University of Baltimore Law Forum

Volume 25
Number 3 *Spring, 1995*

Article 10

1995

Recent Developments: Curry v. Hillcrest Clinic, Inc.: Court of Appeals Reaffirmed Maryland's Acceptance of the "Frow Doctrine" - Defaulting Co-Defendants Inure to the Benefit of Judgments in Favor of Nondefaulting Co-Defendants

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Recommended Citation

Cucuzzella, Paul J. (1995) "Recent Developments: Curry v. Hillcrest Clinic, Inc.: Court of Appeals Reaffirmed Maryland's Acceptance of the "Frow Doctrine" - Defaulting Co-Defendants Inure to the Benefit of Judgments in Favor of Nondefaulting Co-Defendants," *University of Baltimore Law Forum*: Vol. 25 : No. 3 , Article 10.
Available at: http://scholarworks.law.ubalt.edu/lf/vol25/iss3/10

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exclusive pleading rule by citing a decision which held that an insured receives the benefit of the doubt when potential coverage is uncertain from the allegations in the complaint. *Id.* at 107, 651 A.2d at 863-64 (citing *U.S.F. & G. v. Nat. Pav. Co.*, 228 Md. 40, 178 A.2d 872 (1962)). The exclusive pleading rule, the court opined, can often deprive the insured of the benefit of his bargain in an insurance contract by permitting the insurer to look exclusively at the complaint and ignore valid defenses to avoid coverage. *Id.* at 110-11, 651 A.2d at 865.

The court noted an exception for frivolous defenses made by the insured solely to establish an insurer's duty to defend. *Id.* at 111-12, 651 A.2d at 866. In combatting potential abuse, the court limited an insured's use of extrinsic evidence to establish a potentiality of coverage to situations where the insured can demonstrate a "reasonable potential that the issue triggering coverage will be generated at trial." *Id.* at 112, 651 A.2d at 866. Because Cochran had presented corroborating testimony and other evidence supporting the potentiality of coverage, the court found that Cochran's claim of self-defense was not frivolous. *Id.* at 112, 651 A.2d at 866.

Aetna Casualty & Surety Company v. Cochran clearly reinforces the public policy concern that insurance policy holders should not be unreasonably precluded from receiving the coverage bargained for in their insurance contracts. The court's holding will make it considerably more difficult for insurers to avoid their obligations to defend insureds, while simultaneously providing a safeguard against frivolous claims of potential coverage.

- Jeffrey A. Friedman

Curry v. Hillcrest Clinic, Inc.:

COURT OF APPEALS REAFFIRMED MARYLAND'S ACCEPTANCE OF THE "FROW DOCTRINE" - DEFAULTING CO-DEFENDANTS INURE TO THE BENEFIT OF JUDGMENTS IN FAVOR OF NON-DEFAULTING CO-DEFENDANTS.

In *Curry v. Hillcrest Clinic, Inc.*, 337 Md. 412, 653 A.2d 934 (1995), the Court of Appeals of Maryland held that where a common basis of liability is alleged against co-defendants, one of whom has been found in default, a finding in favor of the non-defaulting co-defendant automatically inures to the benefit of the defaulting co-defendant. In such cases, despite an original order of default, damages cannot be assessed against the defaulting co-defendant. Consequently, the order in default must be stricken. This holding signified the court of appeal's recognition, affirmance, and continued acceptance of the *Frow* doctrine, first enunciated in the United States Supreme Court decision *Frow v. De La Vega*, 82 U.S. (15 Wall.) 552 (1872).

Curry involved a malpractice claim filed with the Health Claims Arbitration Office (HCAO) alleging the negligence and liability of Dr. Sharma and the liability of Hillcrest Clinic (Hillcrest), Sharma's employer, under the doctrine of respondeat superior. Hillcrest failed to answer Curry's complaint, and an order of default was entered by the HCAO Director against Hillcrest stating that the amount of damages owed by Hillcrest was to be determined by the HCAO arbitration panel.

The arbitration panel held a hearing on the issue of Sharma's liability to Curry at which time Hillcrest was only permitted to participate with respect to the amount of damages. After the hearing, the panel found that although Sharma's actions in the matter constituted negligence, such negligence was not the proximate cause of Curry's injuries. Therefore, no liability was found on Sharma's part. The panel ultimately concluded that since Sharma's negligence was not the proximate cause of Curry's injuries, no liability could be entered against Hillcrest and that the default order should be stricken.

Curry then brought an action in the Circuit Court for Baltimore County to nullify HCAO's award, asserting that she was entitled to a default judgment against Hillcrest and an award of damages. The circuit court vacated the HCAO's award, noting that a defense established by a non-defaulting defendant inures to the benefit of a co-defendant in default only when the answering defense precludes the claimant's entire right of action, such as in a statute of limitations defense. However, the circuit court found in Hillcrest's favor at the trial on the merits as to its liability.

Curry appealed the circuit court's findings to the Court of Special Appeals of Maryland, and Hillcrest cross-appealed the circuit court's decision to vacate HCAO's award. The court of special appeals, while finding it unnecessary to address the issue of whether Sharma's defense inured to the benefit of Hillcrest, stated that the force of the *Frow* doctrine relied upon by the arbitration panel was "questionable" in Maryland. The court of appeals granted cross-petitions for certiorari to consider the status of this doctrine given the doubts cast upon its continuing validity by the intermediate appellate court.

After establishing the legitimacy of HCAO's action in setting aside the judgment of default against Hillcrest, the court discussed the merits of the *Frow* doctrine. The court, in discussing the historical underpinnings of the doctrine, noted that the *Frow* doctrine was created out of a necessity to prevent judicial absurdity. *Curry* at 429, 653 A.2d. at 942. In cases like the present one, the court explained that if a defendant in default did not inure to the benefit of a judgment in favor of a co-defendant, "there might be one decree of the court sustaining the charge . . . committed by the defendants; and another decree disaffirming the [same] charge." *Id.* (quoting *Frow*, 82 U.S. (15 Wall.) at 554). As with res judicata, the courts rely on the *Frow* doctrine to prevent a separate finding on the same issue or claim from contradicting the original finding.

The court of appeals rebutted the court of special appeal's uncertainty as to the status of the doctrine by showing that its acceptance in Maryland dates back over 150 years. The court cited *Lingan v. Henderson*, which stated that "where the defence made by one defendant goes to the whole cause of [the] complaint, and the plaintiff fails to establish his case in opposition to such defense, he cannot be relieved in anyway whatever, although his claim should be confessed by the other defendants." *Id.* at 431, 653 A.2d at 943 (quoting *Lingan v. Henderson*, 1 Bland 236, 261 (Md. Ct. Chanc. 1827)). The *Lingan* court went on to state that since "every Court of justice must act consistently, [the court] cannot be allowed to contradict itself, by saying, in the same decree, in the same case, that the plaintiff has no cause of suit whatever; and also, that he has a just and well founded cause of complaint." *Id.* at 431-32, 653 A.2d at 944 (quoting *Lingan v. Henderson*, 1 Bland 236, 275 (Md. Ct. Chanc. 1827)). In summary, the court concluded that Maryland law has historically recognized and accepted the *Frow* doctrine. *Id.* at 433, 653 A.2d at 944.

Curry raised the issue, however, that the doctrine may not be applicable to modern jurisprudence. To support this claim, Curry referred to and the court recognized a Georgia case , as having questioned the validity of the *Frow* doctrine. *Id.* at 433, 653 A.2d at 944. In *Chenoweth Fred Chenoweth Equipment Co. v. Oculus Corp.*, the Supreme Court of Georgia

held that the defendant should not be relieved of his default even if co-defendants go on to prevail on the merits. *Id.* at 433, 653 A.2d at 945 (citing *Fred Chenoweth Equipment Co. v. Oculus Corp.*, 328 S.E.2d 539, 541 (Ga. 1985)). The court of appeals distinguished the Georgia ruling by noting that *Chenoweth* relied on the premise that a default judgment is primarily a punitive measure which needed to be enforced. *Id.* at 434, 653 A.2d at 945. In contrast, Maryland law "does not weigh the balance so heavily against the truth seeking function of adversary litigation." *Id.* The court reasoned that although *Chenoweth* cast some doubt upon the *Frow* doctrine, Georgia and Maryland stand on different footings as to their analysis of the significance of the doctrine. *Id.* Whereas Georgia law gives a great amount of deference to enforcing default judgments, Maryland law prefers a resolution to the matter on the merits. Since the *Frow* doctrine is premised upon consistency of judgments on the merits, Maryland courts will logically give the doctrine more weight than Georgia courts.

The court also noted a necessary requirement which must be met to satisfy the *Frow* doctrine -- that a finding of no liability on the part of a non-defaulting co-defendant would necessarily preclude a finding of liability on the part of the co-defendant in default. *Id.* at 430, 653 A.2d at 943. The court reasoned that the doctrine "certainly operates where the conduct of the defendant who appeared and successfully defended on the merits is the *sole basis for liability* of a defaulting defendant." *Id.* (emphasis added). In the instant case the court stressed that a finding of no liability on the part of Sharma would necessarily dictate no liability on the part of Hillcrest under a respondeat superior claim. *Id.* at 435, 653 A.2d at 945. Therefore, it was clear to the court that the *Frow* doctrine is certainly in effect when a finding in favor of one defendant, in the interest of consistency, would necessarily preclude an adverse finding as to any co-defendants.

By legitimizing the *Frow* doctrine in light of modern legal analysis, the Court of Appeals of Maryland has effectively recreated significant common law. In an era of judicial activism and increased skepticism of many common law principles, the court found applicable a doctrine which, while incorporated into Maryland law over 150 years ago, has not gained much consideration since then. In fact, the court did not reference one relevant citation concerning the *Frow* doctrine from this century. Further, in light of the modern Georgia ruling on the *Frow* doctrine in *Chenoweth*, the court of appeals exercised significant judicial restraint by deferring to the common law.

The court's ruling is quite logical in that it not only avoids an absurd situation where one defendant may be held liable even though the merits of the claim were found his favor, but it also establishes a certain amount of judicial economy. The court put an end to the continued disposition of a case where the merits of which had already been determined. Also, regarding the court's having distinguished Maryland law from the Georgia law relied upon in *Chenoweth*, it seems as though, at least in situations such as the one presented here, Maryland law will defer to findings on the substantive merits of a claim rather than getting bogged down in procedural niceties. By not allowing damages to be imposed upon Hillcrest, the court gave more weight to the determination on the merits than to a judgment of default. Accordingly, *Curry v. Hillcrest Clinic, Inc.* indicates a possible movement of Maryland courts toward a preference for disposing of procedural arguments where the substantive merits of a claim are clearly apparent.

- Paul J. Cucuzzella