



Jacqueline Babbitt (“Babbitt”) filed a complaint in St. Joseph Superior Court against Indiana State Trooper E. Lamar Helmuth (“Trooper Helmuth”), in his official capacity. Babbitt’s complaint was dismissed with prejudice, and she appeals pro se. Concluding that the trial court properly dismissed Babbitt’s complaint pursuant to Indiana Trial Rule 12(B)(6), we affirm.

### **Facts and Procedural History**

In her complaint, Babbitt claims that on March 26, 2005, Trooper Helmuth initiated a traffic stop of Babbitt’s vehicle because she was allegedly speeding. During the traffic stop, the trooper became suspicious that Babbitt was intoxicated and administered a portable breathalyzer test. Trooper Helmuth told Babbitt that the test was inconclusive and transported her to the State Police Post to take an additional test. An argument ensued between the trooper and Babbitt, and she refused to take the test at the State Police Post. Babbitt requested that the trooper transport her to the hospital so that she could take a blood test.

Because Babbitt refused to take the test at the State Police Post, Trooper Helmuth arrested her and put her in jail. Babbitt alleges that she was chained to a chair, harassed by other officers, and told to urinate on herself when she requested permission to use the restroom. Further, Babbitt claims that Trooper Helmuth falsified his arrest report and affidavit for probable cause, which resulted in suspension of her driver’s license.

On June 3, 2008, Babbitt filed a pro se complaint against Trooper Helmuth in St. Joseph Superior Court (cause number 71D05-0806-PL-00121). That complaint was

dismissed on September 12, 2008. Babbitt did not appeal the dismissal or seek to amend her complaint.

Instead, on October 28, 2008, Babbitt filed a new complaint against the trooper containing the same subject matter and seeking the same remedies as the June 3, 2008 complaint (cause number 71D05-0810-PL-00257). The October 28, 2008 complaint was dismissed without prejudice on February 23, 2009. Babbitt then filed a motion for certification of interlocutory appeal and a motion to amend. Both motions were denied on March 27, 2009, and the motion to amend was specifically denied because it was filed more than ten days after the February 23, 2009 order dismissing the October 28, 2008 complaint.

On May 7, 2009, Babbitt filed the complaint against Trooper Helmuth at issue in this appeal (cause number 71D05-0905-PL-00140). On July 9, 2009, the State filed a motion to dismiss Babbitt's complaint with prejudice. In the motion, the State argued that the May 7, 2009 complaint contains precisely the "same subject matter and remedies of [Babbitt's] two previously-filed complaints" in the St. Joseph Superior Court. Therefore, the State asserted that Babbitt's complaint should be dismissed pursuant to Trial Rule 12(B)(8), Trial Rule 12(B)(6) (statute of limitations), and because the trooper was entitled to immunity from Babbitt's claims. Appellant's App. p. 143.

A hearing was held on the State's motion to dismiss on August 25, 2009. On August 28, 2009, the trial court issued an order dismissing Babbitt's complaint with prejudice. Babbitt then filed a motion to correct error, which was deemed denied by operation of Trial Rule 53.3(A). Babbitt now appeals pro se.

## Discussion and Decision

Trial Rule 12(B)(6) provides that “[w]hen a motion to dismiss is sustained for failure to state a claim under subdivision (B)(6) of this rule the pleading may be amended once as of right pursuant to Rule 15(A) within ten [10] days after service of notice of the court’s order sustaining the motion and thereafter with permission of the court pursuant to such rule.” A plaintiff is therefore allowed to either amend her complaint pursuant to Trial Rule 12(B)(6) and Trial Rule 15(A), or to elect to stand upon her complaint and to appeal from the order of dismissal. Thacker v. Bartlett, 785 N.E.2d 621, 624 (Ind. Ct. App. 2003). Thus, “a Trial Rule 12(B)(6) dismissal is without prejudice, since the complaining party remains able to file an amended complaint within the parameters of the rule.” Id.

A Trial Rule 12(B)(6) dismissal does not generally operate as an adjudication on the merits. Id. However, a 12(B)(6) dismissal does become an adjudication on the merits if the complaining party opts to appeal the order instead of filing an amended complaint. Id.

In Thacker, the plaintiff’s original complaint was dismissed pursuant to Rule 12(B)(6). Two weeks after the dismissal, the plaintiff filed another complaint alleging the same facts against the same defendant in another division of Vanderburgh Superior Court. Id. at 623. Thacker appealed the dismissal of the second complaint, and our court held that because the plaintiff filed a new complaint, rather than seeking to appeal the 12(B)(6) dismissal, “it was dismissible under Trial Rule 12(B)(8). See id. at 625.

Trial Rule 12(B)(8) “allows a party to move for dismissal on the grounds that the ‘same action is pending in another state court in this state.’” Id. (quoting T.R. 12(B)(8)). “When an action is pending before a court of competent jurisdiction, other courts must defer to that court’s extant authority over the case.” Id. Rule 12(B)(8) “applies where the parties, subject matter, and remedies of the competing actions are precisely the same, and it also applies when they are only substantially the same.” Id.

After observing that Thacker’s second complaint and original complaint contained precisely the same parties, subject matter, and remedies, we held:

We recognize that because the dismissal of Thacker’s original complaint was a final judgment, the original complaint was not “pending” under the strict definition of the word; but neither was the complaint totally settled. As discussed earlier, however, Thacker’s original complaint was never adjudicated on the merits and Thacker theoretically remained able-with the trial court’s permission-to file an amended complaint, replacing the original pleading for all purposes. Thus, Thacker could reanimate his original complaint while his new complaint was active in another court, thereby defeating the interests of fairness to litigants, comity between and among the courts of this state, and judicial efficiency. In addition, by filing a new complaint instead of petitioning to amend his original complaint, Thacker was circumventing the authority and discretion of the original trial court. For these reasons, we find that the purpose behind Trial Rule 12(B)(8) also extends to situations like this one, where a party files a completely new complaint containing precisely the same parties, subject matter, and remedies instead of amending his original complaint or appealing its dismissal for failing to state a claim. Therefore, we find that Thacker’s new complaint was dismissible under Trial Rule 12(B)(8), and we affirm the judgment of the trial court.

Id. (citation omitted).

Relying on Thacker, the State argues that Babbitt’s third complaint was properly dismissed pursuant to Rule 12(B)(8). We disagree. Rule 12(B)(8) clearly requires that the same action must be pending “in another state court in this state.” The plaintiff in

Thacker had two complaints pending in two divisions of the Vanderburgh Superior Court. In this case, Babbitt filed her three complaints all in the same court, before the same trial judge.

We nevertheless conclude that the trial court properly dismissed Babbitt's complaint under Trial Rule 12(B)(6). In its motion to dismiss and at the hearing on its motion, the State also argued that Babbitt's complaint was barred under the statute of limitations, and should therefore be dismissed pursuant to Rule 12(B)(6). A civil action may be dismissed under Trial Rule 12(B)(6) for "failure to state a claim upon which relief can be granted." Such a motion tests the legal sufficiency of the claim, not the facts supporting it. Charter One Mortgage Corp. v. Condra, 865 N.E.2d 602, 604 (Ind. 2007). Review of a trial court's grant of a motion based on Trial Rule 12(B)(6) is de novo. Babe's Showclub, Jaba, Inc., v. Lair, 918 N.E.2d 308, 310 (Ind. 2009). In reviewing a Rule 12(B)(6) dismissal, we view the pleadings in the light most favorable to the nonmoving party, with every reasonable inference construed in the nonmovant's favor. Id. A complaint may not be dismissed for failure to state a claim upon which relief can be granted unless it is clear on the face of the complaint that the complaining party is not entitled to relief. Id.

Babbitt's third complaint alleged claims of false arrest and false imprisonment, and stemming from those alleged torts, claims of defamation, and denial of equal

protection and due process.<sup>1</sup> Babbitt therefore claimed she was entitled to damages pursuant to the Indiana Tort Claims Act. See Appellant’s App. pp. 24-32.

Indiana Code section 34-11-2-4 provides that “[a]n action for [] injury to person or character [or] injury to personal property. . . must be commenced within two (2) years after the cause of action accrues.” “In general, the cause of action of a tort claim accrues and the statute of limitations begins to run when the plaintiff knew or, in the exercise of ordinary diligence, could have discovered that an injury had been sustained as a result of the tortious act of another.” Filip v. Block, 879 N.E.2d 1076, 1082 (Ind. 2008) (quotation omitted). See also Johnson v. Blackwell, 885 N.E.2d 25, 31 (Ind. Ct. App. 2008) (applying Indiana Code section 34-11-2-4’s two-year statute of limitations to claims of false arrest and false imprisonment); Kelley v. Vigo County Sch. Corp., 806 N.E.2d 824, 830 (Ind. Ct. App. 2004), trans. denied (stating that the statute of limitations for a defamation claim is two years). Further, constitutional claims brought under 42 U.S.C. § 1983 are subject to the two-year statute of limitations for a personal injury. See Irwin Mortgage Corp. v. Marion County Treasurer, 816 N.E.2d 439, 443 (Ind. Ct. App. 2004); I.C. 34-11-2-4.

Officer Helmuth arrested Babbitt on March 26, 2005. In her complaint, Babbitt further alleged that the officer defamed her on August 31, 2005. Yet, Babbitt’s third complaint was not filed until May 7, 2009, over four years after her arrest and over three years after Trooper Helmuth made an allegedly defamatory statement about Babbitt.

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<sup>1</sup> Babbitt also sought damages based on her claim that Trooper Helmuth committed perjury. Indiana does not recognize a civil cause of action for perjury.

Babbitt's third complaint was therefore filed well beyond the two-year statute of limitations. For this reason, we affirm the trial court's 12(B)(6) dismissal of Babbitt's complaint for failure to state a claim upon which relief may be granted.<sup>2</sup>

Affirmed.

RILEY, J., and BRADFORD, J., concur.

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<sup>2</sup> Because we conclude that the trial court properly dismissed Babbitt's complaint pursuant to Trial Rule 12(B)(6), we do not address Babbitt's less than cogent arguments concerning whether the Indiana Tort Claims Act is unconstitutional and whether Trooper Helmuth is entitled to immunity for the claims raised in Babbitt's complaint.