No. 21-10159

United States Court of Appeals

FOR THE ELEVENTH CIRCUIT

LISA A. REED,
Plaintiff-Appellant,

v.

PEDIATRIC SERVICES OF AMERICA,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Georgia

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OPENING BRIEF OF COURT-APPOINTED AMICUS

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October 25, 2021

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

COMES NOW Amicus Curiae, and files her Certificate of Interested Persons and Corporate Disclosure Statement pursuant to Eleventh Circuit Rule 26.1 as follows:

1. BATEMAN, Lauren, Counsel for Amicus [added];
2. FREELY, Cheyenne, Student Counsel for Amicus [added];
3. GLASGOW, Julia C., Counsel for Defendant-Appellee;
4. GORDON REES SCULLY MANSUKHANI, LLP, Counsel for Defendant-Appellee;
5. HASHIMOTO, Erica, Counsel for Amicus [added];
6. JOHNSON, Hon. Walter E., United States Magistrate Judge;
7. MURPHY, Hon. Harold L., United States District Judge;
8. NGUYEN, Hannah, Student Counsel for Amicus [added];
9. PEDIATRIC SERVICES OF AMERICA, INC., d/b/a Aveanna Healthcare, Defendant-Appellee;
10. REED, Lisa A., Plaintiff-Appellant;
11. SHULTZ, Chad A., Counsel for Defendant-Appellee.

Amicus is not aware of any publicly traded company or corporation that has an interest in the outcome of the above-captioned case or appeal

beyond those identified in the corporate disclosure statements included in the parties' opening briefs.

Respectfully Submitted,

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Dated: October 25, 2021

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STATEMENT OF INTEREST BY AMICUS CURIAE

Amicus Curiae is the Director of the Appellate Litigation Program at Georgetown University Law Center. She has been instructed to brief and be prepared to present oral argument on the following issues:

1. Whether Appellant has preserved properly (that is, not waived, abandoned, forfeited, been estopped from raising, etc.) her objections to the accuracy of the transcription of her deposition.

2. If preserved, whether the district court—when presented with a deposition transcript certified by the court reporter and with assertions (made under penalty of perjury by a party-deponent) that the transcript is inaccurate—can resolve that conflict by making a credibility determination without first listening to (as requested by the deponent) the audio recording of the deposition or holding a testimonial-evidentiary hearing (allowing valid credibility choices to be made) on the party-deponent's motion to exclude the transcript.

3. Any other issue that amicus curiae deems appropriate in light of the facts and procedural posture of this appeal.

STATEMENT OF THE CASE

Plaintiff-Appellant Lisa Reed, a Black pediatric nurse who delivers home care to patients, sued her employer, Defendant-Appellee Pediatric Services of America, Inc. d/b/a Aveanna Healthcare (PSA), under Title VII of the Civil Rights Act of 1964. Compl., Doc. 1 at 2–3, 7; AA 39 (Doc. 60-1 at 1 n.1).[1] Proceeding *pro se*, she alleged race discrimination, sex discrimination, and retaliation claims. Compl., Doc. 1.

With respect to race discrimination, Ms. Reed alleged that PSA staffed her with a white mother who requested that only Black nurses care for her child. Compl., Doc 1 at 2. It is undisputed that, after Ms. Reed complained about the race-based assignment, she received a letter from Angie Bartles, PSA's Associate Vice President of People Services, acknowledging that "[a] case was offered and accepted in which [Ms. Reed was] told the mother had requested black nurses to care for her child" and stating that it was PSA's policy to "honor" race-based placement requests. SA 239–40 (Doc. 67-1 at 4–5).

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[1] The facts related to Ms. Reed's Title VII claims were presented to this Court in the parties' initial briefing. The arguments contained in this brief primarily concern the course of proceedings below. Accordingly, amicus presents only an abridged version of the underlying facts.

In support of her sex discrimination claim, Ms. Reed alleged that during the course of her employment, coworkers and supervisors at PSA had made numerous comments—both among themselves and to patients—about her appearance, saying "that [she] look[ed] like a man" and that she "could be a man or transgender." AA 134 (Doc. 66-9).

Finally, Ms. Reed alleged that PSA unlawfully retaliated against her by withholding placement offers after she began raising her concerns about the workplace environment. AA 134 (Doc. 66-9). PSA disputed that allegation, arguing that Ms. Reed continued to be offered nursing assignments, including a full-time support role, but that she "declined all of these assignments except one." SA 35 (Doc. 61 at 3). Ms. Reed maintained that she did not in fact receive some of those placement offers, AA 110 (Doc. 70 at 8),[2] and that the assignment offers she did receive were illusory offers that "no one else wanted." SA 77 (Doc. 61-2 at 28); *see also* SA 91 (Doc. 61-2 at 42) (describing the offers as "unreasonable" and that they were "supposed to be declined"). The record

[2] Ms. Reed contended that the headings of the emails containing the putative placement offers reveal that "[n]one of the cases were sent to . . . plaintiff." AA 110 (Doc. 70 at 8).

includes an email that Ms. Reed sent to a PSA operations director stating that, after leaving the race-based placement, she did not receive a single case assignment for approximately five months. SA 209 (Doc. 61-4 at 26).

As her assignments dwindled, Ms. Reed alleged, she lost her life insurance and health insurance, incurred medical bills, and had to deplete her 401(k) to pay rent. SA 78–79 (Doc. 61-2 at 29–30). Finally, she alleged that, in relation to these financial difficulties, she was diagnosed with an anxiety disorder for which she was prescribed medication. Compl., Doc. 2 at 8, 23 (describing the reduction in salary as "financially disabl[ing]" and that her "financial issues . . . caused [her] to have anxiety attacks which . . . [are] being treated with medications prescribed by [her] physician").

On these facts, Ms. Reed filed a Charge of Discrimination with the EEOC. AA 134 (Doc. 66-9). In February 2020, the EEOC issued Ms. Reed notice of her right to sue. Pl.'s Initial Disclosure, Doc. 9 at 11. Ms. Reed then timely filed a complaint. Compl., Doc. 2.

During discovery, counsel for PSA deposed Ms. Reed. AA 14 (Doc. 41 at 1). After receiving a copy of the deposition transcript, Ms. Reed filed a motion with the court seeking to exclude it from the record. AA 14–15

(Doc. 41 at 1–2).[3] Ms. Reed declared under penalty of perjury that she believed the transcript "stated things [she] did not say," "repeatedly misquoted" her, and omitted things that both she and deposing counsel stated. AA 15, 17 (Doc. 41 at 2, 4). She further swore that the transcript had materially misrepresented "[i]mportant questions that were asked and answered about the racism [she] experienced."[4] AA 16 (Doc. 41 at 3). Ms. Reed attached to her motion a copy of the transcript with annotations highlighting some of the alleged inaccuracies, with the caveat that she would be unable to add the omitted material or rearrange the order of the questions and answers. AA 16 (Doc. 41 at 3). Ms. Reed sought to have the court either review the audio recording of the deposition or deem the

[3] Rule 32 contemplates that a litigant may move to suppress a deposition transcript based on alleged defects in how the transcript was "prepared" or "otherwise dealt with." Fed. R. Civ. P. 32(d)(4) (requiring such motions to be made "promptly after the error or irregularity becomes known or, with reasonable diligence, could have been known").

[4] For example, Ms. Reed swore that deposing counsel asked her if she had "any other race issue," to which she responded that a patient's father called her a "[n]igger" and that, after she reported the incident, her clinical director stated that "[h]e can say what he wants in his house." Mot. re: Dep., Doc. 41-2 at 89, 95. The deposition shows Ms. Reed stating that that incident was "not a part" of her race discrimination claim; in her motion, she swore that no such statement was made. Mot. re: Dep., Doc. 41-2 at 95–96.

"entire deposition inadmissible due to [the] numerous inaccuracies." AA 15 (Doc. 41 at 2).[5]

PSA filed a response to Ms. Reed's motion and attached two documents in support of the transcript's accuracy: the certification by the court reporter declaring that the transcript was a "true and correct record of the testimony/evidence given, to the best of [her] ability" and a declaration by a manager at the court reporting agency stating that he listened to the audio recording of the deposition, compared it to the transcript, and found no inconsistencies. AA 19–29 (Doc. 44, 44-1, 44-2). Ms. Reed filed a reply, again asking the court to "request a written transcript along with [the] audio" of the deposition. AA 30 (Doc. 46 at 1).

The magistrate judge reviewed these filings and issued an order on October 15, 2020, stating that "[t]he Court finds no credence in [Ms. Reed's] assertions and declines to find the transcript of her deposition to be inadmissible." AA 34–35 (Doc. 47 at 2–3). The order did not notify Ms. Reed that failure to timely appeal to the district court would constitute waiver of appellate review. AA 35 (Doc 47 at 3).

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[5] Ms. Reed also filed a complaint with the Board of Court Reporting at the Georgia Judicial Council. AA 17 (Doc. 41 at 4).

The parties then filed cross-motions for summary judgment and, as required by the local rules, statements of "material facts to which there is no genuine issue to be tried." NDGa LR 56.1(B)(1); *see* SA 12–43 (Doc. 60, 60-1, 61); Pl.'s Mot. for Summ. J., Doc. 53, 53-1, 54. PSA's brief in support of its motion for summary judgment and its statement of material facts relied on statements drawn from Ms. Reed's deposition transcript. SA 33–41 (Doc. 61 at ¶¶ 3, 5–7, 17–18, 20, 22–51). In her opposition to PSA's motion, Ms. Reed stated that "the entire deposition [transcript] . . . was altered, presenting many issues at trial for the defendant." AA 60 (Doc. 65 at 2). Ms. Reed also filed an opposition to PSA's statement of material facts, arguing that the "[d]eposition was altered and can[]not be deemed completely factual." AA 79 (Doc. 66 at ¶ 48).

Relying on PSA's statement of material facts, which cited to the disputed transcript as evidentiary support for thirty-seven out of fifty-one paragraphs, the magistrate judge recommended that summary judgment be granted to PSA. AA 100 (Doc. 68 at 20). The Final Report and Recommendation (R&R) stated that Ms. Reed's "contention that the

transcript of her deposition testimony was somehow altered . . . ha[d] already been rejected" in the October 15 order. AA 85 (Doc. 68 at 5).

Ms. Reed filed a timely objection to the R&R. *See* AA 101–02 (Doc. 69 at 1–2); AA 103–116 (Doc. 70 at 1–14). Ms. Reed specifically objected to the recommendation's reliance on the deposition transcript as undisputed evidence, stating that "[t]he transcriber grossly altered the deposition" and arguing that just because the court "allowed the deposition into [the] record, that does not mean it was not altered." AA 105 (Doc. 70 at 3); *see also* AA 103 (Doc. 70 at 1) (requesting a "new trial"). The district court overruled Ms. Reed's objection for two reasons. First, Ms. Reed "did not appeal [the magistrate judge's October 15] Order rejecting her challenge to her deposition transcript." AA 121 (Doc. 71 at 5). Second, the district court opined—without holding an evidentiary hearing or listening to the audio recording—that the magistrate judge "correctly rejected" her contention that the transcript was altered. AA 121 (Doc. 71 at 5). It then adopted the R&R's recommendation to grant summary judgment to PSA. AA 126–27 (Doc. 71 at 10–11).

Ms. Reed filed a timely notice of appeal. (Not. of App., Doc. 74). After briefing was completed, this Court *sua sponte* appointed

undersigned counsel as amicus curiae to brief and be prepared to present oral argument on the following issues: (1) Whether Ms. Reed has preserved properly (that is, not waived, abandoned, forfeited, been estopped from raising, etc.) her objections to the accuracy of the transcription of her deposition; (2) If preserved, whether the district court—when presented with a deposition transcript certified by the court reporter and with assertions (made under penalty of perjury by a party-deponent) that the transcript is inaccurate—can resolve that conflict by making a credibility determination without first listening to (as requested by the deponent) the audio recording of the deposition or holding a testimonial-evidentiary hearing (allowing valid credibility choices to be made) on the party-deponent's motion to exclude the transcript; and (3) Any other issue that amicus curiae deems appropriate in light of the facts and procedural posture of this appeal. Dkt. No. 30.

STANDARD OF REVIEW

This Court reviews *de novo* a grant of summary judgment. *See Clark v. Coats & Clark, Inc.*, 929 F.2d 604, 609 (11th Cir. 1991). Summary judgment is improper where genuine issues of material fact remain. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48 (1986).

This Court reviews a district court's decision not to hold an evidentiary hearing for abuse of discretion. *Odyssey Marine Expl., Inc. v. Unidentified Shipwrecked Vessel*, 657 F.3d 1159, 1169 (11th Cir. 2011). "A district court abuses its discretion if it applies an incorrect legal standard, applies the law in an unreasonable or incorrect manner, follows improper procedures in making a determination, or makes findings of fact that are clearly erroneous." *Brown v. Ala. Dep't of Transp.*, 597 F.3d 1160, 1173 (11th Cir. 2010) (quoting *Citizens for Police Accountability Pol. Comm. v. Browning*, 572 F.3d 1213, 1216–17 (11th Cir. 2009)).

Ms. Reed's *pro se* filings must be "liberally construed" and "held to a less stringent standard" than those drafted by lawyers. *Jones v. Fla. Parole Comm'n*, 787 F.3d 1105, 1107 (11th Cir. 2015).

SUMMARY OF THE ARGUMENT

Ms. Reed timely objected to the Final R&R recommending that summary judgment be granted to PSA. Specifically, she objected to the magistrate judge's reliance on the transcript in resolving the cross-

motions for summary judgment. By doing so, she preserved her objection to the accuracy of the transcript.

Although Ms. Reed failed to appeal to the district court the magistrate judge's nondispositive October 15 order deeming the transcript *admissible*, forgoing that appeal did not waive her ability to object now to the reliance of the district court on the transcript's *accuracy*. The October 15 order was scant in its analysis and appeared only to focus on evidentiary admissibility. Nothing in that order would have prompted Ms. Reed to realize that she might need to appeal it to the district court to preserve her ability to object to the use of the transcript as undisputed fact at summary judgment. Indeed, the order was so ambiguous that it led both parties—Ms. Reed and PSA's seasoned attorneys alike—to assume in briefing before this Court that the merits of her accuracy argument may be reviewed on appeal. Particularly as a *pro se* litigant, Ms. Reed could not have known that when the magistrate judge credited the court reporter's certification over her sworn statement for purposes of admissibility at trial, he had perhaps also implicitly determined that the transcript was indisputably accurate for the purposes of summary

judgment. Accordingly, the October 15 order did not trigger any obligation under Rule 72(a) to appeal the issue lest it be deemed waived.

Faced with Ms. Reed's objections to the Final R&R, the district court, while recognizing that Ms. Reed did not appeal the October 15 order, went on to conclude that the magistrate judge "correctly rejected [Ms. Reed's] contention" that the deposition transcript was altered. AA 121 (Doc. 71 at 5). But in light of the conflicting documentary evidence, and because the magistrate judge conducted inadequate review, the district court could only properly resolve the transcript dispute through conducting a testimonial-evidentiary hearing or by listening to the audio of the deposition. It abused its discretion in failing to do so.

It is impossible to now determine how the summary judgment record would have been affected had the district court properly evaluated Ms. Reed's objections to the transcript's accuracy. The order granting summary judgment therefore must be reversed and the case remanded with instructions to properly resolve Ms. Reed's objections by conducting a testimonial-evidentiary hearing and listening to an audio recording of the deposition to verify the transcript's accuracy.

Additionally, reversal of summary judgment is independently warranted as to Ms. Reed's race discrimination claim because the district court failed to consider undisputed record evidence that may have been sufficient to establish Ms. Reed's prima facie case.

ARGUMENT

I. Ms. Reed preserved her objection to the accuracy of the transcript.

Ms. Reed preserved her objection to the accuracy of the transcript when she objected to the magistrate judge's reliance on the transcript as a source of undisputed fact in the Final R&R. That timely objection specifically identified the error that she wanted the district court to correct. And because the October 15 order on admissibility was deficient in its reasoning and ambiguous in its effect, declining to appeal that order to the district court does not constitute waiver of Ms. Reed's right to seek this Court's review of her objections to the accuracy of the transcript.

A. Ms. Reed's objection is preserved because she objected to the Final R&R.

Ms. Reed preserved her objection to the accuracy of the transcript by filing an objection to the Final R&R. *See* AA 103–116 (Doc. 70). Her

objection was timely. *See* AA 101–02 (Doc. 69 at 1–2); Fed. R. Civ. P. 72(b)(2) (allowing the filing of objections within fourteen days of service of the recommended disposition). And it pinpointed the specific issue she wished the district court to consider: Ms. Reed objected to the use of the "altered deposition as . . . 'material fact'" in light of "problems with the validity of the document." AA 105 (Doc. 70 at 3). That is all that was required to preserve her objection. *See* 11th Cir. R. 3-1 (requiring party to object to findings or recommendations of an R&R in order to avoid waiver of appellate review); *United States v. Schultz*, 565 F.3d 1353, 1360 (11th Cir. 2009) (observing that "a party that wishes to preserve its objection must clearly advise the district court and pinpoint the specific findings that the party disagrees with").

B. The failure to appeal the October 15 order does not affect this Court's ability to consider Ms. Reed's objection.

The October 15 order facially resolved only the question of the transcript's evidentiary admissibility, so Ms. Reed's failure to appeal it cannot have constituted waiver of her objections to the transcript's accuracy. When granting summary judgment to PSA, the district court observed that Ms. Reed "did not appeal [the magistrate judge's] Order rejecting her challenge to her deposition transcript." AA 121 (Doc. 71 at

5). Generally, "where a party fails to timely challenge a magistrate's nondispositive order before the district court, the party waive[s] his right to appeal those orders" to the Court of Appeals. *Smith v. Sch. Bd. Of Orange Cty.*, 487 F.3d 1361, 1365 (11th Cir. 2007); Fed. R. Civ. P. 72(a) (requiring parties to file objections to nondispositive orders within fourteen days). Further, this Court lacks jurisdiction to consider direct appeals of nondispositive orders by a magistrate judge. *Schultz*, 565 F.3d at 1359 (citing *United States v. Renfro*, 620 F.2d 497, 500 (5th Cir. 1980)).[6] But the October 15 order was so ambiguous that Ms. Reed could not have known whether she was obligated to appeal it, and—perhaps tellingly—PSA did not brief whether her failure to appeal the order constituted waiver. For the purposes of waiver and jurisdictional analysis, then, the October 15 order must be treated as though it simply

[6] This rule is animated by the concern that parties who seek direct appellate review of nondispositive decisions by magistrate judges deprive the trial judge of an "ability to effectively review the magistrate's holding." *Schultz*, 565 F.3d at 1359 (quoting *Renfro*, 620 F.2d at 500). Amicus has not identified any published opinion in which this Court determined that it lacked jurisdiction to review a nondispositive issue where, as here, the district court actually considered the merits of that issue after it was raised in an objection to a final recommendation. AA 121 (Doc. 71 at 5) (finding that the magistrate judge "properly resolved the issue").

did what it said: it held only that the transcript was admissible as evidence, not that it was a faithful and accurate record of the deposition.

The October 15 order contained a single sentence of analysis: "The Court finds no credence in plaintiff's assertions and declines to find the transcript of her deposition inadmissible." AA 35 (Doc. 47 at 3). In crediting the court reporter's certification of the deposition over Ms. Reed's sworn statement, the magistrate judge may have, in effect, resolved the question whether the deposition was authenticated and therefore indisputably accurate for the purpose of resolving summary judgment. *See Orr v. Bank of Am., NT & SA*, 285 F.3d 764, 773–74 (9th Cir. 2002) (indicating that court reporter's certification authenticates a deposition transcript for use at summary judgment); *Alexander v. CareSource*, 576 F.3d 551, 560 (6th Cir. 2009) (same).

But those consequences were not readily apparent from the October 15 order. The order did not specify the basis upon which it reached its conclusion, other than to say that it reviewed the parties' submissions. AA 34–35 (Doc. 47 at 2–3). And the reference to the deposition's admissibility was misleading: it suggested that, although admissible, there remained the possibility that Ms. Reed could contest the accuracy

of portions of the transcript at trial by, for instance, seeking to have a jury listen to the audio recording of the deposition, or cross-examining the court reporter's manager who swore to the accuracy of the transcript.[7]

Indeed, the vagueness of the order led *both* parties to treat the question of accuracy as an issue properly preserved before this Court. *See* Appellant Br. at 9 (describing the effect of the October 15 order as "allow[ing] the altered deposition into [the] record"); Appellee Br. at 12–13 (describing the effect of the October 15 order as "declin[ing] to find the transcript of her deposition to be inadmissible" and forgoing any argument that Ms. Reed was precluded from appealing the question of accuracy to this Court). Because PSA never raised the possibility of waiver, and because the issue is inextricably intertwined with the underlying summary judgment question, this Court should review Ms. Reed's objections. *See Tabron v. Grace*, 6 F.3d 147, 153 n.2 (3d Cir. 1993)

[7] The order also did not notify Ms. Reed that failure to object could compromise her right to raise her objection on appeal. In the context of magistrate judge findings and recommendations as to dispositive motions, this Court has determined that it is necessary for a magistrate judge to provide "clear notice" of the "time period for objecting" and that "failure to object . . . waives the right to challenge [the findings and recommendations] on appeal." 11th Cir. R. 3 IOP ¶ 3.

(considering issue notwithstanding waiver where issue was briefed on the merits by both parties on appeal, defendant never raised waiver as a defense, plaintiff was *pro se*, and the issue was intertwined with the merits of the appeal); *cf. United States v. Decker*, 832 F. App'x 639, 646 (11th Cir. 2020) (finding that the "interests of justice" enabled appellate review of a district court's decision adopting an unobjected-to recommendation primarily because opposing counsel did not raise waiver in its initial brief).

To determine that the October 15 order triggered Ms. Reed's obligation to appeal to the district court the question of the transcript's accuracy would also be inconsistent with this Court's precedent granting solicitude to *pro se* litigants. Ms. Reed explicitly sought that solicitude. AA 115 (Doc. 70 at 13) (seeking the court's "mercy for her lack of knowledge of the law"). And this Court has recognized its "obligation . . . to make reasonable allowances to protect *pro se* litigants from inadvertent forfeiture of important rights because of their lack of legal training." *United States v. Hung Thien Ly,* 646 F.3d 1307, 1316 (11th Cir. 2011) (quoting *Johnson v. Schmidt*, 83 F.3d 37, 39 (2d Cir. 1996)); *see also Moore v. Agency for Int'l Dev.*, 994 F.2d 874, 876 (D.C. Cir. 1993)

(discussing the importance of providing a *pro se* litigant with the "necessary knowledge to participate effectively in the trial process"). This obligation is especially strong where a *pro se* litigant's putative procedural error stems from the court's promulgation of a vague or ambiguous order. *See Thunderhorse v. Lynaugh*, No. 93-5568, 1994 WL 574715, at *4 (5th Cir. Oct. 12, 1994) (per curiam) (describing a *pro se* litigant's failure to understand a magistrate judge's "opaque" pretrial order as a "very compelling" factor in support of the argument that the magistrate judge abused her discretion in excluding witnesses due to the litigant's failure to comply with that order); *Smart v. Applied Materials, Inc.*, No. 00-50696, 2001 WL 872753, at *2–3 (5th Cir. July 3, 2001) (per curiam) (reversing dismissal for failure to comply with a show cause order where the order was "ambiguous from the perspective of a pro se litigant").

The October 15 order and the consequences attached to it were unclear not only to Ms. Reed, a *pro se* litigant, but also to PSA and its counsel. Ms. Reed's failure to object to that order therefore cannot constitute waiver of her objections to the transcript's accuracy. Thus,

because she raised that argument in her objection to the Final R&R, the issue is properly preserved.

II. The district court abused its discretion by making a credibility determination.

The district court erred in its determination on the merits that the magistrate judge "properly resolved" Ms. Reed's objection to the accuracy of the transcript. AA 121 (Doc. 71 at 5). Faced with Ms. Reed's objection to the Final R&R, it was obligated to review the dispute *de novo*. *See United States v. Powell*, 628 F.3d 1254, 1256 (11th Cir. 2010); *see also* 28 U.S.C. § 636(b)(1)(C) (2018). And when presented with both the certified transcript and the sworn statement that the transcript was inaccurate, the district court erred by making a credibility determination without first holding a testimonial-evidentiary hearing or listening to the audio of the deposition.

The only evidence upon which the district court relied in rejecting on the merits Ms. Reed's argument that the transcript was fraudulent was the documentary evidence submitted in relation to the October 15 order. On one side of the ledger was the court reporter's certification that the transcript was "true and correct . . . to the best of [her] ability" and the declaration of her manager that he reviewed the audio recording and

"found no inconsistencies between the audio recording and the deposition transcript." AA 26 (Doc. 44-1 at 1); AA 27–29 (Doc. 44-2 at 2–4). On the other, Ms. Reed swore under penalty of perjury that the transcript "stated things [she] did not say," "repeatedly misquoted" her, "omitted things [deposing counsel] [s]tated," "added statements [deposing counsel] never made," and added responses from Ms. Reed that she "never made." AA 15–17 (Doc. 41 at 2–4).

The district court did not explain its decision to reject Ms. Reed's request that the court review the audio and to instead credit the court reporter's certification and the manager's affidavit over Ms. Reed's sworn statement. AA 121 (Doc. 71 at 5) ("[T]he Court finds that [the magistrate judge] properly resolved the issue."). That decision was unlawful: Weighing that documentary evidence required the court to determine which affiants were more credible, which it was not permitted to do on the written submissions alone. *See*, *e.g.*, *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970) (noting that "where credibility and veracity are at issue . . . written submissions are a wholly unsatisfactory basis for decision"); *Mathews v. Eldridge*, 424 U.S. 319, 343–44 (1976) (same); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) (observing that

credibility determinations are not an appropriate function of a judge at summary judgment).

The district court was obligated under Rule 43 of the Federal Rules of Civil Procedure to either conduct a testimonial-evidentiary hearing or to listen to the audio of the deposition to evaluate Ms. Reed's objection. Rule 43 governs matters that may only be resolved on "facts outside the record." Fed. R. Civ. P. 43(c). It enables the district court to, in its discretion, "hear the matter on affidavits or it may hear it wholly or partly on oral testimony or on depositions." *Id.* But the Rule also cabins the district court's discretion: Where "questions of fact or credibility predominate, a district court's decision not to hear oral testimony is often found to be an abuse of discretion." 9A Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure § 2416 (3d ed. 2021) ("[C]ourts often cite to Rule 43 to support this inherent proposition.").

The district court abused that discretion here. When a dispute "depend[s] so heavily on complex facts not readily perceivable from the record[,]" a hearing where oral testimony can be evaluated is "necessary" under Rule 43. *See Sanders v. Monsanto Co.*, 574 F.2d 198, 200 (5th Cir.

1978) (evidentiary hearing required on motion for civil contempt)[8]; *see also, e.g.*, *Love v. Deal*, 5 F.3d 1406, 1409 (11th Cir. 1993) (evidentiary hearing required where there is a "dispute of material historical fact" on an application for attorney's fees); *Martin v. Morgan Drive Away, Inc.*, 665 F.2d 598, 602 & n.1 (5th Cir. 1982) (district court would err by failing to hold evidentiary hearing to determine disputed factual issues before dismissing suit under 12(b)(1)).[9]

Further, this Court has held that a district court may not *reject* a magistrate judge's credibility determination without first conducting a testimonial-evidentiary hearing. *See, e.g.*, *Amlong & Amlong, P.A. v.*

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[8] Decisions of the United States Court of Appeals for the Fifth Circuit decided before September 30, 1981, are binding upon the Eleventh Circuit. *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981).

[9] It may have been within the district court's discretion to conduct a non-testimonial evidentiary hearing by requesting an authenticated audio file of the deposition and reviewing it against the transcript. *See, e.g.*, *Boit v. Gar-Tec Prods., Inc.*, 967 F.2d 671, 676 (1st Cir. 1992) (observing that while it "may be an abuse of discretion not to allow an opportunity for cross-examination of an affiant" if "issues of credibility are presented and must be resolved," it is within a district court's discretion to secure further evidence and, if appropriate, "hold the entire evidentiary hearing without taking any testimony orally in open court") (internal quotation marks omitted).

Denny's, Inc., 500 F.3d 1230, 1245 (11th Cir. 2007); *United States v. Cofield*, 272 F.3d 1303, 1306 (11th Cir. 2001); *Calderon v. Waco Lighthouse for the Blind*, 630 F.2d 352, 356 (5th Cir. 1980). The rationale underlying those decisions applies with equal strength when a district court, on *de novo* review, adopts a magistrate judge's unreasoned credibility determination: "A district court cannot make a 'de novo determination' of the credibility of a witness without at least reading a transcript [of a hearing concerning credibility] or listening to a tape recording of the testimony of the witness." *Calderon*, 630 F.2d at 356. Just as *de novo* review obligates the district court to "review the transcript or listen to [a] tape-recording" of a magistrate judge's testimonial-evidentiary hearing as to credibility where the magistrate judge held such a hearing, *LoConte v. Dugger*, 847 F.2d 745, 750 (11th Cir. 1988), so too does *de novo* review obligate the district court to hold its own testimonial-evidentiary hearing where the magistrate judge reaches a credibility determination absent such a hearing.

Other circuit courts agree: A district court abuses its discretion when it accepts one sworn statement over another without an evidentiary hearing in evaluating fact-intensive motions with hotly contested

material facts. *E.g.*, *United Com. Ins. Serv., Inc. v. Paymaster Corp.*, 962 F.2d 853, 858 (9th Cir. 1992) ("Where factual questions not readily ascertainable from the declarations of witnesses or questions of credibility predominate, the district court should hear oral testimony."); *Cobell v. Norton*, 391 F.3d 251, 261 (D.C. Cir. 2004) ("Particularly when a court must make credibility determinations to resolve key factual disputes in favor of the moving party, it is an abuse of discretion for the court to settle the question on the basis of documents alone, without an evidentiary hearing.").

III. The district court erred in granting summary judgment in the absence of an evidentiary hearing.

It is impossible to disentangle the improper credibility determination from the district court's order adopting the magistrate judge's Final R&R to grant summary judgment in favor of PSA. Had the district court conducted an evidentiary hearing or listened to the audio of the transcript, as it was required to, the factual configuration it would have considered at summary judgment might have been radically different. Nearly every paragraph of the Defendant's Statement of Material Facts cites exclusively to the deposition as the source for a given factual proposition. SA 34–41 (Doc. 61 at ¶¶ 3, 5–7, 17–18, 20, 22–51).

Ms. Reed's ability to object to those facts in a manner compliant with the local rules (by refuting those factual propositions one-by-one based on record evidence or by "point[ing] out that the movant's citation does not support the movant's fact") was compromised by the district court's failure to properly resolve questions as to the accuracy of the transcript. *See* NDGa LR 56.1(B)(2)(a)(1)–(2); *Reese v. Herbert*, 527 F.3d 1253, 1268 (11th Cir. 2008) (noting that compliance with the local rule is the "only permissible way" for a non-movant to "establish a genuine issue of material fact"). Summary judgment was therefore inappropriate, and this Court should remand with an instruction to conduct a testimonial-evidentiary hearing and to evaluate the accuracy of the transcript by listening to the audio recording. *See McKenzie v. Davenport-Harris Funeral Home*, 834 F.2d 930, 934 (11th Cir. 1987) (noting that summary disposition is disfavored where there is a "potentially inadequate factual presentation" on Title VII claims).

IV. The district court erred by granting summary judgment to PSA as to Ms. Reed's race discrimination claim.

Finally, an additional error in the district court's analysis requires remand notwithstanding the transcript dispute: The district court failed to address direct (and undisputed) evidence that PSA assigned Ms. Reed

to a placement based upon her race. Summary judgment therefore was inappropriate as to Ms. Reed's race discrimination claim.

In resolving that claim, the district court relied on the magistrate judge's conclusion that Ms. Reed had not offered any direct evidence in support of the claim, instead applying the *McDonnell Douglas* burden shifting framework. AA 122–23 (Doc. 71 at 6–7); AA 95 (Doc. 68 at 15) ("Plaintiff neither asserts that there is direct evidence of race . . . discrimination . . . nor argues that a convincing mosaic of discrimination exists."). It then adopted the magistrate judge's conclusion that because Ms. Reed had neither "suffer[ed] an adverse employment action" nor "establish[ed] that a similarly situated comparator was treated differently or more favorably," she failed to establish a prima facie case under *McDonnell Douglas*. AA 123 (Doc 71 at 7).

In fact, the record PSA submitted at summary judgment included direct evidence of race discrimination in the form of a letter to Ms. Reed from Angie Bartles, PSA's Associate Vice President of People Services, acknowledging that "[a] case was offered and accepted in which [Ms. Reed was] told [that] the [white] mother had requested black nurses to care for her child" and stating that it was PSA's policy to "honor" race-based

placement requests. SA 239 (Doc. 67-1 at 4)*; see Morris v. Emory Clinic, Inc.*, 402 F.3d 1076, 1081 (11th Cir. 2005) (noting that "direct evidence" in the employment discrimination context is "evidence that, if believed, proves the existence of a fact without inference or presumption" (internal alterations omitted)) (quoting *Wilson v. B/E Aerospace, Inc.*, 376 F.3d 1079, 1086 (11th Cir. 2004)).

The district court did not consider this evidence at all. AA 122–24 (Doc. 71 at 6–8). It offered no analysis as to whether Bartles's letter might have constituted sufficiently direct evidence of race discrimination such that Ms. Reed's case-in-chief would have been satisfied, even in the absence of a similarly-situated comparator. *See Ferrill v. The Parker Grp., Inc.*, 168 F.3d 468, 472 (11th Cir. 1999) (observing that when an employee "adduces direct evidence of disparate treatment on the basis of race[,]" she "makes out a prima facie case of intentional discrimination"); *Wright v. Southland Corp.*, 187 F.3d 1287, 1293 (11th Cir. 1999) (noting that a plaintiff who provides direct evidence "need not make use of the *McDonnell Douglas* presumption"). And it did not consider whether such

a race-based placement would have constituted employment discrimination under Title VII.[10]

This Court therefore should reverse the district court's order granting summary judgment to PSA as to Ms. Reed's race discrimination claim and remand with instructions to consider the totality of the evidence. *See Nyland v. Moore*, 216 F.3d 1264, 1266 (11th Cir. 2000) (explaining that "[i]f there is an issue that the district court did not decide in the first instance . . . we remand for the district court's consideration"); *see also Dugandzic v. Nike, Inc.*, 807 F. App'x 971, 976 (11th Cir. 2020) (remanding for further consideration a Title VII claim where "the district court did not consider all the relevant evidence and the totality of the circumstances" in assessing the plaintiff's prima facie case); *Ramirez v. Bausch & Lomb, Inc.*, 546 F. App'x 829, 833 (11th Cir. 2013) (same).

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[10] Although this Court need not reach the issue, there is ample reason to think that intentionally assigning a Black nurse to a white mother who requested only Black nurses constitutes race discrimination under Title VII. *See Ferrill*, 168 F.3d at 472–73 ("[L]iability for intentional discrimination [in Title VII suits] . . . requires only that decisions be premised on race, not that decisions be motivated by invidious hostility or animus"); *see also Ortiz-Diaz v. U.S. Dep't of Hous. & Urban Dev.*, 867 F.3d 70, 81 (D.C. Cir. 2017) (Kavanaugh, J., concurring) (observing that when an action is taken "because of the employee's race," that action "plainly constitutes discrimination").

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's order granting summary judgment and remand with instructions to conduct a testimonial-evidentiary hearing as to the accuracy of the transcript and to evaluate the accuracy of the transcript by listening to the audio recording. Further, it should reverse the district court's order granting summary judgment as to Ms. Reed's race discrimination claim.

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CERTIFICATE OF COMPLIANCE

This brief complies with the length limitation of 30 pages set forth in this Court's order dated August 24, 2021; *see also* 11th Cir. R. 32-4.

This brief complies with the type-face requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word Century Schoolbook 14-point font.

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CERTIFICATE OF SERVICE

I, Lauren Bateman, certify that on October 25, 2021, I electronically filed the foregoing brief with the Clerk of the Court for the Eleventh Circuit using the CM/ECF system, which will send notice of such filing to counsel of record in the above-captioned case.

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