No. _____

IN THE

Supreme Court of the United States

SHERILYN J. LEROUX,

Petitioner,

v.

NCL (BAHAMAS), LTD.,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

I. Under the General Maritime Law of comparative negligence, should a finding of "open and obvious" act as a complete bar to recovery or merely serve as a factor to be weighed in apportioning fault? At present, there is a split in the federal circuits on this important issue, and it is imperative for this Honorable Court to resolve the conflict to maintain uniformity in federal maritime law.

PARTIES TO THE PROCEEDING

Petitioner, who was the plaintiff-appellant below, is Dr. Sherilyn J. LeRoux. Respondent, who was defendant-appellee below, is NCL (Bahamas), LTD. There are no parties to the proceeding other than those listed in the caption.

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The unreported opinion of the United States Court of Appeals for the Eleventh Circuit is available at *Leroux v. NCL (Bahamas) Ltd.*, 2018 WL 3860510 (11th Cir. Aug. 14, 2018) and reproduced in Appendix A at 1a–6a. The unreported order of the United States District Court for the Southern District of Florida granting summary judgment is reproduced in Appendix B at 7a–24a.

JURISDICTION

The court of appeals entered judgment on August 14, 2018. *See* App. A. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Dr. Sherilyn J. LeRoux filed suit against NCL (Bahamas) Ltd. d.b.a. Norwegian Cruise Line ("NCL") for negligence arising from injuries she suffered onboard the *Norwegian Epic*, a cruise ship owned and operated by NCL. App. A at 3a. Dr. LeRoux alleged that NCL failed to adequately warn her about the danger posed by the unusually high threshold between her cabin and balcony. The district court granted summary judgment on the basis of the hazard causing Dr. LeRoux's accident being an "open and obvious" danger. The Eleventh Circuit affirmed.

In May of 2015, Dr. LeRoux boarded the *Norwegian Epic* as a fare paying passenger. Her cabin featured an outdoor balcony, which was

accessible through a hinged glass door that opened into the cabin. App. B at 8a. Five days into her cruise, Dr. LeRoux decided to go onto the balcony for the first time while the ship was docked in Naples, Italy. App. B at 8a. She stepped out onto the balcony during the afternoon, and spent more than two hours relaxing there. App. B at 8a. The light on Dr. LeRoux's balcony was burned out and NCL had not repaired it by the time the accident occurred. App. B at 8a. Shortly after dusk on May 31, 2015, with the poor lighting a contributing factor, Dr. LeRoux tripped and fell while trying to enter her cabin when her foot became stuck in the threshold between her cabin and balcony. App. A at 2a. She was severely injured as a result of this incident.

The doorway threshold that caused Dr. LeRoux to trip and fall was 5½ inches high as opposed to the maximum safe height of ½ an inch for similar doorway thresholds in shore-side locations. App. B at 8a. This was Dr. LeRoux's first time out on the balcony and, although the threshold was somewhat visible in the failing light, she did not fully comprehend the hazard presented by its unusual height. App. B at 8a. Dr. LeRoux tendered well-supported expert testimony showing that a 5½ inch threshold created an unreasonably dangerous tripping hazard and necessitated appropriate safety warnings. App. B at 21a.

During the three years before Dr. LeRoux's accident, NCL had received notice of at least eight other passengers who tripped over raised doorway thresholds while onboard the same class of ship as the *Norwegian Epic*. App. B at 19a–20a. At least two

other passengers had tripped over balcony thresholds either the same or very similar to the one Dr. LeRoux tripped over. App. B at 19a–20a. In both of those prior instances, just as with Dr. LeRoux, there was no warning on the balcony door nor any floor level warnings on the threshold. App. B at 19a–20a. Dr. LeRoux's balcony door should have contained a sign warning about the unusually high threshold, and the threshold also should have been marked with floor level warnings. Dr. LeRoux acknowledges she knew there was a threshold separating her cabin from the balcony (App. A at 2a), but she did not fully appreciate the abnormal height and width of the threshold due to the lack of warning, causing her to trip and fall as a result.

Even if the raised threshold was open and obvious to some degree, the evidence presented was adequate to demonstrate that warning signs and adequate lighting could have drawn Dr. LeRoux's attention to the hazard allowing her to safely cross the threshold. With the poor lighting and lack of warnings, Dr. LeRoux simply did not fully appreciate the abnormal height and width of the threshold, and she failed to successfully navigate the threshold as a result. App. A at 6a. In summary, there is more than enough evidence to raise a genuine fact dispute as to whether the conduct of Dr. LeRoux was 100% the cause of her accident.

INTRODUCTION

Just as with every other passenger, NCL owed Dr. LeRoux the duty to exercise reasonable care under the circumstances with pure comparative fault being

the appropriate standard for assessing the conduct of the parties. *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625, 629 (1959). The lower courts erred by holding that the open and obvious nature of the threshold hazard created a "no duty" situation that completely bars recovery. Under binding Supreme Court precedent, a duty to exercise reasonable care under the circumstances continually existed. *Id.* at 632. The doctrine of "open and obvious" is really nothing more than a reiteration of the common-law defense of "assumption of the risk," which this Honorable Court has long since condemned to Davey Jones's Locker. *Socony-Vacuum Oil Co. v. Smith*, 305 U.S. 424, 431 (1939). The conduct of Dr. LeRoux should have been only a factor to consider in apportioning fault rather than an automatic 100% bar to recovery.

REASONS FOR GRANTING THE PETITION

I. The Circuits Are Split on Whether a Finding of "Open and Obvious" Automatically Serves as a Complete Bar to Recovery under General Maritime Law.

Both the Third and Ninth Circuit Courts of Appeals have outright rejected the open-and-obvious doctrine. *Davis v. Portline Transportes Maritime Internacional,* 16 F.3d 532, 537 (3d Cir. 1994); *Lawson v. United States,* 605 F.2d 448, 453 (9th Cir. 1979). In *Davis,* the Third Circuit reversed an order granting summary judgment based on the district court's conclusion that the obviousness of the danger negated liability as a matter of law:

> [E]ven if we shared the district court's view that a reasonable jury must conclude that the danger was obvious, known to Davis, and easily avoidable, we still would not affirm its order granting Portline summary judgment because we cannot conclude as a matter of law that Portline was 0% and Davis was 100% at fault. So long as the jury could find Portline negligent for creating an icy spot on the deck of the ship, it could attribute *some* fault to Portline, and, as federal maritime law embodies a system of "pure" comparative negligence, that would suffice to preclude summary judgment.

16 F.3d at 537 (citing *Socony–Vacuum Oil Co.*, 305 U.S. at 431 ("Under [the admiralty doctrine of comparative negligence] contributory negligence, however gross, is not a bar to recovery but only mitigates it.")).

In *Lawson*, the Ninth Circuit Court of Appeals actually refers to the "open and obvious assumption of the risk" defense as one and the same, while reinforcing that the defense is not available under maritime law. 605 F.2d at 453. Not surprisingly, numerous federal circuit courts of appeals have routinely refused to treat the open and obvious defense as an absolute bar to recovery.[1] These

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[1] *Martinez v. Angel Expl., LLC*, 798 F.3d 968, 975 (10th Cir. 2015) ("[T]he open and obvious danger doctrine is 'not absolute.' . . . [E]ven where an invitee is injured by an open and obvious condition, a landowner may still have a duty to warn of or otherwise protect the invitee from the dangerous condition if the injury suffered was reasonably foreseeable to the

holdings uniformly recognize that comparative fault abrogates the open and obvious defense in situations where a defendant can and should anticipate that a dangerous condition could cause harm, despite its known or obvious danger. *See* Restatement (Second) of Torts § 343A, comment f (1965) (explaining that a situation may arise "where the possessor has reason to expect that the invitee's attention may be distracted, so that he will not discover what is obvious, or will forget what he has discovered, or fail to protect himself against it.").

This makes sense because "[t]he preferred method of federal contribution is allocation on the basis of comparative fault." *Franklin Stainless Corp. v. Marlo Transp. Corp.*, 748 F.2d 865, 871 (4th Cir. 1984). "In addition to being the most just method, division of damage by degree of fault imposes the strongest deterrent upon the wrongful behavior that is most likely to harm others." *Id.* (citing *United States v.*

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landowner."); *Wood v. RIH Acquisitions MS II, LLC*, 556 F.3d 274, 281 (5th Cir. 2009) ("Because an open and obvious condition can be an unreasonably dangerous condition, an owner is not exonerated simply because the dangerous condition was obvious."); *Cudney v. Sears, Roebuch & Co.*, 21 Fed. App'x. 424, 428 (6th Cir. 2001) ("[E]ven if a danger is open and obvious, a premises owner may still owe a duty to protect an invitee if the risk of harm remains unreasonable, despite its obviousness or despite knowledge of it by the invitee."); *Michalski v. Home Depot, Inc.*, 225 F.3d 113, 119 (2d Cir. 2000) ("When a reasonable landowner might anticipate an unreasonable risk of harm to a visitor, therefore, a duty to protect from or warn of even obvious dangers may arise."); *Zrust v. Spencer Foods, Inc.*, 667 F.2d 760, 764 (8th Cir. 1982) (holding that a landowner is responsible for open and obvious dangers when the invitee cannot reasonably be expected to protect himself).

Reliable Transfer Co., 421 U.S. 397, 405 n. 11 (1975)); *see also Ward v. K Mart Corp.,* 554 N.E.2d 223, 231 (Ill. 1990) (collecting cases from 16 state courts that consider an open and obvious danger as a factor in assessing comparative fault rather than as an absolute bar to recovery). In essence, the open-and-obvious defense forgives a defendant's negligence if the plaintiff spotted, or should have spotted the dangerous condition and should have taken steps to evade it. But a jury should have the right and responsibility to decide as a matter of fact whether the defendant's negligence actually caused the plaintiff's injury, regardless of whether the dangerous condition was open and obvious.

It appears the Eleventh Circuit Court of Appeals stands alone as the only federal circuit court that has adopted the open-and-obvious doctrine as a complete bar in maritime cases. Even then, conflict exists within the lower courts of the Eleventh Circuit, as Judge Cecilia Altonga has repeatedly rejected the open-and-obvious defense. *See Heller v. Carnival Corp.*, 191 F. Supp. 3d 1352 (S.D. Fla. 2016); *Belik v. Carlson Travel Grp., Inc.*, 864 F. Supp. 2d 1302 (S.D. Fla. 2011); *Geyer v. NCL (Bahamas) Ltd.*, 204 F. Supp. 3d 1354 (S.D. Fla 2016). Numerous other trial courts within the Eleventh Circuit have avoided confronting the open and obvious defense by simply holding that dangerous conditions were not open and obvious to the injured passenger.[2] In each instance,

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[2] *See, e.g.*, *Geyer v. NCL (Bahamas) Ltd.,* 204 F. Supp. 3d 1354 (S.D. Fla. 2016) (dangerousness of walking through cruise ship's aqua park not open and obvious as a matter of law); *Merideth v. Carnival Corp.*, 49 F. Supp. 3d 1090 (S.D. Fla. 2014)

the evidence could have enabled a reasonable jury to conclude that a condition onboard was open and obvious, yet it was left to the jury to decide whether the cruise ship failed to exercise reasonable care by not adequately warning about the danger.

The Eleventh Circuit's all-or-nothing approach to the open-and-obvious doctrine appears to have been uniquely adopted for cruise ship cases and is fundamentally at odds with longstanding principles of General Maritime Law (*i.e.*, that such defenses are subsumed within comparative fault). *See, e.g.*, *National Marine Service, Inc. v. Petroleum Service Corp.*, 736 F.2d 272 (5th Cir. 1984). This Honorable Court has soundly rejected the argument that a plaintiff's negligence in failing to appreciate and avoid an obvious danger operates as a complete bar to recovery. *See, e.g.*, *Socony-Vacuum Oil Co.*, 305 U.S. at 431; *Kermarec*, 358 U.S. at 629. Thus, Dr. LeRoux's actual knowledge of a dangerous condition and the decision to expose herself to said condition should not automatically act as a complete bar to her recovery. Instead, it should merely be a factor for the

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(dangerousness of slippery floor not open and obvious as a matter of law); *Belik v. Carlson Travel Grp., Inc.*, 864 F. Supp. 2d 1302, 1308 (S.D. Fla. 2011) (dangerousness of jumping or diving into water of indeterminate depth not open and obvious as a matter of law); *Smolnikar v. Royal Caribbean Cruises Ltd.*, 787 F. Supp. 2d 1308, 1323 (S.D. Fla. 2011) (dangerousness of crashing into a tree while zip-lining not open and obvious as a matter of law); *Prokopenko v. Royal Caribbean Cruises Ltd.*, No. 10-20068-CIV-HUCK, 2010 WL 1524546, at *2 (S.D. Fla. Apr. 15, 2010) (dangerousness of wet pool deck not open and obvious as a matter of law).

jury to consider when apportioning fault between the parties.

The newly-created open-and-obvious defense also demands revision because it establishes a lower standard than the previously-abolished assumption of risk defense. Under assumption of the risk, a plaintiff can have actual knowledge of a danger and voluntarily accept a known risk and is still not completely barred from recovery. *See Socony-Vacuum Oil Co.*, 305 U.S. at 431. By contrast, the open-and-obvious defense sets a much lower standard inasmuch as it only requires that a reasonable person should be able to identify the dangerous condition via his or her ordinary senses. *See, e.g.*, *Luby v. Carnival Cruise Line, Inc.*, 633 F. Supp. 40 (S.D. Fla. 1986). If intentional conduct is not a bar to total recovery, then how could conduct that equates to simple negligence logically act as a total bar? The "open and obvious" doctrine applied as an all-or-nothing defense only serves to create confusion and distract from the goal of uniformity in applying federal maritime law.

CONCLUSION

A finding of open and obvious is not an automatic, 100% bar to recovery under General Maritime Law. This Court should grant this petition for a writ of certiorari, reverse the decision of the Eleventh Circuit Court of Appeals, and remand for further proceedings consistent with this Court's opinion.

Respectfully submitted,

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