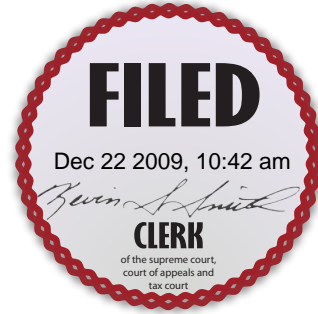


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

CHERYL WEIRD,)
)
Appellant,)
)
vs.) No. 10A04-0905-CV-283
)
ERIC EMBERTON,)
)
Appellee.)

APPEAL FROM THE CLARK CIRCUIT COURT
The Honorable Daniel Moore, Judge
Cause No. 10C01-0101-CP-5

December 22, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Cheryl Weird appeals the trial court's entry of summary judgment in favor of Eric Emberton.

We affirm.¹

ISSUE

Whether the trial court erred in awarding Emberton interpleaded funds.

FACTS

At some point, Thomas and Cheryl Weird filed an action for personal injuries against Blaise Transportation, Inc. in Indiana's Clark County Circuit Court (the "Indiana Court") under Cause Number 10C01-0101-CP-005. Cheryl asserted a loss-of-consortium claim. During the pendency of the matter, the Weirds separated.

The Weirds and Blaise Transportation eventually reached a settlement. Although the settlement purportedly satisfied both of the Weirds' claims, the settlement funds were not apportioned between the Weirds. "Given the emergent conflicting claims between" the Weirds, their attorney, who held the settlement funds in the amount of \$74,575.08, filed a complaint of interpleader pursuant to Indiana Trial Rule 22 on August 17, 2005. (App. 37). The complaint joined the Weirds as defendants. The Weirds' attorney sought to pay the settlement funds to the court clerk, "to be held under Court order until further orders of the Court regarding the appropriate distribution" of the settlement funds to

¹ We heard oral argument in this matter on October 28, 2009, in Indianapolis. We thank counsel for their presentations.

Thomas and Cheryl. (App. 37). On or about August 18, 2005, and pursuant to Indiana Trial Rule 22(D),² the Indiana Court ordered that the settlement funds be deposited with the court clerk, relieving the Weirds' attorney from further responsibility as to the settlement funds.

On December 6, 2005, the Jefferson Circuit Court of Kentucky entered a judgment in favor of Emberton and against Thomas in the amount of \$100,000.00. On or about December 12, 2005, Cheryl filed a petition with the Indiana Court to apportion the settlement funds between her and Thomas. The matter was scheduled for a hearing on February 6, 2006.

In the interim, on or about January 24, 2006, Emberton filed a complaint against the Weirds in the Indiana Court. He requested that the Indiana Court "adopt the Kentucky judgment so that [he] may enforce the Kentucky judgment" and that "any funds apportioned to Thomas Weird by the [Indiana Court] be paid to [him] to satisfy the Kentucky [j]udgment." (App. 28; 29). On January 31, 2006, the Indiana Court granted Emberton's motion to intervene. For reasons unknown and despite a scheduled hearing, the Indiana Court did not enter a judgment; thus, the settlement funds remained in an escrow account, pending the Indiana Court's decision.

On May 18, 2006, Emberton filed a certified copy of his Kentucky judgment with the Indiana Court. Emberton also filed a motion for judgment on the pleadings. On May

² Trial Rule 22(D) provides that a party seeking interpleader may deposit with the trial court the amount of the claim, "and the court may thereupon order such party discharged from liability as to such claims, and the action continued as between the claimants of such money"

22, 2006, the Indiana Court found Emberton's foreign judgment to be "a valid and enforceable judgment in the State of Indiana." (App. 5). It held that the funds deposited with the Clerk of the Indiana Court "should be delivered to . . . Emberton to satisfy [the] Kentucky judgment." *Id.*

On June 16, 2006, Cheryl filed a motion for default judgment in her and Thomas' dissolution proceeding pending in Jefferson Circuit Court of Kentucky (the "Kentucky Court"). Apparently, Cheryl testified during the hearing on her motion and "requested that the judgment awarded to [the Weirds] jointly [in the Indiana Court] be allocated to her as marital property."³ (App. 22). On June 20, 2006, the Kentucky Court entered its decree, dissolving the Weirds' marriage. Among other things, the Kentucky Court awarded Cheryl "the entirety of the interest of the parties in the judgment awarded in *Thomas J. Weird and Cheryl Weird v. Blaise Transp[.], Inc.*, Case No. 10C01-0101-CP-005 in the [Indiana Court]." (App. 24).

On June 21, 2006, Cheryl filed a motion to set aside Emberton's judgment on the pleadings. Thomas also filed a motion to set aside the judgment on June 27, 2006. On June 29, 2006, the Indiana Court granted the Weirds leave to file an answer to Emberton's complaint, and it set aside the judgment on the pleadings.

In the meantime, on or about April 21, 2006, a Kentucky court had awarded National City Bank a default judgment against the Weirds on joint marital debt secured

³ The record does not reflect whether the Kentucky Court was made aware of the pending complaint for interpleader in the Indiana Court. Cheryl's request that the Kentucky Court award the entirety of the settlement funds to her despite pending litigation in the Indiana Court therefore raises concerns regarding forum shopping.

by marital property. On October 11, 2006, National City Bank, as an intervenor, filed a motion for summary judgment in the Indiana Court. Apparently without objection from any of the parties, the Indiana Court granted National City Bank's motion for summary judgment on December 11, 2006, and ordered the Clerk of the Clark Circuit Court to release interpleaded funds in the amount of \$36,466.79 to National City Bank, leaving a balance of \$38,108.29.

On April 25, 2008, Emberton filed a motion to release the remaining interpleaded funds in satisfaction of his Kentucky judgment. On May 1, 2008, the Indiana Court granted the motion and ordered the Clerk of the Clark Circuit Court to release "any proceeds on deposit" to Emberton. (App. 7). On May 7, 2008, Cheryl filed a motion to set aside the order, which the Indiana Court granted the same day. The Indiana Court therefore ordered that the settlement funds be held in the escrow account of Emberton's counsel, Jeremy McMahan.

Cheryl also had filed a motion for summary judgment on May 2, 2008. On June 2, 2008, Emberton filed a response to Cheryl's motion for summary judgment and a cross-motion for summary judgment. On October 10, 2008, the Indiana Court denied both Cheryl's motion for summary judgment and Emberton's cross-motion for summary judgment.

Emberton filed a motion for bench trial on October 21, 2008. The Indiana Court commenced a bench trial on February 4, 2009, at which time the parties renewed their

respective motions for summary judgment. After conducting the bench trial, the Indiana Court ordered the parties to submit proposed findings of fact and conclusions of law.

On March 24, 2009, the Indiana Court entered its findings of fact, conclusions of law and judgment. It found, in part, as follows:

8. The parties have filed motions, requests and cross-motions for summary judgment, leaving the questions to be determined as (i) what are the priorities of interests of the claimants and (ii) who shall receive the monies that are now on deposit in Mr. McMahon's escrow account ("the escrow account").

9. Emberton claims that his Kentucky judgment is senior to Cheryl's divorce decree and he sought enforcement of his Kentucky judgment as a priority interest, superior to the other claimants. Cheryl argues that the [Kentucky Court's] divorce decree is superior to Emberton's Judgment because that divorce court ordered that she receive all interpleaded funds.

10. Thomas has lost any interest in the interpleaded funds by virtue of either Emberton's Kentucky judgment or the Kentucky divorce decree.

11. The Court finds the following dates and events to exist to address [the order] of October 10, 2008, and the claims of Thomas, Cheryl and Emberton:

<u>DATE</u>	<u>EVENT</u>
a) 8/18/05	\$74,575.08 deposited with Clerk of this Court
b) 12/6/05	Emberton receives \$100,000 judgment against Thomas
c) 2/6/06	Prescheduled apportionment hearing (Cheryl & Thomas) did not occur
d) 5/18/06	Emberton registers Kentucky Judgment against Thomas with this Court
e) 6/16/06	Kentucky divorce judgment of Cheryl & Thomas entered in Kentucky Family Court

f) 12/11/06 Intervenor National City Bank is paid \$36,466.79 to satisfy mortgage debt of Thomas and Cheryl (each being equally responsible for this debt)

12. Emberton's Kentucky Judgment was registered/entered in this Court's record prior to the Kentucky divorce judgment between Thomas and Cheryl.

* * *

14. Both Emberton and Cheryl filed Kentucky Judgments with this Court. Neither party, nor any Intervenor, objected to any procedures or aspects of making such Judgments a valid, legal part of the Record before the Record was closed on February 4, 2009.

15. There is no genuine issue of fact precluding summary judgment in Emberton's favor and he is entitled to judgment . . . against monies in the escrow account as a matter of law.

(App. 12-14).

The Indiana Court then concluded, in pertinent part, as follows:

3. This Court must honor foreign judgments that are properly entered by a court of competent jurisdiction from a sister state. In this case, two Kentucky judgments are presented for enforcement against the remaining monies in the escrow account, believed to be \$38,108.29.

4. Emberton's Judgment was entered in this record prior to Cheryl's divorce Judgment. The [Kentucky] Court's divorce decree cannot be a senior, superior interest to Emberton's earlier entered and registered Judgment in this record.

5. Under I.C. 34-39-4-3(b) judgments of other courts in the United States are subject to full . . . faith and credit and Indiana courts may not make this mandate for full faith and credit subject to arbitrary modification.

6. A spousal loss of consortium claim is a derivative claim only and arises from injuries to the other spouse, within a marital relationship, which

are recognized in Indiana common law. It is not a separate, independent claim of a non-injured spouse on a [personal injury] case.

7. The \$74,575.08 settlement of August 18, 2005, included Cheryl's settlement of her consortium claim. When considering the benefit conferred upon her by payoff of the National City Mortgage debt . . . , the Court concludes that Cheryl's original derivative claim for loss of consortium claim was satisfied when she was relieved of National City liability . . . by this payoff. This was a benefit conferred upon Cheryl, arising from injuries to Thomas.

8. When Cheryl and Thomas declined to specifically apportion settlement portions after the \$74,575.08 was first paid in to the Clerk on August 18, 2005 (or after the National City payout), and in view of all that occurred thereafter, the Court's conclusion for determining entitlement to remaining funds are based on actions/inactions of Thomas and Cheryl and the totality of all other circumstances in this record.

9. The Court concludes that Emberton should have priority of enforcement of his judgment against the net proceeds remaining in the escrow account

(App. 14-15) (internal citations omitted).

Only Cheryl appeals the trial court's order.

DECISION

Cheryl asserts that the Indiana Court erred in failing to award the interpleaded funds to her. Specifically, she argues that 1) the Indiana Court's award of the remaining settlement funds violated the dictates of full faith and credit; and 2) the Indiana Court erred in finding that her claim for loss of consortium was satisfied by the payoff to National City Bank.

Summary judgment is appropriate only where the evidence shows that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of

law. Ind. Trial Rule 56(C). All facts and reasonable inferences drawn from those facts are construed in favor of the nonmoving party. *Hopper v. Carey*, 810 N.E.2d 761, 764 (Ind. Ct. App. 2004), *trans. denied*. “We must reverse the grant of a summary judgment motion if the record discloses an incorrect application of the law to those facts.” *Lake States Ins. Co. v. Tech Tools, Inc.*, 743 N.E.2d 314, 317 (Ind. Ct. App. 2001). Where there are no disputed facts with regard to a motion for summary judgment and the question presented is a pure question of law, we review the matter de novo. *Harold McComb & Son, Inc. v. JPMorgan Chase Bank, NA*, 892 N.E.2d 1255, 1257 (Ind. Ct. App. 2008).

“Specific findings and conclusions by the trial court are not required, and although they offer valuable insight into the rationale for the judgment and facilitate our review, we are not limited to reviewing the trial court’s reasons for granting or denying summary judgment.” *Doe v. Donahue*, 829 N.E.2d 99, 106 (Ind. Ct. App. 2005), *trans. denied, cert. denied*, 126 S. Ct. 2320 (2006). “In addition, ‘[t]he fact that the parties [made] cross-motions for summary judgment does not alter our standard of review.’” *Id.* (quoting *Indiana Farmers Mut. Ins. Group v. Blaskie*, 727 N.E.2d 13, 15 (Ind. Ct. App. 2000)).

1. Full Faith and Credit

Cheryl argues that the Indiana Court “was without authority to make an independent determination or allocation of the funds between Thomas and Cheryl once the [Kentucky Court’s] Judgment was final and binding.” Cheryl’s Br. at 5. She

maintains that the Indiana Court “was obligated, under the full faith and credit clause of the United States Constitution and [Indiana Code section] 34-39-4-3, to distribute the money” to her. *Id.*

Full faith and credit means 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.” Indiana has codified this notion at Indiana Code § 34-39-4-3, 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.” Full faith and credit commands deference to the judgments of foreign courts, and “the judgment of a sister state, regular and complete upon its face, is prima facie valid.”

Gardner v. Pierce, 838 N.E.2d 546, 550 (Ind. Ct. App. 2005) (internal citations omitted).

Here, the Weirds’ attorney filed a complaint for interpleader in the Indiana Court on August 17, 2005. After his discharge, the action continued between the Weirds. The Indiana Court, however, did not enter a final disposition as to the complaint. Accordingly, the Indiana Court retained jurisdiction over the settlement funds. *See Chapin v. Hulse*, 599 N.E.2d 217, 219 (Ind. Ct. App. 1992) (“Once a trial court acquires jurisdiction, it retains jurisdiction until it makes a final disposition of the case.”), *trans. denied*.

On June 16, 2006, the Kentucky Court awarded “the entirety of the interest of the [Weirds] in the judgment awarded” in the Indiana action to Cheryl. (App. 24). There is no evidence, however, that the Indiana Court had entered a final judgment.⁴ In fact, given

⁴ The chronological case summary in the Indiana action does not indicate that the settlement between the Weirds and Blaise Transportation was filed with the Indiana Court.

the complaint for interpleader, we cannot say that final judgment in the Indiana action existed because all issues as to all parties had not been disposed of, thereby ending the case and leaving “nothing for future determination.” *See Georgos v. Jackson*, 790 N.E.2d 448, 451 (Ind. 2003), *reh’g denied*. Rather, the Weirds’ interest in the settlement funds remained undetermined, given Emberton’s intervention in the complaint for interpleader. Moreover, notwithstanding the complaint for interpleader pertaining to the apportionment of the settlement funds between the Weirds, the settlement between the Weirds and Blaise Transportation would not have constituted a final judgment because it did not determine damages between them. *See id.* (“A judgment that fails to determine damages is not final.”). Hence, the Kentucky Court’s award to Cheryl was subject to, and contingent upon, the Indiana Court’s final determination regarding apportionment of the settlement funds.

We therefore do not find that the Kentucky Court awarded Cheryl \$74,575.08. Rather, it only awarded that amount in which the Indiana Court determined either Cheryl or Thomas to have an interest. The Indiana Court subsequently held that Cheryl’s consortium claim was a derivative claim only and any interest in the settlement funds was satisfied by the release of settlement funds to pay off marital debts owed to National City Bank; it also held that Thomas had forfeited any interest in the settlement funds. Thus, the entirety of the Weirds’ interest in the settlement funds consisted of only that amount awarded to National City Bank. Accordingly, we find no violation of full faith and credit in awarding the remaining interpleaded funds to Emberton.

2. Satisfaction of the Loss-of-Consortium Claim

Cheryl further asserts that the Indiana Court erred in “allocat[ing] a percentage of the funds . . . for her loss of consortium claim and then proceed[ing] to hold that those were extinguished by the attachment of National City Bank.” Cheryl’s Br. at 8. Essentially, Cheryl argues that the Indiana Court’s award in her favor was inadequate. We disagree.

“A loss of consortium claim is described as a claim derivative of the injured spouse’s personal injury claim.” *Evans v. Buffington Harbor River Boats, LLC*, 799 N.E.2d 1103, 1112 (Ind. Ct. App. 2003), *trans. denied*. It is derivative because it “derives its viability from the validity of the claim of the injured spouse against the wrongdoer.” *Indiana Patient’s Comp. Fund v. Winkle*, 863 N.E.2d 1, 6 (Ind. Ct. App. 2007) (quoting *Nelson v. Denkins*, 598 N.E.2d 558, 563 (Ind. Ct. App. 1992)), *trans. denied*. “They are basically an additional element of the damage caused by the incident[.]” 863 N.E.2d at 6. Fact-finders are to be afforded “great latitude in making damage award determinations.” *Hockema v. J.S.*, 832 N.E.2d 537, 541 (Ind. Ct. App. 2005), *trans. denied*.

Here, the Indiana Court concluded that “Cheryl’s original derivative claim for loss of consortium . . . was satisfied” by the release of \$36,466.79 to National City Bank. (App. 15). The amount released to National City Bank constituted almost half of the settlement funds. Furthermore, other than her argument to the contrary, Cheryl has presented no evidence as to why her consortium claim should be of greater value than

that found by the Indiana Court. We therefore cannot say that the Indiana Court's apportionment of the settlement funds to Cheryl is inadequate as a matter of law, particularly where the Indiana Court allocated nearly half of the settlement funds to Cheryl's damages. *Cf. Evans*, 799 N.E.2d at 1113-14 (finding that the evidence could support a jury determination that the spouse claiming loss of consortium suffered no compensable damages). Accordingly, we find no error in the Indiana Court's determination that Cheryl's damages for her loss of consortium, and therefore her interest in the settlement funds, were subsumed by the award to National City Bank.⁵

Affirmed.

MATHIAS, J., concurs.

ROBB, J., concurs in result with separate opinion.

⁵ Given our holding that Cheryl had no interest in the settlement funds, once a portion was used to satisfy her debt to National City Bank, we need not address Cheryl's assertion that Emberton, "[a]s merely a holder of a judgment against one of the co-owners" of the settlement funds, did "not have any 'superior' claim to the funds as to Cheryl" and therefore was not entitled to the settlement funds. Cheryl's Br. at 5.

**IN THE
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vs.)	No. 10A04-0905-CV-283
)	
ERIC EMBERTON,)	
)	
Appellee.)	

ROBB, Judge, concurring in result

I, too, believe the trial court’s judgment in favor of Emberton should be affirmed, but for reasons different than the majority. I therefore concur in result.

The majority analyzes Cheryl’s argument as a matter of full faith and credit. I believe, however, it is a simple matter of priority. The settlement funds for Thomas’s personal injury were awarded as a whole to Thomas and Cheryl. Because they were at the time of the settlement in the process of dissolving their marriage, the undivided settlement funds were interpleaded and deposited with the Indiana Court clerk.⁶ Thomas sought to have the settlement funds apportioned, but for reasons not apparent from the

⁶ The parties’ dissolution action was proceeding in the Kentucky Court. In Kentucky, when a spouse suffers a personal injury during the marriage, recovery for lost wages and permanent impairment of ability to earn money is considered marital property, but any portion constituting damages for pain and suffering and other elements “peculiarly personal” to the party receiving it, such as loss of consortium in this case, is nonmarital. Weakley v. Weakley, 731 S.W.2d 243, 244-45 (Ky. 1987). Presumably, the Weirds wanted the settlement funds to be apportioned into the various elements to aid in dividing the funds as part of the dissolution.

record, a hearing scheduled for that purpose was not held and was not rescheduled. Neither party took steps to have the settlement funds apportioned thereafter. Thus, when Emberton registered his judgment with the Indiana Court on May 18, 2006, the settlement funds had not been apportioned and belonged to both Thomas and Cheryl. Cheryl's individual interest did not arise until June 20, 2006, when the Kentucky Court entered a decree of dissolution awarding her "the entirety of the interest of the parties" in the settlement funds. Appellant's App. at 24.

There is no doubt Emberton's Kentucky judgment is entitled to full faith and credit in the Indiana Court. See Hamilton v. Hamilton, 914 N.E.2d 747, 752 (Ind. 2009) ("The Full Faith and Credit Clause 'generally requires every State to give to a judgment at least the res judicata effect which the judgment would be accorded in the state which rendered it.'") (quoting Durfee v. Duke, 375 U.S. 106, 109 (1963)). Emberton registered his judgment with the Indiana Court asserting his interest against any of the settlement funds apportioned to Thomas. His judgment was obtained and registered prior to Cheryl obtaining her judgment with respect to Thomas's interest in the settlement funds. As the holder of a first-in-time judgment, Emberton was entitled to priority over Cheryl as to the settlement funds. Cf. Atlas Securities Co. v. Grove, 79 Ind. App. 144, 137 N.E. 570, 572 (1922) ("The principle is believed to be universal . . . that a prior lien gives a prior claim, which is entitled to prior satisfaction, out of the subject it finds . . .") (citing Rankin v. Scott, 25 U.S. 177 (1827)); Brownell Imp. Co. v. Nixon, 48 Ind. App. 195, 92 N.E. 693, 695 (1910) ("At common law priority of liens as a rule was fixed by the time the liens

attached to the subject-matter . . .”).

