No. __-____

IN THE

Supreme Court of the United States

ESTATE OF GERALDINE F. JENNINGS,
ROBERT J. JENNINGS, CHERYL FAZO,
KIM S. JENNINGS,

Petitioners,

v.

GULFSHORE PRIVATE HOME CARE, LLC,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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March 31, 2022

QUESTIONS PRESENTED

In this case, the district court entered an order dismissing the case upon summary judgment and directed the clerk to enter judgment. The clerk did so and the plaintiff filed a notice of appeal. The district court then *sua sponte* issued an order vacating the judgment, without notice, and subsequently issued an almost identical order that did not impact the dismissal, and the clerk issued a new judgment of dismissal. This raises the following issues:

1. Whether a district court has the power to *sua sponte* vacate a final judgment without notice to the parties, an issue that has divided the Circuits, the Sixth and the Tenth Circuits saying "no" and the other Circuits considering it saying "yes," and if there is such power, it is a violation of due process to vacate a judgment without notice to any of the parties, such that the vacatur is void.

2. Whether, if there is such power, the sua sponte reconsideration should be considered a motion under Fed.R.Civ.P. 59(e) and the notice of appeal should be considered premature and timely, pursuant to the plain language Fed.R.App.P. 4(a)(4).

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3, Whether, the right of appeal is not lost if a mistake is made in designating the judgment appealed from where it is clear that the overriding intent was

effectively to appeal, as held by this Court and every other Circuit to consider the question.

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

CORPORATE DISCLOSURE

Respondent Gulfshore Private Home Care, LLC is a Florida Limited Liability Company. None of its shares are held by a publicly traded company.

RELATED CASES

None.

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MISCELLANEOUS

IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit has not been selected for publication in the Federal Reporter. At the time that this petition is being prepared, however, it has not been published in the Federal Appendix, thus, it is possible that the Court is considering full publication in the Federal Reporter. It is electronically published at 2021 WL 4817710 and may be found in the Appendix at 3a. The original opinion of the district court granting summary judgment is not officially reported, but is reported electronically at 2020 U.S. Dist. LEXIS 218588 and 2020 WL 6873373, and may be found in the Appendix at 32a. The order vacating the judgment is simply a docket entry indicating an endorsed order, at Docket No. 190. The decision reinstating the judgment, which is essentially the same decision, has not been officially reported, but is reported electronically at 2020 U.S. Dist. LEXIS 220221, 2020 WL 6930497 and may be found in the Appendix at 11a.

JURISDICTION

The Court of Appeals issued its decision on October 15, 2021. A timely petition for rehearing and rehearing en banc was denied on January 14, 2022. A copy of the order denying rehearing and rehearing en banc may be found in the Appendix at 1a.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

RELEVANT STATUTORY AND RULES PROVISIONS INVOLVED

28 U.S.C. § 1291:

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

Fed.R.Civ.P. 59(d) and (e):

(d) New Trial on the Court's Initiative or for Reasons Not in the Motion. No later than 28 days after the entry of judgment, the court, on its own, may order a new trial for any reason that would justify granting one on a party's motion. After giving the parties notice and an opportunity to be heard, the court may grant a timely motion for a new trial for a reason not stated in the motion. In either event, the court must specify the reasons in its order.

(e) Motion to Alter or Amend a Judgment. A motion to alter or amend a judgment must be filed no later than 28 days after the entry of the judgment.

Fed.R.App.P 3:

(c) Contents of the Notice of Appeal.

(1) The notice of appeal must:

(A) specify the party or parties taking the appeal by naming each one in the caption or body of the notice, but an attorney representing more than one party may describe those parties with such terms as "all plaintiffs," "the defendants," "the plaintiffs A, B, et al.," or "all defendants except X";

(B) designate the judgment—or the appealable order—from which the appeal is taken; and

(C) name the court to which the appeal is taken.

Fed.R.App.P. 4(a):

(a) Appeal in a Civil Case.

* * *

(2) Filing Before Entry of Judgment. A notice of appeal filed after the court announces a decision or order—but before the entry of the judgment or order—is treated as filed on the date of and after the entry.

* * *

(4) Effect of a Motion on a Notice of Appeal.

(A) If a party files in the district court any of the following motions under the Federal Rules of Civil Procedure—and does so within the time allowed by those rules—the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion:

(i) for judgment under Rule 50(b);

(ii) to amend or make additional factual findings under Rule 52(b), whether or not granting the motion would alter the judgment;

(iii) for attorney's fees under Rule 54 if the district court extends the time to appeal under Rule 58;

(iv) to alter or amend the judgment under Rule 59;

(v) for a new trial under Rule 59; or

(vi) for relief under Rule 60 if the motion is filed no later than 28 days after the judgment is entered.

(B)(i) If a party files a notice of appeal after the court announces or enters a judgment—but before it disposes of any motion listed in Rule 4(a)(4)(A)—the notice becomes effective to appeal a judgment or order, in whole or in part, when the order disposing of the last such remaining motion is entered.

(ii) A party intending to challenge an order disposing of any motion listed in Rule 4(a)(4)(A), or a judgment's alteration or amendment upon such a

motion, must file a notice of appeal, or an amended notice of appeal—in compliance with Rule 3(c)—within the time prescribed by this Rule measured from the entry of the order disposing of the last such remaining motion.

STATEMENT OF THE CASE

A. Background

The underlying case is a wrongful death action, More specifically, Respondent Gulfshore is a nurse registry that connects home healthcare workers to elderly and disabled clients and also provides transportation services by assigning drivers to its clients when requested. In March 2017, Gulfshore assigned Cris Carol Samuels to transport a client.

While the client was in her car, Samuels drove off the road and onto a sidewalk, fatally striking Geraldine F. Jennings. Jennings' estate and surviving husband and daughters sued Gulfshore for negligence and wrongful death based on three theories: Samuels was an agent for, or joint venture with, Gulfshore, Gulfshore was negligent in selecting, hiring, retaining, instructing, and/or supervising Samuels, and Gulfshore breached its non-delegable duty to ensure that the transportation services were provided in a safe manner.

Samuels had an extensive history of driving violations, which resulted in the suspension of her driver's license, and criminal charges/convictions prior to the accident at issue.

B. Statement of Facts Concerning the Issues

On November 23, 2020, the district court issued two orders. The first granted defendant's fourth motion for summary judgment, dismissed the complaint and directed the Clerk to enter judgment accordingly. (Doc. 187). The second denied, as moot, plaintiff's emergency motion to temporarily suspend the processing of the case. (Doc. 188). The Clerk, following the Court's directive, entered a judgment that same day. (Doc. 189).

Without notice, the same day, the district court issued an endorsed order "vacating the Court's Opinion and Order granting Defendant Gulfshore Private Home Care, LLC's motion for summary judgment. (Doc. 187). The Court will enter an amended decision under separate cover."

The next day, plaintiff filed a notice of appeal from the judgment. (Doc. 191). The district court then transmitted the "initial appeal package" to the Eleventh Circuit . (Doc. 192).

The district court then filed an order reading as follows: "Defendant Gulfshore Private Home Care, LLC's Fourth Motion for Summary Judgment (Doc. 155) is GRANTED. Plaintiffs' discovery motions (Doc. 172; Doc. 175; Doc. 182) are DENIED. The Clerk is DIRECTED to enter judgment, deny all other pending motions as moot, terminate all remaining deadlines, and close the file." (Doc. 193). The Clerk entered such a judgment. (Doc. 194)

motions as moot, terminate all remaining deadlines, and close the file." (Doc. 193). The Clerk entered such a judgment. (Doc. 194).

As can be seen, the "second judgment" was, for all practical purposes, identical to the "first judgment": it dismissed the case. Indeed, the underlying decision is identical.

The Clerk's office sua sponte raised the question of jurisdiction and referred the issue to the merits panel. The panel found the notice of appeal jursdictionally defective because it was dated the same date as the "original judgment." Rehearing en banc was denied.

REASONS WHY THE WRIT SHOULD ISSUE

THE DECISION OF THE ELEVENTH CIRCUIT IS CONTRARY TO THE DECISIONS OF THIS COURT AND OTHER CIRCUITS AND THE PLAIN LANGUAGE OF THE FEDERAL RULES OF APPELLATE PROCEDURE. IT EFFECTIVELY RENDERS THE PROVISIONS OF FED.R.APP.P. 4(a)(2) AND 4(a)(4)(B)(i) MEANINGLESS

A. Every Other Circuit Has Rejected the Notion that a Final Judgment May Be Vacated *Sua Sponte* Without Notice

Other than in the Eleventh Circuit, it has been held that a district court may not act on its own motion to vacate a judgment previously entered. See *Nelson v. City of Albuquerque*, 921 F.3d 925, 930 (10th Cir. 2019) ("Only one circuit has addressed a district court's power to act sua sponte by granting relief under Rule 59(e)") (citing *Burnam v. Amoco Container Co.*, 738 F.2d 1230, 1232 (11th Cir. 1984) (per curiam)); Ann., Tolling of time for filing notice of appeal in civil action in federal court under Rule 4(a)(4) of Federal Rules of Appellate Procedure, 74 A.L.R. Fed. 516 § 13[c]; Cyclopedia of Federal Procedure § 37:5. ("Power of court on own motion to alter or amend judgment")

"Circuits are split on the question whether a district court may grant Rule 60(b) relief sua sponte" The Sixth and the Tenth Circuits hold that it is not

permissible. *United States v. Pauley*, 321 F.3d 578, 581 n.1 (6th Cir. 2003). Some Circuits have held that a district court has the power to vacate a judgment *sua sponte* pursuant to Fed.R.Civ.P. 60(b), but only if the effected parties have been given proper notice. See *Kingvision Pay-Per-View Ltd. v. Lake Alice Bar*, 168 F.3d 347, 352 (9th Cir. 1999) ("A judgment is property, so taking it away requires due process of law . . . . Due process generally requires notice and an opportunity to be heard"); *Int'l Controls Corp. v. Vesco*, 556 F.2d 665, 668 (2d Cir. 1977) ("the district court, which ruled on all issues raised on this appeal, had power to decide sua sponte whether its judgment should be vacated, *provided all parties had notice*") (emphasis added).

Other than the Eleventh Circuit, there is no Circuit that has held that a Rule 59(e) motion may be granted *sua sponte*. See *Jones v. Illinois Dep't of Rehab. Servs.*, 689 F.2d 724, 731–32 (7th Cir. 1982) (Rule 59(e) of the Federal Rules of Civil Procedure inapplicable to *sua sponte* vacatur).

Under the rule in other Circuits, the *sua sponte* vacatur of a valid judgment was void without any notice. Consequently, the notice of appeal from the original judgment was timely and proper.

The rule in the Eleventh Circuit creates a trap for practitioners that should not be countenanced.

B. If There is a *Sua Sponte* Power to Vacate the Notice of Appeal is Rendered Timely By Virtue of Fed.R.App. 4(a)(4)and There is No Need to File a New Notice of Appeal

The Eleventh Circuit holds that the district court may *sua sponte* vacate a judgment pursuant to Fed.R.Civ.P. 59(e). See *Burnam v. Amoco Container Co.*, 738 F.2d 1230, 1232 (11th Cir. 1984) (per curiam). If that be the rule, then the notice of appeal was premature and took effect upon the determination of that motion without the need to file a new notice of appeal.

Under Federal Rule of Appellate Procedure 4(a)(4) an otherwise timely notice of appeal filed before the disposition of a Rule 59 motion is not voided but instead merely lies dormant while the motion is pending, and the notice of appeal becomes effective as of the date of the order disposing of the Rule 59 motion. "[T]he amended version of Rule 4(a)(4) that went into effect on December 1, 1993, provides that when a notice of appeal is filed before the trial court rules on a pending tolling motion, the notice of appeal lies dormant until the trial court disposes of the pending motion. Upon such disposition, the notice becomes effective." *United States v. Duke*, 50 F.3d 571, 575 (8th Cir. 1995); see *Leader Nat'l Ins. Co. v. Industrial Indem. Ins. Co.*, 19 F.3d 444, 445 (9th Cir. 1994).

The Notes of Advisory Committee on Rules on the 1993 Amendment confirm that the Eleventh Circuiit's decision is an incorrect construction of Fed.R.App.P. 4(a)(4). It noted that the 1979 amendment created a trap for an unsuspecting litigant who files a notice of appeal before a posttrial motion, or while a posttrial motion is pending. The 1979 amendment requires a party to file a new notice of appeal after the motion's disposition. Unless a new notice is filed, the court of appeals lacks jurisdiction to hear the appeal. "The amendment provides that a notice of appeal filed before the disposition of a specified posttrial motion will become effective upon disposition of the motion. A notice filed before the filing of one of the specified motions or after the filing of a motion but before disposition of the motion is, in effect, suspended until the motion is disposed of, whereupon, the previously filed notice effectively places jurisdiction in the court of appeals."

The only exception is where there is a desire to obtain review of a modification of the original judgment which a party intends to challenge on appeal. "The amendment provides that a notice of appeal filed before the disposition of a posttrial tolling motion is sufficient to bring the underlying case, as well as any orders specified in the original notice, to the court of appeals. If the judgment is altered upon disposition of a posttrial motion, however, and if a party wishes to appeal from the disposition of the motion, the party must amend the notice to so indicate. When a party files an amended notice, no additional fees are required because the

notice is an amendment of the original and not a new notice of appeal."

Thus, as the United States Court of Appeals for the Sixth Circuit has held, under what it called the identical language in the Fed.R.Bkcy.P.,,"a new notice of appeal [is required]to be filed only if the motion to reconsider is itself appealed or if the disposition of that motion alters or amends the previous judgment." *Markowitz v. Campbell (In re Markowitz),* 190 F.3d 455, 460 (6th Cir. 1999)

That, of course, is not an issue as the "new" judgment did not modify the dismissal of the complaint, precisely what the plaintiffs desired to appeal. The original notice of appeal is sufficient.

If left to stand, the decision of the Eleventh Circuit will only generate a trap for appellate practitioners.

C. The Right of Appeal Is Not Lost If a Mistake Is Made in Designating the Judgment Appealed from Where it Is Clear That the Overriding Intent Was Effectively to Appeal

Outside of the Eleventh Circuit, it is a settled rule that "a notice of appeal will be deemed sufficient even though it references . . .the wrong judgment date." *Gov't of Virgin Islands v. Mills*, 634 F.3d 746, 752 (3d Cir. 2011) (citing *Flieger v. Delo*, 12 F.3d 766, 770 (8th Cir.1993)); *Schneider v. Colegio de Abogados*

de P.R., 917 F.2d 620, 630 (1st Cir.1990)). *Kicklighter v. Nails by Jannee, Inc.,* 616 F.2d 734, 739 n.1 (5th Cir. 1980) (Rejecting argument that "Kay-See should not be permitted to appeal because it did not properly designate the judgment appealed from")

The United States Court of Appeals for the Third Circuit, citing this Court's precedents, has stated the governing rule precisely:

> Courts employ a commonsense, purposive approach to determine whether a notice of appeal complies with the rules. See *Bankers Trust Co. v. Mallis*, 435 U.S. 381, 387, 98 S. Ct. 1117, 55 L. Ed. 2d 357 (1978); *Matute v. Procoast Navigation Ltd.*, 928 F.2d 627, 629 (3d Cir. 1991); *Dura Sys., Inc. v. Rothbury Invs., Ltd.*, 886 F.2d 551, 555 (3d Cir. 1989); Fed. R. App. P. 3(c) advisory committee's note ("[S]o long as the function of notice is met by the filing of a paper indicating an intention to appeal, the substance of the rule has been complied with."). Thus, the Supreme Court has said that "imperfections in noticing an appeal should not be fatal where no genuine doubt exists about who is appealing, from what judgment, to which appellate court." *Becker v. Montgomery*, 532 U.S. 757, 767, 121 S. Ct. 1801, 149 L. Ed. 2d 983 (2001).

Under the purposive approach taken by the courts, a notice of appeal that fails to strictly comply with the judgment-designation requirement will nevertheless be deemed adequate if, " 'in light of all the circumstances,' " *FirsTier*, 498 U.S. at 276 n.6 (quoting Torres, 487 U.S. at 316), it is reasonably clear which judgment the party seeks to appeal. See *Foman,* 371 U.S. at 181-82; *Torres,* 487 U.S. at 322-23 (Brennan, J., dissenting); *Castillo-Rodriguez v. INS*, 929 F.2d 181, 183-84 (5th Cir. 1991) ("[A] party does not forfeit the right to appeal by designating the wrong judgment as long as it is clear which judgment the party intends to appeal."). This means that as long as the judgment the party intends to appeal is fairly discernible, a notice of appeal will be deemed sufficient even though it references the wrong case number, see *Marshall v. Lancarte*, 632 F.2d 1196, 1197 (5th Cir. 1980); *Scherer v. Kelley*, 584 F.2d 170, 174-75 (7th Cir. 1978), or the wrong judgment date, see *Flieger v. Delo*, 12 F.3d 766, 770 (8th Cir. 1993); *Schneider v. Colegio de Abogados de P.R.*, 917 F.2d 620, 630 (1st Cir. 1990).

VI In assessing the adequacy of a flawed appeal notice, a court should also consider whether the opposing party

> was misled or prejudiced by the errors. See *Sanabria v. United States*, 437 U.S. 54, 67 n.21, 98 S. Ct. 2170, 57 L. Ed. 2d 43 (1978); *Bankers Trust*, 435 U.S. at 387; Foman, 371 U.S. at 181; *Matute,* 928 F.2d at 629 (a notice of appeal will generally be deemed sufficient "unless [it] is so inadequate as to prejudice the opposing party"); *Keller v. Petsock*, 849 F.2d 839, 842 (3d Cir. 1988). While a lack of prejudice will not save a notice that totally fails to comply with the rules, see *Smith*, 502 U.S. at 248; *Torres*, 487 U.S. at 317, courts understandably are more willing to overlook a notice's flaws in the absence of prejudice to the opposing party, see *Bankers Trust*, 435 U.S. at 387; *FirsTier,* 498 U.S. at 276 (observing that, where the opposing party is not prejudiced by mistakes made in the process of noticing an appeal, "[l]ittle would be accomplished by prohibiting the court of appeals from reaching the merits"); *Matute*, 928 F.2d at 629

Government of the Virgin Islands v. Mills, 634 F.3d at 751-752.

"It is too late in the day and entirely contrary to the spirit of the Federal Rules of Civil Procedure for decisions on the merits to be avoided on the basis

of such mere technicalities." *Foman v. Davis*, 371 U.S. 178, 181 (1962).

The Eleventh Circuit recognized this rule, but found that there is a difference in analysis between a "counseled" notice of appeal and a pro se notice of appeal. In that Court's view, a rule of strict construction is to be applied against attorneys. As far as can be ascertained, there is no precedent for such a holding, and certainly the precedents of this Court brook no such distinction. The same procedural rules apply to pro se litigants and attorneys alike. See, e.g. *State Farm Mutual Auto Insurance Co. v. Palmer,* 350 U.S. 944 (1956); *Kicklighter v. Nails by Jannee, Inc.*, 616 F.2d 734, 739 n.1 (5th Cir. 1980).

D. The Decision Below Wrongfully Justifies Gamesmanship Over Fundamental Fairness

There can be no dispute as to what occurred here. For reasons best known to the district court - - and without notice to the parties, violating thereby the fundamental fairness that is the bedrock of our Constitutional due process and even handed justice that the Plaintiff/Appellants are due - - vacated its order granting summary judgment and reentered essentially the same order the very next day. Once counsel filed the notice of appeal from the judgment, counsel had no reason to monitor the docket in the district court and the Court of Appeals.

No one could attribute an extraordinary level of clairvoyance to lawyers in knowing that would

occur and then making this lack of clairvoyance a jurisdictional defect. The Court of Appeals engaged in sheer speculation and, in so doing, skipped over the fact that no evidence existed that counsel had actual knowledge thereof. *Cf. Unicolors, Inc. v. H&M Hennes & Mauritz, L.P.*, 142 S.Ct. 941 (2022), holding that an error of law, like an error of fact, in a copyright registration did not invalidate the copyright unless the copyright holder (actually) knew of the inaccuracy and re-affirming that "[b]oth case law and the dictionary tell us that "knowledge" has historically "meant and still means 'the fact or condition of being aware of something.'

Respectfully, here, since counsel did not know, or reasonably could have known, because of the district court's lack of notice to him, should not permit the district court and the Court of Appeals to invalidate the Notice of Appeal to create a jurisdictional defect.

Finally, at the time that this petition is being prepared, the underlying decision has not been published in the Federal Appendix, thus, it is possible that the Court is considering full publication in the Federal Reporter. No matter. "We note in passing that the fact that the Court of Appeals' order under challenge here is unpublished carries no weight in our decision to review the case. The Court of Appeals exceeded its jurisdiction regardless of nonpublication and regardless of any assumed lack of precedential effect of a ruling that is unpublished." *Comm'r v. McCoy*, 484 U.S. 3, 7 (1987)

(per curiam). "The fact that the Court of Appeals' opinion is unpublished is irrelevant. Nonpublication must not be a convenient means to prevent review. An unpublished opinion may have a lingering effect in the circuit and surely is as important to the parties concerned as is a published opinion." *Smith v. United States*, 502 U.S. 1017, 1020 n. * (1991) (Blackmun, J., dissenting with others).

CONCLUSION

Certiorari should be granted, and the judgment summarily reversed, and the matter remanded to the Court of Appeals for determination of the merits. Summary reversal is appropriate because the law is settled and stable, the facts are not in dispute, and the decision below is clearly in error.

Dated: March 31, 2022

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

January 14, 2022, Filed

No. 20-14415-GG

ESTATE OF GERALDINE F. JENNINGS,
ROBERT J. JENNINGS, CHERYL FAZO,
KIM S. JENNINGS,

Plaintiffs-Appellants,

versus

GULFSHORE PRIVATE HOME CARE, LLC,

Defendant-Third Party Plaintiff-Appellee.

Appeal from the United States District Court
for the Middle District of Florida.

For ROBERT J. JENNINGS, ESTATE OF GERALDINE F. JENNINGS, CHERYL FAZO, KIM S. JENNINGS, Plaintiffs-Appellants: Eddi Z. Zyko, Attorney Advisor, Law Office of Eddi Z. Zyko, MIDDLEBURY, CT; Joel J. Ewusiak, Ewusiak Law, PA, Tampa, FL.

For GULFSHORE PRIVATE HOME CARE, LLC, Defendant-Appellee: Anna D. Torres, Powers McNalis Torres Teebagy & Luongo, WEST PALM BCH, FL; Jeffrey Dale Jensen, Laura Elizabeth Schinella,

Thomas Robert Unice Jr., Attorney, Unice Salzman Jensen, PA, TRINITY, FL.

For SERVICE: John J. Kozak, Kass Shuler, PA, TAMPA, FL.

BEFORE:

JORDAN, GRANT, and BLACK, Circuit Judges.

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

PER CURIAM:

The Petition for Rehearing En Banc is DENIED, no judge in regular active service on the Court having requested that the Court be polled on rehearing en banc. (*FRAP 35*) The Petition for Panel Rehearing is also denied. (*FRAP 40*)

UNITED STATES COURT OF APPEALS,
ELEVENTH CIRCUIT.

No. 20-14415

Non-Argument Calendar

Filed: 10/15/2021

ESTATE OF Geraldine F. JENNINGS,
Robert J. Jennings, Cheryl Fazo,
Kim S. Jennings,

Plaintiffs-Appellants,

v.

GULFSHORE PRIVATE HOME CARE, LLC,

Defendant-Third Party Plaintiff-Appellee.

Appeal from the United States District Court for the Middle District of Florida, D.C. Docket No. 2:19-cv-00072-SPC-NPM

Attorneys and Law Firms

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Anna D. Torres, Powers McNalis Torres Teebagy & Luongo, West Palm Beach, FL, Jeffrey Dale Jensen, Laura Elizabeth Schinella, Thomas Robert Unice, Jr., Attorney, Unice Salzman Jensen, PA, Trinity, FL, for Defendant-Third Party Plaintiff-Appellee.

Before

Jordan, Grant, and Black, Circuit Judges.

Opinion

PER CURIAM

This Court requested that the Estate of Geraldine F. Jennings, Robert J. Jennings, Cheryl Fazo, and Kim S. Jennings (collectively, Jennings) and Gulfshore Private Home Care, LLC (Gulfshore) respond to jurisdictional questions raised by Jennings's appeal of the district court's November 23, 2020 judgment. We asked them to address (1) given that the November 23, 2020 order and judgment granting summary judgment to Gulfshore were vacated, whether any challenge to that order and judgment was now moot; and (2) whether the notice of appeal was effective to appeal from the district court's November 24, 2020 order and judgment. Both parties filed responses, and Gulfshore incorporated a motion to dismiss Jennings's appeal for lack of appellate jurisdiction.

The facts relevant to the motion to dismiss occurred over a two-day period. On November 23,

2020, the following events occurred: (1) the district court entered an opinion and order granting Gulfshore's fourth motion for summary judgment, dismissing Jennings's amended complaint with prejudice, and directing the clerk to enter judgment accordingly and to terminate all remaining deadlines and motions; (2) the clerk entered a document setting out the judgment pursuant to the district court's order; and (3) the district court then entered an endorsed order vacating its opinion and order granting the motion for summary judgment and stating it would "enter an amended decision under separate cover."

On November 24, 2020, Jennings, through counsel, filed a notice of appeal stating Jennings was seeking an appeal "from the judgment of this Court entered on November 23, 2020, which, upon a motion for summary judgment, dismissed the action with prejudice." The district court transmitted the "initial appeal package" to this Court as well. The same day, after the district court had docketed and transmitted Jennings's notice of appeal, the district court entered a new opinion and order which granted Gulfshore's fourth motion for summary judgment, denied Jennings's discovery motions as untimely, and directed the clerk to enter judgment accordingly. The clerk entered judgment pursuant to the new opinion and order.

This Court will not dismiss an appeal "for informality of form or title of the notice of appeal, or for failure to name a party whose intent to appeal is otherwise clear," Fed. R. App. P. 3(c)(4); and "embraces 'a policy of liberal construction of notices

of appeal' when (1) unnoticed claims or issues are inextricably intertwined with noticed ones and (2) the adverse party is not prejudiced," *Hill v. BellSouth Telecomm., Inc.*, 364 F.3d 1308, 1313 (11th Cir. 2004) (quoting *C.A. May Marine Supply Co. v. Brunswick Corp.*, 649 F.2d 1049, 1056 (5th Cir. 1981)). However, this case does not present the circumstances of a notice of appeal that is merely lacking formality or contains a simple mistake of omitting an intended party or order, nor does this case warrant this Court exercising liberal construction of the notice of appeal because (1) Jennings is not proceeding *pro se* and the notice of appeal was filed by Jennings's counsel; (2) the notice of appeal clearly and unambiguously states it is seeking an appeal from the judgment entered on November 23, 2020; and (3) the notice of appeal was filed before the existence of the November 24, 2020 final order and judgment, so there was no possibility that the wrong judgment date was entered by mistake.

Jennings's counseled notice of appeal sought to appeal the judgment from an already vacated final order. The district court vacated only the November 23 opinion and order granting summary judgment but did not vacate the November 23 clerk-entered judgment. Jennings asserts that because the district court vacated only the opinion and order, but not the judgment, his notice of appeal deprived the district court of jurisdiction to enter the November 24 opinion and order and judgment. The flaw in this argument is that the November 23 judgment was dependent on the November 23 opinion and order granting Gulfshore's motion

for summary judgment. Without the November 23 opinion and order, there is no final order disposing of the case and no final judgment and nothing to appeal. 28 U.S.C. § 1291; *see also Barfield v. Brierton*, 883 F.2d 923, 931 (11th Cir. 1989) (explaining this court usually cannot hear appeals from non-final orders). Jennings's notice of appeal of a non-appealable order did not divest the district court of jurisdiction to enter the November 24 order and judgment. *United States v. Hitchmon*, 602 F.2d 689, 694 (5th Cir. 1979) (en banc),[1] *superseded by statute on other grounds as recognized by United States v. Martinez*, 763 F.2d 1297, 1308 & n.11 (11th Cir. 1985) (holding that filing a notice of appeal from a non-appealable order does not divest the district court of jurisdiction).

We conclude that by the time the notice of appeal was filed, the November 23 judgment was null and void because the November 23 opinion and order, upon which the judgment was entered, was vacated by the district court. *See United States v. Ayres*, 76 U.S. 608, 610 (1869) (holding an order granting a new trial had the effect of vacating the former judgment and rendering it null and void, leaving the parties in the same situation as if no trial had ever taken place). Because the November 23 opinion and order was vacated, there is no live controversy with respect to which this Court may grant meaningful

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[1] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), this Court adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to close of business on September 30, 1981.

relief and Jennings is no longer aggrieved by the November 23 final order and judgment. Jennings's challenge of the vacated order and judgment is moot. *See Christian Coal. of Fla., Inc. v. United States*, 662 F.3d 1182, 1189 (11th Cir. 2011) (stating an "issue is moot when it no longer presents a live controversy with respect to which the court can give meaningful relief"); *Wolff v. Cash 4 Titles*, 351 F.3d 1348, 1353-54 (11th Cir. 2003) (explaining a party to the lawsuit must be aggrieved by the judgment or order to sustain an appeal); *see also Fort Knox Music, Inc. v. Baptiste*, 257 F.3d 108, 110 (2d Cir. 2001) (stating because a vacated judgment has no effect, a party can no longer be aggrieved by that judgment and an appeal from the vacated judgment is moot).

Further, Jennings's counseled notice of appeal is invalid to appeal from the November 24 final judgment because it was filed and entered on the docket before the existence of the November 24 final order and judgment. *See Bogle v. Orange Cty. Bd. of Cty. Comm'rs*, 162 F.3d 653, 661 (11th Cir. 1998) (stating under Federal Rule of Appellate Procedure 3(c), a notice of appeal must designate an existent judgment or order, not one that is merely expected or within the appellant's contemplation when the notice of appeal is filed). Moreover, the notice of appeal is invalid to challenge the November 24 final order and judgment because it specifically designated that it was seeking an appeal from the final judgment entered on November 23 which, as discussed above, was vacated. *See* Fed. R. App. P. 3(c)(1)(B) (providing a notice of appeal "must . . .

designate the judgment, order, or part thereof being appealed"); *Osterneck v. E.T. Barwick Indus., Inc.*, 825 F.2d 1521, 1528 (11th Cir. 1987) (explaining that ordinarily, the failure to abide by the requirement a notice of appeal "designate the judgment, order or part thereof appealed from" will preclude the appellate court from reviewing any judgment or order not so specified).

Nor was the district court's vacating of the November 23 order a *sua sponte* reconsideration under Federal Rule of Civil Procedure 59(e), making the notice of appeal effective when the district court entered the November 24 final order. Jennings did not file a notice of appeal from an order or judgment which was still valid and was later revisited and vacated or amended by the district court, but instead filed a notice of appeal from an order and judgment that had already been vacated. Even if we considered the district court's actions to constitute a *sua sponte* reconsideration pursuant to Rule 59(e), Jennings was required to file a new or amended notice of appeal to challenge the November 24 order which resolved the *sua sponte* Rule 59(e) reconsideration. *See* Fed. R. App. 4(a)(4)(B)(ii); *Weatherly v. Alabama State Univ.*, 728 F.3d 1263, 1271 (11th Cir. 2013) (stating to seek appellate review of an order entered after the notice of appeal was filed disposing of a tolling motion, the appealing party is required to file a separate notice of appeal or amend its original notice to designate the order on the motion as subject to appeal).

Accordingly, we GRANT Gulfshore's motion to dismiss Jennings's appeal for lack of appellate jurisdiction and this appeal is hereby DISMISSED.

UNITED STATES DISTRICT COURT,
M.D. FLORIDA,
FORT MYERS DIVISION.

Case No.: 2:19-cv-72-FtM-38NPM

Signed 11/24/2020

ESTATE OF Geraldine F. JENNINGS,
Robert J. Jennings, Cheryl Fazo
and Kim S. Jennings,

Plaintiffs,

v.

GULFSHORE PRIVATE HOME CARE, LLC,

Defendant/Third Party Plaintiff,

Cris-Carol Samuels,

Third-Party Defendant.

Attorneys and Law Firms

Eddi Z. Zyko, Pro Hac Vice, Law Office of Eddi Z. Zyko, Middlebury, CT, Joel J. Ewusiak, Ewusiak Law, P.A., Tampa, FL, for Plaintiffs.

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Jensen, PA, Trinity, FL, for Defendant/Third Party Plaintiff.

John J. Kozak, Cole, Scott & Kissane, PA, Tampa, FL, for Third-Party Defendant.

OPINION AND ORDER[1]

Before the Court are Defendant Gulfshore Private Home Care, LLC's Fourth Motion for Summary Judgment (Doc. 155), Plaintiffs' response in opposition (Doc. 161), and Gulfshore's reply (Doc. 170).[2] After the parties briefed summary judgment and months after discovery closed, Plaintiffs filed three discovery motions (Doc. 172; Doc. 175; Doc. 182), all of which Gulfshore opposes (Doc. 173; Doc. 176; Doc. 183). So those motions are also before the Court. For the below reasons, the Court denies the discovery motions but grants summary judgment for Gulfshore.

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[1] Disclaimer: Documents hyperlinked to CM/ECF are subject to PACER fees. By using hyperlinks, the Court does not endorse, recommend, approve, or guarantee any third parties or the services or products they provide, nor does it have any agreements with them. The Court is also not responsible for a hyperlink's availability and functionality, and a failed hyperlink does not affect this Order.

[2] Gulfshore has asked for oral argument on its motion. (Doc. 165). After reviewing the record and the parties' memoranda of law, the Court finds that it has sufficient information to decide the motion without more argument. M.D. Fla. L. R. 3.01(j).

BACKGROUND

This is a wrongful death action. Gulfshore is a licensed Florida nurse registry that refers home healthcare professionals to elderly and disabled clients. (Doc. 88-3 at 3; Doc. 108-2). Gulfshore hires home healthcare professionals as independent contractors and refers them to clients. (Doc. 154-1, 30:12-15; 31:13-15; 112:1; 113:16-17). It uses software to send potential referrals to its registered independent contractors, and they may accept or decline the referral. (Doc. 154-1, 140:15-19).

Third-Party Defendant Cris-Carol Samuels is a certified nursing assistant who registered with Gulfshore to receive client referrals. (Doc. 153-1, 50:3-11). She signed an employment contract that defined her status with Gulfshore as an independent contractor. The parties' agreement for referral services provides, in part:

> WHEREAS, Registry is engaged in the business of identifying and notifying self employed caregivers about opportunities to provide home-care services for persons (hereinafter called "Clients") that seek the services that such caregivers are authorized under Florida law to provide;
>
> WHEREAS, Caregiver is a self-employed caregiver who desires to engage Registry to (i) inform Caregiver about potential Client opportunities, and (ii) provide certain administrative services in support of Caregiver's business;

> WHEREAS, Caregiver represents that Caregiver (i) is self-employed, (ii) maintains and operates a separate and independent business, (iii) holds himself/herself out to the public as independently competent and available to provide care-provider services, and (iv) has obtained clients through means other than Registry;
>
> WHEREAS, It is not the obligation of the Nurse Registry to monitor, supervise, manage or train caregiver referred for contract; and
>
> WHEREAS, nothing in this Agreement shall be interpreted as creating between Registry and Caregiver a relationship of partnership, employer and employee or joint venture. . . .
>
> (Doc. 108 at 7).

Each agreement for referral services further provides, in part:

> Caregiver acknowledges that it is an independent contractor, and not an employee, for all purposes and acknowledges its sole responsibility for complying with all federal, state and local tax filing and payment obligations consistent with Caregiver's self-employed status, including but not limited to, income taxes, Social Security and Medicare taxes, self-employment taxes and their corresponding quarterly filing and estimated-payment obligations, that pertain to any remuneration received in connection with this Agreement. Caregiver also acknow-

> ledges its sole responsibility to maintain workers' compensation coverage for itself and its employees to the extent required by Florida law, and will not be eligible for unemployment insurance benefits, unless unemployment compensation coverage is provided by Caregiver or some other entity. This paragraph shall survive the termination of this Agreement.
>
> (Doc. 108 at 7).

In March 2017, Gulfshore assigned Samuels to transport Antoinette Janich ("the Client"). (Doc. 53, ¶¶ 11-12; Doc. 88-1, ¶¶ 11-12). While doing so, Samuels drove onto a sidewalk and fatally struck Geraldine Jennings. (Doc. 53 ¶ 15; 53-1; Doc. 88-1 ¶ 15). This suit ensued.

Plaintiffs are Jennings' estate, husband and daughters. They sue Gulfshore for wrongful death based on three negligence theories. (Doc. 53). In Count I, Plaintiffs claim Samuels was an agent for, or in a joint venture with, Gulfshore. (Doc. 53 at 4-5). In Count II, they allege "Gulfshore was negligent in selecting, hiring, retaining, instructing, and/or supervising" Samuels. (Doc. 53 at 5). In Count III, Plaintiffs contend Gulfshore breached its duty to vet Samuels' driving ability.[3] (Doc. 53 at 6-7).

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[3] As the Court reads it, the duty at issue in Count 3 is not the duty to ensure safe transportation services, but the duty to vet Samuels' driving ability. The "nondelegable" part of the claim is a red herring because Plaintiffs fail to allege that Gulfshore delegated any duty.

Gulfshore now moves for summary judgment on all counts, arguing it is not liable because Samuels was an independent contractor. (Doc. 150). Plaintiffs not only oppose summary judgment, but they also bring three discovery-related motions. The Court starts with the latter motions.

PLAINTIFFS' DISCOVERY MOTIONS

Plaintiffs move to compel Gulfshore to authenticate documents purportedly published on its website. (Doc. 172). They do not stop there. They have also filed a second request for admissions (Doc. 176) and a motion to determine the sufficiency of Gulfshore's objection to their third request for admission (Doc. 183). Both motions were filed months after discovery closed and summary judgment was briefed. Naturally, Gulfshore opposes all motions as untimely. And the Court agrees.

The motions are five months too late. Plaintiffs could have requested this material during discovery but did not. As Gulfshore points out, Plaintiffs did not even ask about the material at the Rule 30(b)(6) deposition when they had the chance. What is more, Plaintiffs never asked to extend the discovery deadline, opting instead to wait until after summary judgment was briefed to seek more information. The Court thus denies Plaintiffs' pending discovery motions and turns to Gulfshore's motion for summary judgment.

GULFSHORE'S MOTION FOR SUMMARY JUDGMENT

A. Legal Standard

Summary judgment is proper only if there are no disputed issues of material fact and the moving party is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(a); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). The moving party bears the initial burden of stating the basis for its motion and identifying those portions of the record demonstrating the absence of genuine issues of material fact. *See O'Ferrell v. United States*, 253 F.3d 1257, 1265 (11th Cir. 2001). An issue is genuine if there is sufficient evidence so that a reasonable jury could return a verdict for either party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

When opposing a motion for summary judgment, the nonmoving party must show the existence of specific facts in the record that create a genuine issue for trial. *See id.* at 256. Courts view the evidence and draws reasonable inferences from the evidence for the nonmoving party. *See Burton v. City of Belle Glade*, 178 F.3d 1175, 1187 (11th Cir. 1999) (citation omitted). A party opposing a properly supported motion for summary judgment may not rest on mere allegations or denials and "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986) (citation omitted). Failure to show

evidence of any essential element is fatal to the claim and courts should grant summary judgment. *See Celotex*, 477 U.S. at 322-23. But if reasonable minds could find a genuine issue of material fact, then summary judgment should be denied. *See Miranda v. B & B Cash Grocery Store*, Inc., 975 F.2d 1518, 1532 (11th Cir. 1992).

B. Discussion

This wrongful death suit stems from Gulfshore's alleged negligence. A claim for wrongful death is "created and limited by Florida's Wrongful Death Act." *Cinghina v. Racik*, 647 So.2d 289, 290 (Fla. 4th DCA 1994); *Estate of McCall v. United States*, 134 So.3d 894, 915 (Fla. 2014). That law provides a right of action "[w]hen the death of a person is caused by the wrongful act, negligence, default, or breach of contract or warranty of any person. . . and the event would have entitled the person injured to maintain an action and recover damages if death had not ensued." Fla. Stat. § 768.19. To state a claim for negligence in a wrongful death action, a plaintiff must allege "(1) the existence of a legal duty owed to the decedent, (2) breach of that duty, (3) legal or proximate cause of death was that breach, and (4) consequential damages." *Jenkins v. W.L. Roberts, Inc.*, 851 So.2d 781, 783 (Fla. 1st DCA 2003).

The parties square off on the first element. Gulfshore argues it owes no legal duty because Samuels was an independent contractor. (Doc. 155 at 2-3). If Gulfshore is correct, Plaintiffs face an uphill battle

ascribing liability to it because Florida follows the general rule that the employer of an independent contractor is not liable for the independent contractor's negligence because the employer has no control over how the work is done. *See McCall v. Ala. Bruno's, Inc.*, 647 So.2d 175, 177 (Dist. Ct. App. Fla. 1994) (quoting Restatement (Second) of Torts §409). But Florida recognizes exceptions to the general rule: (1) negligence in selecting, instructing, or supervising the contractor; (2) non-delegable duties arising out of some relation toward the public or the particular plaintiff; and (3) work specially, peculiarly, or 'inherently' dangerous. *Id.*

Whether Samuels is an independent contractor is the threshold matter. On this issue, the Court recognizes that "the question of an employer/employee relationship is generally a question of fact, and therefore a question for the trier of fact." *Pate v. Gulmore*, 647 So.2d 235, 236 (Fla. 1st Dist. Ct. App. Fla 1994). But, "[t]here are of course circumstances in which the undisputed facts will demonstrate the nonexistence of an employment relationship as a matter of law and thereby establish the proper basis for granting summary judgment. Thus, if the only reasonable view of the evidence compels the conclusion that an employment relationship did not exist, a court may determine the issue as a matter of law." *Harper ex rel. Daley v. Toler*, 884 So.2d 1124, 1129-30 (Fla. 2d DCA 2004) (citations omitted). Such is the situation here.

To start, Samuels acknowledges that she was an independent contractor. (Doc. 153-1 at 48:24-25). Her concession tracks Florida law that classifies

caregivers referred by nurse registries as independent contractors. This classification starts with the Home Health Services Act, Fla. Stat. §§ 400.461 to 400.5185, which governs health and medical services furnished by an organization to an individual in the individual's home. The Act defines "nurse registry" as

> any person that procures, offers, promises, or attempts to secure health-care-related contracts for registered nurses, licensed practical nurses, **certified nursing assistants**, home health aides, companions, or homemakers, **who are compensated by fees as independent contractors**, including, but not limited to, contracts for the provision of services to patients and contracts to provide private duty or staffing services to health care facilities[.]

Fla. Stat. § 400.462 (emphasis added). It is undisputed that Samuels is a certified nursing assistant. (Doc. 153-1 at 42; Doc. 108-8). And the Act says that a certified nursing assistant "referred for contract under this chapter by a nurse registry **is deemed an independent contractor and** not an employee of the nurse registry[.]" Fla. Stat. § 400.506(6)(d) (emphasis added).

Despite this clear statutory language, Plaintiffs argue the Court should apply the seven-factor test set out in *Cantor v. Cochran*, 184 So.2d 173 (Fla. 1966) to determine whether an employer-employee relationship exists. But the Court need not look

past Samuels' concession and the unambiguous language of the Home Health Services Act to determine she was an independent contractor as a matter of law.[4]

Seeming to grasp at straws, Plaintiffs present five arguments to convince the Court that Samuels was not an independent contractor. As discussed below, none of the arguments prevail.

First, Plaintiffs argue Gulfshore fraudulently identifies as a nurse registry while it operates a non-emergency medical transportation business. Although they concede Gulfshore is a nurse registry (Doc. 160 at 3), they try to muddy the water by arguing it is impermissible for a nurse registry to provide transportation. But their argument is not rooted in any record fact. According to Gulfshore's expert James Mark, a certified nursing assistant generally "provides Activities of Daily Living and Instrumental Activities of Daily Living custodial care services[,]" one of which is transportation. (Doc. 107-1 at 5-6). Furthering the point on transportation is Florida Administrative Code 59A-18.009(2)(b) that says among the responsibili-

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[4] Even if the Florida legislature did not classify Samuels as an independent contractor per the Home Health Care Act, application of the *Cantor* test would still compel the Court to find Samuels to be an independent contractor. Gulfshore exercised no control over her work. She is licensed by the State of Florida and received no training or supervision from Gulfshore as to the means and methods of her work. Samuels understands she is an independent contractor and was paid directly by the client. And she used her own tools and materials, including driving her own car at the time of the accident.

ties of a "companion" is the responsibility "to provide escort services such as taking the patient or client to the health care provider." Plaintiffs have adduced no evidence to counter these points.

Based on one driving event, Plaintiffs also leap to the conclusion that transportation is a core business activity of Gulfshore. But one caregiver transporting a single client does not necessarily convert a nurse registry business into a transportation company.

Second, Plaintiffs contend the Home Health Services Act does not apply because Gulfshore referred Samuels to help the Client in an activity "outside of what is permitted by Florida law"—driving the Client. (Doc. 160 at 20-21). But under the Act, a nurse registry can provide occasional transportation services. Here, the Client requested a nursing assistant to assist with her custodial care. (Doc. 107-1 at 6). Transportation is a custodial care service and incidental to the overall care services normally provided by a nursing assistant. (Doc. 107-1 at 6). In addition, Section 400.506(6)(b) permits a nursing assistant to assist with "physical transfer." The Court thus rejects Plaintiffs' second argument and finds the Home Health Services Act applies.

As best the Court can tell, Plaintiffs' third argument is that Gulfshore is hiding behind its nurse registry status when performing non-emergency medical transportation. (Doc. 160 at 4-5). On this point, Plaintiffs suggest that Samuels had to drive the Client because she learned about that task after she accepted the assignment. (Doc. 160 at 4).

Typically, a nursing assistant knows the full assignment's details before accepting it, so Samuels' situation with the Client was unusual. But Plaintiffs have not shown how Samuels needing to transport the Client after accepting the assignment changes her independent contractor status. Nor have Plaintiffs overcome the testimony of Gulfshore's owner, who said that nursing assistants can decline a job if the services requested differ from the description provided when they accepted the job. (Doc. 154-1, 142:8-14).

Fourth, Plaintiffs argue the general independent contractor rule should not apply because Jennings was an innocent bystander. This argument is a nonstarter. If Plaintiffs want to recover from Gulfshore for Jennings' death, they must show Gulfshore violated a duty of care owed to her. Central to that analysis is the relationship between Gulfshore and Samuels. Other than their say so, Plaintiffs have adduced nothing to show that a third-party bystander somehow changes the independent-contractor relationship between Gulfshore and Samuels.

Fifth, Plaintiffs claim the agreement for referral services shows Samuels was an employee because Gulfshore exercised control over the performance of her work. To support this argument, they point to a single subsection in the agreement informing Samuels that Gulfshore could terminate the agreement. (Doc. 160 at 14). But the fact that Gulfshore retained the right to end the independent contractor relationship does not mean it retained or exercised control over the way Samuels performed her

work. Plaintiffs present no evidence that Gulfshore retained any control over the means of the job after referring clients to Samuels. Instead, the agreement simply lays out that Gulfshore can stop allowing Samuels to use its service for referrals.

Because Plaintiffs cannot overcome Samuels' status as an independent contractor, their only avenue to hold Gulfshore liable is an exception to the general independent contractor rule. Here lie some counts of the Amended Complaint.

But before examining the Amended Complaint's counts, the Court notes that Plaintiffs rely heavily on inadmissible evidence. First, they use Dr. Joseph Rubino's testimony to argue that Gulfshore violated its duty to Jennings. The Court, however, has twice considered the admissibility of Dr. Rubino's testimony and twice ruled it inadmissible. (Doc. 139; Doc. 151). And Plaintiffs offer no reason for the Court to find now that his opinions are admissible. Second, Plaintiffs mention a Florida Highway Report and Gulfshore's liability insurance coverage (Doc. 160 at 18; Doc. 160 at 8)—both of which the Court had ruled inadmissible (Doc. 138; Doc. 140). Third, Plaintiffs try to use a supplemental expert report from Dr. Rubino (Doc. 114-1) dated after the deadline for submission of expert reports to win their case. But the Court need not consider that untimely report. *See Corwin v. Walt Disney Co.*, 475 F.3d 1239, 1252 (11th Cir. 2007)("a supplemental expert report may be excluded pursuant to Federal Rule of Civil Procedure 37(c) if a party fails to file it prior to the deadline imposed"); *see also Goodbys Creek, LLC v. Arch Ins. Co.*, No.

3:07-cv-947, 2009 WL 1139575, at *2 (M.D. Fla. Apr. 27, 2009).

The Court turns now to each count in the Amended Complaint.

1. Count I

In Count I, Plaintiffs claim Samuels was in a joint venture with Gulfshore. But the undisputed material evidence shows otherwise. "A joint venture is created when two or more persons combine their property and/or their time to conduct a particular line of trade or business deal." *See Kislak v. Kreedian*, 95 So. 2d 510, 515 (Fla. 1957). Plaintiffs have adduced no evidence of shared ownership, shared returns and risks, or shared governance. The agreement between Samuels and Gulfshore states, "nothing in this Agreement shall be interpreted as creating between Registry and Caregiver a relationship of partnership, employer and employee or joint venture." (Doc. 108 at 7). As discussed, the Florida legislature defines the relationship between the caregivers and a nurse registry as an employer-independent contractor relationship. And the agreement between the parties lays out an employer-independent contractor relationship. It states, "[Samuels] hereby engages Registry to inform Caregiver about potential Clients that [Gulfshore] . . .determines might be of interest to Caregiver." (Doc. 108 at 7). Gulfshore connects clients with caregivers, and Samuels used Gulfshore to connect with potential clients. There is no joint venture.

Gulfshore is thus entitled to summary judgment on Count I.

2. Count II

Count II alleges that "Gulfshore was negligent in selecting, hiring, retaining, instructing, and/or supervising" Samuels. (Doc. 53 at 6). This count aligns with the first exception to the general independent rule. Plaintiffs have no evidence that Gulfshore negligently supervised or trained Samuels. In fact, the Home Health Services Act prevented Gulfshore from monitoring, supervising, managing, or training Samuels. Fla. Stat. § 400.506(19) ("A nurse registry may not monitor, supervise, manage, or train a. . .certified nursing assistant. . . referred for contract under this chapter."); (Doc. 107-1 at 3). It only allowed Gulfshore to refer independent contractor care providers. Thus, as a matter of law, it cannot be liable for negligent supervision or training of Samuels.

Nor was Gulfshore negligent in hiring or retaining Samuels. Plaintiffs claim—but have no supporting admissible evidence—that Gulfshore breached its duty to properly vet Samuels. But Gulfshore presents evidence establishing it fulfilled its duty under Florida law.

To work as an independent contractor for a nurse registry, a person must pass a background check conducted by the Florida Department of Law Enforcement. (Doc. 107-1 at 4); *See also* Fla. Stat. § 400.506(9). The Department forwards a person's fingerprints to the Federal Bureau of Investigation

for a national criminal history record check. (Doc. 107-1 at 4). The state, not the nurse registry, determines whether the caregiver is eligible. (Doc. 107-1 at 4). Here, Samuels' independent contractor file shows Gulfshore properly verified her credentials and conducted a background check in compliance with Florida law. (Doc. 107-1 at 4). Gulfshore thus fulfilled its duty and was not negligent in hiring or retaining Samuels.

Plaintiffs' case law to support Count II are inapplicable. In *Suarez v. Gonzalez*, 820 So. 2d 342, 345-46 (Dist. Ct. App. Fla. 2002), the court held that a landlord can be liable for the tortious actions of an independent contractor if the landlord was negligent in hiring him. As shown above, Gulfshore was not negligent in hiring or selecting Samuels. So *Suarez* does not help. The same is true for *Williams v. Wometco Enterprises, Inc.*, 287 So.2d 353 (Dist. Ct. App. Fla. 1974). That case supports this Court's finding because *Williams* held an employer cannot be liable for the negligent discharge of a firearm by an independent contractor security guard when the employer did not supervise or control the security guard.

The Court thus finds Gulfshore is entitled to summary judgment on Count II.

3. Count III

Finally, Plaintiffs contend that Gulfshore is vicariously liable for Samuels' negligence because Gulfshore breached its non-delegable duty to properly vet Samuels for the ability to properly operate

a vehicle for commercial purposes on a public highway. A party who hires an independent contractor may still be liable if a nondelegable duty is involved. Typically, a nondelegable duty arises when, for policy reasons, the employer cannot shift the responsibility for the proper conduct of the work to the contractor. *See Carrasquillo v. Holiday Carpet Services, Inc.*, 615 So.2d 862, 863 (Fla. Dist. Ct. App. 1993) (citing Restatement (Second) of Torts §§ 416-26).

Plaintiffs fail to specify the nondelegable duty.[5] Based on the Court's reading, this is not a nondelegable duty claim or an inherently dangerous activity claim. In their complaint, Plaintiffs use these terms of art to suggest they are raising an exception to the general rule that the employer of an independent contractor is not liable for the independent contractor's negligence. But the allegations against Gulfshore solely concern the duty to vet. Because of the danger allegedly involved in driving, Plaintiffs claim a more stringent duty to vet applies than the background check required by the Home Health Services Act. But Plaintiffs adduce no admissible evidence showing that a more stringent background check applies.

If Plaintiffs find this duty outside the Home Health Services Act, the Court points out the Home Health Services Act applies and Gulfshore com-

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[5] In the Amended Complaint, Plaintiffs plead "Gulfshore breached its nondelegable duty for the protection of Geraldine's widower and daughters." (Doc. 53 at 7). The duty owed to the Jennings family is the same duty owed to any member of the public.

plied with the Act. Under the Home Health Services Act, Gulfshore is a nurse registry who contracts with independent contractor nursing assistants. As a nurse registry, Gulfshore's primary job is to comply with Florida rules and regulations, specifically Florida Statute Chapters 400, 408, 435, and Rule 59A-18 F.A.C. These chapters impose requirements for a background check a nurse registry must complete before referring a nursing assistant to clients. (Doc. 107-1 at 4). Samuels' independent contractor file shows Gulfshore properly verified Samuels' credentials and background screen. (Doc. 107-1 at 4). Plaintiffs do not point to any Florida statute that imposes this more stringent duty to vet. Gulfshore meets its burden of showing it ran a proper background check and verified Samuels' credentials.

Plaintiffs do not stop there. Seeking to find a duty breached by Gulfshore, Plaintiffs claim Gulfshore "failed to comply with CFR Sec 37.171 or Sec 37.713."[6] Yet these regulations do not apply. They are federal regulations requiring private entities that operate fixed route or demand responsive transportation services (such as Uber and Lyft) to avoid disparately treating disabled customers and properly train drivers to do so. *See* 49 CFR §§ 37.171, 37.173. There is no evidence the Client was disabled, and Gulfshore neither operates a fixed route system nor provides responsive transportation services.

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[6] This alleged failure comes from an inadmissible opinion of Dr. Rubino.

Just as Plaintiffs' cited case law did not help them on Count II, the same is true for *McCall v. Alabama Bruno's Inc.*, 647 So. 2d 175 (Dist. Ct. App. Fla. 1994) on Count III. That case involved a premises liability action and discusses a property owner's nondelegable duties toward invitees. The case does not pertain because no such nondelegable duty applies to Gulfshore.

At bottom, the undisputed record evidence shows that Gulfshore complied with its duties before referring Samuels to drive the Client. It is thus entitled to summary judgment on Count III.

CONCLUSION

This litigation arises from a tragedy. But there is no evidence Gulfshore violated any duty of care it owed to Jennings. Samuels was an independent contractor who worked with clients referred by Gulfshore. There was no joint venture. Gulfshore ran the required background checks before referring Jennings to clients. Under Florida law, it could not monitor or supervise her work. The Home Health Services Act permits a nursing assistant to drive a client, and Gulfshore fulfilled its legal duty before referring Samuels to the client. Plaintiffs present no admissible evidence supporting their claims. The Court finds Gulfshore was not negligent and bears no legal responsibility for Jennings' tragic death. Gulfshore is entitled to summary judgment on all counts.

Accordingly, it is now

ORDERED:

1. Defendant Gulfshore Private Home Care, LLC's Fourth Motion for Summary Judgment (Doc. 155) is **GRANTED**.

2. Plaintiffs' discovery motions (Doc. 172; Doc. 175; Doc. 182) are **DENIED**.

3. The Clerk is **DIRECTED** to enter judgment, deny all other pending motions as moot, terminate all remaining deadlines, and close the file.

DONE and ORDERED in Fort Myers, Florida, on November 24, 2020.

UNITED STATES DISTRICT COURT,
M.D. FLORIDA,
FORT MYERS DIVISION.

Case No.: 2:19-cv-72-FtM-38NPM

Signed 11/23/2020

ESTATE OF Geraldine F. JENNINGS,
Robert J. Jennings, Cheryl Fazo
and Kim S. Jennings,

Plaintiffs,

v.

GULFSHORE PRIVATE HOME CARE, LLC,

Defendant/Third Party Plaintiff,

Cris-Carol Samuels,

Third Party Defendant.

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Jensen, PA, Trinity, FL, for Defendant/Third Party Plaintiff.

John J. Kozak, Cole, Scott & Kissane, PA, Tampa, FL, for Third Party Defendant.

OPINION AND ORDER[1]

Sheri Polster Chappell, United States District Judge

Before the Court is Defendant Gulfshore Private Home Care, LLC's Fourth Motion for Summary Judgment (*Doc. 155*), Plaintiffs' response in opposition (*Doc. 161*), and Gulfshore's Reply (*Doc. 170*).[2] The Court grants the motion.

BACKGROUND

This is a wrongful death action arising under Florida law. Gulfshore is a licensed Florida nurse registry that refers home healthcare professionals to elderly and disabled clients. (*Doc. 88-3 at 3*).

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[1] Disclaimer: Documents hyperlinked to CM/ECF are subject to PACER fees. By using hyperlinks, the Court does not endorse, recommend, approve, or guarantee any third parties or the services or products they provide, nor does it have any agreements with them. The Court is also not responsible for a hyperlink's availability and functionality, and a failed hyperlink does not affect this Order.

[2] Gulfshore has requested oral argument on its motion. (*Doc. 165)*. After reviewing the record and the parties' memorandums of law, the Court finds that it has sufficient information to decide the motion without additional oral argument. M.D.Fla.L.R. 3.01(j).

Gulfshore hires the home healthcare professionals as independent contractors. (*Doc. 154-1*, 30:12-15; 31:13-15; 112:1; 113:16-17). It uses software to send out potential referrals to its registered independent contractors. (*Doc. 154*, 140:15-19).

Third-Party Defendant Cris-Carol Samuels is a certified nursing assistant who registered with Gulfshore to receive client referrals in 2016. (*Doc. 153-1*, 50:3-11). In March 2017, Gulfshore assigned Samuels to transport Antoinette Janich ("the Client"). (*Doc. 53* at ¶¶ 11-12; *Doc. 88-1* at ¶¶ 11-12). While transporting her, Samuels drove onto the sidewalk and fatally struck Geraldine F. Jennings. (*Doc. 53* at ¶ 15; 53-1; *Doc. 88-1* at ¶ 15). This suit ensued.

Plaintiffs are Jennings' estate, husband, and daughter. They sue Gulfshore for wrongful death based on three theories of negligence. (*Doc. 53*). In Count I, Plaintiffs claim Samuels was an agent for, or in a joint venture with, Gulfshore. (*Doc. 53 at 4-5*). In Count II, Plaintiffs claim "Gulfshore was negligent in selecting, hiring, retaining, instructing, and/or supervising" Samuels. (*Doc. 53 at 5*). In Count III, Plaintiffs claim Gulfshore is vicariously liable for Samuels' negligence because it breached its nondelegable duty to ensure safe transportation services. (*Doc. 53 at 6-7*).

Gulfshore moves for summary judgment as to the Estate, husband, and surviving daughters. (*Doc. 150*). It argues summary judgment is proper because Samuels was an independent contractor and Gulfshore is not liable for her actions.

After briefing on the motion for summary judgment finished, and nearly five months after discovery ended, Plaintiffs moved to compel Gulfshore to authenticate documents purportedly published on its website. (*Doc. 172*). Two subsequent related motions are pending. (*Doc. 175*; *Doc. 182*). The Court denies the requests as procedurally improper. Discovery is over. Plaintiffs could have requested this material during discovery but did not. As Gulfshore points out, Plaintiffs chose not to ask about the material at the 30(b)(6) deposition. It is not appropriate for Plaintiffs to be filing discovery motions as the Court considers a summary judgment motion. And even if the Court considered these materials, it cannot discern from a brief review how they help Plaintiffs' case.[3]

LEGAL STANDARD

Summary judgment is proper only if there are no disputed issues of material fact and the moving party is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(a); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). The moving party bears the initial burden of stating the basis for its motion and identifying those portions of the record demonstrating the absence of genuine issues of material fact. *See O'Ferrell v. United States*, 253

[3] To wit, one webpage lists "transporting clients to social activities and appointments" as a service nursing assistants provide clients, seeming to contradict Plaintiffs' argument that driving clients is impermissible for a nurse registry. *See Doc. 110-1 at 5*.

F.3d 1257, 1265 (11th Cir. 2001). An issue is genuine if there is sufficient evidence so that a reasonable jury could return a verdict for either party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

When opposing a motion for summary judgment, the nonmoving party must show the existence of specific facts in the record that create a genuine issue for trial. *See id.* at 256. The Court should view the evidence and the inferences that may be reasonably drawn from the evidence in the light most favorable to the nonmoving party. *See Burton v. City of Belle Glade*, 178 F.3d 1175, 1187 (11th Cir. 1999) (citation omitted). A party opposing a properly supported motion for summary judgment may not rest on mere allegations or denials and "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986) (citation omitted). Failure to show evidence of any essential element is fatal to the claim and the Court should grant summary judgment. *See Celotex*, 477 U.S. at 322-23. But if reasonable minds could find a genuine issue of material fact, then summary judgment should be denied. *See Miranda v. B & B Cash Grocery Store*, Inc., 975 F.2d 1518, 1532 (11th Cir. 1992).

DISCUSSION

In Florida, a claim for wrongful death is "created and limited by Florida's Wrongful Death Act." *Cinghina v. Racik*, 647 So.2d 289, 290 (Fla. 4th

DCA 1994); *Estate of McCall v. United States*, 134 So.3d 894, 915 (Fla. 2014). It provides a right of action "[w]hen the death of a person is caused by the wrongful act, negligence, default, or breach of contract or warranty of any person...and the event would have entitled the person injured to maintain an action and recover damages if death had not ensued." Fla. Stat. § 768.19; Plaintiffs allege wrongful death based on three negligence theories. To state a claim for negligence in a wrongful death action, a plaintiff must allege: "(1) the existence of a legal duty owed to the decedent, (2) breach of that duty, (3) legal or proximate cause of death was that breach, and (4) consequential damages." *Jenkins v. W.L. Roberts, Inc.*, 851 So.2d 781, 783 (Fla. 1st DCA 2003).

The primary disagreement among the parties is whether Samuels is an independent contractor. If she is, Plaintiffs will face an uphill battle ascribing liability to Gulfshore because Florida follows the general rule that the employer of an independent contractor is not liable for the contractor's negligence because the employer has no control over how the work is done. *McCall v. Alabama Bruno's, Inc.*, 647 So.2d 175, 177 (Dist. Ct. App. Fla. 1994) (quoting Restatement (Second) of Torts § 409). But it also recognizes exceptions to the general rule which may generally be divided into three categories: 1) negligence in selecting, instructing, or supervising the contractor; 2) non-delegable duties arising out of some relation toward the public or the particular plaintiff; and 3) work which is specially, peculiarly, or 'inherently' dangerous. *Id.*

In Florida, home health services—defined as health and medical services furnished by an organization to an individual in the individual's home—are governed by the Home Health Services Act, Fla. Stat. §§ 400.461 to 400.5185. Gulfshore maintains a nurse registry under Florida law. (*Doc. 155 at 3*; *Doc. 160 at 3*). A nurse registry procures health-care-related contracts for registered nurses, licensed practical nurses, certified nursing assistants, home health aides, companions or homemakers, **who are compensated by fees as independent contractors**, including, but not limited to, contracts for the provision of services to patients. *See* Fla. Stat. 400.462(21)(emphasis added).

Samuels is a certified nursing assistant. (*Doc. 153-1 at 42*; *Doc. 108*). Section 400.506(6)(d) of the Florida Statutes lays out the following employment relationship:

> A registered nurse, licensed practical nurse, certified nursing assistant, companion or homemaker, or home health aide referred for contract under this chapter by a nurse registry ***is deemed an independent contractor and not an employee of the nurse registry under any chapter regardless of the obligations imposed on a nurse registry under this chapter or chapter 408.***

(emphasis added).

Under the Home Health Services Act, Samuels is an independent contractor. The question of an

employer/employee relationship is generally a question for the trier of fact. *Pate v. Gulmore*, 647 So.2d 235, 236 (Fla. 1st Dist. Ct. App. Fla 1994). Perhaps that is why Plaintiffs urge the Court to apply the seven-factor test laid out in *Cantor v. Cochran*, 184 So.2d 173 (Fla. 1966) to determine whether an employer-employee relationship exists. But sometimes, the only reasonable view of the evidence compels the conclusion that an employment relationship did not exist. If so, a court may determine the issue as a matter of law. *See Johnson v. Gourmet Gardens, Inc.*, 827 So.2d 1020, 1020 (2d Dist. Ct. App. Fla. 2002). Here, as a matter of law, Florida classifies caregivers referred by nurse registries as independent contractors. Samuels acknowledges she was an independent contractor. (*Doc. 153-1*, 48:24-25). The Court need not delve any deeper into the relationship.[4]

Grasping at straws, Plaintiffs present five arguments to attempt to convince the Court that Samuels was not an independent contractor.

First, Plaintiffs argue Gulfshore fraudulently identifies as a nurse registry while it operates a

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[4] Even if the Florida legislature did not classify Samuels as an independent contractor, application of the *Cantor* test would still compel the Court to find Samuels was an independent contractor. Gulfshore exercised no control over Samuels' work. Samuels is licensed by the state and received no training or supervision from Gulfshore as to the means and methods of her work. Samuels understands she is an independent contractor and was paid directly by the client. And she used her own tools and materials, including driving her own car at the time of the accident.

non-emergency medical transportation business. Though Plaintiffs concede Gulfshore is a nurse registry, they try to muddy the water by arguing it is impermissible for a nurse registry to provide transportation. But this assertion is not rooted in fact. A Certified Nursing Assistant provides Activities of Daily Living and Instrumental Activities of Daily Living custodial care services, one of which is transportation. (*Doc. 107-1 at 6*). The independent contractors and the client may agree to transportation services. (*Doc. 154*, 91:1-20). And as Gulfshore points out, Florida Administrative Code 59A-18.009(2)(b) includes among the responsibilities of a "companion" the responsibility "to provide escort services such as taking the patient or client to the health care provider." Plaintiffs provide no evidence to support their assertion. Instead, based solely on *one* driving event, Plaintiffs insinuate Gulfshore is a transportation business and makes providing transportation a core business activity. Incidental transportation provided by the caregiver does not convert a nurse registry into a transportation company.

Second, Plaintiffs contend the Home Health Services Act does not apply because by driving a client, Gulfshore referred a nursing assistant to help a client in an activity "outside of what is permitted by Florida law." But under the statutory framework, a nurse registry can provide occasional transportation services. Here, the client requested a nursing assistant to assist with her custodial care. (*Doc. 107-1 at 6*). Transportation is a custodial care service and incidental to the overall care

services normally provided by a nursing assistant. (*Doc. 107-1* at 6). In addition, Section 400.506(6)(b) permits a nursing assistant to assist with "physical transfer." The Home Health Services Act applies.

Third, Plaintiffs argue the independent contractor rule should not apply because Geraldine Jennings was an innocent bystander. This argument is a nonstarter. If Plaintiffs want to recover from Gulfshore for Geraldine Jennings' death, they must show Gulfshore violated a duty of care owed to Jennings. Central to that analysis is the relationship between Gulfshore and Samuels. No doubt this was a tragic accident. But a tragedy does not mean those seeking justice can circumvent well-established legal principles.

Fourth, regarding the argument Samuels had to drive the client (*Doc. 160 at 4*), it appears Samuels discovered she had to transport the client after she had accepted the assignment, unusual because she typically knew what an assignment entailed before accepting it. This does not mean she was Gulfshore's employee. There is no evidence Samuels *had* to transport the client. To the contrary, one of Gulfshore's owners testified if an independent contractor shows up to a job and the services being requested differ from the description provided in the text or email, it is solely within the independent contractor's discretion whether to perform the services. (*Doc. 154-1*, 142:8-14).

Fifth, Plaintiffs claim the agreement for referral services shows Samuels was an employee because Gulfshore exercised control over the performance of her work. They point to a single subsection inform-

ing Samuels that Gulfshore could terminate the agreement to support this argument. But the fact Gulfshore retained the right to end the independent contractor relationship does not mean it retained or exercised control over the way Samuels performed her work. Plaintiffs present no evidence Gulfshore retained any control over the means of the job after referring the client to Samuels. Instead, the agreement simply lays out that Gulfshore can stop allowing Samuels to use its service for referrals.

Because Samuels is an independent contractor, Plaintiffs must establish an exception to the general rule to hold Gulfshore liable. The Court will examine the three counts of the amended complaint to see if Gulfshore meets its burden of proof.

Before examining each count separately, the Court notes that Plaintiffs rely heavily on evidence the Court ruled inadmissible. Plaintiffs use Dr. Joseph Rubino's testimony to advance their argument that Gulfshore violated its duty to Jennings. The Court, however, has twice considered the admissibility of Dr. Rubino's testimony and ruled it inadmissible. (*Doc. 139*; *Doc. 151*). It will not find his opinions admissible now. And Plaintiffs use an expert report (*Doc. 114-1*) dated after the deadline for submission of expert reports that will not be considered.

Likewise, Plaintiffs mention the Florida Highway Report and Gulfshore's liability insurance coverage. (*Doc. 160 at 18*; *Doc. 160 at 8*). The Court has ruled both items inadmissible. (*Doc. 138*; *Doc. 140*).

A. Count I

Plaintiffs claim Samuels was in a joint venture with Gulfshore. But the evidence establishes there was no joint venture. "A joint venture is created when two or more persons combine their property and/or their time to conduct a particular line of trade or business deal." *See Kislak v. Kreedian*, 95 So. 2d 510, 515 (Fla. 1957). Plaintiffs have adduced no evidence of shared ownership, shared returns and risks, or shared governance. As discussed, the Florida legislature defines the relationship between the caregivers and a nurse registry as an employer-independent contractor relationship. And the agreement between the parties lays out an employer-independent contractor relationship. It states, "[Samuels] hereby engages Registry to inform Caregiver about potential Clients that [Gulfshore]. . .determines might be of interest to Caregiver." (*Doc. 108 at 7*). Gulfshore connects clients with caregivers, and Samuels used Gulfshore to connect with potential clients. There is no joint venture. Gulfshore is thus entitled to summary judgment on Count I.

B. Count II

Plaintiffs claim "Gulfshore was negligent in selecting, hiring, retaining, instructing, and/or supervising" Samuels. If Gulfshore was negligent in this way, Plaintiffs could recover from Gulfshore.

Plaintiffs, however, did not negligently supervise or train Samuels. The Home Health Services Act

delineates the duties and obligations of Florida's nurse registries. The subsection provides:

> A nurse registry may not monitor, supervise, manage, or train a registered nurse, licensed practical nurse, certified nursing assistant, companion or homemaker, or home health aide referred for contract under this chapter.

Fla. Stat. § 400.506(19). Under Florida law, as a licensed nurse registry, Gulfshore may only refer independent contractor care providers and may not monitor, supervise, manage, or train the care provider. (*Doc. 107-1 at 3*). Not only Gulfshore did have no duty to instruct or supervise Samuels, it could not under Florida law. Thus, as a matter of law, it cannot be liable for negligent supervision or training of Samuels.

Nor was Gulfshore negligent in hiring or retaining Samuels. Plaintiffs claim Gulfshore breached its duty to properly vet Samuels but fail to adduce admissible evidence supporting that claim. On the other hand, Gulfshore presents evidence establishing it fulfilled its duty under Florida law. To work as an independent contractor for a nurse registry, a person must pass a background check conducted by the Florida Department of Law Enforcement. (*Doc. 107-1 at 4*); *see also* Fla. Stat. § 400.506(9). The Department takes and forwards the person's fingerprints to the FBI for a national criminal history record check. (*Doc. 107-1 at 4*). The state, not the nurse registry, determines whether the caregiver is eligible. (*Doc. 107-1 at 4*). Samuels's independent

contractor file shows Gulfshore properly verified her credentials and conducted a background check in compliance with Florida law. (*Doc. 107-1 at 4*). Thus, Gulfshore fulfilled its duty and was not negligent in hiring or retaining Samuels. Gulfshore is entitled to summary judgment on Count Two.

As Gulfshore points out, Plaintiffs cite inapplicable cases. *Suarez v. Gonzalez*, 820 So. 2d 342, 345-46 (Dist. Ct. App. Fla. 2002) holds that a landlord can be liable for the tortious actions of an independent contractor if the landlord was negligent in hiring him. Gulfshore was not negligent in hiring or selecting Samuels. *McCall v. Alabama Bruno's Inc.*, 647 So. 2d 175 (Dist. Ct. App. Fla. 1994) involved a premises liability action and discusses a property owner's non-delegable duties toward invitees. The case does not pertain.

C. Count III

Plaintiffs claim operating a vehicle for commercial purposes on the public highways is inherently dangerous and that Gulfshore should be liable because it did not properly vet Samuels for the ability to provide transportation services. A party who hires an independent contractor may still be liable if a nondelegable duty is involved. Typically, a nondelegable duty arises when, for policy reasons, the employer cannot shift the responsibility for the proper conduct of the work to the contractor. *Carrasquillo v. Holiday Carpet Services, Inc.*, 615 So.2d 862, 863 (Fla. Dist. Ct. App. 1993)(citing Restatement (Second) of Torts §§ 416-26).

Plaintiffs fail to specify the nondelegable duty.[5] Still, because of the danger allegedly involved in driving, Plaintiffs appear to contend a more stringent duty to vet applies than the background check required by the Home Health Services Act. But Plaintiffs adduce no admissible evidence showing that a more stringent background check applies. If Plaintiffs find this duty outside the Home Health Services Act, the Court points out the Home Health Services Act applies and Gulfshore complied with the provisions of the Act. Gulfshore meets its burden of showing it ran a proper background check and verified Samuels' credentials.

Nor do Plaintiffs point to any Florida statute showing the duty to drive safely is nondelegable. As discussed, the Home Health Services Act allows a nursing assistant to drive a client. Gulfshore contracts out the performance of the client's requested assistance—after Gulfshore verifies the background and refers the nursing assistant, it is no longer liable for any negligence by the nursing assistant in helping the client. Gulfshore meets its burden of proof by showing Florida law does not impose a nondelegable duty on nurse registries for the negligence of independent contractor nursing assistants.

Seeking to find a duty breached by Gulfshore, Plaintiffs claim Gulfshore "failed to comply with

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[5] In the amended complaint, Plaintiffs plead "Gulfshore breached its nondelegable duty for the protection of Geraldine's widower and daughters." (Doc. 53 at 7). The duty owed to the Jennings family is the same duty owed to any member of the public.

CFR Sec 37.171 or Sec 37.713."[6] Yet these regulations do not apply. CFR Sec. 37.171 and Sec. 37.713 are federal regulations requiring private entities that operate fixed route or demand responsive transportation services (such as Uber and Lyft) to avoid disparately treating disabled customers and properly train drivers to do so. *See* 49 CFR §§ 37.171, 37.173. There is no evidence the client was disabled, and Gulfshore neither operates a fixed route system nor provides responsive transportation services.

Gulfshore is entitled to summary judgment on Count III: it meets its burden of proof by adducing evidence showing it complied with its duties before referring Samuels to drive the client.

CONCLUSION

This litigation arises from a tragedy. The Court empathizes with Jennings' husband and daughters and appreciates the magnitude of the loss. The Court understands they want justice and to hold accountable those whose actions caused their loved one's death. But there is no evidence Gulfshore violated the duty of care it owed to Jennings. Samuels was an independent contractor who worked with clients referred by Gulfshore. There was no joint venture. Gulfshore ran the required background checks before referring Jennings to clients. Under Florida law, it could not monitor or supervise her

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[6] This alleged failure comes from an inadmissible opinion of Dr. Rubino.

work. The Home Health Services Act permits a nursing assistant to drive a client, and Gulfshore fulfilled its legal duty before referring Samuels to the client. Plaintiffs present no *admissible* evidence supporting their claims. The Court concludes Gulfshore was not negligent and bears no legal responsibility for Jennings' tragic death. Gulfshore is entitled to summary judgment on all counts.

Accordingly, it is now

ORDERED:

1. Defendant Gulfshore Private Home Care, LLC's Fourth Motion for Summary Judgment (*Doc. 155*) is **GRANTED**.

2. The Amended Complaint (*Doc. 53*) is **DISMISSED** with prejudice

3. The Clerk shall enter judgment accordingly, terminate all remaining deadlines and motions, and close the file.

DONE and ORDERED in Fort Myers, Florida, on November 23, 2020.