No. 18-_____

In The
Supreme Court of the United States

ANTOINETTE PIZZINO,

Petitioner,

v.

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

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 FOR REVIEW

Whether, in cases where a defendant or its agent has *created* the dangerous condition that causes injury, a plaintiff in a maritime negligence case should be required to make a separate showing that the defendant had actual or constructive notice of the condition when the plaintiff would have no such obligation under the common law?

PARTIES AND RULE 29.6 STATEMENT

The parties to the proceedings in the court whose judgment is sought to be reviewed are as follows.

Petitioner, Antoinette Pizzino ("Plaintiff" or "Mrs. Pizzino"), was the plaintiff in the District Court and the appellant in the court of appeals.

Respondent, NCL (Bahamas) Ltd., d/b/a/ Norwegian Cruise Line ("Defendant" or "Norwegian"), was the defendant in the District Court and the appellee in the court of appeals. With respect to Norwegian's corporate ownership, Petitioner quotes below the corporate disclosure made by Norwegian in a May 23, 2018 filing in an unrelated appeal.

> NCL is a wholly-owned subsidiary of NCL International, Ltd., a Bermuda company, which in turn is a wholly-owned subsidiary of Arrasas Limited, an Isle of Man company, which in turn is a wholly-owned subsidiary of NCL Corporation Ltd., a Bermuda company ("NCLC"). NCLC is subsidiary of Norwegian Cruise Line Holdings Ltd., ("NCLH") a Bermuda company publicly traded on NASDAQ as ticker symbol "NCLH." NCLH in turn is owned by: Star NCLC Holdings Ltd., a Bermuda company ("Genting HK"); one or more of AIF VI NCL (AIV), L.P., AIF VI NCL (AIV II), L.P., AIF VI NCL (AIV III), L.P., AIF VI NCL (AIV IV), L.P., AAA Guarantor – Co-Invest VI (B), L.P., Apollo Overseas Partners (Delaware) VI, L.P., Apollo Overseas Partners (Delaware 892) VI,

PARTIES AND RULE 29.6 STATEMENT – Continued

L.P., Apollo Overseas Partners VI, L.P., Apollo Overseas Partners (Germany) VI, L.P., AAA Guarantor – Co-Invest VII, L.P., AIF VI Euro Holdings, L.P., AIF VII Euro Holdings, L.P., Apollo Alternative Assets, L.P., Apollo Management VI, L.P. and Apollo Management VII, L.P., (collectively, the "Apollo Funds"); one or more of TPG Viking, L.P., TPG Viking AIV I, L.P., TPG Viking AIV II, L.P., and TPG Viking AIV III, L.P. (collectively, the "TPG Viking Funds"); and public shareholders. As of January 31, 2016, the relative ownership percentages of NCLH's ordinary shares were approximately: Genting HK (11.1%), Apollo Funds (15.8%), TPG Viking Funds (2.3%) and public shareholders (70.8%).

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OPINIONS BELOW

The opinion of the court of appeals (Appendix ("App.") 1-11)) was not selected for publication, but can be found in the unofficial federal reporter at *Pizzino v. NCL* (*Bahamas*) *Ltd.*, 709 Fed. Appx. 563 (11th Cir. 2017).

JURISDICTION

The Eleventh Circuit filed its opinion on September 20, 2017. (App. 1). The court denied Appellant's motion for panel rehearing and rehearing en banc by orders dated April 19, 2018. (App. 13-15). This Court has jurisdiction to review the Eleventh Circuit's judgment by writ of certiorari pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The question presented concerns an issue of general maritime law, which is constitutionally committed to the Judiciary. *See* U.S. Const. art. III, § 2 ("The judicial Power shall extend . . . to all Cases of admiralty and maritime Jurisdiction. . . .").

STATEMENT OF THE CASE AND FACTS

A. Relevant Facts Regarding Plaintiff's Injury

Plaintiff fell and broke both her wrists after she slipped in a puddle of liquid as she walked down a corridor aboard Defendant's vessel, the *Norwegian Sky*. (App. 2-3). The fall, and the events that preceded it, were captured by closed circuit television cameras aboard the ship. (App. 3). The footage showed Defendant's employee, Dimitur Hulea, carrying buckets of liquid as he walked back and forth down a corridor that connects a coffee bar to the ship's casino. (App. 2-3). The buckets were filled to about "three quarters full" with water and a bleach-water mixture, which he used to clean the coffee bar. (App. 2). Mr. Hulea was required to trek back and forth with buckets of liquid "[b]ecause the coffee bar did not have the appropriate facilities." (App. 2).

At one point, one of the buckets containing liquid appeared to tilt and strike Mr. Hulea's knee as he approached the coffee bar. (App. 3). Approximately 14 minutes later, as Mr. Hulea continued to clean the coffee bar, Plaintiff and her husband walked down the same corridor, from the casino toward the coffee bar. (App. 3). As she approached the coffee bar, Plaintiff slipped and fell, breaking both her wrists. (App. 3). Before she slipped, Plaintiff did not see any liquid on the ground, nor was there a "wet floor" or other caution sign in the area. (App. 3). After she fell, Plaintiff noticed several "four to six inch puddles on the floor." (App. 3).

Plaintiff's husband immediately told Mr. Hulea to wipe up the puddles before someone else fell. (App. 3). Mr. Hulea later testified that he "never spilled liquid from the buckets when transporting them down the corridor" (App. 2), and that he "did not see any water on the ground" immediately after Plaintiff fell. (App. 3).

B. Proceedings in the District Court

Plaintiff filed suit against Norwegian, asserting a claim for negligence based on Norwegian's creation of, and failure to eliminate, a hazardous condition – namely, the puddles of water near the coffee bar where she fell and broke her wrists. (App. 4). The District Court had subject matter jurisdiction based on diversity of citizenship, under 28 U.S.C. § 1332, and also based on admiralty or maritime jurisdiction, under 28 U.S.C. § 1333.

The case proceeded to a jury trial, where the District Court gave the following jury instruction pertaining to Plaintiff's burden:

> To recover for injuries sustained in her fall, the plaintiff, Mrs. Pizzino, must prove either, first, that Norwegian had actual notice of the alleged risk-creating condition of which she complains or, alternatively, the second part, that the dangerous condition existed for such a length of time that in the exercise of ordinary care Norwegian should have known of it.

(App. 4). Plaintiff requested that the District Court give the following additional instruction concerning notice, which the District Court declined to give: "Where a cruise ship operator created the unsafe or foreseeably hazardous condition, a plaintiff need not prove notice in order to prove negligence." (App. 4). The jury ultimately returned a verdict for Norwegian. (App. 4). The District Court entered final judgment for Norwegian on October 18, 2016. (App. 12).

C. Proceedings Before the Eleventh Circuit

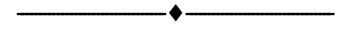
On appeal, Plaintiff argued that the District Court erred when it declined to give Plaintiff's requested jury instruction that a defendant's creation of the dangerous condition satisfies or excuses the requirement that a plaintiff independently establish that the defendant had notice of the condition. The Eleventh Circuit disagreed, affirming the judgment below. (App. 1-11).

The three-judge panel of the Eleventh Circuit held that its decision was "controlled by *Everett v. Carnival Cruise Lines*, 912 F.2d 1355, 1358 (11th Cir. 1990), where we considered the notice requirement's contours in light of facts similar to those confronting us here." (App. 6). According to the panel, its prior holding in *Everett* required it to "reject[] the notion that 'notice of the defect' could be imputed to a cruise ship operator 'inasmuch as it created' the defect and maintained it." (App. 7).

The panel rejected Plaintiff's attempts to distinguish *Everett* and expressly disapproved of decisions by "numerous district courts" that "have concluded that a cruise ship operator can be liable absent notice where it created a dangerous condition, notwithstanding *Everett*." (App. 9). The panel closed the opinion by acknowledging the public policy rationale supporting Plaintiff's position, but ultimately concluded that it was bound by its interpretation of its own prior precedent.

> We recognize that there may be sound policy justifications supporting the rule for which Pizzino advocates. *See, e.g.*, *McDonough v. Celebrity Cruises, Inc.*, 64 F. Supp. 2d 259, 264 (S.D.N.Y. 1999) ("To require a plaintiff to also establish notice in a case where the defendant's own activities created a foreseeable and unreasonable risk of harm . . . would have the absurd result that negligence actions could only be brought after a dangerous condition or practice created by a defendant claimed a previous victim, whose own recovery would be barred by the absence of notice."). But Pizzino's position simply cannot be squared with our prior precedent. We therefore affirm the district court's judgment.

(App. 11). Plaintiff petitioned the full Eleventh Circuit for rehearing en banc, which the court denied. (App. 14-15).



REASONS WHY CERTIORARI IS WARRANTED

The Eleventh Circuit's decision creates a distinct standard for cruise lines, affording special protection that is not available to analogous on-shore property owners under common law, notwithstanding the fact that modern cruise ships are effectively floating resorts that present the same conditions (and hazards) routinely found in hotels and resorts on land. There is no public policy reason for imposing an additional notice requirement the moment a passenger steps off a gangplank onto a cruise ship, and doing so runs afoul of this Court's precedent, which sought to conform maritime law to the emerging trend in the common law of premises liability. None of the 50 states or the District of Columbia gives defendants the shield against liability provided by the Eleventh Circuit's decision below, leaving the maritime law radically out of step with the common law of premises liability on land.

I. REVIEW BY CERTIORARI IS CONSISTENT WITH THIS COURT'S OFT-EXERCISED AUTHORITY TO DETERMINE MARITIME LAW

This Court has frequently recognized its obligation to develop maritime law. Just a decade ago, the Court stated that "the Judiciary has traditionally taken the lead in formulating flexible and fair remedies in the law maritime, and Congress has largely left to this Court the responsibility for fashioning the controlling rules of admiralty law." *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 508 n.21 (2008) (quoting *United States v. Reliable Transfer Co.*, 421 U.S. 397, 409 (1975)). Indeed,

that responsibility derives directly from the Constitution. *See* U.S. Const. art. III, § 2 ("The judicial Power shall extend . . . to all Cases of admiralty and maritime Jurisdiction. . . ."). In *Baker*, this Court acknowledged that it has long played a "large part . . . in working out the governing maritime tort principles," resulting in a maritime law that is "an amalgam of traditional common-law rules, modifications of those rules, and newly created rules." 554 U.S. at 508 n.21 (citing *East River S.S. Corp. v. Transamerica Delaval Inc.*, 476 U.S. 858, 865 (1986)).

Consistent with this authority to develop maritime law, this Court weighed in on the subject of a shipowner's duty of care for negligence almost 60 years ago. In *Kermarec v. Compagnie Generale Transatlantique*, the Court recognized the "settled principle of maritime law that a shipowner owes the duty of exercising reasonable care towards those lawfully aboard the vessel who are not members of the crew." 358 U.S. 625, 630 (1959). The question in that case was whether a "different and lower standard of care" should be applied to a plaintiff who was merely a "ship's visitor . . . to whom the label of 'licensee' can be attached." *Id.* The Court rejected the outdated common law distinction between licensees and invitees, based on what was, at the time, an emerging trend in the common law "towards imposing on owners and occupiers a single duty of reasonable care in all the circumstances." *Id.* at 631. Seeking to harmonize the maritime standard of care with that trend, the Court expressly held that "the owner of a ship in navigable waters owes to all who are on board

for purposes not inimical to his legitimate interests the duty of exercising reasonable care under the circumstances of each case." *Id.* at 632.

The principles that informed the Court's holding in *Kermarec* favor granting certiorari to review the Eleventh Circuit's decision in this case.

II. THE COURT SHOULD REVIEW THE DECISION BELOW TO DETERMINE WHETHER TO BRING MARITIME LAW INTO CONFORMITY WITH THE VIRTUALLY UNANIMOUS COMMON LAW OF PREMISES LIABILITY

Under the Eleventh Circuit's holding, a plaintiff in a maritime negligence case must "demonstrate that [the defendant] had actual or constructive notice of the risk-creating condition," even if the condition was ***created*** by the defendant or its agent. (App. 7). To establish notice, maritime plaintiffs are required to "point to previous injuries or show that the defendant previously warned of the danger." *Malley v. Royal Caribbean Cruises, Ltd.*, 713 Fed. Appx. 905, 908 (11th Cir. 2017) (citing *Sorrels v. NCL* (*Bahamas*) *Ltd.*, 796 F.3d 1275, 1280 (11th Cir. 2015)). The Eleventh Circuit's imposition of an independent notice requirement, even in cases where the defendant or its agent created the hazardous condition, is in conflict with well-established principles of common law premises liability throughout the United States.

The law is virtually unanimous that, when a premises owner or its agent is responsible for creating

the hazardous condition that injured the plaintiff, the additional notice requirement is deemed met or simply excused. Courts justify this common-sense rule in one of two ways. Some courts reason that "[t]he creator of the dangerous condition is charged with notice of the danger caused by his own creation." *Pogue v. Great Atl. & Pac. Tea Co.*, 242 F.2d 575, 581 (5th Cir. 1957) (applying Florida law). Alternatively, some courts simply hold that the act of a property owner or its agent in negligently creating a dangerous condition is sufficient to impose liability without requiring an additional showing of notice. *E.g.*, *Tuite v. Stop and Shop Companies, Inc.*, 696 A.2d 363, 366 (Conn. App. Ct. 1997) ("It is well established that a plaintiff does not have to prove that a defendant had actual or constructive notice of a dangerous condition when the plaintiff claims that the defendant's employees created the condition.").

Indeed, virtually every state in the union, as well as the District of Columbia follows some formulation of this sensible approach. Plaintiff understands that the following citations and parentheticals are cumbersome, but provides them to illustrate the remarkable consistency in the common law on this point (and, correspondingly, the extreme isolation of the Eleventh Circuit's holding below).

> *Wal-Mart Stores, Inc. v. Rolin*, 813 So. 2d 861, 864 (Ala. 2001) ("When the defendant or his employees have affirmatively created the dangerous condition, the plaintiff need not introduce evidence that the defendant had actual

or constructive knowledge of the hazard. Under such circumstances, the courts presume notice.")

Johnson v. State, 636 P.2d 47, 68 (Alaska 1981) ("Actual or constructive notice of a dangerous condition is necessary unless the government entity itself created the dangerous condition.")

Andrews v. Fry's Food Stores of Arizona, 770 P.2d 397, 399 (Ariz. Ct. App. 1989) ("The plaintiff must prove that the proprietor created the dangerous condition resulting in the fall, or that the proprietor had actual or constructive notice of the dangerous condition.")

Morehart v. Dillard Dept. Stores, 908 S.W.2d 331, 333 (Ark. 1995) ("In order to prevail in a slip and fall case, a plaintiff must show either (1) the presence of a substance upon the premises was the result of the defendant's negligence, or (2) the substance had been on the floor for such a length of time that the appellee knew or reasonably should have known of its presence and failed to use ordinary care to remove it.")

Getchell v. Rogers Jewelry, 203 Cal. App. 4th 381, 386 (Cal. Ct. App. 2012) ("Where the dangerous or defective condition of the property which causes the injury has been created by reason of the negligence of the owner of the property or his employee acting within the scope of the employment, the owner of the property cannot be permitted to assert that he had no notice or knowledge of the defective or

dangerous condition in an action by an invitee for injuries suffered by reason of the dangerous condition. Under such circumstances knowledge thereof is imputed to him.")

Safeway Stores, Inc. v. Smith, 658 P.2d 255, 256-57 (Colo. 1983) ("Unless a dangerous condition is created by the operator or its agents, its duty of care is breached only if, after actual or constructive notice, the store operator fails to correct the condition or warn of its existence.")

Tuite v. Stop and Shop Cos., Inc., 696 A.2d 363, 366 (Conn. App. Ct. 1997) ("It is well established that a plaintiff does not have to prove that a defendant had actual or constructive notice of a dangerous condition when the plaintiff claims that the defendant's employees created the condition.")

Howard v. Food Fair Stores, New Castle, Inc., 201 A.2d 638, 640 (Del. 1964) ("In an action for personal injuries resulting from a shopkeeper's breach of that duty, the plaintiff must show that . . . the condition or defect causing the injury was placed there by the defendant or its employees, or was permitted to remain after notice of its existence had come or should have come to the attention of the defendant, or its employees.")

Croce v. Hall, 657 A.2d 307, 310 n.6 (D.C. 2001) ("[I]f the landowner (or his agent) is responsible for creating the dangerous condition, the plaintiff need not show notice.")

Gonzalez v. B&B Cash Grocery Stores, Inc., 692 So. 2d 297, 298 n.1 (Fla. Dist. Ct. App. 1997) ("Constructive notice must be established because plaintiff does not contend that defendant's employees created the dangerous condition or that defendant had actual notice of a dangerous condition.")

Gilbert v. Automotive Purchasing Serv., 563 S.E.2d 906, 909 (Ga. Ct. App. 2002) ("[U]nder Georgia law, one who creates a dangerous condition on his property has constructive knowledge of the danger.")

Gump v. Wal-Mart Stores, Inc., 5 P.3d 407, 411 (Haw. 2000) ("The mode of operation rule is also consistent with the exception to the notice requirement where the dangerous condition is traceable to the defendant or its agents.")

McDonald v. Safeway Stores, Inc., 707 P.2d 416, 419 (Idaho 1985) (holding premises owner could be held liable under premises liability theory for "negligent creation of a foreseeable risk of harm," and noting "[t]hat theory does not require that the owner or possessor of land have actual or constructive knowledge of the dangerous condition")

Hornacek v. 5th Ave. Property Mgmt., 959 N.E.2d 173, 183 (Ill. App. Ct. 2011) ("However, where a defendant created the condition through its own negligence, a plaintiff does not need to show constructive or actual notice.")

F.W. Woolworth Co. v. Jones, 130 N.E.2d 672, 673 (Ind. Ct. App. 1955) ("A storekeeper is charged with actual knowledge of a dangerous condition created by his own act or acts of his employees within the scope of their employment, and with constructive knowledge thereof if such condition has existed for such a length of time and under such circumstances that it would have been discovered in time to have prevented injury if the storekeeper, his agents or employees had used ordinary care.")

Bartels v. Cari-Dem, Inc., 124 N.W.2d 514, 518 (Iowa 1963) ("If the storekeeper or his servant places the obstacle on the floor, proof of knowledge is unnecessary; the storekeeper will be presumed to have notice.")

Jackson v. K-Mart Corp., 828 P.2d 941, 944 (Kan. Ct. App. 1992) ("[W]here the customer's injury is caused by dangerous conditions negligently created or maintained by the proprietor or its agents, the proprietor is deemed to have actual notice and it is not necessary for the plaintiff to show the proprietor had notice of the condition. Thus, if the dangerous condition is traceable to the proprietor's actions, proof of notice is unnecessary.")

Horne v. Precision Cars of Lexington, Inc., 170 S.W.3d 364, 368 (Ky. 2005) ("If the actions of the [premises] owner or the owner's employees created the hazardous condition, notice is immaterial.")

Burns v. Sedgwick Claims Mgmt. Servs., Inc., 165 So. 3d 147, 153 (La. Ct. App. 2014) ("Under

La. R.S. 9:2800.6, a plaintiff has the burden of proving that the condition presented an unreasonable risk of harm, that the risk of harm was reasonably foreseeable, and that the merchant either created or had actual or constructive notice of the condition which caused the damage, prior to the occurrence.")

Budzko v. One City Center Assocs. Ltd. P'ship, 767 A.2d 310, 314 (Me. 2001) ("[A] business owner has a duty to respond to a foreseeable danger from foreign substances on the floor of its premises if the owner: (1) caused the substance to be on the floor; (2) had actual knowledge of the existence of the foreign substance; (3) was aware of a recurrent condition that posed a potential risk to invitees from foreign substances on the floor; or (4) allowed the foreign substance to remain on the floor for such a length of time that the defendant should have known about it.")

Lexington Market Auth. v. Zappala, 197 A.2d 147, 148 (Md. 1964) ("[T]he burden is upon the customer to show that the proprietor created the dangerous condition or had actual or constructive knowledge of its existence.")

Thorell v. ADAP, Inc., 789 N.E.2d 1086, 1089 (Mass App. Ct. 2003) (noting that, in a slip-and-fall case, the plaintiff must "demonstrate that the defendant either caused the substance to be there, had actual knowledge of its existence, or had a reasonable opportunity to discover and remedy it")

Anderson v. Merkel, 227 N.W.2d 554, 555 (Mich. 1975) ("It was not necessary for plaintiff to prove defendant had actual or constructive knowledge of the hazardous condition of its floor, as the alleged negligence was the act of the defendant in creating this condition.")

Messner v. Red Owl Stores, 57 N.W.2d 659, 661 (Minn. 1953) ("Unless the dangerous condition in the instant case resulted from acts of defendant's employees, defendant would be negligent only if its employees failed to rectify the dangerous condition after they knew, or in the exercise of reasonable care should have known, that the condition existed.")

Elston v. Circus Mississippi, Inc., 908 So. 2d 771, 776 (Miss. Ct. App. 2005) ("To survive a motion for summary judgment in a slip-and-fall case, a plaintiff must show that the defendant created an unreasonably dangerous condition, or he must show that the defendant had actual or constructive knowledge of a dangerous condition.")

Prier v. Smitty's Supermarkets, Inc., 715 S.W.2d 579, 580 (Mo. Ct. App. 1986) ("The defendant store owner is generally deemed to have actual notice if it is affirmatively shown that an agent of defendant created or was aware of the hazardous condition.")

Ulmen v. Schwieger, 12 P.2d 856, 861 (Mont. 1932) ("Knowledge of the defect or danger is not a necessary element of negligence where the act or omission, in and of itself, involves a

violation of a duty . . . or where the negligent act or omission of the owner of the premises created the dangerous condition.") (ellipsis in original)

Edwards v. Hy-Vee, Inc., 883 N.W.2d 40, 43 (Neb. 2016) ("In premises liability cases, an owner or occupier is subject to liability for injury to a lawful visitor resulting from a condition on the owner or occupier's premises if the lawful visitor proves (1) that the owner or occupier either created the condition, knew of the condition, or by exercise of reasonable care would have discovered the condition. . . .")

Asmussen v. New Golden Hotel Co., 392 P.2d 49, 50 (Nev. 1964) ("If one slips and falls because of [a foreign substance on a floor], liability may be found if the condition was created by the proprietor or his agent, or, if created by another, the proprietor had actual or constructive notice of its existence.")

Rallis v. Demoulas Super Markets, Inc., 977 A.2d 527, 532 (N.H. 2009) ("[E]ven without showing that the defendant had actual or constructive notice of green beans being on the floor, the plaintiff might have established the defendant's negligence on the first theory of liability . . . that the defendant's conduct created a foreseeable risk of harm.")

Smith v. First Nat. Stores, Inc., 228 A.2d 874, 876-77 (N.J. Super. Ct. App. Div. 1967) ("Notice, either actual or constructive, is not required where a defendant through its agents

and employees creates a dangerous condition.")

Holguin v. Smith's Food King Properties, Inc., 737 P.2d 96, 98 (N.M. Ct. App. 1987) ("If a dangerous condition existed on defendant's premises, caused by defendant or its employees, or if the defendant had actual knowledge of such a condition, then it had a duty to exercise ordinary care to correct it, or to warn plaintiff of the presence of the condition.")

Parietti v. Wal-Mart Stores, Inc., 83 N.E.3d 853 (N.Y. 2017) ("In a slip-and-fall case, a defendant property owner moving for summary judgment has the burden of making a prima facie showing that it neither (1) affirmatively created the hazardous condition nor (2) had actual or constructive notice of the condition and a reasonable time to correct or warn about its existence.")

Burnham v. S&L Sawmill, Inc., 749 S.E.2d 75, 80 (N.C. Ct. App. 2013) ("In order to prove a defendant's negligence, a plaintiff must show that the defendant either (1) negligently created the condition causing the injury, or (2) negligently failed to correct the condition after actual or constructive notice of its existence.")

Dahl v. Nelson, 56 N.W.2d 757, 759 (N.D. 1953) ("Before liability can attach to a city because of an unsafe condition of a street, which the city did not itself create, it must be shown that the city had actual or constructive notice of the condition.")

Burke v. Giant Eagle, Inc., 91 N.E.3d 1245, 1247 (Ohio Ct. App. 2017) ("In order for a business invitee to recover for an injury sustained in the context of this case, the invitee is required to show that an employee of the business was negligent in creating a hazard, had actual notice of a hazard and failed to remedy it, or had constructive notice by allowing a hazard to exist for an unacceptable amount of time such that the hazard should have been remedied, but was not.")

Safeway Stores, Inc. v. Feeback, 390 P.2d 519, 521 (Okla. 1964) ("Unless it is established that customer slipped on store floor through negligence of store owner's employees, or because of condition of which owner had actual or constructive notice, there can be no recovery.")

Pribble v. Safeway Stores, Inc., 437 P.2d 745, 747 (Or. 1968) ("An invitee who is injured by slipping on a foreign substance on the floor or stairs of business property must, in order to recover from the occupant having control of said property, show either: (a) That the substance was placed there by the occupant, or (b) That the occupant knew that the substance was there and failed to use reasonable diligence to remove it, or (c) That the foreign substance had been there for such a length of time that the occupant should, by the exercise of reasonable diligence, have discovered and removed it.")

Moultrey v. Great A&P Tea Co., 422 A.2d 593, 596 (Pa. Super. Ct. 1980) ("Pennsylvania courts have uniformly held that if the harmful transitory condition is traceable to the possessor or his agent's acts, (that is, a condition created by the possessor or those under his authority), then the plaintiff need not prove any notice in order to hold the possessor accountable for the resulting harm.")

Mead v. Papa Razzi Rest., 840 A.2d 1103, 1108 (R.I. 2004) ("[W]hen a plaintiff brings forth evidence that a landowner or his agent caused the unsafe condition, constructive notice of the condition may be presumed.")

Wintersteen v. Food Lion, Inc., 542 S.E.2d 728, 729 (S.C. 2001) ("To recover damages for injuries caused by a dangerous or defective condition on a storekeeper's premises, the plaintiff must show either (1) that the injury was caused by a specific act of the defendant which created the dangerous condition; or (2) that the defendant had actual or constructive knowledge of the dangerous condition and failed to remedy it.")

Orrison v. City of Rapid City, 74 N.W.2d 489, 493 (S.D. 1956) ("As a general rule, in order to render a municipal corporation liable under the common law for injuries resulting from a defective condition in a street or sidewalk, which it has not itself created or authorized, it must have had knowledge or notice thereof a sufficient length of time before an injury to afford a reasonable opportunity to remedy the

condition or to take other precaution to guard against injury.")

Parker v. Holiday Hospitality Franchising, Inc., 446 S.W.3d 341, 350 (Tenn. 2014) ("[P]ersons seeking to prevail against a property owner on a premises liability claim must prove the elements of a negligence claim, and in addition, must prove either that the condition was caused or created by the owner, operator, or his agent, or if the condition was created by someone other than the owner, operator, or his agent, that the owner or operator had actual or constructive notice that the condition existed prior to the accident.")

Jex v. JRA, Inc., 196 P.3d 576, 582 (Utah 2008) ("In permanent unsafe condition cases, the notice requirement does not apply because owners are deemed to know of the conditions they create. . . . [I]n cases where temporary unsafe conditions are created by owners, the notice requirement also does not apply.")

Malaney v. Hannaford Bros. Co., 861 A.2d 1069, 1072 (Vt. 2004) ("[I]f a plaintiff is unable to prove that the store or its employees created, or otherwise had actual knowledge of, the dangerous condition, the plaintiff must demonstrate that the condition existed for such a length of time that in the exercise of reasonable care the proprietor should have known of the condition.")

Winn-Dixie Stores, Inc. v. Parker, 396 S.E.2d 649, 651 (Va. 1990) ("Because [plaintiff] failed to establish that [defendant] placed the bean

on the floor or that [defendant's employee] missed it during his mopping, it became [plaintiff's] burden to prove that [defendant] had either actual or constructive notice of the bean's presence and failed to remove it.")

Carlyle v. Safeway Stores, Inc., 896 P.2d 750, 752 (Wash. Ct. App. 1995) ("To impose liability for failure to maintain business premises in a reasonably safe condition generally requires the plaintiff to prove (1) the unsafe condition was caused by the proprietor or its employees, or (2) the proprietor had actual or constructive notice of the dangerous condition.")

Roach v. McCrory Corp., 210 S.E.2d 312, 315 (W. Va. 1974) ("[A] defendant is liable for a condition which he causes by negligently applying an offending substance to a floor regardless of whether it is later proven that he had prior knowledge of its presence. The act of applying the substance in itself creates such knowledge.")

Wallow v. Zupan, 150 N.W.2d 329, 331 (Wis. 1967) ("Usually (in the absence of statute) a proprietor may not be held negligent for a defective or hazardous condition when the proprietor or his agent did not create the condition or know of its presence or should have known.")

Buttrey Food Stores Div. v. Coulson, 620 P.2d 549, 552 (Wyo. 1980) ("[W]hen plaintiff has shown that the circumstances were such as to create a reasonable probability that the dangerous condition would occur, he need not also

> prove actual or constructive notice of the specific condition. . . .")

The only state that takes a slightly different approach is Texas, which treats a defendant's creation of a dangerous condition as evidence of notice: "Proof that the premises owner or occupier created a condition which poses an unreasonable risk of harm may constitute circumstantial evidence that the owner or occupier knew of the condition . . . [but] does not establish knowledge as a matter of law for purposes of premises liability." *Keetch v. Kroger Co.*, 845 S.W.2d 262, 266 (Tex. 1992). Even under the Texas approach, a premises owner who creates a dangerous condition does not automatically escape liability merely because the plaintiff cannot independently establish notice. Rather, the creation constitutes some evidence, which the plaintiff may use to argue that the defendant was on notice.

Under the Eleventh Circuit's decision below, however, a plaintiff's inability to meet the separate notice requirement, even though the defendant or its agent created the dangerous condition, entitles the ship owner to judgment as a matter of law. *See, e.g.*, *Morhardt v. Carnival Corp.*, 304 F. Supp. 3d 1290 (S.D. Fla. 2017) (citing *Pizzino* and granting summary judgment for defendant based on plaintiff's inability to meet the separate requirement of showing the defendant's actual or constructive notice).

Before the *Pizzino* opinion, District Courts within the Eleventh Circuit deciding maritime negligence

cases routinely applied the rule in accord with the common law – *i.e.*, they held that a defendant's creation of the dangerous condition dispenses with the need for a separate showing of notice. Here, again, Plaintiff apologizes for the lengthy citation, but believes it is important to note that a long roster of District Court judges have ruled, over many years, that a separate showing of notice is not required when a defendant or its agent has created the dangerous condition.[1]

> *Klein v. Seven Seas Cruises S. De R.L.*, 2017 WL 3405531, *4-6 (S.D. Fla. Aug. 7, 2017) ("Klein is not required to prove that Regent was on notice of a dangerous condition if Regent created the foreseeably dangerous condition.")
>
> *Villa v. Carnival Corp.*, 207 F. Supp. 3d 1311, 1315 (S.D. Fla. 2016) (denying cruise line's motion for summary judgment where passenger slipped and fell shortly after crewmember mopped bathroom floor as required by cruise line)
>
> *Geyer v. NCL (Bahamas) Ltd.*, 204 F. Supp. 3d 1354, 1357 (S.D. Fla. 2016) (denying motion for summary judgment where plaintiff "presents

[1] While the panel below held that its decision was mandated by a prior panel's decision in *Everett v. Carnival Cruise Lines*, 912 F.2d 1355 (11th Cir. 1990), these District Courts did not read *Everett* in the same manner as the panel ultimately did in this case. Thus, not believing that there was any contrary Eleventh Circuit precedent, those District Courts simply applied the common law rule.

evidence Norwegian created the unsafe condition")

Sampson v. Carnival Corp., 2016 WL 7209844, *5 (S.D. Fla. Dec. 7, 2016) ("Here, since Plaintiff alleges that the Defendant created the dangerous condition . . . Plaintiff 'does not need to prove notice in order to show negligence.'") (quoting *Poole v. Carnival Corp.*, 2015 WL 1566415, *4 (S.D. Fla. Apr. 8, 2015))

Higgs v. Costa Crociere S.p.A., 2016 WL 4375434, *3 (S.D. Fla. Jan. 14, 2016) (denying defendant's motion for summary judgment where evidence showed cruise line created the dangerous condition when its agent left a bucket in a walkway where passenger tripped and fell)

Lipkin v. Norwegian Cruise Line Ltd., 93 F. Supp. 3d 1311, 1320 (S.D. Fla. 2015) ("Actual or constructive notice need not be established if the defendant created the hazardous condition.")

Holderbaum v. Carnival Corp., 87 F. Supp. 3d 1345, 1355 (S.D. Fla. 2015) (denying summary judgment and noting "[w]here it is alleged that defendant created an unsafe or foreseeably hazardous condition, a plaintiff need not prove notice in order to show negligence")

McQuillan v. NCL (Bahamas) Ltd., 2015 WL 7294828, *3 (S.D. Fla. Nov. 19, 2015) (denying summary judgment and stating "[w]hile there is no evidence in the record that Defendant had knowledge of any prior injury-causing

incidents involving this step, notice is not required when a defendant creates the dangerous condition")

Farley v. Oceania Cruises, Inc., 2015 WL 1131015, *1 (S.D. Fla. Mar. 12, 2015) (recognizing the rule in defendant's motion to strike plaintiff's expert)

Villeta v. Carnival Corp., 2014 WL 11930610, *3 (S.D. Fla. Oct. 6, 2014) ("Villeta points to facts Carnival created the unsafe or foreseeably hazardous condition [slippery tile floors], obviating the need to show notice")

Long v. Celebrity, Inc., 982 F. Supp. 2d 1313, 1317 (S.D. Fla. 2013) (denying summary judgment based on fact issue "whether Defendant created the allegedly dangerous condition")

Caldwell v. Carnival Corp., 944 F. Supp. 2d 1219, 1224 (S.D. Fla. 2013) (recognizing in slip and fall action that, even in the absence of notice, cruise line "still may be held liable for the Plaintiff's injuries for allegedly having created the unsafe or foreseeably hazardous condition")

Ingram-Wargo v. NCL (Bahamas) Ltd., 2013 WL 12106178, *3 (S.D. Fla. Oct. 4, 2013) (denying summary judgment based on fact issue whether cruise line created dangerous condition when crewmember carried drinks over area where plaintiff subsequently slipped and fell)

Harrison v. Royal Caribbean Cruises, Ltd., 2013 WL 12101117, *4 (S.D. Fla. Sept. 18,

2013) (ruling plaintiff did not need to show independent notice where defendant "admits to having created the [dangerous] condition itself")

Whelan v. Royal Caribbean Cruises Ltd., 2013 WL 5583970, *3 (S.D. Fla. Aug. 14, 2013) (denying summary judgment and noting "Plaintiff need not prove notice where he also alleges that Defendant created the dangerous condition")

Reinhardt v. Royal Caribbean Cruises, Ltd., 2013 WL 11261341, *7 (S.D. Fla. Apr. 2, 2013) ("Of course, where Defendant creates the dangerous condition, Plaintiff need not prove notice in order to prove negligence.")

McLean v. Carnival Corp., 2013 WL 1024257, *4-5 (S.D. Fla. Mar. 14, 2013) (plaintiff stated negligence claim by alleging defendant created a hazardous condition in its design and assembly of gangway, even absent allegation of notice)

Zygarlowski v. Royal Caribbean Cruises Ltd., 2013 WL 12059607, *6 (S.D. Fla. Feb. 2, 2013) (noting cruise line can be liable for creating dangerous condition even absent notice)

Baker v. Carnival Corp., 2006 WL 3519093, *3 (S.D. Fla. Dec. 6, 2006) ("Where it is alleged, however, that defendant created an unsafe or foreseeably hazardous condition, a plaintiff need not prove notice in order to show negligence"), overruled on other grounds as recognized by *Doe v. Royal Caribbean Cruise,*

> *Ltd.*, 2012 WL 920675, *3-4 (S.D. Fla. Mar. 19, 2012)
>
> *Rockey v. Royal Caribbean Cruises*, 2001 WL 420993, *4 (S.D. Fla. Feb. 20, 2001) (denying motion for summary judgment where "[a] genuine issue of material fact has been created as to whether defendant created a dangerous and hazardous situation" and recognizing "Plaintiff need not prove notice")

Oddly, the Eleventh Circuit panel seemed to invite review by this Court when it acknowledged the "sound policy justifications supporting the rule for which Pizzino advocates." (App. 11). The panel, quoting a New York federal District Court decision, observed that adhering to the present rule has "the absurd result that negligence actions could only be brought after a dangerous condition or practice created by a defendant claimed a previous victim, whose own recovery would be barred by the absence of notice." (App. 11 (quoting *McDonough v. Celebrity Cruises, Inc.*, 64 F. Supp. 2d 259, 264 (S.D.N.Y. 1999)). Norwegian has never offered any policy rationale for why the current rule is needed in the maritime setting, and Plaintiff's research has not revealed any such rationale, either.

Notwithstanding its clear reservations about the rule reflected in its interpretation of its prior precedent, the panel below indicated that its hands were tied by what it felt was binding precedent. (App. 11). Of course, this Court is under no such restriction, and it should review the decision below to determine whether to bring the maritime premises liability law

into conformity with the common law of premises liability as it exists throughout the United States.

III. REVIEW IS WARRANTED BECAUSE ELEVENTH CIRCUIT LAW GOVERNS A DISPROPORTIONATE NUMBER OF MARITIME NEGLIGENCE CLAIMS BROUGHT AGAINST CRUISE LINES IN U.S. COURTS

Although the Eleventh Circuit is the only court of appeals to opine on this issue to date, review by this Court is important because of the Eleventh Circuit's outsize influence in shaping maritime law governing the claims of cruise ship passengers.

A substantial majority of American cruise ship passengers set sail from ports within the Eleventh Circuit's boundaries. According to a recent publicly-available report by a cruise industry trade group, of the 11.66 million cruise passengers who embarked from U.S. ports in 2016, 7.08 million, or 61 percent, embarked from Florida ports. *See* Cruise Lines International Association, *The Contribution of the International Cruise Industry to the U.S. Economy in 2016*, at 7 (Oct. 2017).[2] In fact, the three U.S. ports with the highest number of passenger embarkations are all in Florida: Miami, Port Canaveral, and Port Everglades. *Id.* at 11. These statistics prompted the cruise industry trade association to observe: "Florida is not only the

[2] *Available at*: https://cruising.org/docs/default-source/research/us_economicimpact-100217.pdf?sfvrsn=2 (last visited on July 13, 2018).

center for cruise originations, it is the center of just about all aspects of the cruise industry. Carnival Corporation & plc, Royal Caribbean Cruises, Ltd. and Norwegian Cruise Line have their headquarters in Florida, as do other cruise lines." *Id.* at 48.

Indeed, even those passengers who do not board their cruises at ports within the Eleventh Circuit are often contractually bound to file suit there. Carnival, Royal Caribbean, and Norwegian – the world's three largest cruise lines who transport a combined 79.9 percent of all cruise passengers in the world[3] – all include forum selection clauses in their standard tickets requiring injured passengers to bring suit in the United States District Court for the Southern District of Florida. *See, e.g.*, *Estate of Myhra v. Royal Caribbean Cruises, Ltd.*, 695 F.3d 1233, 1236 (11th Cir. 2012); *Crist v. Carnival Corp.*, 410 Fed. Appx. 197, 199 (11th Cir. 2010); *Rutledge v. NCL* (*Bahamas*) *Ltd.*, 2009 WL 10669945, *1 (S.D. Fla. Mar. 25, 2009).

* * *

In *Kermarec*, this Court sought to bring maritime premises liability in line with the common law of premises liability. The Eleventh Circuit's current rule disrupts that effort, while serving no good purpose or policy. Under the Eleventh Circuit's rule, cruise lines are allowed to escape premises liability for injuries caused by dangerous conditions of their own creation

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[3] *See* Cruise Market Watch, 2018 Worldwide Cruise Line Market Share. *Available at*: https://www.cruisemarketwatch.com/market-share/ (last visited on July 13, 2018).

as a matter of law if no separate showing of notice is made, though they would have no such immunity under the common law. This Court should grant review to examine whether that protection is justified based solely on the fact that an injury occurs at a business premises in navigable waters as opposed to a business premises on land.

This Court is charged with shaping the maritime law. It should exercise that authority to review the decision below, which leaves maritime victims without a remedy that the common law uniformly provides to persons on land when they suffer the same injuries under the same circumstances.

CONCLUSION

For all the reasons stated above, the petition for writ of certiorari should be granted.

Respectfully submitted,

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