Groover v. Polk County Bd. of County Comm'Rs

United States District Court for the Middle District of Florida, Tampa Division

November 9, 2021, Decided; November 9, 2021, Filed

Case No: 8:18-cv-2454-KKM-TGW

Reporter

2021 U.S. Dist. LEXIS 224987 *

SHERRY GROOVER, as Personal Representative of the Estate of JOHN DARRELL HAMILTON, deceased, for the benefit of his survivors and estate; SHERRY GROOVER, individually; AIMEE HAMILTON GOSS; JULIE JACOBY; and LOIS FULKERSON, Plaintiffs, v. POLK COUNTY BOARD OF COUNTY COMMISSIONERS; CITY OF WINTER HAVEN; JASON MONTGOMERY, individually; TIMOTHY CHRISTENSEN, individually; CORY HART, individually; and JUSTIN RINER, individually, Defendants.

Counsel: [*1] For Sherry Groover, as personal representative of the estate of John Hamilton, deceased, for the benefit of his survivors and estate, Sherry Groover, individually, Julie Sue Hamilton Jacoby, individually, Louis Fulkerson, individually, Amiee Hamilton Goss, Plaintiffs: James Roscoe Tanner, LEAD ATTORNEY, Tanner Law Group PLLC, Tampa, FL USA; Marie A. Mattox, LEAD ATTORNEY, Marie A Mattox PA, Tallahassee, FL USA.

For Polk County Board of County Commissioners, Defendant: Barbara W. Davis, LEAD ATTORNEY, Campbell Trohn Tomayo & Aranda PA, Lakeland, FL USA; Jonathan Barnet Trohn, LEAD ATTORNEY, Valenti, Campbell, Trohn, Tamayo & Aranda, PA, Lakeland, FL USA.

For City of Winter Haven, Florida, Jason Montgomery, individually, Cory Hart, individually, Defendants: Jenna Marie Winchester, S. Renee Lundy, William E. Lawton, LEAD ATTORNEYS, Gail C. Bradford, Dean, Ringers, Morgan & Lawton, PA, Orlando, FL USA; Eric J. Netcher, Osceola County Circuit Court, Kissimmee, FL USA.

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For Justin Riner, individually, Defendant: Jenna Marie Winchester, S. Renee Lundy, William E. Lawton, LEAD ATTORNEYS, Gail C. Bradford, Dean, Ringers, Morgan & Lawton, PA, Orlando, FL USA; Eric J. Netcher, Osceola County Circuit Court, Osceola County Courthouse 2 Courthouse Square, Kissimmee, FL USA; Neal L. O'Toole, LEAD ATTORNEY, Lilly, O'Toole & Brown, LLP, Bartow, FL USA.

Judges: Kathryn Kimball Mizelle, United States District Judge.

Opinion by: Kathryn Kimball Mizelle

Opinion

ORDER

In May 2014, John Hamilton suffered a heart attack at his home and died in front of his mother, Lois Fulkerson. Despite Fulkerson's efforts to seek emergency medical assistance, she told the 911 operator before help

arrived that Hamilton was dead and it was too late. The paramedic shortly thereafter confirmed that Hamilton was, tragically, dead. Within weeks of her son's death, Fulkerson filed an official complaint with Polk County alleging that the medical personnel provided insufficient care to her son. Over the course of the next two years, Hamilton's sister and mother continued to press their belief that, had medical personnel not been negligent, Hamilton could have survived, including filing a second complaint with Polk County [*3] in June 2015, sending numerous emails complaining of the care provided, and consulting with several lawyers. But they did not initiate this action until May 2018, four years after Hamilton's death.

In their Corrected Fifth Amended Complaint, Plaintiffs Sherry Groover (as representative of the estate of John Darrell Hamilton and individually), Aimee Hamilton Goss, Julie Jacoby, and Lois Fulkerson allege that the Individual Defendants, who are emergency medical technicians (EMTs) for Polk County and the City of Winter Haven, failed to administer life-saving care to Hamilton when they responded to his mother's 911 call, resulting in Hamilton's death. (Doc. 151.) Plaintiffs bring various claims under federal and state law, including Fourteenth Amendment violations under the federal constitution, wrongful death, professional and common law negligence, and negligent training. *(Id.)* Defendants Polk County Board of County Commissioners, City of Winter Haven, Jason Montgomery, Timothy Christensen, Cory Hart, and Justin Riner move for summary judgment against the Plaintiffs. (Docs. 188, 189, 190, 191.) The Defendants also move to exclude Plaintiffs' experts. (Docs. 210, 211.)

The Plaintiffs' claims sounding in negligence [*4] are time-barred, and the Plaintiffs fail to establish sufficient facts for a reasonable jury to conclude that, more likely than not, the Defendants caused Hamilton's death. And even if Plaintiffs showed sufficient evidence of causation, the Plaintiffs have not established sufficient facts to prove that the Individual Defendants violated Hamilton's substantive due process rights through conduct that amounted to a "purpose to cause harm" or more than deliberate indifference. Alternatively, the Individual Defendants are entitled to qualified immunity because it was not clearly established that their conduct in this factual situation satisfied that extremely high standard. Finally, the Plaintiffs conspiracy claims fail for lack of causation and because there are no actionable underlying tort or constitutional claims. For all these reasons, the Defendants' Motions for Summary Judgment are **GRANTED**.

I. BACKGROUND

Early in the morning on May 3, 2014, Hamilton suffered a heart attack at the home he shared with his mother, Fulkerson. (Doc. 151 ¶¶ 12, 14.) When Hamilton began to feel ill, he asked Fulkerson to call 911. (Doc. 187 ¶ 6; Doc. 198 ¶ 6.) She knew something was terribly wrong by the [*5] sound of his voice and called 911 at 5:23 A.M. (Doc. 187 ¶ 8; Doc. 198 ¶ 8.) While Fulkerson was still on the line with the 911 operator, Hamilton fell down the stairs and hit his head on the terrazzo floor. (Doc. 187 ¶ 9; Doc. 198 ¶ 9; Doc. 203-14.) The 911 operator instructed Fulkerson to do CPR; she attempted to do chest compressions but was too weak due to her own health problems. (Doc. 187 ¶¶ 4, 10; Doc. 198 ¶¶ 4, 10.) Fulkerson was screaming and inconsolable throughout the 911 call despite the operator's best efforts to calm her down. (Doc. 203-14.) At this point, Fulkerson told the operator that Hamilton was unresponsive, and she thought he was dead. (Doc. 187 ¶¶ 11-12; Doc. 198 ¶¶ 11-12.) Fulkerson also described Hamilton as "getting stiff." (Doc. 203-14 at 4.)

At 5:32 A.M.—nine minutes after Fulkerson first called 911—two emergency medical response teams arrived

separately to the house, one from the City and the other from the County. (Doc. 187 ¶¶ 16, 19.) The City team, which arrived at 5:32:22 A.M., consisted of three firefighters/EMTs: Jason Montgomery, Justin Riner, and Cory Hart. (Doc. 187 ¶ 15.) The County team, which arrived at 5:32:29 A.M., consisted of one paramedic, [*6] Emery Roberts,[1] and one firefighter/EMT, Timothy Christensen. (Doc. 187 ¶¶ 16, 19.)[2] At this point, the parties' stories diverge.

According to Defendants, the City team (EMTs Montgomery, Riner, and Hart) arrived just before the County team (Paramedic Roberts and EMT Christensen) and entered the residence first. (Doc. 187 ¶¶ 19-20; Doc. 186-9 at 25.) A police officer reported that Fulkerson told him that night that she informed the EMTs upon arrival, "It's too late, he's dead," (Doc. 187 ¶ 14; Doc. 186-4 at 40; Doc. 203-61 at 35-36), although Fulkerson now admits making that statement only to the 911 operator, (Doc. 186-4 at 40). EMT Montgomery checked Hamilton's pulse and immediately started CPR. (Doc. 187 ¶ 20; Doc. 186-9 at 32.) When Paramedic Roberts[3] arrived, he also checked Hamilton's carotid pulse. (Doc. 187 ¶ 21; Doc. 198 ¶ 21.) Then, as the Defendants tell it, the emergency teams moved Hamilton to a larger space and performed an EKG. (Doc. 187 ¶ 22; Doc. 186-9 at 47-48; Doc. 192-2 at 10-12, 26.) Paramedic Roberts, who was monitoring the EKG machine, declared Hamilton dead at 5:36 A.M. after reading the EKG results. (Doc. 187 ¶ 26; Doc. 198 ¶ 100; Doc. 186-9 at 71-72.) They [*7] did not provide additional resuscitation efforts after Roberts determined that any efforts were futile. According to them, there were no signs of life from the time the first EMTs arrived on the scene until Roberts declared him dead. (Doc. 187 ¶ 26.) In total, the City and County teams provided approximately four minutes of emergency care to Hamilton.

Plaintiffs tell a different story. As Fulkerson (Hamilton's mother) remembers it, Paramedic Roberts and EMT Christensen (the County team) entered the residence first; she does not ever remember seeing members from the City team in the residence at all. (Doc. 198 ¶¶ 97-98; Doc. 203-61 at 50, 56, 57.) At no time did Fulkerson observe any City or County emergency personnel attempt CPR on Hamilton. (Doc. 203-61 at 49.) Further, Fulkerson claims no EKG was ever performed and, after Paramedic Roberts declared Hamilton dead, no other life saving measures were attempted. (Doc. 203-61 at 49-51.) Fulkerson says she attempted to tell Paramedic Roberts that Hamilton "continued to mumble and try to speak," but he ignored her. (Doc. 198 ¶ 102; *see also* Doc. 203-61 at 47-48.) Instead, he rolled Hamilton over and told EMT Christensen that a dark area [*8] on Hamilton's back was lividity, even though Fulkerson told Paramedic Roberts that the dark area was a birth mark. (Doc. 198 ¶ 103; Doc. 203-61 at 47-48.)

After these events, Paramedic Roberts filled out a report documenting that Hamilton was cold and had signs of lividity and rigor mortis. (Doc. 198 ¶ 104; Doc. 203-5 at 4.) County medical personnel have testified that lividity and rigor mortis typically set in around one hour after death, meaning these assessments were probably incorrect. (Doc. 98 ¶ 106; Doc. 187 ¶ 79; Doc. 203-67 at

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[1] Paramedic Roberts passed away in 2016 and was dismissed from this action. (Doc. 34.)

[2] Plaintiffs contend that they are "without knowledge, and therefore, den[y]" the arrival sequence of the Defendants, (Doc. 198 ¶ 19), but at this stage, they must proffer evidence to rebut the facts put forth by Defendants to render them disputed. *See Celotext Corp. v. Catrett*, 477 U.S. 317, 324 (1986).

[3] Paramedic Roberts was undisputedly the person of highest rank on the scene. Plaintiffs do not challenge that the EMTs assist and must defer to the judgment of the paramedic. (Doc. 187 ¶¶ 34-35; Doc. 198 ¶¶ 34-35.)

44-45, 79-80; Doc. 203-64 at 15-16; Doc. 203-36 at 3.) Dr. Stephen Nelson, a pathologist and medical examiner, performed an autopsy on Hamilton and determined that the cause of death was a heart attack and that his manner of death was natural. (Doc. 203-64 at 14, 16.) He also testified that he did not receive EKG strips for Hamilton, but that it is not typical for the medical examiner to receive EKG strips with the medical file when conducting the autopsy. (Doc. 203-64 at 13-14.)

After Hamilton's death, Fulkerson filed a complaint with Polk County in June 2014. (Doc. 203-61 at 71.) Groover, Hamilton's sister and representative of the estate, contacted multiple [*9] attorneys beginning in September 2014 to help her investigate the care given to her brother. (Doc. 187 ¶ 57; Doc. 198 ¶ 57.) By May 2015, Groover and Fulkerson had obtained documentation regarding the EMS care provided to Hamilton and the audio recording of the 911 call. (Doc. 187 ¶ 58; Doc. 198 ¶ 56.)

Groover filed a second complaint with the County in May 2015. (Doc. 193-1 at 9.) She also sent multiple emails to the County officials between May 2015 and September 2015 indicating that she believed negligence by the paramedic and EMTs caused her brother's death. (Doc. 193-1 at 52-64.) In June 2015, the County opened an administrative investigation into Plaintiffs' allegations that the emergency services personnel failed to render any emergency aid to Hamilton and failed to revive him. (Doc. 192-5 at 15.) Following the investigation, the County acknowledged that Paramedic Roberts followed the wrong emergency protocol in his care for Hamilton and that, if Paramedic Roberts had not died before the investigation, he would have been disciplined. (Doc. 198 ¶ 60; Doc. 203-36 at 2-3.) The County's investigation made no findings about the EMTs' care of Hamilton.

The City and County did not initially [*10] provide Groover and Fulkerson with a copy of Hamilton's EKG strip and, according to Plaintiffs, eventually provided them with a strip that does not belong to Hamilton. (Doc. 187 ¶ 59; Doc. 198 ¶ 56, 58; Doc. 203-61 at 75-76, 80; Doc. 203-68 at 59-61.) Defendants argue that the EKG strip was not initially provided due to an administrative oversight. (Doc. 187 ¶ 83.) Fulkerson and Groover, although clearly concerned about the propriety of care provided to Hamilton, did not secure representation for this action until Dr. Nelson, the medical examiner, sent Groover an email on June 11, 2016, stating that Hamilton's file contained no EKG strip. (Doc. 203-10; Doc. 203-77 at 2.)

On May 3, 2018, Plaintiffs sued Jason Montgomery, Timothy Christensen, Cory Hart, Justin Riner (collectively, Individual Defendants), the City, and the County, in state court. (Doc. 1-3.) Defendants removed to this Court and Plaintiffs filed an amended Complaint. (Docs. 1, 2.) The Amended Complaint was dismissed without prejudice and Plaintiffs filed a Second Amended Complaint. (Docs. 90, 98.) This Court granted in part Defendants' motions to dismiss. (Doc. 117.) Plaintiffs filed multiple other amended complaints, eventually [*11] filing a Corrected Fifth Amended Complaint, which is now the operative complaint. (Doc. 151.) En route to the final pleadings, this Court dismissed several counts. (Doc. 134.) In its final form, the Corrected Fifth Amended Complaint alleges eight kinds of claims: (1) wrongful death; (2) wrongful death — manslaughter; (3) Fourteenth Amendment violations; (4) common law civil conspiracy; (5) conspiracy to violate constitutional rights; (6) common law negligence; (7) professional negligence; and (8) common law negligent training. (Doc. 151.)

Defendants move to exclude Plaintiffs' experts, (Docs. 210, 211), and for summary judgment on all counts, (Docs. 188, 189, 190, 191).

II. LEGAL STANDARD

Summary judgment is appropriate if no genuine dispute of material fact exists and the moving party is entitled to judgment as a matter of law. Fed R. Civ. P. 56(a). A fact is material if it might affect the outcome of the suit under governing law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

A moving party is entitled to summary judgment when the nonmoving party "fail[s] to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof." *Celotext Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The movant always bears the initial burden of informing the district court of the basis for its [*12] motion and identifying those parts of the record that demonstrate an absence of a genuine issue of material fact. *Clark v. Coats & Clark, Inc.*, 929 F.2d 604, 608 (11th Cir. 1991).

When that burden is met, the burden shifts to the nonmovant to demonstrate that there is a genuine issue of material fact, which precludes summary judgment. *Id.* The nonmoving party must "go beyond the pleadings and her own affidavits" and point to evidence in the record that demonstrates the existence of a genuine issue for trial. *Celotex*, 477 U.S. at 324 (quotation omitted). The Court reviews all the record evidence and draws all legitimate inferences in the nonmoving party's favor. *Cleveland v. Home Shopping Network, Inc.*, 369 F.3d 1189,1192-93 (11th Cir. 2004).

III. ANALYSIS

The Court first addresses Defendants' preliminary argument that the Individual Plaintiffs are not proper parties and then addresses Defendants' arguments that they are entitled to summary judgment on each of Plaintiffs' claims.

A. Individual Plaintiffs Are Not Proper Parties

Defendants contend that they are entitled to summary judgment on the claims brought by the Individual Plaintiffs because those Plaintiffs are improper parties. (Doc. 189 at 6-7; Doc. 190 at 11-12; Doc. 191 at 10-11; Doc. 188 at 5-6.) In its first dismissal order, this Court ruled that the Individual Plaintiffs may recover (if at all) [*13] only under the wrongful death claims because the Individual Plaintiffs lack standing to bring any of the other claims. (Doc. 117 at 4-5.) So the only remaining question is whether the Individual Plaintiffs are proper parties to the wrongful death claims.

Plaintiffs concede in their responses to Defendants' Motions for Summary Judgment that the Individual Plaintiffs are "not parties to the wrongful death claim[s]" under Florida Law but rather are "entitled to damages as [] survivor[s] of Mr. Hamilton." *(See, e.g.*, Doc. 200 at 3.); *Wagner, Vaughan, McLaughlin & Brennan, P.A. v. Kennedy Law Grp.*, 64 So. 3d 1187, 1191 (Fla. 2011) ("[T]he personal representative is the only party with standing to bring a wrongful death action to recover damages for the benefit of the decedent's survivors and the estate."). While it is true that survivors may not bring "independent action[s]" for wrongful death under section 768.20, the survivors may still "participate in the single legal action filed by the estate." *Wagner*, 64 So. 3d at 1191; *see also Wiggins v. Est. of Wright*, 850 So. 2d 444, 446 (Fla. 2003). But "[t]he survivors are not parties to the wrongful death litigation, even when the claims are brought for their benefit." *Heiston v. Schwartz & Zonas, LLP*, 221 So. 3d 1268, 1271 (Fla. 2d DCA 2017) (quotation omitted).

Thus, to the extent Sherry Groover (in her individual capacity), Julie Jacoby, Lois Fulkerson, and Aimee

Hamilton Goss[4] continue to assert wrongful [*14] death claims as individuals, rather than in their capacities as survivors, summary judgment on any such claims is granted and the Court strikes them as Individual Plaintiffs.

B. Claims Sounding in Negligence

The Court next addresses Defendants' arguments that they are entitled to summary judgment on the claims Plaintiffs assert against the Defendants that sound in negligence (i.e., state-law claims for wrongful death, wrongful death — manslaughter, negligence, and negligent training).

1. Wrongful Death

[4] Defendants also argue that Aimee Hamilton Goss is not a proper plaintiff because she was not added until Plaintiffs' Fourth Amended Complaint filed on October 2, 2020, (Doc. 137), and her addition does not relate back to the original pleading under Federal Rule of Civil Procedure 15(c). *See Cliff v. Payco Gen. Am. Credits, Inc.*, 363 F.3d 1113, 1131-33 (11th Cir. 2004) (applying Rule 15(c) to a complaint that added a new plaintiff). This argument fails. Goss's addition to the lawsuit did not in any way alter the claims being brought against Defendants and did not unfairly "prejudice [Defendants] in defending on the merits[.]" Fed. R. Civ. P. 15(c)(1)(C); *cf. Makro Cap. of Am., Inc. v. UBS AG*, 543 F.3d 1254, 1259 (11th Cir. 2008) (holding an amended complaint adding a new plaintiff did not relate back where the new complaint "widely diverge[d]" from the former complaint in that it fundamentally changed the "nature" of the action). Indeed, since Goss appears now in her capacity only as a survivor beneficiary as prescribed under Florida law, Defendants were in theory on notice of all survivors' interests from the onset of the wrongful death claims. Regardless, since Goss is not a party to the action in a traditional sense, Defendants' argument is moot on this point.

a. Statute of Limitations

Defendants argue that they are entitled to summary judgment on Plaintiffs' wrongful death claims because those claims are outside the applicable statute of limitations. (Doc. 188 at 11-13; Doc. 189 at 12-13; Doc. 190 at 6-10; Doc. 191 at 5-9.)

This Court previously explained that section 95.11(4)(b), Florida Statutes, provides the statute of limitations for Plaintiffs' wrongful death claims because it "appl[ies] to wrongful death actions in cases where the basis for the action is medical [negligence]." (Doc 117 at 6 (quoting *Ash v. Stella*, 457 So. 2d 1377, 1379 (Fla. 1984)).) Under section 95.11(4)(b), "[a]n action for medical malpractice shall be commenced within 2 years from the time [of the incident]" or "within 2 years from the time the incident is discovered[] [*15] or should have been discovered." But there is an exception where "it can be shown that fraud, concealment, or intentional misrepresentation of fact prevented the discovery of the injury." *Id.* Where such a showing is made, "the period of limitations is extended forward 2 years from the time that the injury is discovered or should have been discovered with the exercise of due diligence." *Id.*

In its prior dismissal order, this Court ruled "[a]t th[at] point in the lawsuit Plaintiffs' allegations" that Defendants concealed their failure to perform an EKG were sufficient to toll the statute of limitations until June 22, 2016, when Plaintiffs allegedly received "confirmation by the Polk County medical examiner's office that an EKG was not done on Hamilton[.]" (Doc. 117 at 6-7.) The Court emphasized that, at the motion to dismiss stage, Plaintiffs' allegations of concealment were sufficient to defeat Defendants' statute-of-limitations argument.

But at the summary judgment stage, Plaintiffs need to do more than rely on allegations. *Stewart v. Booker T.*

Washington Ins., 232 F.3d 844, 851 (11th Cir. 2000). The moving party, here the Defendants, bears the initial burden to demonstrate that there is no dispute of material fact that would preclude summary judgment. *[*16] See Clark*, 929 F.2d at 608. If they make such a showing, the burden then shifts to the Plaintiffs to point to specific evidence that creates a dispute of fact and precludes summary judgment. *Id.; see also Celotex*, 477 U.S. at 324 ("[T]he nonmoving party [must] go beyond the pleadings and by her own affidavits, or by the depositions, answers to interrogatories, and admissions on file, designate specific facts showing that there is a genuine issue for trial." (quotations omitted)).

Defendants argue that they are entitled to summary judgment on the statute-of-limitations issue because there is significant evidence that Hamilton's mother (Fulkerson) and sister (Groover) had knowledge that Defendants' "negligence or worse caused Hamilton's death" "well within two years" from when Hamilton died. (Doc. 190 at 7-9.) For support, Defendants point to the undisputed fact that both Fulkerson and Groover knew of Hamilton's injury (his death) on the day it occurred—May 3,2014. (Doc. 190 at 7.) Fulkerson filed a complaint with Polk County the following month raising concerns that the medical personnel did not have the proper equipment and did not attempt to resuscitate her son. (Doc. 203-61 at 71.) Groover then contacted multiple attorneys beginning [*17] in September 2014 to help her investigate the care given to her brother, indicating she suspected that negligence caused her brother's death. (Doc. 187 ¶ 57; Doc. 198 ¶ 57.) Further, Groover filed another complaint with the County within roughly a year of Hamilton's death alleging that the paramedics "did nothing to try to revive [Hamilton]" and asking that they be "reprimanded in some way." (Doc. 193-1 at 9-11.) Groover also emailed the investigator of the complaints at Polk County numerous times between May and September 2015, indicating that Groover believed negligence caused Hamilton's death. (Doc. 193-1 at 52-64 (alleging that the paramedic "apparently put the sticky pads on my brother once my Mom was out of the house to as he says 'CYA'"; "I will hold my head high in this fight for accountability for what I know was negligence on the part of Polk County Fire Rescue"; claiming that Fulkerson and herself "are the victims of negligence of the Polk County Fire Rescue and my brother is dead").)

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says 'CYA'"; "I will hold my head high in this fight for accountability for what I know was negligence on the part of Polk County Fire Rescue"; claiming that Fulkerson and herself "are the victims of negligence of the Polk County Fire Rescue and my brother is dead").)

Plaintiffs argue that the Defendants "conspired to cover up the fact that the proper emergency medical response protocol was not followed." (Doc. 199 at 7; Doc. 200 at 7; Doc. 201 at 4; Doc. 202 at 4.) According to Plaintiffs, the lack of an EKG in Dr. Nelson's file confirms that Defendants never administered one that evening. And Plaintiffs contend that "[e]vidence of the cover-up was not discovered until June 22, 2016, when Polk County district medical examiner[, Dr. Nelson,] informed Plaintiff Groover that he was not in possession of an EKG strip and had never been provided a copy of the strip." (Doc. 199 at 7; Doc. 200 at 7; Doc. 201 at 4; Doc. 202 at 4; Doc. 151 ¶ 29; Doc. 203-10.) So Plaintiffs claim that the causes of action did not accrue until June 22, 2016, when Dr. Nelson "confirmed" via email [*20] that there were "no EKG strips that have ever been located or identified to match Hamilton." (Doc. 151 ¶ 29.) Plaintiffs also point to evidence that they were initially not provided with Hamilton's EKG strips when they requested Hamilton's file and eventually were provided with EKG strips that do not belong to Hamilton. (Doc. 198 ¶¶ 87, 89, 113; Doc. 203-61 at 76-77, 80; Doc. 203-68 at 59-61.) Defendants counter that Plaintiffs misunderstood Dr. Nelson's comments at the time as admitting that no EKG was done, but Dr. Nelson has since clarified that he does not typically receive the EKG strips. (Doc. 187 ¶ 48; Doc. 203-64 at 13-14.) Although there is a dispute as to the meaning of Dr. Nelson's email about the lack of an EKG strip in Hamilton's file and why it was belatedly produced to Plaintiffs, those disputes of fact about the "cover-up" are not ultimately dispositive as to the issue of tolling given the other undisputed evidence that Plaintiffs knew of a "reasonable possibility" that medical negligence caused Hamilton's death.

Section 95.11(4)(b) provides that the two-year statute of limitations for a medical malpractice action begins to run when Plaintiffs knew or should have known of the incident, [*21] meaning when the plaintiff has knowledge of the injury and knowledge of a "reasonable possibility" that it was caused by medical negligence. *Tanner v. Hartog*, 618 So. 2d 177, 181-82 (Fla. 1993); *see also Lee v. Simon*, 885 So. 2d 939, 940 (Fla. 4th DCA 2004). But "fraud, concealment, or intentional misrepresentation of fact [that] prevent[s] the discovery of the injury" tolls the statute of limitations. In that case, the two-year clock begins to run when Plaintiffs discovered or should have discovered the injury despite the fraud, concealment, or misrepresentation. § 95.11(4)(b).

Here, it is undisputed that the Plaintiffs had knowledge of Hamilton's injury (his death) and the alleged misconduct (failure to provide any resuscitation measures) immediately after it occurred on May 3, 2014. Thus any concealment about the EKG or lack thereof did not "prevent" Plaintiffs from learning about a "reasonable possibility" of medical negligence. Fulkerson is the primary eyewitness on behalf of Plaintiffs, and her allegations about the theory of liability—that the lack of any care by the Individual Defendants caused Hamilton's death—have remained constant since at least June 2014. Further, the following undisputed evidence does not allow a reasonable jury to conclude that Plaintiffs were unaware of a "reasonable [*22] possibility" that Hamilton's death was caused by medical negligence before June 22, 2016: (1) Fulkerson and Groover both filed complaints with the County in the year following Hamilton's death seeking an investigation into the medical personnel who responded that evening; (2) Groover sent multiple emails to Polk County in 2015 indicating her belief that

negligence caused Hamilton's death; and (3) Groover began contacting attorneys in September 2014 about pursuing this action. *See Roberts v. Casey*, 413 So. 2d 1226, 1229 (Fla. 5th DCA 1982) (affirming a trial court's grant of summary judgment because the statute of limitations in Section 95.11(4)(b) "begins to run when the plaintiff has been put on notice of an invasion of his legal rights"); *see also Arrington v. Walgreen Co.*, 416 F. App'x 846, 848-49 (11th Cir. 2011) (affirming the district court's grant of summary judgment on Florida medical negligence claim because two years had passed since plaintiff first "knew of the cause of [the] injuries [and] suspected those injuries were proximately caused by negligence"). Throughout the course of this case—from their presuit investigation through completion of discovery—Plaintiffs' theory of liability has not changed: Defendants failed to provide sufficient lifesaving measures to Hamilton that resulted in his death. The only conclusion [*23] a reasonable jury could come to here is that Plaintiffs knew very early on of a "reasonable possibility" that medical negligence caused Hamilton's death, and thus the two-year statute of limitations commenced prior to May 3, 2016. Since they filed this wrongful death suit on May 3, 2018, a full four years after the incident, their suit for wrongful death is outside the applicable statutory period and is barred under Florida law.

Plaintiffs argue that the Defendants concealed that an EKG was not performed on Hamilton until Dr. Nelson's June 22, 2016 email, which tolled the statute of limitations under the "fraud, concealment, or intentional misrepresentation of fact" statutory exception. *See* § 95.11(4)(b), Fla. Stat. Setting aside whether events leading up to Dr. Nelson's email constitute "fraud, concealment, or intentional misrepresentation of fact," this argument fails. As a threshold matter, Plaintiffs do not even argue that Defendants concealed the "incident" such that they were prevented from discovering that Defendants' negligence caused Hamilton's death—they instead argue that they did not discover until June 2016 evidence of the Defendants' attempts to conceal that not all proper medical protocols were [*24] followed. (Doc. 201 at 4.) Whether true or not, it is irrelevant to the tolling provision which applies when the acts of concealment concern knowledge of the injury and incident itself, not knowledge of attempts to conceal. Indeed, the tolling provision applies only where "concealment . . . *prevent*[s] the discovery of the injury." § 95.11(4)(b) (emphasis added). Florida courts have interpreted "injury" to include both the actual injury and the "incident" of medical negligence. *See Phillips v. Mease Hosp. & Clinic*, 445 So. 2d 1058, 1061 (Fla. 2d DCA 1984).[5]

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[5] A careful reader of the text would naturally question why "injury" and "incident"—two clearly distinct terms used by the Florida legislature—have been assigned the same meaning. *See Nardone v. Reynolds*, 333 So. 2d 25, 37 (Fla. 1976), *modified on other grounds by Tanner*, 618 So.2d 177 ("[F]raudulent concealment by defendant so as to prevent plaintiffs from discovering their *cause of action*, where the physician has fraudulently concealed the facts showing negligence, will toll the statute of limitations until the facts of such fraudulent concealment can be discovered through reasonable diligence." (emphasis added)); *see also Phillips v. Mease Hosp. & Clinic*, 445 So. 2d 1058, 1061 (Fla. 2d DCA 1984) ("Reading the statute as a whole therefore requires, in our opinion, that both 'incident' (or act) and 'injury' must be known and that fraud, concealment, or intentional misrepresentation of fact that conceals either will extend the limitations period."); *Bryant v. Adventist Health Sys. Sunbelt, Inc.*, 869 So. 2d 681, 685 (Fla. 5th DCA 2004) (noting that this "broad interpretation" has been "consistently followed"). Courts generally will not use words interchangeably when the plain text differentiates between them. *See* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* § 25, at 170 (2012) ("[A] material variation in terms suggests a variation in meaning. . . . [W]here the document has used one term in one place, and a materially different term in another,

Here, it is undisputed that Plaintiffs had knowledge of Hamilton's injury (his death) on the day it occurred, and as discussed above, they also knew there was a "reasonable possibility" that Hamilton's death was caused by medical negligence well before June 22, 2016, notwithstanding any confirmation about the existence of an EKG from Dr. Nelson. (Doc. 203-64 at 11.) This is clear from Groover's emails to the County alleging that the Defendants' negligence caused her brother's death, her attempts to secure legal representation, and her and Fulkerson's complaints filed within a year of Hamilton's death. *See, e.g., [*25] Lee v. Simon*, 885 So. 2d 939, 942 (Fla. 4th DCA 2004) ("In this case, the statute [of limitations] started running with the death of [the decedent. Plaintiff] cannot contest the fact that he knew both of the injury (death) and that negligence may have occurred. . . . [T]he statute of limitations . . . commences when [plaintiff] has notice of the injury and its possible cause by medical negligence."); *Townes v. Nat'l Deaf Acad., LLC*, 197 So. 3d 1130, 1137 (Fla. 5th DCA 2016) (affirming grant of summary judgment on medical malpractice claims where statute of limitations had expired because the evidence demonstrated plaintiff had prior knowledge of the injury and of "a reasonable possibility that the injury was caused by medical malpractice"). Dr. Nelson's email may corroborate Plaintiffs' narrative of the events that the EMTs and Paramedic Roberts did nothing to attempt to revive Hamilton, but the email does not diminish their earlier knowledge that satisfies a "reasonable possibility." *See McGinley v. Mauriello*, 682 F. App'x 868, 872 (11th Cir. 2017) ("The limitations clock begins running when a reasonable person would know they had a claim, not only when the facts crystallize into a slam-dunk case."); *see also Mullinax v. McElhenney*, 817 F.2d 711, 716 (11th Cir. 1987).

Therefore, because no reasonable jury could conclude that Plaintiffs lacked knowledge of the injury and of a reasonable possibility that the injury was caused [*26] by medical negligence well before May 2016, Defendants are entitled to summary judgment on Plaintiffs wrongful death claims because those claims are barred by the applicable statute of limitations.

b. Causation

Defendants argue that they are entitled to summary judgment on Plaintiffs' wrongful death claims because there is no admissible evidence of causation. (Doc. 188 at 13-14; Doc. 189 at 14-15; Doc. 190 at 12-16; Doc. 191 at 15-19.) The Court agrees.

As an initial matter, Plaintiffs wholly fail to point the Court to causation evidence to create a dispute of material fact as required at summary judgment. *See Clark*, 929 F.2d at 608. Instead, the Defendants identify the only potential causation evidence on behalf of Plaintiffs. They point to a comment in a rebuttal report by Fred Ellinger, Jr., one of Plaintiff's experts who is a nationally registered paramedic. (Doc. 192-4 at 59-65.) In his rebuttal report, Ellinger states:

> According to the American Heart association[,] the survival rate without CPR declines from 7%-10% for every minute that passes. Based on all estimates Mr. Hamilton was without CPR for approximately 7 to 8 minutes. Using these statistics from the American Heart Association, had CPR been [*27] continued . . . the likelihood of successful resuscitation of Mr. Hamilton could have been between 20% and 51%.

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the presumption is that the different term denotes a different idea."). This Court is bound by the Florida courts' interpretations of its own law, but notes that if the terms were interpreted according to their ordinary, distinct meanings, that Defendants' argument would be all the more strong as Plaintiffs certainly were not prevented from learning of the injury—Hamilton's death—by any concealment the EKG.

(Doc. 192-4 at 64.) [6] Assuming the Court is obligated to address Ellinger's rebuttal report given that it was Defendants (rather than Plaintiffs) that identified it and then the Plaintiffs entirely ignored in it their responses to the motions for summary judgment, the Court concludes (1) that Ellinger's causation testimony constitutes inadmissible expert testimony under the standards set forth in Rule 702 and *Daubert*, (Docs. 210 & 211),[7] and (2) even if the evidence was admissible, it is too speculative and imprecise to create a dispute of fact as to whether the Defendants more likely than not caused Hamilton's death.

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[6] Ellinger's initial expert report offers no estimation about Hamilton's chance of survival. At best, he opines that Paramedic Roberts's failure to follow appropriate emergency protocol "certainly eliminated any chance of survival of the decedent and contributed to this death." (Doc. 210-2 at 3-4.) That conclusion is insufficient to satisfy Plaintiffs' burden of establishing that Defendants' negligence more likely than not caused Hamilton's death. And at several other points in his initial report, Ellinger opined that Roberts's failings only *"may* have contributed to the death of the decedent," (Doc. 210-2 at 2, 3, 5 (emphasis added)), which is also insufficient to establish causation. Additionally, Ellinger's initial and rebuttal reports both focus on Roberts's actions and omissions, not the remaining Individual Defendants.

[7] Neither the Defendants nor the Plaintiffs requested oral argument on the *Daubert* motions, and the Court concludes none is needed to address Ellinger's causation opinion. The parties had sufficient opportunity to present their arguments in the summary judgment and *Daubert* motions and responses. *See Williams v. Mosaic Fertilizer, LLC*, 889 F.3d 1239, 1249 (11th Cir. 2018) ("[W]e conclude that the District Court did not abuse its discretion in ruling on the admissibility of his opinion testimony without conducting [a *Daubert*] hearing. . . . [Parties] had sufficient opportunity to present [their arguments] to the Court [in their motions] before it decided the question.").

i. *Daubert* Analysis

Ellinger's expert testimony on causation is inadmissible under Rule 702 and the standards set forth in *Daubert*. (*See* Docs. 210 & 211.) Rule 702 requires that expert testimony meet four conditions: (1) the testimony "will help the trier of fact"; (2) "the testimony is based on sufficient facts or data"; (3) "the testimony is the product of reliable principles and methods"; and (4) "the expert has reliably applied the principles and methods to the [*28] facts of the case." *See also Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 592-93 (1993); *United States v. Frazier*, 387 F.3d 1244, 1260 (11th Cir. 2004) (mapping out a three-part inquiry for determining the admissibility of expert testimony focusing on "qualification, reliability, and helpfulness"). "The proponent of the expert testimony"—the Plaintiffs—"bear[] the burden of showing, by a preponderance of the evidence, that the expert satisfies each prong." *Hendrix ex rel. G.P. v. Evenflo Co.*, 609 F.3d 1183, 1194 (11th Cir. 2010). Because Ellinger is unqualified to render a medical causation opinion and Plaintiffs have not shown that his testimony is reliable, it is excluded.

The Court turns first to *Daubert's* qualification prong. Ellinger, as a paramedic rather than a physician, is likely qualified to opine on appropriate paramedic procedures and whether Roberts or the EMTs deviated from the appropriate standard of emergency care, but he is unqualified to render a medical causation opinion as to Hamilton's death. *See Martin v. Sowers*, 231 So. 3d 559, 564 (Fla. 3d DCA 2017) ("[I]t should be noted that expert testimony is required before a claim of third-party causation may be presented to the jury in the context of a medical malpractice claim."); *Wingster v. Head*, 318 F. App'x 809, 815 (11th Cir. 2009) (noting medical causation is a technical and scientific issue that requires specialized knowledge of an expert medical witness); *In re Abilify (Aripiprazole) Prods. Liab. Litig.*, 299 F. Supp. 3d 1291, 1361-68 (N.D. Fla 2018) (Rogers, C.J.)

(finding the expert "amply qualified" [*29] to offer a statistical analysis of the evidence but unqualified to offer expert opinions on medical causation). Though they bear the burden to show that the testimony satisfies each prong of the *Daubert* analysis, *see Hendrix ex rel. G.P.*, 609 F.3d at 1194, Plaintiffs do not meaningfully argue that Ellinger is qualified to render a medical causation opinion in their response to the motion seeking his exclusion as an expert witness on this issue. (Doc. 220 at 14-15.) To be sure, his initial and rebuttal reports identify his responsibilities as "offer[ing] expert opinions on whether the EMS response and care provided to Mr. John Hamilton, the decedent was timely and appropriately applied according to department protocol and accepted EMS standard of care." (Doc. 210-2 at 2, 15.) His background and experience all support his expertise in emergency care and paramedic procedures, and Ellinger's description of himself is likewise couched in those specialties. (Doc. 210-2 at 2, 15 ("[I am] considered an expert in EMS care and education.").) Nowhere in his reports does he purport to have the requisite scientific and technical training to render an opinion on medical causation, nor does his training or experience support such a finding [*30] by this Court. (Doc. 210-2 at 2.) Thus, Ellinger's expert testimony is excluded to the extent it constitutes a medical causation opinion as to Hamilton's death.

The Court turns next to *Daubert's* reliability prong. Plaintiffs have not shown that Ellinger bases his causation testimony on a reliable method and sufficient facts to calculate the survival rate as to Hamilton. When expert "testimony's factual basis, data, principles, methods, or their application are called sufficiently into question, . . . the trial judge must determine whether the testimony has a 'reliable basis in the knowledge and experience of [the relevant] discipline.'" *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 149 (1999) (alteration in original) (quoting *Daubert*, 509 U.S. at 592); *see also Weisgram v. Marley Co.*, 528 U.S. 440, 455 (2000) (noting that standards of reliability applied to an expert's methods are "exacting"); *Allison v. McGhan Med. Corp.*, 184 F.3d 1300, 1311-12 (11th Cir. 1999) ("The judge's role is to keep unreliable and irrelevant information from the jury because of its inability to assist in the factual determinations, its potential to create confusion, and its lack of probative value."). Ellinger concluded that, based on a generic statistic from the American Heart Association, Hamilton had anywhere from a "20% to a 51%" chance of survival with the continuation of CPR and the initiation [*31] of advanced care. (Doc. 192-4 at 64.) He does not specify what that advanced care would entail or whether the EMTs, as opposed to the paramedic, could administer it. As a result of that omission, he never specifies whether CPR or the "advanced care" is the substantial factor in survival or whether it is the combination of the two. At bottom, Ellinger bases his conclusion (a percentage spanning 31%) on a single statistic from the American Heart Association and a series of factual assumptions without accounting for particularized facts relevant to Hamilton's cause of death.

First, when determining the reliability of the method of calculating the survival rate for Hamilton, this Court may consider, among other things, "1) whether the expert's methodology has been tested or is capable of being tested; (2) whether the technique has been subjected to peer review and publication; (3) the known and potential error rate of the methodology; and (4) whether the technique has been generally accepted in the proper scientific community." *McDowell v. Brown*, 392 F.3d 1283, 1298 (11th Cir. 2004). It can also evaluate whether the expert relies on anecdotal evidence, such as case reports, and whether the expert improperly extrapolates. *Id.* The Eleventh Circuit [*32] has reminded district courts to "meticulously focus on the

expert's principles and methodology," "not on the conclusions that they generate." *Id.* This Court endeavors to do so here.

Ellinger's entire analysis rests on a single statistic from the American Heart Association. But he does not explain whether the American Heart Association statistic was subject to peer review and publication, the known and potential error rate of the statistic, and whether use of the statistic alone is considered the generally accepted technique for calculating the likelihood of survival and rendering an opinion as to the cause of death in the proper scientific field (of course, Ellinger is not a medical doctor, so is unqualified to opine as to whether it is a reliable methodology in the experience of the relevant medical field). Nor does Ellinger provide the American Heart Association data upon which the statistic relies, he does not confirm the data remains current, and he does not explain where the American Heart Association data derives. Thus, the Court cannot know whether his extrapolation of that lone statistic to Hamilton's circumstances is proper. Without any of the above antecedent information the [*33] Court cannot evaluate whether applying it here is a reliable method or based on reliable principles in the medical field for determining the cause of death and the likelihood of survival had CPR been implemented. *See Kumho Tire Co.*, 526 U.S. at 149; *Frazier*, 387 F.3d at 1265 (affirming the district court's exclusion of expert testimony as unreliable where there was "precious little in the way of a reliable foundation or basis" by which to assess the opinions and where the expert identified a probability the basis of which was "unclear, imprecise, and ill-defined"); *see also Arquette v. Eslinger*, No. 6:08-cv-1836-Orl-35DAB, 2010 WL 11453163, at *4 (M.D. Fla. Jan 22, 2010) (Scriven, J.) (excluding physician testimony on causation as "imprecise and unspecific," as well "as unhelpful to the trier of fact").

As for the sufficiency of facts and reliable application to the case, Ellinger fails to account for Hamilton's medical history—for example, whether he had any health conditions that might exacerbate a heart attack and potentially make CPR less efficacious, like coronary heart disease, diabetes, or obesity or even basic biological facts like his age—and Ellinger fails to address the events surrounding Hamilton's cardiac arrest—such as falling down the stairs and hitting his head on the terrazzo [*34] floor. *See Williams v. Mosaic Fertilizer, LLC*, 889 F.3d 1239, 1245, 1248-49 (11th Cir. 2018) (affirming exclusion of expert witness and noting that "the most significant problems with [the expert's] methodology" include "his failure to meaningfully rule out other potential causes of [the plaintiff's] medical conditions" and "his failure to account for the background risk of her conditions" "such as [her] obesity, allergies, lifestyle, exposure to secondhand smoke, or possible genetic predisposition"); *see also Hendrix ex rel. G.P.*, 609 F.3d at 1194 ("Although experts 'commonly extrapolate from existing data ... a district court [need not] admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert.' Rather, the trial court is free to 'conclude that there is simply too great an analytical gap between the data and the opinion proffered.'" (quoting *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997))). To render an opinion on survival rates reliable, a medical expert on causation of death would likely need to consider these decedent-dependent facts to establish "an appropriate 'fit' with respect to the offered opinion and the facts of the case." *McDowell v. Brown*, 392 F.3d 1283, 1299 (11th Cir. 2004) (quoting *Daubert*, 509 U.S. at 591).

Nor does Ellinger explain where he derived his factual basis that "Hamilton was without CPR for approximately 7 to 8 minutes." (Doc. 220-2 at 19.) The undisputed [*35] record is that Fulkerson called 911 at 5:23 A.M., *after* Hamilton began exhibiting symptoms. The undisputed record also shows that the first EMTs

arrived at 5:32:22 A.M., a span of 9 and a half minutes from the initiation of the 911 call, and that Roberts declared Hamilton dead at 5:36 A.M., four minutes after the first EMTs arrived. The record contains no medical expert testimony about the precise time that Hamilton went into cardiac arrest. Ellinger's "7 to 8 minutes" figure, although perhaps not demonstrably wrong, does not fully comport with the undisputed record that Hamilton could have been without CPR for more than 9 minutes, possibly longer if cardiac arrest began before Fulkerson sought help. And Ellinger's causation testimony of "up to 51% chance of surviving"[8] can only be reached by relying on the lowest American Heart Association percentage per minute (7%) and the least amount of time between the heart attack and the EMTs arrival (7 minutes). Anything more on either assumption renders Hamilton's survival rate less than "more likely than not" that he would have survived. Finally, if Hamilton's cardiac arrest occurred even half a minute before his mother called 911, then the [*36] outer bound of 10 minutes at a 10% reduction per minute without CPR renders Hamilton's survival rate zero, which Ellinger never mentions.

His lack of requisite qualifications and the fundamentally unreliable nature of Ellinger's causation testimony does not meet the "exacting" expert-testimony-reliability standards set out by the Supreme Court. Thus, the Court excludes the causation portion of Ellinger's testimony, which in turn leaves Plaintiffs without any evidence of causation, an element which requires medical expert testimony. Plaintiffs only other expert witness does not provide a causation opinion, as Plaintiffs admit. (Doc. 220 at 9 ("Dr. Diaz did not, however, offer an opinion as to causation.").)

ii. Speculative and Imprecise Nature of Ellinger's Testimony

Alternatively, even if Ellinger's causation testimony was admissible, that portion of his testimony is highly speculative and does not establish more likely than not that Defendants' omissions caused Hamilton's death; thus, it cannot create a dispute of material fact as to causation.

"[A] plaintiff in a medical malpractice action must show more than a decreased chance of survival because of defendant's conduct. [*37] The plaintiff must show that the injury more likely than not resulted from the defendant's negligence in order to establish a jury question on proximate cause." *Gooding v. Univ. Hosp. Bldg., Inc.*, 445 So. 2d 1015, 1020 (Fla. 1984); *see Prieto v. Total Renal Care, Inc.*, 843 F. App'x 218, 225 (11th Cir. 2021) ("In negligence actions Florida courts follow the more likely than not standard of causation and require proof that the negligence probably caused the plaintiff's injury." (quotation omitted)).[9] "A mere

[8] At one point in his rebuttal report, Ellinger opines, "Continuation of CPR and initiation of advanced care would have given Mr. Hamilton a chance of survival, *upwards of 51%* according to American Heart Association estimates." (Doc. 210-2 at 20 (emphasis added).) Given that application of the American Heart Association percentages would, under the best factual assumptions possible, render the upper limit 51% chance of survival, the Court assumes Ellinger's "upwards" statement is a typographical error. It would otherwise be excluded as per se unreliable using the methods and data Ellinger purports to rely upon.

[9] As Plaintiffs note, where there are multiple potential causes, the proximate cause standard is whether Plaintiffs have introduced evidence that the "negligence more likely than not was a substantial factor in causing" the death. (Doc. 220 at 13 (citing *Prieto*, 843 F. App x at 226).); see *also Ruiz v. Tenet Hialeah Healthsystem, Inc.*, 260 So. 3d 977, 981 (Fla. 2018). Plaintiffs here need not show that Defendants were the sole cause or the primary cause of Hamilton's death. But none of

possibility of such causation is not enough; and where the matter remains one of pure speculation or conjecture, or the probabilities are at best evenly balanced, the court has a duty to direct a verdict for the defendant." *Ponders v. United States*, No. 13-22876-CIV, 2014 WL 2612315, at *2 (S.D. Fla June 11, 2014) (Moreno, J.). A plaintiff cannot sustain the burden to prove causation "by relying on pure speculation—a rule that also applies to medical experts." *Cox v. St Josephs Hosp.*, 71 So. 3d 795, 799-800 (Fla. 2011).

Here, Ellinger opines that Hamilton's chances of survival would have been between 20-51% or "up to a 51% chance of surviving had CPR and advanced care been initiated immediately." (Doc. 192-4 at 64.) But that testimony is so imprecise, unspecific, and unhelpful that it amounts to "pure speculation" that cannot create a dispute of material fact for summary judgement purposes.

Ellinger reaches the 51% number only by assuming (1) Hamilton was without [*38] CPR for the lowest number of minutes permissible by the Plaintiffs' evidence (7 minutes); (2) assuming the survival rate without CPR declined by the lowest percentage (7%); (3) assuming the American Heart Association data is accurate and up to date; and (4) that extrapolation to Hamilton is appropriate. His rebuttal report does not account for an increased or decreased percentage based on Hamilton's individual characteristics (had he suffered a previous heart attack, was he within a healthy BMI, did he have comorbidities that impact cardiac arrest and survival rates) and it credits a timeline of seven minutes despite Fulkerson placing the 911 call nine minutes before the EMTs arrived. This myriad of stacked assumptions is highly speculative.

Further, Ellinger's rebuttal report does not unequivocally state that Hamilton would more likely than not have survived with CPR. Instead, he offers that the "resuscitation of Mr. Hamilton *could* have been between 20% and 51%." (Doc. 192-4 at 64 (emphasis added).) This broad range is far from a definitive statement that Hamilton's "injury more likely than not resulted from the defendant's negligence in order to establish a jury question on proximate [*39] cause" or that Defendants' failure "probably would have affected the outcome." *Gooding*, 445 So. 2d at 1020.[10] Further, Ellinger's percentage range of potential survival rates ignores the evidence showing that Hamilton may have been without CPR for more than nine and a half minutes and ignores the impact of the minutes, regardless of the exact number, that passed prior to the arrival of EMS personnel when Hamilton was certainly without CPR, thereby undercutting its value. (Doc. 187 ¶¶ 15-19.) In sum, even if a jury fully credited Ellinger's statement of causation that had CPR and other measures been immediately implemented Hamilton had a chance of survival anywhere from 20 to 51%, that statement alone is insufficient for a reasonable jury to find that Plaintiffs proved Hamilton's death "more likely than not resulted from the defendant's negligence," *Gooding*, 445 So. 2d at 1020, or that "the negligence probably caused" Hamilton's death, *Prieto*, 843 F. App'x at 225.

Therefore, in the alternative, Defendants are entitled to

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this negates the primary rule under Florida law that Plaintiffs need to show that Hamilton's death "more likely than not resulted from the defendant's negligence." *Gooding*, 445 So. 2d at 1020.

[10] Ellinger's initial report concludes even less, stating that Roberts' actions "certainly eliminated any chance of survival of the decedent and contributed to this death," (Doc. 210-2 at 3-4), and, worse yet, that Roberts's failings only "*may* have contributed to the death of the decedent," (Doc. 210-2 at 2, 3, 5 (emphasis added)). That evidence alone plainly fails to meet the causation standard under Florida law. *See Gooding*, 445 So. 2d at 1017-20.

summary judgment on their wrongful death claims based on lack of evidence of causation.

2. Wrongful Death — Manslaughter

Defendants next argue that Plaintiffs' claims for wrongful death - manslaughter under section 782.07, Florida Statutes, fail as a matter of law because "there [*40] is no such civil cause of action." (Doc. 188 at 16-18; Doc. 189 at 16-17; Doc. 190 at 16; Doc. 191 at 19-20.) They are correct. Section 95.11(10) eliminates a statute of limitations when an intentional tort constituting manslaughter as defined in section 782.07 forms the basis for the death giving rise to the wrongful death claim, but it does not create a new cause of action.

Plaintiffs have not pointed this Court to any authority establishing that the criminal manslaughter statute, section 782.07, Florida Statutes, creates a private right of action separate from a traditional wrongful death claim. The Defendants, on the other hand, identify a recent intra-district case where the court ruled that the same kind of wrongful death - manslaughter claim under section 782.07, Florida Statutes, must be dismissed because there is no separate civil remedy for manslaughter. *Haegele v. Judd*, No. 8:19-cv-2750-T-33CPT, 2020 WL 1640034, at *3 (M.D. Fla Apr. 2, 2020) (Covington, J.) (holding plaintiff could assert only traditional wrongful death claims and dismissing the separate wrongful death - manslaughter claim; see *also Featherstone v. AT&T*, No. 3:17cv837-MCR-HTC, 2019 WL 5460198, at *3 (N.D. Fla. Sept. 24, 2019) ("Criminal statutes ... do not generally create an independent cause of action for damages." (citations omitted)).

This Court concurs. No separate cause of action exists for [*41] wrongful death premised on manslaughter, under either section 95.11(10) or section 782.07, Florida Statutes. The former states that "an action for wrongful death seeking damages authorized under section 768.21 brought against a natural person for an intentional tort resulting in death from acts described in [Florida's manslaughter statute, section 782.07, Florida Statutes] may be commenced at any time." § 95.11(10). While this statute creates no separate cause of action for wrongful death based on manslaughter as Plaintiffs contend, (Doc. 151 at 14-15), it removes the statute of limitations for wrongful death claims against a natural person where the underlying death is caused by manslaughter. *See* § 782.07(1), Fla. Stat, (manslaughter statute). To the extent these counts are subsumed into the regular wrongful death counts as an alternative theory of liability to negligence and therefore are not barred by the 2-year statute of limitations, they likewise fail for lack of evidence of causation. *See supra* Section III.B.1.b; *Menard v. Fla. Att'y Gen.*, No: 2:16-cv-854-FtM-29NPM, 2020 WL 2559753, at * 12 (M.D. Fla May 20, 2020) (Steel, J.) ("The elements of manslaughter are (1) death of the victim and (2) *causation* of the victim's death by the defendant through an[] intentional act, intentional procurement of an act, or culpable negligence." (emphasis [*42] added)); *accord King v. State*, 286 So. 3d 850, 855 (Fla. 2d DCA 2019). Additionally, the statute does not extend the statute of limitations for wrongful death claims against the City and County, as neither are "natural person[s]" under section 95.11(10), Florida Statutes, so those claims fail for both lack of causation and as barred under the relevant 2-year limitations period.

For the above reasons, summary judgment is granted to Defendants on Plaintiffs' claims for wrongful death — manslaughter as a standalone cause of action separate from their wrongful death claims.

3. Professional Negligence, Common Law Negligence, and Negligent Training

Defendants argue that, under Florida law, Plaintiffs may

not bring personal injury claims (specifically, claims for professional negligence, common law negligence, and negligent training) on behalf of Hamilton other than wrongful death because his death extinguished any such claims. (Doc. 190 at 10-11; Doc. 191 at 9-10.)

Under Florida law, "[w]hen a personal injury to the decedent results in death, *no action for the personal injury shall survive*, and any such action pending at the time of death shall abate." § 768.20, Fla. Stat. (emphasis added); *see also Mucciolo v. Boca Raton Reg'l Hosp., Inc.*, 824 F. App'x 639, 643-44 (11th Cir. 2020) ("[A]ny personal injury claims alleging wrongdoing that ultimately resulted in the death of the decedent [*43] are extinguished upon death, leaving the statutory wrongful death claim as the only avenue for damages against the tortfeasor."). "[A]lternative theories of relief [are] subsumed in the wrongful death claim, and no claim, other than the statutory wrongful death claim, [can] be brought or require[s] consideration by the district court." *Mucciolo*, 824 F. App'x at 644; *see Banuchi v. City of Homestead*, No. 20-25133-Civ-Scola, 2021 WL 2333265, at *7 (S.D. Fla. June 8, 2021) (Scola, J.) (holding Florida's Wrongful Death Act precluded personal injury torts where defendant's actions resulted in decedent's death); see *also Shehada v. Tavss*, 965 F. Supp. 2d 1358, 1378 (S. D. Fla 2013) (Lendard, J.) ("[W]hen death is the result of a personal injury, the law of Florida essentially substitutes a statutory wrongful death action for the personal injury action[.] (quoting *Niemi v. Brown & Williamson Tobacco Corp.*, 862 So. 2d 31, 33 (Fla. 2d DCA 2003))).

Here, Florida's Wrongful Death Statute precludes Plaintiffs' personal-injury type tort claims (professional negligence, common law negligence, and negligent training) because, for each claim, Plaintiffs allege conduct that, according to the operative complaint, ultimately resulted in Hamilton's death. *See Starling v. R.J. Reynolds Tobacco Co.*, 845 F. Supp. 2d 1215, 1219 (M.D. Fla 2011) (Dalton, J.) (noting that Florida's survival statute, section 46.021, Florida Statutes, preserves the right to bring personal injury actions which the decedent may have brought prior to his death *only when* the personal injury was not the cause [*44] of death (citing *Martin v. United Sec. Servs., Inc.*, 314 So. 2d 765, 770 n.18 (Fla. 1975))). Plaintiffs' alternative theories for personal injury relief are "subsumed in the wrongful death claim" here because Plaintiffs are alleging that the personal injury serving as the basis for their tort claims was the cause of Hamilton's death. *Mucciolo*, 824 F. App'x at 644.

Thus, Defendants are entitled to summary judgment on Plaintiffs' professional and common law negligence claims and the common law negligent training claim.[11]

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[11] Alternatively, the City and County are entitled to summary judgment on the negligent training claim because Plaintiffs have not pointed to any evidence that would allow a reasonable jury to find that they were negligent in "implementing and operat[ing]w their training programs. *Lewis v. City of St. Petersburg*, 260 F.3d 1260, 1266 (11th Cir. 2001) (citing *McFarknd 8c Son, Inc. v. Basel*, 727 So. 2d 266 (Fla. 5th DCA 1999)). Plaintiffs point to the actions of the EMTs as evidence that the City and the County negligently trained them. (See, *e.g.*, Doc. 201 at 10.) But the actions of individual officers on a single occasion cannot support a negligent training claim. *See City of Canton v. Harris*, 489 U.S. 378, 390-91 (1989) ("That a particular officer may be unsatisfactorily trained will not alone suffice to fasten liability on the city, for the officer's shortcoming may have resulted from factors other than a faulty training program[.]"). Because Plaintiffs have failed to "go beyond the pleadings and [their] own affidavits" and point to evidence in the record that demonstrates the existence of a genuine issue for trial, *Celotex, All* U.S. at 324, summary judgment is granted to Defendants City and County on Plaintiffs' negligent training claims.

C. Claims Against the Individual Defendants

The Court will next address the Individual Defendants' arguments that they are entitled to summary judgment on the claims Plaintiffs assert against them only (i.e., constitutional claims and conspiracy claims).

1. Fourteenth Amendment Claims[12]

The Individual Defendants argue that Plaintiffs' claims under the Fourteenth Amendment of the United States Constitution fail because they did not violate Hamilton's constitutional rights, or, alternatively, they are entitled to qualified immunity. (Doc. 189 at 20-26; Doc. 191 at 20-30.) They are correct.

a. Constitutional Violations

The Individual Defendants first argue that Plaintiffs' Fourteenth Amendment claims against them fail because Hamilton was not in government custody at the time these events occurred and they had no constitutional duty to Hamilton. (Doc. 189 [*45] at 20-21.) Although that argument fails (they did have a duty), they are correct that the Plaintiffs have not established a constitutional violation here under the extremely high standard articulated by the Eleventh Circuit to establish a substantive due process violation in a non custodial setting.

"Where no custodial relationship exists, 'conduct by a government actor will rise to the level of a substantive due process violation only if the act can be characterized as arbitrary or conscience shocking in a constitutional sense." *L.S. ex rel. Hernandez v. Peterson*, 982 F.3d 1323,1330 (11th Cir. 2020) (Pryor, C.J.) (quoting *Waddell v. Hendry. Cnty. Sheriff's Off.*, 329 F.3d 1300, 1305 (11th Cir. 2003)). In the non-custodial context, *more than* deliberate indifference is needed to satisfy this culpability level to prove a substantive due process claim. *See Waldron v. Spicher*, 954 F.3d 1297, 1310 (11th Cir. 2020) (citing *Cty. Of Sacramento v. Lewis*, 523 U.S. 833, 852-55 (1998)) ("No case in the Supreme Court, or in this Circuit, or in the Florida Supreme Court has held that recklessness or deliberate indifference is a sufficient level of culpability to state a claim of violation of substantive due process rights in a non-custodial context."); *Peterson*, 982 F.3d at 1330 ("We doubt that deliberate indifference can ever be 'arbitrary' or 'conscience shocking' in a non-custodial setting.").[13] Indeed, "the 'purpose to cause harm' requirement" "controls whenever rapid judgments [*46] are necessary" in the non-custodial context. *Peterson*, 982 F.3d at 1331; *cf. Waldron*, 954 F.3d at 1310 (concluding that "act[ing] for the purpose of causing harm" meets the arbitrary-and-conscience-shocking standard). This highest level of tort culpability is mandated because "[o]nly the most egregious official conduct" qualifies under the standard, *Peterson*, 982 F.3d at 1330 (quotation omitted), and the arbitrary-and-conscience shocking standard must be "narrowly interpreted and applied." *White v. Lemacks*, 183 F.3d

[12] Plaintiffs bring constitutional claims under the Fourteenth Amendment and characterize them as claims for "deliberate indifference to serious medical needs." (Doc. 151 at 18-25.) These claims, arising in a non custodial context, are more accurately characterized as substantive due process claims. *See* discussion *infra* Section III.C.1.a.

[13] The Eleventh Circuit has suggested, but never held, that deliberate indifference alone *might* rise to the level of a substantive due process violation. *See Waldron*, 954 F.3d at 1310 n.5 (discussing *Waddell*, 329 F.3d at 1306). *But see Nix v. Franklin Cnty. Sch. Dist.*, 311 F.3d 1373, 1377 (11th Cir. 2002) ("This court has been explicit in stating that deliberate indifference is insufficient to constitute a due-process violation in a non-custodial setting[.]"); *Davis v. Carter*, 555 F.3d 979, 983 (11th Cir. 2009) (same).

1253, 1259 (11th Cir. 1999). To make that determination of whether government officials acted with the "purpose to cause harm," *Lewis*, 523 U.S. at 836, the totality of the circumstances must be considered, *see Waddell*, 329 F.3d at 1305-06.

Waldron is instructive. There, after a young man attempted to hang himself on a tree, a sheriff's deputy prevented several bystanders from performing CPR on him. *Waldron*, 954 F.3d at 1300-01. The deputy told emergency units not to "rush" to the scene because the individual was already deceased, even though there were recent signs of life. *Id.* at 1302. In the resulting litigation, the deputy asserted qualified immunity and moved for summary judgment. *Id.* at 1301. The district court denied the motion. *Id.* On appeal, the Eleventh Circuit vacated the district court's order and remanded in the light of its opinion articulating the correct legal standard for [*47] evaluating these kinds of substantive due process claims. *Id.* at 1312. The Eleventh Circuit instructed the district court to decide in the first instance whether they were clearly established for purposes of qualified immunity. *Id.* at 1301, 1312. The Eleventh Circuit clarified that the deputy's actions, "if merely reckless or deliberately indifferent, would not rise to the level of culpability necessary to state a violation of clearly established substantive due process rights." *Id.* at 1310. But the court "nevertheless h[e]ld that [the deputy's] actions would rise to that necessary level *if* the jury should find that [he] acted for the purpose of causing harm [to the decedent]." *Id.* It left it to the district court to apply those standards in the first instance at the summary judgment stage.

Unlike in *Waldron*, where the sheriffs deputy actively prevented others from administering medical care, here, viewing the evidence in the light most favorable to Plaintiffs, the Individual Defendants did not provide CPR to Hamilton in the few minutes between arriving on the scene and Roberts declaring him dead. *CE Peterson*, 982 F.3d at 1331 (holding plaintiffs' allegations that defendants blocked lifesaving medics from entering a school during a school shooting did not [*48] meet the purpose-to-harm standard); *Hamilton by and through Hamilton v. Cannon*, 80 F.3d 1525,1531-32 (11th Cir. 1996) (affirming the district court's grant of summary judgment to sheriffs deputy on qualified immunity grounds where the deputy intervened to stop CPR from being given to girl who drowned at a swimming pool, albeit under a prior legal standard for evaluating substantive due process claims). Unlike in *Waldron, Peterson*, or *Hamilton*, here the Individual Defendants did not stop care from being administered to Hamilton; instead, Plaintiffs' best evidence, based primarily on Fulkerson's testimony, is that the Individual Defendants did not themselves provide CPR in the approximately 3 to 4 minutes between arriving on the scene and Roberts declaring Hamilton dead. Defendants acknowledge that Paramedic Roberts followed the wrong protocol and would have been disciplined had he not passed away before the investigation concluded. (Doc. 198 ¶ 60; Doc. 203-36 at 2-3.) But however egregious Roberts's conduct might have been, it cannot be attributed to the remaining Individual Defendants to establish constitutional liability against them. It is undisputed that Roberts, as the paramedic, was the highest-ranking person at the scene and the EMTs were [*49] duty bound to defer to him. (Doc. 187 ¶¶ 34-35; Doc. 198 ¶¶ 34-35.)

To succeed on a substantive due process claim in the non-custodial context, Plaintiffs' need to show that the Individual Defendants (not Roberts) were "act[ing] for the purpose of causing harm" to Hamilton. *Waldron*, 954 F.3d at 1310. Stated otherwise, at this stage, the Plaintiffs need to identify evidence that a reasonable jury could find demonstrates something *more than* deliberate indifference. Thus, for Plaintiffs to succeed on the constitutional claims, they must prove that the failure

to administer CPR in those few minutes before Roberts declared Hamilton dead evinces a "purpose to cause harm" or more than deliberate indifference. Plaintiffs have not pointed to sufficient evidence to meet this extremely high standard. Based on the evidence viewed in the light most favorable to them, a reasonable jury could conclude that the Individual Defendants should have done more, but that is akin to a negligence standard.[14] Yet the Eleventh Circuit recently and repeatedly has held that even the deliberate indifference standard is insufficient in the non custodial setting to establish constitutional liability.

Fulkerson stated in her deposition that [*50] the Individual Defendants did not administer CPR, perform an EKG (although that would be Roberts's obligation), or otherwise attempt to care for Hamilton at all. (Doc. 203-61 at 49-51.) She does not dispute though that Hamilton was unresponsive directly before the Individual Defendants responded to the scene. (Doc. 198 ¶ 12.) She also does not dispute that one of the Individual Defendants checked Hamilton's pulse before pronouncing him dead. (Doc. 187 ¶ 20; Doc. 198 ¶ 21.) Even if a jury fully credited Fulkerson's testimony, that evidence alone does not establish that the Individual Defendants acted for the *purpose* of causing harm to Hamilton or with something *more* than deliberate indifference. Importantly, Plaintiffs do not dispute that Fulkerson repeatedly conveyed to the 911 operator that she thought Hamilton was dead, it was "too late," and even mentioned that he was "getting stiff" before the Individual Defendants arrived. (Doc. 187 ¶¶ 11-12; Doc. 198 ¶¶ 11-12; Doc. 203-14 at 6-7.)[15] Nor do Plaintiffs dispute that Hamilton was laying unresponsive on the floor when the EMTs arrived and that the EMTs were subordinate to Paramedic Roberts and his determination that Hamilton was beyond [*51] resuscitation. At the most, the evidence would permit a jury to conclude that the Individual Defendants believed Hamilton beyond help before taking all possible resuscitation efforts. So even if Fulkerson's testimony is entirely credited by a jury, Plaintiffs have failed to create a dispute of material fact that Defendants acted "for the purpose to cause harm" to Hamilton.[16] Therefore, Defendants are entitled to summary judgment on the constitutional claims.

b. Qualified Immunity

In the alternative, the Individual Defendants argue that they are entitled to qualified immunity on Plaintiffs' constitutional claims. (Doc. 191 at 28-30; Doc. 189 at

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[14] Plaintiffs' experts opined that they deviated from the acceptable standard of care, although Ellinger primarily blames Roberts, not the remaining Individual Defendants. (*See* Doc. 192-4.) Their opinions support a finding of negligence; they do not establish a "purpose to cause harm."

[15] Fulkerson testified that she told Roberts, *not* the remaining Individual Defendants, that Hamilton continued to mumble after falling down the stairs and hitting his head. But as explained earlier, Roberts's knowledge and actions cannot be imputed to the others. *See City of Okla. City v. Tuttle*, 471 U.S. 808, 818 (1985) ("[Section] 1983 only imposes liability for deprivations 'cause[d]' by a particular defendant." (alteration in original) (quotation omitted)).

[16] Of course, the Plaintiffs must still establish that the constitutional violation *caused* Hamilton's death. For the same reasons as discussed above, Plaintiffs are unable to do so. *See Troupe v. Sarasota Cnty.*, 419 F.3d 1160, 1165 (11th Cir. 2005) (noting that a § 1983 claim requires proof "of an affirmative causal connection between the defendant's acts or omissions and the alleged constitutional deprivation"); *Jackson v. Sauls*, 206 F.3d 1156, 1168 (11th Cir.2000) (noting that a § 1983 defendant is responsible only for the natural and foreseeable consequences of his actions).

23-26.) The Court agrees.

"Qualified immunity protects government officials from liability for civil damages unless they violate a statutory or constitutional right that was clearly established at the time the alleged violation took place." *Gilmore v. Hodges*, 738 F.3d 266, 272 (11th Cir. 2013). Qualified immunity is only available if the official is acting within the scope of his discretionary authority. *See Holloman v. Harland*, 370 F.3d 1252, 1264 (11th Cir. 2004). "If; interpreting the evidence in the light most favorable to the plaintiff, the court concludes that the defendant[s] w[ere] engaged in a discretionary function, then the burden [*52] shifts to the plaintiff to show that the defendant[s are] *not* entitled to qualified immunity." *Id.* Plaintiffs here do not dispute that the Individual Defendants were acting within their discretionary authority when they were called to Hamilton's home. (Doc. 200 at 17-18; Doc. 202 at 14-15.) So, the burden shifts to Plaintiffs to show that Hamilton's constitutional rights were violated and that the right at issue was clearly established at the time of the alleged misconduct. *See Pearson v. Callahan*, 555 U.S. 223,232 (2009).

This Court concluded above that no constitutional violation took place. But even if a jury could find that Hamilton's constitutional rights were violated, given this novel factual situation, those rights were not clearly established at the time.

The Eleventh Circuit has identified three ways that a plaintiff can prove a constitutional right is clearly established: (1) "a plaintiff can show a materially similar case has already been decided"; (2) "a plaintiff can also show that a broader, clearly established principle should control the novel facts of a particular case"; or (3) "a plaintiff can show that the case 'fits within the exception of conduct which so obviously violates [the] Constitution that prior case [*53] law is unnecessary." *Waldron*, 954 F.3d at 1304-05 (alteration in original) (quotation omitted). Plaintiffs point to no materially similar case (indeed, they do not even attempt to do so). The Court likewise located no materially similar case. Nor do Plaintiffs identify the correct governing standard for evaluating non-custodial substantive due process claims. (*See, e.g.*, Doc. 202 at 14-15.) Nonetheless, the Court has identified the relevant "clearly established principle": that "act[ing] for the purpose of causing harm" in a non-custodial context that requires "rapid judgments" is a "violation of clearly established substantive due process rights." *Waldron*, 954 F.3d at 1304-05,1311 & n.6; *Peterson*, 982 F.3d at 1331. Although that principle governs, its application to the undisputed facts here does not show the Individual Defendants' conduct violated clearly established constitutional rights.

Here, Plaintiffs need to prove that the Individual Defendants acted for the purpose of causing harm to Hamilton for it to be a violation of clearly established constitutional rights. Gross negligence is not enough. Deliberate indifference is not enough. If Fulkerson's testimony is believed, the Individual Defendants arrived on the scene around nine minutes after Hamilton collapsed [*54] and promptly pronounced him dead after briefly taking his pulse but without administering any medical care—no CPR, no EKG, no defibrillator. (Doc. 203-61 at 49-51.) But again, even if Fulkerson's testimony is fully credited, the evidence does not show that the Individual Defendants acted for the purpose of causing harm to Hamilton. The Eleventh Circuit reminds district courts that the factual context matters here. *See Waldron*, 954 F.3d at 1307 ("[T]he context in which the officer's action occurs is important in determining the level of culpability required for a plaintiff to state a viable substantive due process violation."); *Peterson*, 982 F.3d at 1331 ("[W]e must evaluate the totality of the circumstances."). And that evening, Fulkerson

repeatedly conveyed to the 911 operator that she thought Hamilton was dead. (Doc. 187 ¶¶ 11-12; Doc. 198 ¶¶ 11-12; Doc. 203-14 at 46-47.) It is undisputed that the Individual Defendants arrived and checked Hamilton's pulse before they pronounced him dead. (Doc. 187 ¶ 20; Doc. 198 ¶ 21.) At the most, the Individual Defendants pronounced Hamilton—who lay unresponsive after suffering a cardiac arrest and smashing his head on the terrazzo floor—dead without providing all the medical care they should have. [*55] The Eleventh Circuit has declined to find the rigorous purpose-to-cause harm standard met even where an official actively prevents the administration of care, much less when an EMT takes a pulse and concludes (even erroneously) that the person is beyond resuscitation. *See, e.g., Lewis*, 982 F.3d at 1331; *Hamilton*, 80 F.3d at 1531-32. A reasonable jury could conclude that the Individual Defendants negligently failed to provide the proper care to Hamilton, but the facts even viewed in Fulkerson's best light do not show it was a clear violation of constitutional rights.

Thus, in the alternative to concluding that there was no constitutional violation here, the Individual Defendants are entitled to qualified immunity on the constitutional claims because it was not clearly established that their conduct amounted to a violation of the Constitution.

2. Conspiracy Claims

The Individual Defendants argue that summary judgment should be granted on Plaintiffs' conspiracy claims because there is no underlying tort or constitutional violation that could support a conspiracy claim. (Doc. 189 at 22-23; Doc. 191 at 24-27); *see Fla. Fern Growers Ass'n, Inc. v. Concerned Citizens of Putnam Cnty.*, 616 So. 2d 562, 565 (Fla. 5th DCA 1993) ("An actionable conspiracy requires an actionable underlying tort or wrong."); *Grider v. City of Auburn*, 618 F.3d 1240, 1260 (11th Cir. 2010) ("A plaintiff may state a § 1983 claim for conspiracy [*56] to violate constitutional rights by showing a conspiracy existed that resulted in the actual denial of some underlying constitutional right."). As this Court concluded above, there are no actionable underlying torts or constitutional claims here.

Additionally, the conspiracy claims do not survive because the Plaintiffs have failed to put on evidence demonstrating that Hamilton's death resulted from (i.e., was caused by) a conspiracy between the Defendants and that "the defendants 'reached an understanding' to violate the plaintiff's constitutional rights." *Grider*, 618 F.3d at 1260 (quotation omitted); *see Walters v. Blankenship*, 931 So. 2d 137, 140 (Fla. 5th DCA 2006) (stating a conspiracy requires "damage[s] to plaintiff *as a result* of the acts performed pursuant to the conspiracy', (emphasis added)). Without evidence to support causation and an agreement or understanding, Plaintiffs cannot prove the conspiracy claims. Thus, Defendants are entitled to summary judgment on Plaintiffs' conspiracy claims.

IV. CONCLUSION

Defendants' Motions for Summary Judgment (Docs. 188, 189, 190, 191) are **GRANTED**. Accordingly, the following is **ORDERED**:

1. Defendant City's motion for summary judgment (Doc. 188) is **GRANTED**.

2. Defendants Montgomery, Hart, and Riners' motion for summary judgment [*57] (Doc. 189) is **GRANTED**.

3. Defendant County's motion for summary judgment (Doc. 190) is **GRANTED**.

4. Defendant Christensen's motion for summary

judgment (Doc. 191) is **GRANTED**.

5. Defendants' motions in limine are **DENIED** as moot, (Docs. 210, 211, 215, 216), except that the parts of the motions to exclude Ellinger's causation testimony are **GRANTED**, (*see* Docs. 210 & 211).

6. The clerk is directed to terminate any pending motions and deadlines, enter judgment in favor of Defendants, and to close this case.

ORDERED in Tampa, Florida, on November 9, 2021.

/s/ Kathryn Kimball Mizelle

Kathryn Kimball Mizelle

United States District Judge
