FILED
United States Court of Appeals
Tenth Circuit

April 6, 2022

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

ANN SHIVELY, in her capacity as presumptive personal representative on behalf of all beneficiaries of the estate of Michael Jay Shively,

Plaintiff - Appellant,

v.

UTAH VALLEY UNIVERSITY; ASTRID S. TUMINEZ; KAREN CLEMES; SARA J. FLOOD,

Defendants - Appellees.

No. 20-4088
(D.C. No. 2:20-CV-00119-DB)
(D. Utah)

ORDER AND JUDGMENT*

Before **BACHARACH**, **KELLY**, and **CARSON**, Circuit Judges.

Dr. Michael Jay Shively taught at Utah Valley University ("UVU") from 1993 until his death. In response to allegedly false accusations of misconduct, UVU administrators opened an investigation into Dr. Shively in March 2019 that lasted over five months. University officials suspended him with pay during that time. The investigation eroded Dr. Shively's mental health. He committed suicide in August. Plaintiff Ann Shively, his wife, sued UVU and the administrators involved in the

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

investigation on behalf of his estate, alleging due process violations, wrongful death, negligent infliction of emotional distress, breach of implied contract, and civil conspiracy. The district court dismissed every claim with prejudice after Defendants moved for judgment on the pleadings. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

I.

Dr. Shively, a tenured professor, taught at UVU, a public university, and directed its anatomy program.[1] UVU's administrators began investigating Dr. Shively after receiving complaints about his teaching performance and behavior toward students and colleagues. Plaintiff alleged that Defendant Sara Flood, another UVU professor, filed complaints and solicited student complaints against Dr. Shively because she wanted his job. During the investigation, UVU suspended Dr. Shively but allowed him to continue receiving his full salary and benefits. The investigation lasted over five months, from March until Dr. Shively's untimely death in August 2019. According to Plaintiff, UVU administrators knew the complaints lacked credibility but prolonged the investigation to isolate and shame Dr. Shively. They even pressured him to retire or resign. The investigation caused Dr. Shively severe emotional distress—and the administrators knew it. The emotional distress led to his suicide in August 2019.

[1] This case comes before us at the motion to dismiss stage. So we "accept all the well-pleaded allegations of the complaint as true and must construe them in the light most favorable to the plaintiff." Thomas v. Kaven, 765 F.3d 1183, 1190 (10th Cir. 2014) (quoting Cressman v. Thompson, 719 F.3d 1139, 1152 (10th Cir. 2013)).

Following Dr. Shively's death, Plaintiff sued UVU, UVU's President, Dr. Astrid S. Tuminez, UVU's General Counsel at the time, Karen Clemes, and Flood. Plaintiff alleged (1) Tuminez and Clemes violated Dr. Shively's due process rights by suspending him based on a bogus investigation and without him committing "a serious offense affecting the public interest" as required in UVU's Policies and Procedures; (2) UVU's investigation wrongfully caused Dr. Shively's death; (3) UVU and its administrators negligently inflicted emotional distress on Dr. Shively by initiating and unnecessarily prolonging the investigation; (4) UVU breached its implied contract with Dr. Shively; and (5) Tuminez, Clemes, and Flood conspired to remove Dr. Shively from his job.

The district court dismissed Plaintiff's claims with prejudice. It dismissed the due process claims for failing to plead the deprivation of a clearly established property right. It determined that the Governmental Immunity Act of Utah barred the wrongful-death and negligent-infliction-of-emotional-distress claims. It dismissed the contract claim for failure to allege damages. And it dismissed the conspiracy claim for failure to allege a meeting of the minds.

Plaintiff appeals the district court's dismissal with prejudice of every claim except the civil-conspiracy claim.[2]

[2] Plaintiff only mentions the civil-conspiracy claim in her opening brief in two lines—both without any analysis of a civil-conspiracy claim. See Appellant's Br. at 11 ("[T]he district court erred in dismissing the breach of contract and civil conspiracy claims *with* prejudice when the only purported defects were pleading issues."); id. at 44 ("[T]he district court's order with respect to Shively's breach of contract and civil conspiracy claims were based solely on alleged pleading errors.").

II.

"We review a district court's grant of a motion for judgment on the pleadings de novo, using the same standard that applies to a Rule 12(b)(6) motion." Colony Ins. Co. v. Burke, 698 F.3d 1222, 1228 (10th Cir. 2012) (citation omitted). This means we accept Plaintiff's factual pleadings as true and resolve all reasonable inferences from the pleadings in favor of Plaintiff. Id. To survive a Rule 12(b)(6) motion, Plaintiff's complaint must allege sufficient facts to state a claim for relief plausible on its face. Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (defining a facially plausible claim as one where "the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged").

III.

Plaintiff contends the district court improperly dismissed her due process claims because Defendants deprived Dr. Shively of his constitutionally protected property interest in continued employment with UVU. Plaintiff also argues that the district court incorrectly interpreted the Governmental Immunity Act of Utah. Plaintiff finally appeals the district court's dismissal of her contract claim for failure to plead damages. Taking each issue in turn, we affirm.

A.

This passing mention fails to sufficiently brief that claim. Plaintiff has thus waived that issue. Adler v. Wal-Mart Stores, 144 F.3d 664, 679 (10th Cir. 1998) ("Arguments inadequately briefed in the opening brief are waived . . . .").

We begin with the due process claims. Plaintiff must get over the qualified-immunity hurdle to survive dismissal of these claims. Qualified immunity "protects public employees from both liability and from the burdens of litigation arising from their exercise of discretion." Cummings v. Dean, 913 F.3d 1227, 1239 (10th Cir. 2019) (internal quotation marks omitted). To overcome qualified immunity, Plaintiff must prove (1) Defendants violated Dr. Shively's statutory or constitutional right that was (2) clearly established when UVU suspended him. See Ashcroft v. al-Kidd, 563 U.S. 731, 735 (2011). The Court can tackle either prong first. Id. The district court determined that Tuminez and Clemes did not deprive Dr. Shively of his property interest in continued employment. We agree with the district court because Dr. Shively's suspension with pay does not offend due process; and even if it did, the right is not clearly established under the particular facts alleged in this case.

The Fourteenth Amendment forbids "any State [from] depriv[ing] any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. For a state actor to deprive a citizen of a property interest, the Due Process Clause requires the actor to provide some sort of notice and hearing "appropriate to the nature of the case." Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 542 (1985) (citation omitted). Independent sources, such as state law, create and define the property interest. Id. at 538 (citing Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 577 (1972)). For example, a state can confer a constitutionally protected property interest in continued employment. See id. at 538–39. And we have held tenured professors have a property interest in their employment. See, e.g.,

Tonkovich v. Kan. Bd. of Regents, 159 F.3d 504, 517 (10th Cir. 1998). But the key question is whether Plaintiff pleaded facts plausibly showing that Tuminez and Clemes deprived Dr. Shively of this protected property interest. See Hyde Park Co. v. Santa Fe City Council, 226 F.3d 1207, 1210 (10th Cir. 2000).

Generally, suspension with pay does not raise due process concerns because a suspension with pay does not infringe on an employee's protected property right in continued employment. See Hicks v. City of Watonga, 942 F.2d 737, 746 n.4 (10th Cir. 1991) (citing Loudermill, 470 U.S. at 544–45 (noting that suspending an employee with pay can avoid due process problems)); see also Pitts v. Bd. of Educ., 869 F.2d 555, 556 (10th Cir. 1989) (finding that the district court correctly held that "suspension *with* pay did not deprive [the public employee] of any measurable property interest."). But Plaintiff's argument is more nuanced. Plaintiff contends that administrators may violate due process by indefinitely suspending a tenured faculty member with pay where the suspension causes the faculty member to suffer "indirect economic effects."

We have never adopted (or even considered) Plaintiff's theory in a published opinion. Recognizing the lack of circuit authority for her position, Plaintiff seemingly relies on a Seventh Circuit case which mentions the possibility that potential "indirect economic effects" of a suspension with pay could "trigger the protection of the Due Process Clause." Luellen v. City of East Chicago, 350 F.3d 604, 613–14 (7th Cir. 2003) (citation omitted).

But neither Luellen nor any other case relied upon by Plaintiff is persuasive in the context of this case. Indeed, although some of Plaintiff's authorities mention the "indirect economic effects" theory, none actually found a deprivation of a protected property right under the Fourteenth Amendment on that basis. See id. at 608–09, 613–14 (no property deprivation when a fire department suspended an employee with pay pending a nearly twenty-one-month investigation even though he lost the opportunity to earn on-call pay during the investigation); Townsend v. Vallas, 256 F.3d 661, 664–66, 676 (7th Cir. 2001) (no property deprivation when a school temporarily reassigned a teacher to an administrative position during a nearly three-month investigation, foreclosing his ability to earn extra income from coaching but still paying him his full teacher's salary); Bordelon v. Chi. Sch. Reform Bd. of Tr., 233 F.3d 524, 526, 530–31 (7th Cir. 2000) (no property deprivation when a school board transferred a principal to an administrative position for fifteen months but still afforded him his full pay and benefits); Swick v. City of Chicago, 11 F.3d 85, 86–87 (7th Cir. 1993) (no property deprivation when a police department placed an officer on involuntary sick leave for over a year but still paid him his full income). And Plaintiff's complaint never alleged that Dr. Shively's loss of an "indirect economic benefit" resulted in a due process violation. So, even if we found Plaintiff's "indirect economic benefit" theory persuasive, it lacks merit in this appeal because she never sought relief on that basis in the district court.

Defendant's conduct also did not violate a right (assuming one exists) clearly established under our precedents. To meet her burden of showing a right is clearly

established, Plaintiff need not pinpoint precedent with precisely the same facts as her case. See A.M. v. Holmes, 830 F.3d 1123, 1135–36 (10th Cir. 2016) (citations omitted). But she must show that in light of "pre-existing law," the unlawfulness of Defendant's conduct was "apparent." Id. at 1136. Plaintiff alleged that Defendants violated Dr. Shively's due process rights by temporarily suspending him with pay during an investigation without disciplining him, simply because the suspension lasted over five months. But she can point to no precedent to support the idea that suspending a tenured professor with pay pending an investigation violates due process when the suspension lasts for a sufficiently lengthy amount of time. In fact, our precedents seemingly establish the contrary. See Hicks, 942 F.2d at 746 n.4; Pitts, 869 F.2d at 556. With this legal background in mind, we conclude Plaintiff failed to plead "facts sufficient to show . . . that [Tuminez and Clemes] plausibly violated [Dr. Shively's] constitutional right[], and that [this right was] clearly established at the time." Robbins v. Oklahoma, 519 F.3d 1242, 1249 (10th Cir. 2008). So qualified immunity protects Tuminez and Clemes from liability for the first due process claim.

The second due process claim fails, too. Plaintiff argues that Defendants violated Dr. Shively's right that UVU not suspend him unless he was "charged with a serious offense affecting the public interest," as stated in UVU's Policies and Procedures. This language, according to Plaintiff, created a protected property interest in not being suspended unless authorized by UVU policy. And because no one had charged Dr. Shively with "a serious offense affecting the public interest,"

UVU administrators had no authority to suspend him with pay—violating his property interest. They also allegedly violated Dr. Shively's due process rights by not providing him with notice of the suspension, evidence supporting a reason to suspend him, or a pre-suspension hearing.

As we previously noted, independent sources with "existing rules or understandings" create and define property interests. Roth, 408 U.S. at 577. Even if a property interest would not normally exist, a contract guaranteeing substantive rights combined with surrounding circumstances can create one. See Hulen v. Yates, 322 F.3d 1229, 1240 (10th Cir. 2003) (per curiam). Plaintiff claims Hulen supports her position because both sides agree that UVU's Policies and Procedures created an implied contract with Dr. Shively. But the contract in Hulen—the source creating the property interest—differs materially from UVU's policies.

In Hulen, we held that a professor had a property interest in his departmental assignment based on the school's faculty manual, which functioned like a contract, and the school's customs and practices. Id. at 1243–44. The manual guaranteed tenured professors the ability to "mutually determine[] the new conditions" with an administrator before the school could modify the professor's assignment. Id. at 1241. This language, we reasoned, placed a "substantive restriction" on the school, creating a property interest in tenured appointments and changes in employment status because "mutual consent or due process" protected both. Id. The due process protections stemmed from other provisions of the manual that prohibited

administrators from taking "unfair, unreasonable, arbitrary, capricious, or discriminatory" actions, including faculty discipline decisions. Id. at 1241–42.

No such guarantee, or anything like it, exists in UVU's policies. The pertinent provision states: "[i]n the event that a faculty member is charged with a serious offense affecting the public interest, the President may suspend the faculty member from professional duties . . . .". Like the district court noted, the language *offers* a reason to suspend the faculty member ("may"); it does not limit suspension to *only* when the school charges the faculty member with a serious offense affecting the public interest. The policy defines the property interest. See Roth, 408 U.S. at 577–78 (likening a statute that created a property interest to a school's employment terms, determining that the terms also created a property interest). And like a statute, when the plain language of the policy is unambiguous, "our inquiry ends." See United States v. Broadway, 1 F.4th 1206, 1211 (10th Cir. 2021) ("If the statute's text is unambiguous, then its plain meaning controls, and our inquiry ends."). Plaintiff asks us to read into a rule language not present to create a substantive property interest. We decline to do so.

And even if we could construe the policy to confer a property interest in employment by limiting suspensions, the right at issue in this case is not clearly established. To meet her burden, Plaintiff must provide a Supreme Court or Tenth Circuit decision on point or show the weight of authority from other courts. See Schwartz v. Booker, 702 F.3d 573, 587 (10th Cir. 2012) (citation omitted). Plaintiff relies on Hulen to argue that Dr. Shively's right that UVU not suspend him without

satisfying the policy condition was clearly established. But Hulen only establishes that an employment contract that contains certain language *can* create a protected property interest, not that every employment contract does so. UVU's policy does not create a property interest in "not being suspended" unless "charged with a serious offense affecting the public," as Plaintiff suggests. Thus, Plaintiff cannot prove Defendants violated a clearly established right "of which a reasonable government official would have known," Hulen, 322 F.3d at 1236 (citing Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)), and qualified immunity also protects Tuminez and Clemes for this claim.[3]

B.

Plaintiff also challenges the district court's holding that the Governmental Immunity Act of Utah ("the Act") bars her negligent-infliction-of-emotional-distress and wrongful-death claims.

[3] Plaintiff also points us to a different provision in UVU's policies, which describes the tenured position as "permanent and not subject to termination or substantial reduction in status, except under those circumstances discussed herein." But Dr. Shively neither lost his job nor experienced a substantial reduction in his status. To reiterate, UVU suspended Dr. Shively with pay pending an investigation into his teaching without disciplining him. The result of that investigation may have led to termination or a substantial reduction in his status, but during the investigation, neither occurred. So even if § 4.1.2 created a property interest, Plaintiff has not pleaded facts plausibly showing that Tuminez or Clemes deprived Dr. Shively of such a property interest. See Hyde Park Co., 226 F.3d at 1210.

The Act shields state governmental entities and their employees from suit "for any injury that results from the exercise of a governmental function," unless the Act waives immunity. Utah Code Ann. § 63G-7-201(1). The Act waives immunity when a state employee, acting within the scope of employment, proximately causes an injury by a negligent act or omission. Id. § 63G-7-301(2)(i). But the waiver is not absolute: immunity exists when the injury "arises out of or in connection with, or results from . . . infliction of mental anguish." Id. § 63G-7-201(4)(b). The Act broadly defines "arises out of or in connection with, or results from" as follows:

> (a) there is some causal relationship between the conduct or condition and the injury;
> (b) the causal relationship is more than any causal connection but less than proximate cause; and
> (c) the causal relationship is sufficient to conclude that the injury originates with, flows from, or is incident to the conduct or condition.

Id. § 63G-7-102(1). In short, the Act retains immunity for government employees whose negligent acts or omissions inflict mental anguish.

We note at the start of this discussion that UVU, as a public university, is a state entity that employed the individual defendants. The district court determined that the individual defendants acted within the scope of their employment by initiating the investigation. Plaintiff does not challenge that conclusion on appeal. So we focus on the Act's applicability. The district court reasoned that Plaintiff's theory of her case rests on the idea that Defendants inflicted such mental anguish on Dr. Shively that they drove him to suicide. Based on this reasoning, the district court

concluded the Act barred the wrongful-death and negligent-infliction-of-emotional-distress claims against UVU and its employees. We agree.

The Act "focuses on the conduct or situation out of which the injury arose, not on the theory of liability crafted by the plaintiff or the type of negligence alleged." Ledfors v. Emery Cnty. Sch. Dist., 849 P.2d 1162, 1166 (Utah 1993). And courts should "strictly appl[y]" it. Hall v. Utah Dep't of Corr., 24 P.3d 958, 962 (Utah 2001). Plaintiff alleged that UVU administrators relied on baseless allegations to initiate a sham investigation into Dr. Shively, intending to isolate and shame him. In fact, according to the allegations, they continued the investigation needlessly, even after learning that Dr. Shively suffered extreme emotional distress because of the prolonged investigation. Taking these allegations as true, the administrators' conduct led to Dr. Shively's death—the conduct "out of which the injury arose." Ledfors, 849 P.2d at 1166. Put another way, Dr. Shively's emotional distress, and eventual death, "flows from" their "infliction of mental anguish" during the investigation. § 63G-7-102(1)(c), 201(4)(b). Because Dr. Shively's injuries flowed from Defendants' infliction of mental anguish, Defendants retain immunity under the Act for Plaintiff's negligent-infliction-of-emotional-distress claim.[4]

[4] Plaintiff insists that the mental-anguish exception applies only when a party seeks mental-anguish damages. So, because she does not seek mental-anguish damages, the Act waives immunity. To support this argument, Plaintiff urges us to rely on a Utah Court of Appeals case that interpreted an earlier version of the Act. See Gabriel v. Salt Lake City Corp., 34 P.3d 234, 237 (Utah Ct. App. 2001). That case analyzed the 2001 version of the Act, which did not define "arises out of or in connection with, or results from." See Utah Code Ann. § 63-30-2 (2001). Gabriel fails to illuminate how the most recent version of the Act—which includes the

The same analysis applies to Plaintiff's wrongful-death claim—Dr. Shively's death "arose out of" UVU administrators' "infliction of mental anguish." See id. § 63G-7-201(4)(b). Besides, under Utah law, a wrongful-death claim will not exist without an underlying personal-injury claim. Feldman v. Salt Lake City Corp., 484 P.3d 1134, 1139 (Utah 2021). Thus, because the Act immunizes UVU and its administrators for the negligent-infliction-of-emotional-distress claim, it does so for the wrongful-death claim as well.

For the first time on appeal, Plaintiff argues that the Act does not apply because Defendants' conduct violated Dr. Shively's due process rights under Utah's constitution, which the Act does not protect.[5] Maybe so. But a party forfeits arguments not raised at the district court. Richison v. Ernest Grp., Inc., 634 F.3d 1123, 1128 (10th Cir. 2011) (citations omitted). Forfeited arguments only warrant reversal if the party can show plain error. Id. We only review for plain error, though, when the party argues for plain error in the opening brief. See id. at 1131 (citing McKissick v. Yuen, 618 F.3d 1177, 1189 (10th Cir. 2010)). Because Plaintiff

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definition, see § 63G-7-102(1)—applies to Plaintiff's allegations. It thus cannot guide our analysis here. And in any event, the Act does not limit the mental-anguish exception to only when the plaintiff seeks mental-anguish damages.

[5] Plaintiff couches this argument as another reason to support her argument that the Act's immunity does not apply to Defendants, rather than a new theory. But Plaintiff's new position contradicts the only position she took at the district court. There, Plaintiff argued only that the Act waived immunity for her claims. Now Plaintiff argues that the Act does not even apply to her claims. Appellate courts do not "serve as a second-shot forum . . . where secondary, back-up theories may be mounted for the first time." Richison, 634 F.3d at 1130 (alteration in original) (quotation omitted). Plaintiff's state-constitutional argument smacks of exactly the type of "back-up" theory forfeited on appeal if not raised at the district court.

failed to argue for plain error in her opening brief, we will not consider her new theory.

C.

Plaintiff also challenges the district court's determination that she failed to plead damages for her breach-of-implied-contract claim. Under Utah law, to sufficiently plead a breach-of-contract claim, a plaintiff must allege "(1) a contract, (2) performance by the party seeking recovery, (3) breach of the contract by the other party, and (4) damages." Am. W. Bank Members, L.C. v. State, 342 P.3d 224, 230–31 (Utah 2014). Typically, we calculate damages based on what a party would expect to receive had the breaching party performed plus any other incidental losses from not performing but less any costs saved. See Trans-W. Petroleum, Inc. v. U.S. Gypsum Co., 379 P.3d 1200, 1206 (Utah 2016). We call these expectation damages.

Sometimes, a party can also recover consequential damages—a loss foreseeably resulting from this particular contract breach. See id. at 1207 (quoting Prince v. Peterson, 538 P.2d 1325, 1328 (Utah 1975) (describing consequential damages as "particular items of damages which result from circumstances peculiar to the case at hand.")) To recover consequential damages, a plaintiff must prove (1) the contract breach caused the consequential damages, which were (2) foreseeable when the parties contracted and are (3) reasonably certain. Id. Expectation and consequential damages should restore the nonbreaching party "to the position it was in prior to the injury [caused by the breach]." Id. at 1206 (brackets and citation omitted). Damages cannot be speculative; the evidence must "give rise to a

reasonable probability that the plaintiff suffered damage as a result of a breach." Atkin Wright & Miles v. Mountain States Tel. & Tel. Co., 709 P.2d 330, 336 (Utah 1985).

Dr. Shively's estate cannot claim any sort of expectation damages because he received what he expected from his employment contract—his full salary and benefits. But Plaintiff alleged in the alternative that Dr. Shively lost the opportunity to teach at another school and that this "opportunity cost" entitles his estate to consequential damages. On appeal, Plaintiff argues that the district court erred in not recognizing that she could recover consequential damages. We disagree for a few reasons.

First, and perhaps most importantly, Plaintiff never pleaded that Dr. Shively sought employment at other universities with higher salaries but failed to obtain a new job because of his temporary suspension at UVU. And it appears from the record and Plaintiff's pleadings that he could not have—because he did not actually seek such alternative employment.[6] Because the complaint does not allege that Dr. Shively sought employment at other universities which was foreclosed by Defendant's purported sham investigation, the district court had no basis on which to accept Plaintiff's argument.

[6] In fact, Plaintiff admitted that Dr. Shively "did not seek alternative employment," thus demonstrating that we cannot calculate consequential damages to a reasonably certain degree.

Second, the notion that UVU breaching Dr. Shively's employment contract would preclude Dr. Shively from receiving a higher salary from a job he never pursued at another university is speculative and not reasonably foreseeable under the facts of this case. It is well-settled under Utah law that consequential damages may not be recovered where damages are speculative. See Atkin Wright & Miles, 709 P.2d at 336. And Plaintiff's argument is foreclosed because her "opportunity costs" teem with uncertainty, since we have no idea where Dr. Shively would have worked or what his new, higher salary would pay him. The same goes for any reliance damages sought—we cannot calculate such damages when Plaintiff has offered no evidence to show that Dr. Shively expended any funds in reliance on his employment contract. Plaintiff pleaded no damages sufficient to support a breach-of-implied-contract claim.

D.

Plaintiff lastly appeals the district court's dismissal with prejudice of her contract claim. We review a district court's decision to dismiss with prejudice for an abuse of discretion. United States ex rel. Stone v. Rockwell Int'l Corp., 282 F.3d 787, 809 (10th Cir. 2002), rev'd in part on other grounds, Rockwell Int'l Corp. v. United States, 549 U.S. 457 (2007). An "arbitrary, capricious, whimsical, or manifestly unreasonable" decision meets this standard. Brooks v. Mentor Worldwide LLC, 985 F.3d 1272, 1282 (10th Cir. 2021) (quoting Bylin v. Billings, 568 F.3d 1224, 1229 (10th Cir. 2009)).

Before the district court, Defendants answered Plaintiff's complaint and, less than a week later, moved for judgment on the pleadings. See Fed. R. Civ. P. 12(c). In that motion, Defendants requested that the district court dismiss all claims with prejudice. Plaintiff had twenty-one days to cure any defects in her complaint identified in the answer, Fed. R. Civ. P. 15(a)(1)(B), but she did not. Plaintiff similarly did not seek leave to amend to cure any deficiencies mentioned in the motion for judgment on the pleadings, either. Instead, Plaintiff opposed the motion. But even in that filing, Plaintiff did not address whether the district court should dismiss her claims with prejudice.

We have held that a plaintiff cannot successfully challenge a dismissal with prejudice when she only offered to cure pleading deficiencies in a response brief without seeking to amend her complaint. See Brooks, 985 F.3d at 1282–83. In Brooks, we determined that a party's failure to adequately request leave to amend did not put the issue before the district court. Id. at 1283. And when a party fails to seek leave to amend the complaint, thereby not putting the issue before the district court, the party forfeits the issue on appeal. See City of Harper Woods Emp.s' Ret. Sys. v. Olver, 589 F.3d 1292, 1304 (D.C. Cir. 2009). The district court did not abuse its discretion when it dismissed the contract claim with prejudice, because Plaintiff had

the opportunity to amend her complaint and never did so.

AFFIRMED.

Entered for the Court

Joel M. Carson III
Circuit Judge