MEMORANDUM DECISION

APPELLANT PRO SE

Thomas De Cola
North Judson, Indiana

ATTORNEYS FOR APPELLEE

Elizabeth A. Knight
Lisa A. Baron
Katlyn M. Christman
Knight Hoppe Kurnik & Knight, Ltd.
Merrillville, Indiana

IN THE COURT OF APPEALS OF INDIANA

Thomas De Cola,
Appellant-Plaintiff,

v.

Katherine Chaffins,
Appellee-Defendant,

January 29, 2021

Court of Appeals Case No. 20A-CT-1609

Appeal from the Starke Circuit Court

The Honorable Jeffrey L. Thorne, Special Judge

Trial Court Cause No. 75C01-2002-CT-4

Robb, Judge.

Case Summary and Issue

[1] Thomas De Cola appeals from the trial court's dismissal of his complaint against Katherine Chaffins and raises two issues, which we consolidate into one: whether the trial court erred when it dismissed his complaint. Concluding the trial court did not err, we affirm.

Facts and Procedural History

[2] On February 27, 2014, the Starke County Commissioners conducted a tax certificate sale during which a tax certificate was offered for parcel #75-04-36-500-003.000-011, a former railroad right of way. U.S. Railroad Vest Corporation JMS was believed to be the owner of the parcel prior to the sale and De Cola owned a small piece of land adjacent to the parcel. Herb Kuehn was the highest bidder for the certificate and De Cola was the second highest. Chaffins, the Starke County Auditor, also bid on the certificate. After the sale, Kuehn failed to pay. Ordinarily, the tax sale would have been rescheduled, but the County discovered that there were no delinquent taxes due on the parcel because the railroad only owned an easement and the underlying fee belonged to adjacent property owners. *See* [Appellant's] Appendix, Volume II at 61. As a result, property tax had not been assessed consistent with ownership, and the parcel should not have been offered for sale. The sale was invalidated, and the parcel was not offered for sale again.

[3] On April 10, 2014, the county's deputy auditor sent a letter to De Cola, stating:

> [A] number of property owners have provided documentation from the late 1800's proving that the railroad was deeded this property as a right of way for use as long as there was an existing railroad. As a result[,] the railroad property running through your property . . . has now been transferred into the name shown above & all prior taxes have been removed.

Id. at 58. The deputy auditor offered De Cola and other landowners the opportunity to combine their tax statements for the railroad property with their existing tax statements. De Cola completed the paperwork to combine the tax statements.

[4] On October 31, 2017, De Cola filed suit against the Starke County Commissioners in the Pulaski County Circuit Court under Cause No. 66C01-1801-CT-3 ("*De Cola I*"). De Cola amended his complaint on November 16. He later sought, and was granted, leave to amend his complaint again. On April 9, 2018, De Cola filed his amended complaint detailing the February 27, 2014 tax certificate sale of the parcel and alleging constructive fraud. Specifically, he claimed that Chaffins acted outside the scope of her duty by failing to be present at the sale; there was a conspiracy originating in the Starke County Auditor's Office to illegally bid against him; two people impersonated Kuehn and Chaffins and "maliciously bid against [him] for the Certificate to intentionally deny [him] from purchasing [it]"; the imposters conspired with the deputy auditor to not pay for the certificate and draft a letter "contain[ing] false material representations"; and Chaffins personally gained "by the conspiratorial deceptions and misrepresentations . . . by acquiring a section of the [parcel]

contained within the Certificate at [De Cola's] risk to expense." *Id.* at 102-04 (record citations omitted).

[5] On April 13, 2018, the Commissioners filed a motion for judgment on the pleadings with supporting memorandum, affidavit, and exhibits, which was treated as a motion for summary judgment. Following a hearing, the trial court issued an order on July 10 granting the Commissioners' motion for summary judgment and concluding:

> 1. Mr. De Cola did not give timely notice of his tort claim as required by Ind. Code § 34-13-3-8 and is thus barred from bringing this action;
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> 2. Mr. De Cola seeks a remedy that has no legal basis in law or in equity;
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> 3. Mr. De Cola did not plead a case of actual fraud and cannot avoid the immunity provided in Ind. Code § 34-13-3-3;
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> 4. The Commissioners and other Starke County Officials are immune under various provisions of Ind. Code § 34-13-3-3 for any acts or omissions that occurred at the tax sale on February 27, 2014, or thereafter when the decision was made not to re-offer [the parcel] for sale;
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> 5. Mr. De Cola failed to state a claim upon which relief can be grant[ed];
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> 6. Mr. De Cola's pleadings and supporting documents do not establish constructive fraud;

7. Mr. De Cola waived and acquiesced to the post sale conduct of Starke County Officials and is estopped from complaining;

8. The statutes Mr. De Cola claims were violated do not establish a private right of action for his claim;

9. Any other claims or torts were not properly pled or supported; and

10. The Commissioners' motion for summary judgment is warranted under other numerous legal theories.

Id. at 28-29. De Cola appealed the trial court's decision and a panel of this court affirmed in *De Cola v. Starke Cnty. Comm'rs*, No. 18A-CT-2239 (Ind. Ct. App. Feb. 28, 2019). De Cola petitioned our supreme court for transfer, which was denied on August 8, 2019.

[6] On February 24, 2020, De Cola filed the present action against Chaffins in the Starke County Circuit Court under Cause No. 75C01-2002-CT-4 ("*De Cola II*") alleging actual and constructive fraud, property tax conversion, official misconduct, and a civil rights violation. *See* Appellant's App., Vol. II at 10-16. De Cola alleged that Chaffins committed actual and constructive fraud by "wrongfully securing the possibility of an expectancy of title" for the parcel offered for sale and falsely claiming, in her official capacity, that "the adjoining landowners [ ] includ[ing] Chaffins, De Cola, et al. possessed deeded rights to the tract supposedly proofed by an ancient deed[.]" *Id.* at 11-12. He claimed that he relied on Chaffins' false assertions and, as a result, was denied the

highest winning bid for the parcel despite bidding against an individual claiming to be Kuehn who did not attend the sale.

[7] De Cola alleged Chaffins stated the parcel had not been previously assessed and could not be sold for delinquency and she "committed an act that affected the eligibility of the tangible property for an exemption after the assessment date by awarding an exemption which is contrary to [Indiana law and constitutes] the crime of property tax conversion." *Id.* at 14. De Cola contended that Chaffins committed official misconduct by "obtain[ing] the possibility of expectancies of titles for sections of the tract via means of adverse possession quit [sic] title claims for herself and other adjoining landowners of the tract" and was "acting outside the scope of her duty in the selling and handling of the tract before, during, and after the sale." *Id.* at 15. And finally, De Cola claimed Chaffins' actions deprived him of due process of law. De Cola sought damages and an order vacating the grant of summary judgment in favor of the Starke County Commissioners in *De Cola I*.

[8] On April 20, Chaffins filed a motion to dismiss arguing that De Cola's claims were barred under the doctrine of res judicata. De Cola subsequently filed a notice to remove the action to federal court. The action was remanded to the Starke Circuit Court and the trial court held a hearing on August 14, 2020. Following the hearing, the trial court issued an order granting Chaffins' motion. The trial court found that "*De Cola II* is brought in four counts and is prefaced with the language 'De Cola demands vacation of the Pulaski Circuit Court's Order Granting Summary Judgment for the Starke County Commissioners filed

on July 10, 2018 in [*De Cola I.*]'" Appealed Order at 3, ¶ 20. With respect to Counts I and II in *De Cola II*, in which De Cola alleged actual and constructive fraud and property tax conversion, the trial court found that "these issues were specifically addressed and decided in [*De Cola I*] and [are], therefore, precluded under the doctrine of res judicata by virtue of . . . having previously [been] decided and/or as an issue which could and should have been pled in *De Cola I.*" *Id.* at 3-4, ¶¶ 22, 24.

[9] Regarding Counts III and IV, in which De Cola alleged Chaffins committed official misconduct as defined in Indiana Code section 35-44.1-1-1 and violated Title 18 of the United States Code sections 241 and 242, the trial court found that these statutes "involve[ ] criminal actions which can only be brought by [state or federal prosecutors] by information or indictment and [do] not confer a private cause of action and, therefore, fail[to] state a claim upon which relief can be granted, or in the alternative, could and should have been pled" in *De Cola I*. *Id.* at 4, ¶¶ 26, 28. De Cola now appeals.

Discussion and Decision

I. Standard of Review

[10] We begin by acknowledging that De Cola proceeds pro se. It is well-established that "a pro se litigant is held to the same standards as a trained attorney and is afforded no inherent leniency simply by virtue of being self-represented." *Zavodnik v. Harper*, 17 N.E.3d 259, 266 (Ind. 2014).

[11] A motion to dismiss for failure to state a claim tests the legal sufficiency of the claim, not the facts supporting it. *First Am. Title Ins. Co. v. Robertson*, 65 N.E.3d 1045, 1049 (Ind. Ct. App. 2016), *trans. denied*. This court reviews a trial court's ruling on a motion to dismiss de novo. *Freels v. Koches,* 94 N.E.3d 339, 342 (Ind. Ct. App. 2018). When reviewing a motion to dismiss, "we view the pleadings in the light most favorable to the nonmoving party, with every reasonable inference construed in the non-movant's favor." *Kitchell v. Franklin*, 997 N.E.2d 1020, 1025 (Ind. 2013) (quotation omitted). If a complaint sets forth facts that, even if true, would not support the requested relief, we will affirm. *Freels,* 94 N.E.3d at 342. And we may affirm the grant of a motion to dismiss if it is sustainable on any legal theory. *Id.*

II. Motion to Dismiss

[12] The trial court found that Counts I and II of De Cola's complaint were barred by the doctrine of res judicata. It found that De Cola failed to state a claim upon which relief could be granted in Counts III and IV because the counts were criminal actions that could only be brought by state or federal prosecutors. The trial court also found that Counts III and IV were claims that could and should have been pled in *De Cola I*. We conclude the trial court properly dismissed De Cola's complaint.[1]

[1] In his brief, De Cola claims his action is an independent Trial Rule 60(B) motion and states "his avenue of an independent T.R. 60(B)(3) is the fourth method of asserting a T.R. 60(B)(3) action [and] is not subject to

[13] The doctrine of res judicata prevents the repetitious litigation of disputes that are essentially the same. *Indianapolis Downs, LLC v. Herr,* 834 N.E.2d 699, 703 (Ind. Ct. App. 2005), *trans. denied*. The principle of res judicata is divided into two branches: claim preclusion and issue preclusion. *Id.*

> [C]laim preclusion . . . applies where a final judgment on the merits has been rendered and acts as a complete bar to a subsequent action on the same issue or claim between those parties and their privies. When claim preclusion applies, all matters that were or might have been litigated are deemed conclusively decided by the judgment in the prior action. The following four requirements must be satisfied for claim preclusion to apply as a bar to a subsequent action: (1) the former judgment must have been rendered by a court of competent jurisdiction; (2) the former judgment must have been rendered on the merits; (3) the matter now in issue was, or could have been, determined in the prior action; and (4) the controversy adjudicated in the former action must have been between the parties to the present suit or their privies.
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> [I]ssue preclusion, also known as collateral estoppel[,] bars the subsequent litigation of a fact or issue that was necessarily adjudicated in a former lawsuit if the same fact or issue is presented in the subsequent lawsuit. If issue preclusion applies, the former adjudication is conclusive in the subsequent action, even if the actions are based on different claims. The former adjudication is conclusive only as to those issues that were actually litigated and determined therein. Thus, issue preclusion

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claim preclusion[.]" Appellant's Brief at 5. De Cola's arguments to this point are waived as he fails to present a cogent argument. *See* Ind. Appellate Rule 46(A)(8)(a).

> does not extend to matters that were not expressly adjudicated and can be inferred only by argument.

Angelopoulos v. Angelopoulos, 2 N.E.3d 688, 696 (Ind. Ct. App. 2013) (citations omitted), *trans. denied*. In determining whether claim preclusion is applicable, it is helpful to inquire as to whether identical evidence will support the issues involved in both actions. *Indianapolis Downs, LLC,* 834 N.E.2d at 703. "A party is not allowed to split a cause of action, pursuing it in a piecemeal fashion and subjecting a defendant to needless multiple suits." *Id.* (citation omitted).

[14] De Cola's claims in *De Cola I* and *De Cola II* both arise from the February 27, 2014 tax sale at which he bid on but did not receive the tax certificate. As stated above, issue preclusion bars subsequent litigation of an issue that was necessarily adjudicated in a former lawsuit if the same issue is presented in the subsequent lawsuit. *Angelopoulos*, 2 N.E.3d at 696. Such is the case with respect to De Cola's constructive fraud and property tax conversion claims in the present action.

[15] In *De Cola I*, the trial court concluded: De Cola failed to provide timely notice of his tort claim; the "Commissioners and other Starke County Officials are immune under various provisions of Ind. Code § 34-13-3-3 for any acts or omissions that occurred at the tax sale . . . or thereafter when the decision was made not to re-offer [the parcel] for sale;" De Cola's "pleadings and supporting documents do not establish constructive fraud;" De Cola failed to object to the apportionment of the parcel to the adjoining landowners and therefore, acquiesced and acknowledged that the Commissioners' actions were proper and

waived any claim that he is entitled to damages for any alleged improper conduct at the sale; and the statutes De Cola claimed were violated do not provide him with a private right of action. Appellant's App., Vol. II at 24-28. Therefore, the adjudication of these issues in *De Cola I* is conclusive in *De Cola II*, even if the actions are based on different claims, and bars his claims in *De Cola II*.

[16] With respect to De Cola's official misconduct claim, a Level 6 felony, *see* Ind. Code § 35-44.1-1-1, and civil rights claims, *see* 18 U.S.C. §§ 241, 242, the trial court concluded that the statutes alleged to have been violated involved criminal actions that could only be brought by state or federal prosecutors and do not confer a private cause of action and therefore, De Cola failed to state a claim upon which relief can be granted. *See* Appealed Order at 4. We agree.

[17] A private cause of action allows an individual with appropriate standing to go to court and seek enforcement of a statute's provisions. *Blanck v. Ind. Dep't of Corr.*, 829 N.E.2d 505, 509 (Ind. 2005). When a statute does not explicitly provide a private cause of action to enforce the provisions of a particular statute, courts are frequently asked to find that the Legislature intended that such a right be implied. *Id.* And when a statute imposes a duty for the public's benefit, no private cause of action will be inferred. *Id.* Such is the case for criminal statutes, causes of action which may only be brought by a prosecuting attorney or attorney general. Ind. Code § 33-39-1-5(1) ("[T]he prosecuting attorneys, within their respective jurisdictions, shall . . . conduct all prosecutions for felonies, misdemeanors, or infractions[.]"); Ind. Code § 4-6-2-

1(a) ("The attorney general shall prosecute and defend all suits instituted by or against the state of Indiana[.]"). De Cola is neither and cannot bring an action charging Chaffins with official misconduct.[2] Therefore, his claim for official misconduct in *De Cola II* fails to state a claim upon which relief may be granted.

[18] And finally, with respect to 18 U.S.C. §§ 241 and 242, De Cola also fails to state a claim upon which relief may be granted. De Cola alleged Chaffins' conduct violated these two federal criminal statutes, which prohibit anyone from "conspir[ing] to injure, oppress, threaten, or intimidate any person . . . in the free exercise or enjoyment of any right or privilege secured to him" or "willfully subject[ing] any person . . . to the deprivation of any rights, privileges, or immunities secured or protected" by the Constitution or laws of the United States. 18 U.S.C. §§ 241 and 242. Except as otherwise provided by law, it is the duty of each United States attorney to prosecute all offenses within his or her district against the United States. 28 U.S.C. § 547(1). "[A] private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another." *Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973); *see also Gill v. Texas*, 153 Fed.Appx. 261, 262 (5th Cir. 2005) ("[D]ecisions whether to

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[2] De Cola claims the trial court's decision "that a civil cause of information can be brought only by a prosecutor is contrary to the statutory provision under I.C. § 34-17-2-2(a)(2)[.]" Appellant's Br. at 9. Indiana Code section 34-17-2-2(a) provides, "An information to annul or vacate any letters-patent, certificate, or deed described in IC 34-17-1-2 may be filed by . . . the prosecuting attorney . . . or . . . a private person, upon the person's relation, showing the person's interest in the subject matter." As De Cola acknowledges, this is a civil statute allowing a private person to file an information to vacate certain documents prescribed in the statute. It is not a criminal statute and does not allow a private person to file a criminal information or indictment against another individual.

prosecute or file criminal charges are generally within the [U.S. attorney's] discretion, and . . . a private citizen . . . has no standing to institute a federal criminal prosecution and [has] no power to enforce a criminal statute."). Therefore, De Cola lacks standing to initiate a federal criminal prosecution and cannot enforce the federal criminal statutes he alleges Chaffins violated. De Cola has failed to state a claim upon which relief can be granted.

[19] In sum, De Cola's claims of constructive fraud and property tax conversion are barred by the doctrine of res judicata and his claims for official misconduct and civil rights violations failed to state a claim upon which relief can be granted.[3]

Conclusion

[20] For the reasons set forth above, we conclude De Cola's claims either failed to state a claim upon which relief can be granted or are barred by the doctrine of res judicata. Therefore, the trial court properly granted Chaffins' motion to dismiss. We affirm.

[21] Affirmed.

Bailey, J., and Tavitas, J., concur.

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[3] Given our conclusion, we need not address other bases or alternative theories upon which the trial court relied in dismissing De Cola's complaint.