defendants Funk, Osborne, and Allstatt averred in their affidavits, which were designated as evidence in support of the State's motion for summary judgment, that they were not aware that Midwest was a minority-owned business at the time they completed their evaluations of the bids. See Appellee's App. pp. 25, 40, 55. However, Midwest included its Minority Business Enterprise Program participation plan in its bid for the contract at issue. Appellant's App. p. 960.

recommended Indiana Disability Determination Consultants because it "has 113 years of combined experience in the review and evaluation of Social Security Disability claims with an average of 15 years experience per each member of the corporation." Id. at 13. The company was also recommended because it has "completed 100% of the workload in the Indiana Disability Determination Bureau (DDB) in the past with a 24 hour turnaround, adjusting their schedules to meet the needs of the DDB. They propose to complete 100% of the workload." Id. at 14.

Although Midwest's proposed cost per case was the lowest among the three competing companies, Carew-Casey did not recommend Midwest because it failed the technical proposal section of the RFP. Specifically, Carew-Casey noted:

> Initially [Midwest] only provided the Curriculum Vitae and license of one psychologist with the corporation. When the Indiana Department of Administration (IDOA) requested that they provide the licenses and curriculum vitas of all of the members of the corporation, they still failed to provide licenses for 3 members of the corporation. They have no experience in the evaluation of disability claims for any agency and scored 0% out of a possible 25% in the area of Disability Program Experience. They scored 21% out of a possible [25%] in the area of Workload as they stated a willingness to review and evaluate 100% of 35,000 claims per year. However, this is only 90.65% of the average number of cases reviewed during the past three years. It is unclear how many consultants they were committing to the DDB workload as their organizational chart shows only 1 psychiatrist and 1 psychologist yet, on request from IDOA, they faxed CV's of 2 psychiatrists and 7 psychologists. In Overall Management Judgement [sic] they scored 1.6% out of a possible 25% as some members of the corporation do consultative exams for the DDB. However, they would require extensive training and review at a considerable cost to the DDB in order to review and evaluate disability claims.

Id. Carew-Casey therefore concluded that Midwest was not "a viable candidate for this contract." Id.

The State also designated the affidavits and the work product of the three evaluators in support of its summary judgment motion. The evaluators observed that Midwest appeared to specialize in one-on-one counseling and providing services to individuals with psychiatric and emotional issues. The evaluators noted that Midwest failed to list experience with evaluating claims for disability purposes. Id. at 29, 44, 59.

The State's designated evidence establishes that Indiana Disability Determination Consultants received the highest score of the three companies bidding on the contract. Therefore, assuming for the sake of argument that Midwest could establish a prima facie case of discrimination under the McDonnell Douglas framework, the State satisfied its burden to articulate a legitimate, nondiscriminatory reason for failing to award the contract to Midwest. Because Midwest did not properly designate any evidence, we need not consider whether Midwest can produce sufficient evidence from which a jury could conclude that the State's stated reason for Midwest's rejection was in fact pretextual. See Raytheon Co. v. Hernandez, 540 U.S. 44, 52 (2003) (citing McDonnell Douglas, 411 U.S. at 804). Finally, we observe that the undisputed fact that Midwest is a minority-owned company is not sufficient to survive the State's motion for summary judgment.

Conclusion

Although the trial court erred when it concluded that Midwest did not have standing to bring a § 1981 claim, the trial court correctly determined that the State was not collaterally estopped from raising the issues argued in its motion for summary

judgment. Finally, we conclude that the trial court did not err when it granted summary judgment in favor of the State.[6]

Affirmed.

RILEY, J., and BRADFORD, J., concur.

[6] For this reason, we do not address Midwest's challenge to the trial court's alternative conclusion that the State is immune from liability upon the principles of qualified immunity.