

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

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No. 19-12871  
Non-Argument Calendar

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D.C. Docket No. 1:19-cv-00149-TFM-B

EMOGENE R. BROWN,

Plaintiff-Appellant,

versus

DR. LLYAS SHALKH,

Defendant-Appellee.

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Appeal from the United States District Court  
for the Southern District of Alabama

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(September 29, 2020)

Before WILLIAM PRYOR, Chief Judge, ROSENBAUM and ANDERSON,  
Circuit Judges.

PER CURIAM:

Emogene Brown appeals *pro se* the *sua sponte* dismissal without prejudice  
of her second amended complaint against Dr. Llyas Shalkh and her postjudgment

motion for pain and suffering. The district court dismissed Brown's complaint and her motion for lack of subject-matter jurisdiction. Fed. R. Civ. P. 12(h)(3). We affirm the dismissal of Brown's motion, and we dismiss for lack of jurisdiction the part of her appeal challenging the dismissal of her second amended complaint.

We are obligated *sua sponte* to inquire into our jurisdiction whenever it may be lacking. *Trichell v. Midland Credit Mgmt., Inc.*, 964 F.3d 990, 996 (11th Cir. 2020). We review *de novo* the dismissal of a complaint for lack of subject-matter jurisdiction. *Dixon v. Hodges*, 887 F.3d 1235, 1237 (11th Cir. 2018). “[A]lthough we . . . give liberal construction to the pleadings of *pro se* litigants, we nevertheless . . . require[] them to conform to procedural rules.” *Albra v. Advan, Inc.*, 490 F.3d 826, 829 (11th Cir. 2007) (internal quotation marks omitted).

We lack jurisdiction to review the dismissal of Brown's second amended complaint because she failed to timely appeal the ruling. An appellant must file a written notice of appeal in a civil case “within 30 days after entry of the judgment or order appealed from.” Fed. R. App. P. 4(a)(1)(A). “[T]imely filing of a notice of appeal is ‘mandatory and jurisdictional.’” *Advanced Estimating Sys., Inc. v. Riney*, 77 F.3d 1322, 1323 (11th Cir. 1996) (quoting *Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56, 61 (1982)). After the district court dismissed Brown's second amended complaint on June 17, 2019, she waited 39 days, until July 26, 2019, to file her notice of appeal. Brown did not seek to extend the deadline. Her

postjudgment motion for pain and suffering does not mention her second amended complaint, much less request an extension of time to appeal its dismissal. *See Fed. R. Civ. P. 4(a)(5)*. And Brown's motion, in which she requests compensation because the doctor "worked on [her] arm" instead of treating her "neck injury [that] happen[ed] 20 year[s] ago," is not a postjudgment motion that tolls the 30-day deadline. *See Fed. R. App. P. 4(a)(4)(A)*. We dismiss the part of Brown's appeal that challenges the dismissal of her second amended complaint.

The district court correctly dismissed Brown's postjudgment motion for lack of jurisdiction. As the district court explained in its orders instructing Brown to amend her original and amended complaints, she had to allege facts establishing that her civil action either "ar[ose] under the Constitution, laws, or treaties of the United States," 28 U.S.C. § 1331, or involved "citizens of different States" and an amount in controversy that exceeded \$75,000, *id.* § 1332(a)(1). Brown's action for medical malpractice does not involve a federal question, *see id.* § 1331, and her allegation that she and the doctor reside in Mobile, Alabama, defeats jurisdiction based on diversity of citizenship, *see id.* § 1332.

We **AFFIRM** the dismissal of Brown's second amended complaint.

UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING  
56 Forsyth Street, N.W.  
Atlanta, Georgia 30303

David J. Smith  
Clerk of Court

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September 29, 2020

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 19-12871-GG  
Case Style: Emogene Brown v. Llyas Shalkh  
District Court Docket No: 1:19-cv-00149-TFM-B

**This Court requires all counsel to file documents electronically using the Electronic Case Files ("ECF") system, unless exempted for good cause. Non-incarcerated pro se parties are permitted to use the ECF system by registering for an account at [www.pacer.gov](http://www.pacer.gov). Information and training materials related to electronic filing, are available at [www.ca11.uscourts.gov](http://www.ca11.uscourts.gov). Enclosed is a copy of the court's decision filed today in this appeal. Judgment has this day been entered pursuant to FRAP 36. The court's mandate will issue at a later date in accordance with FRAP 41(b).**

The time for filing a petition for rehearing is governed by 11th Cir. R. 40-3, and the time for filing a petition for rehearing en banc is governed by 11th Cir. R. 35-2. Except as otherwise provided by FRAP 25(a) for inmate filings, a petition for rehearing or for rehearing en banc is timely only if received in the clerk's office within the time specified in the rules. Costs are governed by FRAP 39 and 11th Cir.R. 39-1. The timing, format, and content of a motion for attorney's fees and an objection thereto is governed by 11th Cir. R. 39-2 and 39-3.

Please note that a petition for rehearing en banc must include in the Certificate of Interested Persons a complete list of all persons and entities listed on all certificates previously filed by any party in the appeal. See 11th Cir. R. 26.1-1. In addition, a copy of the opinion sought to be reheard must be included in any petition for rehearing or petition for rehearing en banc. See 11th Cir. R. 35-5(k) and 40-1.

Counsel appointed under the Criminal Justice Act (CJA) must submit a voucher claiming compensation for time spent on the appeal no later than 60 days after either issuance of mandate or filing with the U.S. Supreme Court of a petition for writ of certiorari (whichever is later) via the eVoucher system. Please contact the CJA Team at (404) 335-6167 or [cja\\_evoucher@ca11.uscourts.gov](mailto:cja_evoucher@ca11.uscourts.gov) for questions regarding CJA vouchers or the eVoucher system.

Pursuant to Fed.R.App.P. 39, costs taxed against appellant.

Please use the most recent version of the Bill of Costs form available on the court's website at [www.ca11.uscourts.gov](http://www.ca11.uscourts.gov).

For questions concerning the issuance of the decision of this court, please call the number referenced in the signature block below. For all other questions, please call Joseph Caruso, GG at (404) 335-6177.

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Jeff R. Patch  
Phone #: 404-335-6151

OPIN-1A Issuance of Opinion With Costs

UNITED STATES COURT OF APPEALS  
For the Eleventh Circuit

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No. 19-12871

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District Court Docket No.  
1:19-cv-00149-TFM-B

EMOGENE R. BROWN,

Plaintiff - Appellant,

versus

DR. LLYAS SHALKH,

Defendant - Appellee.

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Appeal from the United States District Court for the  
Southern District of Alabama

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JUDGMENT

It is hereby ordered, adjudged, and decreed that the opinion issued on this date in this appeal is entered as the judgment of this Court.

Entered: September 29, 2020  
For the Court: DAVID J. SMITH, Clerk of Court  
By: Jeff R. Patch

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF ALABAMA  
SOUTHERN DIVISION

EMOGENE R. BROWN, :  
Plaintiff, :  
vs. : CIVIL ACTION NO. 1:19-cv-149-TFM-B  
DR. LLYAS SHALKH, :  
Defendant. :  
\_\_\_\_\_

**MEMORANDUM OPINION AND ORDER**

On May 14, 2019, the Magistrate Judge entered a Report and Recommendation (Doc. 10) to which no objections have been filed. After due and proper consideration of all portions of this file deemed relevant to the issues raised, the Report and Recommendation of the Magistrate Judge is **ADOPTED** as the opinion of this Court. Accordingly, it is **ORDERED** that Plaintiff's action is **DISMISSED without prejudice** for lack of subject matter jurisdiction.

Final judgment shall issue separately in accordance with this order and Federal Rule of Civil Procedure 58.

**DONE** and **ORDERED** this 18th day of June, 2019.

/s/Terry F. Moorer  
TERRY F. MOORER  
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF ALABAMA  
SOUTHERN DIVISION

EMOGENE R. BROWN, :  
Plaintiff, :  
vs. : CIVIL ACTION NO. 19-cv-149-TFM-B  
DR. LLYAS SHALKH, :  
Defendant. :

**JUDGMENT**

In accordance with the order entered on this date adopting the Recommendation of the Magistrate Judge, it is **ORDERED, ADJUDGED, and DECREED** that Plaintiff's claims are hereby **DISMISSED without prejudice**.

The Clerk of Court is **DIRECTED** to enter this document on the civil docket as a Final Judgment pursuant to Rule 58 of the Federal Rules of Civil Procedure

**DONE and ORDERED** this 17th day of June, 2019.

/s/Terry F. Moorer  
TERRY F. MOORER  
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF ALABAMA  
SOUTHERN DIVISION

EMOGENE R. BROWN,

\*

Plaintiff,

\*

vs.

\* CIVIL ACTION NO. 19-00149-TFM-B

DR. LLYAS SHALKH,

\*

Defendant.

\*

REPORT AND RECOMMENDATION

Plaintiff Emogene R. Brown, proceeding *pro se*, initiated this action on March 26, 2019, by filing a complaint and a motion to proceed without prepayment of fees. (Docs. 1, 2). Upon *sua sponte* review, the Court, in an order dated April 1, 2019, informed Plaintiff that her one-sentence complaint was deficient, as it contained no information regarding the nature of Plaintiff's claim or request for relief, nor the basis for federal jurisdiction. (Doc. 4). Therefore, the Court ordered Plaintiff to file an amended complaint that contained "a short and plain statement" of her claims as required by Federal Rule of Civil Procedure 8(a) and to provide the grounds for the Court's jurisdiction.<sup>1</sup> (Doc. 4). The

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<sup>1</sup> The Court informed Brown that her one-sentence complaint was deficient, as it contained no information regarding the nature of her claim or request for relief. The complaint also failed to provide any basis for federal jurisdiction. (Doc. 4). The Court expressly advised Brown that in order to establish federal subject (Continued)

Court ordered Plaintiff to file an amended complaint curing the noted deficiencies by April 22, 2019, and cautioned her that if she failed to do so, the Court would recommend dismissal of her complaint.<sup>2</sup> (Id.). The Court also advised Brown that her motion to proceed without prepayment of fees (Doc. 2) was deficient because it did not include information needed to accurately assess her ability to pay the statutory filing fee. Accordingly, Brown was directed to refile the motion to proceed without prepayment of fees and to complete the Court's form completely so as to assist the Court in determining her ability to pay the filing fee. (Id.).

On April 11, 2019, Brown filed a supplement to her original complaint, which the Court construed as an amended complaint, but again Brown failed to assert any basis for the Court's subject matter jurisdiction over her claims.<sup>3</sup> (Doc. 6). Brown also filed

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matter jurisdiction for this action, she must show the existence of either diversity jurisdiction (pursuant to 28 U.S.C. § 1332) or federal question jurisdiction (pursuant to 28 U.S.C. § 1331) (Id.). The Court ordered Brown to file an amended complaint curing the noted deficiencies by April 22, 2019, and cautioned her that if she failed to do so, the Court would recommend dismissal of her action.

<sup>2</sup> The Court expressly advised Brown that, in order to establish federal subject matter jurisdiction for this action, she must show the existence of either diversity jurisdiction (pursuant to 28 U.S.C. § 1332) or federal question jurisdiction (pursuant to 28 U.S.C. § 1331). (Doc. 4).

<sup>3</sup> Plaintiff's amended complaint consisted of the style of the case and twenty-seven pages of medical records. (Doc. 6). Like the original complaint, it did not contain a short and plain statement

(Continued) ---

a second motion to proceed without prepayment of fees (Doc. 7); however, it also was deficient because it did not provide sufficient information regarding Brown's sources of income and monthly expenses. As a result, in an order dated April 12, 2019, (Doc. 7), the Court again ordered Brown to amend her complaint to provide a short and plain statement of her claims and the basis for the Court's jurisdiction by April 22, 2019. The Court also denied Brown's motion to proceed without prepayment of fees and ordered her to re-file the motion and to address her sources of income and monthly expenses. (Id.).

On April 19, 2019, Brown paid the filing fee and, on April 29, 2019, she filed a second amended complaint. (Doc. 9). However, the second amended complaint likewise fails to comply with the Court's two previous orders to provide the basis for the Court's subject matter jurisdiction over Plaintiff's claims.<sup>4</sup> Accordingly, the undersigned finds that this action is due to be **DISMISSED** without prejudice under Federal Rules of Civil Procedure

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of the nature of her claims as required by Rule 8(a) of the Federal Rules of Civil Procedure, nor did it provide any basis for federal jurisdiction.

<sup>4</sup> Plaintiff's second amended complaint consists of the style of the case naming Gulf Coast Neurology and Dr. Llyas Shalkh as Defendants and the following three sentences: "On July 3, 2017, at Gulf Coast Neurology facility: a study was perform[ed] without my con[s]ent. I am now suffering with nerve damage and muscle weakness. I'm asking the court to grant me compensa[tion] for pain and suffering." (Doc. 9).

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12(h) (3) and 41(b).

## I. DISCUSSION.

"It is . . . axiomatic that the inferior federal courts are courts of limited jurisdiction." Univ. of S. Ala. v. Am. Tobacco Co., 168 F.3d 405, 409 (11th Cir. 1999). "They are 'empowered to hear only those cases within the judicial power of the United States as defined by Article III of the Constitution,' and which have been entrusted to them by a jurisdictional grant authorized by Congress." Id. (citations omitted). "[I]t is well settled that a federal court is obligated to inquire into subject matter jurisdiction *sua sponte* whenever it may be lacking." Id. at 410. "[A] court should inquire into whether it has subject matter jurisdiction at the earliest possible stage in the proceedings." Id.

"When a plaintiff files suit in federal court, she must allege facts that, if true, show federal subject matter jurisdiction over her case exists." Travaglio v. Am. Exp. Co., 735 F.3d 1266, 1268 (11th Cir. 2013).

Those allegations, when federal jurisdiction is invoked based upon diversity, must include the citizenship of each party, so that the court is satisfied that no plaintiff is a citizen of the same state as any defendant. Triggs v. John Crump Toyota, Inc., 154 F.3d 1284, 1287 (11th Cir. 1998) ("Diversity jurisdiction requires complete diversity; every plaintiff must be diverse from every defendant."). Without such allegations, district courts are constitutionally

obligated to dismiss the action altogether if the plaintiff does not cure the deficiency. Stanley v. C.I.A., 639 F.2d 1146, 1159 (5th Cir. Unit B Mar. 1981); see also DiMaio v. Democratic Nat'l Comm., 520 F.3d 1299, 1303 (11th Cir. 2008) ("Where dismissal can be based on lack of subject matter jurisdiction and failure to state a claim, the court should dismiss on only the jurisdictional grounds." (internal quotation marks omitted)). That is, if a complaint's factual allegations do not assure the court it has subject matter jurisdiction, then the court is without power to do anything in the case. See Goodman ex rel. Goodman v. Sipos, 259 F.3d 1327, 1331, n. 6 (11th Cir. 2001) ("'[A district] court must dismiss a case without ever reaching the merits if it concludes that it has no jurisdiction.'" (quoting Capitol Leasing Co. v. FDIC, 999 F.2d 188, 191 (7th Cir. 1993))); see also Belleri v. United States, 712 F.3d 543, 547 (11th Cir. 2013) ("We may not consider the merits of [a] complaint unless and until we are assured of our subject matter jurisdiction.").

Travaglio, 735 F.3d at 1268-69.

"In a given case, a federal district court must have at least one of three types of subject matter jurisdiction: (1) jurisdiction under a specific statutory grant; (2) federal question jurisdiction pursuant to 28 U.S.C. § 1331; or (3) diversity jurisdiction pursuant to 28 U.S.C. § 1332(a)." Baltin v. Alaron Trading Corp., 128 F.3d 1466, 1469 (11th Cir. 1997). In this case, Plaintiff has failed to allege any of the three types of subject matter jurisdiction.

While pleadings filed by *pro se* litigants are given liberal construction, "we nevertheless have required them to conform to

procedural rules." Moree v. Wells Fargo Bank, N.A., 2017 U.S. Dist. LEXIS 33112, \*2, 2017 WL 1319840, \*2 n.1 (S.D. Ala. Mar. 6, 2017), *report and recommendation adopted*, 2017 WL 1294003 (S.D. Ala. Apr. 4, 2017) (quoting Moton v. Cowart, 631 F.3d 1337, 1341 n.2 (11th Cir. 2011)). A plaintiff must "affirmatively allege facts demonstrating the existence of jurisdiction." Moree, 2017 U.S. Dist. LEXIS 33112 at \*2 n.1, 2017 WL 1319840 at \*2 n.1 (quoting Taylor, 30 F.3d at 1367; see also Morrison v. Allstate Indem. Co., 228 F.3d 1255, 1273 (11th Cir. 2000) ("It is the plaintiff's burden . . . to allege with sufficient particularity the facts creating jurisdiction . . . .").

As stated in the Court's two previous orders, neither Brown's initial complaint (Doc. 1), nor any of her amended complaints (Docs. 6, 9) contain, as they must, "a short and plain statement of the grounds for the Court's jurisdiction," Fed. R. Civ. P. 8(a)(1), nor is any basis reasonably apparent from the face of these pleadings. In Brown's latest amended complaint, the cause of action appears to be in the nature of a medical malpractice claim, which would not provide subject matter jurisdiction under either a specific statutory grant or federal question jurisdiction pursuant to 28 U.S.C. § 1331. Further, in neither the original complaint nor the two subsequent amendments does Brown properly assert diversity jurisdiction pursuant to 28 U.S.C. § 1332(a).

Under § 1332(a)(1), a district court has subject matter

jurisdiction "where the matter in controversy exceeds the sum or value of \$75,000, exclusive of interest and costs, and is between . . . citizens of different States." However, when federal jurisdiction is invoked based upon diversity, the complaint "must include the citizenship of each party, so that the court is satisfied that no plaintiff is a citizen of the same state as any defendant." Travaglio, 735 F.3d at 1268.

In neither the original complaint nor the two amended complaints does Brown identify the citizenship of the parties or the requisite amount in controversy such that diversity jurisdiction is apparent. With respect to the citizenship of the parties, Brown makes no direct comment on this issue but merely identifies her address as being located in Mobile, Alabama, and likewise lists the address of Defendant Dr. Shalkh as being located in Mobile, Alabama. (Doc. 1 at 1-2). Additionally, she has offered no facts on which to determine that the amount in controversy has been met. Because Brown has not alleged facts that show that federal subject matter jurisdiction over this case exists, dismissal of this action is mandated by Federal Rule of Civil Procedure 12(h)(3). See Moree, 2017 U.S. Dist. LEXIS 33112 at \*6-7, 2017 WL 1319840 at \*3; see also Crotwell v. Hockman-Lewis Ltd., 734 F.2d 767, 769 (11th Cir. 1984) (holding that dismissals for lack of subject matter jurisdiction are without prejudice because the court has no power to render a judgment on the merits);

accord- Georgia Advocacy Office, Inc. v. Camp, 172 F.3d 1294, 1299 - (11th Cir. 1999).

**II. CONCLUSION.**

For the reasons set forth above, the undersigned **RECOMMENDS**, under 28 U.S.C. § 636(b)(1)(B)-(C) and Federal Rule of Civil Procedure 72(b)(1), that this action be **DISMISSED without prejudice** under Federal Rule of Civil Procedure 12(h)(3) for lack of subject matter jurisdiction and that final judgment be entered accordingly under Federal Rule of Civil Procedure 58.

**DONE** this **14th** day of **May, 2019**.

/s/ SONJA F. BIVINS  
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

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No. 19-12871-GG

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EMOGENE R. BROWN,

Plaintiff - Appellant,

versus

DR. LLYAS SHALKH,

Defendant - Appellee.

---

Appeal from the United States District Court  
for the Southern District of Alabama

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BEFORE: WILLIAM PRYOR, Chief Judge, ROSENBAUM and ANDERSON, Circuit Judges.

PER CURIAM:

The Petition for Panel Rehearing filed by the Appellant is DENIED.

ORD-41

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**Additional material  
from this filing is  
available in the  
Clerk's Office.**

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