IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY, MARYLAND

ANNE GEIER, et al.,	:	
	:	
Plaintiffs,	:	
	:	Case No. 371761-V
v.	:	
	:	
MARYLAND BOARD OF PHYSICIANS, et al.,	:	
	:	
Defendants.	:	

MEMORANDUM AND ORDER

On November 13, 2014, the court held a hearing on the plaintiffs' fifth motion for sanctions. After argument from counsel, the court made factual findings and advised that the motion for the imposition of a discovery sanction would be granted, with the precise sanction to be determined by the court at a later time. By Order entered on December 16, 2014, the court entered a default against all of the defendants on the issue of liability. The court advised that a damages trial would be held after the completion of the defendants' second interlocutory appeal.

The defendants' second interlocutory appeal was, in large measure, dismissed by the Court of Appeals on January 23, 2017.[1] The mandate from the Court of Appeals was received on March 27, 2017.

At a status conference held on April 4, 2017, the plaintiffs advised that they would be waiving a trial by jury. Counsel for the plaintiffs expressed the view that because all of the defendants were in default, the plaintiffs alone could consent to the removal of the damages trial from the jury calendar, and have the matter heard by the

[1] The appeal did decide, in the defendants' favor, that certain audio tapes were protected by the deliberative process privilege. That ruling is of no significance to the proceedings at this juncture.

court. The defendants disagreed with the plaintiffs' contention. The court indicated it would consider the jury trial question once the parties filed written submissions. Pending further consideration of this question, the court set a five-day jury trial on the issue of damages to begin on July 10, 2017.

On April 10, 2017, the plaintiffs filed a written jury trial waiver under Md. Rule 2-325(f). The defendants have objected to the attempted jury trial waiver, contending that the issue of damages must be tried to a jury notwithstanding the entry of the default against them in December 2014. The court holds that the damages portion of this case should be tried to the court.

Background

This case began on December 21, 2012. The crux of the plaintiffs' claim is that the defendants published private and confidential medical information on the government website of the Maryland Board of Physicians (the "Board") on January 25, 2012. According to the plaintiffs' complaint, the Board issued a cease and desist order (the "Order") against Dr. Mark R. Geier stating that Dr. Geier had "prescribed drugs to himself, his son and his wife after his license was suspended." The Order also identified the names of the drugs and the persons for whom the drugs had been prescribed. Also noted were the symptoms and conditions that the drugs were designed to treat. According to the plaintiffs, the Order disclosed to the public at large their private medical information, which is required to be kept confidential by state statute. The Board's website contained a link to the Order, which made it readily available to anyone over the internet.

On February 6, 2012, an attorney for the plaintiffs sent a letter to the Board detailing the ways in which the Board had violated Maryland law in making the Order, which included private medical information, public. After receipt of this letter, on February 10, 2012, the Board removed the link to the Order from the Board's website.

On February 22, 2012, the Board issued an amended Order, which excluded the personal medical information. However, despite the removal of the link, the original Order was still widely available over the internet, and was "republished" by, among other outlets, ABC News and various blogs. According to the complaint, the original Order was still available over the internet as of the date the suit was filed in December 2012. Based on the foregoing, the court concluded that the complaint asserted cognizable claims for damages under 28 U.S.C. § 1983 and common law defamation.

Discussion

The complaint in this case included a demand for a jury trial under Md. Rule 2-325(a). That Rule provides: "Any party may elect a trial by jury of any issue triable of right by a jury by filing a demand therefor in writing either as a separate paper or separately titled at the conclusion of a pleading and immediately preceding any required certificate of service." Ordinarily, once a jury trial is demanded by one party, the demand secures a jury trial for all parties on all issues for which a jury trial is available. Md. Rule 2-325(e) provides, in relevant part: "When trial by jury has been elected by any party, the action, including all claims . . . as to all parties, and as to all issues triable of right by a jury, shall be designated upon the docket as a jury trial." As a consequence, once a jury

demand is made, ordinarily all issues in the lawsuit triable of right to a jury must be decided by a jury, not the court.[2]

An exception to this rule is when the parties consent to remove a trial from the jury calendar. Ordinarily, such a removal requires the unanimous agreement of all parties to withdraw a jury election previously made by any one party. However, Md. Rule 2-325(f) circumscribes the ability to block the withdrawal of a jury demand by requiring only "the consent of all parties not in default." Under the plain meaning of this Rule, therefore, the consent of a party in default is not necessary to effectuate the withdrawal of a jury demand. In this case, all of the defendants are in default and have been in default since December 2014. As a consequence, the plaintiffs, and the plaintiffs alone, can withdraw the jury demand previously made in this case.

The "all parties not in default" language of Md. Rule 2-325(f) has not received much attention by Maryland's appellate courts. The language of Md. Rule 343 e, which is the predecessor to Md. Rule 2-325(f), was discussed by the Court of Special Appeals in *Cello v. Farbo.*[3] In that case, the plaintiff had obtained a default judgment as to liability against one driver in an automobile accident case. Originally, the case had been set for a jury trial as to damages. On the day of trial, June 25, 1982, plaintiff's counsel appeared with a written jury waiver. Counsel for the defendant, after noting that the case was number 19 on the trial docket on the afternoon of June 24, and being in trial in another case, did not appear believing that the case would not be reached. The judge was not advised that defense counsel had not been given notice of the jury trial waiver, and, after

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[2] *See, e.g., Goldstein & Baron Chartered v. Chesley,* 375 Md. 244, 255-56 (2003); *Hawes v. Liberty Homes, Inc.* 100 Md. App. 222, 233-34 (1994).

[3] 59 Md. App. 606 (1984).

learning of the default and the waiver by the plaintiff, sent the case to a non-jury courtroom for an inquest on damages. That judge was told, affirmatively, but falsely by plaintiff's counsel, that defense counsel would not be appearing for trial. As a consequence, the damages inquisition proceeded *ex parte* and the plaintiff was awarded over $45,000.

Plaintiff's counsel argued on appeal that the jury withdrawal was valid because the defendant was in default as to liability. The Court of Special Appeals said the following in this regard: "Appellee's contention that she had a right to withdraw her election for jury trial without the consent of appellant is correct."[4] However, the award was reversed on appeal because the plaintiff's counsel had deceived the trial judge as to the intentions of the defendant's attorney, whom he knew was trying another case at the time of the damages hearing. Further, there was no evidence of record that the defendant's counsel was served with a copy of the plaintiff's jury waiver.

The issue surfaced again in *State Farm Mutual Automobile Ins. Co. v. Schlossberg*.[5] In that case, a bankruptcy trustee brought a bad faith claim against State Farm, the bankrupt's insurer, arising out of a case where the policy limit was $50,000 but the underlying wrongful death verdict was for over $500,000. State Farm was defaulted because it refused to obey a discovery order.[6] A bench trial was held thereafter and damages were awarded against State Farm. On appeal, State Farm contended that the circuit court erred in denying it a right to a jury trial.

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[4] *Cellano v. Farbo*, 59 Md. App. at 610.

[5] 82 Md. App. 45 (1990).

[6] 82 Md. App. at 61.

The Court of Special Appeals disagreed, stating: "The Maryland Rules clearly provide that, subsequent to a default, the party in default no longer has the option of a jury trial on the remaining issue of damages. Only a party not in default may have the election of a court trial or a jury trial."[7] However, the intermediate appellate court noted that Md. Rule 2-325(f) might be in conflict with an 1870 decision by the Court of Appeals. In *Knickerbocker Life Ins. Co. Inc. v. Hoeske*,[8] the Court of Appeals held that a statute which purported to eliminate a right to a jury trial after the entry of a default as to liability violated the Maryland Constitution.[9] The Court of Special Appeals in S*chlossberg* did not address the constitutional question, however, finding instead that since damages were "a fixed sum determined by a mathematical computation, there [was] no issue for a jury to decide."[10]

The Maryland Rules have the force and effect of law until rescinded, changed or modified by the Court of Appeals or the General Assembly.[11] Indeed, the Court of Appeals has held: "Our Rules of Practice and Procedure have the force of law, until rescinded, changed or modified by this Court or otherwise by law."[12]

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[7] 82 Md. App. at 62.

[8] 32 Md. 317 (1870).

[9] 32 Md. at 326.

[10] 82 Md. App. at 63. The damages were simply the difference between the amount of the insurance coverage and the jury's verdict in the underlying tort case. *Id.*

[11] MD. CONST. ART. IV, § 18(A); *State v. Diggs*, 24 Md. App. 681, 682 (1975).

[12] *Hill v. State*, 218 Md. 120, 127 1958); *see Hauver v. Dorsey*, 228 Md. 499, 502 (1962).

The usual rules of construction that guide the interpretation of statutes apply when interpreting a Maryland Rule.[13] In most instances, the court's search for the meaning of a Maryland Rule "must start with and, if the words are clear and unambiguous, end with, the words of the rule."[14] The court may also consult relevant case law and other secondary authority to place the meaning of a Maryland Rule in proper context.[15] In addition, the court can consult the records of the Standing Committee on Rules of Practice and Procedure to ascertain why certain language was used in a Rule or why it was amended (or not amended).[16]

The words of Md. Rule 2-325 (f) are plain and unambiguous. The Rule provides that a jury election may be withdrawn without the consent of the parties who are in default. It seems self-evident that the Court of Appels was aware of what it was doing when it adopted subsection (f) of Md. Rule 2-325. The phrase "all parties not in default" is clear and unambiguous, and should be construed to mean just what it says.[17]

It also seems plain that the Court of Appeals would neither blindly nor cavalierly adopt a Rule that conflicted with its own jurisprudence, especially one of such significance. It also is unlikely that the Rules Committee would have proposed a Rule, on at least two occasions, that was not within the power of the Court of Appeals to adopt.

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[13] *Warehime v. Dell*, 124 Md. App. 31, 53 (1998).

[14] *State v. Montgomery*, 334 Md. 20, 24 (1994).

[15] *Johnson v. State*, 360 Md. 250, 265-66 (2000).

[16] *See Matthews v. State*, 187 Md. App. 496, 505-511 (2009), *vacated on other grounds*, 415 Md. 286 (2010).

[17] *See Kerpelman v. Smith, Somerville & Case, L.L.C.*, 115 Md. App. 353, 357-59, *cert. denied*, 346 Md. 241 (1997)(holding, under Md. Rule 2-423 as it existed in 1997, that the word "physician" did not include a psychologist. The Rule was thereafter amended to substitute the phrase "suitably licensed or certified examiner" for "physician" so that persons other than physicians could conduct a mental or physical examination of a party).

Not insignificantly, the words at issue in this case—"with the consent of all parties not in default"—are not new. Md. Rule 2-325 was adopted in 1984. The language at issue was carried over, albeit in slightly revised form, from former Rule 343 e.[18] The pertinent language of Rule 343 e provided: "Election of jury trial shall be withdrawn only with the consent of all parties filed in the action, except where judgment by default has been entered in which case the election *may be withdrawn in writing by the party not in default.*" (Emphasis added).[19] Although the wording of Rule 343 e was edited for clarity when Md. Rule 2-325(f) was adopted, the meaning did not change.

Given the dearth of Maryland authority, this court has considered the treatment of this question by the federal courts. In the federal system, a party in default has no right under the Federal Rules,[20] the Seventh Amendment or federal common law[21] to a jury trial on the issue of damages.[22] Most state appellate courts that have considered the question are in accord that a jury trial is not required after the entry of a default, albeit for

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[18] Rule 343 was adopted by the Court of Appeals on February 10, 1969. It took effect on April 1, 1969. *See Elmore v. Reese*, 268 Md. 490, 493 (1973); *Md. Community Development Inc. v. State Roads Commission*, 261 Md. 205, 211-12, *appeal dismissed*, 404 U.S. 803 (1971).

[19] MARYLAND RULES OF PROCEDURE p. 157 (1970 ed. Michie Co.)

[20] Rule 55(b)(2) simply preserves the right to trial by jury after a default only "when and as required by any statute of the United States." However, some federal district judges have held that Federal Rule 39(b) and Federal Rule 38(d) affords them the inherent, discretionary power to submit damages questions to a jury, even after a default. *E.g., Armeni v. Transunion LLC, Inc.*, 2016 WL 7046839 (W.D. Va. 2016); *Zero Down Supply Chain Solutions, Inc. v. Global Transportation Solutions, Inc.*, 282 F.R.D. 604, 606 (D. Utah 2012).

[21] *See, e.g., Brown v. Ban Braam*, 3 U.S. 344, 355 (1797); *Pierre v. Eastern Air Lines, Inc.*, 152 F. Supp. 486, 488 (D. N.J. 1957); *Raymond v. Danbury & N.R. Co.*, 20 F. Cas. 332, No 11,593 (C.C.D. Conn. 1987).

[22] *See, e.g., Olcott v. Delaware Flood Co.*, 327 F.3d 1115, 1124 (10th Cir. 2003); *Graham v. Malone Freight Lines, Inc.*, 314 F.3d 7, 16 (1st Cir. 19990; *Henry v. Sneiders*, 490 F.2d 315, 318 (9th Cir.), *cert. denied*, 419 U.S. 832 (1974); Mwani v. Bin Laden, 244 F.R.D. 20, 24 (D.D.C. 2007); *Benz v. Skiba, Skiba & Glomski*, 164 F.R.D. 115 (D. Me. 1995).

a variety of reasons.[23] The clear majority sentiment among the federal and state courts is that a defendant simply has no absolute right to a jury trial on damages if the defendant is in default as to liability.

The court is aware that the right to trial by jury is guaranteed by the Maryland Constitution, as expressed in Articles 5(a) and 23 of the Declaration of Rights. The legal history of these protections has been well documented and discussed by the Court of Appeals.[24] Nevertheless, the right to trial by jury "is not an absolute one and may be waived."[25] Indeed, Article IV, § 8(a) of the Maryland Constitution provides: "The parties to any cause may submit the cause to the court for determination without the aid of a jury." In addition, the right to trial by jury "may be subjected to reasonable regulation."[26] This court concludes that in adopting Md. Rule 2-325(f), and its predecessor Rule 343 e, the Court of Appeals has effectuated a reasonable regulation of the right to trial by jury and has changed the common law of Maryland.[27]

The plaintiffs' request to withdraw their jury demand is granted. It is SO ORDERED this 26th day of April, 2017.

Ronald B. Rubin, Judge

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[23] *See, e.g., Haines v. Comfort Keepers, Inc.* ___ P.3d ___, 2017 WL 1102813 (Alaska 2017); *Payne v. Dewitt*, 995 P.2d 1088, 1093-94 (Okla. 1999); *Silkey v. New England Tel. & Tel Co.*, 398 N.E.2d 508, 508-09 (Mass. App. 1980); *see also Farrell v. Hursh Agency, Inc.*, 713 P.2d 1174, 1181 (Wyo. 1986).

[24] Davis v. Slater, 383 Md. 599, 609-21 (2004).

[25] P. Niemeyer, L. Schuett & J. Smithey, MARYLAND RULES COMMENTARY 530 (4th ed. 2014)

[26] *Houston v. Lloyd's Consumer Acceptance Corp.*, 241 Md. 10, 14 (1965); *see* J. Lynch & R. Bourne, MODERN MARYLAND CIVIL PROCEDURE § 5.2(b) (3d ed. 2016).

[27] The text of Md. Rule 2-433(a)(3) does not aid the defendants in the default context because the Rule preserves the right to trial by jury on damages only to a plaintiff.