

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 21-1489

CYNTHIA J. ROWE,
Appellant

v.

PENNY J. ROBERTS;
JASON HUNTER;
ATTORNEY WILLIAM CARROLL;
FAYE COLE, Penny's Sister.

On Appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. No. 3-18-cv-00250)
District Judge: Honorable Stephanie L. Haines

Submitted Pursuant to Third Circuit L.A.R. 34.1(a)
on March 25, 2022

Before: KRAUSE, BIBAS, and SCIRICA, Circuit Judges

(Opinion filed: March 30, 2022)

OPINION*

PER CURIAM

Cynthia Rowe appeals pro se from the District Court's order dismissing her complaint for lack of subject matter jurisdiction. For the reasons that follow, we will affirm that judgment.

I.

Rowe, who appears to be domiciled in Florida, filed a pro se diversity action in the District Court pursuant to 28 U.S.C. § 1332. Her complaint named four defendants, all of whom appear to be domiciled in Pennsylvania. The defendants subsequently moved to dismiss the complaint, arguing, *inter alia*, that Rowe had failed to satisfy the amount-in-controversy requirement. See 28 U.S.C. § 1332(a) (providing that a federal district court has subject matter jurisdiction under this section if, *inter alia*, the amount in controversy exceeds \$75,000, exclusive of interest and costs). On February 3, 2021, the District Court granted those motions, dismissed Rowe's complaint for lack of subject matter jurisdiction based on her failure to satisfy the amount-in-controversy requirement, and directed the District Court Clerk to close the case.¹ This appeal followed.²

* This disposition is not an opinion of the full Court and pursuant to I.O.P. 5.7 does not constitute binding precedent.

¹ The District Court's dismissal was without prejudice to Rowe's ability to pursue her claims in the appropriate state court.

² Because the District Court's February 3, 2021 order did not comply with Federal Rule of Civil Procedure 58(a)'s separate-document requirement, see *LeBoon v. Lancaster Jewish*

II.

As indicated above, the District Court’s decision to dismiss Rowe’s complaint for lack of subject matter jurisdiction turned on that court’s determination that she had failed to satisfy the amount-in-controversy requirement. However, as the Appellees point out, Rowe’s opening appellate brief does not challenge that determination.³ Instead, that brief discusses various issues relating to the merits of her claims—issues that the District Court did not reach.

As we have previously explained, “arguments not developed in an appellant’s opening brief are forfeited.” In re LTC Holdings, Inc., 10 F.4th 177, 181 n.1 (3d Cir. 2021) (citing In re Wettach, 811 F.3d 99, 115 (3d Cir. 2016)); see also Emerson v. Thiel Coll., 296 F.3d 184, 190 n.5 (3d Cir. 2002) (per curiam) (applying this rule to a pro se appeal). Because Rowe’s opening brief has failed to develop any argument related to the basis on which the

Cmty. Ctr. Ass’n, 503 F.3d 217, 224 (3d Cir. 2007) (stating that, to meet this requirement, the order in question must, *inter alia*, “omit (or at least substantially omit) the [district] court’s reasons for disposing of the claims”), the time to appeal from that order did not expire until August 2021, see Fed. R. Civ. P. 58(c)(2)(B); Fed. R. App. P. 4(a)(1)(A). Rowe filed her notice of appeal well before that deadline. Accordingly, this appeal is timely, and we have jurisdiction over it pursuant to 28 U.S.C. § 1291.

³ In a footnote, the District Court’s dismissal order noted that Rowe’s complaint “in no way stated a federal question claim” under 28 U.S.C. § 1331]. (Dist. Ct. Mem. Order entered Feb. 3, 2021, at 2 n.1.) Rowe’s opening appellate brief does not challenge that determination either.

District Court dismissed her complaint, we deem any challenge to that dismissal forfeited,⁴ and thus we will affirm the District Court's judgment.⁵

⁴ Although we may entertain forfeited arguments in "truly exceptional circumstances," Barna v. Bd. of Sch. Dirs. of Panther Valley Sch. Dist., 877 F.3d 136, 147 (3d Cir. 2017) (internal quotation marks omitted), those circumstances are not present here, see id. (explaining that "[s]uch circumstances have been recognized when the public interest requires that the issue[s] be heard or when a manifest injustice would result from the failure to consider the new issue[s]" (alterations in original) (internal quotation marks omitted)).

⁵ In light of this disposition, we need not reach the argument, made by Appellees Carroll and Hunter, that Rowe has withdrawn all claims against them.

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

CYNTHIA J. ROWE,)	
)	
Plaintiff,)	
)	
v.)	Civil No. 3:18-cv-250
)	Judge Stephanie L. Haines
PENNY J. ROBERTS, et al.,)	
)	
Defendants.)	

MEMORANDUM ORDER

Plaintiff Cynthia Roberts, *pro se*, commenced this case by filing a civil complaint (ECF No. 1-1) on December 14, 2018, following the grant of a motion to proceed *in forma pauperis* (ECF No. 2). This matter was referred to United States Magistrate Judge Keith A. Pesto in accordance with the Federal Magistrates Act, 28 U.S.C. §636(b)(1), and Local Civil Rule 72.D.

Pending before the Court are Defendants William Carroll's, Jason Hunter's, Faye Cole's, and Penny Roberts' Motions to Dismiss (ECF Nos. 24, 25, and 27). These motions seek to have the complaint dismissed in its entirety based on a number of theories, including, *inter alia*, dismissal for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1). On November 30, 2020, Magistrate Judge Pesto filed a Report and Recommendation (ECF No. 34) recommending that the motions be granted based on lack of subject matter jurisdiction, but finding that the complaint should be dismissed without prejudice to refile the action in state court. In analyzing Plaintiff's complaint and various filings and ECF Nos. 5, 7, 8, 31, 32, and 33, Magistrate Judge Pesto determined that Plaintiff's claims essentially are that, after the death of Harold Rowe, Plaintiff's husband, on December 24, 2014, his sister, Defendant Roberts, caused the death certificate to list that Harold Rowe was divorced, when Harold Rowe and Plaintiff were only

findings or recommendations to which objection is made.” *EEOC v. City of Long Branch*, 866 F.3d 93, 100 (3d Cir. 2017) (quoting 28 U.S.C. § 636(b)(1)); *see also* Local Civil Rule 72.D.2. Upon *de novo* review of all documents of record and the Report and Recommendation (ECF No. 34), and pursuant to Local Civil Rule 72.D.2, the Court will accept in whole the findings and recommendations of Magistrate Judge Pesto in this matter.

Plaintiff’s objections at ECF Nos. 35 and 36 simply do not state any additional factual allegations to overcome the threshold issue of subject matter jurisdiction. Although the law does not command mathematical precision from evidence in finding damages, sufficient facts must be introduced so that the court can arrive at an intelligent estimate without conjecture. *Rochez Bros., Inc. v. Rhoades*, 527 F.2d 891, 895 (3rd Cir. 1975). Magistrate Judge Pesto correctly finds that Plaintiff fails to plead the value of the disputed property, let alone sufficient facts that support Plaintiff’s conclusory claim for \$75,000 against the Defendants.

Moreover, Plaintiff’s damages claims for emotional distress, without further substantiation, do not establish diversity jurisdiction. In determining whether the claim in fact exceeds \$75,000, exclusive of interests and costs, the court must assess “the value of the rights being litigated.” *Angus v. Shiley Inc.*, 989 F.2d 142, 146 (3d Cir. 1993). The Court cannot find, based on the record before it, that the amount in controversy exceeds the \$75,000 threshold required by 28 U.S.C. § 1332. *See Schober v. Schober*, No. 17-1511, 2018 U.S. Dist. LEXIS 97367, at *11 (W.D. Pa. June 11, 2018) (internal citations omitted). “[E]stimations of the amounts recoverable must be realistic.” *Samuel-Bassett v. KIA Motors Am., Inc.*, 357 F.3d 392, 403 (3d Cir. 2004). When determining whether a complaint premised on diversity jurisdiction meets the amount in controversy, “[t]he inquiry should be objective and not based on fanciful, ‘pie-in-the-sky,’ or simply wishful amounts, because otherwise the policy to limit diversity jurisdiction will

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CYNTHIA J. ROWE, :
Plaintiff :
v. : Case No. 3:18-cv-250-SLH-KAP
PENNY J. ROBERTS, *et al.*, :
Defendants :
:

Report and Recommendation

Recommendation

Pending are motions to dismiss by defendant William Carroll, ECF no. 24, Jason Hunter, ECF no. 25, and Faye Cole and Penny Roberts, ECF no. 27. They should be granted, and the complaint should be dismissed without prejudice to refile the action in state court.

Report

Plaintiff Cynthia Rowe, the widow of Harold Rowe, is domiciled in Florida. Proceeding *pro se*, she filed a Complaint postmarked December 6, 2018, naming as defendants her sister in law Penny Roberts, Penny's sister Faye Cole, their attorney William Carroll, Esquire, and the Somerset County District Attorney's Office's Chief Detective, Jason Hunter. The defendants are domiciled in Pennsylvania. A fair reading of the Complaint, ECF no. 3, and several supplemental pleadings filed by plaintiff at ECF nos. 5, 7, 8, 31, 32, and 33, viewed in the light most favorable to plaintiff, indicates that Harold Rowe died on December 24, 2014 in Pennsylvania. Harold and the plaintiff were married in 2001 and were married at the time of Harold's death, although the two were separated. During Harold's last illness he was in a hospital in Pennsylvania, and during that time Penny was involved in the completion of Harold's advance health care directive, which is attached as an exhibit to the complaint. Plaintiff alleges that Harold would not have made the decisions memorialized therein. Harold's original death certificate, also attached as an exhibit to the complaint, listed his marital status as divorced. Harold's sister Penny was the source of the information on the death certificate.

Allegedly, after Harold's death, Penny disposed of Harold's property contrary to Harold's wishes, depriving plaintiff of items that should have been passed to her. One item of property allegedly is an insurance policy issued to Harold by the Colonial Penn Life Insurance Company. By letter dated March 2, 2018, the insurance company informed plaintiff that to disclose information about the policy it needed proof that plaintiff was the executor of Harold's estate. No further information is given about this policy. In the exhibits submitted by plaintiff there is reference made to a New York Life policy in the

communication with defendant Hunter. In a local case, as a matter of first impression, the Pennsylvania Superior Court considered “whether statements made preliminary to a criminal proceeding, made solely to the officials who might be responsible for prosecuting the criminal charges, and made by private parties for the purpose of initiating the prosecution of those charges, are absolutely privileged.” Pawlowski v. Smorto, 588 A.2d 36, 42 (Pa. Super. 1991). As a matter of state law, the court declared even defamatory statements in such a context to be privileged. See Schanne v. Addis, 121 A.3d 942, 947 (Pa. 2015), citing with approval Pawlowski v. Smorto, supra. Plaintiff does not allege any unprivileged defamatory statements by Carroll, and if the plaintiff could be taken to be asserting that Penny’s statement that plaintiff and Harold Rowe were divorced is a defamatory statement, Carroll is not liable for conveying this statement to Hunter.

As for any claim of fraud against Penny (and anything concerning Penny would apply to Faye as well since her role is at worst no more culpable than Penny’s), plaintiff must allege six elements:

(1) a representation; (2) which is material to the transaction at hand; (3) made falsely, with knowledge of its falsity or recklessness as to whether it is true or false; (4) with the intent of misleading another into relying on it; (5) justifiable reliance on the misrepresentation; and (6) the resulting injury was proximately caused by the reliance. See Gibbs v. Ernst, 647 A.2d 882, 889 (Pa. 1994).

Plaintiff appears to be claiming that Penny represented on the original death certificate that plaintiff was divorced from Harold Rowe to defeat her claim to his estate. How this caused or could have caused her injury is not alleged.

Plaintiff also alleges that there never was an estate opened in Somerset County. It is not clearly alleged whether Harold died testate, in which case the proper venue for probating any will and for the distribution of the estate is the Orphans Court Division of the Court of Common Pleas of Somerset County, or whether Harold died intestate and plaintiff (assuming no issue or surviving parent) would be entitled to the entirety of the estate. 20 Pa.C.S. § 2102. A generous interpretation of the complaint as amended is that plaintiff is alleging that Penny has wrongfully appropriated some of the assets of the estate. That claim would not be one that is excluded from federal jurisdiction by the probate exception to diversity jurisdiction.

However, this would have diversity jurisdiction the claim against Penny and Faye only where: (1) the controversy is between citizens of different states, and (2) the amount in controversy exceeds \$75,000. 28 U.S.C. § 1332(a). The second requirement, that the matter in controversy exceeds \$75,000, is not pleaded.

As the party invoking diversity jurisdiction, plaintiff bears the burden of alleging in good faith that the amount in controversy exceeds \$75,000. Auto-Owners Ins. Co. v. Stevens & Ricci, Inc., 835 F.3d 388, 395 (3d Cir. 2016), citing St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283, 288-89 (1938)). Where a plaintiff makes no money damage demand in the complaint “and the court is unable to infer any specific value of such damages,” the plaintiff has failed to meet the minimal burden of alleging that the amount

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) Judge Stephanie L. Haines
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MEMORANDUM ORDER

Plaintiff Cynthia Roberts, *pro se*, commenced this case by filing a civil complaint (ECF No. 1-1) on December 14, 2018, following the grant of a motion to proceed *in forma pauperis* (ECF No. 2). This matter was referred to United States Magistrate Judge Keith A. Pesto in accordance with the Federal Magistrates Act, 28 U.S.C. §636(b)(1), and Local Civil Rule 72.D.

Pending before the Court are Defendants William Carroll's, Jason Hunter's, Faye Cole's, and Penny Roberts' Motions to Dismiss (ECF Nos. 24, 25, and 27). These motions seek to have the complaint dismissed in its entirety based on a number of theories, including, *inter alia*, dismissal for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1). On November 30, 2020, Magistrate Judge Pesto filed a Report and Recommendation (ECF No. 34) recommending that the motions be granted based on lack of subject matter jurisdiction, but finding that the complaint should be dismissed without prejudice to refile the action in state court. In analyzing Plaintiff's complaint and various filings and ECF Nos. 5, 7, 8, 31, 32, and 33, Magistrate Judge Pesto determined that Plaintiff's claims essentially are that, after the death of Harold Rowe, Plaintiff's husband, on December 24, 2014, his sister, Defendant Roberts, caused the death certificate to list that Harold Rowe was divorced, when Harold Rowe and Plaintiff were only

separated. Pursuant to Plaintiff's claims, Defendant Roberts then disposed of Harold Rowe's property contrary to his wishes and deprived Plaintiff of personal property that she believes she is entitled to possess (hereafter "disputed property"). Defendant Carroll was named in the complaint by virtue of his role as the attorney for Defendant Roberts, and Plaintiff alleges Defendant Carroll has knowledge of the disposition of the disputed property. Plaintiff claims Defendant Cole is Defendant Roberts' sister and that Defendant Cole also has knowledge of Defendant Roberts' wrongdoing. Lastly, Defendant Hunter is alleged to be a law enforcement officer that interviewed Defendant Roberts and concluded Plaintiff's allegations of fraud did not result in any criminal conduct. In his Report and Recommendation, Magistrate Judge Pesto discusses the merits of these state law claims,¹ but ultimately concludes that Plaintiff has failed to overcome the \$75,000 amount in controversy requirement to establish subject matter jurisdiction in federal court. The parties were given notice that they had fourteen days to file written objections to the Report and Recommendation (ECF No. 34).

On December 14, 2020, Plaintiff filed objections to the Report and Recommendation, as well as "Additional Objections" attaching several exhibits (ECF Nos. 35 and 36). These filings attempt to bolster the claims in the complaint with additional factual allegations concerning Plaintiff's deceased husband and the disputed property. Plaintiff also now claims that she seeks \$75,000 from Defendant Roberts in damages relating to claims of emotional distress stemming from the events surrounding her husband's death and the distribution of his possessions.

When a party objects timely to a magistrate judge's report and recommendation, the district court must "make a *de novo* determination of those portions of the report or specified proposed

¹ Assuming, *arguendo*, Plaintiff's claims against Defendant Hunter are somehow intended to fall under 42 U.S.C. §1983, the Court finds that Plaintiff has in no way stated a federal question claim against Defendant Hunter. Further, Plaintiff's objections (ECF Nos. 35 and 36) do not undermine Magistrate Judge Pesto's finding that Plaintiff has failed to plead any claim against Defendant Hunter.

findings or recommendations to which objection is made.” *EEOC v. City of Long Branch*, 866 F.3d 93, 100 (3d Cir. 2017) (quoting 28 U.S.C. § 636(b)(1)); *see also* Local Civil Rule 72.D.2. Upon *de novo* review of all documents of record and the Report and Recommendation (ECF No. 34), and pursuant to Local Civil Rule 72.D.2, the Court will accept in whole the findings and recommendations of Magistrate Judge Pesto in this matter.

Plaintiff’s objections at ECF Nos. 35 and 36 simply do not state any additional factual allegations to overcome the threshold issue of subject matter jurisdiction. Although the law does not command mathematical precision from evidence in finding damages, sufficient facts must be introduced so that the court can arrive at an intelligent estimate without conjecture. *Rochez Bros., Inc. v. Rhoades*, 527 F.2d 891, 895 (3rd Cir. 1975). Magistrate Judge Pesto correctly finds that Plaintiff fails to plead the value of the disputed property, let alone sufficient facts that support Plaintiff’s conclusory claim for \$75,000 against the Defendants.

Moreover, Plaintiff’s damages claims for emotional distress, without further substantiation, do not establish diversity jurisdiction. In determining whether the claim in fact exceeds \$75,000, exclusive of interests and costs, the court must assess “the value of the rights being litigated.” *Angus v. Shiley Inc.*, 989 F.2d 142, 146 (3d Cir. 1993). The Court cannot find, based on the record before it, that the amount in controversy exceeds the \$75,000 threshold required by 28 U.S.C. § 1332. *See Schober v. Schober*, No. 17-1511, 2018 U.S. Dist. LEXIS 97367, at *11 (W.D. Pa. June 11, 2018) (internal citations omitted). “[E]stimations of the amounts recoverable must be realistic.” *Samuel-Bassett v. KIA Motors Am., Inc.*, 357 F.3d 392, 403 (3d Cir. 2004). When determining whether a complaint premised on diversity jurisdiction meets the amount in controversy, “[t]he inquiry should be objective and not based on fanciful, ‘pie-in-the-sky,’ or simply wishful amounts, because otherwise the policy to limit diversity jurisdiction will

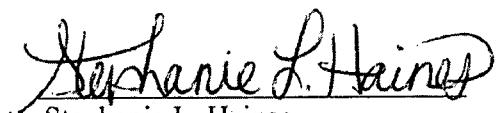
be frustrated." *Id.* "The authority which the [diversity] statute vests in the court to enforce the limitations of its jurisdiction precludes the idea that jurisdiction may be maintained by mere averment." *McNutt v. General Motors Acceptance Corp. of Indiana*, 298 U.S. 178, 189 (1936).

The Court finds that Plaintiff's objections (ECF Nos. 35 and 36) do not undermine the recommendation of Magistrate Judge Pesto (ECF No. 34), and Plaintiff's objections to the Report and Recommendation (ECF Nos. 35 and 36) are overruled.

Accordingly, the following order is entered:

ORDER OF COURT

AND NOW, this 3rd day of February, 2021, IT IS ORDERED that Plaintiff's objections (ECF Nos. 35 and 36) to the Magistrate Judge's Report and Recommendation (ECF No. 34), hereby are **overruled**; and Magistrate Judge Pesto's Report and Recommendation (ECF No. 34) is adopted as the opinion of the Court. IT IS FURTHER ORDERED that the Defendants' motions to dismiss (ECF Nos. 24, 25, and 27) are GRANTED to the extent that the complaint (ECF No. 1-1) is DISMISSED for lack of subject matter jurisdiction but without prejudice to being refiled in the appropriate state court; in all other respects said motions are DENIED. IT IS FURTHER ORDERED that the Clerk of Court mark this case "CLOSED."



Stephanie L. Haines
United States District Judge

IN THE UNITED STATES DISTRICT COURT
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Plaintiff :
v. : Case No. 3:18-cv-250-SLH-KAP
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Report and Recommendation

Recommendation

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Allegedly, after Harold's death, Penny disposed of Harold's property contrary to Harold's wishes, depriving plaintiff of items that should have been passed to her. One item of property allegedly is an insurance policy issued to Harold by the Colonial Penn Life Insurance Company. By letter dated March 2, 2018, the insurance company informed plaintiff that to disclose information about the policy it needed proof that plaintiff was the executor of Harold's estate. No further information is given about this policy. In the exhibits submitted by plaintiff there is reference made to a New York Life policy in the

amount of \$10,000.

Since plaintiff is proceeding in forma pauperis, 28 U.S.C. § 1915(e)(2) commands:

(2) Notwithstanding any filing fee, or any portion thereof, that may have been paid, the court shall dismiss the case at any time if the court determines that--

- (A) the allegation of poverty is untrue; or
- (B) the action or appeal--
- (i) is frivolous or malicious;
- (ii) fails to state a claim on which relief may be granted; or
- (iii) seeks monetary relief against a defendant who is immune from such relief.

The legal theories for plaintiff's claims against the defendants are less than clear. Plaintiff describes Penny's conduct as "fraud." Faye is not alleged to have committed an independent fraud but is Penny's sister, allegedly had knowledge of Penny's wrongdoing, and it is implied, benefited from Penny's conduct. Hunter's only role in this matter is that as a detective he interviewed Penny and concluded that Penny did not have the intent to defraud plaintiff. Hunter so advised plaintiff of this in a letter dated January 30, 2017, attached as an exhibit to the Complaint, and advised plaintiff that she could file an amended death certificate. Plaintiff subsequently did so, and it is dated January 10, 2018, and is attached as an Exhibit to the Complaint. Carroll is Penny's attorney: he spoke or wrote to defendant Hunter on Penny's behalf and has knowledge of Penny's disposition of Harold's belongings.

In the "Relief" section of the complaint, plaintiff seeks only that "she" (it is apparent that "she" is Penny) pay her legal fees and return or compensate plaintiff for the property "[t]hat my husband had for me." Plaintiff mentions contacting attorneys in Florida and Pennsylvania in 2016, but does not even approximately give a figure for her legal expenses or for the value of the property she was allegedly deprived of. She describes that property generally as Elvis memorabilia and mentions "CDs" without any indication that she knows that any certificates of deposit existed.

No claim is stated against defendant Hunter. Hunter does not by virtue of his office owe any legal duty to plaintiff and accordingly breached no duty to plaintiff by deciding not to pursue any criminal charge against Penny. The Supreme Court has expressly stated that a private citizen lacks a judicially cognizable interest in either the federal prosecution or nonprosecution of another. Linda R.S. v. Richard D., 410 U.S. 614, 619 (1973). Pennsylvania has a limited private criminal complaint process under Pa.R.Crim.P. 506, but it does not under state law confer a right to have another person prosecuted either. If there were such a right, absolute immunity would still protect Hunter from liability for money damages resulting from a decision not to prosecute.

No claim is stated against defendant Carroll. His alleged role in this matter is representing Penny and arguing that she lacked intent to commit fraud in Carroll's

communication with defendant Hunter. In a local case, as a matter of first impression, the Pennsylvania Superior Court considered “whether statements made preliminary to a criminal proceeding, made solely to the officials who might be responsible for prosecuting the criminal charges, and made by private parties for the purpose of initiating the prosecution of those charges, are absolutely privileged.” Pawlowski v. Smorto, 588 A.2d 36, 42 (Pa. Super. 1991). As a matter of state law, the court declared even defamatory statements in such a context to be privileged. See Schanne v. Addis, 121 A.3d 942, 947 (Pa. 2015), citing with approval Pawlowski v. Smorto, supra. Plaintiff does not allege any unprivileged defamatory statements by Carroll, and if the plaintiff could be taken to be asserting that Penny’s statement that plaintiff and Harold Rowe were divorced is a defamatory statement, Carroll is not liable for conveying this statement to Hunter.

As for any claim of fraud against Penny (and anything concerning Penny would apply to Faye as well since her role is at worst no more culpable than Penny’s), plaintiff must allege six elements:

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Plaintiff appears to be claiming that Penny represented on the original death certificate that plaintiff was divorced from Harold Rowe to defeat her claim to his estate. How this caused or could have caused her injury is not alleged.

Plaintiff also alleges that there never was an estate opened in Somerset County. It is not clearly alleged whether Harold died testate, in which case the proper venue for probating any will and for the distribution of the estate is the Orphans Court Division of the Court of Common Pleas of Somerset County, or whether Harold died intestate and plaintiff (assuming no issue or surviving parent) would be entitled to the entirety of the estate. 20 Pa.C.S. § 2102. A generous interpretation of the complaint as amended is that plaintiff is alleging that Penny has wrongfully appropriated some of the assets of the estate. That claim would not be one that is excluded from federal jurisdiction by the probate exception to diversity jurisdiction.

However, this would have diversity jurisdiction the claim against Penny and Faye only where: (1) the controversy is between citizens of different states, and (2) the amount in controversy exceeds \$75,000. 28 U.S.C. § 1332(a). The second requirement, that the matter in controversy exceeds \$75,000, is not pleaded.

As the party invoking diversity jurisdiction, plaintiff bears the burden of alleging in good faith that the amount in controversy exceeds \$75,000. Auto-Owners Ins. Co. v. Stevens & Ricci, Inc., 835 F.3d 388, 395 (3d Cir. 2016), citing St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283, 288-89 (1938)). Where a plaintiff makes no money damage demand in the complaint “and the court is unable to infer any specific value of such damages,” the plaintiff has failed to meet the minimal burden of alleging that the amount

in controversy exceeds \$75,000. Johnson v. Rite Aid (Derek Faight), No. CV 17-862, 2018 WL 4838540, at *6 (W.D. Pa. Oct. 4, 2018). Another way of phrasing the point is that when the complaint is so patently deficient as to reflect to a legal certainty that the plaintiff could not recover the jurisdictional amount the complaint should be dismissed. See Huber v. Taylor, 532 F.3d 237, 246 (3d Cir. 2008).

In response to this argument, plaintiff baldly states, "I did explain 75,000.00 for Elvis collection, my belonging[s] in house, my e[n]gagement ring, pain, suffering...." ECF no. 31-5 at 10, ¶7. Pain and suffering cannot be relied on to push the amount in controversy over the threshold: in Pennsylvania, damages for fraud are limited to pecuniary losses caused by the fraud. Delahanty v. First Pa. Bank, N.A., 464 A.2d 1243, 1257 (Pa. Super. 1983). Further, at no place in the pleadings does plaintiff allege any value for the above-listed items or any other items she claims were taken from her. In various pleadings, petitioner offers pictures of or lists alleged missing personal property that was in her husband's possession at the time of his death, such as an Elvis collection (including a 3D picture and plates), a grandfather clock, clothing, Lost in Space models, and old Avon bottles; however, she does not assign any value to these items. Further, although she mentions CDs, which presumably would have an easily ascertained value, she does not assign any value to these either. There is the additional problem of the statute of limitations, in that plaintiff did not file her complaint until December 2018, and given a two year statute of limitations for fraud or conversion, 42 Pa.C.S. § 5524(7), only the value of property fraudulently taken or converted after December 2016 would be relevant. A fair reading of the complaint would indicate that any fraud or conversion took place during and shortly after Harold's last illness.

No one minimizes the heartbreak of the loss of a spouse, or claims that the items of property that plaintiff believes were taken were not of sentimental value to her. But because plaintiff has not met her burden of establishing subject matter jurisdiction in this Court, it is recommended that the complaint be dismissed against defendants without prejudice to transferring the matter to state court under 42 Pa.C.S. § 5103(b)(2).

Pursuant to 28 U.S.C. § 636(b)(1), the parties are given notice that they have fourteen days to file written objections to this Report and Recommendation.

DATE: 30 November 2020

KA Pesto
Keith A. Pesto,
United States Magistrate Judge

Notice by ECF to counsel of record and by U.S. Mail to:

Cynthia J. Rowe
8105 Simpson Lane
Lakeland, FL 33809

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 21-1489

CYNTHIA J. ROWE,
Appellant

v.

PENNY J. ROBERTS; JASON HUNTER;
ATTORNEY WILLIAM CARROLL; FAYE COLE, Penny's Sister

(W.D. Pa. 3:18-cv-00250)

SUR PETITION FOR REHEARING

Present: CHAGARES, Chief Judge, MCKEE, AMBRO, JORDAN, HARDIMAN,
GREENAWAY, JR., SHWARTZ, KRAUSE, RESTREPO, BIBAS,
PORTER, MATEY, PHIPPS, and SCIRICA,* Circuit Judges

The petition for rehearing filed by Appellant in the above-captioned case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc is **DENIED**.

By the Court,

s/Stephanos Bibas
Circuit Judge

* The vote of Judge Scirica is limited to panel rehearing only.

Dated: July 14, 2022
Tmm/cc: Cynthia J. Rowe
Patrick P. Svonavec, Esq.
Marie M. Jones, Esq.
Michael R. Lettrich, Esq.
Amy J. Coco, Esq.

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