

MEMORANDUM DECISION

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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IN THE COURT OF APPEALS OF INDIANA

Earl D. Wilder,
Appellant-Plaintiff,

v.

Jeffrey K. Sinkovics,
Appellee-Defendant.

October 24, 2022

Court of Appeals Case No.
22A-CT-380

Appeal from the Miami Circuit
Court

The Honorable James
Muehlhausen, Special Judge

Trial Court Cause No.
52C01-2111-CT-958

Riley, Judge.

STATEMENT OF THE CASE

[1] Appellant-Plaintiff, Earl Wilder (Wilder), appeals the trial court's dismissal of his Amended Complaint against Appellees-Defendants, Jeffrey Sinkovics (Sinkovics) and Bruce Embry (Embry).¹

[2] We affirm.

ISSUE

[3] Wilder presents this court with one issue, which we restate as: Whether the trial court erred when it dismissed Wilder's Amended Complaint for failure to state a claim upon which relief can be granted.

FACTS AND PROCEDURAL HISTORY

[4] In accordance with our standard of review, we accept the following facts as alleged by Wilder as true.² Embry and Sinkovics were prosecutors with the Miami County Prosecutor's Office. In 2012, Wilder was detained on two matters, a case in Howard County involving illegal drugs and, based on the Howard County drug offenses, a petition to modify Wilder's probation in Miami County in another criminal matter wherein he had previously received

¹ On November 15, 2021, Wilder filed his Complaint. On December 27, 2021, Wilder tendered his Amended Complaint naming Sinkovics and Embry as defendants. On January 21, 2022, the trial court granted Wilder leave to file his Amended Complaint, the dismissal of which he now appeals. Therefore, although Embry does not participate in this appeal, he is a party. *See* Ind. Appellate Rule 17(A). Our substantive analysis pertains to the allegations of Wilder's Amended Complaint.

² Wilder has filed a motion to strike Sinkovics' Appellee's Brief in whole or in part. We deny that motion in a separate order.

thirty years of probation. On August 3, 2012, Wilder was notified by his counsel in writing that he had received a plea offer from Embry in the Miami County probation revocation matter. Wilder's counsel informed Wilder that he would

[a]dmit the violation and be sentenced to ten (10) years to the Department of Correction, consecutive to the sentence in Howard County. Actually, that sentence would have to be served consecutive to our sentence since he was on probation at the time of the Howard County offense. We would then terminate his probation and upon release he would be finished in Miami County. There are thirty (30) years suspended.³

(Appellant's App. Vol. II, p. 25). On October 1, 2012, Wilder was sentenced to ten years in the Howard County case, eight years of which were to be executed, with two years suspended to probation. On November 8, 2012, Wilder admitted to the Miami County probation violation. The Miami Circuit Court judge acknowledged the parties' oral plea agreement, ordered that Wilder serve his probation revocation sentence consecutively to the Howard County sentence, and terminated Wilder's Miami County probation unsuccessfully.

[5] On March 18, 2020, Wilder filed a Motion to Correct Erroneous Sentence in Miami County, alleging a breach in his plea agreement and what injury he would sustain if it were not corrected. On April 14, 2020, Sinkovics, who had succeeded Embry at the Miami County Prosecutor's Office, filed a sworn

³ This memorandum from Wilder's counsel was reproduced in full in Wilder's Amended Complaint.

response on behalf of the State in which he argued that Wilder had been sentenced according to the terms of his plea agreement which provided that he would receive ten years of his previously suspended thirty-year sentence, that Wilder did not dispute this, and that the sentence imposed was permitted under Indiana law. In his response, Sinkovics did not cite any legal authority. On April 27, 2020, the trial court denied Wilder's Motion to Correct Erroneous Sentence.

[6] On July 7, 2020, Wilder was released from the Department of Correction. Wilder then learned that he was required to serve five years on parole in his Miami County case before he could begin serving his two years of probation in Howard County. On September 26, 2021, Wilder was arrested for allegedly violating his parole.

[7] Thereafter, Wilder filed the instant civil action in which he raised breach of contract claims against Sinkovics and Embry and alleged that they had committed fraudulent inducement, constructive fraud, actual fraud, and fraud on the trial court. Wilder alleged that Embry had made "material promised obligations . . . in the 'inducement' and 'consideration' in his plea offer" which had been breached, namely that "[Wilder] would only serve ten (10) [years] of a thirty (30) year sentence in prison"; he would serve his Howard County sentence consecutively to his Miami County probation revocation sentence; and that, after serving his sentences he "would be terminated and he would be finished with Miami County." (Appellant's App. Vol. II, p. 29). Wilder

contended that this agreement was breached because he did not serve his Miami

County and Howard County sentences in the correct order and because he was placed on parole for five years in Miami County. As to Sinkovics, Wilder complained that, because Wilder had attached the correspondence from his counsel regarding the proposed Miami County plea agreement to his 2020 Motion to Correct Erroneous Sentence, Sinkovics' responses to the 2020 Motion were knowingly material misrepresentations to the trial court that amounted to fraud. According to Wilder, Sinkovics' responses were also fraudulent because Indiana law mandated that Wilder serve his Miami County probation revocation sentence first. Wilder sought compensatory and punitive damages amounting to \$641 per day since July 7, 2020, the date that he asserted that he was first damaged by the alleged breach of his plea agreement, as well as \$5,000 for "lost property". (Appellant's App. Vol. II, p. 41).

[8] On December 17, 2021, Sinkovics filed his Motion to Dismiss pursuant to Indiana Trial Rule 12(B)(6), arguing, in relevant part, that Sinkovics was entitled to prosecutorial immunity and that he was shielded from liability under the Indiana Tort Claims Act (ITCA). On December 27, 2021, Wilder filed his Response to Sinkovics' Motion to Dismiss, arguing that Sinkovics was not entitled to prosecutorial immunity for willful fraud and intentional tortious acts. On January 13, 2022, Sinkovics filed his Reply in Support of Motion to Dismiss, and on January 20, 2022, Wilder filed a response to Wilder's Reply.

- [9] On January 21, 2022, the trial court held a hearing on Sinkovics’ Motion to Dismiss.⁴ Also on January 21, 2022, the trial court granted Sinkovics’ Motion “based upon the legal principal of [a]bsolute [p]rosecutorial [i]mmunity.” (Appellant’s App. Vol. II, p. 7).
- [10] Wilder now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

I. *Standard of Review*

- [11] Wilder, who proceeds pro se, appeals following the trial court’s grant of Sinkovics’ Motion to Dismiss pursuant to Indiana Trial Rule 12(B)(6) for failure to state a claim upon which relief can be granted. Our supreme court has outlined our standard of review in such matters as follows:

A 12(B)(6) motion tests the legal sufficiency of the plaintiff’s claim, not the facts supporting it. Dismissal under 12(B)(6) is not proper unless it appears to a certainty on the face of the complaint that the complaining party is not entitled to any relief. We review a 12(B)(6) dismissal anew, giving no deference to the trial court’s judgment. A reviewing court takes the complaint’s allegations as true and considers them in the light most favorable to the nonmoving party, drawing every reasonable inference in that party’s favor. Dismissal under 12(B)(6) is rarely appropriate when the asserted ground for dismissal is an affirmative defense; but where a plaintiff has pleaded himself out of court by alleging,

⁴ The January 21, 2022, hearing was not transcribed for the instant appeal. On June 22, 2022, Wilder filed an addendum to his Appellant’s Brief that contains his sworn affidavit regarding purported events at the January 21, 2022, hearing. Sinkovics has not moved to strike Wilder’s addendum.

and thus admitting, the essential elements of a defense, his complaint fails to state a claim on which relief can be granted.

Payne-Elliott v. Roman Catholic Archdiocese of Indianapolis, Inc., 193 N.E.3d 1009, 1013 (Ind. 2022) (cleaned up). We may affirm a trial court’s Rule 12(B)(6) dismissal of a complaint “if it is sustainable on any basis in the record.” *Thornton v. State*, 43 N.E.3d 585, 587 (Ind. 2015).

II. *Wilder’s Claims*

[12] In his Amended Complaint, Wilder named Sinkovics and Embry in their “individual and professional” capacities for breach of contract and various torts. (Appellant’s App. Vol. II, p. 24). However, on appeal, Wilder focuses on his claims that Sinkovics was liable in his personal capacity for allegedly breaching the 2012 plea agreement by making false statements in responding to Wilder’s 2020 Motion to Correct Erroneous Sentence.⁵ For instance, Wilder argues on appeal that “Sinkovics is the actor who has caused this injury to Wilder when he committed fraud upon the court to renege on the promised terms of the agreement made with Embry.” (Appellant’s Br. p. 11).

[13] We observe that Wilder is correct that “a plea agreement is contractual in nature, binding the defendant, the state, and the trial court.” *Lee v. State*, 816

⁵ Because Wilder has failed to develop any appellate argument as to Embry or as to Sinkovics in his professional capacity, he has waived any challenge to the trial court’s dismissal of those claims. *See* Ind. Appellate Rule 46(A)(8)(a); *Shepherd v. Truex*, 819 N.E.2d 457, 463 (Ind. Ct. App. 2004) (holding that a pro se litigant who failed to present cogent argument waived his appellate claim).

N.E.2d 35, 38 (Ind. 2004) (quoting *Pannarale v. State*, 638 N.E.2d 1247, 1248 (Ind. 1994)). In addition, the prosecutor and the defendants are the contracting parties to a plea agreement. *Id.* However, Wilder has presented us with no legal precedent directly supporting his proposition that a prosecutor may be sued in his personal capacity for breach of contract for allegedly breaching a plea agreement. In addition, Wilder concedes on appeal that “despite his diligent effort, he cannot point to any specific precedent wherein a plaintiff has brought a civil action seeking damages from a prosecutor in his individual capacity on the grounds of fraudulent interference with contract rights bargained for in a plea agreement.” (Appellant’s Br. p. 7). It was Wilder’s burden to support his appellate argument with cogent reasoning and legal authority. *See* Ind. Appellate Rule 46(A)(8)(a). In light of the lack of legal authority supporting Wilder’s claims and his concession, we conclude that the trial court did not err in granting Sinkovics’ Motion to Dismiss Wilder’s Amended Complaint.

II. *Immunity*

[14] Inasmuch as the allegations of Wilder’s Amended Complaint raised state law tort claims against Sinkovics, in his Motion to Dismiss, Sinkovics argued below that he was entitled to prosecutorial immunity and immunity under the ITCA. The trial court granted Sinkovics’ Motion based on the doctrine of prosecutorial immunity. Wilder centers his appellate arguments regarding these issues as they pertain to Sinkovics and contends that the trial court erred in dismissing

the Amended Complaint based on prosecutorial immunity or the immunity provisions of the ITCA. We address Wilder's contentions in turn.

A. *Common Law Prosecutorial Immunity*

[15] Our supreme court has long recognized that prosecutors and their deputies exercising their investigative, administrative, and prosecutorial duties enjoy absolute immunity from state law tort claims. *See Foster v. Percy*, 387 N.E.2d 446, 449 (Ind. 1979) (upholding the dismissal of a state law libel suit against a prosecutor on the basis of immunity). Put another way, where a prosecutor acts “reasonably within the general scope of authority granted to prosecuting attorneys, no liability will attach.” *Id.* As this court has held, “the public interest in a prosecutor’s ability to vigorously and fearlessly perform his duties unhindered by the threat of lawsuits is great, and such interest justifies foreclosing an injured plaintiff from pursuing his cause of action against a prosecutor.” *Foster v. New*, 407 N.E.2d 271, 274 (Ind. Ct. App. 1980).

[16] Here, in his Amended Complaint, Wilder alleged injuries flowing from Sinkovics’ responses to Wilder’s 2020 Motion to Correct Erroneous Sentence, in which Wilder claims he sought to enforce his version of the 2012 plea agreement. A prosecutor has authority to enter into plea agreements. *See Lee*, 816 N.E.2d at 38; *see also* I.C. § 35-35-3 *et seq.* Indeed, our supreme court has observed that our judicial system counts on plea agreements in criminal cases, otherwise the system would grind to a halt. *J.W. v. State*, 113 N.E.3d 1202, 1206 (Ind. 2019). Sinkovics’ response to Wilder’s Motion to Correct Erroneous

Sentence was an effort to enforce the 2012 plea agreement. We conclude that

Sinkovics' act of responding to Wilder's 2020 Motion fell reasonably within Sinkovics' prosecutorial duties, and was, thus, conduct that was properly deemed immunized from suit. *See Foster*, 387 N.E.2d at 449.

[17] Nevertheless, Wilder claims that Sinkovics' actions were outside of his prosecutorial duties because (1) prosecutors do not enjoy immunity for post-conviction proceedings, which is how Wilder characterizes his 2020 Motion to Correct Erroneous Sentence, and (2) Sinkovics filed a verified response to his Motion to Correct Erroneous Sentence and was, therefore, acting as a witness, not as a prosecutor, when he filed his written response. In addressing these arguments, we first note that Wilder has not provided this court with any directly applicable legal authority expressly supporting either of these contentions, *i.e.*, holding that prosecutors cannot claim immunity from liability for post-conviction matters or that a prosecutor's act of submitting a verified response to a defendant's motion renders the prosecutor potentially liable to civil suit. Therefore, we are not persuaded by Wilder's argument that Sinkovics' actions were not shielded from the state tort claims that he raised. In addition, our review of Wilder's pleadings responding to Sinkovics' Motion to Dismiss revealed that Wilder did not raise either of these arguments in the proceedings below. "It is the general rule that an argument or issue raised for the first time on appeal is waived for appellate review." *First Chicago Ins. Co. v. Collins*, 141 N.E.3d 54, 61 (Ind. Ct. App. 2020). Accordingly, we do not further address Wilder's waived and unsupported arguments.

III. ITCA

[18] The ITCA provides that a “governmental entity or an employee acting within the scope of the employee’s employment is not liable if a loss results from” one of the conditions enumerated in the statute, such as the “initiation of a judicial or an administrative proceeding” or the “performance of a discretionary function[.]” I.C. § 34-13-3-3(a)(6), (7). The ITCA also provides immunity for “[m]isrepresentation if unintentional.” *Id.* at (a)(14). Wilder essentially asserts that Sinkovics could not claim immunity under the ITCA because Sinkovics made false statements and committed perjury in responding to Wilder’s 2020 Motion to Correct Erroneous Sentence. As a result, Wilder maintains that Sinkovics could not have been acting within the scope of his employment and that, because Sinkovics was aware of the letter from Wilder’s counsel informing Wilder of the terms of the proposed 2012 plea agreement, Sinkovics’ alleged misrepresentations could not have been unintentional.

[19] We reject these arguments because in his Amended Complaint Wilder alleged, and thus admitted, facts showing Sinkovics’ immunity under the ITCA. *See Payne-Elliott*, 193 N.E.3d at 1013. Wilder alleged that Sinkovics’ response to Wilder’s 2020 Motion to Correct Erroneous Sentence included verified statements that Wilder had been sentenced according to the terms of his plea agreement which provided that he would receive ten years of his previously suspended thirty-year sentence, that Wilder did not dispute this, and that the sentence imposed was permitted under Indiana law. Wilder does not argue that Sinkovics’ mere act of responding to his motion was de facto outside the scope

of his employment. In addition, even if we accept the other allegations of Wilder's Amended Complaint as true, as we are obligated to do pursuant to our standard of review, *see id.*, Wilder provides us with no legal authority supporting his proposition that a prosecutor who simply contests the factual and legal assertions made in a defendant's motion has acted outside the scope of his employment, made an intentional misrepresentation, or committed perjury.⁶ Indeed, authority cited by Wilder indicates that, for purposes of the ITCA's immunity provisions, mere expressions of opinion, belief, or representations of law are not misrepresentations of present or past facts that can sustain a fraud claim. *Clinton Cnty. v. Clements*, 945 N.E.2d 721, 728 (Ind. Ct. App. 2011), *trans. denied*. Again, in light of the lack of legal authority directly supporting Wilder's appellate arguments, we are unpersuaded that the trial court erred.

CONCLUSION

[20] Based on the foregoing, we conclude that Wilder failed to state any valid contract or tort claims and hold that the trial court properly dismissed his Amended Complaint.

[21] Affirmed.

⁶ Pursuant to Indiana Rule of Evidence 201(b)(1) and (c)(1), we take judicial notice of this court's opinion in *Wilder v. Hunter*, No. 22A-MI-229, slip op. at 4 (Ind. Ct. App. June 22, 2022), wherein we held that Wilder had failed to show that the sentencing statutes in effect in 2012 mandated that he serve his consecutive Howard and Miami County sentences in any particular order.

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