Land & Water Law Review

Volume 31 | Issue 2 Article 17

1996

Torts - I May Be Liable but It's Not My Fault: The Wyoming Supreme Court Rules That Defaulting Defendants Can Now Challenge Fault - McGarvin-Moberly Const. v. Welden

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TORTS—I may be liable but it's not my fault!: The Wyoming Supreme Court rules that defaulting defendants can now challenge fault. *McGarvin-Moberly Const. v. Welden*, 897 P.2d 1310 (Wyo. 1995).

Within the patchwork of policies that form our judicial system, concerns of efficiency often conflict with the nobler concept of justice. This struggle recently erupted in the case of *McGarvin-Moberly Const. v. Welden*,[1] where the Wyoming Supreme Court addressed comparative fault's relationship with default.

On May 29, 1992, an automobile accident occurred on U.S. Highway 310 near Lovell, Wyoming.[2] An employee of S & L Industrial, a subcontractor for McGarvin-Moberly Construction, had stopped traffic along the highway to allow for on-going construction.[3] Billy and Josephine Welden occupied the first car stopped by the flagwoman.[4] Two other cars sat waiting in line behind them.[5] Before the flagwoman could give the signal to proceed through the construction area, Mrs. Bertha Hunter approached the waiting cars from behind and failed to stop. She slammed into the column of cars, causing a chain reaction which ended when the second car in line collided with the Weldens' vehicle.[6]

On January 20, 1993, the Weldens filed a complaint alleging negligence against Bertha Hunter[7] and McGarvin-Moberly Construction Company.[8] Mrs. Hunter's estate filed a timely answer. However, McGarvin-Moberly failed to respond by the February 18, 1993 deadline,[9] as required by Wyo. R. Civ. P. 12(a).[10] The clerk of the district court entered default against McGarvin-Moberly on March 3, 1993 pursuant to

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1. 897 P.2d 1310 (Wyo. 1995).
2. *McGarvin-Moberly Const.*, 897 P.2d at 1312.
3. Petition for Writ of Review at 2, Welden v. Hunter (Wyo. June 29, 1995) (No. 93-238) [hereinafter McGarvin-Moberly's Petition].
4. *Id.*
5. *Id.*
6. *McGarvin-Moberly Const.*, 897 P.2d at 1312.
7. Mrs. Hunter passed away on January 20, 1993. McGarvin-Moberly's Petition, *supra* note 3, at 6. The complaint was served on her personal representative, Dan A. Hunter. *Id.*
8. Welden's Response to McGarvin-Moberly's Petition for Writ of Review at 8-9, Welden v. Hunter (Wyo. June 29, 1995) (No. 93-238) [hereinafter Welden's Response].
9. *Id.* at 9.
10. WYO. R. CIV. P. 12 states in part, "(a) When presented.— A defendant shall serve an answer within 20 days after the service of the summons and complaint upon that defendant."

Wyo. R. Civ. P. 55(a).[11] application for default judgment to the court, but the court did not immediately rule on it.[12]

On March 19, 1993, one month after the statutory deadline to respond, McGarvin-Moberly filed a motion to set Aside the entry of default, and an answer to the plaintiff's complaint.[13] The district court refused to set aside the default and held that McGarvin-Moberly had failed to establish "good cause" for its delay.[14]

Plaintiffs filed a motion to bar McGarvin-Moberly from any further participation in the action.[15] The district court stated that it would allow McGarvin-Moberly to fully participate in discovery and at the trial "on issues concerning proximate cause and damages."[16] Plaintiffs moved for reconsideration, and the court modified its order.[17] The new order allowed McGarvin-Moberly to fully participate in discovery and the trial "solely on the issue of Plaintiffs' damages."[18]

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11. WYO. R. CIV. P. 55 reads in part:

(a) Entry- When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, the clerk shall enter the party's default.

(b) Judgment-Judgment by default may be entered as follows:

(1) . . .

(2) By the Court . . . If the party against whom a judgment by default is sought has appeared in the action the party . . . shall be served with written notice of the application for judgment at least three days prior to the hearing on such application. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages . . . the court may conduct such hearings or order such references as it deems necessary.

12. Welden's Response, *supra* note 8, at 9. There are several noteworthy differences between default and a default judgment. Entry of default "is simply a clerical act performed by the clerk of court which determines liability but not relief." Lee v. Sage Creek Refining Co., 876 P.2d 997 (Wyo. 1994). Default can be set aside "for good cause shown" and is not appealable. WYO. R. CIV. P. 55 (c); Booth v. Magee Carpet Co., 548 P.2d 1252, 1255 (Wyo. 1976). *See also* CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE, § 2696 (1983) [hereinafter WRIGHT].

Default judgments can be entered by the clerk or the court, but only when damages are for a sum certain or made certain through a damages hearing. Courts require a higher standard which includes mistake, inadvertence, or excusable neglect to set aside default judgments. WYO.R.CIV.P. 60(b). Default judgments, because of their finality, are appealable. *See also* Carl B. Schultz, *Sanctioning Defendants' Non-Wilful Delay: The Failure of Rule 55 and a Proposal for Its Reform*, 23 U. RICH. L. REV. 203, 207-09 (1989)[hereinafter Schultz]; Robert B. Sessums, *Judgments—Rules 41, 54(b), 55, 57, 58, and 60*, 52 MISS. L.J. 171, 172-75 (1982) (comparing default and default judgment).

13. Welden's Response, *supra* note 8, at 9.

14. *McGarvin-Moberly*, 897 P.2d at 1313. McGarvin-Moberly had given the complaint to its insurance company who misplaced it and as a result failed to respond. Welden's Response, *supra* note 8, at 10.

15. *Id.*

16. *Id.*

17. Welden's Response, *supra* note 8, at 14. This order was styled an "Order on Defendant McGarvin-Moberly's Further Participation" (Oct. 26, 1993). *Id.*

18. *McGarvin-Moberly*, 897 P.2d at 1313.

The plaintiffs and the defaulting defendant filed petitions for writ of review with the Wyoming Supreme Court.[19] The court granted the writs and affirmed the district court's initial ruling.[20] The court stated that the defaulting party should be permitted to participate on issues of both fault and damages.[21] It found that under a comparative fault regime, damages and fault are bound too closely together to allow a defendant to contest one, but not the other.[22]

This casenote examines how this decision modifies the Wyoming Supreme Court's past treatment of default. It also analyzes comparative fault and its role in default situations. In doing so, it explores Wyoming law as well as approaches adopted by other jurisdictions. Finally, the note analyzes the potential negative consequences this decision may have on the policy goals underlying the default rule and on its practical application in Wyoming courts.

BACKGROUND

Rule 55 of the Wyoming Rules of Civil Procedure is modeled after Fed. R. Civ. P. 55.[23] Wyoming's rule allows the clerk of court to enter default against a party who has failed to submit a timely responsive pleading. If the requested damages are unliquidated,[24] Rule 55 requires the court to hold hearings to determine the amount of damages rightfully owed to the plaintiff before entering default judgment.[25] After determining the damages, the court enters a default judgment binding the defaulting party to the court's decree.[26]

The Wyoming Supreme Court analyzed the policies behind Rule 55 in depth in *Vanasse v. Ramsay*.[27] In *Vanasse*, the court described default judgment as a powerful tool for discouraging delay in the trial process.[28]

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19. *Id.*

20. *Id.* at 1311.

21. *Id.*

22. *McGarvin-Moberly*, 897 P.2d at 1317. Although the case was remanded by the court, it was settled before any further proceedings took place. Telephone Interview with C. Bradley Smith, Counsel for Plaintiff Welden (Oct. 9, 1995).

23. Hopkinson v. State, 664 P.2d 43, 52 (Wyo. 1983). "[O]n July 2, 1957 . . . the Wyoming Rules of Civil Procedure, patterned after the Federal Rules of Civil Procedure, were adopted." *Id.*

24. Damages are liquidated only "when they are certain or, by computation, made certain." Halberstam v. Cokeley, 872 P.2d 109, 113 (Wyo. 1994).

25. *See supra* note 11.

26. *Id.*

27. 847 P.2d 993 (Wyo. 1993); *See also* WRIGHT, *supra* note 12, § 2681 (analyzing the policies which underlie the federal rule).

28. *Vanasse*, 847 P.2d at 1000. *See also* Byrd v. Keene Corp., 104 F.R.D. 10, 11 (E.D.

The threat of default ensures that defendants intending to defend the case will answer in a timely manner.[29] If a defendant fails to respond, either through inadvertence or purposeful delay, default ensures that the toll they exact from the process is paid with their own opportunity to defend.

The default mechanism is also essential for encouraging efficiency and finality in litigation.[30] Besides deterring late answers, Rule 55 precludes challenges to those issues deemed admitted by an entry of default.[31] Among the most important admissions is liability.[32] Entry of default closes the issue of liability to further challenges by the defendant and advances the case toward resolution.[33]

Because it denies litigants the opportunity to present their case, default is often harsh.[34] As a result, "default judgments are not favored at law . . . it is preferable that cases be tried on their merits."[35] With this in mind, courts have allowed limited participation by defaulting parties who indicate a desire to defend.[36] The primary vehicle for this participation has been the damages hearing provided for in Wyo. R. Civ. P. 55(b)(2).[37]

Rule 55(b)(2) allows a court to establish the amount and degree of relief by conducting a damages hearing prior to the entry of default judg-

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Penn. 1984); H.F. Livermore Corp. v. Aktiengesellschaft Gebruder Loepfe, 432 F.2d 689, 691 (D.C. Cir. 1970) (noting the importance of default judgment in discouraging delay in federal courts).

29. *Vanasse*, 847 P.2d at 1000.

30. *Id. See also* Carlson v. Carlson, 836 P.2d 297, 301 (Wyo. 1992).

31. *Id. See also* Zweifel v. State *ex rel.* Brimmer, 517 P.2d 493, 499 (Wyo. 1974) (ruling that a defaulting defendant has no standing to challenge factual allegations of the plaintiff's claim).

32. Farrell v. Hursh Agency, Inc., 713 P.2d 1174, 1181 (Wyo. 1986). *Vanasse*, 847 P.2d at 996-97. "[D]efault generally forecloses the party found to be in default from making any further defense or assertion with respect to liability or an asserted claim." *Id.* (quoting Spitzer v. Spitzer, 777 P.2d 587, 592 (Wyo. 1989)).

33. *Spitzer*, 777 P.2d at 592. Default also performs some functions that are beyond the scope of this note. It is regularly used as a sanction against those who ignore orders compelling discovery. WYO. R. CIV. P. 37(b)(2)(C). *See Zweifel*, 517 P.2d at 498-99.

34. *Spitzer*, 777 P.2d at 592.

35. *Carlson*, 836 P.2d at 301. *But see Vanasse*, 847 P.2d at 1000 (holding that default is becoming a more common sanction and is not perceived as being as drastic as it once was).

36. *Farrell*, 713 P.2d at 1179 (quoting Bankers Union Life Ins. Co. v. Fiocca, 532 P.2d 57, 58-59 (1975)). The court stated that the purpose of the notice requirement for the Rule 55 damages hearing, "is to protect those parties who, although delinquent in filing pleadings within the time periods specified, have indicated a clear purpose to defend by entry of their appearance." *Id.* The notice provided for in WYO. R. CIV. P. 55(b)(2), and the resulting participation in the damages hearing is only afforded those defaulting parties who have appeared in the action following the entry of default. Booth v. Magee Carpet Co., 548 P.2d 1252, 1254 (Wyo. 1976).

37. *Farrell*, 713 P.2d at 1179. *See* B. Finberg, Annotation, *Defaulting Defendant's Right to Notice and Hearing as to Determination of Amount of Damages*, 15 A.L.R. 3d 586 (1967) [hereinafter Finberg] (analyzing defaulting parties' right to participate in Rule 55 damages hearing).

ment.[38] In cases of default where the damages are unliquidated the court requires such a hearing.[39] While the court has defined when a hearing is needed, until *McGarvin-Moberly*, the court had never defined comparative fault's role in that process.

Comparative Fault

Wyoming has had a comparative fault statute in one form or another since 1973.[40] The Wyoming Legislature originally approved the comparative fault provision "to eliminate the unjust concept of common law contributory negligence."[41] In 1986, a significant revision of the comparative fault statute eliminated joint and several liability and limited joint tortfeasors' liability to the percentage of fault individually attributed to them.[42]

Wyoming has a modified comparative fault statute[43] which allows plaintiffs to collect damages so long as they are "not more than fifty percent at fault."[44] At the request of any party in an action, the fact finder

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38. *See supra* note 11. While the court had ruled that default establishes liability, it had also found that the amount and degree of relief remained undetermined following default. *Spitzer*, 777 P.2d at 592.

39. Melehes v. Wilson, 774 P.2d 573, 580 (Wyo. 1989); Midway Oil Corp. v. Guess, 714 P.2d 339, 345 (Wyo. 1986); Adel v. Parkhurst, 681 P.2d 886, 892 (Wyo. 1984). "The district court shall conduct a hearing, take evidence and determine an amount of damages based on the evidence presented." *Melehes*, 774 P.2d at 580.

40. Greg Greenlee & Ann M. Rochelle, *Comparative Negligence and Strict Tort Liability- The Marriage Revisited*, 22 LAND & WATER L. REV. 455, 469 (1987).

41. Kirby Bldg. Sys. v. Mineral Explorations, 704 P.2d 1266, 1275 (Wyo. 1985). An additional function of the comparative fault statute is to create an incentive to join all the parties involved and generate greater judicial economy. Board of County Comm'rs of Campbell County v. Ridenour, 623 P.2d 1174, 1192 n.14 (Wyo. 1981).

42. WYO. STAT. § 1-1-109 (1988). *See also* Schneider Nat'l Inc. v. Holland Hitch Co., 843 P.2d 561, 569 (Wyo. 1992); James W. Owens Jr., Comment, *The Availability of Indemnity In Tort Actions Involving The Wyoming Comparative Negligence Statute—Multiple Parties Cause Multiple Problems: A Comment on Schneider Nat'l, Inc. v. Holland Hitch Co.*, 29 LAND & WATER L. REV. 253 (1994) (providing an excellent review of recent changes in the comparative fault statute).

43. Danculovich v. Brown, 593 P.2d 187, 192 (Wyo. 1979).

44. WYO. STAT. § 1-1-109 (1988) states in part:

(a) Contributory negligence shall not bar a recovery in an action by any person . . . if contributory negligence of the said person is not more than fifty percent (50%) of the total fault. Any damages allowed shall be diminished in proportion to the amount of negligence attributed to the person recovering.

(b) The court may, and when requested by any party shall:

(i) If a jury trial:

(A) Direct the jury to find separate special verdicts determining the total amount of damages and the percentage of fault attributable to each actor whether or not a party.

(ii) . . .

(d) Each defendant is liable only for that proportion of the total dollar amount deter-

must establish separate special verdicts.[45] One verdict determines the total damages, and the other determines the proportion of fault attributable to each of the actors.[46] The percentage of fault must be divided among all actors, not just the parties to the legal action.[47] The court then apportions the damages according to those findings.[48]

Matching damages with the proportion of the defendant's fault has been a prominent policy consideration encompassing the Wyoming Supreme Court's approach to comparative fault.[49] When ruling on the availability of indemnification in comparative fault actions, the court adopted a theory of comparative partial indemnity.[50] This approach ensures that indemnity liability "be allocated among the parties proportionately to their comparative degree of fault."[51] The court found that matching fault and damages was fundamental to "the interest of attaining justice."[52]

The court has shown its commitment to matching fault and damages even when the results run contrary to common notions of justice.[53] When defining the effect of settlement agreements in comparative fault cases, the court found that non-settling defendants must pay a share of the damage proportionate to their fault.[54] The court arrived at this conclusion despite creating a substantial windfall for the plaintiff.[55] The court stated that "each defendant is liable only for the portion of the injury he caused not the whole injury; no two are liable for the same injury."[56]

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mined as damages . . . in the percentage of the amount of fault attributed to him.

Though the format of this statute was substantially modified in 1994, the modifications do not affect the analysis of this case. *McGarvin-Moberly*, 897 P.2d at 1316 n.2.

45. WYO. STAT. § 1-1-109(b).

46. *Id.*

47. *Ridenour*, 623 P.2d at 1188; *Kirby Bldg. Sys.*, 704 P.2d at 1272. The court stated that failing to account for non-parties would result in an inflated percentage of negligence for the defendants in an action. *Id.* at 1272-73.

48. WYO. STAT. § 1-1-109(d).

49. Halliburton Co. v. McAdams, Roux & Assocs., 773 P.2d 153, 155 (Wyo. 1989). *See supra* notes 41-43 and accompanying text.

50. Schneider Nat'l, Inc. v. Holland Hitch Co., 843 P.2d 561, 576 (Wyo. 1992).

51. *Id.* at 578. This contrasts sharply with the traditional notions of indemnification which were governed by an all or nothing standard. *Id.* at 571-73.

52. *Id.* at 576.

53. *See* Haderlie v. Sondgeroth, 866 P.2d 703 (Wyo. 1993).

54. *Id.* at 710.

55. *Id.* In *Haderlie*, two of the three defendants settled for a total of $205,000. The non-settling defendant was found to be 100% responsible for the accident and was ordered to pay, $375,000 the full amount of damages. The plaintiff thus received a windfall of $205,000. *Haderlie*, 866 P.2d at 706-07.

56. *Id.* at 709.

Until *McGarvin-Moberly*, the court had said very little about the application of comparative fault in default situations. It had found Wyoming Statute section 1-1-109 to be a factor only when "a case is tried by a jury or to the court and a party requests, or the court on its own, makes a determination of the percentages of fault attributable to each [actor]."[57] If all the defendants in an action default and a court does not apportion damages of its own volition, the court has ruled that joint and several liability will apply.[58]

The court seemed to take a stronger position in *State Farm v. Colley*.[59] In *Colley*, State Farm attempted to intervene in order to protect its interests where one defendant had settled and one of its insureds had defaulted.[60] State Farm argued that not allowing them into the case would foreclose defenses like comparative negligence and prevent them from protecting their interests.[61] The Wyoming Supreme Court affirmed the lower court's refusal of State Farm's intervention.[62] Though no defendant remained active in the case, the court ruled that the district court had an "obligation . . . to make an allocation of damages after granting a judgment by default."[63] The court reasoned that although default established the defendant's liability, "the apportionment of damages required by Wyoming Statute section 1-1-109 . . . [remained] to be determined."[64] The *Colley* decision may have obscured when comparative fault should apply in default situations, but it made one thing clear: default alone does not remove a case from the purview of the comparative fault statute.

Other Jurisdictions

Prior to *McGarvin-Moberly*, the Wyoming Supreme Court decided that comparative fault would apply to some cases of default, but said nothing about the defaulting party's participation in the apportionment of fault.[65] Though no jurisdictions have dealt with the application of compar-

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57. *Melehes*, 774 P.2d at 580.

58. *Id.* The court is currently facing this issue again. Brief of Appellee D.A. Stinger Servs. Inc. at 19, Olsten Staffing Servs. Inc. v. D.A. Stinger Services Inc. (Wyo. Oct. 13, 1995) (No. 95-197, 95-198) (defaulting defendants appeared before entry of default judgment, but the district court did not allow them to challenge or apportion fault).

59. 871 P.2d 191 (Wyo. 1994).

60. *Id.* at 193.

61. *Id.* at 196.

62. *Id.* at 198.

63. *Id.* at 196. In making this ruling the court did not draw a distinction between *Colley* and *Melehes*. In fact, the court did not mention *Melehes* in its decision. *Id.*

64. *Id.*

65. *See* McGarvin-Moberly's Petition, *supra* note 3, at 20.

ative fault where a defendant has appeared between default and default judgment, several have addressed its application following a judgment by default. These courts have predominantly decided not only to bar defaulting defendants from challenging issues of fault, but to totally prohibit the use of comparative fault.[66]

In *Whitby v. Maloy*,[67] the Georgia Court of Appeals addressed a case in which one of three defendants defaulted. The court found that the defendant, by way of default, had admitted negligence and every other material allegation except for the amount of damages.[68] As a result, the defaulting defendant could challenge damages, but no other issue.[69] The court went on to say that because comparative fault goes to the right of recovery it is "not available to the defendant in default even though . . . [it] may also go to the assessment of damages."[70]

The New Mexico Court of Appeals came to the same conclusion in *Passino v. Cascade Steel Fabricators, Inc.*[71] The New Mexico Court held that liability is not an issue and apportionment of fault is not available once a court enters default against a defendant.[72] Passino involved two defendants. One of the defendants answered as required, but settled the case before trial.[73] The other defendant failed to answer and the court entered default judgment against him.[74] The court said that "by defaulting, defendant has waived its rights to the application of comparative negligence and apportionment of damages."[75] It held that "any other holding would seriously weaken, and could even abolish the efficacy of default judgments."[76]

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66. *See infra* text accompanying notes 67-97.

67. 258 S.E.2d 181 (Ga. Ct. App. 1979).

68. *Id.* at 182.

69. *Id.*at 183. *See also* Adkisson v. Huffman, 469 S.W.2d 368, 375 (Tenn. 1971) (ruling that the defaulting defendant cannot challenge plaintiff's contributory negligence because all material allegations are admitted as a result of the default). *Adkisson* uses the term contributory negligence to signify the apportionment of liability between the defendant and the plaintiff. Kuhn v. Harless, 390 So. 2d 721, 722 (Fla. Dist. Ct. App. 1980).

70. *Whitby*, 258 S.E.2d at 182-83. While not directly addressing the applicability of comparative fault, the Michigan court of appeals showed similar reasoning when they said, "[o]nce default is established the defendant loses his standing to contest the factual allegations of the plaintiff's claim for relief." Akron Contracting Co. v. Oakland County, 310 N.W.2d 874, 877 (Mich. Ct. App. 1981).

71. 734 P.2d 235 (N.M. Ct. App. 1987).

72. *Id.* at 237.

73. *Id.* at 236.

74. *Id.*

75. *Id.* at 237. *But see* Greater Houston Transp. Co. v. Wilson, 725 S.W.2d 427 (Tex. Ct. App. 1987) (affirming instructions to the jury allowing them to apportion fault between a defaulting party and the remaining defendants, but not reaching the issue of whether a defaulting party could participate in any of the proceedings).

76. *Passino*, 743 P.2d at 237.

In *Kuhn v. Harless*,[77] a Florida court considered whether a defendant could challenge fault when default was applied as a sanction for violating discovery orders.[78] The Florida Court of Appeals held that "comparative negligence is a defense to an allegation of liability."[79] Once liability is admitted by the entry of default, a defaulting defendant cannot use comparative fault to challenge it.[80] When the question was appealed, the Florida Supreme Court held that a trial court has discretion to allow this type of participation when default is used as a discovery sanction.[81] The court, however, found that a different rule applies when the defendant suffers a default for failure to plead.[82] In these cases defendants have "the right to contest damages caused by [their] own wrong but no other issue."[83]

Though the majority of courts have rejected the use of comparative fault in default situations at least one jurisdiction, Ohio, has chosen a sharply contrasting approach. In *Jordan v. Elex Inc.*,[84] the trial court found that the defendant had failed to "answer or otherwise defend."[85] Consequently, the court entered default judgment against the defendant on the issue of liability, but not on the issue of damages.[86] The court went on to find that the defense of comparative fault was still available and that even the issues of foreseeability and proximate cause remained at issue following the default. The appellate court accepted these findings in their totality allowing the defaulting party to utilize comparative fault as a defense.[87]

Federal Law

Many federal courts have held that only damages remain at issue in cases of default. These courts found that default concedes "all well pleaded allegations of liability."[88] The courts reasoned that allowing a default-

77. 390 So. 2d 721 (Fla. Dist. Ct. App. 1980).

78. *Id. See* 6 JAMES W. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 55.02[4] (2d ed. 1995) (analyzing the differences between a default order sanctioning violation of court orders and default for failure to plead).

79. *Kuhn*, 390 So. 2d at 722.

80. *Id.*

81. Harless v. Kuhn, 403 So. 2d 423, 425 (Fla. 1981).

82. *Id.* at 425.

83. *Id. See also* Thomas v. Duquesne Light Co., 545 A.2d 289 (Pa. Super. Ct. 1988) (ruling that comparative negligence, while it relates to damages, is a "substantive defense" and cannot be used by a defaulting defendant).

84. 611 N.E.2d 852 (Ohio Ct. App. 1992).

85. *Id.* at 855.

86. *Id.*

87. *Id.*

88. Greyhound Exibitgroup v. E.L.U.L. Realty, 973 F.2d 155, 158 (2nd Cir. 1992); Brockton Sav. Bank v. Peat, Marwick, Mitchell & Co., 771 F.2d 5 (1st Cir. 1985); Nishimatsu Constr. Co., Ltd., v. Houston Nat'l Bank, 515 F.2d 1200 (5th Cir. 1975).

ing defendant to contest comparative fault would permit a defendant to "effectively contest settled issues of liability . . . [undermining] the general policy governing default."[89]

Federal courts have not, however, taken a completely uniform approach to this issue. For example, in *Fehlhaber v. Indian Trail Inc.*,[90] the Court of Appeals for the Third Circuit addressed a case where a third-party defendant had defaulted.[91] The third-party plaintiff urged the court not to apportion negligence but instead to hold the defaulting party responsible for the full measure of damages.[92] The court focused on Delaware's contribution statute which required the court to apportion negligence among the responsible parties.[93] It held that default only establishes liability.[94] "The degree of their fault . . . [goes] to the extent of the defendant's damages."[95] As a result, the court allowed the defaulting party to challenge fault in the Rule 55 damages hearing and apportioned damages between the third-party plaintiff and the third party defendant.[96] Both the language and the reasoning of this case corresponded closely with that of the principal case.[97]

PRINCIPAL CASE

McGarvin-Moberly Construction v. Welden marks the Wyoming Supreme Court's first detailed decision regarding default's role under the state's comparative fault provision.[98] The majority opinion allowed a defaulting defendant to participate in litigation on issues of fault.[99] Justice Cardine wrote a dissenting opinion that criticized the majority for undermining the effect of default and its incentives.[100] He instead argued that the court could read the comparative fault and default provisions in concert while maintaining default's full effect.[101]

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89. *Greyhound*, 973 F.2d at 159.
90. 425 F.2d 715 (3rd Cir. 1970).
91. *Id.* at 716.
92. *Id.*
93. DEL. CODE ANN. tit. 10, § 6302(d) (1974) states, "[w]hen there is such a disproportion of fault among joint tort-feasors as to render inequitable an equal distribution among them of the common liability by contribution, the relative degrees of fault of the joint tort-feasors shall be considered in determining their pro rata shares."
94. *Fehlhaber*, 425 F.2d at 717.
95. *Id.*
96. *Id.*
97. *McGarvin-Moberly*, 897 P.2d at 1314.
98. *Id.* at 1311.
99. *Id.*
100. *Id.* at 1319.
101. *Id.* at 1317.

The majority began its opinion by endorsing the traditional notions of default encompassed by both *Vanasse* and *Spitzer*.[102] It acknowledged that default maintains "a reasonably high standard of diligence in observing the courts' rules of procedure."[103] The court was, however, quick to draw a distinction between the entry of default and default judgment.[104] Chief among these distinctions was that default judgment acts as a final judgment, but an entry of default leaves open the issue of unliquidated damages.[105] Out of this difference the court derived the right for a defaulting party to challenge issues of both fault and damages.

The majority first outlined the defaulting party's right to participate in the damages hearing provided for under WYO.R.CIV.P. 55(b)(2).[106] The court found that the notice requirement provided for in Rule 55 would be void of meaning absent the defaulting party's ability to participate.[107] In addition, it found that if defendants were truly to participate in hearings, they should have the opportunity to challenge the issue of fault as well as damages.[108] Although the holding was somewhat revolutionary, the court carefully limited its decision to cases where default is entered against a defendant, but the defendant appears prior to default judgment.[109]

According to the majority, the commands of Wyoming Statute section 1-1-109(d) (1988) support this new doctrine.[110] The majority found that denying McGarvin-Moberly the opportunity to contest fault would "deprive [it] of the statutory formula" provided for under this provision.[111] The degree of relief to be determined after an entry of default[112] necessarily includes the amount of fault attributable to each

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102. *Id.* at 1313-14. These included default's role in spurring litigation to a conclusion and its utility in encouraging compliance with the Rules of Civil Procedure. *See supra* notes 27-31 and accompanying text.

103. *McGarvin-Moberly*, 897 P.2d at 1314.

104. *Id.* at 1313.

105. *Id. See supra* note 38. The court also noted that an appearance after the entry of default entitles the defaulting party to the notice required by Rule 55, while appearance after default judgment does not. *McGarvin-Moberly*, 897 P.2d at 1315.

106. *See supra* note 11. The majority cited cases from no fewer than nineteen jurisdictions to validate its finding. *McGarvin-Moberly* 819 P.2d at 1315.

107. *McGarvin-Moberly*, 897 P.2d at 1315. *See also* WRIGHT, *supra* note 12, § 2687; Finberg, *supra* note 37, § 3; *Farrell*, 713 P.2d at 1179.

108. *McGarvin-Moberly*, 897 P.2d at 1316.

109. *Id.* "Our sole concern in this case is the degree of participation . . . that should be afforded to a defendant . . . when default, but no judgment by default has been entered against that defendant." *Id.* at 1311.

110. *Id. See supra* note 44.

111. *McGarvin-Moberly*, 897 P.2d at 1316.

actor.[113] The court reasoned that under the comparative fault regime adopted in Wyoming, "the question of fault is inextricably intertwined with the amount of damages that may be awarded against any defendant."[114] The inseparable nature of damages and fault suggested that if a defendant were not allowed to defend on the issue of fault, his participation in the damages hearing would be less than complete.[115]

The court also based its opinion on considerations of fairness.[116] It reasoned that limiting a defaulting party to participation on damages only, might result in compensation for a plaintiff who is more than 50% at fault.[117] The court found this result to not only contravene section 1-1-109, but common sense as well.[118] In addition, the court feared that non-defaulting defendants might collaborate with plaintiffs in order to hoist responsibility for damages upon the defaulting defendant.[119] Finally, the court held that the sense of fairness reflected in its other comparative fault decisions[120] would be compromised if the defendant were not allowed to challenge fault.[121]

Dissenting Opinion

The dissenting opinion by Justice Cardine argued that denying a defaulting defendant the full benefits of section 1-1-109 is not only acceptable, but implements the policies embodied in the default rule. In the dissent's view, other defendants blaming the defaulting party for the full measure of damages, or plaintiffs recovering damages though they are more than 50% at fault are simply "the detriment resulting from default."[122] It argued the court had failed to read WYO. R. CIV. P. 55 and Wyoming Statute section 1-1-109 in harmony, and in the process undermined the "reasonable and understood effect of default."[123]

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113. *Id. But see Whitby*, *supra* note 67 (holding that comparative negligence goes to the right of recovery and cannot be raised in a default case even though it may also go to the assessment of damages).

114. *McGarvin-Moberly*, 897 P.2d at 1317.

115. *Id.*

116. *Id.*

117. *Id.* The application of the comparative fault statute even without participation by the defaulting defendant would prevent this. WYO. STAT. § 1-1-109(a). This statement indicates that the court limited its options to either allowing the defaulting party to participate or refusing application of the comparative fault statute altogether. *Id. See Passino*, *supra* note 71 (ruling that default puts a party outside the purview of comparative fault).

118. *McGarvin-Moberly*, 897 P.2d at 1317.

119. *Id.* at 1317. The danger of this type of collaboration increases in cases like this where the defaulting party is the one with the most financial resources. McGarvin-Moberly's Petition, *supra* note 3, at 23.

120. *See supra* notes 49-56 and accompanying text.

121. *McGarvin-Moberly*, 897 P.2d at 1317.

122. *Id.* at 1319.

123. *Id.*

To support its position, the dissent attacked two of the majority's principal findings. First, it challenged the majority's ruling that a defaulting defendant does not admit fault. In *Vanasse* the court stated that an entry of default is equal to admitting liability.[124] The majority in *McGarvin-Moberly* reconciled its decisions by stating that an entry of default admits liability, but not fault.[125] The dissent countered that liability is an umbrella term which includes fault.[126] It went on to say that "in the context of a personal injury claim, [fault and liability are] not distinguishable at all."[127] The dissent criticized the majority for subverting the precedent established in *Vanasse*. If the majority was going to overturn prior cases, the dissent admonished, "it should so state in clear and unequivocal language."[128]

Second, the dissent challenged the majority's characterization of damages and fault as being "intertwined."[129] It maintained that the language of Wyoming's comparative fault statute clearly indicates that damages and fault can and should be considered separately.[130] It pointed to Wyoming Statute section 1-1-109 which states that a jury should separate verdicts to find the total amount of damages and the percentage of fault attributable to each actor.[131] It then cited the Wyoming Pattern Jury Instructions developed to carry out this command.[132] The dissent contended that provisions governing comparative fault indicate not only the ability to separate damages and fault, but a clear policy to do so.[133]

The dissent concluded that the defaulting party should not be allowed to challenge fault, but should instead be placed on the verdict form and treated similar to a non-party in the action.[134] In Cardine's view the majority approach placed a defaulting party in a "defensive posture as favorable as though default had never occurred" and abolished the incentives stemming from the use of default.[135]

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124. *Vanasse*, 847 P.2d at 1000.

125. *McGarvin-Moberly*, 897 P.2d at 1315.

126. *Id.* at 1318.

127. *Id.*

128. *Id.* at 1319.

129. *See supra* note 114 and accompanying text.

130. *McGarvin-Moberly*, 897 P.2d at 1319.

131. *See supra* note 44.

132. *See* WYOMING PATTERN JURY INSTRUCTIONS (Rev. 1993), Rule 10.04. This instruction established a two stage process. In stage one, the jury apportions fault among the parties. In stage two, the jury determines the total amount of damages "without considering the percentage of fault." *Id.*

133. *McGarvin-Moberly*, 897 P.2d at 1319.

134. *Id.* The treatment would differ in some respects because, unlike a non-party, the defaulting party would be bound by the judgment. County Comm'rs of Campbell County v. Ridenour, 623 P.2d 1174, 1188 (Wyo. 1981).

135. *McGarvin-Moberly*, 897 P.2d at 1319.

ANALYSIS

In *McGarvin-Moberly,* the court's desire for fairness impeded its duty to promote efficiency in the court. The result was a revolutionary decision[136] wandering far from the path followed by most other jurisdictions; a decision that undermines both the integrity of the court's prior decisions and the effectiveness of default under Rule 55.

Lack of Authority

In rendering its decision, the court provided remarkably little authority for its conclusions. In support of its core holding the court cited only two cases. One was a case from the Eastern District of New York finding that a defaulting defendant should be allowed to conduct "discovery regarding the amount of unliquidated damages."[137] The other was a United States Supreme Court case holding that, in multiple defendant cases, a court should not impose default judgment until the case is tried against the defendants not in default.[138]

The dissent suggested that the conspicuous absence of on-point case law may "indicate no one has heretofore even seriously suggested that any court would allow a defendant in default to defend fault contrary to the language of decided cases."[139] Where parties have suggested the application of comparative fault in cases of default, the weight of authority is clearly contrary to the findings in *McGarvin-Moberly.*[140]

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136. *See* John W.R. Murray, *Defendant Defaults; May Avoid Paying Any Damages at All,* 95 LAWYERS WEEKLY USA 744, 757(1995) [hereinafter Murray].

137. Clague v. Bednarski, 105 F.R.D. 552, 553 (E.D.N.Y. 1985) (quoted with approval in *McGarvin-Moberly,* 897 P.2d at 1316).

138. Frow v. De La Vega, 82 U.S. 552, 554 (1872) (cited with approval in *McGarvin-Moberly,* 897 P.2d at 1316). The courts main concern was a possibility of inconsistent judgments. It is interesting to note that the *Frow* court goes on to say the trial should proceed based upon the answers of the other defendant because the defaulting party has "lost his standing in court." *Id.*

At the circuit court level, the *Frow* decision has been limited to cases resulting in joint liability. Some courts have ruled it inapplicable in cases where they apply joint and several liability or comparative fault, because the chance for inconsistent judgments not as great. In re Uranium Antitrust Litig., 617 F.2d 1248, 1257 (7th Cir. 1980). *See also* Wright, *supra* note 12, § 2690.

139. *McGarvin-Moberly,* 897 P.2d at 1319.

140. *See supra* notes 67-89 and accompanying text. *But see Fehlhaber,* 425 F.2d at 715; *Jordan,* 611 N.E.2d at 852. Though the cases conflicting with *McGarvin-Moberly* deal with default judgments, their reasoning is also applicable to cases where only default has been entered. These cases hold that comparative fault does not apply to default because liability has already been determined and comparative fault is a defense to liability. Liability is uncontestable whether default or default judgment has been entered. *Spitzer,* 777 P.2d at 592; *Vanasse,* 847 P.2d at 1000.

Decisions lacking authority are expected when courts rule on a blank slate, but this was not such a case. This decision tacitly overruled important principles that have guided the court's use of default for years.[141] Despite the carefully phrased arguments that the majority employs, they are allowing the defendant to assert a defense to liability.[142]

The court has historically characterized liability as the legal responsibility emanating from fault.[143] The whole impetus behind comparative fault was to create a closer relationship between fault and liability.[144] If any two principles are "inextricably intertwined" they are fault and liability not the clearly separable issues of fault and damages. With the 1986 amendments to Wyoming Statute section 1-1-109, the legislature created a direct correlation between fault and liability.[145] To permit a challenge to one and say you are not permitting a challenge to both is to let semantics overcome reason. Allowing a defaulting party to contest fault is in essence allowing them to assert a "further defense . . . with respect to liability" contrary to the holdings in *Spitzer* and *Vanasse*.[146]

The Demise of Default

Perhaps the greatest weakness of this decision is that it frustrates the operation of default. Historically default has been a powerful tool, allowing courts to usher litigation to a speedy conclusion despite a party who fails to answer in a timely manner.[147] Under *McGarvin-Moberly*, defaulting defendants who appear before default judgment can revive issues of fault that before would have been laid to rest by an entry of default.[148] The majority indicated that default retains consequences regardless of the defendant's ability to challenge fault. They stated that a defaulting party still cannot implead others or argue that it is negligence-free.[149] Though

141. *McGarvin-Moberly*, 897 P.2d at 1319.

142. *Id. See Colley*, 871 P.2d at 196 (characterizing comparative negligence as a defense).

143. *See* Eiselein v. K-Mart, 868 P.2d 893, 896 (Wyo. 1994) (describing the purpose of comparative fault as distributing liability on the basis of causal fault); Allmaras v. Mudge, 820 P.2d 533, 542 (Wyo. 1991) (finding that liability results from fault even in some cases of intervening negligence).

144. *Halliburton*, 773 P.2d at 155. *See* ALAN D. BUDMAN ET AL., COMPARATIVE NEGLIGENCE § 1.30[1] (1990).

145. *Eiselein*, 868 P.2d at 896. *See* Greenlee & Rochelle, *supra* note 40, at 469; WYOMING PATTERN JURY INSTRUCTION (Rev. 1993), Rule 10.03. "Each defendant's liability is limited by the percentage of fault . . . that you find is attributable to that particular defendant." *Id.*

146. *See supra* note 32 and accompanying text.

147. *Vanasse*, 847 P.2d at 1000; *Greyhound*, 973 F.2d at 159. *See* Schultz, *supra* note 12, at 203-05.

148. Murray, *supra* note 136, at 744.

149. *McGarvin-Moberly*, 897 P.2d at 1317.

this may impose some efficiency in trial proceedings, it falls far short of that achieved by barring challenges to fault.[150] With this decision the court has transformed default from an agent of efficiency into a foundation for additional delay.

Alternatives

Treating the defaulting defendant similar to a non-party is a sensible option for these types of cases.[151] Using this approach, a court could bifurcate the proceeding, holding one hearing on the issue of fault and liability, and another on the amount of damages. The court would place the defaulting defendant on the verdict form without allowing them to participate on issues of fault. It would then permit the defendant to contest the amount of total damages in the second hearing. Applied in *McGarvin-Moberly*, this approach would allow the defaulting defendant to challenge the existence and severity of the Weldens' injuries but no more.[152] This alternative would leave the application of default untethered while ensuring that courts would comply with the spirit of the comparative fault statute.

As the majority indicated, if a defaulting party was not allowed to challenge fault, other parties might try to shift responsibility to defaulting defendants with deep pockets.[153] If a court determined this situation was inequitable, it could exercise the discretion provided in Rule 55 to overcome it.[154] A court could remove the entry of default,[155] and allow a defendant to participate as a party and contest all aspects

150. Because the defaulting party still has the power to challenge the degree of negligence, the court gains little efficiency by instructing the jury that the defaulting defendant is negligent. Likewise, the efficiency gained by barring the defaulting party from impleading others is largely illusionary. Though this allows the court to avoid counter and cross-claims that an additional party could bring, the requirement that all parties be placed on the verdict form necessarily means that the litigants will continue to contest the negligence of those not in the action. *See Ridenour*, 623 P.2d at 1188; *Kirby Bldg. Sys.*, 704 P.2d at 1272.

151. This is the option that Justice Cardine proposes in his dissent. *McGarvin-Moberly*, 897 P.2d at 1319. *See Kirby Bldg. Sys*, 704 P.2d at 1272; *Ridenour*, 623 P.2d at 1188-89 (illustrating the treatment of non-parties in comparative fault cases).

152. McGarvin-Moberly asserted that the absence of physical damage to the Weldens' car, and the fact that the plaintiffs did not request any medical assistance at the scene of the accidents indicated that they were not injured at all. *See* McGarvin-Moberly's Petition, *supra* note 3, at 4-5. This is the type of evidence Justice Cardine's approach would allow the defaulting party to present.

153. *McGarvin-Moberly*, 897 P.2d at 1317.

154. Claassen v. Nord, 756 P.2d 189 (Wyo. 1988); Zweifel v. State 517 P.2d 493, 498 (Wyo. 1974). *But see* Vanasse, 847 P.2d at 1000 (making an analogy between the imposition of default and a statute of limitation saying: "They are not judicially made but represent legislative and public policy controlling the right to litigate . . . courts have no right to deny their application.").

155. *Claassen*, 756 P.2d at 193.

of the case.[156] The decision in *McGarvin-Moberly* has removed much of this discretion. Challenging fault has ceased to be a privilege for parties who respond promptly, or for courts to grant when justice demands, and has become an undeniable right.[157]

Absent the dramatic step of setting aside an entry of default, the system itself would contain protection for the defaulting party. The jury's final determination of fault, while influenced by the facts given, is still limited to what the participating parties can prove.[158] The demands of the judicial system would not allow parties to create a case out of whole-cloth in order to pin responsibility on a defaulting defendant. Despite these protections a defaulting party would be disadvantaged by their default. The measure of true justice, however, may be that parties who respond promptly are rewarded for their vigilance, and those who harm the system through delay are forced to pay for that harm.

CONCLUSION

The Wyoming Supreme Court's decision to allow a defaulting defendant, who has appeared prior to the entry of judgment, to participate in litigation on the issue of fault is suspect both in respect to precedent and in respect to public policy. Though the court came to what it viewed as a just conclusion, it did so at great cost. This decision significantly undermines both precedent and default's role in promoting efficiency in litigation.

A better approach would have been to treat the defaulting defendant similar to a non-party. This would allow the courts to stay true to the letter and spirit of the comparative fault statute while ensuring that default continued to encourage efficiency in litigation.

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156. Another option, beyond the scope of this note, is to create alternatives to default as sanctions for failure to plead. Schultz, *supra* note 147, at 226. Alternatives could include mandatory awards of costs and expenses to the non-defaulting party. *Id.*

157. *McGarvin-Moberly*, 897 P.2d at 1316.

158. DeWald v. State, 719 P.2d 643, 652 (Wyo. 1986). "Negligence and proximate cause are never presumed from the happening of an accident, and mere conjecture cannot form the basis of liability." *Id.*