

United States Court of Appeals
For the Eighth Circuit

No. 20-2943

John Benson; Brian Benson

Plaintiffs - Appellants

v.

Family Tree Corporation, Inc.; Desert Partners IV, L.P.

Defendants

Ann Kemske; Jon Kemske

Defendants - Appellees

Brigham Oil & Gas, LP; Oasis Petroleum Incorporated

Defendants

Jodee Lawler; Carolyn Probst; Judge Robin Schmidt

Movants

Appeal from United States District Court
for the District of Minnesota

Submitted: August 31, 2021

Filed: September 7, 2021

[Unpublished]

Before SHEPHERD, GRASZ, and KOBES, Circuit Judges.

PER CURIAM.

In this diversity action, Minnesota residents John and Brian Benson appeal the district court's¹ grant of the defendants' motion to dismiss based on res judicata. We affirm.

To begin, we conclude the defendants properly raised the defense of res judicata in their motion to dismiss. *See C.H. Robinson Worldwide, Inc. v. Lobrano*, 695 F.3d 758, 763-64 (8th Cir. 2012) (res judicata may be raised as affirmative defense in motion to dismiss; Federal Rule of Civil Procedure 12(b)(6) dismissal appropriately based on affirmative defense apparent from face of the complaint, public records, and materials embraced by the complaint). Further, we need not reach the Bensons' claim for declaratory relief argument because they did not raise it in their response to the motion to dismiss and instead urged the district court to accept the magistrate judge's report and recommendation concluding the claim was barred by claim preclusion. *See Ridenour v. Boehringer Ingelheim Pharms., Inc.*, 679 F.3d 1062, 1067 (8th Cir. 2012) (A party "must present all his claims squarely to the magistrate judge . . . to preserve them for review.").

Finally, after careful de novo review, we conclude that dismissal of the Bensons' tort claims was proper. *See Laase v. County of Isanti*, 638 F.3d 853, 856 (8th Cir. 2011) (reviewing de novo the grant of motion to dismiss for failure to state a claim based on res judicata and relying on the law of forum that rendered first judgment to control res judicata analysis); *see also Finstad v. Beresford Bancorp.*,

¹The Honorable Michael J. Davis, United States District Judge for the District of Minnesota, adopting in part the report and recommendation of the Honorable David T. Schultz, United States Magistrate Judge for the District of Minnesota.

831 F.3d 1009, 1013 (8th Cir. 2016) (noting elements of claim preclusion under North Dakota law). Accordingly, the judgment of the district court is affirmed.
