

## 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

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John J. Lacey,

*Appellant,*

v.

Brett B. Gibson,

*Appellee.*

April 21, 2022

Court of Appeals Case No.  
21A-CT-2852

Appeal from the Boone Superior  
Court

The Honorable Matthew C.  
Kincaid, Judge

Trial Court Cause No.  
06D01-2108-CT-991

**Bailey, Judge.**

## Case Summary

- [1] This appeal concerns a claim of attorney malpractice that pro se litigant John J. Lacey filed against Brett B. Gibson, who had represented Lacey in a criminal matter that resulted in a plea agreement. Gibson filed a Rule 12(B)(6) motion to dismiss, asserting that the malpractice claim was filed outside the two-year statute of limitations. The court granted the motion to dismiss and later denied Lacey's motion to reconsider. Lacey now appeals. He sets forth three issues, which we consolidate and restate as (1) whether the trial court erred by granting the motion to dismiss because the statute of limitations should be tolled until Gibson gave Lacey a complete criminal case file in 2020 and (2) whether the court erred by denying the motion to reconsider due to procedural irregularities.
- [2] We affirm.

## Facts and Procedural History

- [3] In 2016, Gibson represented Lacey in a criminal matter, helping Lacey to negotiate a plea agreement that led to Lacey pleading guilty to Level 3 felony Aggravated Battery and admitting to having the status of a habitual offender. Lacey pursued a direct appeal, pro se, in which he challenged the sufficiency of the evidence supporting the habitual offender enhancement. Lacey was successful on appeal, with this Court reversing the enhancement in a May 2019 opinion. *See Lacey v. State*, 124 N.E.3d 1253, 1257 (Ind. Ct. App. 2019).

- [4] In August 2021, Lacey sued Gibson for attorney malpractice. Lacey sets forth his allegations in a document titled “Civil Complaint for Legal Malpractice,” which incorporates several documents Lacey calls the “Attached Designated Evidence.” App. Vol. 2 at 11. In the main document, Lacey asserts that Gibson committed attorney malpractice by “causing Lacey to enter an [sic] to be sentenced pursuant to a plea agreement which was improper.” *Id.* at 9.
- [5] Gibson moved to dismiss under Rule 12(B)(6), arguing that Lacey failed to state a viable claim because the malpractice claim is time-barred. According to Gibson, in the series of documents that collectively comprise the pleading, Lacey “explicitly recites that he became aware of the [habitual offender] issue in August of 2018, and that the Court of Appeals granted him relief on May 23, 2019.” *Id.* at 132. Gibson points out that Lacey “did not bring his malpractice claim until August 3, 2021 — substantially more than two years after the time he first raised the issue of the erroneous habitual offender enhancement and the date the Court of Appeals ruled unequivocally in his favor on this issue.” *Id.*
- [6] Lacey filed a response in which he argued that dismissal was improper because the statute of limitations should be tolled until sometime in 2020, when Gibson gave Lacey the complete criminal case file. The trial court granted the motion to dismiss. Lacey then moved to reconsider, asserting that the court had not properly reviewed his response due to procedural irregularity. The trial court denied the motion to reconsider, noting that it had “received the submission filed by [Lacey]” and “[n]othing therein changes the Court’s conclusion that Plaintiff’s complaint fails to state a claim for which relief may be granted.” *Id.*

at 163. The court summarized its reasoning: “The complaint itself (with its attachments) and the facts upon which the Court can take judicial notice show that the complaint is time-barred” in that Lacey knew of a potential claim of malpractice “on May 23, 2019” and he “filed suit August 3, 2021.” *Id.* at 164.

[7] Lacey now appeals.

## Discussion and Decision

[8] This case involves a claim of attorney malpractice, a negligence claim requiring proof that (a) an attorney owed a duty to the plaintiff, (b) the attorney breached that duty by failing to exercise ordinary skill and knowledge, and (c) the attorney’s negligence was the proximate cause of damages to the plaintiff. *See generally Rice v. Strunk*, 670 N.E.2d 1280, 1283-84 (Ind. 1996). Moreover, as with any typical tort claim, a malpractice claim is not actionable if the claim is brought outside the applicable statute of limitations. *See generally, e.g., City of Marion v. London Witte Grp., LLC*, 169 N.E.3d 382, 390 (Ind. 2021). As to the statute of limitations, the parties do not dispute that a two-year period applies to Lacey’s claim. *Cf. Chenore v. Plantz*, 56 N.E.3d 123, 126 (Ind. Ct. App. 2016) (applying a two-year statute of limitations to a claim of attorney malpractice).

[9] Trial Rule 12(B)(6) contemplates a motion to dismiss when the plaintiff fails to state a claim upon which relief can be granted. Ultimately, this type of motion tests the legal sufficiency of the complaint, presenting a pure question of law that we review de novo. *Robertson v. State*, 141 N.E.3d 1224, 1227 (Ind. 2020).

In reviewing the propriety of dismissal under Trial Rule 12(B)(6), we focus on the pleading as “supplemented by any facts of which the court will take judicial notice.” *Anderson v. Anderson*, 399 N.E.2d 391, 406 (Ind. Ct. App. 1979). In general, “we take the facts alleged . . . as true” and consider the allegations “in the light most favorable to the nonmoving party.” *Residences at Ivy Quad Unit Owners Ass’n, Inc. v. Ivy Quad Dev., LLP*, 179 N.E.3d 977, 981 (Ind. 2022).

However, we “need not accept as true allegations that are contradicted by other allegations or exhibits attached to or incorporated into the pleading.” *Irish v. Woods*, 864 N.E.2d 1117, 1120 (Ind. Ct. App. 2007). In short, a plaintiff “may plead himself out of court by attaching documents to the complaint that indicate that he or she is not entitled to judgment.” *Id.* (quoting *N. Ind. Gun & Outdoor Shows v. City of S. Bend*, 163 F.3d 449, 455 (7th Cir. 1998)).

[10] In moving to dismiss under Trial Rule 12(B)(6), Gibson asserted that the malpractice claim was not actionable because the statute of limitations had expired. In general, a cause of action accrues—and the limitations period begins to run—when the plaintiff knew or should have known of the legal injury. *Robertson*, 141 N.E.3d at 1227. However, under certain circumstances Indiana law provides for tolling of the statute of limitations, such as when the defendant concealed information that would have helped the plaintiff discover the claim. *See, e.g.*, Ind. Code § 34-11-5-1; *Kenworth of Indianapolis, Inc. v. Seventy-Seven Ltd.*, 134 N.E.3d 370, 383 (Ind. 2019) (discussing principles of equitable tolling). Indeed, Indiana Code Section 34-11-5-1 provides as follows: “If a person liable to an action conceals the fact from the knowledge of the

person entitled to bring the action, the action may be brought at any time within the period of limitation after the discovery of the cause of action.”

- [11] Here, the malpractice claim revolved around the plea agreement, with Lacey alleging that Gibson caused him “to be sentenced pursuant to a plea agreement which was improper.” App. Vol. 2. at 9. That plea agreement was accepted by the trial court, resulting in a conviction and sentence for Aggravated Battery, as a Level 3 felony, and a habitual offender enhancement that was later reversed.
- [12] On appeal, Lacey does not exclusively focus on the habitual offender enhancement, asserting that the enhancement was just “one portion of the legal malpractice claim[.]” Br. of Appellant at 15. Nonetheless, to the extent his claim is based on the lack of evidentiary support for the enhancement, Lacey knew or should have known there was an evidentiary defect in May 2019, when this Court issued an opinion reversing the enhancement. *See Lacey*, 124 N.E.3d at 1257 (noting that there was “insufficient evidence to support the . . . habitual offender enhancement” because Lacey’s prior convictions “could not support a habitual offender enhancement”). That opinion is among the documents attached to the complaint and it is also the proper subject of judicial notice. *See* Ind. Evid. R. 201(a) (permitting judicial notice of a fact that “can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned” as well as the existence of “records of a court of this state”).
- [13] Lacey filed the complaint in August 2021, more than two years after the appellate opinion identifying a defect in the enhancement. Thus, on the face of

it, any malpractice claim based on that defect appears to be time-barred.

Moreover, to the extent Lacey contends that (1) he would not have pleaded guilty to Aggravated Battery if he had known there was insufficient evidence to support the enhancement or (2) the defect in the enhancement renders the plea agreement void, these sorts of claims also appear to be time-barred because the claims also rely on there being a defect in the habitual offender enhancement.

[14] Lacey argues that any enhancement-based claims are not time-barred because Gibson did not give Lacey the complete criminal case file until some point in 2020—“despite repeated requests”—which Lacey claims was concealment tolling the statutory period. Br. of Appellant at 15. According to Lacey, the criminal case file discloses that Gibson had “foreknowledge that the State lacked the evidence needed[.]” Reply Br. at 9. We note, however, that this Court identified a defect in the habitual offender enhancement in 2019, apparently without resort to Gibson’s criminal case file. As of that date at the latest, Lacey was on notice that he had a potential claim against Gibson, a claim that he could develop by filing a lawsuit and using discovery procedures to obtain the case file. At bottom, Lacey seems to be arguing that information in the case file **strengthened** a claim of attorney malpractice. However, he does not explain how any enhancement-related cause of action was **concealed** until 2020. *See, e.g.*, I.C. § 34-11-5-1 (providing that, when there is tolling based on concealment, the plaintiff may sue “at any time within the period of limitation **after the discovery of the cause of action**” (emphasis added)). All in all, Lacey has failed to demonstrate that an enhancement-related claim was timely filed.

[15] Apart from any claim based on the enhancement, Lacey asserts that Gibson is liable for attorney malpractice for the alleged “failure to apprise Lacey of the fact that the State’s evidence failed to satisfy all the elements of the crime of Aggravated Battery which was a violation of Lacey’s . . . constitutional rights.” Br. of Appellant at 16. Lacey does not elaborate on his assertion that there is insufficient evidence supporting his conviction for Aggravated Battery. As best we discern Lacey’s argument, he contends that a claim related to the conviction is not time-barred because he only learned of the claim upon receiving the file.

[16] Even assuming Lacey’s malpractice claim related to Aggravated Battery is timely, the nature of the claim is that “the State’s evidence failed to satisfy all the elements of the crime[.]” *Id.* As to this contention, we turn to the documents attached to the complaint, which include the Chronological Case Summary in the criminal matter, the plea agreement, and transcripts of the plea hearing and the sentencing hearing. These documents disclose that Lacey agreed to plead guilty to Aggravated Battery, as a Level 3 felony, which is criminalized in Indiana Code Section 35-42-2-1.5. Under that statute: “A person who knowingly or intentionally inflicts injury on a person that creates a substantial risk of death . . . commits aggravated battery, a level 3 felony.”

[17] At the plea hearing, Lacey admitted that he knowingly or intentionally inflicted injury on the victim, with her injury creating a substantial risk of death. On appeal, Lacey does not explain how his plea is defective or how Gibson might have committed attorney malpractice related to the plea. And to the extent Lacey suggests that the State could not have proved its case at trial, we note



that the transcript of the sentencing hearing, attached to the complaint, includes testimony from a detective who spoke with the victim. She said Lacey “stabbed her in the neck area making her fall down” and “got on top and continued stabbing her and then after that was done covered her up with a jacket” while saying, “this isn’t my first time, I’ll wait twenty minutes and you’ll bleed out.” App. Vol. 2 at 78. The detective testified that the victim sustained fifteen to sixteen stab wounds with six injuries to the neck and head area. The detective also testified that inmates from the Boone County Jail had contacted law enforcement and reported that Lacey admitted to stabbing the victim.

[18] Ultimately, “[t]he burden is on the appellant to demonstrate error in an appeal.” *Vanderkooi v. Echelbarger*, 235 N.E.2d 165, 167-68 (Ind. 1968). Having reviewed the complaint and the attached documents and having considered Lacey’s appellate arguments as best we discern them, we conclude that Lacey failed to demonstrate that the trial court erred in granting the motion to dismiss.

[19] Next, to the extent that Lacey asserts that the trial court erred in denying his motion to reconsider—a matter we review for an abuse of discretion, *see generally, e.g., Matter of Est. of Lewis*, 123 N.E.3d 670, 673 (Ind. 2019)—for the reasons above, we cannot say the trial court erred in its ruling on the merits. Apart from the merits, Lacey focuses on procedural irregularities, asserting that the trial court improperly granted the motion to dismiss before reviewing Lacey’s response to that motion. Lacey asserts that, because of this procedural irregularity, the trial court should have granted his motion to reconsider. Yet

when the trial court denied the motion to reconsider, the court acknowledged that it had reviewed Lacey's filing and was not persuaded to disturb its ruling.

[20] All in all, even assuming a different procedure was warranted, Lacey has failed to demonstrate how the denial of his motion to reconsider resulted in reversible error on appeal. *See* Ind. App. R. 66(A) (providing that any error that does not affect the "substantial rights of the parties" is not reversible error).

## Conclusion

[21] Lacey has failed to demonstrate that the trial court erred in granting Gibson's Trial Rule 12(B)(6) motion. Moreover, Lacey has not persuaded us that the trial court committed reversible error in denying the motion to reconsider.

[22] Affirmed.

Najam, J., and Bradford, C.J., concur.