

APPENDIX A

Opinion

Court name, Appeals for the Eleventh Circuit.

24-10183

Christine Cichowski, et al v. Kes, et al

Date of opinion, 12/02/2024

Appeal From: Middle District of Florida

CICHOWSKI FAMILY, Plaintiff, v. CVS HEALTH CORPORATION, CVS HEALTH SOLUTIONS, LLC, CVS PHARMACY, INC., CVS RX SERVICE, INC., et al., Defendants, CHRISTINE V. CICHOWSKI, CVC, KEVIN CICHOWSKI, to be known as KJ, STANLEY CICHOWSKI, JR., SC, CHRISTINE CICHOWSKI, CC, Plaintiffs-Appellants, KES, The Pharmacist, SK, CVS PHARMACY, Defendants-Appellees

PER CURIAM:

DO NOT PUBLISH Appeal from the United States District Court for the Middle District of Florida D.C. Docket No. 3:22-cv-00599-TJC-PDB

Before WILSON, BRANCH, and ANDERSON, Circuit Judges. PER CURIAM:

Plaintiffs-Appellants Kevin Cichowski, Christine V. Cichowski, Stanley Cichowski, and Christine Cichowski (collectively, the Cichowskis), proceeding pro se, appeal the district court's grant of CVS Pharmacy Inc.'s (CVS) motion for judgment on the pleadings. Fed.R.Civ.P. 12(c). The Cichowskis argue that the district court erred in finding that their complaint failed to allege facts sufficient to support a valid negligence claim against CVS. After careful review, we affirm.

I.

In our review of the district court's order granting judgment on the pleadings, we must accept as true all material facts in the Cichowskis' complaint. See *Perez v. Wells Fargo N.A.*, 774 F.3d 1329, 1335 (11th Cir. 2014). According to the Cichowskis, these are the facts. On or about May 26, 2022, a CVS pharmaceutical technician, Kes, accepted a service of process assignment. Kes then followed and stalked the Cichowskis at night causing them psychological trauma.

The Cichowskis proceed pro se and allege only a limited factual background in their Second Amended Complaint (SAC). The district court's order provides additional context based on prior filings and a hearing before the district court. The Cichowskis believed that a CVS pharmacist served or attempted to serve Stanley Cichowski in a debt collection case. They thought the connection between their pharmacist and the service of process in the collection case violated their privacy and First Amendment right to freedom of speech by chilling their desire to speak with a pharmacist. While this is helpful context, we base our decision solely on the information provided in the SAC.

II.

We review de novo a district court's order granting judgment on the pleadings. *Perez*, 774 F.3d at 1335. "Judgment on the pleadings is appropriate where there are no material facts in dispute and the moving party is entitled to judgment as a matter of law." *Id.* (quotation marks omitted). "In determining whether a party is entitled to judgment on the pleadings, we accept as true all material facts alleged in the non-moving party's pleading, and we view those facts in the light most favorable to the non-moving party." *Id.*

Although we construe *pro se* pleadings liberally, we "cannot act as de facto counsel or rewrite an otherwise deficient pleading to sustain an action." *Bilal v. Geo Care, LLC*, 981 F.3d 903, 911 (11th Cir. 2020). And we will generally not consider an issue raised for the first time on appeal, *Access Now, Inc. v. Sw. Airlines Co.*, 385 F.3d 1324, 1331 (11th Cir. 2004), nor will we consider issues raised for the first time in a reply brief, *Berry v. Crestwood Healthcare LP*, 84 F.4th 1300, 1313 (11th Cir. 2023). Additionally, "an amended complaint supersedes and replaces the original complaint unless the amendment specifically refers to or adopts the earlier pleading." *Varnes v. Loc. 91, Glass Bottle Blowers Ass'n of U.S. and Canada*, 674 F.2d 1365, 1370 n.6 (11th Cir. 1982).

In reviewing an order of a district court sitting in diversity, we must apply the law of the state in which the district court sits, including that state's common law. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938). Here, the district court sits in Florida, so we apply Florida law. *See id.*

Under Florida law, a negligence claim has four elements: (1) "[t]he claimant must first demonstrate that the defendant owed a duty, or obligation, recognized by the law, requiring the defendant to conform to a certain standard of conduct, for the protection of others against unreasonable risks"; (2) "the claimant must establish that the defendant failed to conform to that duty"; (3) "there must be a reasonably close causal connection between the nonconforming conduct and the resulting injury to the claimant"; and (4) "the claimant must demonstrate some actual harm." *Williams v. Davis*, 974 So.2d 1052, 1056 (Fla. 2007) (quotation marks omitted and alterations adopted).

An employer is vicariously liable for compensatory damages arising from an employee's negligent acts committed within the scope of their employment, though an employer cannot be held vicariously liable for punitive damages unless the employer is also at fault.

Mercury Motors Exp., Inc. v. Smith, 393 So.2d 545, 549 (Fla. 1981). An employee acts within the scope of employment when his or her conduct "occurs substantially within authorized time and space limits, and it is activated at least in part by a purpose to serve the [employer]." *McGhee v. Volusia Cnty.*, 679 So.2d 729, 732 (Fla. 1996).

The Florida Supreme Court has defined the standard of care imposed on pharmacists as follows: a pharmacist who sells a prescription warrants that (1) "he will compound the drug prescribed;"

(2) "he has used due and proper care in filling the prescription (failure of which might also give rise to an action in negligence);" (3) "the proper methods were used in the compounding process;" and (4) "the drug has not been infected with some adulterating foreign substance." *McLeod v. W.S. Merrell Co.*, 174 So.2d 736, 739 (Fla. 1965).

An employer may also be held liable for negligently hiring or negligently supervising its employees. *Malicki v. Doe*, 814 So.2d 347, 361-62 (Fla. 2002). To make out a prima facie case of negligent hiring, a plaintiff must demonstrate that (1) the employer had to "make an appropriate investigation of the employee and failed to do so"; (2) "an appropriate investigation would have revealed the unsuitability of the employee for the particular duty"; and (3) "it was unreasonable for the employer to hire the employee in light of the information he knew or should have known." *Id.* at 362.

Negligent supervision, by contrast, "occurs after employment begins, where the employer knows or should know of an employee's unfitness and fails to take further action such as investigating, discharge or reassignment." *Id.* at 362 n.15 (quotation marks omitted).

III.

Here, because the Cichowskis' SAC alleges that pharmaceutical technician, Sophanath Kes, stalked the Cichowskis at night- that is, outside the "authorized time and space limits" of his employment at CVS-and because there are no allegations in the complaint suggesting that Kes's actions were motivated by a purpose to serve CVS-Kes was not acting within the scope of his employment when he allegedly stalked the Cichowskis. *See McGhee, 679 So.2d at 732*. Thus, CVS would not be vicariously liable for Kes's alleged actions.

Nor are the allegations in the SAC sufficient to suggest that CVS negligently hired or supervised Kes, since "an appropriate investigation" into Kes at the time he was hired, or any time after, would not have suggested that Kes was unsuited to perform his duties as a pharmaceutical technician merely because he also worked as a process server. *See Malicki*, 814 So.2d at 362.

Even if we consider factual allegations from the Cichowskis' prior complaints, the Cichowskis have still failed to allege facts suggesting that CVS is liable to the Cichowskis for negligence. Even if Kes failed to inform the Cichowskis that he was working as a process server in a debt-collection case against Stanley Cichowski before filling and dispensing the Cichowskis' medications, this would not breach any duty that pharmacists owe to their customers under *McLeod*. *See* 174 So.2d at 739. Nor would CVS be liable to the Cichowskis on a theory of negligent hiring or negligent supervision of pharmacist Kes for the same reasons described above.

We need not address the Cichowskis' arguments that the district court did not consider a document describing the scope of CVS's duties, failed to mail them certain orders and documents, and engaged in *ex parte* communications with CVS at a hearing because these issues are raised for the first time on appeal and for the first time in a reply brief. See *Access Now, Inc.*, 385 F.3d at 1331. CVS was entitled to a judgment on the pleadings; we, therefore, affirm.

AFFIRMED.

APPENDIX B

Judgment

Court name Middle District of Florida

Christine Cichowski, et al v. Kes, et al1

Date of judgment, 1/19/2024

UNITED STATES DISTRICT COURT MIDDLE
DISTRICT OF FLORIDA JACKSONVILLE
DIVISION

CHRISTINE V. CICHOWSKI, CVC, KEVIN
CICHOWSKI, to be known as KJ, STANLEY
CICHOWSKI, JR. , SC, and CHRISTINE
CICHOWSKI, CC, Plaintiffs,

v. KES, The Pharmacist, SK and CVS PHARMACY,
Defendants.

Case No: 3:22-cv-599-TJC-PDB

JUDGMENT IN A CIVIL CASE Decision by Court.
This action came before the Court and a decision has
been rendered. IT IS ORDERED AND ADJUDGED
that judgment is hereby entered in favor of CVS
Pharmacy and against

Christine V. Cichowski, Kevin Cichowski, Stanley
Cichowski Jr., and Christine Cichowski. Any motions
seeking an award of attorney's fees and/or costs must
be filed within the time and in the manner
prescribed in Local Rule 7.01, United States District
Court Middle District of Florida. Date: January 19,
2024

ELIZABETH M. WARREN, CLERK s/LDR, Deputy
Clerk

APPENDIX C

Rehearing

Court name, Appeals for the Eleventh Circuit.

24-10183

Christine Cichowski, et al v. Kes, et al

Date of rehearing, 01/22/2025

Appeal From: Middle District of Florida

In the United States Court of Appeals For the
Eleventh Circuit

ON PETITION(S) FOR REHEARING AND
PETITION(S) FOR REHEARING EN BANC

Before WILSON, BRANCH, and ANDERSON,
Circuit Judges. PER CURIAM: The Petition for
Rehearing En Banc is DENIED, no judge in regular
active service on the Court having requested that the
Court be polled on rehearing en banc. FRAP 40. The
Petition for Rehearing En Banc is also treated as a
Petition for Rehearing before the panel and is
DENIED. FRAP 40, 11th Cir. IOP 2.

APPENDIX D

Order on Motion for Judgment on the Pleadings
Court name, Middle District of Florida
Christine Cichowski, et al v. Kes, et al
Date of rehearing, 01/18/2024

3:22-cv-599-TJC-PDB

ORDER

This case is before the Court on Defendant CVS Pharmacy's Motion for Judgment on Pleadings. Doc. 52. Proceeding without a lawyer, Plaintiffs Christine V. Cichowski, Kevin Cichowski, Stanley Cichowski Jr., and Christine Cichowski have filed an original Complaint, an Amended Complaint, and a Second Amended Complaint. Docs. 1, 24, 50. In the Second Amended Complaint, they assert diversity jurisdiction and allege the following: On or about 5-26-22 CVS [illegible] tech accepted an order of Process. After being followed and stalked at night by the Kes's. the Cichowskis suffered traumatic psychological Trauma. The Cichowskis had so much fear. they were afraid to talk about this with other Drs. CVS was Grossly negligent. and would like to amend for punitive damages.

Doc. 50 at 3, 4. They add that they “sufferd trauma, sleepless nights, exess fear, [and] flash Backs.” Id. They attach a partial transcript from a hearing earlier in the case. Doc. 50-1 at 1–2. In the excerpt, counsel for CVS Pharmacy explains that a CVS pharmacist works part-time for his cousin’s process serving company and someone else from the company attempted to serve the Cichowskis.¹ Id.; accord Doc. 48 at 11:18–12:21 (transcript). In the Answer, CVS Pharmacy denies that any employee accepted an “order of process,” admits that its employee was appointed as one of three process servers in a now dismissed case against Stanley Cichowski but denies that the employee served him, denies that any employee stalked any of the Cichowskis or caused them psychological trauma by stalking them, and denies any negligence. Doc. 51 ¶¶ 1, 2, 4–7, 9. CVS Pharmacy raises seven “affirmative and other defenses.” Id. at 3–5.

⁸Based on earlier filings and the hearing, the Court discerns the following circumstances giving rise to this lawsuit. The Cichowskis used to obtain their medicine from CVS Pharmacy and believe a CVS pharmacist served or attempted to serve them in a debt collection case against Stanley Cichowski. See Doc. 1 (Complaint); Doc. 24 (Amended Complaint); Doc. 48 at 4:18, 5:1–6, 25:16–17 (hearing transcript). They believe the connection between their pharmacist and the service of process in the collection case compromises their privacy and violates their First Amendment right to freedom of speech by chilling their desire to speak with their pharmacist about their medical treatment. See Doc. 48 at 4:14–19, 24:15–17, 25:9–13. The Court provides this background for context but bases its decision only on the Second Amended Complaint, Doc. 50, and the Answer, Doc. 51.

“After the pleadings are closed . . . a party may move for judgment on the pleadings.” Fed. R. Civ. P. 12(c). “Judgment on the pleadings is appropriate where there are no material facts in dispute and the moving party is entitled to judgment as a matter of law.” *Samara v. Taylor*, 38 F.4th 141, 149 (11th Cir. 2022) (quoted authority omitted). “A motion for judgment on the pleadings . . . is subject to the same standards as a [Federal Rule of Civil Procedure] 12(b)(6) motion to dismiss.” *United States v. Wood*, 925 F.2d 1580, 1581 (11th Cir. 1991). “To survive a [Rule 12(b)(6) or Rule 12(c) motion], a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

“A pleading that offers labels and conclusions . . . will not do.” *Id.* (internal quotation marks and quoted authority omitted). A court must view the facts “in the light most favorable to the nonmoving party.” *Samara*, 38 F.4th at 149 (quoted authority omitted). Additionally, *pro se* complaints are construed liberally. *Bilal v. Geo Care, LLC*, 981 F.3d 903, 911 (11th Cir. 2020). A federal court sitting in diversity applies the forum state’s substantive law. *Eres v. Progressive Am. Ins. Co.*, 998 F.3d 1273, 1278 n.4 (11th Cir. 2021). In Florida, a negligence claim has four elements. *Williams v. Davis*, 974 So. 2d 1052, 1056 (Fla. 2007). First, the defendant must owe a duty to conform to a certain standard of conduct to protect others against unreasonable risks. *Id.*

Second, the defendant must fail to conform to that duty. *Id.* Third, “there must be a reasonably close causal connection between the nonconforming conduct and the resulting injury to the claimant.” *Id.* (cleaned up). And fourth, the claimant must suffer “some actual harm.” *Id.*

An employer may be liable for an employee's negligence or tortious conduct within the scope of employment. See *Tsuji v. Fleet*, 366 So. 3d 1020, 1031 (Fla. 2023) (negligence); *Fields v. Devereux Found., Inc.*, 244 So. 3d 1193, 1196 (Fla. 2d DCA 2018) (tortious conduct). The Court does not address—but has fully considered—each argument in the Motion for Judgment on Pleadings, Doc. 52, and the Response, Doc. 55. No material facts are in dispute,² and even construing the Second Amended Complaint liberally and viewing the facts in the light most favorable to the Cichowskis, the Cichowskis provide no basis for liability. They allege no facts supporting any element of direct negligence by CVS Pharmacy.

²Even if the disputed facts are true, they do not affect the outcome and thus are immaterial.

They allege misconduct by a CVS Pharmacy employee, but they allege no facts suggesting the misconduct was within the scope of his employment or that CVS Pharmacy was otherwise in any way responsible for it. The assertion that “CVS was Grossly negligent” is conclusory and falls short of the Iqbal–Twombly pleading standard. CVS Pharmacy is thus entitled to judgment. Accordingly, it is hereby

ORDERED:

1. The Motion for Judgment on Pleadings, Doc. 52, is **GRANTED**.
2. The clerk is directed to enter judgment in favor of CVS Pharmacy and against Christine V. Cichowski, Kevin Cichowski, Stanley Cichowski Jr., and Christine Cichowski; terminate any pending deadlines; and close the file. **DONE AND ORDERED** in Jacksonville, Florida, the 18th day of January, 2024.