[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

Nos. 17-15581 & 18-10513
Non-Argument Calendar

D.C. Docket No. 1:16-cv-24421-FAM

ROBERT EDWARD PETERSEN,
ANN WILMA PETERSEN, his wife,

Plaintiffs-Appellants,

versus

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

Defendant-Appellee.

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

(September 5, 2018)

Before MARTIN, JILL PRYOR, and ANDERSON, Circuit Judges.

PER CURIAM:

Plaintiff-Appellant Robert Petersen slipped and fell on the deck of a Norwegian Cruise Line ("NCL") cruise ship. He sued NCL, claiming that NCL was

negligent in several ways. Petersen's wife, Plaintiff-Appellant Anne [sic] Wilma Petersen, brought a loss of consortium claim. The district court granted summary judgment in favor of NCL and the Petersens appealed. For the reasons discussed below, we conclude that the district court prematurely granted summary judgment regarding Mr. Petersen's negligence claims but properly granted summary judgment in favor of NCL on Mrs. Petersen's loss of consortium claim. Accordingly, we affirm with respect to the judgment of the district court regarding Mrs. Petersen's loss of consortium claim, but we reverse the grant of summary judgment as to Mr. Petersen's negligence claims and remand to the district court for further proceedings on those claims.[1]

I. STANDARD

The Court reviews a district court's order granting summary judgment de novo, viewing the record, and all its inferences, in the light most favorable to the nonmoving party. *Zaben v. Air Prod. & Chemicals, Inc.*, 129 F.3d 1453, 1455 (11th Cir. 1997) (per curiam). 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). Additionally, a district court

[1] The district court also entered an order taxing costs in favor of NCL. The Petersens separately appealed from that order, and we consolidated that appeal with this one. Because we reverse the district court's grant of summary judgment regarding Mr. Petersen's negligence claims, we also vacate the award of costs.

may grant summary judgment to a nonmovant or on grounds not raised by the parties only "[a]fter giving notice and a reasonable time to respond." Fed. R. Civ. P. 56(f).

II. BACKGROUND

A. Mr. Petersen's Fall and Injuries

In October 2015, the Petersens took a cruise on NCL's cruise ship, the Breakaway. On October 22, 2015, the Breakaway docked in Bermuda. Rather than go ashore, the Petersens stayed on the Breakaway and planned to soak in the hot tub on deck 16. When the Petersens arrived at deck 16, Mrs. Petersen went to the hot tub and Mr. Petersen went to the bar to get her a drink. According to Mr. Petersen's deposition, he recalls feeling strong wind as he stepped onto the deck. He testified that he remembers the wind blowing water from decorative waterfalls onto him and the deck. Mr. Petersen testified that he does not recall it raining but does remember seeing water on the deck. As Mr. Petersen walked from the bar to the hot tub, both of his feet slipped out from under him. He landed on his back and hit his head on the deck. The ship's closed-circuit television system ("CCTV") captured video footage of Mr. Petersen's fall from several angles.

Mr. Petersen was knocked unconscious by the fall and taken to a hospital in Bermuda. After an examination, Mr. Petersen returned to the Breakaway and remained on board for the rest of the cruise. He sought additional medical treatment when he returned home.

According to Mr. Petersen's treating physician, the fall caused small areas of bleeding in Mr. Petersen's brain. Mr. Petersen still suffers from headaches, impaired vision, equilibrium problems, speech problems, and memory problems due to the fall.

B. Deck Material and Maintenance

The deck material on which Mr. Petersen fell is called Bolidt Bolideck Select Soft ("Bolidt Select Soft"). The Petersens offer evidence of sixty other NCL passengers who slipped and fell on liquid on the Bolidt Select Soft decks on the Breakaway during the three years before Mr. Petersen's fall. The Petersens also offer evidence suggesting that NCL used too strong of a detergent to clean the Bolidt Select Soft deck material. Specifically, NCL's "Deck Night Washing Policy" suggests that NCL used a detergent called "Bolidt Super Stripper" to clean all of its decks, including the Bolidt Select Soft. But the deck manufacturer's instructions recommend that cruise lines clean the Bolidt Select Soft deck material with a "[m]ild soap cleaner for daily use" called "Royal Soft." The instructions recommend the use of a "[s]trong . . . cleaning/degreasing agent," the "Bolidt Super Stripper," on a different kind of Bolidt deck but do not recommend its use on the Bolidt Select Soft. The instructions also warn: "Bolidt Super Stripper is to be used only in the maximum concentrations specified. All traces of Super Stripper should be removed after cleaning by washing with potable water. Prolonged exposure to Super Stripper may permanently damage the deck surface."

C. District Court Proceedings

The Petersons [sic] sued NCL for negligence and loss of consortium. In their complaint, the Petersens claim that NCL was negligent in several ways. Specifically, they allege, "[NCL] owed a duty to the passengers, and in particular to the Plaintiffs, to exercise reasonable care to design, maintain and operate its vessel Norwegian Breakaway in a reasonably safe condition." They claim that NCL was negligent in fulfilling this duty by "[f]ailing to warn passengers of the dangerous conditions of the walking surface of the deck or floor," as well as by "[f]ailing to promulgate and/or follow proper procedures for monitoring the slipperiness and keeping the walking surface of the deck or floor reasonably safe for passengers."

NCL filed a motion for summary judgment, arguing that (1) NCL had no duty to warn Mr. Petersen of the dangerous condition because the dangerous condition was open and obvious; (2) NCL had no duty to warn Mr. Petersen of the dangerous condition because it had no notice of the dangerous condition; and (3) maritime law does not recognize a cause of action for loss of consortium. NCL did not address any claim that it negligently maintained the deck in the motion for summary judgment. In their response in opposition to the motion for summary judgment, the Petersens again referred to NCL's allegedly negligent maintenance of the deck, stating, "Defendant's operations created the unreasonably dangerous condition, by negligent maintenance. . . ." Moreover, at the hearing before the magistrate judge regarding the motion for

summary judgment, the Petersens' counsel argued extensively regarding Mr. Petersen's claim that NCL negligently maintained the deck.

The magistrate judge recommended that summary judgment was appropriate on all of the Petersens' claims. Regarding Mr. Petersen's negligence claims, the magistrate judge concluded that NCL had no duty to warn Mr. Petersen of the slipperiness of the deck because the dangerous condition—the wet deck—was open and obvious. The magistrate judge did not address negligent maintenance at all in the report and recommendation. The Petersens objected to the report and recommendation, arguing again in part that NCL negligently maintained the deck. The district court adopted the magistrate judge's report and recommendation. Like the magistrate judge, the district court did not address negligent maintenance.

On appeal, the Petersens argue that: (1) the district court erred by granting summary judgment in favor of NCL on Mr. Petersen's failure to warn claim based on the open and obvious doctrine because the unreasonably slippery nature of the deck was not open and obvious; (2) the district court erred by granting summary judgment in favor of NCL on Mr. Petersen's negligent maintenance claim because NCL did not seek summary judgment regarding that claim; and (3) the district court erred by denying Mrs. Petersen's loss of consortium claim.

III. DISCUSSION

The parties agree that, because Mr. Petersen's injuries occurred on navigable waters, federal maritime law controls this case. *Everett v. Carnival Cruise Lines*, 912 F.2d 1355, 1358 (11th Cir. 1990); *see also Doe v. Celebrity Cruises, Inc.*, 394 F.3d 891, 901-02 (11th Cir. 2004) (holding that federal maritime law governed a cruise passenger's sexual assault case against a cruise ship even though the assault took place while the ship was docked in Bermuda). In analyzing a maritime tort case, the Court applies the general principles of negligence law. *Chaparro v. Carnival Corp.*, 693 F.3d 1333, 1336 (11th Cir. 2012) (per curiam). Under those principles, a plaintiff must show that (1) the defendant had a duty, (2) the defendant breached that duty, (3) the breach actually and proximately caused the plaintiff's injury, and (4) the plaintiff suffered actual harm. *Id.* A cruise line owes its passengers a duty of "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." *Keefe v. Bahama Cruise Line, Inc.*, 867 F.2d 1318, 1322 (11th Cir. 1989) (per curiam). The cruise line's duty to its passengers includes "a duty to warn of known dangers . . . in places where passengers are invited or reasonably expected to visit" that would not be open and obvious to a reasonable person under the circumstances. *Chaparro*, 693 F.3d at 1336; *Deperrodil v. Bozovic Marine, Inc.*, 842 F.3d 352, 357 (5th Cir. 2016) ("A vessel owner does not need to

warn passengers or make special arrangements for open-and-obvious risks.").

A. Negligent Failure to Warn

The Petersens first argue that the district court should not have applied the open and obvious doctrine to Mr. Petersen's negligent failure to warn claim. Specifically, they claim that, although it was obvious that the deck on which Mr. Petersen fell was wet, it was not open and obvious that the deck was unreasonably slippery. The Petersens offer the following evidence to support their claim that the deck on which Mr. Petersen fell was unreasonably slippery: (1) the video footage showing that both of Mr. Petersen's feet slipped completely out from under him in such a manner that a jury might find that the deck surface was unreasonably slippery; (2) the fact that sixty other NCL passengers fell on Bolidt Select Soft decking on the Breakaway during the three year period before Mr. Petersen fell; and (3) the evidence suggesting that NCL used the Bolidt Super Stripper detergent on the Select Soft deck, even though that was not recommended by the manufacturer.

We agree with the Petersens that this evidence is sufficient for a reasonable juror to conclude that the deck on which Mr. Petersen fell was unreasonably slippery. Furthermore, we agree that, although the wetness of the deck was open and obvious, the unreasonably slippery state of the deck may not have

been open and obvious to a reasonable person.[2] Because there is evidence in the record from which a reasonable juror could conclude that the deck was unreasonably slippery, we reverse the district court's grant of summary judgment on the failure to warn claim based on its conclusion that the water on the deck was an open and obvious risk.

We recognize that in the district court NCL raised additional alternative arguments in its defense against Mr. Petersen's negligent failure to warn claim—i.e., NCL's alleged lack of notice of the risk-creating condition and its argument that the warnings actually given were adequate. However, Mr. Petersen's failure to warn claim was rejected by the magistrate judge and the district court solely on the open and obvious ground, and neither addressed NCL's alternative grounds. Having vacated the district court's judgment with respect to the open and obvious ground, we remand Mr. Petersen's failure to warn claim to the district court to consider in the first instance NCL's alternative arguments.

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[2] We have reached this same conclusion in another unpublished case. See *Frasca v. NCL (Bahamas), Ltd.*, 654 F. App'x 949, 953 (11th Cir. 2016) (per curiam) (reversing the district court's grant of summary judgment in a case in which the plaintiffs presented evidence that the deck was unreasonably slippery because, although it may be obvious that water on a deck will make it slicker than usual, the deck's visible wetness may not alert a reasonable person to the extent of the deck's slipperiness).

B. Negligent Maintenance

The Petersens next argue that the district court erred by granting summary judgment with regards to their negligent maintenance claim. Specifically, they claim that NCL did not move for summary judgment regarding this claim and that the district court did not give them sufficient notice of its intent to grant summary judgment on the claim. We agree with the Petersens that the district court did not properly address their negligent maintenance claim.

The Petersens' complaint lists a single negligence count against NCL. But the substance of the complaint makes clear that the Petersens claim that NCL was negligent in several ways, including by negligently maintaining the deck material. Moreover, counsel for the Petersens eliminated any uncertainty by arguing extensively regarding Mr. Petersen's negligent maintenance claim at the summary judgment hearing. Nevertheless, the magistrate judge, who conducted the hearing, did not address the negligent maintenance claim in his report and recommendation. And despite the fact that the Petersens argued that the deck was negligently maintained in their objections to the report and recommendation, the district court also failed to address that claim. Given that NCL did not move for summary judgment regarding Mr. Petersen's negligent maintenance claim, the district court never addressed that claim, and there is evidence suggesting that NCL did not follow the manufacturer's instructions for cleaning the deck, we remand for the district court to

address Mr. Petersen's negligent maintenance claim in the first instance.

C. Loss of Consortium

This Court has held that plaintiffs may not recover loss of consortium damages for personal injury claims under federal maritime law. *See In re Amtrak Sunset Ltd. Train Crash in Bayou Canot, Ala. on Sept. 22, 1993*, 121 F.3d 1421, 1429 (11th Cir. 1997) (holding that the plaintiffs could not recover punitive or loss of consortium damages for personal injuries sustained when a commercial vessel crashed into a railway bridge); *see also Lollie v. Brown Marine Serv., Inc.*, 995 F.2d 1565, 1565 (11th Cir. 1993) (per curiam) ("[N]either the Jones Act nor general maritime law authorizes recovery for loss of society or consortium in personal injury cases."). "We are bound to follow a prior precedent or en banc holding, except where that holding has been overruled or undermined to the point of abrogation by a subsequent en banc or Supreme Court decision." *Tobinick v. Novella*, 884 F.3d 1110, 1118 (11th Cir. 2018) (quoting *Chambers v. Thompson*, 150 F.3d 1324, 1326 (11th Cir. 1998)).

The Petersens recognize that this Circuit's precedent precludes Mrs. Petersen's loss of consortium claim. Nevertheless, they argue that the Court should reexamine *In re Amtrak* in light of the Supreme Court's more recent holding in *Atlantic Sounding Co. v. Townsend*, 557 U.S. 404, 129 S. Ct. 2561, 174 L. Ed. 2d 382 (2009). In *Atlantic Sounding*, the

Supreme Court held that, as a matter of general maritime law, a seaman may recover punitive damages for the willful and wanton disregard of the maintenance and cure obligation in the appropriate case. *Id.* at 424, 129 S. Ct. at 2575. Nothing in that opinion undermines our holding in *In re Amtrak*. *See In re Amtrak*, 121 F.3d at 1429 (suggesting that punitive or loss of consortium damages may be available under federal maritime law "in exceptional circumstances such as willful failure to furnish maintenance and cure to a seaman"). That is, there are no exceptional circumstances in this case and no allegations of intentional conduct. Accordingly, we affirm the district court's grant of summary judgment regarding Mrs. Petersen's loss of consortium claim.

AFFIRMED in part, REVERSED in part, and REMANDED with instructions.

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

Case Number: 16-24421-CIV-MORENO

ROBERT EDWARD PETERSEN and ANN WILMA PETERSEN

Plaintiffs,

vs.

NCL (BAHAMAS) LTD. d/b/a NORWEGIAN CRUISE LINE,

Defendant. /

ORDER ADOPTING MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION AND GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

(Filed Nov. 20, 2017)

This is a slip-and-fall case brought by Robert Petersen against Norwegian Cruise Line for alleged negligence in failing to protect or warn him of a dangerously slippery open-weather deck. Ann Petersen, Robert's wife, also brought a loss of consortium claim. This cause comes before the Court upon Norwegian's motion for summary judgment, which was referred to Magistrate Judge William C. Turnoff for a report and recommendation. Norwegian argued that: (1) it had no duty to warn because the alleged dangerous condition was open and obvious; (2) it had no notice of a dangerous condition; and (3) maritime law does not

recognize loss of consortium claims. Judge Turnoff recommends granting summary judgment, specifically finding that the alleged danger was open and obvious as a matter of law. Plaintiffs filed objections.

First, Plaintiffs argue that Norwegian has failed to present evidence to disprove the allegations. However, this argument misunderstands the burden of proof. Plaintiffs have the burden to provide sufficient evidence to demonstrate a genuine issue of material fact. Here, the record simply does not create a genuine dispute. And at this stage of litigation, the Court does not consider any of Plaintiffs' allegations that are not supported by record evidence.

Plaintiffs also argue that the report and recommendation improperly transforms comparative negligence into a bar to recovery, However, the report and recommendation does not address comparative negligence or any other affirmative defense. The analysis begins and ends with Plaintiffs' inability to prove duty, an essential element of the negligence claim. Based on the record evidence, the report and recommendation correctly found that Norwegian had no duty to warn because the alleged dangerous condition was open and obvious as a matter of law.

Plaintiffs also argue that the report and recommendation fails to address the actual hazard—that the deck's non-skid properties were not working—and instead addresses only the potential hazard of a wet deck. Here, Plaintiffs miss the mark. Indeed, the report and recommendation states: "Plaintiff argues that

[Norwegian] failed to warn him of the unreasonably dangerous condition, i.e., that the deck was slippery as ice . . . In his view, such a hazard is different from a properly maintained non-skid walking surface that is simply wet." Thus, the report and recommendation clearly addresses the proper allegations,

The Court has reviewed the entire file and record, has made a *de novo* review of the issues that the objections present, and being otherwise fully advised in the premises, it is

ADJUDGED that Plaintiffs' objections are **OVERRULED**, the Report and Recommendation is **AFFIRMED** and **ADOPTED**, and Norwegian's motion for summary judgment is **GRANTED**. Further, all pending motions are **DENIED AS MOOT**.

DONE AND ORDERED in Chambers at Miami, Florida, this 20th of November 2017.

/s/ [Illegible]
FEDERICO A. MORENO
UNITED STATES
DISTRICT JUDGE

Copies furnished to:
Counsel of Record; United States Magistrate Judge William C. Turnoff

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA
Miami Division

Case Number: 16-24421-CIV-MORENO

ROBERT EDWARD
PETERSEN and ANN
WILMA PETERSEN

Plaintiffs,

vs.

NCL (BAHAMAS) LTD. d/b/a
NORWEGIAN CRUISE LINE,

Defendant. /

FINAL JUDGMENT

(Filed Nov. 20, 2017)

Pursuant to Federal Rules of Civil Procedure 56 and 58, and in accordance with the reasons stated in the Court's Order Granting Summary Judgment on November 20, 2017, judgment is entered in favor of the Defendant NCL (Bahamas) Ltd. and against Plaintiffs Robert Edward Petersen and Ann Wilma Petersen.

DONE AND ORDERED in Chambers at Miami, Florida, this 20th of November 17.

/s/ [Illegible]
FEDERICO A. MORENO
UNITED STATES
DISTRICT JUDGE

Copies furnished to:
Counsel of Record

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO: 16-24421-CIV-MORENO/TURNOFF

ROBERT PETERSEN and
ANN PETERSEN, his wife,

Plaintiffs,

vs.

NCL (BAHAMAS) LTD., d/b/a
NORWEGIAN CRUISE LINE,
et al.,

Defendants. /

REPORT AND RECOMMENDATION

(Filed Oct. 13, 2017)

THIS CAUSE is before the Court upon Defendant, Norwegian Cruise Lines' ("NCL") Motion for Summary Judgment. **(ECF No. 41)**. The Motion was filed on June 23, 2017. The Response was filed on July 7, 2017 **(ECF No. 49)**, and the Reply was filed on July 14, 2017. **(ECF No. 52)**. The Motion was referred to the undersigned on July 15, 2017. **(ECF. No. 57)**. On August 28, 2017, the undersigned entered an Order scheduling a hearing for September 27, 2017. **(ECF No. 60)**. A hearing on the Motion took place as scheduled.

Upon review of the Motion, the Response, the Reply, hearing argument from counsel, and being

otherwise duly advised in the premises, the Court makes the following findings.

Background

This action was filed on October 20, 2016. **(ECF No. 1)**. The Complaint alleges, among other things, negligence in connection with a slip and fall onboard the Norwegian *Breakaway*. *Id*. Specifically, Plaintiff Robert Peterson [sic] (hereinafter "Plaintiff') claims that he fell on water in an open-weather deck in the "Spice H20" pool area. **(ECF No. 41)**. He claims to have suffered head injuries as a result [sic] the fall. **(ECF No. 1)**. Plaintiff alleges negligence against NCL[1] for failing to protect and/or warn him of the dangers presented by the wet deck. *Id*. His wife is alleging loss of consortium. *Id*.

NCL's Motion for Summary Judgment

NCL seeks summary judgment on the following grounds: (1) it had no duty to warn Plaintiff because the alleged dangerous condition was, or should have been, obvious to him; (2) it had no notice of a dangerous condition; and (3) maritime law does not recognize claims for loss of consortium. **(ECF No. 41)**.

In support of its Motion, NCL has submitted a Statement of Undisputed Facts wherein it lists twenty

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[1] Plaintiffs initially sued both NCL and the M/S Norwegian *Breakaway*. However, the *Breakaway* was ultimately dismissed by stipulation. **(ECF No. 16, 20)**.

purportedly undisputed matters. *Id*. In his Response, Plaintiff(s) concedes, that for the most part, more than half of the listed facts (1, 2, 3, 8, 9,10, 11, 12, 14, 15, 16, 17 and 18) are undisputed. **(ECF No. 49)**. However, some of his concessions come with explanations. Further, in his view, these facts, even if undisputed, are immaterial to the entry of summary judgment. Nevertheless, for present purposes, the following facts are not in dispute.

Plaintiff and his wife, Ann, (collectively "the Peterson's [sic]") had been on ten (10) other cruises prior to the subject cruise. *Id*. On October 22, 2015, the Peterson's [sic] were on vacation aboard NCL's *Breakaway* as non-seamen, fare paying passengers. **(ECF No. 41,49)**. During his deposition, Plaintiff testified that when he stepped onto the exterior of Deck 16 in the "Spice H20 Bar," it was obvious to him that there was water on the deck. *Id*. He also testified that he felt strong winds whipping and pelting water at him as he stepped onto the deck. *Id*. Upon entering the area, Plaintiff and his wife walked to the left towards the bar and left their belongings in a sheltered space. *Id*. Plaintiff then walked barefoot from the bar toward the hot tub with a drink in his hand. *Id*. He knew the deck was wet in the path he was walking towards the hot tub. *Id*. Plaintiff has no recollection of the fall, but he claims that he slipped and fell while walking to the hot tub from the bar. *Id*. Although he alleges that the source of the water was a waterfall feature on the opposite side of the deck, he conceded at deposition that he was actually just guessing. *Id*. On this particular cruise,

Plaintiff had previously visited the deck in question, and had used the hot tub facilities, at least once prior to the accident. *Id*.

Plaintiff disputes and/or expands on the remaining facts listed by NCL. Those items are as follows:

- Prior to Plaintiff's accident, he had spent time walking around the same deck area to observe shows and performances. **(ECF No. 41, 4)**.
- Signage on the flooring in the area warns passengers to exercise caution. *Id.* at 5.
- Plaintiff walked directly over the warning signage on at least one occasion prior to the incident. *Id*. 5-7.
- While Plaintiff ordered a drink at the bar, his wife walked towards the hot tub through the subject area without incident. *Id*. at 13.
- NCL's CCTV video recording shows that the deck is dry and then instantaneously becomes soaked with a sheet of rain just prior to the incident, evidencing little time, if any, for NCL to take corrective action. *Id*. at 19.
- There is no evidence that NCL was aware of any alleged dangerous condition prior to the subject incident. *Id*. at 20.

As noted above, Plaintiff takes issue with these "facts," as alleged by NCL. Specifically, Plaintiff denies that prior to the accident he spent time walking

around the area in question to observe shows and performances. **(ECF No. 41, n.4.)**. While he had walked in other areas, such as the dance floor, prior to his injuries, he had not walked close to where he fell. **(ECF No. 49)**. He likewise denies that the signage on the flooring warns passengers to exercise caution. *Id*. In this connection, he claims that the warning was so inadequate that it even went unnoticed by a bartender that worked next to it for years. *Id*.

In sum, Plaintiff argues that NCL failed to warn him of the unreasonably dangerous condition, i.e., that the deck was as slippery as ice. *Id*. In his view, such a hazard is different from a properly maintained nonskid walking surface that is simply wet. *Id*. Plaintiff further argues that while his wife walked in the same area, there is no evidence that she stepped on the exact same slippery surface that caused him to fall. *Id*. Plaintiff likewise rejects the argument that NCL was unaware of the alleged dangerous condition. *Id*. Specifically, Plaintiff suggests that there were sixty (60) prior substantially similar slips and falls on similar flooring surfaces that were wet. In his papers, Plaintiff states only that the same flooring existed in 60 other slip and fall incidents. In this connection, he refers to the testimony of NCL's corporate representative, Brett Berman, who testified that out of 600,000 guests, only 60 had ever reported slips and falls on liquid involving the same flooring. Berman Dep. 32:1-25. It is not clear whether these references relate to this same ship and this particular deck, or whether this is a fleet wide reference. **(ECF No. 49)**.

In short, Plaintiff suggests that NCL knew of the problem, but did nothing. Further, in his view, notice is not even an issue, because NCL created the condition by its own negligence.

Standard of Review

Summary judgment is proper "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). The moving party bears the initial responsibility to inform the court of the basis for its motion and identifying the portions of the pleadings, or filings, that it believes demonstrate the absence of a genuine issue. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). "[A]t the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). In furtherance of same, the Court should view all evidence and make all justifiable inferences in favor of the non-moving party. *Id*. However, if the evidence proffered by the nonmovant is "merely colorable" or "not significantly probative," summary judgment may still be granted. *Id*. at 249-250.

Analysis

Negligence

Maritime law governs the liability of a cruise ship for a passenger's slip and fall.[2] *Everett v. Carnival Cruise Lines,* 912 F.2d 1355, 1358 (11th Cir.1990). In this connection, a carrier by sea does not serve as an insurer to its passengers. *Kornberg v. Carnival Cruise Lines, Inc.*, 741 F.2d 1332, 1334 (11th Cir.1984). Instead, it is liable only for its negligence. *Id*.; *see also, Weiner v. Carnival Cruise Lines*, No. 11-CV-22516, 2012 WL 5199604, at *2 (S.D.Fla. Oct. 22, 2012). Stated differently, the owner of a ship in navigable waters owes passengers a duty of "reasonable care" under the circumstances. *Sorrels v. NCL, Ltd.*, 796 F. 3d 1275, 1279 (11th Cir.2015).

Here, in order to prevail on his negligence claim, Plaintiff must show that: (1) RCL [sic] owed him a duty; (2) that RCL [sic] breached that duty; (3) that this duty was the proximate cause of his injury; and that (4) that Plaintiff suffered damages. *Isbell v. Carnival Corp.*, 462 F.Supp.2d 1232, 1236 (S.D.Fla. 2006). The failure to show sufficient evidence of each element is fatal to a plaintiff's negligence claim. *Id*. at 1237; *see also Taiariol v. MSC Crociere, SA*, No. 5-61131, 2016 WL 1428942, at *3 (S.D.Fla. Apr. 12, 2016).

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[2] In the absence of applicable maritime law, the court may apply the reasoning used by other federal circuits. *Isbell v. Carnival Corp.*, 462 F.Supp.2d 1232 (2006) (citing *Carlisle v. Ulysees Line Ltd., S.A.*, 475 So.2d 248, 250 (Fla. 3d DCA 1985)).

Open and Obvious

The above-noted 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 v. Bahama Cruise Line, Inc*., 867 F.2d 1318, 1322 (11th Cir.1989). The duty to warn passengers of dangers, however, extends only to "those dangers which are not apparent and obvious to the passenger." *Luby v. Carnival Cruise Lines, Inc.*, 633 F. Supp. 40 (S.D.Fla.1986); *see also*, *Smolnikar v. Royal Caribbean Cruises, Ltd*., 787 F.Supp.2d 1308, 1323 (S.D.Fla.2011). Open and obvious dangers are dangers that should be obvious by the ordinary use of one's senses. *Lancaster v. Carnival Corp.*, 85 F.Supp.3d, 1341, 1344 (S.D.Fla.2015) (open and obvious conditions are discernible through common sense and the ordinary use of eyesight). The question of whether a danger is 'open and obvious' is determined from an objective viewpoint. *John Morrell & Co. v. Royal Caribbean Cruises, Ltd.*, 534 F.Supp.2d 1345 (S.D. Fla. 2008). Stated differently, an individual's subjective perceptions are irrelevant in determining whether a duty to warn existed. *Id*. at 1351.

Here, NCL argues that it owed no such duty,[3] because the conditions on Deck 16 were open and obvious to Plaintiff. In its view, as an avid cruiser, Plaintiff should have been aware of the fact that open weather decks may be exposed to wet weather conditions, and

[3] Notwithstanding this argument, NCL notes that it did, in fact, provide warnings by way of signage which cautioned passengers to exercise caution while walking in the area. **(ECF No. 41)**.

that a wet ship deck may be slippery. **(ECF No. 41)**. Plaintiff, on the other hand, suggests that a jury could view the CCTV video and conclude that the deck' s visible wetness and the weather conditions would not alert a reasonable observer to the extent of the deck's slipperiness. **(ECF No. 49)**. In his view, this conclusion is "bolstered by the uncontroverted fact that Defendant's [own] employee, wearing non-skid boots, also slipped . . . while exiting the area. *Id*. Based upon this record, and after having reviewed the CCTV video **(ECF No. 61)**, the undersigned is not persuaded.

Plaintiff's own testimony reveals that he was familiar with the area in question, he understood the deck to be wet, and was aware of the weather conditions on the day of the accident. **(ECF No. 595)**. Specifically, Plaintiff testified as follows:

> Q. Okay. Had you been to the hot tub area on Deck 16 prior to that day?
>
> A. Yes.
>
> Q. How many times had you been in to the hot tub area would you say?
>
> A. We were in the hot tubs, I don't remember what day it was, but one time prior – prior to that day, and also they have shows and everything else up on the deck. So we didn't really stay at the shows, but you just go up there and see – to see what was going on.

Peterson [sic] Dep. 55:14-25.

Q. Ok, So you had been to the same hot tub area at least once before to go in the hot tub?

A. Correct.

Q. And you had been in that area on another occasion to see what was going on because there was some sort of show or performance?

A. Correct.

* * *

Q. Okay. When you decided to go to the hot tubs on the day of the incident, do you recall what the weather was like outside?

A. That I remember?

Q. Yes.

A. I remember it was a nice day but windy, but when we walked out one [sic] to the – I don't know how to explain it, but the ship is almost like a tunnel . . .

We were just getting – the wind was just whipping. All the chairs itself [sic] were tied up. The wind was whipping, and you felt like you were getting pelted by water.

Id. at 55:25; 56:1-25.

Q. And at that point, it was obvious to you it was very windy out, correct?

A. Very windy.

Q. Okay and your testimony was the wind was whipping, so it was a strong wind that you felt as soon as you got out onto the deck, correct?

A. The wind was, yeah, whipping, gushing. The wind was strong.

Q. Okay. Any [sic] you felt that [sic], and you observed that as soon as you stepped out onto the exterior deck, correct?

A. Yes.

Q. And then you said that you were also getting pelted by water, correct?

A. Correct.

Id. at 58:1-25.

Q. So you just see in front of you from the wind this water just pelting in front of you and coming in front of you?

A. Yeah.

Q. Okay. I just want to make sure. So you felt it because it was hitting you, and you could also feel it?

A. Yes.

Id. at 59:1-25.

Q. And you also recall stepping out onto the deck and feeling the wind and feeling the water, correct?

A. I do.

Id. 60:1-12.

Q. Okay. As you felt the water pelting you and you saw the water in front of you, did you also see water on the deck itself?

A. Yes.

Q. Okay. And that was obvious to you. You could see the water on the deck, correct?

A. Yes.

Q. . . . Was it obvious to you that there was water on the deck when you stepped out onto the exterior deck?

A. Yes.

Q. You would agree with me that you knew the deck was wet once you were on the exterior deck, correct?

A. Yes.

Id. at 61:9-25; 62:1-10.

Q. And was the deck wet in the path that you took to travel to the hot tub?

A. Yes.

Q. Okay. And you could observe that; you could see that, correct?

A. Yes.

Id. at 76:5-13.

Again, Plaintiff was not new to cruising. He had been on ten (10) other cruises before the instant cruise. He had used the hot tub area at issue on at least one occasion before the incident. Plaintiff himself testified that the weather was wet and windy. One might even classify his description as inclement weather conditions. In fact, Plaintiff testified that no one else was on

the exterior deck at the time (Peterson [sic] Dep. 61:1-8) and that the furniture was tied up. *Id*. at 55:25; 56:1-25. These things, on their own, provide adequate warning that there existed the potential for the deck floor to be slick or slippery. In addition, there was a warning sign in the area warning passengers to exercise caution. Under these circumstances – i.e., the wind and water described by Plaintiff – a reasonable person could sense that water may have accumulated on the floor. These things should have been even more obvious to an avid cruiser like Plaintiff. In fact, his wife, also an avid cruiser, had walked on the same path just prior to the accident without issue.

Here, viewing the above facts in the light most favorable to Plaintiff, and applying the law, the undersigned finds that Defendant is entitled to summary judgment. Simply put, the conditions on the deck on the day of the incident were open and obvious. The Court is sympathetic, as it does appear that Plaintiff was injured. However, liability cannot rest on sympathy alone. *Weiner v. Carnival Cruise Lines*, No. 11-CV-22516, 2012 WL 5199604, at *6 (S.D.Fla. Oct. 22, 2012). As noted *supra*, cruise lines do not serve as insurers of the safety of their passengers. *Cohen v. Carnival Corp.*, 945 F.Supp.2d 1351, 1356 (S.D.Fla.2013). In other words, liability cannot be imposed merely because an accident occurs. *Thomas v. NCL,(Bahamas), Ltd.*, No. 13-24682-CIV. 2014 WL 3919914, at *5 (S.D.Fla. Aug. 11, 2014).

Having determined that the condition was open and obvious, and that there existed no duty to warn,

the Court need not conduct a further analysis as to notice. *See e.g.*, *Lugo v. Carnival Corp.*, 154 F.Supp.3d 1341 (S.D.Fla.2015); *Isbell v. Carnival Corp.*, 462 F.Supp.2d (S.D.Fla.2006). Consistent with the above, it is hereby **RESPECTFULLY RECOMMENDED** that Defendant's Motion for Summary Judgment **(ECF No. 41)** be **GRANTED** as to Plaintiffs negligence claim.

Loss of Consortium

Having determined that Plaintiffs claim fails, it logically follows that his wife's loss of consortium claim likewise fails. Indeed, the wife's claim fails even if Plaintiffs claim is allowed to proceed. Specifically since, general maritime law does not allow for loss of support or loss of services in passenger injury cases. **(ECF No. 41)**.

As explained by the Eleventh Circuit, "Neither the Jones Act nor general maritime law authorizes recovery for loss of society or consortium in personal injury cases." *Lollie v. Brown Marine Service, Inc.*, 995 F.2d 1565 (11th Cir.1993). Following this same principle, the Court instructs:

> Unless or until the United States Supreme Court should decide to add state remedies to the admiralty remedies for personal injury, personal injury claimants have no claim for nonpecuniary damages such as loss of society, loss of consortium or punitive damages, except in exceptional circumstances such as willful failure to furnish maintenance and cure to a seaman, intentional denial of a

> vessel owner to furnish a seaworthy vessel to a seaman and in those very rare situations of intentional wrongdoing.

In re Amtrak "Sunset, Ltd." Train Crash, 121 F.3d 1421 (11th Cir.1997).

Florida courts, state and federal, have cited to this line of cases in denying loss of consortium claims in cruise line passenger cases. *See e.g.*, *Ridley v. NCL (Bahamas) Ltd.*, 824 F. Supp.2d 1355, 1363 (S.D.Fla.2010) (there is no doubt that, under Eleventh Circuit precedent, loss of consortium is not permitted under general maritime law); *Frango v. Royal Caribbean Cruises, Ltd.*, 891 So. 2d 1208 (Fla. 3d DCA 2005) (affirming summary judgment against husband of injured cruise passenger because allowing same would conflict with federal maritime law); *see also*, *NCL, Ltd. v. Zareno*, 712 So. 2d 791, 793 (Fla. 3d DCA 1998). Accordingly, it is **RESPECTFULLY RECOMMENDED** that NCL's Motion **(ECF No. 41)** be likewise **GRANTED** as to the loss of consortium claim.

Pursuant to S.D. Fla. Magistrate Rule 4(b), the parties may serve and file written objections to this Recommendation with the Honorable Federico A. Moreno within fourteen (14) days after being served with a copy of this Report and Recommendation. Failure to timely file objections shall bar the parties from attacking on appeal any factual findings contained herein. *RTC v. Hallmark Builders, Inc.*, 996 F.2d 1144 (11th Cir. 1993); *LoConte v. Dugger*, 847 F.2d 745 (11th Cir. 1988).

RESPECTFULLY RECOMMENDED in Chambers at Miami, Florida, this 13th day of October 2017.

/s/ William C. Turnoff
WILLIAM C. TURNOFF
UNITED STATES
MAGISTRATE JUDGE

cc: Hon. Federico A. Moreno
Counsel of Record

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Nos. 17-15581 & 18-10513-FF

ROBERT EDWARD PETERSEN,
ANN WILMA PETERSEN, his wife,

Plaintiffs - Appellants,

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

(Filed Oct. 18, 2018)

BEFORE: MARTIN, JILL PRYOR and ANDERSON, Circuit Judges.

PER CURIAM:

The petition(s) for panel rehearing filed by the Appellee is DENIED.

ENTERED FOR THE COURT:

/s/ R. Lanier Anderson
UNITED STATES CIRCUIT JUDGE

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