

United States Court of Appeals
for the Fifth Circuit

United States Court of Appeals
Fifth Circuit

FILED

October 2, 2026

Thomas B. Plunkett, III
Clerk

No. 25-50116

DE LOIS PHILLIPS, *Individually, and as Independent Executrix of* THE
ESTATE OF FRED STEVEN PHILLIPS, *Deceased*; AMY LEANNE
PHILLIPS; LAURA KYLENE PHILLIPS SUBLETT; KALLI JANETTE
PHILLIPS JACKSON; STEFANIE DENE' PHILLIPS FELLER,

Plaintiffs—Appellants,

versus

ETHICON ENDO-SURGERY, INCORPORATED,

Defendant—Appellee,

CONSOLIDATED WITH

No. 25-50308

DE LOIS PHILLIPS, *Individually, and as Independent Executrix of* THE
ESTATE OF FRED STEVEN PHILLIPS, *Deceased*; AMY LEANNE
PHILLIPS; LAURA KYLENE PHILLIPS SUBLETT; KALLI JANETTE
PHILLIPS JACKSON; STEFANIE DENE' PHILLIPS FELLER,

Plaintiffs—Appellants,

versus

JOHNSON AND JOHNSON COMPANY, *A New Jersey Corporation*;
JOHNSON & JOHNSON HEALTHCARE SYSTEMS, INCORPORATED;
ETHICON US, L.L.C.,

Defendants—Appellees.

Appeals from the United States District Court
for the Western District of Texas
USDC Nos. 1:23-CV-515, 1:24-CV-775

Before SMITH, WIENER, and HIGGINSON, *Circuit Judges*.

STEPHEN A. HIGGINSON, *Circuit Judge*:

These are consolidated appeals of two related Texas products liability cases. Both concern the same alleged breach of the implied warranty of merchantability for a surgical stapler, resulting in a tragic death. After several complications in the cases' early procedural histories, the district court dismissed both cases with prejudice. We AFFIRM.

I.

In September 2021, Fred Steven Phillips ("Phillips") underwent surgery to remove tissue from his colon at Hill Country Memorial Hospital ("HCMH"), in Fredericksburg, Texas. Dr. Lance Love performed the surgery, and during the procedure, he used a surgical stapler called the Ethicon Proximate Linear Cutter 75 ("the Stapler") and staples called the Stapler Linear 75 Reload Blue ("the Staples") to connect two pieces of Phillips's large intestine, creating an anastomosis. Dr. Love documented that there was "no evidence of tension, torsion, ischemia, or bleeding," and he believed the anastomosis was secure after the procedure.

Phillips was discharged but was re-admitted a week later. Dr. Love performed another surgery and discovered that feculent contents were

25-50116
c/w No. 25-50308

leaking from the anastomosis into Phillips's abdominal cavity. Dr. Love removed some tissue from the site, and Phillips was diagnosed with sepsis and multisystem organ dysfunction. Another physician who examined the removed tissue found a two-centimeter transmural defect—*i.e.*, a hole—in the staple line, which Plaintiffs allege was “caused by a failure of the staples.” That defect allegedly caused Phillips's sepsis, leading to months of treatment and, ultimately, to his death in June 2022.

The following year, Phillips's widow, De Lois Phillips, and his four children (together, “Plaintiffs”) sued (“*Phillips I*”). They first filed a complaint against Johnson & Johnson (“J&J”), its subsidiary Ethicon, Inc. (“Ethicon”), and Ethicon Endo-Surgery, Inc. (“EES”) (together, “the *Phillips I* Defendants”) in the Western District of Texas. Plaintiffs alleged three Texas products liability causes of action, all relating to the Stapler and the Staples: breach of the warranty of fitness for a particular purpose, breach of the implied warranty of merchantability, and defective product design. The *Phillips I* Defendants moved to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6) and argued that the breach of warranty claims failed for lack of presuit notice under Texas Business and Commerce Code § 2.607(c)(1).

The parties proceeded with discovery while the motion to dismiss was pending. In their responses to interrogatories, the *Phillips I* Defendants asserted that EES was “the entity responsible for placing surgical stapler devices into the stream of commerce.” With that information, Plaintiffs filed an amended complaint against EES, dropping J&J and Ethicon from the suit and reasserting only their two breach of warranty claims. That amended complaint mooted the pending motion to dismiss. EES then moved to dismiss Plaintiffs' amended complaint, again arguing that Plaintiffs failed to state a claim and to provide EES with presuit notice.

25-50116
c/w No. 25-50308

While EES's motion was pending, the parties agreed to mediate but still continued with discovery. During a deposition with HCMH's risk manager, Plaintiffs learned that J&J Healthcare Systems—not EES—had sold the Stapler and Staples to HCMH, contrary to prior discovery responses (and contrary to information defense counsel would later share). Plaintiffs' counsel then raised with EES's counsel the issue of amending their pleadings to include additional sellers. EES's counsel responded that amendment may jeopardize the upcoming mediation. Aware that the scheduling order in place permitted Plaintiffs to amend their pleadings for another month, Plaintiffs chose not to file a new complaint to avoid compromising the mediation.

Before the scheduled mediation date, however, the magistrate judge entered a report and recommendation ("R&R") on EES's motion to dismiss, recommending that the breach of warranty of fitness for a particular purpose claim be dismissed with prejudice and the breach of implied warranty of merchantability claim be dismissed without prejudice. First, the magistrate judge found that Plaintiffs failed to allege that the Stapler and Staples were used for a non-ordinary purpose, as required for an implied warranty of fitness for a particular purpose claim. Second, the magistrate judge found that Plaintiffs' breach of implied warranty of merchantability allegations were too conclusory and rested only on an alleged product failure, rather than any identified product defect. Third, the magistrate judge found that Plaintiffs' warranty claims were also barred because Plaintiffs had not provided presuit notice to EES. Finally, the magistrate judge recommended that Plaintiffs be denied leave to amend their complaint under Federal Rule of Civil Procedure 15.

Four days later, on June 10, 2024, Plaintiffs filed a new case in state court ("*Phillips II*") against J&J, EES, J&J Healthcare Systems, and HCMH

25-50116
c/w No. 25-50308

(“the *Phillips II* Defendants”). Plaintiffs pled that they had adequately provided presuit notice to the *Phillips II* Defendants.

Then, on June 13, 2024, EES’s counsel notified Plaintiffs that it intended to cancel the mediation and indicated that Ethicon US, LLC (“Ethicon US”)—not J&J Healthcare Systems or EES—had actually sold HCMH the Stapler and Staples.

The next day, June 14, 2024, Plaintiffs filed a motion in *Phillips I* asking the district court to enter an order adopting the R&R and to dismiss the breach of implied warranty of merchantability claim without prejudice. Plaintiffs did not object to the R&R or otherwise challenge any of the magistrate judge’s findings about their substantive allegations. They argued only that they had made diligent efforts to comply with notice requirements but ultimately submitted that the recommendation of dismissal without prejudice for their breach of implied warranty of merchantability claim was “correct.” They did not mention that they had already filed another suit. EES opposed the motion, asking the district court to dismiss Plaintiffs’ breach of implied warranty of merchantability claim with prejudice because Plaintiffs had failed to state a claim and to provide presuit notice, and amendment would be futile. Plaintiffs did not file a reply.

On July 10, 2024, the *Phillips II* Defendants removed the case to federal court.

The next day, the district court adopted in part the R&R in *Phillips I* but dismissed both claims with prejudice and denied Plaintiffs leave to amend. Plaintiffs filed a motion for reconsideration, which the district court denied.

25-50116
c/w No. 25-50308

The *Phillips II* Defendants then moved to dismiss on res judicata and collateral estoppel grounds, based on the dismissal in *Phillips I*. Rather than responding to that motion, Plaintiffs filed another amended complaint, mooting the motion. The *Phillips II* Defendants then filed a second motion to dismiss, again asserting that res judicata and collateral estoppel required dismissal.

The magistrate judge recommended that the district court grant the motion, finding that both preclusion doctrines applied. The district court adopted the R&R over Plaintiffs' objections and dismissed *Phillips II* with prejudice.

Plaintiffs appealed the final judgments from both *Phillips I* and *Phillips II*, and we consolidated the cases.

II.

Plaintiffs challenge three dispositions: (1) dismissal for failure to state a claim in *Phillips I*, (2) dismissal with prejudice, together with denial of leave to amend, in *Phillips I*, and (3) dismissal with prejudice in *Phillips II*, based on the preclusive effects of dismissal with prejudice in *Phillips I*. We consider each issue in turn and AFFIRM on all three grounds.

A.

Plaintiffs first argue that the district court erred by dismissing *Phillips I* for failure to state a claim. We review "a district court's grant of a motion to dismiss *de novo*."¹ *Jack v. Evonik Corp.*, 79 F.4th 547, 561 (5th Cir. 2023).

¹ Normally, "[w]hen a party who is warned of the requirement to file timely objections to a magistrate judge's report and recommendation fails to file any such objections, and the magistrate judge's factual findings and legal conclusions are accepted by the district court, our review is for plain error." *Alexander v. Verizon Wireless Servs.*,

25-50116
c/w No. 25-50308

“To survive a motion to dismiss, the plaintiff’s complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.” *Id.* (internal quotation marks omitted) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)).

A Texas breach of implied warranty of merchantability claim has four elements: “1) the defendant sold or leased a product to the plaintiff; 2) the product was unmerchantable; 3) the plaintiff notified the defendant of the breach; and 4) the plaintiff suffered injury.” *Polaris Indus., Inc. v. McDonald*, 119 S.W.3d 331, 336 (Tex. App.—Tyler 2003, no pet.); *see also* TEX. BUS. & COM. CODE § 2.314. The third element requires presuit notice: “the buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of breach or be barred from any remedy.” TEX. BUS. & COM. CODE § 2.607(c)(1); *McKay v. Novartis Pharm. Corp.*, 751 F.3d 694, 706 (5th Cir. 2014) (“[T]he notification requirement must be satisfied *before* litigation.” (emphasis added)). “The burden of alleging and proving proper notice is on the buyer.” *Id.* at 705 (cleaned up).

Plaintiffs admit they did not provide presuit notice to the only named Defendant in the *Phillips I* amended complaint: EES.² That concession

L.L.C., 875 F.3d 243, 248 (5th Cir. 2017). “When, however, the district court undertakes an independent review of the record, our review is *de novo*, despite any lack of objection.” *Id.* Here, the district court conducted a *de novo* review of the portions of the R&R challenged in this appeal, even though Plaintiffs did not object to the R&R. Thus, we also use a *de novo* standard.

² Plaintiffs do not renew their argument that post-filing notice to EES was reasonable under the circumstances—the basis of their motion asking the district court to adopt the R&R.

25-50116
c/w No. 25-50308

defeats their first argument. Lacking a vital element of their claim, Plaintiffs have not shown that the district court erred in dismissing *Phillips I*.

B.

Next, Plaintiffs argue that the district court erred by dismissing the case with prejudice when Plaintiffs had acceded to the magistrate judge's recommendation of dismissal without prejudice. Plaintiffs' arguments about the impropriety of dismissal with prejudice are bound up with their arguments about leave to amend and proceed in three inconsistent steps. First, Plaintiffs assert that dismissing *Phillips I* with prejudice was impermissible because it left them without an opportunity to amend their pleadings. Next, however, Plaintiffs admit that amendment would have been futile because Plaintiffs could not have cured their presuit notice defect with an amended complaint. Third and finally, what Plaintiffs really seek—and what they had asked for at the district court—is dismissal without prejudice in *Phillips I*, so they can provide presuit notice to the correct defendants and file a new case (or, more practically, for us to reopen *Phillips II*).

We review a district court's denial of leave to amend a complaint for abuse of discretion.³ *United States ex rel. Willard v. Humana Health Plan of Tex. Inc.*, 336 F.3d 375, 379 (5th Cir. 2003). A plaintiff need not always file a "formal motion" for leave to amend but must "set forth with particularity

³ The district court stated that amendment "would be futile" because Plaintiffs "failed to explain how they could amend their complaint to present a viable claim." While we normally review denial of leave to amend based solely on futility grounds *de novo*, mirroring the Rule 12(b)(6) standard used by the district court, *see, e.g., City of Clinton v. Pilgrim's Pride Corp.*, 632 F.3d 148, 152 (5th Cir. 2010), this denial was for Plaintiffs' failure to provide any indication of how they could improve their pleadings. There are, therefore, no proposed amended allegations to review for sufficiency using a Rule 12(b)(6) standard. Regardless, for the reasons outlined in this section, we would also affirm the district court's decision looking at the record before it *de novo*.

25-50116
c/w No. 25-50308

the grounds for the amendment and the relief sought.” *Id.* at 387. Although leave to amend should generally be freely given, FED. R. CIV. P. 15(a)(2), it is “by no means automatic.” *Goldstein v. MCI WorldCom*, 340 F.3d 238, 254 (5th Cir. 2003) (affirming denial of leave to amend where “the plaintiffs tacked on a general curative amendment request to the end of their response in opposition to the defendants’ motion to dismiss” and did not provide any facts that could have cured the defects in their pleading).

Similarly, whether to dismiss a claim with prejudice under Federal Rule of Civil Procedure 12(b)(6) is within the district court’s discretion, so we review a “district court’s decision to dismiss with or without prejudice” for abuse of discretion. *Foster v. Jesel*, 164 F.4th 401, 404 (5th Cir. 2026) (per curiam), *petition for cert. filed* (Apr. 11, 2026) (No. 25-7506).

Plaintiffs only requested permission to amend their complaint in a single sentence at the end of their opposition to EES’s second motion to dismiss: “[A]lternatively, should Defendant’s Motion to Dismiss be granted, Plaintiffs pray that they be granted leave to amend their First Amended Original Complaint.” In the R&R recommending that EES’s motion be granted, the magistrate judge recommended that the district court also deny leave to amend. Plaintiffs did not object to that recommendation, did not defend their factual allegations before the district court, and did not provide any indication of valid grounds for amendment in their motion asking the district court to dismiss their breach of implied warranty of merchantability claim without prejudice. Moreover, on appeal, Plaintiffs concede—and Defendants agree—that amendment would have been futile because they could not cure their presuit notice defect with an amended complaint. Thus, Plaintiffs did not provide the district court with any valid reason to grant leave to amend. Without such a justification before it, the district court did not err in denying leave to amend.

25-50116
c/w No. 25-50308

For similar reasons, the district court did not abuse its discretion in dismissing Plaintiffs' amended complaint with prejudice. Plaintiffs accepted the magistrate judge's recommendation of dismissal without prejudice so that they could cure their presuit notice defect and refile, but Plaintiffs did not show the district court any new factual allegations that they would have included in a new complaint, making refiling worthwhile. By choosing not to object to the R&R on substantive grounds and to focus exclusively on notice in their motion asking the district court to adopt the R&R, Plaintiffs failed to demonstrate why dismissal without prejudice was appropriate. Additionally, Plaintiffs had already amended their complaint once and elected not to amend again after new revelations in discovery, leading the district court to believe Plaintiffs had pled their best case.

Plaintiffs' counsel made all of these choices despite their awareness of additional relevant facts, which they had included in their *Phillips II* complaint before they moved the district court to adopt the R&R in *Phillips I*. The record does not show any attempt by Plaintiffs to notify the district court of their filing *Phillips II* in state court, to share their new allegations with the district court to avoid dismissal with prejudice, or to otherwise stay, moot, or dismiss *Phillips I* before filing *Phillips II*. Because Plaintiffs' counsel opted not to explain what a new complaint would improve or remedy, the district court did not abuse its discretion in dismissing *Phillips I* with prejudice.

C.

Finally, Plaintiffs do not challenge the substantive preclusion rulings in *Phillips II* on appeal. They argue only that the *Phillips II* dismissal on preclusion grounds was improper because the *Phillips I* dismissal with prejudice was improper. As Defendants assert, without any briefing on the preclusion analyses in *Phillips II*, Plaintiffs have forfeited any substantive

25-50116
c/w No. 25-50308

challenges to that ruling. *See, e.g., Rollins v. Home Depot USA*, 8 F.4th 393, 397 (5th Cir. 2021) (“A party forfeits an argument by . . . failing to adequately brief the argument on appeal.”); *Rodriguez v. City of Corpus Christi*, 129 F.4th 890, 896 (5th Cir. 2025) (“An appellant’s failure to identify an error in the district court’s analysis is the same as if she had not appealed the judgment on that issue.”). Therefore, because we affirm the district court’s dismissal with prejudice in *Phillips I*, we also affirm the district court’s dismissal with prejudice on preclusion grounds in *Phillips II*.

III.

Our sympathies are with Plaintiffs, who have suffered a horrible loss. Given Plaintiffs’ concessions and forfeiture, we find that they have not shown any reversible error in *Phillips I* or *Phillips II*. The district courts’ judgments are AFFIRMED.