

IN THE COURT OF APPEALS OF MARYLAND

No. 56

September Term, 1997

PORTER HAYDEN COMPANY
et al.

v.

BARBARA BULLINGER
et al.

Bell, C.J.
Eldridge
Rodowsky
Chasanow
Raker
Wilner
Cathell, Dale R. (Specially Assigned)

JJ.

Concurring and Dissenting
Opinion by Rodowsky, J.

Filed: May 15, 1998

Rodowsky, J., dissenting.

I join in Parts I and II of the Court's opinion. I respectfully dissent from the holding in Part III of the Court's opinion that the effect of the entry of a default judgment for contribution against Babcock & Wilcox Co. (B & W) on the third-party claim of Porter Hayden Company (PH) was to reduce the amount of the judgment payable to the plaintiff by the nonsettling defendants. The Court does not consider the terms of the release between B & W and John M. Grimshaw (Grimshaw). Grimshaw represents, and the Court of Special Appeals treated as a fact, that the Grimshaw-B & W release provided that "in order for [PH] to be entitled to a decrease or pro rata reduction of the damages claimed by Grimshaw, it must be adjudicated that the releasees are joint tort-feasors." *Anchor Packing Co. v. Grimshaw*, 115 Md. App. 134, 183, 692 A.2d 5, 30 (1997). As explained below, the default should not be determined to adjudicate B & W as a joint tort-feasor, *vis-a-vis*, and to the detriment of, Grimshaw.¹

¹Grimshaw's action was consolidated with other cases. Although no part of the Grimshaw-B & W release appears in the record extract, the critical language from releases negotiated by B & W with other plaintiffs in the consolidation does appear in their memorandum supporting a motion to vacate the default in favor of PH against B & W. That provision reads:

"7. It is further agreed and understood by the parties hereto that any other person or organization whom we claim are liable to us for our injuries, losses and damages should not be entitled to a satisfaction or reduction or pro rata reductions of the damages we are claiming against them by reason of the payment herein, unless it is adjudicated that Releasees are joint tortfeasors with said other person or organization. In the event that Releasees or any of them are adjudicated to be joint tortfeasors, then the payment herein shall constitute a reduction to the extent of either the dollar amount of the payment or the pro rata share of liability of any such Releasees, whichever is greater,

(continued...)

It appears that Grimshaw and B & W settled before Grimshaw filed suit against PH and others. PH impleaded B & W as a third-party defendant, claiming contribution. B & W neither answered the third-party complaint nor responded to discovery requests submitted by PH. On August 30, 1995, the circuit court filed, and the clerk docketed, the following order:

"ORDERED that Judgment by Default, pursuant to Maryland Rule 2-433(a)(3) be and the same is hereby entered in favor of [PH], Third-Party Plaintiff, against [B & W], Third Party Claims for contribution filed against [B & W] herein."

Maryland Rule 2-433(a)(3) (1998 Repl. Vol.) provides that

"the [circuit court], if it finds a failure of discovery, may enter such orders in regard to the failure as are just, including ...

....

"... [a]n order ... entering a judgment by default that includes a determination as to liability and all relief sought by the moving party against the failing party If, in order to enable the court to enter default judgment, it is necessary to take an account or to determine the amount of damages ... the court may rely on affidavits, conduct hearings or order references as appropriate, and, if requested, shall preserve to the plaintiff the right of trial by jury."

¹(...continued)

for the damage recoverable by us from other joint tortfeasors. This release is expressly intended and shall be construed to release Releasees for all claims of contribution pursuant to the Uniform Contribution Among Tortfeasors Act."

Because the cases before us will be remanded, under Part II of the Court's opinion for the purpose of reviewing the actual releases, this Court should give the Circuit Court for Baltimore City guidance in that undertaking.

Other plaintiffs in the consolidated cases sought to vacate the above order, but the cases went to trial without the court's ruling on their motion.

The consolidated cases were submitted to the jury on special interrogatories. Grimshaw's claims went to the jury against four defendants, three of whom, including PH, were found to be liable. At the suggestion of PH, the court simply batched the cross-claim and third-party claim defendants, without regard to which of the defendants claimed against them. Describing the cross-claim and third-party claim defendants simply as "listed parties," the court submitted their names to the jury on issues designed to determine which of them were joint tort-feasors.² Ten listed parties were included in those special interrogatories, most of whom were entities that had settled with Grimshaw.³ B & W was not one of the

²The issues submitted to the jury concerning the cross-claim and third-party claim defendants, referred to in the special issues as the "listed parties," were as follows:

"Do you find that [it has been] proven by a preponderance of the evidence that John Grimshaw's exposure to the products manufactured, supplied, installed and/or distributed by the listed parties was a substantial contributing factor in the development of his mesothelioma?"

"Do you find that it has been proven by a preponderance of the evidence that any of the listed parties were negligent in manufacturing, supplying, installing, and/or distributing asbestos-containing products to which Mr. Grimshaw was exposed?"

"Do you find that it has been proven by a preponderance of the evidence that the listed parties manufactured, supplied, installed, and/or distributed asbestos-containing products which reached Mr. Grimshaw in defective condition unreasonably dangerous to him?"

³This procedure illustrates one way in which "the test of [joint tort-feasor] liability" may
(continued...)

listed parties. The jury returned a verdict in favor of Grimshaw for \$1.1 million. The jury also found that each listed party was liable, but the circuit court later revised the judgment to eliminate one of the listed parties.

The circuit court ultimately entered a final judgment, docketed April 17, 1996, against PH and two other defendants, jointly and severally, in the amount of \$170,357.14.⁴

Grimshaw's position is that the verdict should not be reduced based on his settlement with B & W. Grimshaw relies on the well-established proposition that, absent a contractual provision to the contrary, the amount paid by a settling defendant under the type of release apparently involved here is treated under the Uniform Contribution Among Joint Tort-feasors Act (the Act) as a voluntary payment if the payor is not adjudicated as a joint tort-feasor. *Allgood v. Mueller*, 307 Md. 350, 357 & n.2, 513 A.2d 915, 919 & n.2 (1986); *Brooks v. Daley*, 242 Md. 185, 193, 218 A.2d 184, 188 (1966); *Swigert v. Welk*, 213 Md. 613, 619, 133 A.2d 428, 431 (1957); *Collier v. Eagle-Picher Indus., Inc.*, 86 Md. App. 38, 56, 585 A.2d 256, 265 (1991). After his settlement with B & W, Grimshaw's interest was in having

³(...continued)
be "something short of an actual judgment." *Swigert v. Welk*, 213 Md. 613, 619, 133 A.2d 428, 431 (1957).

⁴The docket entries of April 17, 1996, prior to entry of the final judgment, include an order dated April 15, 1996, that in terms revises an earlier judgment entered March 11, 1996, in order "to account for the default order entered on August 30, 1995 against [B & W] in favor of [PH]." Whatever the intent of the quoted order might have been, it is clear that the final judgment did not consider B & W to be a joint tort-feasor. The April 17, 1996 judgment identifies the joint tort-feasors whose settlements were taken into account as credits against the verdict, and that enumeration does not include B & W.

no adjudication that B & W was a joint tort-feasor. Having given a release to B & W, Grimshaw could not sue B & W as an original defendant; nor could Grimshaw be expected to allege or undertake to prove that a nonparty, B & W, acted tortiously toward Grimshaw. In the instant matter the Court of Special Appeals, correctly in my view, emphasized the interest that Grimshaw had in avoiding an adjudication of joint tort-feasor liability on the part of B & W. Because of an interest such as this, it has been held that a trial court erred in excluding a plaintiff from participating in post-trial proceedings in which the court was determining the joint tort-feasor status of settling defendants. *Collier*, 86 Md. App. at 57-58, 585 A.2d at 265-66.

B & W's interest was in enjoying the peace that it had bought. It had no concerns of liability to Grimshaw. B & W apparently believed that it had little or no exposure for contribution to any settling or nonsettling tort-feasor since any adjudication that B & W was a joint tort-feasor at least would credit B & W with having paid its pro rata share. B & W's concern seems to have been in saving the expense of litigation, as evidenced by its lack of response to PH's third-party complaint and to PH's request for discovery. But it appears that the release negotiated by B & W, a so-called *Swigert* release, did not require Grimshaw, as a matter of contract, to credit against a judgment in favor of Grimshaw the greater of the amount paid by B & W or a pro rata share, even if B & W were not adjudicated as a joint tort-feasor.

PH, on the other hand, was interested in demonstrating that B & W was a joint tort-feasor, and PH's requested discovery from B & W properly would have been directed

to that issue. Further, a party in the position of PH would not necessarily know that the plaintiff had settled with an entity that was not joined as an original defendant, and PH represents to us that it learned of the existence of a Grimshaw-B & W release when PH moved for default against B & W.

Although PH may never have seen the terms of the Grimshaw-B & W release, I would hold (and the majority of the Court does not seem to disagree) that the obligation was on PH to obtain an adjudication that B & W was a joint tort-feasor in order for PH to have the verdict in favor of Grimshaw reduced under the Act by the B & W settlement. Not only was PH the third-party plaintiff, but PH has a greater interest in obtaining the adjudication than does B & W, while the plaintiff under the *Swigert* release apparently involved here has no interest in proving the payor's liability as a joint tort-feasor.

The issue then resolves into whether the default entered as a discovery sanction satisfies the Act and the release. I agree with the majority that a default in answering a complaint operates as an admission, by and against the defendant in default, of the well-pleaded allegations of the complaint. *See Curry v. Hillcrest Clinic, Inc.*, 337 Md. 412, 434, 653 A.2d 934, 945 (1995). I also assume that the discovery sanction of default operates in that same fashion against the party failing to provide discovery. Here, however, PH seeks to have B & W's discovery default treated as legally conclusive against Grimshaw. PH, in effect, takes the position that the default by B & W operates as claim or issue preclusion against Grimshaw on B & W's joint tort-feasor status. I do not believe that the sanction

imposed on B & W, without opposition by B & W, can *automatically* operate as an adjudication detrimental to Grimshaw.

The framework for analyzing these issues is found in the opinion after reargument in *Keitz v. National Paving & Contracting Co.*, 214 Md. 479, 134 A.2d 296, *on reargument*, 214 Md. 479, 136 A.2d 229 (1957). In that motor tort case the operator of vehicle No. 1 sued the operator of vehicle No. 2, the latter's general employer, and the corporation that had hired the use of vehicle No. 2 and its driver.⁵ At the close of the plaintiff's case the trial court granted a directed verdict in favor of the hirer. The trial proceeded, resulting in judgments in favor of the plaintiff against the adverse driver and his general employer. On the plaintiff's appeal, the Court vacated the judgment in favor of the hirer on the issue of agency and ordered a new trial. The Court then addressed the plaintiff's contention that, at the retrial after remand, the hirer would be bound by the finding of negligence on the part of the driver and bound by the damages awarded by the jury.

To determine the effect of the judgment against the servant in subsequent proceedings against the hirer, this Court looked to the law of claim and issue preclusion. The Court reasoned that, if the driver of vehicle No. 2 was the servant of both the general employer and the hirer, the latter two would be joint tort-feasors and entitled to contribution at common law, as non-active wrongdoers, and under the Act. *Keitz*, 214 Md. at 497-98, 136 A.2d at 231. Relying on the Restatements of Judgments and of Restitution, on Freeman on

⁵The manager of the general employer was also joined as a defendant, but that aspect of *Keitz* is irrelevant to the present discussion.

Judgments, and on the law of "vouching in," the Court analogized to the rule "that one liable over in tort as indemnitor or contributor is concluded as to the right of the injured person to recover and the amount of damages, by a judgment against the indemnitee or contributtee who had notified him to defend." *Id.* at 499-500, 136 A.2d at 232 (footnote omitted).⁶ Further, this Court said that the policy of the Act

"will best be served by making the judgment against one tortfeasor conclusive as to liability and amount on the other tortfeasor, where that other participated in the case in the manner and to the extent that [the hirer] did in [*Keitz*]."

Id. at 502, 136 A.2d at 234. Consequently, on retrial, the hirer was precluded from relitigating the negligence of the driver and from relitigating the plaintiff's damages.

Keitz differs substantially from the instant matter in at least two aspects. First, the judgment against the general employer in *Keitz* was the result of a trial, but the judgment relied upon here by PH is the result of a default. Second, the general employer and the hirer in *Keitz* were adversaries. *Id.* ("[J]oint tortfeasors, as potential indemnitees *pro tanto* with respect to each other, necessarily are adversaries."). In the action now before us Grimshaw and B & W, the party against whom judgment was entered, are not adversaries on the pleadings, and they were not adversaries in fact, inasmuch as B & W did not participate at all in the action.

Where the prior judgment is entered based on a default, the law distinguishes between claim preclusion (*res judicata*) and issue preclusion (collateral estoppel). Generally, the rule

⁶This principle relied on in *Keitz* is set forth in 2 Restatement (Second) of Judgments § 57 (1982).

is that a default judgment will support claim and defense preclusion against the party in default, but not issue preclusion against a third party. "Judgment by default commands the full effects of claim and defense preclusion." C. Wright et al., *Federal Practice & Procedure* § 4442, at 373 (1981) (Wright). *See also* 18 *Moore's Federal Practice* § 131.30[3][d], at 131-106 (3d ed. 1997) (Moore) (for purposes of claim preclusion a default judgment is treated the same as any other valid final judgment). Thus, in a subsequent action between PH and B & W, B & W would be precluded from asserting that it was not liable to PH for all or a part of Grimshaw's claim against PH.

But the judgment on which PH relies was entered against B & W and not against Grimshaw. In order for Grimshaw to be bound under the law of claim preclusion by the judgment against B & W, Grimshaw must be in privity with B & W. From the time PH impleaded B & W, through the entry of the default, and to final judgment in the action, the relationship between Grimshaw and B & W was that of releasor and releasee. PH has cited no authority, and we have found none, holding that that relationship is one of privity for claim preclusion purposes. I would hold that it is not. The releasor-releasee relationship is too attenuated in relation to traditional privity, and applying claim preclusion to it could create incalculable mischief. *Compare Small v. Ciao Stables, Inc.*, 289 Md. 554, 425 A.2d 1030 (1981) (Under the agency relationship there involved, principal was in privity with agent for determining preclusive effects of New York judgment against agent).

Where, as here, there has been no determination of underlying facts in connection with the entry of a default, the legal conclusion that issue preclusion does not arise is supported by both Wright and Moore. The authors of Wright present the following analysis:

"Issue preclusion has enjoyed a changing relationship to default judgments. Some courts still adhere to a rule that judgment by default establishes issue preclusion as to every issue that would have to be resolved to support the same judgment after trial on the merits. This rule has been criticized vigorously on two related grounds that focus on default by failure to answer. First, it is pointed out that the essential foundations of issue preclusion are lacking for want of actual litigation or actual decision of anything. Second, it is urged that a defendant may suffer a default for many valid reasons other than the merits of the plaintiff's claim. In line with this criticism, many federal cases have ruled in various circumstances that default judgments do not support issue preclusion. This result is correct for the reasons given as to judgments that are entered without further inquiry upon failure to answer."

Wright § 4442, at 374-76 (footnotes omitted). *See also* Moore § 132.03[2][k], at 132-90 (A default judgment would not ordinarily support issue preclusion because the issues have not actually been litigated.).

An illustrative decision is *Nichols v. Anderson*, 788 F.2d 1140 (5th Cir. 1986). There a person who had been injured in an automobile accident filed suit in Mississippi against two defendants, one of whom was insured under a policy containing an exclusion that limited coverage to within a 150 mile radius of McCory, Arkansas. While the Mississippi action was pending, the insurer filed an action in Arkansas against the insured and obtained a declaratory judgment that there was no duty to defend and no coverage, all based upon the default of the insured to respond to the Arkansas suit. After the injured party had obtained judgment against the insured in the Mississippi action, the former instituted a garnishment

proceeding against the insurer. In that garnishment action the insurer contended, and the trial court agreed, that the Arkansas judgment bound the tort plaintiff, rejecting the latter's argument that Arkansas law applied and made the exclusion invalid. The Fifth Circuit reversed, holding that Arkansas law applied but that the validity of the radius exclusion had not been "'actually litigated' in the Arkansas proceedings." *Id.* at 1142. The court specifically noted that it was not reaching the issue of whether the plaintiff-judgment holder could be considered in privity with the adverse operator/insured "for due process purposes." *Id.* at 1142 n.1. (The exclusion was held to be invalid under Arkansas law.).

Issue preclusion based on a default in an action alleging fraud has been denied in a subsequent action in bankruptcy where the judgment debtor's discharge is opposed on the grounds of fraud. *See, e.g., In re Raynor*, 922 F.2d 1146 (4th Cir. 1991); *In re Lombard*, 739 F.2d 499 (10th Cir. 1984); *Matter of McMillan*, 579 F.2d 289 (3d Cir. 1978).

Judgments based upon an express admission of liability are treated similarly to default judgments for issue preclusion purposes. In the context of a judgment based upon an admission of liability to the plaintiff by a defendant-third-party plaintiff, it has been said that the judgment is not binding on a third-party defendant, or on a party who has been vouched in, as to the issue of the defendant-third-party plaintiff's liability to the plaintiff. *See Blommer Chocolate Co. v. Bongards Creameries, Inc.*, 635 F. Supp. 919, 924 (N.D. Ill. 1986) ("the principle [is] that a judgment will not bind a third party defendant if liability was grounded on the defendant/third party plaintiff's admission of liability").

Phrased another way, the default judgment for contribution against B & W in favor of PH is not a judgment on an issue that was actually litigated between PH and Grimshaw, although they were adversaries. *See* Restatement (Second) of Judgments § 27 cmt. *a* ("The rule of issue preclusion is operative where the second action is between the same parties who were parties to the prior action, and who were adversaries (see § 38) with respect to the particular issue."). For all of the foregoing reasons the default judgment for contribution against B & W cannot be enforced by deducting from Grimshaw's damages the greater of (1) the consideration paid by B & W for its release or (2) a pro rata share computed by including B & W among the set of adjudicated joint tort-feasors.

Had PH sought to accomplish that result, absent B & W's discovery default, PH would have to have introduced evidence against B & W and sought a jury determination, all of which Grimshaw would have had an opportunity to oppose. But because of B & W's failure to give discovery, we do not know what evidence PH might have been able to present.

The holding of the majority treats B & W's default as an adjudication that satisfies the condition in the release. Presumably the cost to B & W of a release under which Grimshaw unconditionally agreed to treat B & W as a joint tort-feasor would have been greater than the consideration actually paid. Thus, the majority opinion gives B & W more than it was willing to buy and bases that result on conduct within B & W's control. The majority opinion allows B & W to ignore PH's third-party claim and the associated discovery and thereby to alter Grimshaw's contractual rights.

Although the holding proposed above would resolve in favor of Grimshaw the issue of whether Grimshaw's recovery is to be reduced further, one may fairly ask, "What is the significance of the default judgment?" I would interpret the order imposing the discovery sanction to mean that B & W is liable to PH for contribution. The amount of B & W's exposure to PH may be the difference between PH's pro rata share of the common liability, determined by a set of joint tort-feasors that does not include B & W, and PH's pro rata share of the common liability, determined by a set of joint tort-feasors that includes B & W. Further, PH, by suggesting the manner in which joint tort-feasor status be submitted to the jury, may have waived any right to have a monetary judgment entered against B & W. These and related issues, however, are not before this Court at this time.