FILED
Electronically
CV18-02271
2021-04-09 02:57:07 PM
Jacqueline Bryant
Clerk of the Court
Transaction # 8388300

3060

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA IN AND FOR THE COUNTY OF WASHOE

MEGAN SMITH, et al.,
et al.,

Plaintiffs,

vs.

RENO FLYING SERVICES, INC., et al.,

Defendants.
_____/

Case No.: CV18-02271

Dept. No.: 1

ORDER GRANTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT CONCERNING DEFENDANTS' STATUTORY IMMUNITY DEFENSE

Currently before the Court is Plaintiffs Megan Smith, et. al.'s ("Plaintiffs") *Motion for Summary Judgment Concerning Defendants' Statutory Immunity Defense* ("Motion") filed on November 9, 2020.[1] Defendants Reno Flying Services, Inc., et al. ("Defendants") filed their *Opposition to Plaintiffs' Motion for Summary Judgment, and Memorandum of Points and Authorities* ("Opposition") on December 9, 2020.[2] Plaintiffs filed their *Reply in Further Support [of] Plaintiffs' Motion for Summary Judgment* ("Reply") on December 16, 2020, and submitted the matter for this Court's consideration the same day.

[1] Plaintiffs filed an *Errata to Plaintiffs' Motion for Summary Judgment Concerning Defendants' Statutory Immunity Defense* ("Errata") on November 11, 2020, which clarified that Plaintiffs mistakenly attached a duplicate of Exhibit 20 as Exhibit 19, and provided the intended documentation for Exhibit 19.

[2] Judge Sattler granted Defendants' request for an extension to file the Opposition. *See Order to Set Hearing*, filed Dec. 14, 2020.

Thereafter, Plaintiffs filed their *Supplement to Plaintiffs' Motion for Summary Judgment Concerning Defendants' Statutory Immunity Defense* ("Supplement") on January 28, 2021, and contemporaneously submitted the Supplement for this Court's consideration. Defendants then filed their *Supplemental Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment* on January 29, 2021 ("Supplemental Memorandum"). Plaintiffs filed their *Objection to Defendants "Supplemental Memorandum in Opposition" and Supplemental Reply* ("Objection to Supplemental Memorandum") on February 1, 2021. On February 2, 2021, the parties presented oral argument on the Motion.[3] *See* Transcript of Motions Hr'g, filed Feb. 14, 2021 ("Hr'g Tr.").

I. Background

a. First Amended Complaint

Plaintiffs filed their *First Amended Complaint* ("Complaint") on December 3, 2018, setting forth the following allegations: On November 18, 2016, Jacob Jay Shephard ("Mr. Shephard") and Tiffany Marie Urresti ("Ms. Urresti") were passengers on the subject aircraft, operated by American Medflight, Inc. ("AMF"), that was engaged in an air ambulance flight from Elko, Nevada, with the intended destination of Salt Lake City, Utah; shortly after the subject flight took off from Elko Regional Airport, the subject aircraft experienced a loss of power in the subject engine, resulting in a loss of control that caused the subject aircraft to crash into a parking lot within a half mile of the departure end of the runway and to burst into flames; this crush resulted in the deaths of Mr. Shephard and Ms. Urresti; on and prior to November 18, 2016, and at all relevant times herein, the subject aircraft was maintained repaired, inspected and certified as airworthy by Reno Flying Services, Inc. ("RFS"), JOHN DOES 1-40, and ROE CORPORATIONS 1-40, and each of them (collectively, "Maintenance Defendants"), by and through their parent companies, officers, agents, employees, servants, and/or representatives; and that the subject aircraft's loss of power and control, and the resulting crash, were caused by the Maintenance Defendants' negligent and improper maintenance,

[3] Notably, this Case originated in Department 10, and then was randomly assigned to Department 1 on January 8, 2021, after Defendants preempted Judge Sigurdson. *See Peremptory Challenge of Judge; Case Assignment Notification*. Prior to the preemption, Judge Sattler issued an *Order to Set Hearing* on December 14, 2020, which set a number of motions for hearing in this case. This Court honored that ruling and set those matters for hearing, including the instant Motion.

inspection repair and/or testing of the subject aircraft and subject engine, including but not limited to its fuel delivery system. Compl. at ¶¶ 22- 26.

Based on these allegations, the Complaint sets forth six claims for relief: (1) Wrongful Death and Survival Damages Against the Maintenance Defendants Based upon Negligence; (2) Wrongful Death and Survival Damages Against the Maintenance Defendants Based upon Breach of Warranty; (3) Wrongful Death and Survival Damages Against Air Medical Resource Group, Inc., the Joseph Hunt Trust, Doe Trustees 1-10, Joseph Hunt, Johnathan Hunt, Sara Hunt, James Hunt, and Guardian Flight LLC Based upon Negligence; (4) Wrongful Death and Survival Damages Against Air Medical Resource Group, Inc., the Joseph Hunt Trust, Doe Trustees 1-10, Joseph Hunt, Johnathan Hunt, Sara Hunt, James Hunt, and Guardian Flight LLC Based upon Breach of Warranty; (5) Wrongful Death and Survival Damages Against Global Medical Response, Inc., Air Medical Group Holdings LLC, AMGH Holding Corp, AMGH Merger Sub, Inc., and Guardian Flight LLC Based upon Negligence; and (6) Wrongful Death and Survival Damages Against Global Medical Response, Inc., Air Medical Group Holdings LLC, AMGH Holding Corp, AMGH Merger Sub, Inc., and Guardian Flight LLC Based upon Breach of Warranty. *See* Compl.

b. Plaintiffs' Statement of Material Facts

Plaintiffs set forth the following statement of facts in their Motion:

1. RFS is an independent company whose business is a "Fixed Base Operator" which performs aircraft maintenance including for AMF aircraft; for its own aircraft; and third-party aircraft. *See* Mot., Ex. 4 (RFS Stock Certificate); Ex. 21 (Deposition of John Burruel) at 57-60, 64-68; Ex. 22 (Deposition of David Dragoli) at 19-23; Ex. 23 (Deposition of Curtis Fisher) at 63; Ex. 24 (Deposition of Brian McCarter) at 91, 95-96; Ex. 25 (Deposition of Phillip Steiner) at 54; Ex. 26 (Deposition of Steve Magginetti) at 13-14.
2. AMF is a separate company whose business is an air ambulance charter, and it holds a Part 135 Air Carrier Certificate issued by the FAA. *See* Mot., Ex. 5 (AMF Articles of Incorporation); Ex. 6 (AMF Part 135 Certificate No. XPCA 800S); Ex. 21 (Deposition of John Burruel) at 56; Ex. 22 (Deposition of David Dragoli) at 19; Ex.

23 (Deposition of Curtis Fisher) at 63; Ex. 24 (Deposition of Brian McCarter) at 75; Ex. 25 (Deposition of Phillip Steiner) at 54; Ex. 26 (Deposition of Steve Magginetti) at 13.

3. When AMF was formed and incorporated by some of the same owners as RFS, they purposefully kept the business models of each company distinct so they would not compete with one another; with AMF performing air ambulance services and RFS performing aircraft maintenance. *See* Mot., Ex. 21 (Deposition of John Burruel) at 21-25.
4. Only AMF, not RFS, was licensed as an Advanced Life Support Air Ambulance by the State of Nevada Division of Public and Behavioral Health. *See* Mot., Ex. 7 (AMF ALS Air Ambulance License); Ex. 21 (Deposition of John Burruel) at 62.
5. AMF did not have the authorization to perform maintenance under its FAA Air Carrier Certificate. Mot., Ex. 29 (Rebuttal Expert Report of Steve Magginetti) at 3 (detailing that AMF does not authorization to perform maintenance under their Operating Certificate).
6. AMF did not have an aircraft maintenance workforce and was not capable of performing aircraft maintenance. *See* Mot., Ex. 26 (Deposition of Steve Magginetti) at 13-15, 62.
7. AMF did not have aircraft maintenance tools. *See* Mot., Ex. 22 (Deposition of David Dragoli) at 21, 157; Ex. 24 (Deposition of Brian McCarter) at 78.
8. AMF held itself out on its website as "the largest, most experienced fix-wing air ambulance company in Nevada and Eastern California" and also as the "most experienced air ambulance in the region." *See* Mot., Ex. 9 (AMF Website Excerpt).
9. In contrast, Defendant RFS held itself out on its website as "the only full service maintenance shop on the Reno Tahoe International Airport." *See* Mot., Ex. 8 (RFS Website Excerpt).
10. RFS employed numerous aircraft mechanics which in 2016 included: (1) Brian McCarter; (2) David Dragoli; (3) Curtis Fisher; (4) Phillip Steiner; (5) Michael Repas;

(6) James Richardson; and (7) Bryan Whitfield. *See* Mot., Ex. 24 (Deposition of Brian McCarter) at 49-51, 69-70; Ex. 10 (RFS Training Sign-Off Sheet).

11. At the time of the crash that killed Mr. Shepherd and Ms. Urresti on November 18, 2016, AMF did not employ any aircraft mechanics. *Compare* Mot., Ex. 11 (RFS 2016 Employee Yearly Earning Report) *with* Ex. 12 (AMF 2016 Employee Yearly Earning Report). And while Brian McCarter was previously on both companies' payrolls, he resigned prior to the crash on October 3, 2016. *See* Mot., Ex. 15.
12. Plaintiffs' decedents, Mr. Shepherd and Ms. Urresti, were employed by AMF. *See* Mot., Ex. 13 (Mr. Shepherd's AMF Personnel File Excerpt); Ex. 14 (Ms. Urresti's AMF Personnel File Excerpt).
13. The aircraft that crashed and killed Mr. Shepherd and Ms. Urresti, FAA registration no. N779MF ("the subject aircraft"), was maintained, repaired, and inspected almost exclusively by RFS, with some third-party maintainers also working on it, and the overwhelmingly majority of the entries in the aircraft's maintenance log books are from RFS mechanics on RFS log book stickers. *See* Mot., Ex. 17 (Airframe Log Books for N779MF); Ex. 18 (Engine and Propeller Log Books for N779MF); Ex. 24 (Deposition of Brian McCarter) at 80.
14. AMF did not perform any work on the subject aircraft and there are no aircraft log book entries in the N779MF logs from AMF. *See* Mot., Ex. 17 (Airframe Log Books for N779MF); Ex. 18 (Engine and Propeller Log Books for N779MF); Ex. 24 (Deposition of Brian McCarter) at 76, 78-80; Ex. 22 (Deposition of David Dragoli) at 168; Ex. 23 (Deposition of Curtis Fisher) at 102; Ex. 25 (Deposition of Phillip Steiner) at 73.
15. RFS invoiced AMF for the work it performed on AMF's aircraft, including the subject aircraft. *See* Errata, Ex. 19 (RFS Invoices to AMF and Payment Slips for Subject Aircraft); Mot., Ex. 20 (RFS Invoices for Other AMF Aircraft); Mot., Ex. 26 (Deposition of Steve Magginetti) at 16.

16. AMF never invoiced anyone for aircraft maintenance work because it did not perform aircraft maintenance. *See* Mot., Ex. 22 (Deposition of David Dragoli) at 20-21; Ex. 24 (Deposition of Brian McCarter) at 76; Ex. 26 (Deposition of Steve Magginetti) at 13.

17. RFS received substantial revenues from their aircraft maintenance work, including almost $250,000 from AMF in some years, as seen in the work order and/or invoice summary produced by RFS going back to 2004. *See* Mot., Ex. 16 (RFS Word Order & Repair Order Totals Document).

18. AMF received no revenue from aircraft maintenance work because it did not perform aircraft maintenance. *See* Mot., Ex. 21 (Deposition of John Burruel) at 58-59; Ex. 24 (Deposition of Brian McCarter) at 78-79.

II. Relevant Legal Authority

a. Summary Judgment Standard

NRCP 56(a) instructs that a "court shall grant summary judgment if the movant shows that there is no genuine dispute as to material fact and the movant is entitled to judgment as a matter of law." A genuine issue of material fact exists when the evidence is such that a rational trier of fact could return a verdict for the nonmoving party. *Woods v. Safeway*, 121 Nev. 724, 731, 121 P.3d 1026, 1031 (2005). When deciding whether summary judgment is appropriate, the court must view all evidence in light most favorable to the non-moving party and accept all properly supported evidence, factual allegations, and reasonable inferences favorable to the non-moving party as true. *C. Nicholas Pereos, Ltd. v. Bank of Am*., 131 Nev. 436, 441, 352 P.3d 1133, 1136 (2015); *NGA No. 2 Ltd. Liab. Co. v. Rains*, 113 Nev. 1151, 1157, 946 P.2d 163, 167 (1997).

The Nevada Supreme Court has adopted the federal approach outlined in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), with respect to burdens of proof and persuasion in summary judgment proceedings. *See Cuzze v. Univ. & Cmty. College Sys. of Nevada*., 123 Nev. 598, 602, 172 P.3d 131, 134 (2007). The party moving for summary judgment must meet his or her initial burden of production and show there is no genuine issue of material fact. *Id.* "The manner in which each party may satisfy its burden of production depends on which party will bear the burden of persuasion on the challenged

claim at trial." *Id.* When the moving party bears the burden at trial, that party must present evidence that would entitle it to judgment as a matter of law absent contrary evidence. *Id.* If the burden of persuasion at trial will rest on the nonmoving party, "the party moving for summary judgment may satisfy the burden of production by either (1) submitting evidence that negates an essential element of the nonmoving party's claim, or (2) pointing out that there is an absence of evidence to support the nonmoving party's case." *Id.* After the moving party meets his or her initial burden of production, the opposing party "must transcend the pleadings and by affidavit or other admissible evidence, introduce specific facts that show a genuine issue of material fact." *Id.*

When deciding a motion for summary judgment, a district court cannot make findings concerning the credibility of witnesses or weight of evidence. *Sawyer v. Sugarless Shops Inc.*, 106 Nev. 265, 267-68, 792 P.2d 14, 15-16 (1990). Moreover, if documentary evidence is required, it "must be construed in the light most favorable to the non-moving party. All of the non-movant's statements must be accepted as true and a district court may not pass on the credibility of affidavits." *Id.* (internal citation omitted).

b. Nevada's Industrial Insurance Act

"The Nevada workers' compensation system provides the exclusive remedy of an employee against his employer for workplace injuries." *Lipps v. S. Nevada Paving*, 116 Nev. 497, 499, 998 P.2d 1183, 1184 (2000). Also known as Nevada's Industrial Insurance Act ("NIIA"), NRS 616A.020 provides in relevant part:

> 1. The rights and remedies provided in chapters 616A to 616D, inclusive, of NRS for *an employee on account of an injury by accident sustained arising out of and in the course of the employment shall be exclusive*, except as otherwise provided in those chapters, of all other rights and remedies of the employee, his or her personal or legal representatives, dependents or next of kin, at common law or otherwise, on account of such injury.
>
> 2. The terms, conditions and provisions of chapters 616A to 616D, inclusive, of NRS for the payment of compensation and the amount thereof for injuries sustained or death resulting from such injuries *shall be conclusive, compulsory and obligatory upon both employers and employees coming within the provisions of those chapters.*

(Emphasis added.) "A corollary to the immunity rule is that claims for tort damages in connection with workplace injuries are only sustainable against persons or entities other than a statutory employer or persons in the same employ." *Lipps*, 116 Nev. at 499, 998 P.2d at 1185; *see also* NRS 616C.215(2) (permitting an injured employee that has recovered under Nevada's workers' compensation system to separately recover against a person "*other than the employer or a person in the same employ*" (emphasis added)). Specifically,

> NRS 616A.210(1) states in part that all subcontractors, independent contractors and the employees of either shall be deemed to be employees of the principal contractor for the purposes of [the NIIA]. Therefore, the NIIA provides the exclusive remedy of any employee of a subcontractor injured as a result of the negligence of another subcontractor's employee working for the same principal contractor because they are considered to be working in 'the same employ'; hence, they are statutory co-employees.

Lipps, 116 Nev. at 499, 998 P.2d at 1184-85.

Furthermore, the NIIA only applies to "accidents." *See* NRS 161.030 (defining "accident" as "an unexpected or unforeseen event happening suddenly and violently, with or without human fault, and producing at the time objective symptoms of an injury"). Meaning, a viable intentional tort claim is not barred by the NIIA's exclusivity provisions. *See Fanders v. Riverside Resort & Casino, Inc.*, 126 Nev. 543, 549-50, 245 P.3d 1159, 1163 (2010) ("A viable intentional tort claim, which subjects an employer to liability outside of the workers' compensation statute, requires the employee to plead facts in his or her complaint that establish 'the deliberate intent to bring about the injury.'").

Under Nevada law, one of two tests could apply to determine the applicability of NIIA immunity. First, pursuant to NRS 616B.603, "extended immunity generally automatically applies to matters involving a project executed within the scope of an NRS Chapter 624–licensed contractor's license." *Richards v. Republic Silver State Disposal, Inc.*, 122 Nev. 1213, 1222, 148 P.3d 684, 689 (2006). However, "[a]ll other matters must be further analyzed under NRS 616B.603 and *Meers*." *Id*.

In *Meers v. Haughton Elevator*, 101 Nev. 283, 285-86, 701 P.2d 1006, 1007-08 (1985), the Nevada Supreme Court explained:

///

> [NIIA] is uniquely different from industrial insurance acts of some states in that sub-contractors and independent contractors are accorded the same status as employees. While the legislature afforded this umbrella of protection to sub-contractors and independent contractors, the protection is by no means absolute. There is some limit to its coverage. In order to make the determination of which types of sub-contractors and independent contractors are covered, it is necessary to make an initial determination as to the statutory employer.
> . . . .
> The type of work performed by the sub-contractor or independent contractor will determine whether the employer is the statutory employer:
>
> > The test is not one of whether the subcontractor's activity is useful, necessary, or even absolutely indispensable to the statutory employer's business, since, after all, this could be said of practically any repair, construction or transportation service. The test (except in cases where the work is obviously a subcontracted fraction of a main contract) is whether that indispensable activity is, in that business, normally carried on through employees rather than independent contractors.
>
> This 'normal work' test has been applied in many cases involving sub-contracted maintenance activities. The general rule is that major repairs, or specialized repairs of the sort which the employer is not equipped to handle with his own force, are held to be outside his regular business.

(Internal quotation marks and citations omitted) (Footnotes omitted).

Furthermore, this "test, termed the *Meer*s normal work test" details that "the type of work performed by the subcontractor or independent contractor will determine whether the employer is the statutory employer, and thus whether employees of the two entities are statutory co-employees between which NIIA immunity exists." *Richards*, 122 Nev. at 1220, 148 P.3d at 688 (internal quotation marks omitted). In addition, "NRS 616B.603 was intended to codify the *Meers* normal work test[,]" such that "the *Meers* normal work test and NRS 616B.603 have been conjunctively used in determining when a nonlicensed contractor is deemed the statutory employer or co-employee of an industrially injured employee in nonlicensed defendant and nonconstruction[4] cases." *Id*. at 1220, 148 P.3d at 688-89.

///

[4]While not relevant here, this Court notes that the Nevada Supreme Court overruled "the 'construction versus nonconstruction' analysis." *Richards*, 122 Nev. at 1222, 148 P.3d at 689.

The Nevada Supreme Court also succinctly set forth the operative analysis in *Hays Home Delivery, Inc. v. Employers Ins. Co. of Nevada*, 117 Nev. 678, 682-83, 31 P.3d 367, 370 (2001):

> We must analyze the relationship between Green and Hays under *Meers* and NRS 616B.603 to determine whether Green is a statutory employee and therefore entitled to workers' compensation benefits. NRS 616B.603 provides that an entity is not considered an employer under the NIIA if the entity enters into a contract with an "independent enterprise," and the contracting entity is not in the "same trade, business, profession or occupation" as the independent enterprise. Therefore, in order for Hays to show that Green is not an employee, Hays must demonstrate that Green is an "independent enterprise," and that Green and Hays are not involved in the "same trade, business, profession or occupation."

Pursuant to NRS 616B.603(2) an "independent enterprise" means "a person who holds himself or herself out as being engaged in a separate business and: (a) [h]olds a business or occupational license in his or her own name; or (b) [o]wns, rents or leases property used in furtherance of his business." The *Meers* test governs whether the operative party is in the "same trade, business, profession or occupation as the independent enterprise" under NRS 616B.603. Finally, district courts should broadly apply the *Meers* test:

> We hold that in order to determine whether a subcontractor or independent contractor was engaged in a specialized repair under the *Meers* test, and therefore whether that subcontractor or independent contractor is liable for any injuries caused to workers during the course of that specialized repair, the court must consider the subcontractor or independent contractor's activity leading to a worker's injury within the context of their other actions, both before and after the injury, and not in isolation.

D & D Tire v. Ouellette, 131 Nev. 462, 468-69, 352 P.3d 32, 36-37 (2015).

III. Analysis

In the Motion, Plaintiffs contend that summary judgment should be entered against RFS' workers' compensation immunity affirmative defense. *See* Mot.

a. Argument

Plaintiffs contend that the workers' compensation immunity affirmative defense asserted by RFS, which must establish that RFS undertakes the same "normal work" as Plaintiffs' decedents' employer, AMF, is wholly unsupported by the facts elicited and the controlling law; Plaintiffs

continue that bifurcated discovery shows that RFS was an aircraft maintenance company that maintained aircrafts for the general public, as well as AMF, including the subject aircraft; while AMF was an air ambulance charter company that did not perform any aircraft maintenance at all and did not have an aircraft maintenance workforce whatsoever. Mot. at 2:3-10.

Plaintiffs argue that RFS cannot satisfy the "normal work" test necessary to claim statutory workers' compensation immunity pursuant to *Meers*. *Id*. at 8:10-12:9. Plaintiffs aver that RFS cannot provide any evidence supporting the proposition that AMF was involved in the aircraft maintenance business, or that the aircraft maintenance work RFS negligently performed on the subject aircraft's engine for AMF was part of AMF's "normal work" under *Meers*; instead, the evidence indicates that AMF and RFS were different types of businesses, with RFS a fixed base operator and full service aircraft maintenance shop, and AMF a "911 air ambulance" company that did not perform aircraft maintenance. *Id*. at 9:8-23. Plaintiffs then cite to deposition testimony revealing that AMF did not employ aircraft mechanics and lacked a maintenance workforce. *Id*. at 10:1-12. Plaintiffs next aver that discovery has conclusively shown that AMF did not perform any aircraft maintenance, such that it was not a part of its "normal work." *Id*. at 10:13-11:2.

Plaintiffs contend that the circumstances here are similar to those in *Meers*. *Id*. at 11:3-13. There, a telephone company (Centel) contracted with an elevator company (Haughton) to perform maintenance on the building's elevator. *Meers*, 101 Nev. at 284, 701 P.2d at 1006. The Nevada Supreme Court held that appellant, an employee of Centel, *could* maintain an action against Haughton for her injuries sustained from a malfunctioning elevator because Centel is not the statutory employer of Haughton, such that Haughton cannot be deemed to be the co-employees of Centel's employees. *Id*. at 286, 701 P.2d at 1008 ("We conclude that the specialized maintenance conducted by Haughton was not part of Centel's normal business. Although Centel had to maintain its physical facilities as part of its everyday function, as the great majority of cases illustrates, specialized maintenance requiring skills and expertise not possessed by its employees is not a normal part of maintaining its building." (internal quotation marks omitted)). Plaintiffs contend that AMF's need for aircraft maintenance here is the same as Centel's need for elevator maintenance in *Meers*, and that AMF relied entirely on independent contractors, like RFS with the necessary workforce and expertise for

aircraft maintenance, such that there can be no genuine dispute of material fact that the aviation maintenance work performed by Defendant RFS was *not* part of the "normal work" of non-party AMF. *Id*. at 11:14-15:9.

Plaintiffs next argue that RFS' attempt to rely upon the Director of Maintenance ("DOM") position and federal aviation administration regulations is misplaced and immaterial to the statutory immunity issue and cannot defeat summary judgment. *Id*. at 12:11-16:7. Plaintiffs maintain that Defendants mistakenly try to conflate the air charter operator's and DOM's administrative responsibility for the airworthiness of the aircraft with a responsibility for the actual performance or supervision of maintenance. *Id*. at 12:22-24 (citing 14 CRF § 135.413 (detailing that "[e]ach certificate holder is primarily responsible for the airworthiness of its aircraft" and permitting the certificate holder to "[m]ake arrangements with another person for the performance of maintenance")). And that while the DOM must be a licensed mechanic, RFS's expert admitted that the DOM does not have to perform maintenance at all. *Id*. at 13:5-11. Instead the DOM administratively ensures that maintenance entities perform the necessary aircraft maintenance, *i.e.*, the DOM can keep the plane airworthy entirely via paperwork, by monitoring the aircraft's service times in the logbooks, and making sure the plane is maintained and repaired by licensed mechanics and inspectors when maintenance is due by reviewing the log book entries made and signed off by the professionals doing the work. *Id*. at 13:12-25. Furthermore, Plaintiffs assert that the DOM is not even required to be employed or paid by the charter operator himself. *Id*. at 13:26-14:3. Consistent with this, Plaintiffs state that the evidence shows that the AMF DOM conducted no actual aircraft maintenance and was rarely even on the maintenance floor. *Id*. at 14:13-15:2. Here, at the time of the crash, the DOM designated for AMF was David Dragoli and he was *only* employed by RFS. *Id*. at 15:3-10. Plaintiffs continue that the *Meers* test governs this action—and the facts that are relevant for determining this summary judgment action; therefore, RFS cannot create disputes of fact by pointing to AMF's DOM or what regulatory and administrative responsibilities he may have had despite the fact that AMF did not actually perform aircraft maintenance or have the workforce to do so. *Id*. at 15:11-10.

///

Defendants oppose the Motion, contending that significant issues of fact prevent granting Plaintiffs' Motion. Opp'n at 12:12-14:6. Defendants contend that they can also succeed on their immunity defense by showing either that (1) DOMs Brian McCarter/David Dragoli were employees of AMF, as were Plaintiffs' decedents (Mr. Shepherd and Ms. Urresti); therefore, they were all co-employees and all of the repair and maintenance work performed on the subject aircraft by RFS mechanics under the Part 135 oversight, control, and direction of the DOMs is immune from liability under NRS 616C.215(2)(a); or (2) under the embedded exception of the *Meers* normal work test, the repair and maintenance work performed on the subject aircraft by RFS and its employees was a subcontracted fraction of the main contract between AMF and its DOMs. *Id*. at 12:17-13:2. Defendants continue that the Part 135 Certificate issued by the FAA to AMF allowed AMF to perform maintenance on its own aircraft through its DOM, and that DOMs are required to have an Aircraft Powerplant Mechanic's FAA license, which allows them to perform maintenance on an aircraft. *Id*. at 13:8-14:6. Next, Defendants argue that DOMs McCarter and Dragoli were co-employees of Plaintiffs' decedents Jacob Jay Shepherd and Tiffany Marie Urresti, and all of the repair and maintenance work performed on the subject aircraft by RFS and its employees under the Part 135 direction, oversight, supervision, control, and direction of Brian McCarter and David Dragoli are immune from liability under NRS 616C.215(2)(a). *Id*. at 14:9-15:17.

Defendants also argue that under the embedded exception to the *Meers* normal work test, the repair and maintenance work performed on the subject aircraft by RFS and its employees was a contract. *Id*. at 16:2-21:17. In *Meers*, the Nevada Supreme Court explained that "[t]he test (except in cases where the work is obviously a subcontracted fraction of a main contract) is whether that indispensable activity is, in that business, normally carried on through employees rather than independent contractors." 101 Nev. at 286, 701 P.2d at 1007; *see also Bassett Furniture Indus., Inc. v. McReynolds*, 216 Va. 897, 900, 224 S.E.2d 323, 325 (1976) ("While Bassett did the electrical work and periodically inspected Industrial's work for compliance, it had no control over Industrial's employees and never required any 'specific changes.'"). Defendants argue that DOMs statutorily delegated the repair and maintenance of the subject aircraft to the eight RFS mechanics, but subject to their Part 135 statutory supervision, responsibility, and control. *Id*. at 17:12-18:4. Defendants then

cite to two federal cases involving the embedded exception to the *Meers* test. *Id*. at 18:23-20:23. Finally, Defendants argue that, in any event, it is undisputed that as a matter of law, the normal day-to-day work of AMF included the repair and maintenance work performed on all AMF aircrafts, including the subject aircraft, by RFS mechanics under the Part 135 oversight, supervision, control, and direction of Brian McCarter and David Dragoli. *Id*. at 21:19-23:18.

Plaintiffs reply that there are no genuine issues of material fact precluding summary judgment on Defendants' workers' compensation immunity defense. Reply at 3:17-9:2. First, Plaintiffs contend that David Dragoli was not an employee of AMF. *Id*. at 3:19-4:9. Plaintiffs contend that Defendants provide no support in the record for this claim—only lengthy citations to Mr. Dragoli's deposition that references his designation as AMF's DOM. *Id*. Next, Plaintiffs argue that Defendants misconstrue the FARs concerning maintenance and misrepresent the AMF DOM's involvement with actual aircraft maintenance work. *Id*. at 4:10-6:5. Plaintiffs further contend that RFS is not a direct co-employee of Plaintiffs' decedents. *Id*. at 6:6-7:3. Plaintiffs continue that Defendants' direct co-employee argument lacks legal support—as Defendants cite no authority for their claim that a single employee of one company "supervising" employees for a separate independent contractor company somehow converts all of the independent contractor's employees into "co-employees" for the purpose of workers' compensation immunity. *Id*. at 6:18-21.

Next, Plaintiffs assert that Defendants cannot satisfy the *Meers* normal work test as a matter of law and no rational trier of fact could conclude otherwise. *Id*. at 7:4-9:2. Plaintiffs argue that the test is not whether AMF directed or supervised work—it is whether AMF normally carried on that type of work itself through its own employees and whether its own workforce was equipped to handle aircraft maintenance. *Id*. at 7:16-21. Furthermore, the FAR Part 135 oversight, supervision, control and direction of AMF's DOMs was nothing more than administrative paperwork—not actual maintenance. *Id*. at 7:21-23.

Finally, Plaintiffs argue that the supposed "embedded exception" to the *Meers* normal work test is completely inapplicable and misapplied by Defendants. *Id*. at 9:3-10:22. Plaintiffs explain that the parenthetical exception from the *Meers* test is now defined by Nevada statute and is inapplicable to RFS's situation here. *Id*. at 9:5-9. Meaning, cases involving obviously subcontracted

work with a principal contractor licensed pursuant to NRS Chapter 624. *Id*. at 9:10-19. Here, neither AMF nor RFS are licensed contractors under NRS Chapter 624, nor do Defendants claim they are; thus, this "embedded exception" is inapplicable and Defendants must satisfy the *Meers* test. *Id*. at 9:20-22.

In the Supplement, Plaintiffs attached certain FAA records (that were only just provided to Plaintiffs following a request made in May 2020) indicating that all of the mechanics employed by RFS were part of only the RFS Antidrug and Alcohol Program and not the program of AMF—who employed the decedents. *See* Suppl. In the Supplemental Memorandum, Defendants argue that the *Meers* "normal work" test has no application to the facts and circumstances of the instant case, and that by "reasoning by way of analogy to Virginia jurisprudence," this case should be decided under either the governmental entity test or the stranger to the work test. *See* Suppl. Memorandum. Plaintiffs oppose Defendants' filing of the Supplemental Memorandum. *See* Objection to Suppl. Memorandum.[5]

b. This Court finds good cause to grant the Motion.

In consideration of the foregoing legal arguments, and in consideration of the operative legal authority, this Court finds good cause to grant the Motion. As an initial matter, this Court clarifies that Nevada law governs this determination—specifically, the *Meers* test; thus, this Court rejects Defendants' attempt to apply legal authority from outside of this jurisdiction. Next, this Court acknowledges that the parties included extensive statements of facts in their pleadings, *see* Mot. at 4:14-7:13, Opp'n at 3:7-12:7, which this Court incorporates into this analysis below. Defendants bear the burden of proof regarding their workers compensation affirmative defense, *see Nevada Ass'n Servs., Inc. v. Eighth Jud. Dist. Ct.*, 130 Nev. 949, 955, 338 P.3d 1250, 1254 (2014), such that Plaintiffs may satisfy their summary judgment "burden of production by either (1) submitting evidence that negates an essential element of the nonmoving party's claim, or (2) pointing out that there is an absence of evidence to support the nonmoving party's case" *see Cuzze*, 123 Nev. at 602, 172 P.3d at 134.

[5] This Court also heard oral arguments on the Motion, which were largely duplicative of the briefing filed in this case. *See* Hr'g Tr. at 13:5-59:6.

Based on Plaintiffs' statement of facts detailed above, which is supported by the record, this Court finds that Plaintiffs have put forth substantial evidence that negates an essential element of Defendants' workers compensation affirmative defense. *See Cuzze*, 123 Nev. at 602, 172 P.3d at 134. Notably, Defendants do not dispute that RFS and AMF were separate legal entities; that AMF did not have aircraft maintenance tools; that RFS held itself out as a maintenance shop and that AMF identified as an air ambulance company; that RFS invoiced AMF for work performed on AMF aircrafts; that AMF never invoiced anyone for aircraft maintenance work; that AMF paid RFS for maintenance work; and that AMF received no revenue from aircraft maintenance work. *See* Opp'n at 3:7-12:8. Therefore, Plaintiffs have provided evidence that RFS and AMF are *not* statutory co-employees pursuant to *Meers* and NRS 616B.603 because RFS is an independent enterprise and not involved in the "same trade, business, profession or occupation" as AMF. In other words, because RFS is in the aircraft maintenance business, and because AMF's maintenance activities were carried on through an independent contractor, *i.e.*, RFS, and AMF was not otherwise equipped to handle aircraft maintenance with its own work force, RFS and AMF are not statutory co-employees, such that the NIIA does not apply. *See Meers*, 101 Nev. at 285-86, 701 P.2d at 1007-08.

As such, the summary judgment burden now shifts to Defendants, who "must transcend the pleadings and by affidavit or other admissible evidence, introduce specific facts that show a genuine issue of material fact." *See Cuzze*, 123 Nev. at 602, 172 P.3d at 134. In opposing the Motion, Defendants essentially challenge the definition of maintenance as used by Plaintiffs. At the hearing, Defendants represented, "It's true that [RFS] had more mechanics, and [AMF] had the one director of maintenance who was the mechanic. It's actually true too that [American Med Flight] did not do maintenance"; Defendants also explained that both RFS and AMF were maintaining the aircraft, because "[p]art of maintaining an aircraft required by the FARs is that we have a director of maintenance, and that person supervised the maintenance." Hr'g Tr. at 43:6-10, 44:11-15. In other words, Defendants represent that DOMs Brian McCarter and David Dragoli were employees of AMF, as were Plaintiffs' decedents (Mr. Shepherd and Ms. Urresti); therefore, they were all co-employees and all the repair and maintenance work performed on the subject aircraft by RFS mechanics under

the Part 135 oversight, control, and direction of the DOMs is immune from liability under NRS 616C.215(2)(a).[6] *See* Opp'n at 14:9-15:17.

This Court is not persuaded that Defendants' argument satisfies *Meers* and NRS 616B.603(2). As an initial matter, there cannot be any dispute that AMF and RFS are independent enterprises within the meaning of NRS 616B.603(2). *See* NRS 616B.603(2) (defining "independent enterprise" as "a person who holds himself out as being engaged in a separate business" as well as "[h]olds a business or occupational license in his or her own name"). Here, AMF and RFS hold themselves out as separate businesses, and based on corporate documentation, are unquestionably separate businesses. And the argument set forth by Defendants regarding the fact that AMF and RFS shared a location or had "co-employees" does not affect this analysis.[7]

Therefore, for the NIIA to apply here, Defendants must demonstrate that even though RFS and AMF are independent enterprises, that AMF is nevertheless "in the same trade, business, profession or occupation" as RFS. *See* NRS 616B.603(1)(b). To do this, Defendants must show that airplane maintenance is "normally carried on through employees rather than independent contractors." *See Meers*, 101 Nev. at 285-86, 701 P.2d at 1007-08. As Plaintiffs have stated many times, this case is not about negligent paperwork—it is about negligent, physical maintenance performed on an aircraft resulting in a plane crash. Hr'g Tr. at 52:4-6. Thus, a focused application of the *Meers* test, in conjunction with Defendants' own admissions that AMF did not perform any physical maintenance on the subject aircraft, is enough to determine that the NIIA does not apply.

In other words, this Court is not persuaded that AMF's adherence to federal guidelines, or that AMF, through its DOMs "directed" or "supervised" maintenance work, alters the conclusion that the kind of aircraft maintenance work alleged to be negligently performed by RFS as an independent

---

[6] Defendants also contend in the Opposition that the embedded exception to the *Meers* normal work test applies here. *See* Opp'n at 16:2-21:17. However, as explained by Plaintiffs, the embedded exception is now codified by statute and refers to subcontracted work with a principal contractor licensed pursuant to NRS Chapter 624. Because Defendants do not assert that AMF or RFS are licensed contractors under NRS Chapter 624, the "embedded exception" is not applicable here.

[7] Plaintiffs vehemently dispute that David Dragoli was every employed by AMF; instead, they maintain that only RFS paid or employed Mr. Dragoli, and that an air charter operator is not required to actually employ the person they designate as DOM. *See* Reply at 3:17-4:9. The record before this Court supports Plaintiffs' position. *See* Mot., Ex. 22 (David Dragoli Deposition at 19:10-12 (Q: Your understanding is that you were never an employee of American Med Flight? A: Yes, sir."); *see also* Mot., Ex. 26 at 33:22-34:18 (Deposition of Steve Magginetti) (explaining that Mr. Dragoli was never paid by AMF, and that, at the time of the crash, AMF did not employ any aircraft mechanics).

contractor was *not* the normal work of AMF. The testimony of Defendants' expert, Steve Magginetti is especially illuminating:

> Q. As you say, I believe this is in your rebuttal report, essentially, that the FAA doesn't care what business you're in or what business model you use as long as you satisfy the technical requirements of a Part 135, correct?
> A. Correct. The FAA does not mandate employment, who's being paid for what. All they want is a warm body that will personally take responsibility for the airworthiness of the aircraft and the operation.
> Q. And in a situation where there is no actual maintenance being done by the certificate holder or the DOM, the responsibility you're talking about would be to ensure that a proper mechanic or maintenance facility is doing the work and that they signed off on it properly, correct?
> MR. KENT: Objection. Compound question. Argumentative. Incomplete hypothetical.
> THE WITNESS: It would include those elements.
> BY MR. ROSE:
> Q. So the FAA doesn't care –withdrawn.
> The – you said it would include those elements, but there are no other elements that require a DOM to actually do maintenance work, correct?
> MR. KENT: Objection. Incomplete hypothetical. Ambiguous. Argumentative.
> THE WITNESS: Correct.
> BY MR. ROSE:
> Q. And there's no requirement that the DOM actually be physically president – present for any maintenance, correct?
> MR. KENT: Objection. Asked and answered.
> THE WITNESS: There's no requirement in the rule.
> . . . .
> Q. But in any event, we can agree that the regs, again, don't require the director of maintenance to be physically present for any maintenance or inspection, correct?
> A. That's a fact.
> Q. And the reg you're relying on here, does not say that a certificate holder has to perform the maintenance, correct?
> A. Correct.

Mot., Ex. 26 (Deposition of Steve Magginetti) at 44:5-45-12; 70:3-10.

Steve Magginetti' s report further provides:

> The maintenance for American Med Flight aircraft was their ultimate responsibility per 14CFR Part 145 413. American Med Flight the certificate the subject aircraft was on. The actual work on the aircraft can be performed by any appropriately rated FAA licensed Airframe and Powerplant (A&P) provided they are vetted by the Director of Maintenance and are on a drug testing

> program. American Med Flight made arrangements with qualified technicians who were employed by Reno Flying Service.

Opp'n, Ex. 1 (Report of Steve Magginetti) at 2.

Therefore, while federal regulations unquestionably require a DOM to **take responsibility** for the airworthiness and maintenance of the subject aircraft, Defendants provide no evidence that any AMF employee, working as an AMF employee, performed maintenance on the subject aircraft—let alone any aircraft. Thus, Defendants failed to meet their summary judgment burden, *see Cuzze*, 123 Nev. at 602, 172 P.3d at 134, and Plaintiffs are entitled to judgment as a matter of law because no rational trier of fact could conclude that AMF performed airplane maintenance such that RFS and AMF could be considered to be "in the same trade, business, profession or occupation." *See* NRS 616B.603(1)(b); *see also Meers*, 101 Nev. at 285-86, 701 P.2d at 1007-08 (detailing that the test is whether the activity is normally performed by its employees rather than independent contractors).

Based upon the foregoing and good cause appearing,

IT IS HEREBY ORDERED that Plaintiffs' *Motion for Summary Judgment Concerning Defendants' Statutory Immunity Defense* is GRANTED.

IT IS HEREBY FURTHER ORDERED that Defendants' *Motion for Extension of Time to Oppose Plaintiffs' Motion for Summary Judgment and to File Defendants' Dispositive Motion Due to Illness of Defendants' Counsel*, *Defendants' Motion for Summary Judgment, and Memorandum of Points and Authorities*, and Plaintiffs' *Motion to Strike Defendants' Motion for Summary Judgment* are DENIED as moot.

IT IS SO ORDERED.

DATED this 9th day of April, 2021.

KATHLEEN M. DRAKULICH
DISTRICT JUDGE

CERTIFICATE OF SERVICE

CASE NO. CV18-02271

I certify that I am an employee of the SECOND JUDICIAL DISTRICT COURT of the STATE OF NEVADA, COUNTY OF WASHOE; that on the 9th day of April, 2021, I electronically filed the **ORDER GRANTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT CONCERNING DEFENDANTS' STATUTORY IMMUNITY DEFENSE** with the Clerk of the Court by using the ECF system.

I further certify that I transmitted a true and correct copy of the foregoing document by the method(s) noted below:

Electronically filed with the Clerk of the Court by using the ECF system which will send a notice of electronic filing to the following:

KIRK WALKER, ESQ. for RENO FLYING SERVICE, INC.

BRADLEY BOOKE, ESQ. for JAMES URRESTI et al

STEPHEN KENT, ESQ. for AIR MEDICAL RESOURCE GROUP, INC., GUARDIAN FLIGHT, LLC, THE JOSEPH HUNT FAMILY TRUST, JOSEPH HUNT, RENO FLYING SERVICE, INC.

VINCENT LESCH, III, ESQ. for JAMES URRESTI et al

Deposited to the Second Judicial District Court mailing system in a sealed envelope for postage and mailing by Washoe County using the United States Postal Service in Reno, Nevada: [NONE]

Danielle Redmond

Department 1 Judicial Assistant