

NONPRECEDENTIAL DISPOSITION
To be cited only in accordance with FED. R. APP. P. 32.1

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

Submitted February 14, 2023*

Decided February 17, 2023

Before

DIANE P. WOOD, *Circuit Judge*

MICHAEL Y. SCUDDER, *Circuit Judge*

CANDACE JACKSON-AKIWUMI, *Circuit Judge*

No. 22-1894

TIMOTHY MARCUS MAYBERRY,
Plaintiff-Appellant,

v.

THOMAS KELLER, et al.,
Defendants-Appellees.

Appeal from the United States District
Court for the Northern District of Indiana,
South Bend Division.

No. 3:21-CV-506-JD-MGG

Jon E. DeGuilio,
Chief Judge.

ORDER

Invoking federal jurisdiction based on diversity of citizenship, Timothy Mayberry sued Thomas Keller for legal malpractice under Indiana law. Keller was Mayberry's court-appointed attorney in his appeal of conviction for murder in Indiana.

* The appellees were not served with process and are not participating in this appeal. We have agreed to decide the case without oral argument because the briefs and record adequately present the facts and legal arguments, and oral argument would not significantly aid the court. FED. R. APP. P. 34(a)(2)(C).

Mayberry alleged that if Keller had raised certain errors on appeal, he would have received a more favorable outcome. The district court concluded that it lacked subject-matter jurisdiction and dismissed Mayberry's complaint without prejudice. We affirm.

The following allegations from the complaint are presumed true, with reasonable inferences drawn in Mayberry's favor. *See Schillinger v. Kiley*, 954 F.3d 990, 994 (7th Cir. 2020). We also take judicial notice of the record in Mayberry's criminal appeal, out of which his claim here arose. *See United States v. Payne*, 964 F.3d 652, 656 (7th Cir. 2020).

When Mayberry appealed his murder conviction, the state court appointed Keller (a volunteer private attorney) to represent him pro bono. In that appeal, Mayberry primarily argued that a prosecution witness should have been excluded because of the late disclosure of test results the witness would provide foundation for. But the Indiana appellate court determined that Mayberry failed to make a cogent argument or support his contentions with authorities. The court nevertheless reviewed the evidentiary ruling for an abuse of discretion and concluded that the trial court did not err; it therefore affirmed Mayberry's conviction. *Mayberry v. State*, 161 N.E.3d 1256 (Ind. Ct. App. 2020) (table decision), *trans. denied*, 167 N.E.3d 1158 (Ind. 2021), *cert. denied*, 142 S. Ct. 442 (2021).

While still serving his sentence, Mayberry sued Keller for malpractice, invoking diversity jurisdiction based on his domicile in Illinois and Keller's in Indiana and his claimed damages: more than \$75,000 in actual damages and more than \$1 million in punitive damages for the loss of his "life, liberties, and personal assets." *See* 28 U.S.C. § 1332. He alleged that his former attorney negligently waived his best argument by failing to develop it, causing the appellate court to apply a more stringent standard of review. He further asserted that if Keller had raised an issue with jury selection as Mayberry requested, and communicated more frequently with him, he would have secured a more favorable outcome on appeal. Mayberry also sued St. Joseph County and the State of Indiana, possibly on a theory of vicarious liability or indemnification, though the pleadings do not make clear how either entity fits in.

The district court screened Mayberry's complaint under 28 U.S.C. § 1915A and concluded that it lacked subject-matter jurisdiction because Mayberry could not satisfy the amount-in-controversy requirement. To the extent Mayberry sought damages for losses resulting from his conviction, the court reasoned that under *Heck v. Humphrey*, 512 U.S. 477 (1994), his still-intact conviction precluded any recovery. The court further concluded that Indiana's tort immunity law foreclosed punitive damages against the

appointed attorney—a public servant. The court therefore concluded that there was a legal certainty that Mayberry could not plead more than \$75,000 in damages.

Reviewing the screening order de novo, *Schillinger*, 954 F.3d at 994, we conclude that Mayberry lacks sufficient potential economic damages allegedly caused by Keller’s representation and that punitive damages are barred by the Indiana Tort Claims Act. It is therefore a legal certainty that the amount in controversy is less than \$75,000. See *McMillian v. Sheraton Chi. Hotel & Towers*, 567 F.3d 839, 844 (7th Cir. 2009).

The typical remedy for legal malpractice is compensatory damages. *Schultheis v. Franke*, 658 N.E.2d 932, 939–40 (Ind. Ct. App. 1995). A successful plaintiff may recover what he paid in attorney’s fees and costs for the deficient representation. *Solnosky v. Goodwell*, 892 N.E.2d 174, 186 (Ind. Ct. App. 2008). But Keller was appointed to represent Mayberry at the state’s expense and so Mayberry lacks any actual loss associated with the representation. See generally *Harris v. Denning*, 900 N.E.2d 765, 769 (Ind. Ct. App. 2009). Mayberry suggests that the loss of liberty or other inchoate harms derived from his criminal conviction are compensable, but he points us to no Indiana authorities allowing such damages in a legal malpractice case stemming from representation in a criminal case, nor does he give us any idea how he “made a good faith effort to estimate”, as he must, that his alleged damages exceed \$75,000. *Macken ex rel. Macken v. Jensen*, 333 F.3d 797, 800 (7th Cir. 2003).

Further, as the district court concluded, the Indiana Tort Claims Act bars punitive damages because Keller was a court-appointed public defender and therefore a “public employee” under the Act. *Wright v. Elston*, 701 N.E.2d 1227, 1233 (Ind. Ct. App. 1998). The state authorizes appointment of any competent practicing attorney for a criminal defendant who cannot afford an attorney, IND. CODE § 33-40-2-2(3), and those attorneys must be paid by the court, *id.* § 33-40-2-5. Under the Act, an employee is “a person presently or formerly acting on behalf of a governmental entity, whether temporarily or permanently or with or without compensation.” *Id.* § 34-6-2-38(a). And attorneys serving as independent contractors, such as Keller, are expressly covered. *Id.* § 34-6-2-38(b); see also *Wright*, 701 N.E.2d at 1232–33.

Under the Act, a plaintiff cannot obtain punitive damages from an Indiana public employee unless the tortious conduct is outside the scope of his employment. *Myers v. Maxson*, 51 N.E.3d 1267, 1278–79 (Ind. Ct. App. 2016). Here, however, each allegedly deficient action by Keller—failing to raise a cogent argument on appeal, communicating infrequently with Mayberry, refusing to raise a particular appellate argument, and

declining to file a petition for rehearing—falls squarely within the duties of a defense attorney. Therefore, punitive damages are unavailable even if Keller performed these duties negligently. True, the Act sets out some exceptions to this bar—among them, malicious or wanton conduct. But, despite some conclusory references to Keller’s state of mind, Mayberry has not plausibly alleged that Keller intended for Mayberry to lose his appeal or otherwise acted wantonly or with malice. *See* IND. CODE § 34-13-3-5(c); *Miner v. Sw. Sch. Corp.*, 755 N.E.2d 1110, 1113 (Ind. Ct. App. 2001) (conduct negligent but not willful or wanton).

Further, Mayberry’s complaint suggests no plausible basis for holding St. Joseph County or the State of Indiana liable for Keller’s conduct or any damages. Respondeat superior liability is not available. *See Harris*, 900 N.E.2d at 768. And, although the state would have to indemnify Keller for any compensatory damages, IND. CODE § 34-13-3-5(d), we have already concluded that, here, such damages are not plausible.

Because there are no compensatory damages plausibly caused by Keller’s allegedly negligent conduct, and punitive damages are not available, we need not decide whether *Heck* has a role to play in restricting Mayberry’s potential recovery. We therefore AFFIRM the judgment.