

In the
Indiana Court of Appeals
Case No. **23A-PL-00705**

THEODORE ROKITA,
Defendant-Appellant

v.

BARBARA TULLY,
Plaintiff-Appellee

Appeal from Marion County Superior Civil
Court D06

Trial Court Case No. 49D06-2107-PL-025333

The Honorable:
Kurt Eisgruber, Judge

**Motion to Strike Portions of Reply in Support of Appellee/cross-appellant
Tully’s Cross-appeal**

Pursuant to Indiana Rule of Appellate Procedure 42, Appellant/Cross-Appellee, Attorney General Rokita, (“**Attorney General Rokita**”), respectfully moves this Court to strike portions of the Reply in Support of Appellee/Cross-Appellant Tully’s Cross-Appeal containing arguments related to waiver and separation of powers.¹

Ms. Tully only raised two issues on cross-appeal: (1) whether the trial court erred by permitting Attorney General Rokita to make redactions to the Inspector General’s Opinion after

¹Attorney General Rokita moves that the following specific portions of Ms. Tully’s Reply be stricken: (1) **Summary of Argument**: the first two full paragraphs (line 2 of page 4 - line 8 of page 5); (2) **Argument Section I**: “Rokita waived and/or is estopped from invoking APRA’s deliberative materials exception.” (line 8 of page 6 - the end of page 11); (3) **Argument Section II**: “I.C. section 4-2-7-3(9) (effective July 1, 2023), enacted while this case was pending appeal in this Court, cannot be applied retroactively to summarily resolve this case in Rokita’s favor, as doing so would seriously interfere with judicial powers in contravention of the separation of powers clause of the Indiana Constitution.” (line 1 of page 12 - the end of page 13).

granting summary judgment in her favor; and (2) whether the trial court erred by denying Ms. Tully fees and costs after holding that she was entitled to summary judgment.

Yet Ms. Tully is attempting to take another bite out of the briefing apple by making arguments related to waiver and separation of powers that had already been fully briefed by both parties. Procedurally, this is inappropriate. Portions of Ms. Tully's additional briefing on waiver raised arguments related to a wholly separate disciplinary matter involving Attorney General Rokita. Ms. Tully's counsel raised this argument after he was procedurally barred from doing so, and these portions are immaterial and inappropriate to the outcome of this appeal.

Therefore, the portions of Ms. Tully's Reply concerning waiver and separation of powers should be stricken, and this Court should not consider these arguments.

Procedural Background

The procedural history of this case is straightforward.

On July 7, 2023, Attorney General Rokita filed his appellant brief, raising four issues for this Court's consideration on appeal.

On August 23, 2023, Ms. Tully filed her appellee/cross-appellant brief. In the appellee portion of her brief, Ms. Tully properly raised, *inter alia*, two defenses to Attorney General Rokita's appellant arguments: (1) whether Attorney General Rokita waived a claim to the confidentiality of the Inspector General's Opinion; and (2) whether a new statute, enacted after the trial court entered its judgment, could be considered by this court without violating principles of separation of powers. (Collectively, "waiver and separation of powers"). Appellee Br. at 21 - 25; 27 - 34.

In addition, Ms. Tully raised two, and only two, issues on cross-appeal: (1) whether the

trial court erred by permitting Attorney General Rokita to make redactions to the Inspector General's Opinion after granting summary judgment in her favor; and (2) whether the trial court erred by denying Ms. Tully fees and costs after holding that she was entitled to summary judgment. Appellee Br. at 7 (“**ADDITIONAL ISSUES RAISED BY TULLY’S CROSS APPEAL**”).

On September 22, 2023, Attorney General Rokita filed his reply brief/cross-appellee brief. (“**Attorney General Rokita’s Reply**”). Attorney General Rokita’s Reply included a proper reply in support, addressing the defenses of waiver, at 32 - 35, and separation of powers, at 12 - 15, raised by Ms. Tully in her Appellee Brief. At that point, Ms. Tully’s defenses of waiver and separation of powers were fully briefed by both parties. *Id.* In addition, Attorney General Rokita responded in opposition to the two issues Ms. Tully raised on cross-appeal, namely the trial court’s rulings on fees and redactions after granting Ms. Tully summary judgment. *Id.* at 37 - 40.

On October 18, 2023, Ms. Tully filed her Reply in Support of her Cross-appeal. (“**Ms. Tully’s Reply**”). In Ms. Tully’s Reply, she did not limit herself to briefing the trial court’s rulings on fees and redactions, which were the only two cross-appeal issues she raised. Instead, she continued briefing her defenses regarding waiver and separation of powers. In fact, of the twelve pages devoted to Ms. Tully’s arguments, nine of them were devoted to the waiver and separation of powers arguments. *See* Ms. Tully’s Reply at 6 - 14.

Argument

I. Indiana Rules of Appellate Procedure Prohibit Ms. Tully from Arguing Issues Outside the Scope of Arguments Raised on Cross-Appeal.

Indiana Rules of Appellate Procedure 46(C) provides that no new issues shall be raised in the reply brief. In the case of cross-appeals, the appellant's reply brief shall address the arguments raised on cross-appeal. Ind. R. App. P. 46(D)(3). Indiana courts have adhered to longstanding principles aimed at preventing a "second bite at the apple." *Am. Family Mut. Ins. Co. v. Federated Mut. Ins. Co.*, 800 N.E.2d 1015, 1022 (Ind. Ct. App. 2004) (disallowing argument concerning issue already decided previously on appeal); *see also Adams v. Sand Creek, Inc.*, 860 N.E.2d 898, n. 5 (Ind. Ct. App. 2007) (finding parties not permitted to present new arguments in reply brief).

Ms. Tully's Reply to arguments raised on the cross-appeal issues concerning redactions and attorney's fees was proper. However, Ms. Tully exceeded the scope of the arguments raised on cross-appeal and departed from general appellate practice by continuing to brief the arguments concerning waiver and separation of powers, which had been fully briefed by both parties.

Ms. Tully's inclusion of waiver and separation of powers arguments, which were exhaustively briefed by both parties, is in violation of this Court's rules prohibiting new arguments on reply. Ind. R. App. P. 46(C). Likewise, the Indiana Rules for Appellate Procedure do not contemplate sur-replies. Allowing Ms. Tully to introduce these arguments in her reply would unjustly favor her, as it would enable her to use her reply in support of her cross-appeal to elaborate on the issues she did not sufficiently address in her Appellee Brief. Such conduct should not be condoned; otherwise, there will be no finality to the appellate review.

II. The Formal Disciplinary Complaint is Immaterial and Inappropriate Under Rule 42.

Upon motion by a party, "the court may order stricken from any document any redundant, immaterial, impertinent, scandalous, or other inappropriate matter." Ind. Appellate Rule 42. *See Henri v. Curto*, 891 N.E.2d 135, 137 n.3 (Ind. Ct. App. 2008); *Bowlers Country Club, Inc. v. Royal Links USA, Inc.*, 846 N.E.2d 732, 733 n.1 (Ind. Ct. App. 2006) (striking language that contained an inappropriate tone); *Indiana Dep't of Env'tl. Mgmt. v. Med. Disposal Servs.*, 729 N.E.2d 577, 581 n.10 (Ind. 2000) (striking language that was hyperbolic, accusatory, and disrespectful towards opposing counsel); *Shepherd v. Truex*, 823 N.E.2d 320, 322 n.1 (Ind. Ct. App. 2005); *Hilbert v. Conseco Servs., L.L.C.*, 836 N.E.2d 1001, 1017 n.17 (Ind. Ct. App. 2005) (striking arguments that addressed issues that were not properly before the Court).

The inclusion of the disciplinary complaint filed against Attorney General Rokita in Ms. Tully's Reply is not only procedurally inappropriate, but it is also immaterial. The inappropriateness of Ms. Tully's inclusion of this disciplinary action is compounded by the fact that Ms. Tully's counsel, William Groth, also filed a disciplinary complaint against Attorney General Rokita in December of 2022.² By raising this disciplinary action in this separate matter, Ms. Tully and her counsel expose their naked partisanship and underscore how inappropriate it is for this Court to consider those arguments. Ms. Tully's use of this disciplinary action to (again) raise arguments concerning waiver (which had been fully briefed) did not contribute to the substantive legal issues at hand and appeared to be a deliberate attempt to impugn his reputation, rather than engaging in a productive legal discourse.

²<https://www.indystar.com/story/news/politics/2023/02/13/indiana-attorney-general-todd-rokita-faces-disciplinary-commission-probe-heres-whats-next/69894040007/>

The impropriety of including Attorney General Rokita's disciplinary complaint is supported by the fact that the scope of waiver in one context (e.g., licensing proceedings) has no bearing on waiver in another context (e.g., APRA). Thus, its inclusion appears not only inappropriate but also immaterial, further detracting from the procedural integrity of Ms. Tully's Reply.

WHEREFORE, pursuant to Indiana Rule of Appellate Procedure 42, Appellant/Cross-Appellee Attorney General Rokita, respectfully moves this Court to strike portions of the Reply in Support of Appellee/Cross-Appellant Tully's Cross-Appeal containing arguments related to waiver and the separation of powers, and for all other relief just and proper under the circumstances.

Dated: November 2, 2023

Respectfully submitted,

Theodore E. Rokita
Indiana Attorney General,
Ind. Bar No. 18857-49

By:

/s/ Melena S. Siebert
James Bopp, Jr., Ind. Bar No. 2838-84
Melena S. Siebert, Ind. Bar No. 35061-15
THE BOPP LAW FIRM, PC
The National Building
1 South Sixth Street
Terre Haute, IN 47807
jboppjr@aol.com
msiebert@bopplaw.com
Phone: 812/232-2434
Fax: 812/235-3685
Attorneys for Defendant-Appellant

Certificate of Filing and Service

I certify that on November 2, 2023, the foregoing document and all attachments thereto were filed using the Indiana E-filing System. I also hereby certify that on November 2, 2023, the foregoing action served the foregoing document on the following via IEFS:

William R. Groth, wgroth@fdgtlaborlaw.com

Daniel Bowman, dbowman@fdgtlaborlaw.com

Counsel for Plaintiff-Appellee

/s/ Melena S. Siebert

Attorney for Defendant-Appellant