DIAZ v. PREMIER FRANCHISE MANAGEMENT, LLC et al.

2026 OK 79

Case Number: 123384

Decided: 11/10/2026

THE SUPREME COURT OF THE STATE OF OKLAHOMA

Cite as: 2026 OK 79, __ P.3d __

NOTICE: THIS OPINION HAS NOT BEEN RELEASED FOR PUBLICATION. UNTIL RELEASED, IT IS SUBJECT TO REVISION OR WITHDRAWAL.

MARIA DIAZ, Plaintiff/Petitioner,

v.

PREMIER FRANCHISE MANAGEMENT, LLC, Defendant/Respondent, and PREMIER POOLS & SPAS and NJOHN DOES 1-3, Defendants.

REVIEW OF A CERTIFIED INTERLOCUTORY ORDER ENTERED IN THE DISTRICT COURT OF OKLAHOMA COUNTY, STATE OF OKLAHOMA

Honorable Anthony L. Bonner, District Judge

¶0 In this certified interlocutory appeal, Petitioner challenges the district court's order allowing Respondent to amend the pretrial conference order to assert *res judicata* and dismissing Petitioner's apparent authority claims as barred by claim preclusion. We hold that the district court did not abuse its discretion in permitting the amendment but erred in dismissing Petitioner's apparent authority claims without first developing the record necessary to determine whether claim preclusion applies under Oklahoma law. We therefore reverse in part and remand for further proceedings.

PETITION FOR CERTIORARI PREVIOUSLY GRANTED;

DISTRICT COURT'S CERTIFIED INTERLOCUTORY ORDER REVERSED IN PART AND REMANDED FOR FURTHER PROCEEDINGS.

Phillip P. Owens, II, Owens Law Office, PC, Oklahoma City, Oklahoma, for Petitioner Maria Diaz.

Chris Harper, Chris Harper, Inc., Edmond, Oklahoma, for Petitioner Maria Diaz.

Bill T. McKee and Joseph E. Stall, Rhodes, Hieronymus, Jones, Tucker & Gable, PLLC, Oklahoma City, Oklahoma, for Respondent Premier Franchise Management, LLC.

Winchester, J.

¶1 This matter comes before the Court on a certified interlocutory order granting a motion to amend the pretrial conference order to assert the defense of *res judicata* based on a prior small claims action. Petitioner Maria Diaz ("Diaz") seeks review of the district court's ruling allowing amendment of the pretrial conference order and dismissing certain claims against Respondent Premier Franchise Management, LLC ("Premier") based on claim preclusion. The district court determined that Diaz's apparent authority claims against Premier were barred by the judgment previously entered against SOL Pools, LLC, d/b/a Premier Pools and Spas ("SOL"), the alleged agent.

¶2 Diaz contracted with SOL to build a swimming pool. At that time, SOL was a franchisee of Premier. In 2022, Diaz initially filed suit in small claims court against "Premier Pools & Spas d/b/a Rafael Solano," claiming breach of contract and property damage due to SOL's failure to complete construction of her pool. Diaz properly served SOL with the small claims affidavit, but SOL failed to enter an appearance or participate in the matter. The small claims court entered default judgment in favor of Diaz in the amount of $10,000, unless SOL completed the work within two weeks.

¶3 In 2023, Diaz filed suit against SOL and Premier in district court, asserting claims for breach of contract, fraud, negligence, and violations of the Home Repair Fraud Act, 15 O.S.2021, §§ 765.1 *et seq*. Diaz also alleged claims against Premier based on a theory of apparent authority. SOL again failed to appear in the case, and the district court entered default judgment against SOL, awarding $48,921 in actual damages and $100,000 in punitive damages.

¶4 Six days before trial, Premier moved to amend the pretrial conference order to add the defense of *res judicata* based on the 2022 small claims judgment. The district court then *sua sponte* vacated the default judgment against SOL and dismissed Diaz's claims against SOL with prejudice. The district court also dismissed Diaz's apparent authority claims against Premier based upon claim preclusion. The district court certified its order for immediate appeal under 12 O.S.2021, § 952(b)(3). Diaz filed a petition for certiorari to review the certified interlocutory order. The Court granted certiorari.

STANDARD OF REVIEW

¶5 Proceedings to review certified interlocutory orders are governed by 12 O.S.2021, § 952(b)(3) and Oklahoma Supreme Court Rules 1.50-1.56, 12 O.S.2021, ch.15, app. 1. To be reviewable, Rule 1.50 requires that the order: (1) not overrule a motion for summary judgment; (2) not be appealable by right; (3) affect a substantial part of the merits of the controversy; and (4) be certified by the district court as one for which an immediate appeal may materially advance the ultimate termination of the litigation. This Court has previously determined that "merits of the controversy" means the real or substantial grounds of the action or defense. *Roach v. Jimmy D. Enters., Ltd.*, 1996 OK 26, ¶ 6, 912 P.2d 852, 854; *Pierson v. Canupp*, 1988 OK 47, ¶ 11 n.8, 754 P.2d 548, 552 n.8.

¶6 Here, the order is not one appealable by right, nor does it concern summary judgment. The district court correctly determined that resolution of the issues raised in Premier's motion to amend the pretrial conference order affected a substantial part of the merits of the controversy because a determination in favor of Premier terminated the apparent authority claims against it. The issues before us are (1) whether the district court abused its discretion in allowing Premier to amend the pretrial conference order to add the defense of *res judicata*; and (2) whether the district court erred in dismissing Diaz's apparent authority claims against Premier based on claim-preclusion. We hold that the district court did not abuse its discretion in permitting the amendment but erred in dismissing the apparent authority claims on claim preclusion grounds without developing the record necessary to determine whether claim preclusion applies under Oklahoma law. [1]

DISCUSSION

I. The district court did not abuse its discretion in allowing Premier to amend the pretrial conference order to add the defense of *res judicata*.

¶7 Diaz contends that the district court erred by permitting Premier to amend the pretrial conference order to assert the affirmative defense of *res judicata*. We disagree. The decision to permit amendment of a pretrial conference order lies within the district court's broad discretion. On this record, the amendment was permissible because it served to prevent potential manifest injustice, including the possibility of double recovery.

¶8 Failure to assert an affirmative defense in the original answer could result in waiver of that defense. *See Furr v. Thomas*, 1991 OK 93, ¶ 23, 817 P.2d 1268, 1272 (holding that a statute of limitations defense was waived when not raised in the responsive pleading). However, such an omission does not always preclude a party from asserting the defense later. For example, the Court has concluded that an answer should be deemed amended to

include an affirmative defense where the defense was sufficiently raised in the parties' summary judgment briefing. *Liberty Bank and Tr. Co. of Okla. City, N.A. v. Bachrach*, 1996 OK 143, ¶ 11, 916 P.2d 1377, 1380. This reflects the broader principle that, under Oklahoma's notice-pleading system, amendments are to be liberally permitted in furtherance of substantial justice. *See Wilson v. Webb*, 2009 OK 56, ¶ 9, 221 P.3d 730, 734. That liberal approach, however, must be balanced against the requirements of fundamental fairness, including timely notice of claims and defenses and the orderly resolution of litigation. *Tulsa Ambulatory Proc. Ctr., LLC v. Olmstead*, 2024 OK 57, ¶ 15, 558 P.3d 374, 381.

¶9 The issue here is not whether Premier could have asserted *res judicata* earlier, but whether the district court abused its discretion in allowing the pretrial conference order to be amended to include the defense. Oklahoma's Pleading Code does not expressly prohibit amendment of a pretrial conference order to add an affirmative defense. Under Rule 5(l) of the Rules for the District Courts of Oklahoma, 12 O.S.2021, ch. 2, app., an order entered following a final pretrial conference may be modified only to prevent manifest injustice. That standard is the state-law equivalent of Federal Rule of Civil Procedure 16(e), which likewise permits modification of a pretrial conference order only to prevent manifest injustice. Because Rule 5(l) is modeled on the Federal Rules of Civil Procedure, federal authority provides useful guidance. *See Gay v. Akin*, 1988 OK 150, ¶ 16, 766 P.2d 985, 992-93; *Shores v. First City Bank Corp.*, 1984 OK 67, ¶ 5, 689 P.2d 299, 301.

¶10 In applying the standard of manifest injustice, federal courts generally consider: (1) the prejudice or surprise to the opposing party from the introduction of the new issue; (2) the opposing party's ability to cure any prejudice; (3) the extent to which allowing the amendment would disrupt the orderly and efficient trial of the case; and (4) whether the party seeking modification acted in bad faith. The court may also consider whether the party acted diligently and timely in seeking amendment. *Koch v. Koch Indus., Inc.*, 203 F.3d 1202, 1222 (10th Cir. 2000).

¶11 In *Olmstead*, 2024 OK 57, ¶¶ 24-25, 558 P.3d at 385-86, this Court recently rejected an attempt to add affirmative defenses at the time of the pretrial conference and applied similar considerations. Relying on federal authority, including *LSREF2 Baron, L.L.C. v. Tauch*, 751 F.3d 394, 402 (5th Cir. 2014), and *Sky Harbor Air Service, Inc. v. Reams*, 491 F. App'x 875, 884 (10th Cir. 2012), the Court concluded that it must ascertain if there has been undue delay, bad faith, dilatory motive, and/or prejudice caused by a party's failure to timely raise an affirmative defense.

¶12 *Tauch* illustrates the circumstances in which a late assertion of a defense may result in unfair prejudice. There, the Fifth Circuit Court of Appeals found prejudice because the defense was raised only after summary judgment, required proof of additional facts beyond the pleadings, provided no meaningful notice that the defense might be pursued, and was asserted after critical pretrial deadlines had passed or were about to expire. 751 F.3d at 402.

¶13 Likewise, in *Sky Harbor*, the Tenth Circuit recognized that, in evaluating a delayed affirmative defense, a court must consider whether the opposing party will suffer prejudice. 491 F. App'x at 884. Amendment is particularly inappropriate when an untimely defense transforms the case into a moving target, introduces a new legal theory after the opposing party has prepared its case, or serves to salvage a losing case through undue delay, bad faith, or a dilatory motive. *Id*. Those circumstances are absent here.

¶14 Diaz cannot establish unfair surprise or prejudice from Premier's assertion of *res judicata*. Diaz herself knew of the prior small claims action and the judgment entered in that case. Premier did not introduce a wholly new factual matter of which Diaz was unaware; rather, the defense was based on a judgment that Diaz herself obtained and therefore necessarily knew existed. The record reflects that Premier did not learn of the prior proceeding until Diaz disclosed it during her deposition. At some point after the deposition, Premier obtained new counsel unfamiliar with the small claims judgment. At the hearing on the eve of trial, the district court itself questioned why Diaz had not disclosed the prior judgment to the court earlier.

¶15 Under these circumstances, the amendment did not cause the type of prejudice contemplated by Rule 5(l). Diaz possessed the underlying judgment, knew the facts giving rise to the defense, and was not confronted with an unexpected factual development requiring her to reconstruct her case. The principal concern in many pretrial

conference order cases is that one party seeks to inject an entirely new claim, issue, or theory of which the opposing party had no prior knowledge. That did not occur here. Diaz knew of the prior judgment because she was the party who obtained it.

¶16 Nor does the record demonstrate that allowing the amendment disrupted the orderly disposition of the case. The district court delayed the trial after Diaz sought an appeal, and no new trial date has been set. Diaz therefore will have an opportunity to prepare to meet the *res judicata* defense. Even more, nothing in the record indicates that the amendment requires reopening completed discovery or otherwise undermines the orderly and efficient resolution of the litigation.

¶17 The record likewise fails to support a finding of bad faith or dilatory motive. Premier had already asserted related affirmative defenses, including collateral estoppel, waiver, and ratification. Thus, the assertion of *res judicata* was not an entirely new litigation position adopted solely to delay the proceedings or salvage an otherwise unsuccessful case. Rather, the defense was consistent with Premier's existing position that Diaz was prohibited from pursuing her claims against Premier.

¶18 The circumstances therefore differ materially from cases such as *Olmstead*, *Sky Harbor*, and *Tauch*, where the delayed defenses threatened to inject new factual or legal theories into the case after the opposing party had already prepared for trial and where the delay resulted in demonstrable prejudice. Here, there was no comparable surprise, no disruption of a scheduled trial because the trial was delayed due to Diaz's appeal, and no evidence of bad faith.

¶19 Although Premier could have raised *res judicata* earlier, that fact alone does not establish manifest injustice. The purpose of the pretrial conference order rule is to promote orderly litigation and prevent unfair surprise, not to impose an inflexible procedural bar where the opposing party is fully aware of the underlying facts and suffers no cognizable prejudice. Oklahoma's liberal policy favoring amendments in furtherance of substantial justice must be balanced against fairness to the opposing party, but on this record that balance weighs in favor of allowing the amendment. Accordingly, the district court acted within its discretion in permitting Premier to amend the pretrial conference order to assert *res judicata*.

II. The district court erred in dismissing Diaz's apparent authority claims against Premier without first developing the record necessary to determine whether claim preclusion applies.

¶20 The district court dismissed Diaz's apparent authority claims against Premier, concluding that because those claims were derivative, they were required to have been asserted in the prior small claims action under the doctrine of claim preclusion. Diaz contends that her claims against Premier remain viable because Oklahoma law permits a plaintiff to bring separate actions and obtain separate judgments against a principal and its agent. We hold that the district court erred by dismissing the claims without first determining whether the requirements for claim preclusion and apparent authority were satisfied.

¶21 Under the doctrine of claim preclusion, a final judgment on the merits bars the parties from relitigating not only the claim that was adjudicated, but also any theories or issues that were actually decided, or that could have been decided, in the prior action. The doctrine is intended to prevent piecemeal litigation by prohibiting a party from splitting a single claim into multiple lawsuits. *Miller v. Miller*, 1998 OK 24, ¶ 23, 956 P.2d 887, 896-97.

¶22 We have consistently identified the requirements for claim preclusion. The doctrine applies only when there is: "(1) an identity of subject matter, of the parties or their privies, of the capacity of the parties and of the cause of action; (2) the court which heard the original action must have been one of competent jurisdiction; and (3) the judgment rendered must have been a judgment on the merits of the case and not upon purely technical grounds." *Carris v. John R. Thomas & Assocs., P.C.*, 1995 OK 33, ¶ 10, 896 P.2d 522, 527; *see also Robinson v. Texhoma Limestone, Inc.*, 2004 OK 50, ¶ 11, 100 P.3d 673, 676; *Barker v. State Ins. Fund*, 2001 OK 94, ¶ 13, 40 P.3d 463, 467 (recognizing as an element of claim preclusion an identity of subject matter and the parties or their privies in the prior litigation).

¶23 The requirement of identity between the parties is fundamental. As the Court explained in *Dearing v. State ex rel. Commissioners of Land Office*, a final judgment "concludes the matter as to the parties to the litigation and their privies and constitutes a bar to a new action upon the same cause of action." 1991 OK 6, ¶ 8, 808 P.2d 661, 664. A party is in privity with a party to the prior action only when the party "actually ha[s] the same interest, character, or capacity as the party against whom the prior judgment was rendered." *Hildebrand v. Gray*, 1993 OK CIV APP 182, ¶ 16, 866 P.2d 447, 450-51 (quoting 46 Am. Jur. 2d, Judgments § 532 (1969)). Similarly, privity exists where one person is "so identified in interest with another that he represents the same legal right." *Id*.

¶24 In *Nealis v. Baird,* 1999 OK 98, ¶ 51, 996 P.2d 438, 458, the Court discussed the requirement of privity in the context of issue preclusion:

> Issue preclusion prevents relitigation of facts and issues *actually litigated* and *necessarily determined* in an earlier proceeding between the same parties or their privies. An issue is actually litigated if it is properly raised in the pleadings or otherwise, submitted for determination, and in fact determined. . . . Additionally, the party against whom issue preclusion is interposed must have had a "full and fair opportunity" to litigate the critical issue in the earlier case.

¶25 Here, the district court made no finding that SOL and Premier were in privity for purposes of claim preclusion. Indeed, the court recognized that the parties asserted directly contrary positions: Diaz contended that SOL was an apparent agent of Premier, while Premier denied that an agency relationship existed. That dispute is significant because privity cannot simply be presumed from the existence of an alleged agency relationship.

¶26 Agency is not to be presumed, but, on the contrary, "requires proof of facts essential to establish it, and the burden of proving not only the existence of the agency but the nature and extent thereof rests on the party alleging it." *Elliott v. Mut. Life Ins. Co. of New York*, 1939 OK 106, ¶ 6, 91 P.2d 746, 747. Diaz's theory in this case rests principally on apparent authority.

¶27 Apparent authority exists when a principal knowingly permits an agent to assume authority or holds the agent out as possessing such authority. The elements necessary to impose liability on a principal under a theory of apparent authority are: "(a) conduct of the principal, (b) reliance thereon by the third person, and (c) change of position by the third person to his detriment." *Anglo-Am. Clothing v. Marjorie's of Tiburon, Inc.*, 1977 OK 165, ¶ 7, 571 P.2d 427, 429. Critically, "[a]pparent agency develops from the acts of the principal himself, not the agent's acts." *Id.* ¶ 8, 571 P.2d at 429.

¶28 Apparent authority therefore arises from a manifestation by the principal to a third party that another person is acting as its agent. *Stephens v. Yamaha Motor Co., Ltd.*, 1981 OK 42, ¶ 8, 627 P.2d 439, 441. That manifestation may be made directly to the third party or to the public at large, including through "signs or by advertising." *Id*. (citing Restatement (Second) of Agency §§ 8, 27, 49).

¶29 Because Diaz's claim depends on whether Premier manifested that SOL, the alleged agent, possessed authority to act on its behalf, the existence and scope of any apparent agency necessarily required a factual determination. The district court could not properly treat the agency relationship--and therefore privity--as established for purposes of claim preclusion without resolving that factual issue.

¶30 Moreover, even assuming the existence of an agency relationship, Oklahoma law does not necessarily require a plaintiff to pursue the principal and agent in the same action. In *Cox v. Kansas City Life Insurance Co.*, the Court held that "a plaintiff may bring separate actions against a master and his servant, or a principal and his agent, to recover for the negligence of the servant or agent, where the master's or principal's only responsibility is derivative." 1997 OK 122, ¶ 19, 957 P.2d 1181, 1186 (quoting *Employers Cas. Co. v. Barnett*, 1951 OK 186, ¶ 11, 235 P.2d 685, 689). The distinction recognized in *Cox* is important. The liabilities of the agent and principal are legally distinct even when the principal's liability is purely derivative. Thus, a judgment against the agent does not, standing alone, establish liability on the part of the principal.

¶31 Accordingly, the fact that Diaz previously pursued and obtained a judgment against the alleged agent does not automatically establish that the claim against Premier was adjudicated or that Premier was in privity with the party to the prior action. Before applying claim preclusion, the district court was required to determine whether the parties were the same or in privity, whether the causes of action were the same, and, in particular, whether the factual and legal relationship between Premier and the alleged agent satisfied Oklahoma's requirements for privity. Because the district court did not make those necessary determinations, dismissal of Diaz's claims against Premier on claim preclusion grounds was premature.

CONCLUSION

¶32 We hold that the district court did not abuse its discretion in permitting Premier to amend the pretrial conference order to assert *res judicata*. However, the court erred in dismissing Diaz's apparent authority claims, as deciding whether claim preclusion applies under Oklahoma law requires further record development. We therefore reverse in part and remand for further proceedings consistent with this opinion.

PETITION FOR CERTIORARI PREVIOUSLY GRANTED;

DISTRICT COURT'S CERTIFIED INTERLOCUTORY ORDER REVERSED IN PART AND REMANDED FOR FURTHER PROCEEDINGS.

CONCUR: Rowe, C.J., Kuehn, V.C.J., Winchester, Edmondson, Gurich, Darby, Kane, and Jett. JJ.

CONCUR IN PART; DISSENT IN PART: Combs, J. (By Separate Writing).

COMBS, J., concurring in part and dissenting in part:

¶1 The majority holds that the trial court did not abuse its discretion when, six days before trial and nearly six months after the final pretrial conference, it allowed Premier to amend the final pretrial conference order to add the affirmative defense of res judicata. I respectfully dissent. A final pretrial conference order may be departed from "only to prevent manifest injustice." Okla. Dist. Ct. R. 5(l), 12 O.S.2024, ch. 2, app. The district court failed to apply that standard, the majority identifies no manifest injustice that the proposed amendment would have avoided, and the record forecloses the possibility of making any such finding. I write separately on the manifest-injustice question in four parts: (1) the district court's failure to apply the standard was itself an abuse of discretion; (2) the majority errs in finding manifest injustice present; (3) no manifest injustice exists on this record; and (4) in all events, the manifest-injustice determination is one the district court was required to make before modifying the order.

I. The district court failed to apply the manifest-injustice standard, which is itself an abuse of discretion.

¶2 Amendment of a pretrial conference order is governed by Rule 5 of the Rules for the District Courts of Oklahoma, 12 O.S.2024, ch. 2, app. Under Rule 5(l), the order "shall be modified only to prevent manifest injustice," and its contents "supersede the pleadings and govern the trial of the case unless departure therefrom is permitted by the Court to prevent manifest injustice." Okla. Dist. Ct. R. 5(l). That standard rests on statutory authority. 12 O.S.2024, § 2016. The burden of establishing manifest injustice falls squarely on the party seeking the departure--here, Premier. S*ee Corman v. H-30 Drilling, Inc.*, 2001 OK 92, ¶ 16, 40 P.3d 1051, 1055 (holding that Rule 5(l) barred a party from presenting an issue omitted from the pretrial order without first showing manifest injustice); *accord R.L. Clark Drilling Contractors, Inc. v. Schramm, Inc*., 835 F.2d 1306, 1308 (10th Cir. 1987);. The showing is intentionally demanding, and allowing amendment without that showing is reversible error. *Corman*, 2001 OK 92, ¶¶ 13,15, 40 P.3d at 1055.

¶3 The trial court's decision whether to permit amendment of the pretrial conference order is reviewed for abuse of discretion. *R.L. Clark Drilling*, 835 F.2d at 1308; *cf*. *Tulsa Ambulatory Proc. Ctr., LLC v. Olmstead*, 2024 OK 57, ¶ 13, 558 P.3d 374, 380 (applying abuse-of-discretion review to the denial of leave to amend pleadings and to raise an affirmative defense). But deference presupposes that the trial court actually exercised its discretion; review "requires an actual antecedent exercise of that judicial discretion by the trial court on the issue reviewed." *Shawareb v. SSM Health Care of Okla., Inc*., 2020 OK 92, ¶ 20, 480 P.3d 894, 903. A trial court abuses its discretion when its decision "is contrary to a governing principle of law," *Birtciel v. Jones*, 2016 OK 103, ¶ 7, 382 P.3d 1041, 1043, or when it "fails to consider the applicable legal standard," *Davey v. Lockheed Martin Corp*., 301 F.3d 1204, 1208 (10th Cir. 2002). Discretion is not a license to apply the wrong law nor to apply no law at all. We have accordingly reversed where a trial court, though vested with discretion, applied an erroneous standard and *failed to conduct the legally required inquiry* before exercising it. *Jones, Givens, Gotcher & Bogan, P.C. v. Berger*, 2002 OK 31, ¶¶ 5, 12-13, 46 P.3d 698, 701-03. A discretionary ruling made without reference to the controlling standard is therefore not shielded by the deference we ordinarily extend.

¶4 The record does not show that the district court measured Premier's request against the manifest-injustice standard at all. The court never required Premier--as the movant--to carry the burden Rule 5(l) places on it, and nothing in the record reflects consideration of Rule 5(l) or a finding--or even a recitation--that denial of the amendment would work a manifest injustice. The analysis that would justify the amendment appears for the first time in the majority opinion, not in the order under review. As Part II explains, that after-the-fact reasoning is itself mistaken; but its more basic defect is that the reasoning comes from the majority, not the district court.

¶5 The amendment was no mere addition to a pleading. The appealed order used the newly added defense to vacate the default judgment against SOL and to dismiss Diaz's apparent-authority claims against Premier with prejudice on claim-preclusion grounds. The district court thus allowed a dispositive defense to be added and deployed to terminate Diaz's principal theory of recovery in a single stroke--without the manifest-injustice inquiry Rule 5(l) requires and without any development of the privity and agency facts on which the affirmative defense depended.

¶6 *Corman*, which the majority does not address, confirms this was error. While *Corman* arose from a plaintiff's eve-of-trial motion to strip the defendant of its right to defend rather than a defendant's motion to add a defense, its Rule 5(l) holding does not turn on that difference. The Rule speaks to *any* issue omitted from the pretrial order, and the principle *Corman* enforces--that a party may not inject an unlisted issue on the eve of trial without the manifest-injustice showing Rule 5(l) demands--applies with equal force whether the omitted issue is a claim, a defense, or a dispositive bar.

¶7 In *Corman*, a party pressed on the morning of trial an issue it had not identified in the pretrial order, although its counsel had known of the issue for nearly two years. *Corman*, 2001 OK 92, ¶¶ 5, 14, 40 P.3d at 1053, 1055. We held that the trial court committed reversible error in entertaining the unlisted issue without any showing of manifest injustice; the only prejudice the moving party faced from a short continuance was the possible loss of its place on the jury docket--a small price compared to the trial-by-ambush the opposing party would otherwise suffer. The parallel here is close. Premier, like the party in *Corman*, held the facts underlying its new defense long before trial, yet omitted the defense from its pleading and the final pretrial order and sprang it six days before trial; and the district court entertained it without requiring the manifest-injustice showing Rule 5(l) demands. *See Id*. ¶¶ 15-16, 40 P.3d at 1055. *Corman* establishes that this was error. And the majority's contrary answer--that Diaz knew of the small claims judgment because she obtained it--misreads what Rule 5(l) protects. In *Corman*, the issue sprung on the eve of trial was the opposing party's own unpaid franchise taxes, a fact necessarily within that party's knowledge; yet knowledge of the underlying fact did not save the belated assertion, because the movant had failed to identify the issue in the pretrial order. *Id.* ¶¶ 14-16, 40 P.3d at 1055. So too here. That Diaz knew a judgment existed says nothing about whether Premier carried its burden to justify injecting a dispositive defense built on that judgment six days before trial.

¶8 Because the district court permitted Premier to depart from the pretrial conference order without applying--or even invoking--the governing standard, it exercised no discretion along the lines Rule 5(I) requires. There is thus no antecedent exercise of discretion to which this Court can defer. *Shawareb*, 2020 OK 92, ¶ 20, 480 P.3d at 903. That failure is itself an abuse of discretion and requires reversal.

II. The majority errs in finding that manifest injustice exists.

¶9 Rather than reverse for the district court's failure to apply the standard, the majority supplies a manifest-injustice rationale on its own and holds the amendment justified. Majority Op. ¶¶ 7, 19. That rationale rests on three errors. Each is independently sufficient to reject it.

¶10 **The majority inverts the movant's burden.** As Part I explains, the burden of demonstrating injustice rests on the party seeking the departure--Premier. The majority never identifies the manifest injustice that granting the amendment avoids. It instead asks whether Diaz--the non-movant--would be prejudiced by allowing the amendment, finds she would not, and treats that absence of prejudice as the affirmative justification for the departure. Majority Op. ¶¶ 14-15. That reverses the inquiry. Lack of prejudice to the opposing party shows only that the amendment is harmless; it does not show that failure to grant would be unjust. The movant's burden goes unaddressed, and a ruling that rests on the wrong inquiry is an abuse of discretion. *Davey*, 301 F.3d at 1208 (movant "bears the burden to prove the manifest injustice," and a court abuses its discretion when it "fails to consider the applicable legal standard").

¶11 **The "double recovery" rationale is both unsupported and foreclosed by the majority's own authority.** The only affirmative injustice the majority identifies is "the *possibility* of double recovery." Majority Op. ¶ 7 (emphasis added). That rationale assumes Diaz's small claims judgment against SOL and any judgment against Premier would compensate the same loss twice. But double recovery is not possible on these facts. Oklahoma permits a plaintiff to bring separate actions and obtain separate judgments against a principal and its agent where the principal's liability is derivative. *Cox v. Kan. City Life Ins. Co*., 1997 OK 122, ¶ 19, 957 P.2d 1181, 1186. The liabilities are legally distinct and a judgment against the agent does not, standing alone, establish or satisfy the principal's liability. *Id*. ¶¶ 17, 20, 957 P.2d 1181at 1186-87. The majority supplies no record finding of overlapping damages. Nor does the small claims judgment create a double-recovery problem that only res judicata could cure. It was that later district-court default judgment against SOL, not the $10,000 small-claims default judgment, that the district court vacated; the small claims judgment remains outstanding. To the extent any recovery against Premier would overlap the still-outstanding small claims judgment, the one-satisfaction rule prevents duplication by crediting amounts Diaz actually collects against any later judgment; it supplies a credit, not a preclusion bar. *Kirkpatrick v. Chrysler Corp*., 1996 OK 136, ¶ 13 & n.9, 920 P.2d 122, 127, 133. The injustice the majority posits to justify the amendment is therefore unsupported in the record and in tension with the very separate-judgments rule the majority invokes elsewhere in its opinion. *Cox*, 1997 OK 122, ¶¶ 17, 20, 957 P.2d at 1186-87; Maj. Op. ¶ 30.

¶12 **The injustice the majority posits cannot justify an amendment the majority simultaneously holds may be futile.** An amendment cannot prevent manifest injustice by adding a defense that may never succeed. The majority's sole affirmative justification is the "possibility of double recovery" that res judicata would avert. Majority Op. ¶ 7. But in the same breath the majority holds that whether res judicata applies at all is unresolved: privity cannot be presumed from the disputed agency relationship, and the question requires development on remand. *Id*. ¶¶ 25, 29, 31. Our own amendment standard treats "futility of amendment" as an independent ground to deny leave. *Tulsa Ambulatory*, 2024 OK 57, ¶ 18, 558 P.3d at 382-83. The majority thus affirms an eve-of-trial amendment to assert a defense whose merit it refuses to credit--and credits that same defense as the injustice that made the amendment necessary. If the res judicata defense is unproven, it cannot be the manifest injustice that Rule 5(I) requires.

III. **No manifest injustice exists on this record**

¶13 Even if the manifest-injustice question were open for this Court to decide, the record will not support the finding the majority makes. The standard the majority invokes is a demanding one, and the decisive facts cut against Premier at every turn. The bar is deliberately high, and for reasons that matter here. A final pretrial conference order "may be amended only to prevent manifest injustice," and the standard "is as high as it is" to preserve the order's twin functions of encouraging counsel to edit their own cases and giving the court and the opposing party fair disclosure of each side's real trial intentions. *Monfore v. Phillips*, 778 F.3d 849, 851-52 (10th Cir. 2015). A policy of too-easy modification "unduly discounts [the order] as the governing pattern of the trial." *Id*. The pretrial order "measures the dimensions of the lawsuit, both in the trial court and on appeal," and "binds counsel" to the issues they defined. *R.L. Clark Drilling*, 835 F.2d at 1308-09.

¶14 Measured against that standard, the single most important fact is that Premier knew of the small claims judgment and the defenses built on it long before trial--indeed, at least ten months before the final pretrial conference. This Court has already identified a movant's knowledge about the factual basis for a defense as "probably the most persuasive factor" supporting waiver of the defense. *Tulsa Ambulatory*, 2024 OK 57, ¶ 27, 558 P.3d at 386-87. A court may decline to amend "if the evidence or issue was within the knowledge of the party seeking modification at the time of the pretrial conference." *Monfore*, 778 F.3d at 853. "Manifest injustice generally does not result where a party requests to amend based on evidence that the party knew about at the time of the pretrial conference." *Jordan v. Maxfield & Oberton Holdings, L.L.C.*, 977 F.3d 412, 421 (5th Cir. 2020). A party's failure to raise a defense at an earlier juncture "cuts deeply against [its] claim of manifest injustice." *Koch v. Koch Indus., Inc.*, 203 F.3d 1202, 1223-24 (10th Cir. 2000). Here, Premier learned of the small claims judgment at Diaz's deposition, which was taken months before the August 2024 final pretrial conference. Premier did not raise res judicata at that conference, did not move to amend within the time set by the scheduling order, and waited until six days before the February 2025 trial to assert it. The majority itself concedes both that Premier learned of the judgment at the deposition, Majority Op. ¶ 14, and that it "could have raised res judicata earlier." *Id*. ¶ 19. That new counsel may have been unfamiliar with a judgment about which Premier or its previous lawyer already knew, is not a manifest injustice; a change of counsel does not reset the clock on knowledge the client already had. This is the textbook case for refusing a belated amendment, not a predicate for manifest injustice. Far from working an injustice on Premier, holding it to the order holds it only to the "deliberate" litigation choice it made and never timely revisited. *R.L. Clark Drilling*, 835 F.2d at 1308.

¶15 The remaining factors confirm the point. The governing inquiry asks about prejudice or surprise to the opposing party, the ability to cure it, disruption to the orderly trial of the case, and the movant's bad faith or dilatory motive. *Koch*, 203 F.3d at 1222-23. Res judicata was a dispositive affirmative defense never pled, and proving it would have required facts beyond the existing record--privity, identity of cause of action, and a judgment on the merits. Injecting it six days before trial left Diaz no opportunity to conduct discovery or otherwise prepare to meet it. The majority answers that the trial was later continued because of Diaz's own appeal, so no disruption resulted. Majority Op. ¶ 16. But the disruption and prejudice are measured at the time of the district court's decision, not cured in hindsight by a delay the non-movant was forced to seek; and a continuance compelled by the amendment is a cost of the amendment, not a reason to excuse it. The whole point of *Corman* was that even a short continuance--there, the possible loss of a place on the jury docket--did not justify entertaining an unlisted issue absent the required showing. *Corman*, 2001 OK 92, ¶ 15, 40 P.3d at 1055. Whether unfair surprise or prejudice exists is "a fact-specific inquiry based on the circumstances of the case," *Tulsa Ambulatory*, 2024 OK 57, ¶ 24, 558 P.3d at 385, and on these circumstances the inquiry yields one answer: a movant that sat on a known, dispositive defense through the pretrial conference and the scheduling order's deadlines, and sprang it on the eve of trial, has not shown that denial would be manifestly unjust.

¶16 The majority seeks to distinguish *Tulsa Ambulatory (Olmstead)*, *Tauch*, and *Sky Harbor* as cases involving "new factual or legal theories" and demonstrable prejudice. Majority Op. ¶ 18. The distinction does not hold. Res judicata was a new legal theory--a dispositive affirmative defense Premier never pled--whose proof required the same facts beyond the pleadings. That is the very feature that produced the prejudice finding in *Tauch* and the "moving target"/"salvage a lost case" concern in *Sky Harbor*, on which *Tulsa Ambulatory* relied. *Tulsa Ambulatory*, 2024 OK 57, ¶ 25, 558 P.3d at 385-86. The majority recites the correct standard and then reaches the result those

cases forbid. The flaw is also one of logic: *Tulsa Ambulatory*, *Tauch*, and *Sky Harbor* each held only that *refusing* a late defense was within the district court's discretion. *Tulsa Ambulatory*, 2024 OK 57, ¶ 32, 558 P.3d at 388; *LSREF2 Baron, L.L.C. v. Tauch*, 751 F.3d 394, 402 (5th Cir. 2014); *Sky Harbor Air Serv., Inc. v. Reams*, 491 F. App'x 875, 884-85 (10th Cir. 2012)(unpublished). Because abuse-of-discretion review marks a range of permissible choices rather than a single required one, a holding that exclusion was permissible does not establish that the opposite ruling--allowing the defense--was permissible too. To treat decisions upholding exclusion as approving its opposite is a *non sequitur*. If these fact-matched decisions bear on this record at all, they show only that the district court could have *refused* Premier's belated defense. Nor does Premier's having already pled collateral estoppel, waiver, and ratification show good faith, as the majority suggests. Majority Op. ¶ 17. A party already litigating preclusion theories understood the significance of the small claims judgment, which makes its omission of res judicata from the pretrial order harder to excuse, not easier; and consistency with previously pled defenses is not the Rule 5(l) test.

¶17 The surprise Rule 5(l) guards against, moreover, is not surprise that a fact exists; it is surprise that an issue will be litigated. Diaz knew of the small claims judgment, but Premier's theory that the judgment precluded her claims against the franchisor was never disclosed in the pretrial order. Apparent authority is Diaz's central theory of recovery against Premier, and the res judicata defense was aimed at extinguishing it. Injecting that defense six days before trial deprived her of any opportunity to develop the record on privity and agency needed to meet it. No manifest injustice exists on this record.

IV. Regardless of the outcome, the district court was required to weigh the standard and make an explicit finding of manifest injustice.

¶18 Even if this Court were unwilling to hold that the record forecloses any manifest-injustice finding, the district court's decision to allow the amendment should not be affirmed. The decision whether to permit departure from the pretrial conference order is confined to the district court in the first instance--and that court never made it. The majority does not defer to a determination below; the majority manufactures its own determination on appeal. That inverts the respective roles of trial and appellate courts.

¶19 The decision to modify a pretrial order is "initially left to the district court's discretion." *Ohlander v. Larson*, 114 F.3d 1531, 1537--1538 (10th Cir. 1997). When the trial court fails to exercise that discretion, "such discretion does not excuse a court's failure to exercise any discretion," and the failure "amounts to a failure to exercise discretion, and is, consequently, an abuse of that discretion." *Id*. As Part I explains, this Court's abuse-of-discretion review presupposes an actual antecedent exercise of discretion by the district court. Where that antecedent exercise is missing, the ordinary and proper course is to reverse and remand so the trial court may apply the correct standard, not to have the appellate court supply the missing judgment itself. *Id*. at 1538. We have done exactly that in other appeals: in *Berger*, having found the trial court applied an erroneous legal standard and failed to conduct the legally required inquiry, we reversed and remanded with directions to hold a new hearing under the correct standard; we did not resolve the question ourselves. *Jones, Givens, Gotcher & Bogan, P.C. v. Berger*, 2002 OK 31, ¶¶ 12-13, 46 P.3d 698, 703.

¶20 The reasons for leaving the determination to the district court are not merely formal. The manifest-injustice inquiry is multi-factored, *Koch*, 203 F.3d at 1222-23, and is "a fact-specific inquiry based on the circumstances of the case." *Tulsa Ambulatory*, 2024 OK 57, ¶ 24, 558 P.3d at 385. Those are findings a trial court makes on a developed record, not conclusions an appellate court draws in the first instance. The federal courts proceed to the merits of such a question only where "no dispute regarding the underlying facts exists and the existing record is adequate," and treat remand as the default when the record is not adequate. *Ohlander*, 114 F.3d at 1538. This record is the opposite. Because the district court never held Premier to its burden or conducted a manifest-injustice inquiry, the facts bearing on diligence, bad faith, and prejudice were never found. The majority's willingness to supply those findings is especially difficult to reconcile with its own disposition of the preclusion issue, where it declines to resolve a fact-dependent question and remands for the district court to develop the

record in the first instance. Majority Op. ¶¶ 31-32. The amendment question deserved the same restraint. Having identified the absence of any first-instance determination, this Court should have at least reversed and remanded for the district court to apply Rule 5(l)'s standard--not affirmed on a rationale the district court never adopted.

¶21 I would reverse the order in part in so far as it permitted Premier to amend the final pretrial conference order dismissed Diaz's apparent-authority claims against Premier and remand with directions to proceed on the pretrial conference order as it stood. [1] At a minimum, if this Court were unwilling to resolve the manifest-injustice question itself, I would reverse and remand for the district court to apply Rule5(l)'s standard in the first instance. I respectfully dissent.

FOOTNOTES

Winchester, J.

[1] The district court's order also vacated the default judgment against SOL and dismissed Diaz's claims against SOL with prejudice. Diaz identified those rulings in her petition for certiorari but did not raise the issues with argument and authority in her brief in chief. Accordingly, Diaz waived review of those issues. *Worsham v. Nix*, 2006 OK 67, ¶ 28, 145 P.3d 1055, 1064.

COMBS, J., concurring in part and dissenting in part:

[1] The appealed order also vacated the district court's October 17, 2025 default judgment against SOL and dismissed Diaz's claims against SOL with prejudice. That portion of the order remains undisturbed. *See* Majority. Op. n. 1.

Citationizer© Summary of Documents Citing This Document

Cite Name Level

None Found.

Citationizer: Table of Authority

Cite Name Level

Oklahoma Court of Civil Appeals Cases

Cite	Name	Level
1993 OK CIV APP 182, 866 P.2d 447, 65 OBJ 136,	Hildebrand v. Gray	Discussed

Oklahoma Supreme Court Cases

Cite	Name	Level
1988 OK 47, 754 P.2d 548, 59 OBJ 1228,	Pierson v. Canupp	Discussed
1988 OK 150, 766 P.2d 985, 59 OBJ 3601,	Gay v. Akin	Discussed
1939 OK 106, 91 P.2d 746, 185 Okla. 289,	ELLIOTT v. MUTUAL LIFE INS. CO.	Discussed
1991 OK 6, 808 P.2d 661, 62 OBJ 435,	Dearing v. State ex rel. Com'rs of Land Office	Discussed
1991 OK 93, 817 P.2d 1268, 62 OBJ 2873,	Furr v. Thomas	Discussed
1996 OK 143, 916 P.2d 1377, 67 OBJ 800,	LIBERTY BANK AND TRUST CO. v. BACHRACH	Discussed

Cite	Name	Level
2001 OK 92, 40 P.3d 1051, 73 OBJ 878,	CORMAN v. H-30 DRILLING, INC.	Discussed at Length
2001 OK 94, 40 P.3d 463, 72 OBJ 3283,	BARKER v. STATE INS. FUND	Discussed
2002 OK 31, 46 P.3d 698,	JONES, GIVENS, GOTCHER & BOGAN, P.C. v. BERGER	Discussed at Length
1995 OK 33, 896 P.2d 522, 66 OBJ 1239,	Carris v. John R. Thomas and Associates, P.C.	Discussed
2004 OK 50, 100 P.3d 673,	ROBINSON v. TEXHOMA LIMESTONE, INC.	Discussed
1996 OK 26, 912 P.2d 852, 67 OBJ 803,	Roach v. Jimmy D. Enterprises, Ltd.	Discussed
2006 OK 67, 145 P.3d 1055,	WORSHAM v. NIX	Discussed
2009 OK 56, 212 P.3d 731,	WILSON v. WEBB	Cited
1996 OK 136, 920 P.2d 122, 67 OBJ 2065,	Kirkpatrick v. Chrysler Corp.	Discussed
1977 OK 165, 571 P.2d 427,	ANGLO-AM. CLOTHING v. MARJORIE'S OF TIBURON	Discussed
2016 OK 103, 382 P.3d 1041,	BIRTCIEL v. JONES	Discussed
2020 OK 92, 480 P.3d 894,	SHAWAREB v. SSM HEALTH CARE OF OKLAHOMA	Discussed at Length
1999 OK 98, 996 P.2d 438, 70 OBJ 3640,	Nealis v. Baird	Discussed
2024 OK 57, 558 P.3d 374,	TULSA AMBULATORY PROCEDURE CENTER v. OLMSTEAD	Discussed at Length
1981 OK 42, 627 P.2d 439,	Stephens v. Yamaha Motor Co., Ltd.	Discussed
1997 OK 122, 957 P.2d 1181, 68 OBJ 3333,	COX v. KANSAS CITY LIFE INSURANCE COMPANY	Discussed at Length
1951 OK 186, 235 P.2d 685, 205 Okla. 73,	EMPLOYERS CAS. CO. v. BARNETT	Discussed
1998 OK 24, 956 P.2d 887, 69 OBJ 1172,	MILLER v. MILLER	Discussed
1984 OK 67, 689 P.2d 299,	Shores v. First City Bank Corp.	Discussed

Title 12. Civil Procedure

Cite	Name	Level
12 O.S. 952,	Jurisdiction of Supreme Court	Discussed
12 O.S. 2016,	Pretrial Procedure - Formulating Issues	Cited

Title 15. Contracts

Cite	Name	Level
15 O.S. 765.1,	Short Title - Construction of Violations	Cited