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

JANIE P. KINSEY,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 1:12-cv-850-MEF-TFM
	)	[wo]
ASSURANCE AMERICA INSURANCE COMPANY,	)	
	)	
	)	
Defendants.	)	

REPORT AND RECOMMENDATION OF THE MAGISTRATE JUDGE

I. INTRODUCTION

Pursuant to 28 U.S.C. § 636(b)(1) this case was referred to the undersigned United States Magistrate Judge for review and submission of a report with recommended findings of fact and conclusions of law (Doc. 6, filed October 22, 2012). Pending before the Court is Defendant's *Motion for Summary Judgment* (Doc. 4, filed October 5, 2012). The Court has carefully reviewed the Motion for Summary Judgment, the brief filed in support of and in opposition to the motion, and the supporting and opposing evidentiary materials. For good cause, it is the RECOMMENDATION of the Magistrate Judge that the Defendant's Motion be GRANTED.

II. FACTUAL BACKGROUND

On October 26, 2009, Plaintiff Janie P. Kinsey ("Kinsey" or "Plaintiff") was involved in an automobile accident in Dothan, Alabama with Xavier Pierre Dunlap ("Dunlap"). *See*

Doc. 4 at 1. Kinsey's vehicle was deemed a total loss and Kinsey suffered some personal injuries. *See* Doc 1-1 at 1. At the time of the accident, Dunlap carried an automobile liability insurance policy with Defendant Assurance America Insurance Company ("AAIC" or "Defendant"). *See* Doc. 4 at 1-2. The parties attempted to resolve the issue, but were not successful. *See* Doc. 4 at 2. As a result of the inability to reach a settlement, on March 9, 2011, Kinsey filed a pro se lawsuit against AAIC in this Court ("*Kinsey I*"). *See* Doc. 4-2 at 2-4; *see also Kinsey v. Assurance Am. Ins. Co.*, 1:11-CV-166-MEF, 2011 WL 1344180 (M.D. Ala. Apr. 8, 2011) report and recommendation adopted, 1:11-CV-166-MEF, 2011 WL 1545969 (M.D. Ala. Apr. 25, 2011). The Court held that "Alabama law is clear that before Kinsey can bring suit against Assurance, she must first obtain a judgment against Assurance's insured motorist," and "because Kinsey has not yet obtained a judgment against Assurance America's insured, the claim she presents against Assurance is 'without arguable merit in fact or law,' and she has failed to state a claim for which relief may be granted. Consequently, this action is due to be dismissed as frivolous." *Id.* at *1-*2.

Despite this Court's ruling, on September 25, 2012, Kinsey filed another complaint against AAIC in the Circuit Court of Houston County in Dothan, Alabama. *See* Doc. 1-2. On October 2, 2012, AAIC filed a Notice of Removal with the Circuit Court of Houston County and with this Court ("*Kinsey II*"). *See* Docs. 1-3 and 1-4.

III. JURISDICTION

The district court has diversity jurisdiction over the claims in this action pursuant to

28 U.S.C. § 1332. The plaintiff is a resident and citizen of Headland, Houston County, Alabama, and the defendant is a South Carolina corporation with its principal place of business in Atlanta, Georgia. *See* Doc. 1 at 1. The plaintiff's complaint alleges that she is entitled to damages in the amount of $200,000.00; thus the amount in controversy exceeds $75,000.00. *See* Doc. 1-2 at 1. The parties do not contest personal jurisdiction or venue, and there are adequate allegations to support both.

IV. SUMMARY JUDGMENT STANDARD

All litigants, *pro se* or not, must comply with the Federal Rules of Civil Procedure. Although the court is required to liberally construe a *pro se* litigant's pleadings, the court does not have "license to serve as *de facto* counsel for a party. . .or to rewrite an otherwise deficient pleading in order to sustain an action." *GJR Invs., Inc. v. Cnty. of Escambia, Fla.*, 132 F.3d 1359, 1369 (11th Cir. 1998) (citations omitted), *overruled on other grounds by Randall v. Scott*, 610 F.3d 701 (11th Cir. 2010)[1]; *see also Giles v. Wal-Mart Distrib. Ctr.*, 359 Fed. Appx. 91, 93 (11th Cir. 2009) (internal citations and quotations omitted) ("Although *pro se* pleadings are held to a less strict standard than pleadings filed by lawyers and thus are construed liberally, this liberal construction does not give a court license to serve as de facto

[1] The Eleventh Circuit overruled its prior holdings with regards to the heightened pleading standard for § 1983 claims that were asserted against government officials in their individual capacity. The Eleventh Circuit subsequently held that "[p]leadings for § 1983 cases involving defendants who are able to assert qualified immunity as a defense shall now be held to comply with the standards described in *Iqbal*." *Randall*, 610 F.3d at 709 (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)).

counsel for a party, or to rewrite an otherwise deficient pleading in order to sustain an action.").

A party in a lawsuit may move a court to enter summary judgment before trial. FED. R. CIV. P. 56(a)-(b). Summary judgment is appropriate when the moving party establishes that there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(a);[2] *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-24, 106 S.Ct 2548, 2552-53, 91 L.Ed.2d 265 (1986); *Moore ex rel. Moore v. Reese*, 637 F.3d 1220, 1231-32 (11th Cir. 2011). "[T]he substantive law will identify which facts are material." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986); *see also Ritchey v. S. Nuclear Operating Co., Inc.*, 2011 WL 1490358 (11th Cir. 2011) (unpublished opinion quoting *Anderson*). At the summary judgment juncture, the court does not "weigh the evidence and determine the truth of the matter," but solely "determine[s] whether there is a genuine issue for trial." *Anderson*, 477 U.S. at 249, 106 S.Ct. at 2511. Only disputes about the material facts will preclude the granting of summary judgment. *Id.*

The movant bears the initial burden of proof. *Celotex*, 477 U.S. at 323, 106 S.Ct. at

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[2] Effective December 1, 2010 Rule 56 was "revised to improve the procedures for presenting and deciding summary-judgment motions." FED. R. CIV. P. 56 Advisory Committee Notes. Under this revision, "[s]ubdivision (a) carries forward the summary-judgment standard expressed in former subdivision (c), changing only one word-genuine 'issue' becomes genuine 'dispute.' 'Dispute' better reflects the focus of a summary-judgment determination." *Id.* "'Shall' is also restored to express the direction to grant summary judgment." *Id.* The Advisory Committee was careful to note that the changes "will not affect the continuing development of the decisional law construing and applying these phrases." *Id.* Thus, although Rule 56 underwent stylistic changes, its substance remains the same and, therefore, all cases citing the prior versions of the rule remain equally applicable to the current rule. *Id.*

2552. A party must support its assertion that there is no genuine issue of material fact by "citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations . . . admissions, interrogatory answers, or other materials" or by "showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." FED. R. CIV. P. 56(c)(1). The admissibility of evidence is subject to the same standards and rules that govern admissibility of evidence at trial. *Clemons v. Dougherty Cnty., Ga.*, 684 F.2d 1365, 1369 n.5 (11th Cir. 1982) (citing *Pan-Islamic Trade Corp. v. Exxon Corp.*, 632 F.2d 539, 556 (5th Cir. 1980)).

Once the movant meets its burden under Rule 56, the non-movant must go beyond the pleadings and designate specific facts showing there is a genuine issue for trial. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87, 106 S.Ct. 1348, 1355-56, 89 L.Ed.2d 538 (1986). A genuine issue of material fact exists when "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Moore*, 637 F.3d at 1232 (quoting *Anderson*, 477 U.S. at 248, 106 S.Ct. at 2510). The court must view the facts and draw all reasonable inference in favor of the nonmoving party. *Id*. (citing *Rosario v. Am. Corrective Counseling Servs., Inc.*, 506 F.3d 1039, 1043 (11th Cir. 2007)); *Greenberg v. BellSouth Telecomms., Inc.*, 498 F.3d 1258, 1265 (11th Cir. 2007) ("We view the evidence and all factual inferences therefrom in the light most favorable to the party opposing the motion."). However, to avoid summary judgment, the nonmoving party "must do more than

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