APPENDIX

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APPENDIX A—OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, FILED AUGUST 14, 2018

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 17-13877
Non-Argument Calendar

SHERILYN J. LEROUX,

Plaintiff-Appellant,

versus

NCL (BAHAMAS) LTD.,
d.b.a. Norwegian Cruise Line,

Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Florida

(August 14, 2018)

Before MARCUS, ROSENBAUM, and JULIE CARNES, Circuit Judges.

PER CURIAM:

In this maritime tort action, Plaintiff Sherilyn J. LeRoux appeals the grant of summary judgment to defendant NCL (Bahamas) Ltd., d.b.a. Norwegian Cruise Line ("NCL"). Plaintiff sued Defendant

following an injury Plaintiff sustained after a fall aboard a NCL vessel. After careful review of the record and the parties' briefs, we affirm the district court's grant of summary judgment to Defendant.

I. BACKGROUND

A. Factual Background

In May 2015, Plaintiff boarded Defendant's cruise ship, the Norwegian Epic. Plaintiff stayed in a cabin with an exterior balcony. Passengers accessed the balcony through a door that opened into the cabin. The door has a threshold that is several inches high and includes a metal sliding glass door track.

While docked in Naples, Italy, Plaintiff exited her cabin onto the balcony. After more than two hours on her balcony, Plaintiff attempted to reenter her cabin just after sunset. The balcony light was out, but a light was on inside the cabin. As she moved to enter her cabin through the door, she stepped up to avoid the threshold, but her right toe caught in the metal track, causing her to fall into her cabin and sustain injuries. Plaintiff testified that she saw the threshold, door, and cabin as she attempted to enter the cabin from the balcony. She further testified that she knew she had to lift her foot up and over the threshold to get into the cabin without tripping and that she did lift her foot up at least six inches or so. She admitted she had previously stepped over the door's threshold and down onto the balcony without incident. She also testified that she recognized the different colors distinguishing the balcony, threshold, cabin, and ship, and could discern the difference between the balcony floor and the cabin floor.

Although aware of the need to step over the threshold, Plaintiff maintains that she would have been more careful had Defendant warned her of the danger.

B. Procedural History

On August 18, 2015, Plaintiff filed this lawsuit against Defendant. Plaintiff asserted two claims for negligence: (1) that Defendant negligently failed to warn Plaintiff of the dangerous threshold; and (2) that the threshold should have been designed and built such that it did not constitute a tripping hazard. Plaintiff sought damages for pain, mental anguish, and medical expenses.

The district court granted summary judgment for Defendant. The court rejected Plaintiff's failure to warn claim because the threshold was an open and obvious danger that Defendant had no duty to warn Plaintiff about and Plaintiff failed to demonstrate that NCL had notice of the alleged dangerous condition. The district court also granted summary judgment on Plaintiff's improper design claim, holding that Plaintiff failed to demonstrate that Defendant was responsible for the alleged improper design of the threshold. Plaintiff appealed only the district court's grant of summary judgment on her failure to warn claim.

II. DISCUSSION

A. Standard of Review

This Court reviews a district court's grant of summary judgment *de novo,* applying the same legal standards as the district court. *Chapman v. AI*

Transp., 229 F.3d 1012, 1023 (11th Cir. 2000) (en banc). A grant of summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). In making this determination, we view all evidence and make all reasonable inferences in favor of the non-moving party. *Chapman*, 229 F.3d at 1023.

B. Application of Maritime Law to Plaintiff's Claim

Federal maritime law applies to actions arising from alleged torts committed aboard a ship sailing in navigable waters. *Keefe v. Bahama Cruise Line, Inc.*, 867 F.2d 1318, 1320 (11th Cir. 1989). When neither statutory nor judicially created maritime principles provide an answer to a specific legal question, federal courts may apply state law provided that the application of state law does not frustrate national interests in having uniformity in admiralty law. *Misener Marine Constr., Inc. v. Norfolk Dredging Co.*, 594 F.3d 832, 839 (11th Cir. 2010).

"[I]t is a settled principle of maritime law that a shipowner owes a duty of exercising reasonable care towards those lawfully aboard the vessel who are not members of the crew." *Doe v. Celebrity Cruises, Inc.*, 394 F.3d 891, 908 (11th Cir. 2004) (quoting *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625, 630 (1959)). This Court has regularly applied that reasonable care standard in maritime tort cases alleging negligence. *See Everett v. Carnival Cruise Lines*, 912 F.2d 1355, 1357 (11th Cir. 1990) (passenger tripped over metal threshold cover in a

doorway); *Keefe*, 867 F.2d at 1320 (passenger slipped and fell in a cruise ship disco). Our case law makes clear that "[a] carrier by sea ... is not liable to passengers as an insurer, but only for its negligence." *Kornberg v. Carnival Cruise Lines, Inc.*, 741 F.2d 1332, 1334 (11th Cir. 1984).

To prevail on a maritime tort claim, a plaintiff must show that (1) the defendant had a duty to protect the plaintiff from a particular injury; (2) the defendant breached that duty; (3) the breach actually and proximately caused the plaintiff's injury; and (4) the plaintiff suffered actual harm. *Chaparro v. Carnival Corp.*, 693 F.3d 1333, 1336 (11th Cir. 2012); *Zivojinovich v. Barner*, 525 F.3d 1059, 1067 (11th Cir. 2008). We rely on general principles of negligence law. *Chaparro*, 693 F.3d at 1336. The ordinary-reasonable-care-under-the-circumstances standard we apply, as a prerequisite to imposing liability, requires that the shipowner have had actual or constructive notice of the risk-creating condition, at least where, as here, the risk is one just as commonly encountered on land and not clearly linked to nautical adventure. *Keefe*, 867 F.2d at 1322.

But federal courts need not even reach the defendant's actual or constructive notice of a risk-creating condition if they determine that condition was an open and obvious danger. The duty to warn in the maritime tort context extends to only known dangers which are not apparent and obvious. *Cohen v. Carnival Corp.*, 945 F. Supp. 2d 1351, 1357 (S.D. Fla. 2013); *see Luby v. Carnival Cruise Lines, Inc.*, 633 F. Supp. 40, 41 n.1, 42 (S.D. Fla. 1986) (dismissing passenger's claim because the presence of

a ledge behind a shower curtain was an open and obvious condition), *aff'd*, 808 F.2d 60 (11th Cir. 1986) (table); *see also Mosher v. Speedstar Div. of AMCA Int'l, Inc.*, 979 F.2d 823, 826 (11th Cir. 1992) (stating that, under Florida law, obvious danger bars failure-to-warn claims).

Here, the risk-creating condition, the raised threshold, was open and obvious to Plaintiff by her own account. She admitted she had previously stepped over the door's threshold and down onto the balcony without incident. Plaintiff testified that she saw the threshold that separated her cabin from the balcony and knew that she had to lift her foot up and over the threshold to get into the cabin without tripping. She also testified that she recognized the different colors distinguishing the balcony, threshold, cabin, and ship, and could discern the difference between the balcony floor and the cabin floor. Plaintiff simply failed to negotiate a known and obvious hazard. Defendant did not breach its duty of reasonable care by failing to warn her of a condition of which she was aware and any reasonable person in her position would have been aware. *See Luby*, 633 F. Supp. at 41–42.

III. CONCLUSION

For the reasons explained above, we **AFFIRM** the decision of the district court granting summary judgment.

APPENDIX B—ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, FILED JULY 31, 2017

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
Case No. 15-23095-CIV-WILLIAMS

SHERILYN LEROUX,

Plaintiff,

vs.

NCL (BAHAMAS), LTD.,

Defendant.

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

THIS MATTER is before the Court on the motion for summary judgment filed by Defendant NCL (Bahamas) Ltd. d/b/a Norwegian Cruise Line ("NCL") (DE 39), to which Plaintiff Sherilyn Leroux filed a response in opposition (DE 54), and NCL a reply. (DE 60). For the reasons set forth below, Defendant's motion is **GRANTED**.

I. BACKGROUND

This tort action arises from the injuries Plaintiff Sherilyn Leroux sustained while a passenger aboard NCL's cruise ship, the *Epic,* in May 2015. (Def.'s

Statement Material Facts ("DSMF"), DE 39 ¶ 1). Plaintiff's cabin featured an outdoor balcony, which was accessible through a hinged glass door that opened into the cabin. (*Id.* ¶ 2; Sherilyn LeRoux Dep., DE 39-1 at 103). Although her complaint is not organized into counts, Plaintiff appears to allege that NCL's negligence makes it liable for injuries she sustained while traversing the threshold from the balcony to her cabin. (DE 1 ¶¶ 6-7).

Approximately five days into Plaintiff's cruise, she went onto the balcony of her cabin for the first time to observe the port in Naples, Italy where the *Epic* was docked. (LeRoux Dep., DE 39-1 at 74, 91-92). Plaintiff joined her friend, who had accompanied her on the trip and was staying in the cabin with her, after she woke up from a nap. (*Id.* at 91-92). She stepped out onto the balcony during the afternoon, and they spent more than two hours there. (*Id.* at 98).

Plaintiff's accident occurred just after sunset when she attempted to reenter the cabin to get ready for dinner. (*Id.* at 99). The light on the balcony was off, but one light was on inside the cabin. (*Id.*). The threshold at issue was five-and-a-half inches high, so Plaintiff had to step up from the balcony in order to enter her cabin. (DSMF, DE 39 ¶ 3). According to her testimony, Plaintiff opened the door, which swung inside and to her left. (LeRoux Dep., DE 39-1 at 103). As she moved to enter the cabin, she stepped up, but her right foot landed on the metal track of the threshold instead of inside the cabin, where her foot became stuck, causing her to fall and sustain injuries. (*Id.* at 101-04).

Plaintiff testified she knew that there was a threshold separating her cabin from the balcony, and that she had to step up to clear the threshold. (*Id.* at 114, 117-18, 120). She admitted she had previously stepped over the door's threshold and down onto the balcony without incident. (*Id.* at 93, 97). Plaintiff testified that she saw the threshold, door, and cabin as she attempted to enter the cabin from the balcony. (*Id.*). She also testified that she recognized the different colors distinguishing the balcony, threshold, cabin, and ship, and could discern the difference between the balcony floor and the cabin floor. (*Id.* at 121-22).

Plaintiff's asserts two theories of negligence. First, she alleges Defendant was negligent "in failing to adequately warn passengers of the dangers associated with a raised threshold." (DE 1 ¶ 6). Second, she alleges "the threshold should have been designed and built such that it did not constitute a tripping hazard." (*Id.*).

II. LEGAL STANDARD

Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Under this standard, "[o]nly disputes over facts that might affect the outcome of the suit under the governing [substantive] law will properly preclude the entry of summary judgment." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986). Any such dispute is "genuine" only "if the evidence is such that a

reasonable jury could return a verdict for the nonmoving party." *Id.*

In evaluating a motion for summary judgment, the Court considers the evidence in the record, "including depositions, documents, electronically stored information, affidavits or declarations, stipulations ..., admissions, interrogatory answers, or other materials ...." Fed. R. Civ. P. 56(c)(1)(A). The Court "must view all the evidence and all factual inferences reasonably drawn from the evidence in the light most favorable to the nonmoving party, and must resolve all reasonable doubts about the facts in favor of the non-movant." *Rioux v. City of Atlanta,* 520 F.3d 1269, 1274 (11th Cir. 2008) (quotation marks and citations omitted). At the summary judgment stage, the Court's task is not to "weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson,* 477 U.S. at 249.

Claims arising from alleged tort actions aboard ships sailing in navigable waters are governed by general maritime law. *Keefe v. Bahama Cruise Line, Inc.,* 867 F.2d 1318, 1320 (11th Cir. 1989). Under maritime law, a shipowner has a duty to exercise reasonable care to those aboard the vessel who are not members of the crew. *Kermarec v. Compagnie Generale Transatlantique,* 358 U.S. 625, 630 (1959). However, a shipowner "is not liable to passengers as an insurer, but only for its negligence." *Keefe,* 867 F.2d at 1322. To prove negligence, Plaintiff must show: (1) that Defendant had a duty to protect Plaintiff from a particular injury; (2) that Defendant breached the duty; (3) that the breach was the actual

and proximate cause of Plaintiff's injury; and (4) that Plaintiff suffered damages. *Chaparro v. Carnival Corp.,* 693 F.3d 1333, 1336 (11th Cir. 2012). In maritime claims against a vessel owner, a plaintiff must show that a shipowner had "actual or constructive notice of the risk-creating condition" before negligence liability can be imposed. *Keefe,* 867 F.2d at 1322. Finally, while maritime law controls, the Court may rely on state law to supplement maritime law so long as it does not alter or overrule maritime law. *Fadish v. Buffalo Pumps,* 881 F. Supp. 2d 1361, 1368 (S.D. Fla. 2012).

III. DISCUSSION

A. Threshold Summary Judgment Issues

i. Plaintiff's Failure to Submit a *Statement of Material Facts*

Before the Court can turn to the merits of the Parties' arguments, it must first take up two issues regarding Plaintiff's response in opposition to Defendant's motion for summary judgment. First, Plaintiff failed to provide a statement of material facts in accordance with Local Rule 56.1. Local Rule 56.1 requires a party opposing summary judgment to submit a statement of material facts that

> shall correspond with the order and with the paragraph numbering scheme used by the movant, but need not repeat the text of the movant's paragraphs. Additional facts which the party opposing summary judgment contends are material shall be numbered and placed at the end of the opposing party's

> statement of material facts; the movant shall use that numbering scheme if those additional facts are addressed in the reply.

S.D. Fla. L. R. 56.1(a). Local Rule 56.1 protects judicial resources by "mak[ing] the parties organize the evidence rather than leaving the burden upon the district judge." *Alsina-Ortiz v. Laboy,* 400 F.3d 77, 80 (1st Cir. 2005) (referring to analogous local rule); *see also Libel v. Adventure Lands of America, Inc.,* 482 F.3d 1028, 1032 (8th Cir. 2007) ("Courts have neither the duty nor the time to investigate the record in search of an unidentified genuine issue of material fact to support a claim or defense."). The Rule also streamlines the resolution of summary judgment motions by "focus[ing] the district court's attention on what is, and what is not, genuinely controverted." *Mariani-Colan v. Dep't of Homeland Sec.,* 511 F.3d 216, 219 (1st Cir. 2007). Pursuant to Local Rule 56.1, if a non-movant fails to controvert statements in the movant's statement of material facts, then "all material facts set forth in the movant's statement filed and supported as required [by the rule] will be deemed admitted[,] ... provided that the Court finds the movant's statement is supported by evidence in the record." S.D. Fla. L. R. 56.1(b). Plaintiff failed to submit a statement of materials facts in accordance with the Local Rules, and instead submitted only a response in opposition to summary judgment containing a brief recitation of facts and attaching a few exhibits. Rather than deem Defendant's facts admitted, however, the Court will consider those facts identified in Plaintiff's opposition response and readily supported by the attached exhibits.

ii. Plaintiff's Submission of a Sham Affidavit

Second - and relatedly because Defendant's statement of material facts relies in large part on Plaintiff's deposition testimony - Plaintiff attempts to substitute a later-created affidavit for her deposition testimony in order to create disputed issues of fact at summary judgment. (See DE 54-1). Plaintiff's counsel asserts that Plaintiff was in too much pain during the first day of her deposition, making her testimony from that day unreliable owing to her "weakened condition and compromised mental acuity." (DE 54 at 1-3). Plaintiff's counsel accuses NCL of taking advantage of her. (*Id.* at 4).

The Court observes that, if Plaintiff's impairment was as grave as her counsel asserts, then her counsel should have terminated the deposition and rescheduled it for a time she was fit to testify. She was represented by not one but two lawyers during her deposition who could have intervened, but did not. Alternatively, Plaintiff's counsel should have filed an errata sheet and arranged for Plaintiff to be re-deposed on the contested topics. At minimum, Plaintiff's counsel should have raised some objection during the discovery period, but never did.

Instead, Plaintiff proceeded with two days of deposition testimony without objection. On the second day of her deposition, Plaintiff was given an opportunity to correct misstatements she thought she made on the first day (none of which concerned material facts). (LeRoux Dep., DE 39-1 at 136-149). At this late date, Plaintiff seeks to recast her testimony with an affidavit. Having lodged no

previous objection to Plaintiff's fitness to testify either during her deposition or otherwise during the discovery period, the Court can only conclude that Plaintiff's affidavit is a sham. *Van T. Junkins & Assocs., Inc. v. U.S. Indus., Inc.,* 736 F.2d 656, 657 (11th Cir. 1984) ("When a party has given clear answers to unambiguous questions which negate the existence of any genuine issue of material fact, that party cannot thereafter create such an issue with an affidavit that merely contradicts, without explanation, previously clear testimony."); *Rinker v. Carnival Corp.,* 782 F.2d 1526, 1531 (11th Cir. 1986). Accordingly, Plaintiff's affidavit (DE 54-1)[1] is **STRICKEN.**

B. Plaintiff's Failure-to-Warn Claim

When a passenger claims she is injured by a dangerous condition on the ship, the standard of care "requires, as a prerequisite to imposing liability, that the carrier have had actual or constructive notice of the risk-creating condition." *Keefe,* 867 F.2d at 1322. The mere fact an accident occurs does not mean the accident's setting constituted a dangerous condition. See *Isbell v. Carnival Corp.,* 462 F. Supp. 2d 1232,

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[1] Plaintiff's affidavit, even if it were not stricken as a sham, would not create any genuine issue of material fact to defeat summary judgment. Plaintiff's affidavit states her "true testimony" is that she does "not remember if I saw the threshold when I walked out onto the balcony and I did not notice it as I was walking in just before I fell." (DE 54-1). But Plaintiff cannot create a genuine issue of material fact by testifying that she "does not remember," especially when she previously testified that she did notice the threshold. See *e.g.,* (DE 39-1 at 114) ("Q: So you saw the threshold? A: I saw it.").

1237 (S.D. Fla. 2006). A cruise line has a related "duty to warn passengers of dangers of which [it] knows or should know, but this duty extends only to those dangers which are not apparent and obvious to the passenger." *Lombardi v. NCL (Bahamas) Ltd.,* No. 15-20966-MGC, 2016 WL 1429586, at *3 (S.D. Fla. Apr. 12, 2016), *appeal dismissed* (Aug. 19, 2016) (citations omitted). A condition is obvious (and therefore not dangerous) if a reasonable person can identify the condition through the "ordinary use of her senses." *Luby v. Carnival Cruise Lines, Inc.,* 633 F. Supp. 40, 42 (S.D. Fla. 1986). Thus, to defeat summary judgment in favor of Defendant, Plaintiff must raise a genuine issue of material fact as to whether (1) the dangerous condition was open and obvious, and (2) Defendant had notice of this condition.

i. Whether the Threshold Was Open and Obvious

Here, the undisputed facts show that the threshold between Plaintiff's balcony and cabin was not a dangerous condition since it should have been - and, as Plaintiff admits, was - obvious through "ordinary use of her senses." *See id.* Plaintiff testified she had previously stepped over the door's threshold and onto the balcony without incident. See, *e.g., Lugo v. Carnival Corp.,* 154 F. Supp. 3d 1341, 1346 (S.D. Fla. 2015) (finding that a plaintiff who had used a ladder to climb into a bunkbed could not then complain of the cruise ship's failure to warn him of the ladder when he injured himself descending from it); *Cohen v. Carnival Corp.,* 945 F. Supp. 2d 1351, 1358 (S.D. Fla. 2013) (granting summary judgment

for cruise line because "the presence of the alleged danger-the steps at the end of the gangplank-was, or should have been, obvious to Plaintiff by the ordinary use of his senses."); *Mendel v. Royal Caribbean Cruises, Ltd.,* No. 10-23398-CIV, 2012 WL 2367853, at *4 (S.D. Fla. June 21, 2012) (granting summary judgment for cruise line because "any danger posed by exiting the swimming pool was open and obvious to Plaintiff.").

She also testified she knew she had to step up to enter her cabin from the balcony, and admitted she needed only to lift her foot a little higher to do so without getting "hung up" on the track of the sliding door. (LeRoux Dep., DE 39-1 at 96-97, 104, 108). *Lombardi v. NCL (Bahamas) Ltd.,* No. 15-20966-MGC, 2016 WL 1429586, at *3 (S.D. Fla. Apr. 12, 2016), *appeal dismissed* (Aug. 19, 2016) (danger of step up to cabin bathroom was open and obvious even with lights out where plaintiff knew of the step). Plaintiff further testified she appreciated the step and stepped up to enter the cabin, but her foot landed on the metal threshold of the door. She admitted she could discern changes of color among the balcony, threshold, and door through the use of her ordinary senses during the dusk hour (and with the light from inside the cabin).

The Court finds that there is no dispute of material fact that the balcony door threshold was an open and obvious condition, and concludes that NCL had no duty to warn Plaintiff about it. *See Smith v. Royal Caribbean Cruises, Ltd.,* 620 F. App'x 727 (11th Cir. 2015) (hitting head on side of pool while swimming underwater was an open and obvious

danger); *Lancaster v. Carnival Corp.,* 85 F. Supp. 3d 1341, 1344 (S.D. Fla. 2015) (piece of luggage that plaintiff tripped over during debarkation was an open and obvious condition); *Lombardi,* 2016 WL 1429586, at *3; *Lugo,* 154 F. Supp. 3d at 1346 (no duty to warn passenger of open and obvious danger of descending his bunkbed in his passenger room via a ladder that did not reach the floor when the lights in the room were off).[2] That the step from the balcony

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[2] In so holding, the Court finds Plaintiff's reliance on *McQuillan v. NCL (Bahamas) Ltd.,* No. 14-cv-23823-DPG, 2015 WL 7294828 (S.D. Fla. Nov. 19, 2015) and *Frasca v. NCL (Bahamas) Ltd.,* No. 14-11955, 2016 WL 3553217 (11th Cir. June 30, 2016) (unpublished) is inapposite. In *McQuillan,* the plaintiff fell off a step in an alcove while looking for her bags in a stack of luggage. 2015 WL 72948, at *1. The district court rejected the defendant's summary judgment motion since there was an issue over "whether the character, location or surrounding conditions of the step were such that a prudent person would not anticipate it." *Id.* at *3. The step at issue had a white warning strip, but plaintiff testified that she had previously walked over another white warning strip on the ship without incident, and so did not think the white strip warned her of a step. *Id.* In addition, the alcove was being used to temporarily keep passenger luggage, and the luggage obscured a "very substantial portion" of the step at issue. The district court further found there was an issue regarding whether the cruise line created the risk-creating condition. None of these facts are analogous to Plaintiff's case.

In *Frasca,* an unpublished opinion, the Eleventh Circuit reversed the district court's finding at summary judgment that the slippery deck was an open and obvious condition because the plaintiff demonstrated that a companion also slipped on the deck, and introduced an expert report showing that a reasonable person would have known that the deck was slippery, but the unique characteristics of the deck's surface concealed the "extent of the deck's slipperiness," and that it was

into the cabin was five-and-a-half inches high or that there was no balcony light on outside the cabin does not alter the Court's conclusion. *See Lombardi,* 2016 WL 1429586, at *3 ("While the design of a step separating a bathroom from its surroundings may be uncommon on land, raised surfaces and the risks therein are familiar. So, too, is maneuvering a room with the lights off.") (citation omitted).[3]

"unusually slippery" when wet. 2016 WL 3553217, at *3. This case does not involve the slipperiness of a deck, and the expert report in *Frasca* raised issues regarding the slipperiness of the deck beyond what could be observed by a reasonable person. There is also no record of substantially similar accidents across Plaintiff's threshold. In addition, *Frasca* is unpublished, so the Court need not expand the Eleventh Circuit's holding that there was an issue of fact regarding the *"degree* of slipperiness" to the instant case, particularly where neither of Plaintiff's proffered experts opine on the degree of height that makes a step a tripping hazard on a cruise ship. *(See* DE 37-1).

[3] Plaintiff also argues that a finding of an open and obvious condition is not a complete bar to recovery, and rather is a "comparative negligence" issue to be decided by the jury. None of the cases cited by Plaintiff stands for this proposition. The authority Plaintiff relies on either found disputed issues of fact on both notice and whether the danger was open and obvious at summary judgment, *Geyer v. NCL (Bahamas) Ltd.,* No. 15-24410-CMA, 2016 WL 4618758 (S.D. Fla. Aug. 31, 2016), *Merideth v. Carnival Corp.,* 49 F. Supp.3d 1090 (S.D. Fla. 2014), or determined that, at the motion to dismiss stage, a court Could not determine whether a condition was open and obvious since the factual record was not yet developed. *Pucci v. Carnival Corp.,* 146 F. Supp. 3d 1281 (S.D. Fla. 2015) (granting in part and denying in part a motion to dismiss); *Prokopenko v. Royal Caribbean Cruises Ltd.,* No. 10-cv-20068-PCH, 2010 WL 1524546 (S.D. Fla. Apr. 15, 2010) (denying motion to dismiss); *Joseph v. Carnival Corp.,* No. 11-cv-20221, 2011 WL 3022555 (S.D. Fla. July 22, 2011) (same).

ii. Defendant's Notice of the Condition

Even assuming that the condition of the balcony step constituted a dangerous condition, Plaintiff's duty-to-warn claim fails because Plaintiff has not created a material issue of fact that NCL had notice of the dangerous condition. *Taiariol v. MSC Crociere S.A.,* No. 16-12357, 2017 WL 382316 (11th Cir. Jan. 27, 2017) (holding that even if allegedly dangerous condition were not open and obvious, summary judgment was still warranted because plaintiff did not present evidence that defendant had notice of any risk-creating condition). The applicable standard of care is "ordinary reasonable care under the circumstances, a standard which requires, as a prerequisite to imposing liability, that the carrier have had actual or constructive notice of the risk-creating condition." *Id.; Keefe,* 867 F.2d at 1322. "Constructive notice requires that a defective condition exist for a sufficient interval of time to invite corrective measures." *Cohen,* 945 F. Supp. 2d at 1355 (citation and quotation marks omitted).

First, as noted in Section III(A)(i) above, Plaintiff failed to proffer a statement of material facts establishing Defendant's notice as required by Local Rule 56.1. Second, there is no evidence that NCL had actual notice of a risk-creating condition with respect to Plaintiff's balcony threshold. Third, the only evidence in the record regarding NCL's constructive notice is one of NCL's written discovery responses (DE 54-4), which itself does not establish that the prior incidents were substantially similar. *Heath v. Suzuki Motor Corp.,* 126 F.3d 1391, 1396, 1397 n.12 (11th Cir. 1997) (explaining that "before evidence of

prior accidents or occurrences is admitted into evidence, the proponent of such evidence must show that conditions substantially similar to the occurrence cause the prior accidents"); *Cohen,* 945 F. Supp. 2d at 1356 (S.D. Fla. 2013) (finding no actual or constructive notice of a defective gangplank where plaintiff failed to establish that any of the 22 previous accidents on the gangplank were substantially similar to passenger's trip and fall on gangplank's stairs).

The only two arguably similar prior incidents are contained in Defendant's responses to Interrogatory No. 11, in which a passenger "caught his toe on a metal door of his cabin" while traversing the balcony door threshold approximately a year and a half before Plaintiff's accident, and a second passenger who "tripped re-entering her cabin" after she woke up on her balcony, which occurred two-and-a-half years before the events in this case.[4] (DE 54-4 at 4-6). However, there is no evidence that these two incidents occurred where Plaintiff fell, as the responses included "prior guest trip and falls over balcony threshold on the same class of ship during the three years preceding Plaintiff's alleged incident" and report does not specify where the two incidents occurred. (DE 54-4 at 4). In addition, the response regarding the passenger who "caught his toe on a metal door" does not establish whether his foot also

[4] None of the incidents listed in response to Interrogatory No. 8 have any bearing on this case because Plaintiff has failed to establish that they are substantially similar incidents. (DE 54-4 at 3-4 (listing trips in two nightclubs, three public restrooms, and one hallway)).

got stuck on the threshold, what time of day it was, whether he was under the influence of drugs or alcohol, or frankly any other particularized information that would allow this Court to determine whether the accident was "substantially similar" to Plaintiff's accident. Plaintiff neither conducted nor provided any additional evidence regarding this incident. (*Id.* at 5). Finally, even on this limited information, there appear to be other factors involved with the woman who, upon waking up on her balcony, tripped attempting to reenter her cabin. (*Id.*).

The opinions of Plaintiff's proffered expert, John C. Laughlin,[5] do not save Plaintiff's claims from summary judgment. As discussed above, Plaintiff failed to include Mr. Laughlin's opinions in a statement of material facts as required by the Local Rules. In addition, Mr. Laughlin's opinions do not address-and thus cannot create any issue of fact regarding-Defendant's lack of notice of the allegedly risk-creating condition.[6] Because Plaintiff has failed to establish the existence of substantially similar prior incidents, the Court finds that the undisputed facts demonstrate that NCL had no constructive notice, and therefore no duty to warn Plaintiff, of the balcony threshold. See *e.g., Taiariol,* 2017 WL

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[5] The Court adopts [DE 84] Magistrate Judge Simonton's Report and Recommendation granting Defendant's motion to strike the expert report of Randall Jaques and denying Defendant's motion to strike the expert report of John C. Laughlin.

[6] Mr. Laughlin's expert opinion also fails to create an issue of material fact regarding whether the balcony threshold was open and obvious to Plaintiff.

382316, *3. Accordingly, NCL's motion for summary judgment on Plaintiff's duty-to-warn claim is **GRANTED.**[7]

C. Plaintiffs Negligent Design or Maintenance Claim

NCL also moves for summary judgment on Plaintiff's negligent design claim because there is no evidence in the record that NCL designed, manufactured, or installed the threshold between the cabin and balcony. A cruise line cannot be held liable for an alleged improper design if the plaintiff does not establish that the ship-owner or operator was responsible for the alleged improper design. *Mendel,* 2012 WL 2367853, at *2 (citing *Groves v. Royal*

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[7] At calendar call, Plaintiff argued that two cases supported its arguments in opposition to summary judgment. Plaintiff, however, had not cited or mentioned these cases in its response in opposition to summary judgment, and thus Defendant and the Court learned about them for the first time at calendar call. The Court finds these cases inapposite. In *Bell v. NCL Corp., Ltd,* No. 1:15-CV-20569-UU, 2016 WL 2622291, (S.D. Fla. Mar. 29, 2016), the plaintiff tripped on a low threshold that stretched across a wide hallway located near the ship's disembarkation gate. Unlike in this case, the defendant in *Bell* had notice of prior passenger incidents on this threshold, and there was a disputed issue of fact regarding whether the threshold was open and obvious. Similarly, in *Bonilla v. Seven* Seas *Cruises* S. *De R.L., LLC,* 38 F. Supp. 3d 1340, 1341 (S.D. Fla. 2014), the plaintiff tripped on a threshold in the middle of a doorway on one of the ship's decks. The brief analysis in *Bonilla* is inapplicable here, where Plaintiff has presented no factual evidence of notice and the undisputed facts demonstrate any hazardous condition was open and obvious.

Caribbean Cruises Ltd., No. 11-10815,2012 WL 933236, at *1 (11th Cir. Mar. 20, 2012)). Plaintiff alleges that "the threshold should have been designed and built such that it did not constitute a tripping hazard." (DE 16).

At summary judgment, Plaintiff argues that she is proceeding on the theory that the balcony lights were negligently maintained by NCL. First, no reading of Plaintiff's two-page complaint indicates that she was proceeding on a negligent maintenance theory of liability, nor is she allowed to advance it at this late stage in the litigation. Second, having failed to follow Local Rule 56.1, Plaintiff proffers no evidence establishing whether the balcony lights were exclusively under NCL's control, or that NCL had notice of the defective balcony light. *Everett v. Carnival Cruise Lines,* 912 F.2d 1355, 1359 (11th Cir. 1990) (actual or constructive notice requirement applies to negligent design or maintenance claims). Accordingly, Defendant's motion for summary judgment on Plaintiff's negligent maintenance or design claim is **GRANTED.**

IV. CONCLUSION

For these reasons, NCL's motion for summary judgment (DE 39) is **GRANTED.** All pending deadlines, hearings, and trial settings are **CANCELED,** and all pending motions[8] are **DENIED**

[8] Plaintiff recently moved to depose Dr. Lorenzo Pacelli. (DE 95). This motion is denied, as discovery closed on August 18, 2016. The Court further notes that the testimony Plaintiff seeks to elicit from Dr. Pacelli-regarding "the extent to which

as moot. The Court will enter final summary judgment separately pursuant to Rule 58 of the Federal Rules of Civil Procedure.

DONE AND ORDERED in chambers in Miami, Florida, this day of July, 2017.

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KATHLEEN M. WILLIAMS
UNITED STATES DISTRICT JUDGE

[Plaintiff]'s fall causes the injuries" in question is unrelated to the Court's grounds for granting summary judgment.