



Respondent.

OPINION FILED: November 2, 2021

Suzanne Steinbach ("Steinbach") appeals from the trial court's entry of summary judgment in favor of Maxion Wheels Sedalia LLC ("Maxion Wheels"). Steinbach asserts that the entry of summary judgment was inappropriate because, as a matter of law, Steinbach did not split a single claim of discrimination by filing two suits against Maxion Wheels in that each suit concerned different time periods during which alleged discrimination, harassment, and retaliation took place. Steinbach alternatively argues that Maxion Wheels acquiesced to the claim being split, and that the trial court abused its

discretion in denying Steinbach's motion for leave to file a reply to an amended answer out of time to assert the affirmative avoidance of acquiescence. Because the trial court abused its discretion in denying Steinbach's motion for leave to file a reply to an amended answer out of time, we reverse the grant of summary judgment and remand this matter for further proceedings.

Factual and Procedural History¹

Steinbach filed a charge of discrimination with the Missouri Commission on Human Rights ("MCHR") on February 2, 2018 ("February 2018 charge of discrimination"). In the February 2018 charge of discrimination, Steinbach alleged that from approximately September 1, 2017, to the date of filing, she suffered discrimination on the basis of her sex and retaliation by her employer, Maxion Wheels. In particular, Steinbach alleged that, shortly after she reported ongoing sexual harassment and a hostile work environment to human resources in late September 2017, Steinbach's work was rejected though properly performed, Steinbach was assigned more physically demanding tasks than her typical job duties despite recently returning from medical leave, and Steinbach was transferred to a less desirable shift.

The MCHR issued Steinbach a right-to-sue letter on August 13, 2018. Steinbach filed a petition against Maxion Wheels in the circuit court of Pettis County on October 24, 2018 ("October 2018 Petition"), asserting a claim of discrimination and harassment on the basis of sex for the period from May 2016 through September 2017, and a claim of

¹When reviewing the trial court's entry of summary judgment, "[w]e view the record in the light most favorable to the party against whom the judgment was entered and accord the non-movant all reasonable inferences from the record." *Traweek v. Smith*, 607 S.W.3d 779, 784 (Mo. App. W.D. 2020).

retaliation, continued discrimination, and harassment for the period from September 2017 through January 2018 ("instant case"). Maxion Wheels filed its answer ("Answer") on December 17, 2018, denying Steinbach's allegations and asserting various affirmative defenses.

On October 25, 2018, the day after the October 2018 Petition was filed, Steinbach filed a second charge of discrimination with the MCHR ("October 2018 charge of discrimination"). Steinbach's October 2018 charge of discrimination "attached and incorporated [the February 2018 charge of discrimination] fully . . . by reference." The October 2018 charge of discrimination alleged that when the February 2018 charge of discrimination was filed, Steinbach was beginning a medical leave of absence, and that when she returned to work on June 6, 2018, she was assigned strenuous work that was not typical work for her job title and that was designed to aggravate her injuries. The October 2018 charge of discrimination alleged that, because the work was too strenuous, she took additional time off to recover, and was informed in August 2018 that she would be discharged from her employment effective August 30, 2018, if she could not return to work. Steinbach alleged the change in her work duties and her discharge were in retaliation for earlier complaints of discrimination.

The MCHR issued Steinbach a second right-to-sue letter on April 24, 2019. Steinbach filed a second petition against Maxion Wheels in the circuit court of Pettis County on July 22, 2019 ("July 2019 Petition"), asserting a claim of retaliation that was "part of a pattern and practice of [Maxion Wheels]" following her complaints to human resources about the sexual harassment and sex-based discrimination she suffered at work.

Maxion Wheels removed the second filed action to federal court on August 30, 2019 ("Federal Case"). While the Federal Case was pending, Maxion Wheels did not assert an affirmative defense or otherwise object on the basis of the similarity of the claims asserted in the Federal Case and the instant case.

The Federal Case was tried in the United States District Court for the Western District of Missouri in September 2020. The jury found in favor of Maxion Wheels. Judgment was entered in favor of Maxion Wheels on September 24, 2020 ("federal court judgment").²

On October 15, 2020, Maxion Wheels filed an amended answer ("Amended Answer") in the instant case. The Amended Answer stated that it was being filed with Steinbach's consent pursuant to Rule 55.33(a).³ The Amended Answer was identical to the Maxion Wheel's Answer, except that the Amended Answer asserted the following affirmative defense:

Plaintiff's claims are barred by the doctrines of res judicata, claim preclusion and/or collateral estoppel based on the [federal court judgment] in [the Federal Case]. The parties in the Federal Case were the same as the parties in this case. In addition, Plaintiff's claims in the Federal Case and this case arise out of the same act, contract, transaction or occurrence, and, by exercising reasonable diligence, Plaintiff could have asserted the claims in this case in the Federal Case. Notably, all of the events that make up all of Plaintiff's claims occurred on or before August 31, 2018, before this case and the Federal Case were filed in court. In the Federal Case, Plaintiff alleged that Defendant retaliated against her for filing the charge of discrimination on which her Petition in this case is premised. Plaintiff conducted discovery

²The federal court's judgment is dated September 24, 2019, but that date is plainly a scrivener's error.

³Rule 55.33(a) allows amendment of an answer "at any time within thirty days after it is served," or if that thirty-day period has expired, "by leave of court or by **written** consent of the adverse party." (Emphasis added.) Though the Amended Answer represents that Steinbach consented to the filing of the Amended Answer, no written consent appears in the record.

All rule references are to the Missouri Supreme Court Rules (2020), unless otherwise indicated.

in the Federal Case regarding the allegations of sexual harassment and retaliation contained in her Petition in this case. Moreover, during the trial of the Federal Case, Plaintiff offered evidence regarding the sexual harassment and retaliation alleged in the Petition.

Steinbach did not file a responsive pleading to the Amended Answer.

On November 30, 2020, forty-five days after the Amended Answer was filed, Maxion Wheels filed a motion for summary judgment, suggestions in support, and a statement of uncontroverted facts (collectively "Motion for Summary Judgment") in the instant case. The Motion for Summary Judgment asserted that Maxion Wheels was entitled to judgment in its favor as a matter of law because the claims asserted in the instant case are barred by the doctrine of res judicata, given that:

(1) the parties in the [instant case] and the Federal Case are identical; (2) the claims in the [instant case] and the Federal Case arise out of the same group of operative facts or are part of the same transaction or series of transactions; and (3) a final judgment has been rendered in the Federal Case.

Steinbach filed suggestions in opposition and responses to the statement of uncontroverted facts (collectively "Suggestions in Opposition") on December 30, 2020. Steinbach argued in her Suggestions in Opposition that Maxion Wheels had waived the defense of res judicata by consenting and acquiescing to separate trials in the instant case and the Federal Case. Steinbach also argued that the claims asserted in the instant case are not the same as the claims adjudicated in the Federal Case.

On January 11, 2021, Maxion Wheels filed a reply in support of its Motion for Summary Judgment ("Reply Suggestions") in which it argued that waiver of the affirmative defense of res judicata is an affirmative avoidance, and that Steinbach was barred from

raising the affirmative avoidance to defend the Motion for Summary Judgment because Steinbach failed to file a reply to the Amended Answer within thirty days of its filing.

Two days later, January 13, 2021, Steinbach filed a motion to file a reply out of time ("Motion to File a Reply"). The Motion to File a Reply argued that, pursuant to Rule 55.33(a), Steinbach should be allowed leave to file a reply out of time because she had not believed the Amended Answer required a response since it did not include a counterclaim, and because she had not believed she needed to oppose the affirmative defense of res judicata by pleading an affirmative avoidance. Maxion Wheels opposed Steinbach's Motion to File a Reply, arguing that Rule 44.01(b) applied, not Rule 55.33(a), to determine whether Steinbach should be afforded leave to file a reply out of time. Maxion Wheels argued that Rule 44.01(b) only allowed the trial court to extend Steinbach's time to file a reply upon a showing of excusable neglect, and that Steinbach's Motion to File a Reply did not demonstrate excusable neglect.

The trial court entered a judgment denying Steinbach's Motion to File a Reply and granting Maxion Wheels' Motion for Summary Judgment on April 1, 2021 ("Judgment"). The trial court concluded that Steinbach's Motion to File a Reply to assert the affirmative avoidance of acquiescence should be denied because Rule 44.01(b) required Steinbach to establish excusable neglect and "[n]one has been shown." The Judgment then found that Steinbach admitted in her October 2018 charge of discrimination that the discrimination and retaliation therein asserted were related to the complaints she made in her February 2018 charge of discrimination. Thus, the Judgment concluded that the sexual harassment, discrimination, and retaliation claims in the instant case and in the Federal Case were

connected so that, by filing separate suits, Steinbach improperly split her claims, requiring the entry of summary judgment in favor of Maxion Wheels in the instant case as a matter of law.

Steinbach appeals.

Analysis

Steinbach asserts two points on appeal. In the first, she argues that the trial court erred in granting Maxion Wheels' Motion for Summary Judgment because she did not split her claims by filing the instant case and the Federal Case, and even if she did, Maxion Wheels acquiesced to splitting the claims. In the second point on appeal, Steinbach argues that the trial court erred in denying her Motion to File a Reply as to permit her to file the affirmative avoidance of waiver or acquiescence.

Because any error in denying Steinbach's Motion to File a Reply is rendered moot unless we affirm the trial court's determination that Steinbach split her claims by filing the instant case and the Federal Case, we necessarily begin with a discussion of the merits of Steinbach's first point on appeal.

Point 1: The instant case and the Federal Case were separate actions arising out of the same transaction, as the aggregate of the facts and circumstances constituting the foundation for the claims asserted in both actions are the same

Steinbach's first point on appeal has two parts. First, Steinbach argues that because the instant case sought relief for discrimination and retaliation for a different time period than the Federal Case, it was error to grant summary judgment because Steinbach did not split her claims for discrimination, harassment, and retaliation. Second, Steinbach argues

that even if she split her claims by filing the instant case and the Federal Case, it was error to grant summary judgment because Maxion Wheels acquiesced to splitting the claims.⁴

We review a trial court's grant of a motion for summary judgment *de novo*. *ITT Com. Fin. Corp. v. Mid-Am. Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo. banc 1993), *superseded by rule on other grounds as recognized in Green v. Fotoohigham*, 606 S.W.3d 113 (Mo. banc 2020). Summary judgment is appropriate if there is no genuine issue as to any material fact so that judgment in favor of the moving party is appropriate as a matter of law. Rule 74.04(c)(6). Where, as here, the movant is the defending party relying on an affirmative defense, summary judgment is only appropriate if the movant establishes "that there is no genuine dispute as to the existence of each of the facts necessary to support the movant's properly-pleaded affirmative defense." *ITT Com. Fin. Corp.*, 854 S.W.2d at 381 (emphasis omitted).

Maxion Wheels' Amended Answer asserted the affirmative defenses of "res judicata, claim preclusion and/or collateral estoppel." "Res judicata, or claim preclusion, 'precludes **relitigation of a claim formerly made**,' and 'every point properly belonging to the subject matter of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time.'" *Olofson v. Olofson*, 625 S.W.3d 419, 427-28 (Mo. banc 2021) (emphasis added) (quoting *Chesterfield Vill., Inc. v. City of Chesterfield*, 64 S.W.3d 315, 318 (Mo. banc 2002); *King Gen. Contractors, Inc. v. Reorganized Church of Jesus*

⁴Steinbach's first point on appeal is multifarious in violation Rule 84.04(d) in that it argues alternative bases for claiming that the trial court's entry of summary judgment was erroneous. *Estes as Next Friend for Doe v. Bd. of Trs. of Mo. Pub. Entity Risk Mgmt. Fund*, 623 S.W.3d 678, 703-04 n.21 (Mo. App. W.D. 2021). Multifarious points on appeal are subject to dismissal, but we prefer to decide appeals on their merits if we are able to discern the substance of the argument. *Id.* We have elected to do so here.

Christ of Latter Day Saints, 821 S.W.2d 495, 501 (Mo. banc 1991)). "Unlike res judicata, collateral estoppel, also called issue preclusion, 'operates only as to issues **previously litigated** but not as to matters not litigated in the prior action though such might properly have been determined.'" *Id.* at 428 (emphasis added) (quoting *King Gen. Contractors, Inc.*, 821 S.W.2d at 500). In their effect, res judicata (claim preclusion) and collateral estoppel (issue preclusion) operate to prevent relitigation of a previously adjudicated claim or issue in a subsequently filed action. Thus, "the doctrines of collateral estoppel and res judicata apply only in a **second, subsequent lawsuit**." *Id.* (emphasis added) (quoting *State ex rel. Cullen v. Harrell*, 567 S.W.3d 633, 641 n.5 (Mo. banc 2019)).

Maxion Wheels' Motion for Summary Judgment did not rely on collateral estoppel (issue preclusion). Instead, it relied only on the affirmative defense of res judicata (claim preclusion), and alleged that Steinbach's claims in the instant case "are barred by the doctrine of res judicata because (1) the parties in the [instant case] and the Federal Case are identical; (2) the claims in the [instant case] and the Federal Case arise out of the same group of operative facts or are part of the same transaction or series of transactions; and (3) a final judgment has been rendered in the Federal Case."

In addition to requiring a prior final judgment and a subsequently filed suit, res judicata requires the presence of four identities: "1) identity of the thing sued for; 2) identity of the cause of action; 3) identity of the persons and parties to the action; and 4) identity of the quality of the person for or against whom the claim is made." *Suppes v. Curators of Univ. of Mo.*, 613 S.W.3d 836, 848-49 (Mo. App. W.D. 2020) (quoting *Kesler v. Curators of Univ. of Mo.*, 516 S.W.3d 884, 890 (Mo. App. W.D. 2017)). Here, there is no debate

that the persons and parties in the instant case and the Federal Case are the same, and that the quality of the person for or against whom the claims are made is the same. And there is no debate that the causes of action asserted in the instant case and the Federal Case are substantively the same, albeit for different time periods. The debate arises over whether there is an identity of the thing sued for in the instant case and the Federal Case.

"To determine whether a claim is barred by a former judgment, the question is whether the claim arises out of the same 'act, contract or transaction.'" *Chesterfield Vill., Inc.*, 64 S.W.3d at 318-19 (quoting *Grue v. Hensley*, 210 S.W.2d 7, 10 (Mo. 1948)). If "the underlying facts are the same, res judicata bars re-litigation of the matter whether upon the same or different cause of action, claim, demand, ground or theory." *Roy v. MBW Constr., Inc.*, 489 S.W.3d 299, 305 (Mo. App. W.D. 2016) (quoting *State ex rel. City of Blue Springs, Mo. v. Schieber*, 343 S.W.3d 686, 689 (Mo. App. W.D. 2011)).

When a valid and final judgment rendered in an action extinguishes the plaintiff's claim pursuant to the rules of merger or bar . . . , the claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose.

RESTATEMENT (SECOND) OF JUDGMENTS section 24(1) (AM. L. INST. 1982) (cited with approval in *Chesterfield Vill., Inc.*, 64 S.W.3d at 319 n.6). "'The word 'transaction' has a broad meaning and includes all the facts and circumstances out of which an injury arose.'" *HFC Invs., LLC v. Valley View State Bank*, 361 S.W.3d 450, 457 (Mo. App. W.D. 2012) (quoting *Bagsby v. Gehres*, 139 S.W.3d 611, 615 (Mo. App. E.D. 2004)).

The "identity of the thing sued for" required to establish res judicata in a subsequently filed action after a prior adjudication is thus aligned with the prohibition

against claim splitting.⁵ *Chesterfield Vill., Inc.*, 64 S.W.3d at 318 ("Res judicata, or its modern term, claim preclusion, prohibits 'splitting' a claim or cause of action."). "A single cause of action may not be split and filed or tried piecemeal." *G.B. v. Crossroads Acad.-Cent. St.*, 618 S.W.3d 581, 591 (Mo. App. W.D. 2020). "Claims that could have been raised by a prevailing party in the first action are merged into, and are thus barred by, the first judgment." *Roy*, 489 S.W.3d at 305 (quoting *Chesterfield Vill., Inc.*, 64 S.W.3d at 318).

A cause of action is single and may not be split if either: (1) the "separate actions brought arise out of the same act, contract or transaction;" or (2) "the parties, subject matter and evidence necessary to sustain the claim are the same in both actions." *G.B.*, 618 S.W.3d at 591-92 (quoting *Roy*, 489 S.W.3d at 305). The term "transaction" is broadly interpreted to mean "the aggregate of all the circumstances which constitute the foundation for a claim," and "also includes all of the facts and circumstances out of which an injury arose." *Id.* at 592 (quoting *Roy*, 489 S.W.3d at 305). If, however, the plaintiff brings "separate **and distinct** causes of action separately," the plaintiff has not violated the prohibition against claim splitting, even if the causes of action arise out of the same transaction. *Id.* (quoting *Old Republic Nat'l Title Ins. Co. v. Cox*, 453 S.W.3d 780, 788 (Mo. App. W.D. 2014)). Generally, the plaintiff's causes of action are separate and distinct if "the parties are different, . . . the claims arise from different acts or circumstances, or [the] evidence needed to sustain the actions is different." *McCrory v. Truman Med. Ctr.*,

⁵"The rule against splitting a cause of action applies only where the several causes of action are between the same parties." *Welch v. Contreras*, 174 S.W.3d 53, 56 (Mo. App. W.D. 2005) (quoting *Lee v. Guettler*, 391 S.W.2d 311, 313 (Mo. 1965)).

Inc., 943 S.W.2d 695, 697 (Mo. App. W.D. 1997) (citations omitted). "Whether a plaintiff is seeking to improperly split a cause of action depends on the 'ultimate facts' underlying separate claims, not on the 'evidentiary details.'" *HFC Invs., LLC*, 361 S.W.3d at 457 (citing *Kesterson v. State Farm Fire & Cas. Co.*, 242 S.W.3d 712, 716 (Mo. banc 2008)).

The trial court found the claims in the instant case and in the Federal Case were improperly split. The trial court noted that the October 2018 charge of discrimination alleged that the conduct therein complained of was a continuing course of action related to the February 2108 charge of discrimination, which was incorporated into the October 2018 charge of discrimination by reference. The trial court found that the retaliation about which Steinbach complained in the October 2018 charge of discrimination was inseparable from the course of conduct that gave rise to the retaliation complained of in the February 2018 charge of discrimination. Though the specific acts of retaliation identified in the first and second charges of discrimination occurred at different times, they all arose from the same employment relationship complained of by Steinbach as discriminatory and hostile, and from the same efforts by Steinbach to report her employer's discriminatory conduct. In short, the trial court found that the same ultimate facts supported the claims asserted in the instant case and the Federal Case, requiring the claims to be asserted in the same action. Though the trial court was cognizant of the fact that employment discrimination claims must first be submitted through an administrative process resulting in a right-to-sue letter, it found that nothing prevented Steinbach from moving for leave to amend the petition in the instant case to address the second right-to-sue letter she received after filing the October

2018 charge of discrimination.⁶ The trial court also found that Steinbach could have asked the federal court to remand the Federal Case to be joined with the instant case pursuant to Rule 55.34, or that she could have removed the instant case to the federal court to be joined with the Federal Case.

Steinbach does not challenge the trial court's findings that procedural avenues existed that would have permitted her to assert the retaliation claims raised in the October 2018 charge of discrimination in the instant case. Steinbach instead challenges her obligation to do so, and alleges that because the claims of discrimination and retaliation in the instant case and the Federal Case involve different incidents of retaliation that occurred at different times, they are separate and distinct claims. We disagree.

The claims asserted in the instant case and the Federal Case arose out of the same facts and circumstances: the harassment and discrimination Steinbach endured at work and the retaliation to which she was subjected following her complaints to human resources and the MCHR. Steinbach's October 2018 Petition in the instant case sought relief for discrimination and harassment experienced from May 2016 through September 2017, and for retaliation, continued discrimination, and harassment suffered from September 2017 through January 2018. Steinbach's October 2018 charge of discrimination (filed the day after the October 2018 Petition) "incorporated fully . . . by reference" the allegations set forth in the February 2018 charge of discrimination, and then alleged additional retaliation

⁶There is a recognized exception to the prohibition against claim splitting where procedural bars prevent a plaintiff from bringing all claims that should have been asserted together in the same action. RESTATEMENT (SECOND) OF JUDGMENTS section 26(1)(c), cmt. c (noting that claim splitting does not apply "[w]here formal barriers exist[] against full presentation of [a] claim in first action"). Steinbach has not argued that this exception applies.

by Maxion Wheels as a part of a "pattern and practice of retaliation and discrimination [that became] evident after [she] spoke up about the hostile environment in which [she] worked." As evidenced by Steinbach's incorporation of the February 2018 charge of discrimination by reference, the October 2018 charge of discrimination amounted to little more than a complaint regarding new examples of retaliation stemming from Steinbach's previous reports of discrimination. Consistent with this fact, Steinbach's July 2019 Petition alleged a continuation of the "pattern and practice" of retaliation by Maxion Wheels already identified in the October 2018 Petition. The claim of retaliation ultimately litigated in the Federal Case necessarily arose out of the same acts, conduct, and transactions giving rise to the instant case as both cases depended on the same ultimate facts. *See HFC Invs., LLC*, 361 S.W.3d at 457 ("Whether a plaintiff is seeking to improperly split a cause of action depends on the 'ultimate facts' underlying separate claims, not on the 'evidentiary details.'"); *see also* RESTATEMENT (SECOND) OF JUDGMENTS section 24, cmt. d (observing that "[w]hen a defendant is accused of . . . acts which though occurring over a period of time were substantially of the same sort and similarly motivated . . . [t]he events constitute but one transaction or a connected series"). The trial court did not err in concluding that Steinbach violated the prohibition against claim splitting by filing both the instant case and the Federal Case.

In the second part of her first point on appeal, Steinbach argues that, if we conclude that Steinbach's filing of the July 2019 Petition constituted claim splitting, we should conclude that Maxion Wheels acquiesced to splitting the claim by removing the July 2019 Petition to federal court and permitting the Federal Case to be separately tried without

objection. As we discuss, *infra*, Steinbach is correct that the general rule prohibiting claim splitting is subject to exceptions, and that one such exception is a defendant's acquiescence. However, Steinbach's contention begs the question that is at issue in her second point on appeal.

Waiver of an affirmative defense is an affirmative avoidance. *See Billings Mut. Ins. Co. v. Cameron Mut. Ins. Co.*, 229 S.W.3d 138, 143 (Mo. App. S.D. 2007) (recognizing that waiver is an affirmative avoidance). "An avoidance is 'an affirmative defense to an affirmative defense.'" *Rosales v. Benjamin Equestrian Ctr., LLC*, 597 S.W.3d 669, 683 (Mo. App. W.D. 2019) (quoting *Allen v. Titan Propane, LLC*, 484 S.W.3d 902, 905 (Mo. App. S.D. 2016)). Rule 55.01 requires that "an affirmative avoidance to any matter alleged in a preceding pleading must be pleaded." *See also* Rule 55.08 ("In pleading to a preceding pleading, a party shall set forth all applicable affirmative defenses and avoidances A pleading that sets forth an affirmative defense or avoidance shall contain a short and plain statement of the facts showing that the pleader is entitled to the defense or avoidance."). The failure to plead an affirmative avoidance in a reply results in its waiver. *Billings Mut. Ins. Co.*, 229 S.W.3d at 143. Steinbach was required to file a reply to assert the affirmative avoidance of waiver within thirty days of the filing of Maxion Wheels' Amended Answer. *See* Rule 55.25(b).

Steinbach acknowledges that she did not file a timely reply in response to the Amended Answer's assertion of the affirmative defense that Steinbach's "claims are barred by the doctrines of res judicata, claim preclusion and/or collateral estoppel based on the judgment entered [in the Federal Case] on September 24, 20[20]." Because Steinbach did

not timely plead waiver as an affirmative avoidance, and because Steinbach's Motion to File a Reply was not granted, the Judgment did not address the merits of the affirmative avoidance of acquiescence in the context of contesting the Motion for Summary Judgment. Thus, the second part of Steinbach's first point on appeal is not subject to appellate review as it asks us to review on the merits an issue that the trial court never addressed. *See Kerr v. Curators of Univ. of Mo.*, 512 S.W.3d 798, 815 (Mo. App. W.D. 2016) ("The trial court's authority is limited to such questions as are presented by the parties in their pleadings.") (quoting *McClain v. Hartley*, 320 S.W.3d 183, 185 (Mo. App. E.D. 2010)).

Point One is denied.

That does not end our inquiry, however. The Judgment denied Steinbach's Motion to File a Reply, which sought to assert the affirmative avoidance that Maxion Wheels waived, consented, or acquiesced to Steinbach splitting her claims in the instant case and the Federal Case. Had that affirmative avoidance been permissibly asserted in a late filed reply, and had the affirmative avoidance been deemed by the trial court to have merit, or to have identified genuine issues of material fact in dispute, then the entry of summary judgment would not have been proper. We turn, then, to the merits of Steinbach's second point on appeal.

Point 2: Rule 44.01(b) applied to determine whether Steinbach's Motion to File a Reply should be granted, but the trial court abused its discretion by concluding as to the required demonstration of excusable neglect that none was shown

Steinbach argues in her second point on appeal that the trial court abused its discretion in denying her Motion to File a Reply. Steinbach specifically argues that the trial court's reliance on Rule 44.01(b) to deny the Motion to File a Reply was improper,

and that the trial court should have applied Rule 55.33(a), which directs courts to freely allow leave to amend pleadings out of time "when justice so requires." Affording Steinbach's second point on appeal its broadest intendment, Steinbach also generally asserts that it was an abuse of discretion to deny the Motion to File a Reply.

"We review the trial court's ruling denying [a party's motion for] leave to file a response out of time for abuse of discretion." *Erickson v. Erickson*, 419 S.W.3d 836, 848 (Mo. App. S.D. 2013) (quoting *Inman v. St. Paul Fire & Marine Ins. Co.*, 347 S.W.3d 569, 575 (Mo. App. S.D. 2011)). In order to reverse a judgment, we must conclude that the trial court's denial of a motion for leave to file a response out of time was both an abuse of discretion and "materially affect[ed] the merits of the action." Rule 84.13(b).

Steinbach's Motion to File a Reply alleged that it was subject to Rule 55.33(a). Rule 55.33(a) addresses amendments to pleadings and provides that leave of court to amend a pleading "shall be freely given when justice so requires."

The trial court denied Steinbach's Motion to File a Reply, but relied on Rule 44.01(b), and not Rule 55.33(a), to do so. Rule 44.01(b) provides:

When by these rules . . . an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion . . . upon notice and motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect.

With respect to the required showing of excusable neglect, the Judgment concluded that "[n]one has been shown."

Steinbach argues that the trial court's application of Rule 44.01(b)'s "excusable neglect" standard was erroneous and that the trial court should have instead applied Rule

55.33(a)'s "when justice so requires" standard. We disagree. The applicability of court rules is an exercise in rule interpretation, which relies on similar principles to those employed to interpret statutes. *Olofson*, 625 S.W.3d at 434. A rule's plain language controls. *Id.*

The plain language of Rule 44.01(b) reflects an intent that the rule will apply when a party seeks an ***enlargement of time*** to perform an act required by another rule to be done within a certain time period. The plain language of Rule 55.33(a), on the other hand, reflects an intent for the rule to apply only when permission is sought to ***amend a previously filed pleading***. Steinbach's Motion to File a Reply did not seek leave to amend a previously filed pleading. Instead, Steinbach's Motion to File a Reply sought leave to file a new pleading--a reply--outside the time period required by the combined reading of Rules 55.01, 55.08, and 55.25(b). As such, Rule 44.01(a) described the relevant standard for determining whether to grant or deny Steinbach's Motion to File a Reply.

We acknowledge *Keehn v. Ruzicka Electric & Sons, Inc.*, 251 S.W.3d 388 (Mo. App. E.D. 2008), on which Steinbach relies to support her argument that a party may seek leave to amend a previously filed pleading in lieu of filing a reply in order to assert an affirmative avoidance. In *Keehn*, a defendant's answer asserted that the statute of limitations barred the plaintiffs' lawsuit. *Id.* at 390. In responding to a subsequently filed motion for summary judgment based on the statute of limitations defense, the plaintiff alleged fraudulent concealment, an unpled affirmative avoidance. *Id.* at 389. On appeal, the Eastern District concluded that, because plaintiffs' pleadings did not mention fraudulent concealment, the affirmative avoidance was waived. *Id.* at 390-91. The Eastern District

explained its decision: "Despite [the defendant's] answer alleging that the statute of limitations barred the lawsuit, the [plaintiffs] filed no responsive pleading, ***nor did they amend their petition.***" *Id.* (emphasis added) (citing Rule 55.01; Rule 55.33); *see also Billings Mut. Ins. Co.*, 229 S.W.3d at 143 ("[The plaintiff's] failure to file a reply waived the affirmative avoidances . . . unless either (1) the trial court permitted the pleadings to be amended to include the defense, which it did not, or (2) the issue was tried by implied or actual consent of the parties."); *cf. Rosales*, 597 S.W.3d at 684-85 (concluding that, while the plaintiff failed to file a reply asserting an affirmative avoidance of negligence pursuant to Rule 55.08, a reply would have "merely restate[d] the affirmative allegations of negligence already set forth in the plaintiff's petition" so that "[i]nsisting on a duplicative filing of an already asserted claim in order to demonstrate technical compliance with Rule 55.08 would not further the purpose of isolating and notifying the parties of the issues").

The suggestion in *Keehn* and *Billings* that a previously filed pleading may be amended to assert an affirmative avoidance in lieu of filing a reply is confusing in light of the plain language of Rules 55.01, 55.08 and 55.25(b) directing that an affirmative avoidance must be filed in a responsive pleading within thirty days. *See Jaycox v. Brune*, 434 S.W.2d 539, 547 (Mo. 1968) ("Perhaps one or more of our rules should be amended, but in the meantime and in order to clarify this rather confusing situation we hold now that a reply should be filed when a plaintiff desires to avoid or affirmatively attack new and affirmative matter alleged in the answer. In that reply he should distinctly allege his grounds of avoidance."), *abrogated on other grounds by State ex rel. Leonardi v. Sherry*, 137 S.W.3d 462 (Mo. banc 2004). However, any confusion contributed to by *Keehn* and

Billings is largely academic. Though Steinbach's Motion to File a Reply referred to the rule applicable to amending a pleading, the substance of the motion did not seek to amend a previously filed pleading, and instead plainly sought leave to file a new pleading (a reply) outside the time permitted to do so. Steinbach's Motion to File a Reply thus belies reliance on the suggestion in *Keehn* and *Billings* that an affirmative avoidance can be asserted in an amended pleading in lieu of a reply. Moreover, the suggestion in *Keehn* and *Billings* that an affirmative avoidance can be asserted in an amended pleading in lieu of a reply cannot be read to permit the filing of an amended pleading to assert an affirmative avoidance out of time--that is, after the time to assert the affirmative avoidance has passed. Once the time to assert an affirmative avoidance described in Rule 55.25(b) has passed, a trial court's authority to expand the time to assert the affirmative avoidance is controlled by Rule 44.01(b). See *Holmes v. Union Pac. R.R. Co.*, 617 S.W.3d 853, 859 (Mo. banc 2021) (noting that a trial court's authority to expand the time period for filing certain pleadings is addressed by Rule 44.01(b)).

We therefore reject Steinbach's contention that Rule 55.33(a) described the standard to be applied by the trial court when ruling on her Motion to File a Reply. However, we must nonetheless determine whether the trial court's denial of the Motion to File a Reply pursuant to Rule 44.01(b) was an abuse of discretion. Specifically, we must determine whether the Judgment's finding that "[n]one has been shown" in reference to the required showing of excusable neglect was in error.

Rule 44.01(b) does not define "excusable neglect." The dictionary definition of the term is:

A failure--which the law will excuse--to take some proper step at the proper time (esp. in neglecting to answer a lawsuit) not because of the party's own carelessness, inattention, or willful disregard of the court's process, but because of some unexpected or unavoidable hindrance or accident or because of reliance on the care and vigilance of the party's counsel or on a promise made by the adverse party.

BLACK'S LAW DICTIONARY 1244 (11th ed. 2019). Missouri courts have similarly concluded that excusable neglect exists if "the failure to act [is] not because of the party's own carelessness, inattention, or willful disregard of the court's process, but because of some unexpected or unavoidable hindrance or accident." *Holmes*, 617 S.W.3d at 860 (quoting *Irvin v. Palmer*, 580 S.W.3d 15, 22 (Mo. App. E.D. 2019)). In other words, "[e]xcusable neglect is an action attributable to mishap and not the result of indifference or deliberate disregard." *Id.* (quoting *State ex rel. Mylan Bertek Pharms., Inc. v. Vincent*, 561 S.W.3d 68, 72 (Mo. App. E.D. 2018)). The question then is whether Steinbach's failure to file a reply within thirty days of Maxion Wheels' Amended Answer as required by Rule 55.25(b) was a result of indifference or deliberate disregard, or of mishap or accident.

Courts have rejected claims of excusable neglect when the movant offered no explanation for the failure to file the response timely; where the motion's allegations of excusable neglect were not consistent with the party's behavior during the course of the litigation; or where the motion was filed an extended period of time after the time for response had expired. *See Irvin*, 580 S.W.3d at 22-23 (where motion stated only that a timely response was not filed due to counsel's "professional schedule and certain obligations"); *Inman*, 347 S.W.3d at 576-77 (where motion contained no explanation for the failure to timely file a response to a motion for summary judgment); *Manor Square Inc.*

v. Heartthrob of Kansas City, Inc., 854 S.W.2d 38, 43 (Mo. App. W.D. 1993) (where motion contained no explanation of excusable neglect, the motion was filed nearly fifteen months after time for response had expired, and the movant deployed several procedural tactics to delay trial over the course of two years of the litigation). A claim of excusable neglect has also been rejected when the record indicated that the movant acted carelessly and with a deliberate disregard for the judicial process. *See Holmes*, 617 S.W.3d at 860-61 (where movant's counsel knew that the movant would have to be appointed personal representative, and falsely claimed movant had already been appointed; movant executed medical authorizations purporting to be the personal representative; movant took no action to be appointed personal representative after a motion to dismiss was filed on that basis; and movant did not timely seek appointment after the trial court extended the deadline to allow her to do so). However, excusable neglect has been found when a motion for enlargement of time explained that the movant mistakenly overlooked the need to respond because the motion which required response was combined with other motions that did not require response. *See State ex rel. Mylan Bertek Pharms., Inc.*, 561 S.W.3d at 72 (motion explained that the movant "accidentally and inadvertently failed to file" a timely response because the motion to transfer was combined with other motions that did not require response).

Though Steinbach's Motion to File a Reply referred to the wrong rule, it nonetheless explained why she sought to file a reply to the Amended Answer out of time. Similar to *State ex rel. Mylan Bertek Pharmaceuticals, Inc.*, Steinbach's explanation falls into the category of accidentally and inadvertently overlooking the need to respond:

2. [Steinbach] seeks to file a Reply out of an abundance of caution in response to the assertion in [Maxion Wheels' Reply Suggestions] that such a Reply is necessary before the Court can consider the waiver, consent, acquiescence, and jurisdictional arguments in [Steinbach's] Suggestions in Opposition. [Maxion Wheels] argues that [Steinbach] has waived [her] arguments in a Reply as an affirmative avoidance to Defendant's Affirmative Defense No. 15[, alleging that Steinbach's claims in the instant case "are barred by the doctrines of res judicata, claim preclusion and/or collateral estoppel" based on the Federal Case and resulting federal court judgment].

....

6. Here, there is a hardship to [Steinbach] if leave to file the Reply is denied and if the Court agrees with [Maxion Wheels] that such a Reply was necessary before the Court can consider whether [Maxion Wheels'] actions that led to what [Maxion Wheels] now claims is a splitting of two cases that should have been tried together, preclude [Maxion Wheels'] recently filed *res judicata* affirmative defense.

7. [Steinbach] did not file a Reply pleading earlier because [Steinbach] believed that, because [Maxion Wheels] made no Counterclaim necessitating a Reply, under Rule 55.09 the averments made in [Maxion Wheels'] Amended Answer would be taken as denied and that the arguments in opposition to [Maxion Wheels' affirmative defense of "res judicata, claim preclusion and/or collateral estoppel] did not need to be pled as affirmative avoidances.

Moreover, Steinbach filed her Motion to File a Reply promptly just two days after Maxion Wheels filed its Reply Suggestions claiming she had waived the affirmative avoidance of acquiescence; a month and a half after Maxion Wheels filed its Motion for Summary Judgment identifying claim splitting as the urged legal basis for judgment; and three months after Maxion Wheels filed its Amended Answer. The trial court's conclusion that, with respect to the required showing of excusable neglect, "[n]one has been shown," was in error.

Our conclusion is bolstered by other circumstances in this case. Maxion Wheels did not file an Amended Answer until October 15, 2020, three weeks after entry of the

federal court judgment that disposed of Steinbach's July 2019 Petition, and more than two and a half years after Steinbach filed her February 2018 Petition. The Amended Answer, which varied from the original Answer due only to the assertion of the affirmative defenses of res judicata and collateral estoppel, could not have been filed without leave of court or Steinbach's **written** consent. Rule 55.33(a). Neither of these required predicates to filing an amended pleading is established by the record. Though the Amended Answer summarily states that it was filed with Steinbach's consent, Steinbach's written consent is not reflected on the Amended Answer, and is not otherwise reflected in the record. That calls into question whether Maxion Wheels' newly asserted affirmative defense of res judicata was "properly pled" as to support the entry of summary judgment. *ITT Com. Fin. Corp.*, 854 S.W.2d at 381 (Where summary judgment movant is a defending party relying on an affirmative defense, summary judgment is only appropriate if the movant establishes "that there is no genuine dispute as to the existence of each of the facts necessary to support the movant's **properly-pleaded** affirmative defense") (emphasis omitted and added). And it calls into question the fairness of denying Steinbach leave to file a reply out of time sought a mere three months after the Amended Answer was filed when, according to Maxion Wheels, Steinbach extended Maxion Wheels the professional courtesy of consenting to the filing of Amended Answer two and a half years after the February 2018 Petition was filed.

This inequity is magnified when the Amended Answer is examined more closely. The Amended Answer asserted that the affirmative defenses of res judicata and collateral estoppel could not have been filed before the Federal Case was fully adjudicated, thus

"explaining" why the defenses were not earlier raised. That is true. See *Cornerstone Mortg., Inc. v. Ponzar*, 619 S.W.3d 524, 535 (Mo. App. E.D. 2021) ("Res judicata and collateral estoppel apply to *final* judgments and preclude re-litigation of the claims or issues decided therein in *subsequent* causes of action." (quoting *State ex rel. Koster v. Didion Land Project Assoc. LLC*, 469 S.W.3d 914, 918 (Mo. App. E.D. 2015))); see also RESTATEMENT (SECOND) OF JUDGMENTS section 19 ("A valid and final personal judgment rendered in favor of the defendant bars another action by the plaintiff on the same claim."); RESTATEMENT (SECOND) OF JUDGMENTS section 13 ("The rules of res judicata are applicable only when a final judgment is rendered.").

However, Maxion Wheels' Motion for Summary Judgment, filed forty-five days after the Amended Answer was filed (notably, shortly after the time permitted for Steinbach to file a reply expired), did not rely on collateral estoppel. And though the Motion for Summary Judgment purported to rely on the asserted affirmative defense of res judicata, it in fact relied on the narrower doctrine of claim splitting based on an argument that the claims asserted in the Federal Case could have been asserted in the instant case, and vice versa. The Motion for Summary Judgment even noted in a footnote that "[r]es judicata encompasses the doctrine of claim splitting." Yet, "claim splitting" as a separate doctrine encompassed by res judicata is not referred to in the Amended Answer.

That is problematic here. It is true that res judicata and collateral estoppel are not ripe for assertion as affirmative defenses until a prior adjudication bars *relitigation* of a claim or issue in a subsequent case. It is true that "res judicata and splitting a cause of action are closely related [doctrines] because both are designed to prevent a multiplicity of

lawsuits." *Briscoe v. Walsh*, 445 S.W.3d 660, 664 (Mo. App. E.D. 2014) (quoting *Burke v. Doerflinger*, 663 S.W.2d 405, 407 (Mo. App. E.D. 1983)). And it is true that in the context of res judicata, which necessarily involves a subsequently filed action after a prior adjudication, the concept of claim splitting aligns with the required identity of the thing sued for.

However, where actions are *simultaneously* pending, claim splitting is a distinct (and narrower) affirmative defense that is ripe for immediate assertion, even though the broader defense of res judicata cannot be asserted until there is a prior adjudication. Claim splitting "generally applies to suits filed after the conclusion of a prior suit, [but] the doctrine also applies to actions pending simultaneously." *G.B.*, 618 S.W.3d at 591 n.8; *see also HFC Invs., LLC*, 361 S.W.3d at 457 n.6. If a defendant does not object on the basis of claim splitting while simultaneous actions are pending, the doctrine becomes subject to the exception of acquiescence:

(1) When any of the following circumstances exists, the general [prohibition against claim splitting] does not apply to extinguish the claim, and part or all of the claim subsists as a possible basis for a second action by the plaintiff against the defendant:

(a) The parties have agreed in terms or in effect that the plaintiff may split his claim, or the defendant has acquiesced therein

RESTATEMENT (SECOND) OF JUDGMENTS section 26. The Restatement comments explain the rationale underlying this exception to the general rule:

A main purpose of the general ruled state in section 24 is to protect the defendant from being harassed by repetitive actions based on the same claim. The rule is thus not applicable where the defendant consents, in express words or otherwise, to the splitting of the claim. . . .

Where the plaintiff is simultaneously maintaining separate actions based on parts of the same claim, ***and in neither action does the defendant make the objection that another action is pending based on the same claim, judgment in one of the actions does not preclude the plaintiff from proceeding and obtaining judgment in the other action. The failure of the defendant to object to the splitting of the plaintiff's claim is effective as an acquiescence in the splitting of the claim.***

Id. at cmt. a. (emphasis added.) Illustration 1 describes an example that bears similarity to the instant case:

After a collision in which A suffers personal injuries and property damage, A commences in the same jurisdiction one action for his personal injuries and another for the property damage against B. B does not make known in either action his objection (usually called "other action pending") to A's maintaining two actions on parts of the same claim. After judgment for A for the personal injuries, B requests dismissal of the action for property damage on the ground of merger. Dismissal should be refused as B consented in effect to splitting the claim.

Id. at cmt. a, illustration 1.

Given all of the circumstances in this case, including: that Steinbach's explanation for not timely filing a reply qualifies as excusable neglect; that Steinbach's Motion for Leave to Reply was not substantially late, particularly when calculated from the date the Motion for Summary Judgment was filed and the doctrine of claim splitting was first expressly raised; that there is no indication that Steinbach's failure to timely file a reply was due to indifference or deliberate disregard for the judicial process; that there is a question whether the narrower affirmative defense of claim splitting was pled at all since the doctrine is not mentioned in the Amended Answer, and given the Amended Answer's insistence that no defense could be asserted until after the Federal Case was fully adjudicated; and that there is a question whether the newly asserted affirmative defenses in

the Amended Answer were properly pled as the Amended Answer was filed without leave of court and with no demonstrated written consent from Steinbach; we conclude that the trial court erred when it concluded that no excusable neglect was shown supporting a Rule 44.01(b) enlargement of time to file a reply.

Rule 84.13(b) precludes reversal of the Judgment on this basis unless we also conclude that the trial court's error "materially affect[ed] the merits of the action." *See also Burns v. Granger*, 613 S.W.3d 800, 803 (Mo. App. W.D. 2020) ("[W]e will find reversible error only where an abuse of discretion is found and the [appellant] can demonstrate prejudice." (quoting *In Matter of D.N.*, 598 S.W.3d 108, 115-16 (Mo. banc 2020))).

If Steinbach's reply had been permitted to be filed out of time, the trial court would have been required to consider whether the affirmative avoidance of acquiescence, which was raised in Steinbach's Suggestions in Opposition, foreclosed granting the Motion for Summary Judgment, either as a matter of law or because genuine issues of material fact in dispute were identified. Given our discussion, *supra*, addressing the exception to claim splitting for acquiescence when simultaneous actions are pending, either outcome is a possibility.⁷ The trial court's abuse of discretion in denying Steinbach' Motion to File a Reply was thus prejudicial and requires the Judgment to be reversed.

Point Two is granted.⁸

⁷This Opinion does not address the ultimate merit of the affirmative avoidance of acquiescence, a matter that remains to be determined by the trial court.

⁸The Motion for Summary Judgment did not rely on the affirmative defense of collateral estoppel (issue preclusion), and accordingly, the Judgment did not address the subject. *See* RESTATEMENT (SECOND) OF JUDGMENTS section 27 ("When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim.").

Conclusion

The Judgment is reversed. This matter is remanded with instructions for the trial court to enter an order granting Steinbach's Motion to File a Reply, with instructions for the trial court to reconsider Maxion Wheels' Motion for Summary Judgment in light of Steinbach's asserted affirmative avoidance of acquiescence, and for further proceedings consistent with this Opinion.

Cynthia L. Martin

Cynthia L. Martin, Judge

All concur