

SUPREME COURT OF COLORADO

J.B., as legal guardian and personal representative of E.B., an adult with a disability v. MKBS, LLC d/b/a Metro Taxi, Inc. a/k/a Metro Transportation Planning and Solution Group and Jesus Manuel Ortiz

J.B., 2026 CO 50 (Colo. 2026) · No. 24SC747 · Decided June 23, 2026

SUMMARY

The Colorado Supreme Court held that a defaulting defendant may testify at a non-defaulting codefendant's trial, even when the testimony contradicts facts admitted through the default, when the testimony is relevant to the codefendant's defense. The court also upheld setting aside the default judgment based on excusable neglect and entering judgment for the defaulting defendant to avoid inconsistent adjudications with the jury verdict favoring the codefendant. Chief Justice Marquez dissented.

OPINION

J.B., as legal guardian and personal representative of E.B., an adult with a disability v. MKBS, LLC d/b/a Metro Taxi, Inc. a/k/a Metro Transportation Planning and Solution Group and Jesus Manuel Ortiz. 2026 CO 50

PER CURIAM.

1 2026 CO 50 J.B., as legal guardian and personal representative of E.B., an adult with a disability, Petitioner v. MKBS, LLC d/b/a Metro Taxi, Inc. a/k/a Metro Transportation Planning and Solution Group and Jesus Manuel Ortiz. Respondents No. 24SC747 Supreme Court of Colorado, En Banc June 23, 2026 2 Certiorari to the Colorado Court of Appeals Court of Appeals Case No. 23CA1415 Attorneys for Petitioner: Burg Simpson Eldredge Hersh & Jardine, P.C. Jessica B. Prochaska Jessica L. Breuer D. Dean Batchelder Englewood, Colorado Attorneys for Respondent MKBS, LLC d/b/a Metro Taxi, Inc. a/k/a Metro Transportation Planning and Solution Group: Harris, Karstaedt, Jamison & Powers, P.C. Jamey W. Jamison Mark A. Sares Englewood, Colorado 3 Attorneys for Respondent Jesus Manuel Ortiz: Squire Patton Boggs (US) LLP Keith Bradley Kayla Marie Mendez Denver, Colorado Squire Patton Boggs (US) LLP Samuel Ballingrud Washington, District of Columbia JUSTICE HOOD delivered the Opinion of the Court, in which

JUSTICE BOATRIGHT, JUSTICE GABRIEL, JUSTICE SAMOUR, JUSTICE

BERKENKOTTER, and JUSTICE BLANCO joined. CHIEF JUSTICE MARQUEZ dissented. 4

OPINION

HOOD,

JUSTICE. ¶1

Jesus Manuel Ortiz was accused of sexually assaulting E.B., whom he regularly drove to activities as part of his employment with MKBS, LLC ("MKBS"), a taxi company. E.B.'s legal guardian, J.B., [1] sued both Ortiz and MKBS; however, Ortiz never responded to the complaint, and the district court entered a clerk's default against him. ¶2 During J.B.'s subsequent trial against MKBS, the court allowed Ortiz to testify contrary to the facts established by his default, and the jury found in MKBS's favor. Then, upon Ortiz's request, the court set aside the default and entered judgment in Ortiz's favor. ¶3 J.B. appealed. We agree with the division majority below that the district court properly (1) allowed Ortiz to testify at MKBS's trial (despite the default), (2) set aside the default judgment entered against Ortiz, and (3) entered judgment in his favor consistent with MKBS's jury verdict. Therefore, we affirm the judgment of the court of appeals. 5 I. Facts and Procedural History ¶4 J.B. is the personal representative and legal guardian of E.B., a cognitively impaired, blind adult who uses a wheelchair. For several years, E.B. used MKBS to transport her to a day-program center. Ortiz was E.B.'s regular driver for a few months, and E.B. alleged that, during one of her trips with Ortiz, he sexually assaulted her. ¶5 J.B. filed suit against MKBS and Ortiz based on the alleged sexual assault. She asserted claims against Ortiz for outrageous conduct, intentional infliction of emotional distress, battery, and assault. She also asserted claims against MKBS for negligent hiring and retention, negligent supervision, negligence, negligent infliction of emotional distress, respondeat superior liability, and outrageous conduct. MKBS filed a timely answer denying the claims against it. Ortiz failed to respond to the complaint, and the district court granted J.B.'s motion for entry of default against Ortiz pursuant to C.R.C.P. 55(a). ¶6 The effect of the default was that Ortiz was deemed to have admitted the material allegations in J.B.'s complaint. See *Pinkstaff v. Black & Decker (U.S.) Inc.*, 211 P.3d 698, 703 (Colo. 2009). The order granting the entry of default directed J.B. to file a motion for default judgment against Ortiz within thirty-five days. J.B., however, didn't move for a default judgment for almost two years (after the civil trial against MKBS). 6 ¶7 While the civil case was pending, Ortiz faced criminal charges for the same incident. J.B. and MKBS conferred and jointly filed a motion to stay the civil proceedings pending resolution of Ortiz's criminal trial due to impediments to discovery and the development of evidence for both parties. The district court granted the motion. The criminal case went to trial, and a jury acquitted Ortiz. In the civil case, J.B. filed, and the court granted, a motion to exclude evidence of Ortiz's acquittal in the criminal case. ¶8 At a pretrial conference, MKBS indicated that it planned to call Ortiz to testify in its defense. J.B. moved to preclude Ortiz from making any arguments or presenting testimony that would contradict the factual allegations he admitted by default. The district court denied the motion, concluding that J.B. knew she had to prove liability as to MKBS and failed to provide authority to support her claim that Ortiz's default admissions were binding on MKBS or that MKBS was precluded from introducing Ortiz's testimony as it related to MKBS's liability. ¶9 The

jury trial began, but the court quickly declared a mistrial because Ortiz was at the courthouse talking near and with prospective jurors about the lawsuit and the fact that he was accused of sexual assault. The court reset the trial to begin a couple of months later. 7 ¶10 At trial, Ortiz testified for MKBS and denied sexually assaulting E.B. He also acknowledged that he was in default and aware that MKBS's lawyer was not representing him in the civil case. ¶11 Before closing arguments, the district court read, among others, the following jury instruction aloud in open court: When a defendant has failed to defend himself in a lawsuit, a default shall enter against him. An entry of default establishes a defendant's liability and the allegations in the plaintiff's complaint concerning the defaulting defendant are deemed admitted as to that defendant. An entry of default, however, is not an admission regarding damages. Jesus Ortiz is a defaulting defendant. The jury returned a verdict in MKBS's favor, and on a special verdict form, the jury indicated that, "with respect to all claims against [MKBS]," Ortiz didn't sexually assault E.B. The jury also concluded that E.B. didn't have any injuries, damages, or losses from the alleged sexual assault. ¶12 About a month after the trial, J.B. moved for entry of a default judgment against Ortiz pursuant to C.R.C.P. 55(b). The court entered judgment against Ortiz in the amount of almost \$700,000 based on the evidence that J.B. had presented during MKBS's trial. ¶13 Then, Ortiz, filing pro se, moved to set aside the default judgment. The district court granted Ortiz's motion, finding that he had established excusable neglect. J.B. moved for reconsideration, and the court denied J.B.'s motion. 8 ¶14 Ortiz, now represented by counsel, then moved for entry of judgment in his favor. After a hearing, the court granted the motion. The court relied on the verdict from MKBS's jury trial in issuing its order. And because the jury had found that E.B. had no injury, damages, or losses from the alleged sexual assault, the court concluded that the determination of damages had been fully resolved. ¶15 J.B. appealed, and in a split decision, a division of the court of appeals affirmed the district court's judgment.

J.B. v. MKBS, LLC , 2024 COA 117, ¶ 89 , 563 P.3d

189, 203 . Judge Schutz dissented, expressing concern that the majority opinion "reward[ed] a defendant who failed to comply with litigation deadlines, and depriv[ed] a plaintiff of their opportunity to try their claims against the defaulted defendant." Id. at ¶ 92, 563 P.3d at 203 (Schutz, J., dissenting). ¶16 J.B. petitioned this court for certiorari review, and we granted her petition. [2] 9 II. Analysis ¶17 We begin by addressing the issue of preservation and identifying the standard of review. Next, we discuss whether a defaulting defendant may testify at a non-defaulting codefendant's trial contrary to facts deemed admitted by his default. Then, we review the factors a court must balance before setting aside a default judgment and apply them to the facts of this case. Finally, we analyze whether the district court erred by entering judgment in favor of Ortiz based on the jury verdict in MKBS's trial. A. Preservation and Standard of Review ¶18 Ortiz argues that J.B. did not preserve the issue of whether a defaulting defendant may testify at a non-defaulting codefendant's trial. However, we agree with the division majority that J.B. preserved this issue through her motion arguing that she would be unfairly prejudiced if the court

permitted Ortiz to testify. See J.B. , ¶ 34, 563 P.3d at 195 . ¶19 We review a district court's decision on whether to allow someone to testify for an abuse of discretion. See *Murray v. Just In Case Bus. Lighthouse, LLC* , 2016 CO 47M , ¶¶ 32, 41, 374 P.3d 443, 453, 455 . We also review a district court's order setting aside a default judgment for an abuse of discretion. *McMichael v. Encompass PAHS Rehab. Hosp., LLC* , 2023 CO 2, ¶ 12 , 522 P.3d 713 , 719. A district court abuses its discretion when its decision is based on a misapplication or misinterpretation 10 of the law, or is otherwise manifestly arbitrary, unreasonable, or unfair. *People v. West* , 2025 CO 61 , ¶ 13, 578 P.3d 832 , 835; *People v. Chavez* , 2020 COA 80M , ¶ 8, 486 P.3d 377, 378 . ¶20 Whether a defaulting party's testimony is admissible in a non-defaulting defendant's trial and whether a defaulting defendant is entitled to judgment in his favor to avoid inconsistent adjudications are questions of law, which we review de novo. See *Dickinson v. Lincoln Bldg. Corp.* , 2015 COA 170M , ¶ 21, 378 P.3d 797, 804 .

B. Permitting a Defaulting Defendant to Testify at a Non-Defaulting Codefendant's Trial ¶21 Rule 55 governs the entry of default judgments. Under Rule 55(a), a clerk shall enter a default "[w]hen a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend." An entry of default "constitutes an admission by the defendant of the material allegations contained in the complaint, and the only remaining issue to be determined is the amount of damages." *Pinkstaff* , 211 P.3d at 703 ; see also *Kwik Way Stores, Inc. v. Caldwell* , 745 P.2d 672, 678 (Colo. 1987) (explaining that an entry of "default establishes liability but does not fix the amount of damages" (citation omitted)). The plaintiff may then move for a default judgment to be entered, after which the court will determine damages and, if needed, may hold a hearing to do so. C.R.C.P. 55(b)(1). Defaulting defendants may not challenge their liability at a Rule 55(b)(1) damages 11 hearing. *Dickinson* , ¶ 37, 378 P.3d at 806 . Unless a default is set aside, a defendant is precluded from "urging anything contrary to the complaint." *Bettcher v. State ex rel. Att'y Gen.* , 344 P.2d 969, 971 (Colo. 1959). In other words, a defaulting defendant may not testify or present evidence at a damages hearing that is contrary to the factual basis he is deemed to have admitted by the entry of default. ¶22 The Rules are silent about the use of a defaulting defendant's testimony in other proceedings. ¶23 For two reasons, the division majority held that the district court didn't abuse its discretion by allowing MKBS to call Ortiz as a witness: (1) Ortiz's testimony was relevant to the central question of whether MKBS was liable to J.B., and MKBS's ability to defend itself would be materially prejudiced if Ortiz was prevented from testifying; and (2) Ortiz didn't testify in his capacity as a codefendant and didn't challenge his own liability under the default—he was a subpoenaed witness in a non-defaulting defendant's trial. J.B. , ¶¶ 37-39, 44-46, 563 P.3d at 196-97 . J.B. counters that allowing defaulting defendants to testify about their liability would undercut the reasons for default. We agree with the division majority that the district court didn't abuse its discretion. ¶24 Defendants are generally allowed to defend themselves with the best evidence available, subject to the limits imposed by constitutions, rules, and statutes. See CRE 402 ("All relevant evidence is admissible, except as otherwise 12 provided by the Constitution of the United States, by the Constitution of the State of

Colorado, by these rules, or by other rules prescribed by the Supreme Court, or by the statutes of the State of Colorado."); see also *Pub. Utils. Comm'n v. Donahue* , 335 P.2d 285, 291 (Colo. 1959) (stating that parties should be afforded a fair opportunity to present their case and submit all pertinent facts). "The truthseeking function of our legal system is thwarted . . . if the finder of fact is denied [material] evidence at trial." *Warembourg v. Excel Elec., Inc.* , 2020 COA 103, ¶ 1 , 471 P.3d 1213 , 1217. Accordingly, a non-defaulting codefendant may call a defaulting defendant to testify, as long as doing so isn't prohibited by other sources of law. See *Henry v. Oluwole* , 108 F.4th 45, 49-50 (2d Cir. 2024) (concerning a defaulting employee testifying at his employer's trial for claims deriving from the employee's conduct). ¶25 Our conclusion isn't novel. For example, in *Henry* , the plaintiff alleged that her doctor sexually assaulted her. *Id.* at 49 . She asserted numerous claims against the doctor and the hospital where he worked at the time of the alleged assault. *Id.* The doctor failed to respond to the complaint, and the court entered a default against him. *Id.* At the subsequent trial against the hospital, the doctor was allowed to testify, and the jury found that he hadn't assaulted the plaintiff, absolving the hospital of liability. *Id.* at 50 . 13 ¶26 Just as the hospital in *Henry* relied on the doctor's testimony to defend against the sexual assault allegations, MKBS called Ortiz to defend itself. Therefore, we find this federal precedent instructive. See *Ferraro v. Frias Drywall, LLC* , 2019 COA 123, ¶ 15 , 451 P.3d 1255 , 1259 (explaining that Colorado's default judgment rule—Rule 55—is similar to its federal counterpart, so we may rely on federal cases for guidance in interpreting the rule); see also *Brown v. Walker Com., Inc.* , 2022 CO 57 , ¶ 15, 521 P.3d 1014, 1018 . Ortiz was one of only two people present at the time of the alleged sexual assault, so MKBS would've been prejudiced if it hadn't been allowed to call him as a witness. See *People v. Jackson* , 2018 COA 79, ¶ 51 , 474 P.3d 60 , 72 (stating that the jury's truth-finding function and the interests of justice are better served by admitting observations from someone who was a firsthand witness to the event), *aff'd* , 2020 CO 75 , 472 P.3d 553 . ¶27 Additionally, the clerk's entry of default against Ortiz constituted an admission of the facts alleged in the complaint, but it wasn't a judgment on the merits of the case. We have a long-established preference for resolving cases on the merits rather than through default judgments whenever possible. See *McMichael* , ¶ 11, 522 P.3d at 718-19. Prohibiting MKBS from introducing Ortiz's firsthand testimony because of an entry of default against Ortiz would subvert this preference. Allowing Ortiz to testify promoted the truth-seeking function of our legal system. 14 ¶28 Furthermore, although defaulting defendants are prohibited from challenging their liability at a Rule 55(b)(1) damages hearing, *Dickinson* , ¶ 37, 378 P.3d at 806 , there is no rule that prevents a defaulting defendant from testifying as a witness at a different defendant's trial. The trial here was limited in scope to determining MKBS's liability and damages. Ortiz's liability to J.B. wasn't at issue in this trial; he was testifying as a subpoenaed witness (not a codefendant), and the jury was instructed that he was deemed liable for the sexual assault by virtue of his default. ¶29 Therefore, we agree with the division majority that the district court didn't abuse its discretion by allowing Ortiz to testify at MKBS's trial even though his testimony

contradicted the facts admitted by his default. See J.B. , ¶ 48, 563 P.3d at 197 . C. Setting Aside a Default Judgment ¶30 Default judgment is disfavored and should be imposed only in extreme circumstances. McMichael , ¶ 11, 522 P.3d at 718. "A judgment by default is not designed to be a device to catch the unwary or even the negligent." R.F. v. D.G.W. , 560 P.2d 837 , 839 (Colo. 1977). And so, "when doubt exists as to whether a default should be granted or vacated, the doubt should be resolved in favor of the defaulting party." Henry , 108 F.4th at 51 (quoting Enron Oil Corp. v. Diakuhara , 10 F.3d 90, 96 (2d Cir. 1993)). 15 ¶31 Rule 55(c) allows a court to set aside a default judgment in accordance with C.R.C.P. 60(b). Under Rule 60(b), the defaulting party has the burden to prove by clear and convincing evidence that the court should grant the motion to set aside a default judgment. Goodman Assocs., LLC v. WP Mountain Props., LLC , 222 P.3d 310, 315 (Colo. 2010). A court may set aside a default judgment if the defaulting party establishes excusable neglect for its failure to respond. C.R.C.P. 60(b). A court should consider three factors in determining whether to set aside a default judgment for excusable neglect: "(1) whether the neglect that resulted in entry of judgment by default was excusable; (2) whether the moving party has alleged a meritorious claim or defense; and (3) whether relief from the challenged order would be consistent with considerations of equity." Goodman , 222 P.3d at 319 . Because resolution of a dispute on the merits is favored over a default judgment, courts should liberally construe these factors in favor of the defaulting party. Id. at 320 . ¶32 The division majority held, and we agree, that the district court "did not abuse its discretion by setting aside the default judgment entered against Ortiz because it properly considered the three C.R.C.P. 60(b) factors." J.B. , ¶ 56, 563 P.3d at 198 . ¶33 First , the division majority agreed with the district court's finding that Ortiz's failure to respond to J.B.'s complaint was excusable because he was 16 legitimately confused about whether an attorney represented him. Id. at ¶¶ 57, 64-65, 563 P.3d at 198-99 . The district court reasonably relied on Ortiz's explanation in his motion to set aside the default, in which he said that he believed that MKBS's attorneys represented him because the incident happened during his employment. Id. at ¶¶ 62, 64, 563 P.3d at 199 . Additionally, Ortiz explained that, because he had a public defender represent him during his criminal trial and because he was acquitted, he was confused as to what actions he needed to take in the civil case. Id. at ¶ 57, 563 P.3d at 198 . ¶34 We agree with the division majority that the district court properly applied an objective test in finding that Ortiz's assumptions were reasonable. Id. at ¶ 62, 563 P.3d at 199 . Excusable neglect hinges on whether a reasonably careful person would have similarly neglected a duty. Goodman , 222 P.3d at 319 . "Common carelessness and negligence do not amount to excusable neglect." Id. (quoting In re Weisbard , 25 P.3d 24, 26 (Colo. 2001)). But a reasonably careful person in Ortiz's situation could have believed that his employer's counsel represented him because the civil case arose out of an event that occurred while Ortiz was on the job. And although Ortiz testified at trial that he understood that MKBS's attorney didn't represent him, he didn't say when he came to this understanding. The district court noted that Ortiz didn't appear to have a sophisticated grasp of the

legal process, and it was therefore reasonable for him to believe that his employer's 17 counsel would also be representing him. We conclude that the district court didn't abuse its discretion by concluding that, under these circumstances, a reasonably careful person might have similarly neglected the duty to respond to the complaint. ¶35 Second , we agree with the division majority that the district court didn't abuse its discretion by concluding that the outcome of the MKBS trial indicated that Ortiz had a meritorious defense. See J.B., ¶¶ 58, 66, 563 P.3d at 198-99 . At MKBS's trial, the jury found that Ortiz didn't assault E.B. and that E.B. didn't have any injuries, damages, or losses from the alleged sexual assault. Id. at ¶ 58, 563 P.3d at 198 . He was also acquitted of all criminal charges. Id. ¶36 Third , in determining whether setting aside a default judgment would be consistent with considerations of equity, a court should "take into account the promptness of the moving party in filing the [R]ule 60(b) motion, the fact of any detrimental reliance by the opposing party on the order or judgment of dismissal, and any prejudice to the opposing party if the motion were to be granted." Goodman , 222 P.3d at 319 (quoting Buckmiller v. Safeway Stores, Inc. , 727 P.2d 1112, 1116 (Colo. 1986)). Here, the division majority held that the district court properly concluded that the considerations of equity weighed in Ortiz's favor because Ortiz filed his motion to set aside the default only three weeks after its entry and, 18 although his actions caused a mistrial, when given instructions by the court, he complied with them. See J.B. , ¶ 60, 563 P.3d at 198-99 . ¶37 The division majority was also unpersuaded by J.B.'s argument that it would be unfair to set aside the default because she had relied on it. Id. at ¶¶ 67-68, 563 P.3d at 199-200 . The division majority noted that J.B. waited until after the MKBS trial to move for default judgment against Ortiz despite the court's entry of default two years earlier. Id. at ¶ 68, 563 P.3d at 199-200 . A motion to set aside a judgment under Rule 60(b) is used to set aside a default judgment issued under Rule 55(b), not to set aside a clerk's entry of default under Rule 55(a). So, in determining whether J.B. detrimentally relied on the default against Ortiz, the district court correctly looked at the default judgment entered after the trial in 2021, not the clerk's default entered in 2019. ¶38 Even if we were to consider J.B.'s reliance on the clerk's entry of default in 2019, any prejudice to her was minimal. J.B. knew that MKBS planned on calling Ortiz to testify, and she was able to present evidence about the alleged sexual assault and to cross-examine Ortiz. ¶39 Regarding the concern about J.B.'s expenses, had Ortiz timely answered J.B.'s complaint, she would have incurred similar costs to those already incurred in her case against MKBS, so setting aside the default would not substantially prejudice her. See Henry , 108 F.4th at 52-53 ("[I]t must be shown that delay will 19 result in the loss of evidence, create increased difficulties of discovery, or provide greater opportunity for fraud and collusion." (quoting Davis v. Musler , 713 F.2d 907, 916 (2d Cir. 1983))). And the division majority deemed the expense that J.B. might incur in a trial on the merits of her claim against Ortiz secondary to the other factors. J.B. , ¶ 60, 563 P.3d at 198 . We therefore agree with the division majority that the district court didn't abuse its discretion by concluding that the considerations of equity weighed in Ortiz's favor.

D. Entering Judgment in Ortiz's Favor ¶40 We agree with the United States Supreme Court that it

would be "unseemly and absurd, as well as unauthorized by law" to allow a default judgment to create an incongruity with a judgment on the merits. *Frow v. De La Vega* , 82 U.S. 552, 554 (1872); see also *In re Water Rts. of Elk Dance Colo., LLC* , 139 P.3d 660, 667 (Colo. 2006) (explaining that avoiding inconsistent judgments promotes reliance on the judicial system). So, we, like a majority of federal courts, adopt and expand the rule from *Frow* , which "prohibits a default judgment that is inconsistent with a judgment on the merits," *Moore v. Booth* , 122 F.4th 61, 67 (2d Cir. 2024) (quoting *Henry* , 108 F.4th at 53), as long as "the defendants are 'similarly situated' or have 'closely related defenses' even if not jointly liable," *id.* See *Schenck v. Van Ningen* , 719 P.2d 1100, 1102 (Colo.App. 1986). Therefore, when a jury verdict conflicts with the 20 allegations in a plaintiff's complaint, a default judgment based on those allegations should be vacated. *Henry* , 108 F.4th at 56 . ¶41 Again, we find the Second Circuit's reasoning in *Henry* helpful. As in *Henry* , a judgment against Ortiz would directly conflict with the jury verdict entered at the conclusion of the MKBS trial, finding that Ortiz hadn't sexually assaulted E.B. and that E.B. had no injuries, damages, or losses from the alleged sexual assault. See *Henry* , 108 F.4th at 55-56, 63 (applying the rule from *Frow* , the court ordered the district court to enter judgment in favor of the doctor because the jury from the codefendant hospital's trial concluded that the doctor hadn't sexually assaulted the plaintiff). Similar to the plaintiff in *Henry* , who had the opportunity to examine and challenge the doctor's version of the alleged sexual assault and present essentially the same evidence at the hospital's trial that she would have presented in a trial against the doctor, 108 F.4th at 54 , J.B. had the same opportunity to present evidence about the alleged sexual assault and cross-examine Ortiz in the trial against MKBS as she would have had in a trial against Ortiz. ¶42 Therefore, given the preference for a judgment on the merits over one entered by default and to avoid the entry of inconsistent judgments, we conclude that the district court didn't abuse its discretion by entering judgment in favor of Ortiz. 21 III. Conclusion ¶43 We affirm the judgment of the court of appeals.

CHIEF

JUSTICE MARQUEZ dissented. 22

CHIEF

JUSTICE MARQUEZ, dissenting. ¶44 As Judge Schutz observed in his dissent below, this case "requires us to make difficult choices balancing the tension between the desire for entering consistent judgments, holding defaulted parties accountable, and ensuring parties an opportunity to pursue their claims." *J.B. v.*

MKBS, LLC , 2024 COA 117, ¶ 90 , 563 P.3d 189, 203

(Schutz, J., dissenting). The majority strikes the balance today in a way that not only fails to hold Jesus Manuel Ortiz accountable for his default but ultimately rewards him for the very conundrum he created. Indeed, by upholding the entry of judgment in Ortiz's favor—a judgment that can be directly traced to Ortiz's improper testimony contrary to facts admitted through his default—the majority also simultaneously deprives the plaintiff of any opportunity to try her claims against

Ortiz. All told, this is a startling outcome for a defendant who defaulted, and for a plaintiff who played by the rules. ¶45 Today's outcome undermines the stability and predictability of the rules of procedure that undergird our legal system. Moreover, this outcome is unnecessary, assuming the goal was to strike a fair balance between the interests of the plaintiff, J.B., Ortiz, and MKBS, LLC ("MKBS"). ¶46 Importantly, the claims against MKBS did not require the jury to resolve the question of whether a sexual assault occurred. While MKBS may have preferred to have Ortiz testify that he did not sexually assault E.B., his testimony was not, in 23 fact, legally necessary to MKBS's defense. The district court nevertheless allowed Ortiz to testify as a witness at MKBS's trial to facts directly contrary to the admissions made through his default. This error set in motion a chain of events that ultimately allowed Ortiz to not only escape his own default but to ultimately claim judgment in his favor as a party on the merits of J.B.'s claims—all without ever facing a trial on those claims. ¶47 The majority blesses this outcome, Maj. op. ¶ 3, and along the way, misapplies the narrow rule in *Frow v. De La Vega*, 82 U.S. 552, 554 (1872), while simultaneously ignoring the salient language from that decision emphasizing that a defaulting defendant is not entitled to "adduce . . . evidence" or "be heard" at a proceeding against a codefendant or to "appear in it in any way." ¶48 For these reasons, I respectfully dissent. I. The Majority Misapplies *Frow* ¶49 The majority relies on *Frow* to justify entering judgment in Ortiz's favor, reasoning that *Frow* "prohibits a default judgment that is inconsistent with a judgment on the merits." Maj. op. ¶ 40 (quoting *Moore v. Booth*, 122 F.4th 61, 67 (2d Cir. 2024)). But the decision in *Frow* stands for a narrow rule applicable to situations involving joint liability—which is not the case here. 24 ¶50 In *Frow*, the plaintiff alleged a joint conspiracy by several defendants, including *Frow*, to defraud the plaintiff of a tract of land. 82 U.S. at 552-53. [1] *Frow* failed to respond to the complaint and the court entered a decree against him. *Id.* at 553. While *Frow*'s appeal was pending, a bench trial proceeded against the nondefaulting defendants, and the court ultimately ruled in their favor. *Id.* In resolving *Frow*'s appeal, the Supreme Court observed that "in such a case as this," the incongruent judgments (one against *Frow* and another in favor of all the other codefendants regarding title to the same property) created an "unseemly and absurd" situation. *Id.* at 554. ¶51 The Court then explained the procedure to be followed in such cases: "[W]here a bill makes a joint charge against several defendants, and one of them makes default, [the proper procedure] is simply to enter a default . . . against him, and proceed with the cause upon the answers of the other defendants." *Id.* (emphasis added). The Court reasoned that if the case is then decided against the plaintiff on the merits, the case should be "dismissed as to all the defendants alike—the defaulter as well as the others"—and vice versa. *Id.* 25 ¶52 *Frow* thus sought to avoid the specific outcome where "there might be one decree of the court sustaining the charge of joint fraud committed by the defendants; and another decree disaffirming the said charge, and declaring it to be entirely unfounded, and dismissing the [plaintiff's] bill." *Id.* (emphasis added). In other words, *Frow* stands for the narrow rule that a default judgment may not be entered against one of several defendants

(1) when the theory of recovery is one of true joint

liability, such that, as a matter of law, no one defendant may be liable unless all defendants are liable, or (2) when the nature of the relief demanded is such that, in order to be effective, it must be granted against each and every defendant. 10 Moore's Federal Practice—Civil § ¶53 Frow 's narrow rule is simply inapplicable here. The claims against MKBS that were submitted to the jury in this case (negligence, negligent supervision, negligent retention, and negligent infliction of emotional distress) do not involve joint and several liability with Ortiz. And importantly, a jury could find MKBS not liable for such claims (i.e., not negligent, or not a cause of the plaintiff's damages) without having to resolve the question of whether a sexual assault occurred. In other words, while MKBS preferred to contest that the assault occurred, it was not legally necessary for it to do so to avoid liability. Enforcing 26 the consequence of Ortiz's default would not have deprived MKBS of a meaningful opportunity to defend the case against it. [2] ¶54 Instead, the majority concludes that "a non-defaulting codefendant may call a defaulting defendant to testify, as long as doing so isn't prohibited by other sources of law," Maj. op. ¶ 24, and that "there is no rule that prevents a defaulting defendant from testifying as a witness at a different defendant's trial," *id.* at ¶ 28. But in fact, Frow expressly prohibits this. ¶55 Indeed, the Court in Frow emphasized that a defaulting defendant is "not . . . entitled" to "appear in [the proceeding] in any way . He can adduce no evidence , he cannot be heard at the final hearing." 82 U.S. at 554 (emphases added). ¶56 Thus, under Frow , the district court erred by permitting Ortiz to testify in this case at all, let alone testify contrary to the facts he admitted by default. As Judge Schutz explained, The [division] majority's rationale gives Ortiz the benefit of the Frow rule without adhering to the basic precept that any judgment entered in favor of the remaining defendants must be obtained without the participation of the defaulted defendant. And in doing so, the 27 majority approves a process that is contrary to the principles of consistency, accountability, and fairness that it seeks to promote. J.B. , ¶ 104, 563 P.3d at 206 (Schutz, J., dissenting) (footnote omitted). II. The Initial Error Under Frow Is Then Compounded ¶57 Having taken this wrong turn at the outset, the majority, following the courts below, then compounds this error in multiple ways. ¶58 First, the district court correctly instructed the jury that Ortiz, as a defaulting defendant, was liable to J.B. and a cause of her damages, if any. This was appropriate given that the court had already determined that Ortiz's default established a legally binding admission. But then, the court contradicted its own instructions by presenting the jury with a special verdict form asking it to determine whether Ortiz sexually assaulted E.B. [3] Importantly, neither the jury instructions nor the special verdict form contained any claim for relief against Ortiz , yet the district court later relied on Ortiz's testimony and the jury's responses to the special verdict form to determine that Ortiz had a meritorious defense justifying setting aside his default judgment. 28 ¶59 The majority makes the same mistake. It concludes that the district court properly permitted Ortiz to testify contrary to the facts he admitted by default under C.R.C.P. 55 by reasoning that "Ortiz's liability to J.B. wasn't at issue in this trial; he was testifying as a subpoenaed witness (not a codefendant)." Maj. op. ¶ 28. But then, the majority affirms the division's reasoning allowing Ortiz to effectively

leverage that testimony and the jury's special verdict finding to assert that he had a meritorious defense as a defaulting party under C.R.C.P. 60(b). Maj. op. ¶ 35 (agreeing with the division that the district court did not abuse its discretion); J.B. , ¶ 58, 563 P.3d at 198 (explaining that the district court did not abuse its discretion when "the court found that Ortiz 'asserted a meritorious defense, namely that he did not assault [E.B.]'" (alteration in original)). Thus, the majority allows Ortiz's testimony at MKBS's trial specifically because Ortiz's liability is not at issue with respect to the claims against MKBS—but then permits Ortiz to use that very testimony and the resulting special verdict to directly contest his liability under C.R.C.P. 60(b). ¶60 Finally, as if setting aside the default judgment were not enough, instead of allowing the plaintiff to move forward with her claims, the majority affirms the lower courts' additional final step of affirmatively entering judgment in Ortiz's favor on those claims, reasoning that Frow requires this result to avoid inconsistent 29 judgments. Maj. op. ¶¶ 40, 42. Yet for the reasons stated above, the rule of Frow is inapplicable here. ¶61 None of this was necessary. As Judge Schutz explains, the inconsistency the majority seeks to remedy could have been avoided by prohibiting Ortiz from testifying contrary to the facts he was deemed to have admitted by his default. J.B. , ¶ 107, 563 P.3d at 206 (Schutz, J., dissenting). III. Conclusion ¶62 And so, as a consequence of the initial erroneous decision, contrary to Frow , to allow Ortiz to testify directly contrary to facts deemed admitted as a matter of law by his default, Ortiz is rewarded with a judgment in his favor on the merits of J.B.'s claims, even though he defaulted, and even though J.B.'s claims against Ortiz were never tried or adjudicated. I agree with Judge Schutz that "[s]uch a conclusion does not serve the laudable principles of consistency, accountability, or basic fairness." Id. at ¶ 117, 563 P.3d at 208 . ¶63 Accordingly, I respectfully dissent. Notes:

[1] The complaint was filed by both of

E.B.'s legal guardians, A.B. and J.B. However, only J.B. petitioned this court. For ease of reference, we only refer to J.B. throughout the opinion.

[2] We granted certiorari to review the following issues:

1. Whether the court of appeals erred in affirming the trial court's order permitting a defaulting defendant to testify contrary to the facts of his default.
2. Whether the court of appeals erred in affirming the trial court's order entering judgment, premised on the verdict the jury reached after hearing a defaulting defendant's testimony contrary to his default, in favor of that same defendant.
3. Whether the court of appeals erred in affirming the trial court's order setting aside the default judgment entered against a defaulting defendant, misapplying the applicable three factor test and its heightened standard of proof.

[1] These facts are taken from the

syllabus in Frow and confirmed in 10 Moore's (database updated 2026). See also J.B. , ¶ 95 & n.2, 563 P.3d at 204 & n.2 (Schutz, J., dissenting).

[2] The majority's reliance on the

Second Circuit's decision in *Henry v. Oluwole* , 108 F.4th 45 (2d Cir. 2024), is misplaced. Maj. op. ¶

41. The case is not binding, nor does it serve as persuasive

precedent for the proposition cited by the majority. Although the defendant in that case was allowed to testify at the trial of his nondefaulting codefendants, the propriety of such testimony was neither raised by the parties nor addressed by the court. See *Henry* , 108 F.4th at 49-50, 53-54 .

[3] Although the plaintiff presented this

verdict form, she was essentially forced to do so after the district court made multiple pretrial rulings indicating that it would permit Ortiz to testify that he did not sexually assault E.B. And as Judge Schutz noted, the plaintiff continued to contest the district court's rulings. *J.B.* , ¶ 111, 563 P.3d at 207 (Schutz, J., dissenting).