ATTORNEYS FOR APPELLANTS

Brad A. Catlin
Joseph N. Williams
Williams & Piatt, LLC
Indianapolis, Indiana

Kevin M. Bowen
Brandon E. Tate
Waldron Tate Bowen Spandau, LLC
Indianapolis, Indiana

ATTORNEYS FOR APPELLEES

Theodore E. Rokita
Attorney General of Indiana

Erica Sullivan
Deputy Attorney General
Indianapolis, Indiana

Vincent M. Campiti
Nemeth Feeney Masters &
Campiti, PC
South Bend, Indiana

IN THE

COURT OF APPEALS OF INDIANA

Megan Perry and Jonathon Perry,

Appellants-Plaintiffs,

v.

Indiana Department of Child Services and Linzy Derucki,

Appellees-Defendants.

October 12, 2022

Court of Appeals Case No. 22A-CT-605

Appeal from the Marion Superior Court

The Honorable John F. Hanley, Judge

Trial Court Cause No. 49D11-2107-CT-24187

Riley, Judge.

STATEMENT OF THE CASE

[1] Appellants-Plaintiffs, Megan Perry and Jonathon Perry (collectively, the Perrys), appeal the trial court's dismissal of their Amended Complaint against Appellees-Defendants, Indiana Department of Child Services (DCS) and Linzy Derucki (Derucki), (collectively, the Defendants), for failure to state a claim upon which relief could be granted.

[2] We affirm in part, reverse in part, and remand for further proceedings.

ISSUES

[3] The Perrys present this court with four issues, which we consolidate and restate as the following two:

(1) Whether the Perrys sufficiently pleaded their claim of a federal civil rights violation; and

(2) Whether the Perrys sufficiently pleaded their state law claims for negligence and defamation.

FACTS AND PROCEDURAL HISTORY

[4] Pursuant to our standard of review, we take the following facts from the Perrys' December 9, 2021, Amended Complaint as true. S.F. was born on December 23, 2016. In March of 2017, DCS removed S.F. and placed her in foster care with the Perrys. S.F.'s sister, I.F., was born on December 29, 2017. I.F. had significant medical issues and was also placed in foster care with the Perrys. Derucki was a DCS family case manager who managed I.F.'s and S.F.'s

(collectively, Children) child in need of services (CHINS) cases. At some point that is unclear from the allegations, the Perrys filed a petition to adopt S.F.

[5] On August 5, 2019, DCS informed the Perrys that Children would be removed from the Perrys' care immediately upon DCS's referral being accepted by another foster family. On August 26, 2019, the Perrys attempted to intervene in Children's CHINS proceedings to object to Children's removal from their care. On August 28, 2019, the Perrys filed an amended petition to adopt S.F. On September 16, 2019, the trial court denied the Perrys' motion to intervene as premature, as DCS had yet to file a request for change of placement. Also on September 16, 2019, DCS removed Children from the Perrys' care. On September 17, 2019, DCS filed a formal motion to change Children's placement to kinship care. Children were subsequently placed with their biological mother. On September 23, 2019, the Perrys filed a petition to adopt I.F. DCS withheld its consent to the adoptions of Children by the Perrys, and Children's adoption by the Perrys was ultimately unsuccessful.

[6] On July 19, 2021, the Perrys filed suit against the Defendants, raising a 42 U.S.C. § 1983 civil rights violation claim against Derucki based on their allegation that Children's removal from their care had violated their constitutional rights to family integrity and to due process; a negligence claim against DCS; and a defamation claim against both Defendants for allegedly making false statements to third parties, including that the Perrys had sought out and conspired with medical providers to subject Children to unnecessary medical treatment. On October 18, 2021, Derucki answered the Complaint and

raised several affirmative defenses, only one of which referenced immunity and alleged that Derucki was immune to the Perrys' claims under the Indiana Tort Claims Act (ITCA). Later in the day on October 18, 2021, DCS filed its first Motion to Dismiss and a memorandum in support pursuant to Indiana Trial Rule 12(B)(6). DCS claimed to be filing its motion on behalf of itself and Derucki, even though Derucki was represented by other counsel. As to the Perrys' § 1983 civil rights claim, DCS argued that Derucki was entitled to qualified immunity, and that, even if she were not, the Perrys' federal claim was subject to dismissal for failure to state a claim, as they had not alleged any cognizable constitutional right that had been violated. Regarding the Perrys' state law claims, DCS argued that Defendants were entitled to immunity under Indiana Code section 31-25-2-2.5 (DCS Immunity Statute) which provides that officers and employees of DCS are not personally liable for official acts done or omitted in connection with their duties. DCS also asserted immunity on the state law claims for both Defendants under the ITCA.

[7] On December 9, 2021, the Perrys filed their response to Defendants' Motion to Dismiss the Complaint. On December 9, 2021, the Perrys also filed their Amended Complaint, raising the same three types of claims as they had in their original Complaint but specifying that their § 1983 civil rights claim was raised against Derucki in her individual capacity. In their Amended Complaint, the Perrys also added certain factual allegations to their state law negligence and defamation claims.

[8] On January 21, 2022, Derucki filed a notice that she was joining DCS's Motion to Dismiss and was requesting dismissal of the Perrys' Complaint. On January 24, 2022, the trial court held a hearing on Defendants' dismissal motion. At the hearing, the Perrys argued that their claims against Derucki were not subject to dismissal because she had not raised the affirmative defenses of qualified immunity or immunity under the DCS Immunity Statute in her Answer and that DCS had no standing to assert those defenses for her in her personal capacity. At the conclusion of the January 24, 2022, hearing, the trial court took the matter under advisement.

[9] On January 25, 2022, Derucki answered the Perrys' Amended Complaint. Derucki raised affirmative defenses, but she did not assert qualified immunity as to the § 1983 claim or immunity to the state law claims under the DCS Immunity Statute. On February 4, 2022, DCS filed its Motion to Dismiss the Amended Complaint pursuant to Trial Rule 12(B)(6), along with a supporting memorandum, again arguing that the Perrys had failed to state a claim upon which relief could be granted. DCS reasserted its arguments that the Perrys' § 1983 claim should be dismissed because the Perrys had no cognizable liberty interest to support a civil rights claim and that Derucki was entitled to qualified immunity. As to the Perrys' state law negligence and defamation claims, DCS only argued that Defendants were immune from suit under the DCS Immunity Statute and did not assert any grounds for dismissal based on the ITCA. On February 18, 2022, the Perrys filed their response, and, on February 25, 2022, DCS filed a reply in support of their Motion to Dismiss the Amended

Complaint. On March 3, 2022, Derucki filed a written motion to join in DCS's Motion to Dismiss the Amended Complaint.

[10] On March 14, 2022, the trial court entered its Order dismissing the Perrys' Amended Complaint in full. The trial court's Order set forth the chronology of the proceedings, but the trial court did not enter any other findings of fact or conclusions thereon in support of its ruling.

[11] The Perrys now appeal. Additional facts will be provided as necessary.

DISCUSSION AND DECISION[1]

I. *Standard of Review*

[12] The Perrys appeal following the trial court's grant of Defendants' Motion to Dismiss the Amended Complaint pursuant to Trial Rule 12(B)(6).[2] A motion under Rule 12(B)(6) merely tests the sufficiency of the plaintiff's claim and not the facts supporting the claim. *Bellwether Props., LLC v. Duke Energy Ind., Inc.*, 87 N.E.3d 462, 466 (Ind. 2017). We conduct our review of such matters de novo. *Residences at Ivy Quad Unit Owners Ass'n v. Ivy Quad Dev., LLC*, 179 N.E.3d 977, 981 (Ind. 2022). As part of our de novo review, we take the facts alleged in the

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[1] On August 4, 2022, DCS filed its Brief of Appellee. On August 15, 2022, Derucki filed her Brief of Appellee in which she adopted DCS's appellate assertions and arguments.

[2] For purposes of establishing the course of proceedings, we have set forth facts related to the Complaint. However, our analysis is centered on the allegations contained in the Perrys' Amended Complaint and Defendants' responses to the Amended Complaint. *See Anderson v. Anderson*, 399 N.E.2d 391, 406 n.30 (Ind. Ct. App. 1979) (observing that, as a general rule, "an amended pleading replaces the original pleading for all purposes.").

complaint as true, consider all the allegations of the complaint in the light most favorable to the non-moving party, and draw every reasonable inference in the non-moving party's favor. *Id*. Ultimately, our task to is to determine whether the non-movant has alleged some factual scenario in which a legally actionable injury has occurred. *Id*.

II. *§ 1983 Civil Rights Claim*

[13] The Perrys raised their § 1983 civil rights claim against Derucki in her individual capacity. Suits brought under § 1983 involve a claim of violation of some right guaranteed by the federal constitution. *Daniels v. Williams*, 474 U.S. 327, 330, 106 S.Ct. 662, 664, 88 L.Ed. 662 (1986). In their Motion to Dismiss the Amended Complaint, the Defendants argued that the Perrys' § 1983 claim was subject to dismissal because Derucki is entitled to qualified immunity and because the Perrys did not allege a protectable liberty interest in their Amended Complaint. On appeal, the Defendants suggest that we need not reach the constitutional dimensions of the Perrys' § 1983 claim if we conclude that Derucki is entitled to qualified immunity. Therefore, we first address the issue of whether the Perrys' § 1983 claim was subject to dismissal under a theory of qualified immunity.

A. *Availability of the Affirmative Defense*

[14] Quoting *Mullenix v. Luna*, 577 U.S. 7, 11, 136 S.Ct. 305, 308, 193 L.Ed.2d 255 (2015), Defendants argue that "'[t]he doctrine of qualified immunity shields officials from civil liability so long as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person

would have known.'" (Appellees' Br. p. 19). The Defendants assert that, because the Perrys' constitutional right as foster parents to continue their relationship with Children is not clearly established, the Perrys' § 1983 claim against Derucki was properly dismissed. In response, the Perrys argue that their § 1983 claim was not properly dismissed under a theory of qualified immunity because Derucki answered the Amended Complaint before joining DCS's Motion to Dismiss the Amended Complaint, and, thus, any dismissal motion as to Derucki was a Rule 12(C) motion; under Rule 12(C), the trial court was constrained to consider only those matters within the pleadings; and that Derucki did not plead the affirmative defense of qualified immunity in her Answer.

[15] In addressing the Perrys' argument, we first observe that Trial Rule 12(C) provides that "[a]fter the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings." A Rule 12(C) motion tests the sufficiency of the complaint and defenses and is limited to consideration of matters contained in the pleadings. *Bayer Corp. v. Leach*, 153 N.E.3d 1168, 1175 (Ind. Ct. App. 2020). Here, the theory of qualified immunity was an affirmative defense to Derucki's conduct as alleged in the § 1983 claim. *See Haggerty v. Anonymous Party 1*, 998 N.E.2d 286, 291 (Ind. Ct. App. 2013) (observing that an affirmative defense admits the essential allegations of the complaint but asserts other matters excusing fault). However, Indiana Trial Rule 8(C) lists a number of affirmative defenses that must be raised through a responsive pleading, and immunity is not listed therein. In

addition, as the Perrys acknowledge on appeal, when a Rule 12(C) motion for judgment on the pleadings raises a 12(B)(6) defense, the motion should be treated as a 12(B)(6) motion for failure to state a claim upon which relief may be granted. *Mourning v. Allison Transmission*, 72 N.E.3d 482, 487 (Ind. Ct. App. 2017). Moreover, "an affirmative defense that is not listed in Rule 8(C) may be raised [by a 12(B)(6) motion.]" 1A William F. Harvey, INDIANA PRACTICE: RULES OF PROCEDURE ANNOTATED § 12.11 (3d ed. 1999). Indiana courts routinely consider an immunity defense raised as part of a Rule 12(B)(6) motion. *See*, *e.g*., *Sims v. Beamer*, 757 N.E.2d 1021, 1024-26 (Ind. Ct. App. 2001) (affirming the Rule 12(B)(6) dismissal of plaintiff's complaint due to judicial immunity); *Buchanan v. State*, 122 N.E.3d 969, 973-74 (Ind. Ct. App. 2019) (affirming the Rule 12(B)(6) dismissal of plaintiff's state tort claims due to prosecutor's immunity under the ITCA), *trans. denied*. In light of this authority, we conclude that the theory of qualified immunity was properly brought through DCS's Motion to Dismiss the Amended Complaint which Durecki joined, and was, therefore, potentially a basis for the dismissal of the Perrys' § 1983 claim.

B. *Qualified Immunity*

[16] In the context of assessing the propriety of the grant of a Rule 12(B)(6) motion premised on a defense, our supreme court has held that a plaintiff is not required to anticipate defenses or to plead matters in avoidance in the complaint and that a complaint is not subject to dismissal for failure to state a claim merely because a meritorious defense may be available. *Bellwether Props.*,

87 N.E.3d at 466. However, "a plaintiff may plead itself out of court if its complaint alleges, and thus admits, the essential elements of a defense." *Id.*

[17] The doctrine of qualified immunity shields "federal and state officials from money damages unless a plaintiff pleads facts showing (1) that the official violated a statutory or constitutional right, and (2) that the right was 'clearly established' at the time of the challenged conduct." *Ashcroft v. al-Kidd*, 563 U.S. 731, 735, 131 S.Ct. 2074, 2080, 179 L.Ed.2d 1149 (2011). For purposes of qualified immunity, a right is 'clearly established' when, at the time the challenged conduct occurred, the contours of a right are sufficiently clear that every reasonable official would have understood that what he is doing violates that right. *Dist. of Columbia v. Wesby*, 138 S.Ct. 577, 590, 199 L.Ed.2d 453 (2018). The Supreme Court emphasized that establishing that a right is clearly established is an exacting standard, in that to be 'clearly established'

> a legal principle must have a sufficiently clear foundation in then-existing precedent. The rule must be settled law, which means it is dictated by controlling authority or a robust consensus of cases of persuasive authority. It is not enough that the rule is suggested by then-existing precedent. The precedent must be clear enough that every reasonable official would interpret it to establish the particular rule the plaintiff seeks to apply. Otherwise, the rule is not one that every reasonable official would know.

Wesby, 138 S.Ct. at 589-90.

[18] Here, in their Amended Complaint and in support of their § 1983 claim, the Perrys alleged that they had been Children's foster parents for over one year

and that they had sought to adopt Children. The Perrys further alleged as follows:

> 52. The Fourteenth Amendment to the United States Constitution protects the fundamental right to family integrity against unwarranted government intrusion. Furthermore, a parent's right to raise one's children is protected by due process.
>
> 53. Derucki violated Plaintiffs' Constitutional right to family integrity by the actions set forth above.
>
> 54. Derucki violated Plaintiff's due process rights.

(Appellants' App. Vol. II, p. 86). Therefore, the Perrys identified their fundamental right to family integrity under the Fourteenth Amendment and their federal due process rights as the federal constitutional rights forming the basis of their § 1983 claim.

[19] In support of their argument that they have a protectable liberty interest in their foster-parent relationship with Children, the Perrys direct our attention to several Indiana statutes, including those that provide for the intervention of long-term foster parents in CHINS and termination proceedings, those that require DCS to follow certain procedures to establish a permanency plan for pre-adoptive children, and Indiana Code section 31-27-2-12, the enabling legislation for the Foster Parent Bill of Rights. However, none of these Indiana statutes expressly provide foster parents with a protectable liberty interest, and our own research has uncovered no Indiana legal authority holding as such. The Perrys also rely on *Smith v. Organization of Foster Families for Equality and*

Reform, 431 U.S. 816, 97 S.Ct. 2094, 53 L.Ed.2d 14 (1977), a case wherein the United States Supreme Court made observations about the foster-parent relationship but explicitly declined to address whether such relationships were a protectable liberty interest. *Id*. at 847. Lastly, the Perrys cite a decision from this court, *D.L. v. Huck*, 978 N.E.2d 429, 437-38 (Ind. Ct. App. 2012), *clarified on reh'g*, 984 N.E.2d 223 (2013), wherein we held that a certain foster family had a liberty interest sufficient to confer standing to bring state law claims. However, even if we were to assume, without deciding, that our analysis and holding in *Huck* relating to standing is applicable to the precise question before us, one decision from our state's intermediate appellate court is not the type of "robust consensus of cases of persuasive authority" required to render a liberty interest 'clearly established'. *Wesby*, 138 S.Ct. 589-90. Because the allegations of the Perrys' Amended Complaint affirmatively showed that Durecki was entitled to qualified immunity as to their § 1983 claim, we conclude that it was properly dismissed.[3]

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[3] Given our resolution of this issue, we need not address the parties' arguments as to whether the Perrys had a protectable liberty interest to support their § 1983 claim. *See Pearson v. Callahan*, 555 U.S. 223, 236, 129 S.Ct. 808, 818, 172 L.Ed.2d 565 (2009) (holding that lower courts considering qualified immunity have the flexibility to dispose of cases if a particular asserted constitutional right is not 'clearly established' without first determining if that constitutional right exists).

II. *State Law Claims*

[20] The Perrys brought two state law claims in their Amended Complaint, namely, a negligence claim against DCS and a defamation claim against DCS and Durecki.

A. *DCS*

[21] In its Motion to Dismiss the Amended Complaint, its subsequent dismissal filings, and at the January 24, 2022, hearing, DCS argued that it was entitled to immunity on the Perrys' state law claims under the DCS Immunity Statute. On appeal, DCS concedes that, pursuant to our clarification of *Huck* on rehearing, the DCS Immunity Statute does not block tort claims brought against it as an entity. *Huck*, 984 N.E.2d at 225-26. In light of *Huck* and DCS's concession, we reverse the trial court's dismissal of the Perrys' negligence and defamation claims against DCS.

B. *Derucki*

[22] The Perrys also contend that the trial court erred when it dismissed their defamation claim against Derucki. The Defendants argued in their Motion to Dismiss the Amended Complaint that Derucki was entitled to absolute immunity under the DCS Immunity Statute, which provides in relevant part that DCS employees "are not personally liable, except to the state, for an official act done or omitted in connection with performance of duties under this title[.]" I.C. § 31-25-2-2.5(2). On appeal, the Perrys offer two arguments in support of their contention that dismissal was not merited: (1) that the affirmative defense of complete immunity under the DCS Immunity Statute

was not available to Derucki because she did not plead it in her Answer to the Amended Complaint, and (2) the allegations of the Amended Complaint established that there were factual issues to be resolved regarding whether Derucki's actions were official acts within the meaning of the DCS Immunity Statute. As part of this second argument, the Perrys request that we construe the meaning of 'official act' for purposes of application of the DCS Immunity Statute.

[23] As to the Perrys' argument that the DCS Immunity Statute was not available to Derucki in the dismissal proceedings, we resolve that contention in the same manner as we have the Perrys' argument regarding the availability of the qualified immunity affirmative defense, namely, that the defense was available to Derucki as part of DCS's 12(B)(6) motion that she joined. As this is the only argument offered by the Perrys regarding the procedural availability of immunity to Derucki on their defamation claim, we do not address the issue further.

[24] Regarding the Perrys' argument that they alleged facts in the Amended Complaint which created factual issues about whether Derucki's actions constituted official acts within the meaning of the DCS Immunity Statute, our review of the Perrys' responses to both the Defendants' dismissal motions and our review of the transcript of the January 24, 2022, hearing revealed that the Perrys never raised this issue in the trial court. Rather, their argument centered on whether Derucki's actions were done "in connection with performance of duties under this title" for purposes of the DCS Immunity Statute, which is a

different argument. I.C. § 31-25-2-2.5(2). It is well-settled that arguments raised for the first time on appeal are waived for our consideration. *CT102 LLC v. Auto. Fin. Corp.*, 175 N.E.3d 869, 874 (Ind. Ct. App. 2021). Accordingly, we do not address this argument. *See id*.

CONCLUSION

[25] Based on the foregoing, we conclude that the Perrys' federal civil rights violation and state law defamation claims against Derucki were properly dismissed for failure to state claims upon which relief could be granted. However, as DCS concedes, we further conclude that the Perrys' state law negligence and defamation claims against DCS were improperly dismissed.

[26] Affirmed in part, reversed in part, and remanded for further proceedings.

[27] Bailey, J. and Vaidik, J. concur