

MEMORANDUM DECISION

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision is not binding precedent for any court and may be cited only for persuasive value or to establish res judicata, collateral estoppel, or law of the case.



ATTORNEYS FOR APPELLANTS

John Charles Cox
Christopher J. Neeson
Bleecker, Brodey & Andrews
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE

Daniel L. Freeland
Daniel L. Freeland and Associates,
P.C.
Highland, Indiana

Matthew T. Furton
Hugh S. Balsam
Locke Lord LLP
Chicago, Illinois

IN THE COURT OF APPEALS OF INDIANA

John F. Girsch, individually and
derivatively on behalf of I.B.P.
Limited Partnership and TB
Limited Partnership, et al.,
Appellants-Plaintiffs,

v.

E. Thomas Collins, Jr.,
Appellee-Defendant

May 4, 2023

Court of Appeals Case No.
22A-MI-1854

Appeal from the Lake Superior
Court

The Honorable Julie N. Cantrell,
Special Judge

Trial Court Cause No.
45D09-2112-MI-1005

Memorandum Decision by Judge Crone
Judges Robb and Kenworthy concur.

Crone, Judge.

Case Summary

- [1] Bleecker, Brodey & Andrews (BB&A), an Indiana law firm, filed a petition to domesticate an Illinois judgment. The domestication petition identified the judgment creditors as John F. Girsch, individually and derivatively on behalf of I.B.P. Limited Partnership and TB Limited Partnership, et al. and the judgment debtor as E. Thomas Collins, Jr. After the trial court entered a judgment domesticating the Illinois judgment (domestication judgment), Collins filed a motion to vacate, alleging that the domestication petition contained multiple misrepresentations, including the identity of the party seeking domestication. The trial court agreed and entered an order vacating the domestication petition and dismissing it with prejudice. BB&A filed a motion to correct error, which the trial court denied.
- [2] On appeal, BB&A asserts that the trial court abused its discretion by denying its motion to correct error and by vacating the domestication petition and dismissing it with prejudice. We affirm in part, reverse in part, and remand with instructions to dismiss the domestication petition without prejudice.

Facts and Procedural History

- [3] The underlying litigation began in Illinois approximately twenty years ago and involves a derivative shareholder action brought by the limited partners of I.B.P. Limited Partnership and TB Limited Partnership (the Limited Partnerships) against the general partners of the Limited Partnerships for breach

of their fiduciary duties to the Limited Partnerships. Specifically, John F. Girsch, Edward Zifkin, Marc Munaretto, and Mark Wheelles, individually and derivatively on behalf of TB Limited Partnership, and Marc Munaretto and William Skrzelowski, individually and derivatively on behalf of I.B.P. Limited Partnership (collectively referred to as Plaintiffs),¹ filed the derivative action against Collins, Dennis J. Hiffman, Richard E. Hulina, and John E. Shaffer, the general partners of the Limited Partnerships.

[4] In 2017, Plaintiffs entered into a settlement with Shaffer. The Illinois trial court issued a final order on the Shaffer settlement, in which it ordered that \$2,400,000 be distributed to Plaintiffs and \$1,600,000 be distributed to Plaintiffs' counsel. Appellants' App. Vol. 3 at 61.

[5] Also in 2017, the Illinois trial court entered an order for partial summary judgment in the underlying Illinois action, in which it ruled as follows: (1) any compensatory damages on the derivative claims must be paid to the Limited Partnerships; (2) those compensatory damages must be distributed to every partner, regardless of wrongdoing, according to each partner's percentage interest in the Limited Partnerships; (3) Plaintiffs would be entitled to attorney fees under the "common fund doctrine;"² and (4) the recovery of attorney fees

¹ In the Illinois case, Plaintiffs were sometimes referred to as the "Intervening Plaintiffs" because the lawsuit was initiated by an individual who withdrew from the case and Plaintiffs intervened. Appellants' App. Vol. 2 at 20.

² The Illinois trial court explained,

Under the common fund doctrine, a court of equity or a court in the exercise of equitable jurisdiction may, in its discretion, order an allowance of attorney's fees to a party who, at his

would not be limited by Plaintiffs' percentage of ownership interest. *Id.* at 52-53.

[6] In February 2021, the Illinois trial court entered an order finding that under the Uniform Limited Partnership Act, the proceeds from Plaintiffs' settlement with Shaffer belonged to the Limited Partnerships, not the named Plaintiffs, and therefore the Plaintiffs were obligated to remit that money to the Limited Partnerships. However, the Illinois trial court found that "the more practical solution would be to set off the \$2.4 million from the amounts allocated to [Plaintiffs] in the final judgment order." *Id.* at 64. The following day, Collins, Hiffman, and Hulina, who were still general partners of the Limited Partnerships, entered into a settlement agreement with the Limited Partnerships, in which the Limited Partnerships agreed "not to enforce any rights to collect any amounts due to the Limited Partnerships" related to the damages sought in the derivative claims. *Id.* at 75.

[7] In August 2021, the Illinois trial court issued the final judgment that is the foreign judgment at issue in this case. The Illinois judgment bears a caption that identifies the plaintiffs as "John F. Girsch, individually and on [sic] derivatively on behalf of I.B.P. Limited Partnership and TB Limited Partnership, et al." (Caption Plaintiffs). Appellants' App. Vol. 2 at 20. By this time Girsch had

own expense has maintained a successful suit for the preservation, protection or increase of a common fund or of common property, or who has created at his own expense or brought into court, a fund in which others may share with him.

Appellants' App. Vol. 3 at 53 (citation and quotation marks omitted).

passed away, and in the first paragraph of the Illinois judgment, the Illinois trial court identified the Estate of John Girsch as a plaintiff in the action. The Illinois trial court found that Collins, Hiffman, and Hulina breached their fiduciary duties to the Limited Partnerships and that the Limited Partnerships suffered compensatory damages totaling \$87,325,788, and it entered judgment in favor of the Limited Partnerships for that sum. *Id.* at 20-22. However, due to the setoff from the Shaffer settlement, the Illinois trial court found that Girsch’s Estate, Zifkin, Munaretto, Wheelles, and Skrzelowski would not be entitled to any distribution of the derivative award. The trial court also found that Collins and Hulina breached their fiduciary duties to Girsch’s Estate, Zifkin, Munaretto, and Wheelles. The Illinois trial court determined that Girsch’s Estate, Zifkin, Munaretto, and Wheelles suffered compensatory damages and, after applying the setoff from the Shaffer settlement, entered judgment in their favor for sums not relevant here.

[8] Finally, and significantly, the Illinois trial court “award[ed] the Law Offices of Edward T. Joyce & Associates, P.C. (‘Derivative Counsel’) a fee equal to twenty percent (20%) of the total \$87,325,788 common fund created through their efforts less the \$1.6 million that they received through the Shaffer settlement.... [for] a total fee award [of] \$15,865,157.60” *Id.* at 22. The Illinois trial court also awarded Derivative Counsel reimbursement for litigation expenses for a total award of \$15,902,100.91 to be “paid out of the total common funds.” *Id.*

[9] In December 2021, the matter in this appeal was initiated when BB&A filed an appearance in the Indiana trial court for Caption Plaintiffs. *Id.* at 17. Also, BB&A attorney John C. Cox filed a petition to domesticate foreign judgment pursuant to Indiana Code Chapter 34-54-11, Indiana’s Uniform Enforcement of Foreign Judgments Act (UEFJA), on behalf of Caption Plaintiffs against Collins. *Id.* at 19. The domestication petition alleged that the Illinois trial court had “entered a Judgment against [Collins],” that Collins owned property in Lake County, and that there was “an amount due and owing from [Collins] to [Caption Plaintiffs] in the sum of \$15,865,157.60, plus litigation expenses.... [f]or a total amount due of \$15,902,100.91.” *Id.* The attachments to the domestication petition included a copy of the Illinois judgment and an affidavit signed by Douglas C. Giese. In his affidavit, Giese attested that he was an employee of Markoff Law LLC, located in Chicago, Illinois, “in the Capacity of Counsel for [Caption Plaintiffs],” that he was personally familiar with this account and authorized to make the affidavit, and that the name of the judgment creditor is “John F. Girsch, individually and on [sic] derivatively on behalf of I.B.P. Limited Partnership and TB Limited Partnership, et al.” *Id.* at 54 (typography altered).

[10] On February 9, 2022, the trial court entered the domestication judgment, which found that “Full Faith and Credit” should be given to the Illinois judgment and that Caption Plaintiffs were entitled to enforce and recover from Collins “the sum of \$15,865,157.60, plus litigation expenses for ... a total amount due of: \$15,902,100.91.” *Id.* at 25.

[11] On March 17, 2022, Collins filed a motion to vacate pursuant to Indiana Trial Rule 60(B)(3) with supporting exhibits, alleging that the domestication judgment was procured through misrepresentations. He alleged that the domestication petition misrepresented the amount of the judgment and was not filed by the judgment creditors. Specifically, he alleged that the Illinois judgment awarded a judgment of \$87,325,788 to the Limited Partnerships, and that \$15,865,157.60 was a percentage of that \$87,325,788 judgment for an attorney fee allocation plus costs that was to be paid out of the \$87,325,788 “common fund.” *Id.* at 32. Collins alleged that the Limited Partnerships did not hire the lawyers who filed the domestication petition, that the lawyers were hired by someone other than the Limited Partnerships, that the lawyers appeared to be advancing the interests of Derivative Counsel, and that the Caption Plaintiffs had no interest in the common fund award of \$15,902,100.91. *Id.* at 32-33. Further, Collins stated that Girsch was deceased and that Girsch’s Estate, Zifkin, Munaretto, and Wheelles had been paid on their direct claims in December 2021. Collins also averred that the domestication petition did not include the last known address of the judgment creditor as required by the UEFJA. Finally, Collins alleged that an appeal and cross-appeal of the Illinois judgment were pending and that at least two post-judgment motions were pending in the Illinois trial court.

[12] On March 22, 2022, the trial court issued an order staying all matters related to the domestication petition. Appellants’ App. Vol. 3 at 176. On March 23, 2022, the trial court issued an order setting a hearing for April 21, 2022, on all matters

related to the domestication petition and Collins’s motion to vacate and ordered attorneys Giese and Cox to appear in person. *Id.* at 177. On April 21, 2022, the trial court held the hearing. Giese and Cox did not appear.

[13] On April 28, 2022, the trial court issued an order, in which it found in relevant part as follows: (1) the domestication petition was filed in the name of a deceased person, namely John F. Girsch, who died in 2016; (2) the amount of the judgment sought to be domesticated is \$15,902,100.91, but that amount was awarded solely as attorney fees and costs in connection with a much larger judgment; (3) the only part of the Illinois judgment sought to be domesticated is the attorney fee portion; (4) Giese and Cox failed to disclose that there were appeals of the Illinois judgment and post-judgment proceedings were pending in the Illinois trial court;³ (5) Giese and Cox appeared to be posing as attorneys for the judgment creditors in the Illinois case to advance the financial interests of the counsel in the derivative action; (6) the court believed that Giese and Cox were engaged and/or hired by counsel in the derivative action to advance that attorney’s personal interest in collecting fees and expenses that were contemplated to have been paid out of the “common fund”; (7) the court was unable to determine who gave the direction to Giese and Cox to file the domestication petition; (8) the court believed that Giese and Cox “attempted to

³ The UEFJA does not require that a judgment creditor inform the trial court that the foreign judgment is on appeal, nor does it prohibit registration of a foreign judgment while it is on appeal. Indiana Code Section 34-54-11-4 requires the trial court to stay enforcement of the foreign judgment where the judgment debtor shows that an appeal is pending or will be taken or a stay of execution of the foreign judgment has been granted.

perpetrate a fraud” on the court; and (9) Giese and Cox failed to respond to Collins’s motion to vacate and failed to appear at the hearing after being ordered to do so. 4/28/22 Order at 1-3. The trial court concluded that it detrimentally relied upon information contained in the domestication petition and attachments, including Giese’s affidavit, and that the information contained in the domestication petition is “incomplete, misleading and false.” *Id.* at 3. The trial court ordered that the domestication petition be vacated and dismissed with prejudice. The trial court also authorized Collins to file a motion for sanctions and stated that it would report Giese and Cox to each of their state’s respective disciplinary commissions. *Id.*

[14] On May 31, 2022, BB&A filed a motion to correct error. BB&A asserted that it “was retained to represent [Caption Plaintiffs] in ongoing litigation” in Illinois and to domesticate the Illinois judgment, acknowledged that there was an appeal and cross-appeal of the Illinois judgment, and stated that the purpose of domestication of the Illinois judgment was to preserve the status quo and maintain priority. Appellants’ App. Vol. 3 at 179. BB&A also stated that both the March 22 and 23 orders were sent to it in the same electronic notice, but that BB&A staff did not recognize that the electronic notice included the March 23 order, the staff did not forward the March 23 order to Cox, and Cox was unaware of the March 23 order and the April 21 hearing. *Id.* at 183. The motion was supported by Cox’s affidavit and a second affidavit executed by Giese. In his second affidavit, Giese attested as follows: his law firm, Markoff Law, “was retained by the Law Offices of Edward T. Joyce & Associates, P.C., Counsel

for [Caption Plaintiffs]” in the Illinois derivative action, to assist in efforts to enforce the Illinois Judgment; he prepared and executed the affidavit in support of filing foreign judgment as part of that effort; the domestication of the Illinois judgment was ministerial in nature; and he did not receive notice of the March 23, 2022 or the April 28, 2022 orders because he did not have an appearance on file in the Indiana domestication action. *Id.* at 199-200.

[15] Collins filed a statement in opposition to the motion to correct error. On July 6, 2022, the trial court denied BB&A’s motion to correct error and authorized Collins to file a motion for sanctions in the form of attorney fees. This appeal ensued.

Discussion and Decision

[16] We review a trial court’s ruling on a motion to correct error for an abuse of discretion, which occurs when the court’s decision is against the logic and effect of the facts and circumstances before the court or if the court has misinterpreted the law. *Poiry v. City of New Haven*, 113 N.E.3d 1236, 1239 (Ind. Ct. App. 2018). However, we review questions of law de novo. *Id.*

[17] Our review is also guided by the standard of review for the ruling underlying the motion to correct error. Here, BB&A’s motion to correct error alleged that the trial court abused its discretion when it granted Collins’s motion to vacate. Indiana Trial Rule 60(B) provides in relevant part, “On motion and upon such terms as are just the court may relieve a party ... from a judgment ... for the following reasons: ... (3) fraud (whether heretofore denominated intrinsic or

extrinsic), misrepresentation, or other misconduct of an adverse party.” The moving party bears the burden to establish the ground for relief under Trial Rule 60(B). *In re Paternity of P.S.S.*, 934 N.E.2d 737, 740 (Ind. 2010). We review the trial court’s ruling on a motion for relief from judgment using an abuse of discretion standard. *Speedway SuperAmerica, LLC v. Holmes*, 885 N.E.2d 1265, 1270 (Ind. 2008).

[18] BB&A claims that the trial court abused its discretion in vacating the domestication petition and dismissing it with prejudice because the Illinois judgment is entitled to full faith and credit. The Full Faith and Credit Clause of the United States Constitution provides that “[f]ull Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State.” U.S. Const. art. IV, § 1. The constitutional provision is implemented pursuant to the UEFJA, which provides that records and judicial proceedings from courts in other states “shall have full faith and credit given to them in any court in Indiana as by law or usage they have in the courts in which they originated.” Ind. Code § 34-39-4-3. Full faith and credit provides that “the judgment of a state court should have the same credit, validity, and effect in every other court of the United States, which it had in the state where it was pronounced.” *Gardner v. Pierce*, 838 N.E.2d 546, 550 (Ind. Ct. App. 2005) (quoting *N. Ind. Commuter Transp. Dist. v. Chicago SouthShore & S. Bend R.R.*, 685 N.E.2d 680, 685 (Ind. 1997)).

[19] Here, we are faced with a novel situation wherein the trial court registered a foreign judgment based on a domestication petition that it found was

“incomplete, misleading and false.” Appellants’ App. Vol. 2 at 15. BB&A maintains that its domestication petition did not misrepresent any facts. Although the trial court found many deficiencies, the most significant involves whether the domestication petition was filed on behalf of the proper party. Giese’s first affidavit stated that his law firm was hired by Caption Plaintiffs, but his second affidavit clarified that his law firm was hired by Derivative Counsel. Also, the amount of the Illinois judgment that the domestication petition sought to domesticate was the amount awarded to Derivative Counsel for attorney fees, not the amount of the judgment awarded to the Limited Partnerships as compensatory damages.⁴ Giese’s first affidavit did not clarify the identity of the party seeking domestication because it did not include the judgment creditor’s last known address as required by Indiana Code Section 34-54-11-2.⁵ These circumstances support the trial court’s determination that the domestication petition did not accurately state the identity of the party seeking to domesticate the Illinois judgment. Under these circumstances, we cannot say that the trial court abused its discretion by vacating the domestication petition.⁶

⁴ It bears emphasis that the award of attorney fees is twenty percent of the amount of the common fund created by the judgment entered in favor of the Limited Partnerships. Thus, the attorney fee award of \$15,865,157,60 is contingent upon the Limited Partnerships’ recovery of \$87,325,788 in compensatory damages.

⁵ Section 34-54-11-2 requires that a judgment creditor filing a foreign judgment for domestication file an affidavit with the clerk of the court setting forth the name and last known address of both the judgment debtor and the judgment creditor.

⁶ BB&A contends that Collins’s Trial Rule 60(B)(3) motion is an improper collateral attack on the Illinois judgment, that the trial court does not have the authority to vacate the Illinois judgment, and that the question regarding the proper party to bring the domestication petition involves whether Caption Plaintiffs

[20] However, we reach a different conclusion regarding whether dismissal with prejudice was proper. In applying the Full Faith and Credit Clause, the United States Supreme Court has explained as follows:

With respect to judgments, the full faith and credit obligation is exacting. A final judgment in one State, if rendered by a court with adjudicatory authority over the subject matter and persons governed by the judgment, qualifies for recognition throughout the land. A State may not disregard the judgment of a sister State because it disagrees with the reasoning underlying the judgment or deems it to be wrong on the merits. On the contrary, the full faith and credit clause of the Constitution precludes any inquiry into the merits of the cause of action, the logic or consistency of the decision, or the validity of the legal principles on which the judgment is based.

V.L. v. E.L., 577 U.S. 404, 407 (2016) (quotation marks and citations omitted).

“The judgment of a sister state, regular and complete upon its face, is prima facie valid.” *Tom-Wat, Inc. v. Fink*, 741 N.E.2d 343, 348 (Ind. 2001) (internal quotation marks and citation omitted).⁷

[21] Although the initial registration of the Illinois judgment was based on a defective domestication petition, that does not relieve this state of its

have standing to pursue the award of attorney fees rather than any misrepresentation of the party bringing the petition. We are not persuaded that these contentions accurately frame the issue on appeal.

⁷ However, Indiana is not required to give full faith and credit to a foreign judgment entered by a court that lacked subject matter jurisdiction or personal jurisdiction. *EBF Partners, LLC v. Novabella, Inc.*, 96 N.E.3d 87, 93 (Ind. Ct. App. 2018). Indeed, “before a court is bound by the judgment rendered in another State, it may inquire into the jurisdictional basis of the foreign court’s decree.” *Id.* (quoting *Underwriters Nat’l Assurance Co. v. N. Carolina Life & Accident & Health Ins. Guar. Ass’n*, 455 U.S. 691, 705 (1982)).

constitutional obligation to afford full faith and credit to the Illinois judgment. Accordingly, the trial court abused its discretion by dismissing the domestication petition with prejudice. If and when a petition to domesticate the Illinois judgment is brought by the proper parties and in conformance with the UEFJA, the Illinois judgment may be domesticated and afforded full faith and credit.

[22] Based on the foregoing, we affirm the trial court's order vacating the domestication petition, reverse the dismissal with prejudice, and remand with instructions to dismiss the domestication petition without prejudice.

[23] Affirmed in part, reversed in part, and remanded.

Robb, J., and Kenworthy, J., concur.