IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 18-11638

D.C. Docket No. 1:16-cv-21769-KMW

IRINA TESORIERO,

Plaintiff-Appellant,

versus

CARNIVAL CORPORATION,
d.b.a. Carnival Cruise Line,

Defendant-Appellee.

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

(July 14, 2020)

Before ROSENBAUM, GRANT, and HULL, Circuit Judges.

GRANT, Circuit Judge.

When Irina Tesoriero sat on the vanity chair in her Carnival Cruise ship cabin, she was in for a terrible surprise—it collapsed. While she and her husband waited for help to arrive, they saw that a leg had fallen off the chair. Observing no other outward defects, they took some photos of the pegs that normally held the

chair together, which became visible only after the chair broke. Still waiting for help, they let in a steward who came to replace the broken chair with a fresh one. Finally, the Tesorieros took matters into their own hands and went directly to the onboard medical center; there, they were told that Tesoriero's arm was not broken, and an x-ray was taken to be sure. The onboard doctor treated her with Tylenol, ice, and a sling and sent the couple on their way.

Understandably frustrated that her injury continued to bother her, Tesorerio sought treatment at home after the cruise. Still no broken arm, but she was suffering from a terrible case of medial epicondylitis and ulnar neurapraxia—a diagnosis Tesoriero describes as tennis elbow. Tesoriero was also understandably frustrated with Carnival, and filed suit against the cruise line, alleging that it had failed to inspect and maintain the cabin furniture (or else warn her of the danger the chair posed). Perhaps aware of the difficulty she may have in showing that Carnival had notice about the chair's dangers (especially given the photos suggesting no outward defects), she fought the usual notice requirement on two fronts: first, she alleged that res ipsa loquitor applied and meant that she did not need to show notice, and second, she claimed that Carnival should be sanctioned with an adverse inference on notice because it failed to preserve the broken chair.

The district court granted summary judgment in favor of Carnival. The court found that the cruise line did not have notice that the chair was dangerous, that res ipsa loquitor did not apply, and that the failure to

save the chair was not sanctionable. Tesoriero now appeals those three conclusions. After careful review, we agree with the district court that Tesoriero failed to show that Carnival had actual or constructive notice that the chair was broken. Unlike the district court, we decline to consider whether res ipsa loquitor applies; even if it does, that doctrine cannot cure a defect in notice. Nor can the requested spoliation sanctions; even setting aside whether we think the chair itself could have provided any evidence of notice, Carnival's failure to preserve the chair was not shown to be in bad faith and is therefore not sanctionable. For all those reasons, we affirm.

I.

On June 26, 2015, Irina Tesoriero was getting ready for dinner in her cabin aboard the Carnival *Splendor*. She pulled a wooden chair "about a foot" away from the vanity and attempted to sit down, but it collapsed beneath her. Her right collarbone struck the vanity and her right arm was injured; initially, she believed that her arm was broken. Her husband, Joseph Tesoriero, witnessed the incident and called the front desk for help.

While waiting for help to arrive, Joseph inspected and photographed the chair. He saw that it "did not have any obvious or observable outward defects" before it broke. He also saw that the right front leg, which had been attached to the seat by pegs, had fallen off, and that the glue on the pegs was dried and chipped. In his

opinion, it "was obvious from the appearance of the pegs—visible only after it fell apart—that the pegs had been unglued and loose for a long time." A steward came to the cabin, took away the broken chair, and replaced it with a new one. The chair was later disposed of by an unknown crew member because it could not be fixed.

Tesoriero and her husband waited around for medical staff, and went to the onboard medical center when in-cabin aid was not forthcoming. Tesoriero was then examined by a physician, who told her (correctly, as it turns out) that she did not have a fracture and gave her Tylenol, ice, and an arm sling. Although an x-ray was taken, it was sent to Miami for review because it could not be read on the ship. While at the medical center, Joseph Tesoriero completed a "passenger injury statement" on his wife's behalf. The statement collected basic information, including the time, date, and location of the incident.

In accordance with Carnival's policy, because Tesoriero's injury only required first aid—and because she did not request an accident report—the medical staff classified the accident as "non-reportable." That meant that the security department, which is responsible for investigating accidents and, when necessary, preserving evidence, was asked to do neither. The room stewards, on the other hand, dispose of broken furniture that cannot be repaired and only preserve it if asked to do so. That general policy was followed here, so the chair was not preserved.

After Tesoriero disembarked, she received confirmation that her x-ray results did not show a broken arm. But the arm was not ready to make peace, and Tesoriero continued to experience pain and swelling. She was ultimately diagnosed with medial epicondylitis and ulnar neurapraxia, which she described as "tennis elbow." Tesoriero struggled to get her arm back to full strength, undergoing injections, therapy, and surgery, apparently with little success; she says that she continued to require medical treatment into this litigation, and that she struggles with basic tasks like cooking, taking out the garbage, and carrying groceries.

A little less than a year after the cruise, Tesoriero filed a complaint against Carnival in the Southern District of Florida, asserting a single claim of negligence based on Carnival's alleged failure to inspect and maintain the cabin furniture and failure to warn passengers of the unsafe condition. Both parties moved for summary judgment. For its part, Carnival invoked a familiar defense, arguing that it was not responsible for Tesoriero's injury because it had neither actual nor constructive knowledge that the chair was unsafe prior to the incident.

During discovery, Tesoriero deposed the housekeeping manager who was aboard the ship at the time of the accident. The manager testified that stewards cleaned the cabins daily and were responsible for inspecting the cabin furniture. He explained that that process involved physical movement of the chairs in the course of vacuuming, as well as visual inspection

of the entire cabin, including the furniture, for signs of damage. Damaged furniture was reported to a floor supervisor, who was tasked with making a record of the problem and addressing it. When repairs were possible, they were made, and when repairs were not possible, the items were disposed of.

Tesoriero's arguments—considering both her response to Carnival's motion and her own motion for summary judgment—were threefold. *First*, she said that the condition of the chair, coupled with Carnival's regular inspections of the cabin furniture, was enough to constitute constructive notice of the dangerous condition.[1] *Second*, she contended that the doctrine of res ipsa loquitur applied and eliminated the need for her to show that Carnival had notice in any event. *Finally*, she argued that Carnival's disposal of the broken chair amounted to spoliation of evidence and entitled her to an inference that Carnival had notice of the risk-creating condition.

A magistrate judge issued a report and recommendation on the competing motions. He said that the evidence demonstrated that "no reasonable inspection could have discovered the dangerous condition without

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[1] At the trial level, Tesoriero pressed additional arguments. She said that Carnival had constructive notice because of (1) a prior accident involving a collapsing metal balcony chair; and (2) internal documents from Carnival regarding the repair and replacement of cabin chairs. She also contended that her negligent maintenance claim did not require a showing of notice. The district court rejected all these arguments, and Tesoriero does not challenge those rulings on appeal.

first deconstructing the cabin chair." As to the res ipsa loquitur issue, the magistrate first concluded that the doctrine, if applicable, would indeed absolve Tesoriero of any need to show that Carnival had actual or constructive notice of the dangerous condition. Ultimately though, he decided that the doctrine did not apply because a collapsing chair can easily happen even without negligence. Finally, the magistrate declined to sanction Carnival for spoliation of evidence, seeing no evidence that Carnival reasonably anticipated litigation following the accident.

Over Tesoriero's objections, the district court affirmed and adopted the magistrate judge's report and recommendation and granted Carnival summary judgment. In adopting the recommendation, the court specifically ruled that res ipsa loquitur did not apply and that the facts surrounding the disposal of the broken chair did "not amount to spoliation such that an adverse inference is warranted." Tesoriero appealed.

II.

"We review a district court's grant of summary judgment *de novo.* Summary judgment is appropriate only when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law." *Lewis v. City of Union City*, 918 F.3d 1213, 1220 n.4 (11th Cir. 2019) (en banc) (internal citation omitted). We view "the evidence and all reasonable inferences drawn from it in the light most favorable to the nonmoving party." *Hornsby-Culpepper v. Ware*, 906

F.3d 1302, 1311 (11th Cir. 2018). "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial." *Id.* (quotation marks and citation omitted). "We review the district court's decision regarding spoliation sanctions for abuse of discretion." *Flury v. Daimler Chrysler Corp.*, 427 F.3d 939, 943 (11th Cir. 2005). We "may affirm for any reason supported by the record, even if not relied upon by the district court." *Lage v. Ocwen Loan Servicing LLC*, 839 F.3d 1003, 1009 (11th Cir. 2016) (citation omitted).

III.

On appeal, Tesoriero raises three arguments. *First*, she argues that her husband's observations about the broken cabin chair, coupled with Carnival's admitted regular inspections, show that Carnival had constructive notice that the chair was dangerous. *Second*, she argues that even if she cannot establish notice, the doctrine of res ipsa loquitur saves her claim because it eliminates the ordinary notice requirement. *Finally*, she argues that she is entitled to an adverse inference against Carnival on the notice requirement in any event because Carnival spoliated evidence when it discarded the chair.

A.

Before turning to Tesoriero's constructive notice argument, we should say a few words about the background legal principles in play. "Maritime law governs

actions arising from alleged torts committed aboard a ship sailing in navigable waters." *Guevara v. NCL (Bahamas) Ltd.*, 920 F.3d 710, 720 (11th Cir. 2019). "Drawn from state and federal sources, the general maritime law is an amalgam of traditional common-law rules, modifications of those rules, and newly created rules." *Misener Marine Const., Inc. v. Norfolk Dredging Co.*, 594 F.3d 832, 838 (11th Cir. 2010) (quoting *E. River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 864–65 (1986)). And in the absence of an established federal maritime rule, we "may borrow from a variety of sources in establishing common law admiralty rules to govern maritime liability where deemed appropriate." *Marastro Compania Naviera, S.A. v. Canadian Mar. Carriers, Ltd.*, 959 F.2d 49, 53 (5th Cir. 1992) (applying the "general common law and in particular the Restatement (Second) of Torts" to "determine the law of maritime trespass"); *see also Wells v. Liddy*, 186 F.3d 505, 525 (4th Cir. 1999) (The "general maritime law may be supplemented by either state law or more general common law principles." (internal citation omitted)). For maritime tort cases in particular, "we rely on general principles of negligence law." *Chaparro v. Carnival Corp.*, 693 F.3d 1333, 1336 (11th Cir. 2012) (citation omitted).

A few key principles have developed to guide our analysis of these torts. A cruise line "is not liable to passengers as an insurer," but instead is liable to passengers "only for its negligence." *Keefe v. Bahama Cruise Line, Inc.*, 867 F.2d 1318, 1322 (11th Cir. 1989) (citation omitted). The elements of a maritime

negligence claim, in turn, are well-established, and stem from general principles of tort law. A cruise passenger 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." *Guevara*, 920 F.3d at 720 (quoting *Chaparro*, 693 F.3d at 1336).

Here, the first question for us is the scope of Carnival's duty to Tesoriero. Shipowners owe their passengers a duty of "ordinary reasonable care under the circumstances." *Keefe*, 867 F.2d at 1322. This standard requires, "as a prerequisite to imposing liability, that the carrier have had actual or constructive notice of the risk-creating condition," at least so long as "the menace is one commonly encountered on land and not clearly linked to nautical adventure." *Id.*; *Everett v. Carnival Cruise Lines*, 912 F.2d 1355, 1358 (11th Cir. 1990). In other words, a cruise ship operator's duty is to shield passengers from known dangers (and from dangers that should be known), whether by eliminating the risk or warning of it. Liability for a cruise ship operator thus "'hinges on whether it knew or should have known' about the dangerous condition." *Guevara*, 920 F.3d at 720 (quoting *Keefe*, 867 F.2d at 1322).[2]

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[2] This notice requirement is not unique to maritime law. For example, in a traditional negligence action against a landowner by an invitee, a "defect or danger is generally insufficient to establish liability, unless it is shown to be of such a character or of such duration that the jury may reasonably conclude that due care would have discovered it." W. Page Keeton et al., *Prosser and*

We have identified at least two ways that constructive notice can be shown. *First*, a plaintiff can establish constructive notice by showing that a "defective condition existed for a sufficient period of time to invite corrective measures." *Id.* (alterations adopted) (quoting *Monteleone v. Bahama Cruise Line, Inc.*, 838 F.2d 63, 65 (2d Cir. 1988)). *Second*, a plaintiff can show evidence of "substantially similar incidents in which conditions substantially similar to the occurrence in question must have caused the prior accident." *Id.* (quotation marks and citation omitted). On the other hand, the fact that the cruise line runs the ship is not enough—constructive notice of a risk cannot be imputed merely because a shipowner "created or maintained" the premises. *Everett*, 912 F.2d at 1358–59.

Here, the evidence does not show—and Tesoriero does not contend—that Carnival had actual notice that the chair was dangerous. Nor do we have any evidence of substantially similar incidents involving wooden cabin chairs. Tesoriero's sole argument that Carnival had constructive notice relies on her husband's observations about the chair, along with Carnival's furniture-inspection policy. In her view, these facts demonstrate that Carnival should have known about the chair's "hair-trigger condition." For Tesoriero to prevail on this

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Keeton on the Law of Torts § 61, at 426–27 (5th ed. 1984). So, for example, the "mere fact of the presence of a banana peel on a floor may not be sufficient to show that it has been there long enough for reasonable care to require the defendant to discover and remove it," while a "black, flattened out and gritty" peel might lead to a different conclusion. *Id.* § 39, at 243 (citation omitted). The key is notice.

theory, we would need to conclude that the chair existed in a defective condition "for a sufficient period of time to invite corrective measures." *Guevara*, 920 F.3d at 720. A defect, however, must be reasonably detectable for it to "invite" corrective measures, and we cannot see how the chair's condition here issued any such invitation.

To begin, Carnival's "regular inspections weigh against a finding of constructive notice" that the chair was dangerous—not in favor of that finding. *Id.* at 723 n.8; *see also Monteleone*, 838 F.2d at 66. The daily inspection policy required stewards to report damaged furniture to a floor supervisor, and the supervisor was then responsible for documenting and addressing the issue. The lack of a report noting structural damage to Tesoriero's cabin chair—or any wooden cabin chair for that matter—indicates that the chair was not in a condition that invited corrective measures.

And at a more basic level, Tesoriero's constructive notice argument is undermined by her own evidence. In Joseph Tesoriero's affidavit describing the incident, he observed that the glue on the pegs holding the chair together "appeared to be dried out or chipped away" and that it was "obvious" that "the pegs had been unglued and loose for a long time." But those observations, however obvious they may have been after the fall, could not have been made by the crew before the chair came apart. Joseph Tesoriero himself admitted that—before its collapse—the "chair did not have any obvious or observable outward defects." In fact, he

added that the condition of the pegs was "visible only after it fell apart."

The photographic evidence submitted by Tesoriero only reinforces her husband's observations. Though the pictures cannot reveal the state of the glue, it appears that the leg and seat of the chair were held together by four pegs that fit into opposing holes. With the chair intact, its cloth-covered frame would have enveloped and obscured the peg-and-hole assembly. So, consistent with Joseph Tesoriero's testimony, any defect relating to dried or chipped glue could not have been visible until the chair came apart.

Even beyond the lack of any outwardly visible defect, Tesoriero's characterization of the chair's "hair-trigger condition" is weakened by her own testimony. In her deposition, Tesoriero testified that she moved the chair back from the vanity, evidently without noticing any problem; the issue only became apparent after the chair broke under her full weight.

The combined effect of this evidence does not support a reasonable inference that Carnival should have known about the danger. Quite the opposite: it supports an inference that the defect in the chair was hidden, was not readily observable by sight or touch, and could only be discovered by either disassembling the chair to view the pegs or stress testing it. An implicit legal requirement that all furniture on a cruise ship be either disassembled or subjected to daily stress testing would be remarkable. Rather than establishing that Carnival should have known of the chair's defective

condition, the evidence supports the cruise line's assertion that moving the chair during cleaning and conducting routine visual inspections did not reveal a risk-creating condition.

B.

That brings us to res ipsa loquitur. Tesoriero argues that even if she cannot show that Carnival had notice of the chair's dangerous condition, the cruise line can still be held liable under that doctrine because it eliminates the usual notice requirement. Her theory, though, fails on several fronts: it not only misunderstands the relationship between duty and notice in a tort claim but would also dramatically expand the doctrine of res ipsa loquitur, which "in the admiralty context is not totally unique but neither is it routine." *United States v. Baycon Indus., Inc.*, 804 F.2d 630, 633 (11th Cir. 1986).

Res ipsa loquitur—Latin for "the thing speaks for itself"—is an evidentiary doctrine that permits a trier of fact to infer a defendant's negligence from unexplained circumstances.[3] *Sweeney v. Erving*, 228 U.S. 233, 238–39 (1913); *see also Johnson v. United States*, 333 U.S. 46, 49 (1948). In other words, it is a form of circumstantial evidence. *See Sweeney*, 228 U.S. at 240;

[3] As it turns out, the phrase itself does not "speak for itself"—the Latin terminology has long been criticized for adding unnecessary mystery "to a relatively simple problem" of circumstantial evidence. *Restatement (Second) of Torts* § 328D cmt. a (Am. Law Inst. 1965).

see also W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 39, at 243 (5th ed. 1984); *Restatement (Second) of Torts* § 328D cmt. b (Am. Law Inst. 1965). For the doctrine to apply, the plaintiff needs to show that "(1) the injured party was without fault, (2) the instrumentality causing the injury was under the exclusive control of the defendant, and (3) the mishap is of a type that ordinarily does not occur in the absence of negligence." *Baycon*, 804 F.2d at 633.

But before we address the application of the doctrine to the facts of this case, we need to decide a threshold question that has divided the district courts in our Circuit—whether a maritime passenger who fails to establish the shipowner's notice of a dangerous condition can still survive summary judgment by invoking res ipsa loquitur. If not, the lack of notice is dispositive: no notice, no negligence. This is an open question in our Circuit.

Indeed, district courts have reached conflicting conclusions on the issue. In *Adams v. Carnival Corp.*—a maritime negligence action arising from a deck chair collapsing under a passenger—the district court considered the effect of res ipsa loquitur on the notice requirement. No. 08-22465-CIV, 2009 WL 4907547, at *1, *5 (S.D. Fla. Sept. 29, 2009). The evidence showed that Carnival conducted routine inspections of the chairs, and the court concluded that the plaintiff presented no evidence that the defect was "even capable of detection." *Id.* at *4. There, as here, the plaintiff attempted to get around the usual notice requirement with res ipsa loquitur. Ultimately, the district court held that

the plaintiff's invocation of res ipsa loquitur did "not obviate the need to show that Carnival had notice." *Id.* at *5. "Without specific facts demonstrating, at least, that the purported defect was detectable with sufficient time to allow for corrective action," the case could not proceed to a jury. *Id.*

Since *Adams*, though, the tide has turned and a majority of the district courts in this Circuit have reached the opposite conclusion (including in this case).[4] A leading example is *Millan v. Celebration*

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[4] Cases from other jurisdictions take a variety of approaches on res ipsa loquitur and notice. Following in *Adams*' footsteps, "several cases in the maritime context" support an argument "that a predicate for a *res ipsa loquitur* finding is that the Defendant had notice of the defective condition." *Tillson v. Odyssey Cruises*, No. 08-10997-DPW, 2011 WL 309660, at *7 (D. Mass. Jan. 27, 2011). Others have concluded that res ipsa loquitur is incompatible with a notice requirement. *See*, *e.g.*, *Krivokuca v. City of Chicago*, 73 N.E.3d 525, 532 (Ill. App. Ct. 2017) (holding that res ipsa loquitur was unavailable when statute required showing actual or constructive notice); *Mixon v. Wash. Metro. Area Transit Auth.*, 959 A.2d 55, 60 (D.C. 2008) (This "court and others have held that in cases in which notice is an essential element of a plaintiff's claim, *res ipsa loquitur* is inapplicable because it is inconsistent with the requirement of notice."). There is also considerable support for the opposite proposition. *See*, *e.g.*, *Smith v. United States*, 860 F.3d 995, 998 n.2 (7th Cir. 2017) (noting that "the inference triggered by the res ipsa loquitur doctrine would include the proposition that the defendant had notice of the defective nature of the instrumentality that caused the plaintiff's injury"); *Miller v. Cincinnati, New Orleans & Tex. Pac. Ry. Co.*, 317 F.2d 693, 696 (6th Cir. 1963) ("If application of the doctrine permits an inference of *negligence*, such inference must necessarily include all the essential elements of negligence, including here an inference that defendant had actual or constructive knowledge of the defective condition."); *Burns v. Otis Elevator,*

Cruise Operator, Inc., where a piece of the ceiling fell and hit a passenger. 212 F. Supp. 3d 1301 (S.D. Fla. 2015). After initially distinguishing *Adams* on its facts, the court went on to conclude that "a plaintiff is not required to show the defendant's actual or constructive notice of the defective condition in order to raise a *res ipsa loquitur* inference of negligence under maritime law." *Id.* at 1306. In support of that conclusion, the district court cited our opinion in *United States v. Baycon Industries* as finding "no requirement of actual or constructive notice for *res ipsa* in maritime negligence action." *Id.* at 1305–06 (citing *Baycon*, 804 F.2d at 632-35). The problem is that *Baycon* does not say that (or even hint at it). Nevertheless, many district court opinions have embraced this view in the years that followed, often with little more than a citation to *Millan* itself. *See*, *e.g.*, *Morhardt v. Carnival Corp.*, 304 F. Supp. 3d 1290, 1296 (S.D. Fla. 2017) (citing *Millan* and noting that "courts in this district have held that a plaintiff in a maritime action based on negligence is not required to prove that the shipowner had notice of the defective condition when the doctrine of *res ipsa loquitur* applies"); *O'Brien v. NCL (Bahamas) Ltd.*, 288 F. Supp. 3d 1302, 1314 (S.D. Fla. 2017).

In resolving the apparent uncertainty within our Circuit about notice and res ipsa loquitur, we return to

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Co., 550 So. 2d 21, 22 (Fla. Dist. Ct. App. 1989) (actual or constructive notice of the defect is "immaterial" if the conditions for the res ipsa doctrine are established).

first principles.[5] "Res ipsa loquitur leads only to the conclusion that the defendant has not exercised reasonable care, and is not itself any proof that he was under a duty to do so." Keeton et al., *supra*, § 39, at 255. "It does not permit the imposition of liability without fault, and therefore does not help to establish the duty of care, which is essential to every negligence case." 1 Stuart M. Speiser, *The Negligence Case: Res Ipsa Loquitur* § 3:1, at 90 (1972). That means the doctrine does not apply unless the alleged negligence is "within the scope of the defendant's duty to the plaintiff." *Restatement (Second) of Torts* § 328D (Am. Law Inst. 1965). That same duty requirement is found in the res ipsa loquitur doctrines of many states, and at least one federal circuit court has already stated that it applies in the admiralty context as well. *See*, *e.g.*, *Trigg v. City & County of Denver*, 784 F.2d 1058, 1060 (10th Cir. 1986) (applying Colorado law); *Biggs v. Logicon, Inc.*, 663 F.2d 52, 54 (8th Cir. 1981) (noting in an admiralty case that res ipsa loquitur only applies if the "negligence is within the scope of the defendant's duty to the plaintiff"); *Moon v. Dauphin County*, 129 A.3d 16, 26 (Pa. Commw. Ct. 2015); *Crum v. Equity Inns, Inc.*, 685 S.E.2d 219, 229 (W. Va. 2009); *Linnear v. CenterPoint Energy Entex/Reliant Energy*, 966 So. 2d 36, 44 (La. 2007).

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[5] Our Circuit is not alone in its uncertainty—at least as a general matter. Prosser and Keeton, for instance, describe "an uncertain 'doctrine' of res ipsa loquitur, which has been the source of some considerable trouble to the courts." Keeton et al., *supra*, § 39, at 243–44.

So res ipsa loquitur can allow a jury to infer from circumstantial evidence that the defendant must have breached its duty—but it cannot show that a defendant must have had that duty in the first place. The Supreme Court's description of the doctrine as "an aid to the plaintiff in sustaining the burden of proving *breach* of the duty of due care" is consistent with that understanding—a duty can only be breached if it exists. *Commercial Molasses Corp. v. N.Y. Tank Barge Corp.*, 314 U.S. 104, 113 (1941) (emphasis added). It would be quite odd to say that a party must have had a duty, but for reasons that cannot be discovered. As another court put it, "*res ipsa loquitur* provides no assistance to a plaintiff's obligation to demonstrate a defendant's duty, that a breach of that duty was a substantial factor in causing plaintiff harm, or that such harm resulted in actual damages. However, *res ipsa loquitur* does aid a plaintiff in proving a breach of duty." *Quinby v. Plumsteadville Family Practice, Inc.*, 907 A.2d 1061, 1071 n.15 (Pa. 2006). Well put.

For instance, a trespasser, to whom no duty of care was owed by a landowner, may not establish a landowner's liability for a defective condition by relying on res ipsa loquitur. *Restatement (Second) of Torts* § 328D cmt. j (Am. Law Inst. 1965). Similarly, if a statute provides that automobile drivers are only liable to their passengers for "wilful, wanton, or reckless conduct," a passenger relying on res ipsa loquitur to show a breach of ordinary care cannot establish liability under the higher statutory duty. *Id.* In other words, res ipsa loquitur "does not eliminate a plaintiff's obligation to

prove that the defendant owed a duty to the plaintiff in the first place." *Ausherman v. Bank of Am. Corp.*, 352 F.3d 896, 901 (4th Cir. 2003).

With this foundation laid, our resolution of the notice issue is straightforward. If res ipsa loquitur cannot eliminate the duty requirement, it cannot eliminate the notice requirement; the two are intertwined in a maritime negligence tort. *Guevara*, 920 F.3d at 720. Maritime passengers are owed 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*, 867 F.2d at 1322; *Everett*, 912 F.2d at 1358. And we have been clear that the scope of a cruise line's "duty to protect its passengers is informed, if not defined, by its knowledge of the dangers they face onboard." *K.T. v. Royal Caribbean Cruises, Ltd.*, 931 F.3d 1041, 1044 (11th Cir. 2019).

The *Baycon* case, no matter how frequently it is cited, does not change that equation. In fact, it does not even use the term notice or explicitly consider the issue before us today. Instead, *Baycon* deals with shipowner liability for sunken vessels. *Baycon*, 804 F.2d at 631–32. The suit was brought under the Rivers and Harbors Act of 1899, which imposed a duty on shipowners to not "voluntarily or carelessly" sink a vessel. *Id.* at 631, 633 n.5 (citation omitted). Because the forty-year-old, long-idle ship in that case sunk on a clear and calm night, we allowed the doctrine of res ipsa loquitur to supply the inference that its sudden sinking was caused by negligence. *Id.* at 634. That is all.

Even so, district courts in this Circuit have sometimes concluded—perhaps from the lack of any discussion about notice—that *Baycon* demonstrates that res ipsa loquitur eliminates any notice requirement. But that is just not right. To begin, though *Baycon* does not specifically address notice, the Court's discussion of the dredge's age, the length of time since it had been in service, and the preparation for travel without assessing "the condition of the external hull below the water line" rings in the tones of constructive notice. *Id.* And more to the point, absent so much as a word about notice in that earlier precedent on statutory negligence for sunken vessels, we cannot jump to the conclusion that res ipsa loquitur obviates the well-known notice requirement for cruise ship negligence cases brought by passengers.

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In sum, a plaintiff who relies on res ipsa loquitur to show a breach of duty still bears the burden of proving that a duty existed in the first place. And because notice is an integral part of duty, a passenger who relies on res ipsa loquitur bears the burden of showing that the cruise line had notice. As it applies to this case, then, the doctrine does not help Tesoriero. Carnival's duty was to protect Tesoriero from dangerous conditions that it was aware of or should have been aware of. But as we have already explained, Tesoriero's own evidence shows that the chair's defect was hidden. Because res ipsa loquitur has no effect on our duty analysis, Tesoriero's failure to establish Carnival's actual or constructive notice is fatal to her case. And that is

true whether or not res ipsa loquitur would otherwise apply to a broken chair fact pattern—a question we need not consider given our resolution of the notice issue.

So, although we conclude that the district court erred by holding that res ipsa loquitur obviates the notice requirement, we ultimately reach the same result: Tesoriero's failure to prove that Carnival had notice cannot be cured by her reliance on res ipsa loquitur.

C.

Finally, we consider Tesoriero's argument that Carnival spoliated evidence by disposing of her broken cabin chair. She maintains here, as she did below, that Carnival should be sanctioned with an adverse inference that the cruise line had notice of the defect—an inference that would defeat its motion for summary judgment.

The district court declined to impose Tesoriero's requested sanction because, in its view, Carnival did not reasonably anticipate litigation, and therefore did not have a duty to preserve the chair. This was incorrect, and the district court's reasoning is undermined by Carnival's own admission. During discovery, in its response to a request for admissions under Federal Rule of Civil Procedure 36, Carnival admitted that it anticipated litigation "immediately after the incident was reported." "A matter admitted under this rule is conclusively established unless the court, on motion, permits the admission to be withdrawn or amended."

Fed. R. Civ. P. 36(b). Because the record does not indicate that Carnival's admission was withdrawn or amended, we must conclude that the district court erred in holding that Carnival did not anticipate litigation.

But anticipation of litigation is not the standard for spoliation sanctions—bad faith is. So even though the district court incorrectly concluded that Carnival did not anticipate litigation, the court's decision not to impose sanctions for spoliation would still be appropriate absent evidence that Carnival acted in bad faith. And even if bad faith were shown, the court's decision not to impose sanctions would be appropriate if "the practical importance of the evidence" was minimal. *Flury*, 427 F.3d at 945; *cf. Green Leaf Nursery v. E.I. DuPont De Nemours & Co.*, 341 F.3d 1292, 1308 (11th Cir. 2003) (no spoliation claim under Florida law without a "significant impairment in the ability to prove the lawsuit"); *Walter v. Carnival Corp.*, No. 09-20962-CIV, 2010 WL 2927962, at *2 (S.D. Fla. July 23, 2010) (evidence must be "crucial to the movant being able to prove its prima facie case or defense" to establish spoliation). We "may affirm for any reason supported by the record, even if not relied upon by the district court." *Lage*, 839 F.3d at 1009.

Spoliation is "defined as the destruction of evidence or the significant and meaningful alteration of a document or instrument." *Green Leaf Nursery*, 341 F.3d at 1308 (11th Cir. 2003) (quotation marks and citation omitted). In some circumstances, a party's "spoliation of critical evidence may warrant the imposition

of sanctions." *Flury*, 427 F.3d at 945. Because spoliation is an evidentiary matter, "federal law governs the imposition of spoliation sanctions." *Id.* at 944. Sanctions for spoliation may include "(1) dismissal of the case; (2) exclusion of expert testimony; or (3) a jury instruction on spoliation of evidence which raises a presumption against the spoliator." *Id.* at 945.

When deciding whether to impose sanctions, a number of factors are relevant: "(1) whether the party seeking sanctions was prejudiced as a result of the destruction of evidence and whether any prejudice could be cured, (2) the practical importance of the evidence, (3) whether the spoliating party acted in bad faith, and (4) the potential for abuse if sanctions are not imposed." *ML Healthcare Servs., LLC v. Publix Super Mkts., Inc.*, 881 F.3d 1293, 1307 (11th Cir. 2018) (citing *Flury*, 427 F.3d at 945).

Spoliation sanctions—and in particular adverse inferences—cannot be imposed for negligently losing or destroying evidence. Indeed, "an adverse inference is drawn from a party's failure to preserve evidence only when the absence of that evidence is predicated on bad faith." *Bashir v. Amtrak*, 119 F.3d 929, 931 (11th Cir. 1997). And bad faith "in the context of spoliation, generally means destruction for the purpose of hiding adverse evidence." *Guzman v. Jones*, 804 F.3d 707, 713 (5th Cir. 2015). This consideration is key in evaluating bad faith because the party's reason for destroying evidence is what justifies sanctions (or a lack thereof). "Mere negligence is not enough, for it does not sustain an inference of consciousness of a weak case." *Vick v.*

Tex. Emp't Comm'n, 514 F.2d 734, 737 (5th Cir. 1975) (citation omitted).[6]

Some of our earlier cases illustrate the difference between bad faith and mere negligence. In *Bashir v. Amtrak*, we held on summary judgment that the unexplained absence of a train's speed record tape did not warrant an adverse inference that the train was traveling at an excessive speed when it struck and killed a pedestrian. 119 F.3d at 931. We would "not infer that the missing speed tape contained evidence unfavorable to appellees unless the circumstances surrounding the tape's absence indicate bad faith, e.g., that appellees tampered with the evidence." *Id.* Because plaintiffs produced no evidence that the train company purposefully lost or destroyed the tape, we concluded that there was no showing of bad faith. And finding no bad faith, we declined to impose spoliation sanctions against the train company, which had already produced significant evidence that the train was not exceeding the statutory speed limit. *Id.* at 931–32.

In contrast, bad faith was evident, and spoliation sanctions were appropriate, in *Flury v. Daimler Chrysler Corp.* 427 F.3d at 944–47. There, the plaintiff sued a vehicle manufacturer alleging that he was injured when his car's airbags did not inflate during a crash. *Id.* at 940. Shortly after the lawsuit was filed, the defendant sent a letter requesting the location of the

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[6] In *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981) (en banc), this Court adopted as binding precedent all of the decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981.

vehicle so that it could conduct an inspection. *Id.* at 941–42. The plaintiff did not respond to the letter. Although he was "fully aware that defendant wished to examine the vehicle," he "ignored defendant's request and allowed the vehicle to be sold for salvage without notification to defendant of its planned removal." *Id.* at 945. It is no surprise that we found bad faith on those facts.

But the facts here are different, and Tesoriero has not established that Carnival's failure to preserve the chair rose to the level of bad faith. Nothing in this record indicates that Carnival disposed of the broken chair in a manner inconsistent with its policies or that the policies themselves somehow establish bad faith.[7] And unlike the plaintiff in *Flury*, Carnival cannot be said to have been "fully aware" of Tesoriero's desire to further inspect the chair. *See Flury*, 427 F.3d at 945; *see also Calixto v. Watson Bowman Acme Corp.*, No. 07-60077-CIV, 2009 WL 3823390, at *16 (S.D. Fla. Nov. 16, 2009) (concluding that bad faith can be established by circumstantial evidence only when the "act causing the loss cannot be credibly explained as not involving bad faith by the reason proffered by the spoliator").

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[7] It is unclear to us how—as the dissent suggests—three district court cases that declined to offer any relief based on spoliation or discarding evidence in accordance with Carnival's policies should persuade us that sanctions are appropriate here. Dissenting Op. at 11–12. The point only sharpens when we consider that two out of the three cases involved collapsing chairs. *See Walter v. Carnival Corp.*, No. 09-20962-CIV, 2010 WL 2927962 (S.D. Fla. July 23, 2010); *Hickman v. Carnival Corp.*, No. 04-20044-CIV, 2005 WL 3675961 (S.D. Fla. July 11, 2005).

The record shows that the cabin steward came to Tesoriero's cabin soon after the accident to remove and replace the broken chair. The steward was not there to investigate the accident, but simply to replace the chair. Of course, as the housekeeping manager aboard the Carnival *Splendor* explained, if Tesoriero had requested that the chair be saved, the steward would have done so. He also would have done so if the security department had requested retention. But without a request from Tesoriero or the security department, the chair was taken to maintenance for repair. When the maintenance department could not repair it, the chair was disposed of.

Even if the disposal of the chair were somehow improper, we do not see how it would give rise to anything more than an act of mere negligence. The security department at Carnival is responsible for investigating accidents and preserving evidence. Again, Tesoriero offers no evidence that she ever requested that the chair be preserved. Nor was the security department informed by the medical staff that a passenger was injured seriously enough to require an investigation. Under Carnival's policy, injuries that only require first aid are classified as "non-reportable" and do not require an accident report and an investigation by the security department. By all accounts, on the ship, the injury to Tesoriero's arm appeared minor.[8] Her arm

[8] The dissent's quote from Tesoriero's independent medical examination that her initial x-ray "was read as a hairline fracture" (by whom, he does not say, and we do not know) does not change this fact. Dissenting Op. at 10. Tesoriero does not argue,

was not broken and was only treated with basic first aid—ice, a sling, and Tylenol.[9]

In short, nothing in the record smacks of bad faith. Under these facts, Carnival's explanation reasonably suggests that the chair was not destroyed to hide adverse evidence. At most, Tesoriero has provided evidence that Carnival's shipboard medical staff were negligent in not anticipating that her injury could be more serious than it appeared. Mere negligence in losing or destroying evidence is not enough to warrant sanctions. *Bashir*, 119 F.3d at 931. And the right hand not talking to the left is not the same thing as the right hand telling the left to destroy evidence. Accordingly, we conclude that the district court properly declined to draw an adverse inference from Carnival's failure to retain the chair.

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even once, that her arm was broken. According to her own testimony, she was told it was not broken on the ship, she was told it was not broken on land, and her arm was, in fact, not broken. She was diagnosed with medial epicondylitis and ulnar neurapraxia—a condition that she describes as "tennis elbow"—and Tesoriero does not dispute this conclusion. At this point, of course, we have no doubt that her injury turned out to be serious.

[9] The dissent suggests that this treatment, because it was provided by a physician instead of a layperson, is not really first aid. Dissenting Op. at 8–9. In the context of Carnival's policy, however, first aid refers to the type of care provided, not on who is providing the treatment. We have no hesitation concluding that ice, a sling, and Tylenol together are nothing more than simple first aid in the context of this policy. The fact that an x-ray was taken, as a diagnostic step, to confirm the absence of a fracture does not move the needle.

To be sure, we would have little trouble affirming sanctions against Carnival if the factual circumstances were slightly different. For example, if Tesoriero's arm had been visibly fractured, it would be hard for Carnival to convince us that the decision not to report the injury to security was reasonable, or in keeping with its ordinary policy. Similarly, if there were any evidence that Tesoriero requested that the chair be preserved, we would be highly skeptical of a subsequent claim that the chair was disposed of pursuant to a routine policy. In both of those circumstances, the inference that the chair was destroyed to hide adverse evidence would be much stronger than it is here.

We will briefly add that even if there were evidence to somehow support a finding of bad faith, that would not justify the leap that the dissenting opinion takes. To begin, no party has cited a persuasive case to support a presumption of notice as a spoliation sanction, and the one identified by the dissent falls short.[10]

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[10] We note a few things about the exemplar magistrate judge order cited by the dissent as an example of spoliation leading to an inference-of-notice sanction. First, the sanction imposed was the "least-severe sanction available," and was a "rebuttable, permissible adverse inference that the destroyed evidence would have demonstrated the existence of a dangerous condition" that the defendant knew or should have known about. *In re the Complaint of Boston Boat III, LLC*, 310 F.R.D. 510, 523 (S.D. Fla. 2015) (parenthetical mark omitted). And that light-touch sanction was imposed in a case that involved dramatic evidence of bad faith: for starters, the defendant destroyed critical evidence well after litigation began. Not only that, but the defendant's attorney personally observed and failed to stop ongoing destruction, the plaintiff's attorney was not timely notified of the destruction, and the defendant presented inconsistent explanations for why the

But even more critically, we disagree with the dissent's view that "the practical importance of the evidence" supports sanctions in this case. *Flury*, 427 F.3d at 945; *ML Healthcare Servs., LLC*, 881 F.3d at 1307. Here, even if the chair had been preserved, it is not clear what evidence of Carnival's notice could be deduced from the already-broken piece of furniture. Joseph Tesoriero testified that there was no outwardly visible defect, Tesoriero herself noticed no problem when she moved the chair back from the vanity, and the photographic evidence confirms that the peg-and-hole assembly—as well as the state of the glue holding it together—would have been obscured before the accident. In light of the evidence, and given Tesoriero's failure to avail herself of Carnival's offer to inspect an identical unbroken cabin chair from the *Splendor*, we are unpersuaded that her ability to inspect the broken chair would have been so important to the notice issue as to warrant sanctions. We also note our disagreement with our dissenting colleague's apparent view that because evidence of notice would be necessary for Tesoriero to show a prima facie case of negligence, it must mean that the chair would have provided the evidence. Dissenting Op. at 18-19. Respectfully, we fail to see why one leads to the other; while notice has not been shown here, it is not because the chair is missing.

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evidence was destroyed. *Id.* at 517-23. The differences between those facts and the ones in this case speak for themselves. Indeed, nothing in this case would preclude the sanction applied in that one.

IV.

In conclusion, Tesoriero did not establish that Carnival had actual or constructive notice that the chair was dangerous. This is fatal to her case. Her failure to establish the duty element of her negligence claim cannot be cured by her invocation of the res ipsa loquitur doctrine. And because she has not shown that Carnival committed sanctionable spoliation of evidence, her case is not saved through an adverse inference sanction. Accordingly, although we disagree with the reasoning of the district court in some respects, we reach the same result.

AFFIRMED.

ROSENBAUM, Circuit Judge, dissenting:

When Irina Tesoriero boarded the Carnival *Splendor* to enjoy some special family time, she never expected the costs of her trip to include two surgeries and numerous doctor and physical-therapy appointments totaling more than $120,000 in medical bills. Nor did Tesoriero realize that her cruise would cost her much of the use of her dominant right arm and hand. But that's the price that Tesoriero has paid because a chair on the *Splendor* collapsed as she tried to sit on it.

This case is about who should pay for Tesoriero's damages. Under the law, of course, if Carnival was not negligent, it is entitled to a judgment in its favor, and Tesoriero must shoulder the burden. On the other

hand, if Carnival was negligent, then it has a legal obligation to pay for Tesoriero's reasonable damages.

But we will never know whether Carnival was negligent because Carnival destroyed the chair that caused Tesoriero's injuries. So conveniently for Carnival, there is no evidence that Carnival had notice of the chair's dangerous condition. The panel opinion excuses Carnival's destruction of evidence by just accepting Carnival's word that it did not destroy the chair in bad faith. And the panel opinion does so even though Carnival has previously destroyed evidence in other cases and has been warned by a federal court that its destruction of evidence could result in sanctions, Carnival's so-called evidence-preservation procedures are designed to ensure that evidence will be destroyed in at least some cases and in fact have repeatedly resulted in the destruction of relevant evidence, and Carnival has failed to follow its own evidence-preservation procedures in several cases, including this one.

To make matters worse—and in stark contrast to how Carnival allowed the chair here to be destroyed—Carnival calculatedly preserved evidence favorable to it from the moment Tesoriero reported her fall onboard the *Splendor*.

For these reasons and others I explain below, I respectfully disagree with the panel opinion. The record here raises a genuine issue of material fact concerning whether Carnival destroyed the chair in bad faith.

And if a jury were to conclude that Carnival had, in fact, disposed of the chair in bad faith, Tesoriero

would be entitled to an inference that the chair was evidence favorable to her and detrimental to Carnival. In particular, that inference could establish that Carnival had notice of—that is, it knew or should have known about—the unsafe condition of the chair.

After all, Carnival testified that it repairs broken chairs when possible. ECF No. 39-1 at 19-20.[1] So an examination of the chair at issue here might have revealed a faulty repair, or it could have shown that the type of defect that occurred here has happened before on the very same chair. It also might have suggested that if, in fact, as Carnival testified, its employees conducted proper daily inspection of the furniture, Carnival should have known about the chair's defect through that program. ECF No. 39-1 at 47-48. Any of these outcomes would have provided evidence that Carnival had notice of the chair's dangerous condition. And if Tesoriero could have shown an issue of fact concerning notice, her claim would have survived summary judgment. In short, this record raises a genuine issue of material fact concerning whether Carnival destroyed the chair in bad faith, and that, in turn, necessarily means that it raises a genuine issue of material fact as

[1] For reasons of transparency, I include pincite references to the evidence of record. That way, anyone who wishes to follow along from their armchair may evaluate firsthand the evidence I summarize. References are to the district-court ECF number and the CM/ECF-imprinted page number, except where evidence consists of deposition transcripts. In those cases, references are to the page numbers of the deposition transcript, since four deposition transcript pages appear on each CM/ECF-numbered page.

to whether Carnival had notice of the defect in the chair that injured Tesoriero.

For that reason, Tesoriero is entitled to have a jury decide whether it believes Carnival's version of the story. So I would vacate the grant of summary judgment and remand for a trial. Because the panel opinion erroneously allows a judge (without so much as an evidentiary hearing), instead of a jury, to weigh credibility on the paper record and resolve this genuine issue of material fact—whether Carnival destroyed the defective chair in bad faith—I respectfully dissent.

I.

The panel opinion correctly sets forth the legal principles concerning spoliation. But it's worth emphasizing that the summary-judgment standard applies equally to spoliation-related facts and other facts material to the resolution of the legal issues before the district court. After all, " 'bad faith' is a question of fact like any other." *Bracey v. Grondin*, 712 F.3d 1012, 1019 (7th Cir. 2013) (citation and internal quotation marks omitted).

So we must view the spoliation-related evidence and any reasonable inferences from it in the light most favorable to Tesoriero, since she is the non-moving party. *See Al-Rayes v. Willingham*, 914 F.3d 1302, 1306 (11th Cir. 2019). That means that if a genuine dispute of material fact exists over bad faith, and a finding of bad faith would support an adverse inference against Carnival about a fact material to the resolution of the

merits here, summary judgment must be denied. As I explain below, that's exactly the situation here.

My disagreement, then, lies with the panel opinion's statement of the facts and its application of spoliation law to those facts. Once we consider all the evidence—something the panel opinion did not do—we must conclude that the evidence raises a material issue of fact about whether Carnival destroyed the chair in bad faith. Specifically, a reasonable jury could find that Carnival devised and retained policies and procedures designed to result in the destruction of material evidence in at least some cases, or it created conditions that made compliance with its evidence-preservation policies and procedures unlikely, or both.

If a jury reached any of these conclusions, it reasonably could find that Carnival destroyed the chair here in bad faith. And if a jury made that finding, Tesoriero would be entitled to an adverse inference that Carnival destroyed the chair because an examination of it could have provided evidence that Carnival knew or should have known of the chair's defective condition—a crucial part of Tesoriero's *prima facie* case of negligence against Carnival.

A.

I begin with a little background against which we must view Carnival's policies and procedures covering the preservation of material evidence involved in an onboard injury. As the panel opinion notes, Carnival conceded in its responses to Tesoriero's requests for

admissions that "immediately after the incident was reported [by Tesoriero while onboard the *Splendor*, Carnival] anticipated litigation arising from the accident." ECF No. 65 at 25, 29. Indeed, as Monica Petisco, Carnival's corporate litigation representative, admitted, "anytime anything happens onboard, [Carnival] anticipate[s] litigation." ECF No. 39-2 at 24.

That is certainly clear from the Passenger Injury Statement form that Carnival requires its guests to fill out in their own handwriting as soon as they seek medical attention onboard. *See* ECF No. 44-8. That Carnival demands the injured passenger prepare the form in her own handwriting conveniently renders the form an admission by the passenger for future-litigation evidentiary purposes. *See United States v. Williams*, 837 F.2d 1009, 1014 (11th Cir. 1988). The form also seeks to seal the passenger into the details surrounding the injury, likely before all details are known.

For example, in addition to questions about where and when an injury occurred and how "in detail" it happened, the form asks the passenger to state what she "believe[s] caused this accident" and "what [she] could have done to avoid the accident." *Id.* Then the form requires the guest to identify all witnesses to the accident, whether the guest uses glasses or contact lenses and whether the guest was wearing them at the time of the accident, and "[w]hat kind of shoes" the guest was wearing when the accident happened. *Id.*

Put simply, the Passenger Injury Form appears designed to preserve for Carnival's benefit, from the

instant an injury occurs, all evidence from the passenger that might assist Carnival in future litigation. Indeed, the specific information the questions seek suggests that Carnival has learned much from its past litigation about the evidence most helpful to it in litigation.

Of course, there is nothing inherently wrong with that. But those steps differ strikingly from Carnival's policies and actual practices concerning preservation of material tangible evidence that might hurt Carnival and help a passenger in future litigation. And a reasonable jury might find that fact bears on whether Carnival, in good faith, has developed and executes its policies and procedures to preserve material tangible evidence.

B.

With this in mind, I review Carnival's applicable policies and procedures. According to Carnival's corporate representatives, Carnival's security department is ultimately responsible for maintaining material tangible evidence. ECF No. 39-2 at 48; ECF No. 39-1 at 42. Yet Carnival's security department does not even become involved in deciding whether to preserve such evidence unless an accident report is filed. ECF No. 39-2 at 48. According to Petisco, Carnival's litigation representative, an accident report can be filed in two circumstances. First, a guest can "request that [Carnival] create an accident report." *Id.* And, second, Carnival "entrusts . . . the [ship's] doctor to make the

determination between reportable or non-reportable [accidents]," based on whether an injury requires "[a]nything beyond first aid." *Id.* at 48–49.

The panel opinion simply assumes without any analysis that these policies are reasonable. But on their face, these policies increase in three ways the likelihood that material evidence will be discarded. Indeed, as Carnival well knows, history has proven that true. Carnival's policies have previously resulted in the destruction of material evidence. And, in fact, at least one district court has warned Carnival that a pattern of discarding material evidence could support spoliation sanctions.

1.

I begin by identifying the three ways Carnival's policies meaningfully increase the odds that Carnival will destroy material evidence. First, Carnival's housekeeping process has no mechanism requiring housekeeping employees to check with the security department before discarding broken furniture from a guest's room. Rather, when furniture in a guest's room breaks, Carnival's policy requires housekeeping staff to immediately remove and replace the object in question – even if, as happened here, housekeeping removes the item while the injured passenger remains in the room and waits for help. ECF No. 39-1 at 41-42.

Once the broken piece is removed, it is taken to be repaired. *Id.* at 42. If the furniture cannot be fixed, it is "usually disposed" of. *Id.* That does not happen

if—and only if—Carnival's security department affirmatively intervenes and preserves the piece. *See id.* So unless the security department jumps in to save evidence before the housekeeping department throws it out, evidence is discarded. But of course, the security department does not intercede if an accident report is not filed.

Second, and compounding this problem, Carnival's shipboard processes falsely cause guests to believe that they have made an accident report when they seek medical attention from the ship's doctor. As I have noted, when a guest visits the ship's doctor to address an injury, she must fill out a Carnival document called "Passenger Injury Statement." Besides the other questions the thorough form lists, it asks, "Date [accident] reported," "Name of staff member accident reported to," "Time reported," and "If not reported immediately, please explain why?" ECF No. 44-8. These questions suggest that a passenger can officially report an accident to any "staff member" and that the passenger has officially reported her injury to Carnival when she fills out the Passenger Injury Statement. So a passenger has no reason to ask whether she must do anything further to make an official report to Carnival to trigger the security department's preservation of material evidence. Some might say this form lulls passengers into a false sense of security that they have fully reported the incident.

Third, Carnival's policy leaving it to the discretion of the ship's doctor to decide whether an accident report should be filed (and the evidence thus preserved),

ensures that accident reports will not be filed in at least some cases where evidence should be maintained. Carnival's policy calls for the ship's doctor to prepare an accident report only when the doctor must provide more than first aid. But Carnival does not define what it means by "first aid." Rather, that is up for interpretation by each individual doctor.[2]

And even if we disregard this shortcoming and assume all doctors abide in precisely the same way by some (unidentified) universally applicable definition of "first aid," the policy wrongly equates a doctor's assessment that an injury requires no more than first aid with the determination that an injury is not serious and the piece of furniture causing it should not be preserved. In fact, as is common knowledge, some injuries,

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[2] Standard references do not uniformly define the term "first aid." For example, a medical dictionary defines "first aid" as "[i]mmediate assistance administered in the case of injury or sudden illness by a bystander or other layperson, before the arrival of trained medical personnel." *First Aid*, Stedman's Medical Dictionary (28th ed. 2006). A non-medical dictionary defines "first aid" as "emergency and sometimes makeshift treatment given to someone (as a victim of an accident) requiring immediate attention where regular medical or surgical care is not available." *First Aid*, Webster's Third New International Dictionary, Unabridged (2020), https://unabridged.merriam-webster.com/ (last visited Mar. 25, 2020). Setting aside the fact that a doctor technically does not render "first aid" under either definition, these definitions do not set forth medical standards that identify what treatments, procedures, or remedies are necessarily "first aid" and what are not. As a result, Carnival's policy does not clearly delineate when a doctor should prepare an accident form.

at first glance, may appear minor but later manifest themselves as severe.

Carnival has also not explained why a policy that depends on the provision of "first aid" satisfies its duty to preserve evidence in anticipation of litigation. And the relationship between the two is not obvious to me.

Nor is it obvious to Carnival, since Carnival anticipates litigation "anytime anything happens onboard" and preserves evidence favorable to it in *every* instance, regardless of whether the doctor provides only "first aid." To rubberstamp a policy that allows Carnival to treat plaintiff-favorable evidence in its control differently invites gamesmanship. Indeed, the policy knowingly results in destruction of evidence even though, by requiring the injured guest to fill out the Injury Statement Form to receive medical attention, Carnival simultaneously preserves evidence favorable to itself, in anticipation of litigation, when a doctor does not file an accident report.

2.

This case demonstrates some of these pitfalls.

First, this case appears to have involved more than first aid, but according to Carnival, the doctor did not file an accident report. Here, the doctor took X-rays of Tesoriero's arm. X-ray equipment is not in any standard first-aid kit I've ever seen. Plus here, the doctor sent the X-rays off the ship to Miami to be read—a process that would not be completed until

after Tesoriero left the ship. Seeking consultation from a specialist physician, like taking X-rays in the first place, seems like more than "first aid." (But then again, we can't look to Carnival's policy for guidance on that). If the Miami doctor had found a break in Tesoriero's arm, neither Tesoriero nor the ship's doctor would have known until after the cruise ended. In fact, it is not clear the ship's doctor ever would have learned of the break. But because Carnival left filing an accident report to the doctor's discretion and, according to Carnival, the doctor did not do that (more on this later, *see infra* at 14–15), the chair was discarded—before the ship's doctor even had confirmation about whether Tesoriero's arm was broken.

As it turned out, according to Tesoriero's medical records, Tesoriero's X-ray "was read as a hairline fracture."[3] ECF No. 44-11 at 10. And her follow-up medical

[3] The panel opinion takes issue with this statement because it says that "Tesoriero does not argue . . . that her arm was broken." *See* Maj. Op. at 25 n.8. True, she doesn't. But that misses the point. The point is that the X-ray taken by the ship's doctor was read by a medical professional as showing a serious enough injury to require more than simple first aid. As for the derivation of that statement, it comes from Tesoriero's independent medical examination report, which a Board-certified orthopedic surgeon conducted. More specifically, it appears in his review of Tesoriero's medical records from July 1, 2015, four days after the incident. The surgeon reported that a medical professional who examined Tesoriero on July 1 stated in Tesoriero's visit notes that Tesoriero "had an [X]-ray on the cruise that was read as a hairline fracture." ECF No. 44-11 at 10. Presumably, that refers to the Miami specialist's reading of the X-ray the ship's doctor took, because the ship's medical center advised Tesoriero that the ship's doctor (who told Tesoriero he didn't think her arm was broken but he couldn't

care showed that she had "a focus of T2 hyperintensity at the insertion of the common extensor tendon on the lateral humeral epicondyle consistent with a partial tear." *Id.* As a result, Tesoriero was "unable to drive without pain and unable to carry anything."[4] *Id.* By any definition, that is certainly an injury requiring more than first aid.

Second, even if we assume Tesoriero's injury required only mere "first aid" while she was onboard the *Splendor*, there can be no question that Tesoriero, in fact, suffered a serious injury. I have already recounted the lasting pain the injury has caused Tesoriero. And because of her injury onboard the *Splendor*, Tesoriero

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confirm) "didn't have full expertise to read an X-ray, and it would be shipped to Miami, and they would give [Tesoriero] an answer," which would happen after she left the cruise ship. ECF No. 39-3 at 74. The medical facility Tesoriero visited on July 1 then took a new X-ray that "revealed no acute fracture." ECF No. 44-11 at 10. That a new X-ray taken four days after the incident did not show an "acute fracture" does not mean that an X-ray taken four days earlier did not show a "hairline fracture." By their nature, "hairline" fractures can be difficult to see, and the intervening time between the initial X-ray and the later one could have made any "hairline" fracture that may have existed at one time even harder to see, to the extent that it continued to exist.

[4] Tesoriero also testified,

> I can't carry the garbage. I can't carry the laundry. I can't empty or pick up heavy pots. Cooking is very restrictive in terms of getting things in and out of an oven. Carrying groceries, doing grocery shopping, opening a bottle of water, twisting actions. I can't peel potatoes. I can't peel carrots. I can't flip pancakes. I can't put any pressure on—like when you peel an apple.

ECF No. 39-3 at 52.

had to undergo two surgeries, physical therapy, and other medical treatment after her cruise ended—resulting in medical expenses of more than $120,000. ECF No. 44-11 at 14. If the doctor's failure to file an accident report here was consistent with Carnival policy, a reasonable jury could conclude that Carnival's policy is unreasonable, or even that it was created in bad faith. After all, under the panel opinion's analysis, Carnival's policy that ensures destruction of evidence in these circumstances is precisely what shields it from potential liability and any consequences of destroying the evidence.

Tellingly, this is not the first case where Carnival has destroyed material evidence, supposedly in accordance with its policies. For example, in *Morhardt v. Carnival Corp.*, Morhardt used a ship hair dryer, which electrocuted him and burned and blackened his hand. 304 F. Supp. 3d 1290, 1292–93 (S.D. Fla. 2017). He immediately went to the ship's infirmary for treatment. *Id.* at 1293. Yet Carnival threw out the hair dryer involved in the incident. *Id.* at 1297.

The district court in *Morhardt* described Carnival's actions as being "a matter of keen concern." *Id.* And the court noted that it was "aware of other cases in which a plaintiff passenger was injured aboard a Carnival cruise ship and the object that purportedly caused the injury was immediately discarded." *Id.* at

1297 n.6 (citing *Walter v. Carnival Corp.*, No. 09-20962-CIV, 2010 WL 2927962 (S.D. Fla. July 23, 2010)).[5] Significantly, the court "caution[ed] Carnival against establishing a pattern or practice of discarding such objects because such actions could potentially provide a basis for spoliation sanctions or liability in the future." *Id.*

The panel opinion finds it "unclear how . . . three district court cases that decline to offer any relief based on spoliation or discarding evidence should persuade [the panel opinion] that sanctions are appropriate here." Maj. Op. at 23-24 n.7. And somehow, it thinks the fact that "2 of the 3 cases involved collapsing chairs" strengthens its view that sanctions are not appropriate here. *Id.* In my view, the opposite is true.

At some point, adherence to policies Carnival knows from past litigation result in the destruction of material evidence—especially when Carnival anticipates litigation and simultaneously employs policies designed to preserve evidence favorable to it—constitutes bad faith. This is particularly the case here because a federal court has already expressly warned Carnival that its continuing failure to maintain material evidence may result in spoliation sanctions. Surely, the mere fact of the existence of Carnival's policies (that it knows result in destruction of material evidence)—even if Carnival complied with them—cannot

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[5] *See also Hickman v. Carnival Corp.*, No. 04-20044-CIV, 2005 WL 3675961 (S.D. Fla. July 11, 2005) (Carnival "almost immediately" repaired bar stool involved in incident, instead of preserving it).

indefinitely shield Carnival from liability and consequences of any type.

Indeed, we suggested as much when we held that one of the factors relevant to whether spoliation sanctions should be imposed is "the potential for abuse if sanctions are not imposed." *ML Healthcare Servs., LLC v. Publix Super Mkts., Inc.*, 881 F.3d 1293, 1307 (11th Cir. 2018) (citing *Flury v. Daimler Chrysler Corp.*, 427 F.3d 939, 945 (11th Cir. 2005)). Yet to excuse Carnival's destruction of evidence, the panel opinion allows Carnival to continue to hide behind the very policies Carnival knows result in destruction of evidence. A jury should be allowed to determine whether Carnival has reached the point where its policies that have previously proven to result in destruction of evidence can no longer shield it from liability.

C.

Even if a jury rejected the notion that Carnival's failure to modify its policies to prevent material evidence from being destroyed demonstrates bad faith, a reasonable jury could still conclude that Carnival failed to ensure compliance with its preservation policies here. And a jury that made that finding could conclude that Carnival's failure to abide by its own policies shows bad faith in and of itself.

To begin with, Tesoriero reported her incident with the chair literally at least five different ways to

Carnival while she was still onboard her cruise.[6] And after she told Dr. Milos Potkonjak, the ship's doctor, he advised her that a health-and-safety official on the ship would speak with her about her injury. ECF No. 39-3 at 100-01. Even Carnival conceded in its answers to Tesoriero's requests for admissions that "the accident in this case was reported to the Defendant cruise line on the cruise on which the incident occurred." ECF No. 65 at 25, 29. Yet the chair was not preserved.

Despite all these reports to Carnival employees in various cruise line positions, Carnival made no effort to preserve the chair involved in the injury. And though

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[6] First, Tesoriero's husband Joseph called Guest Services, reported the incident, and asked for immediate medical attention. ECF No. 39-3 at 65-66; ECF No. 44-3 at ¶ 5; ECF No. 39-6 at 3. Second, when the cabin steward went to the Tesorieros' room and removed the broken chair, the Tesorieros told him that Tesoriero believed she had broken her arm and that they had called for help, and they asked him whether a doctor would be coming to the room. ECF No. 39-3 at 67. Third, when no doctor arrived at the Tesorieros' room after half an hour, the Tesorieros went to the infirmary to seek medical attention. *Id.* at 72–73. It was closed, but they found a nurse and told her about Tesoriero's injury. *Id.* at 73. She got Dr. Potkonjak, and the Tesorieros told him about the injury. *Id.*; ECF No. 44-3 at ¶ 6. Fourth, Dr. Potkonjak gave the Tesorieros a Passenger Injury Statement to fill out, which reported the incident yet again. ECF No. 39-3 at 68; *see also* ECF No. 44-8. And finally, while still onboard the cruise, Tesoriero also reported her injury to the front-desk supervisor on the ship, seeking a document stating that she would get her X-rays back. ECF No. 39-3 at 100. Carnival's responses to Tesoriero's interrogatories also indicate that Tesoriero "interacted with . . . I Care personnel" about her injury, ECF No. 39-6 at 3, but it is not clear whether the "I Care personnel" she spoke with included any of the Carnival employees previously identified.

the ship's doctor advised Tesoriero that a health-and-safety official would speak with her concerning her injury, no one ever did.

This reference to a health-and-safety official appears to be a reference to Carnival's security department. If so, that means the doctor apparently thought he was making a report to the security department, even though Carnival has no record of any such report. But once again conveniently for Carnival but inconveniently for Tesoriero, sixteen days after Tesoriero's injury occurred, Carnival did not renew Dr. Potkonjak's contract and provided "his last known address" as, in its entirety, "Biograd, Croatia."[7] ECF No. 39-6 at 3. As a result, checking with Dr. Potkonjak would appear to be difficult, if not impossible.

If a reasonable jury concluded that the destruction of the chair was a consequence of Carnival's failure to follow its own policies, it could also reasonably find that Carnival's shortcomings resulted from its bad faith. First, the mere fact that Tesoriero made five different reports of the incident and the chair was still destroyed—even though Carnival anticipated litigation—could reasonably be construed as evidence that

[7] Tesoriero testified that Dr. Potkonjak informed her when she went to the medical center that "it was his first day on the ship." ECF No. 39-3 at 73-74. If that also meant that the date of Tesoriero's injury was Dr. Potkonjak's first date of employment with Carnival, then Carnival employed Dr. Potkonjak for a total of seventeen days.

Carnival acted in bad faith when it failed to follow its policies here.

Second, that Dr. Potkonjak apparently believed he reported the incident to the security department but no record of that was ever made and that he is now unavailable for questioning similarly could be viewed as suggesting that Carnival acted in bad faith when it threw away the chair.

And finally, this is not the first case where Carnival's failure to follow its own preservation policies has resulted in the destruction of evidence. In *Walter*, Carnival discarded a deck chair that collapsed under the passenger there. 2010 WL 2927962, at *1. The chair in that case was lost, even though Carnival employees prepared an accident report. *Id.* at *2. And just over a year ago, Carnival lost CCTV footage of a guest's fall, even though Carnival conceded it had a duty to preserve that evidence. *Sosa v. Carnival Corp.*, No. 18-20957-CIV, 2018 WL 6335178, *1 (S.D. Fla. Dec. 4, 2018). The magistrate judge considering a motion for sanctions against Carnival in that case described Carnival's position as (1) "'[c]'est la vie' ('that's life,' or 'that's how things happen') and (2) 'stuff happens.'"[8] *Id.*

No wonder Carnival has that attitude. Carnival keeps discarding material evidence, and that keeps

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[8] *See also Wilford v. Carnival Corp.*, No. 17-21992-CIV, 2019 WL 2269155 (S.D. Fla. May 28, 2019) (Carnival could not locate and produce X-rays its medical personnel took in an onboard medical clinic after the plaintiff slipped and fell onboard).

working to its advantage. So why would it ever do anything to remedy its compliance with its own policies?

A reasonable jury viewing these facts could conclude that Carnival's failure to strictly adhere to its stated policies betrayed bad faith on Carnival's part.

And if a jury reached that conclusion, Tesoriero would be entitled to an inference that Carnival destroyed the chair because it would have provided evidence that Carnival knew or should have known of the chair's unsafe condition. Though many courts have observed that "courts must not hold the prejudiced party to too strict a standard of proof regarding the likely contents of the destroyed evidence because doing so allows the spoliators to profit from the destruction of the evidence," *In the Matter of: the Complaint of Boston Boat III, LLC*, 310 F.R.D. 510, 521 (S.D. Fla. 2015) (citations and internal quotation marks omitted) (collecting cases); *see also Kronisch v. United States*, 150 F.3d 112, 128 (2d Cir. 1998), here, it is clear that the missing chair could have provided Tesoriero with critical evidence that Carnival knew or should have known that its chair was defective.

As I have explained, an examination of the chair that actually collapsed could have revealed that Carnival had previously fixed that same chair in the same place. Or it could have shown that Carnival had previously repaired another part of the chair, which caused stress on the joint that separated. Or it could have betrayed that its housekeeping staff did not in fact move and check the furniture daily, as Carnival testified it

did, because if it did, it should have been aware of the chair's defective condition. Any of these revelations would have shown that Carnival either knew or should have known that the chair was not fit for continued use.

And contrary to the panel opinion's suggestion, *see* Maj. Op. at 26-27, it is obvious that examination of a similar chair would not reveal any of these things that, if they existed, would have occurred in only the chair involved in the incident.

Joseph's amateur photographs do not save the day for Carnival, either. *See id.* at 27. They are a poor substitute for the actual chair, which could have permitted sampling of the glue that allowed the joint to separate (as well as examination for more than one application of glue, as in a repair of the chair joint) and inspection of the rest of the anatomy of the chair to determine whether a repair to a part of the chair that was not photographed could have placed extra stress on the part of the chair that separated.

Similarly, I respectfully disagree with the panel opinion that Joseph's brief looking over of the chair while his wife was writhing in pain and the two were waiting for medical attention qualifies as a thorough examination that would have revealed any of these problems with the defective chair if they existed. *See id.*

As for the panel opinion's contention that an examination would not have revealed that housekeeping staff knew or should have known of the defect because

"Tesoriero herself noticed no problem when she moved the chair back from the vanity," *id.*, there is a significant difference between pulling a chair out about a foot from a vanity as a prerequisite to grooming, and cleaning and checking furniture as part of job duties, as the Carnival staff was charged with doing. Plus, even if we assume no difference, Tesoriero's failure to notice a problem with the chair when she pulled it out would not establish that Carnival had not previously repaired that same chair or that the chair had not broken before in the same place.

Notice is the one thing that Tesoriero could not establish on summary judgment without the benefit of an examination of the chair. Because showing notice is an element of her claim for negligence, and because inspecting the chair may well have provided the necessary evidence that Carnival knew or should have known of the chair's defective condition, the chair qualifies as crucial evidence.

The panel opinion suggests that proof of notice is somehow exempt from the regular rules that govern the imposition of spoliation sanctions. *See id.* at 26. But the only support it offers for this novel notion is its assertion that "no party has cited a persuasive case to support a presumption of notice as a spoliation sanction, and the one identified by the dissent falls short." *Id.*

Most respectfully, the panel opinion is doubly wrong. First, as the panel opinion indicates, sanctions for bad faith are appropriate when "the practical

importance of the evidence" is significant. Maj. Op. at 21 (quoting *Flury*, 427 F.3d at 942). It does not make a difference why the evidence is important; all that matters is that the evidence has "practical importance." Obviously, evidence that proves a necessary element of a plaintiff's *prima facie* case is "practical[ly] important" when the plaintiff cannot establish that element without it. *See Palmas & Bambu, S.A. v. E.I. Dupont De Nemours & Co., Inc.*, 881 So. 2d 565, 582 (Fla. Dist. Ct. App. 2004) (noting that "where evidence necessary to prove a *prima facie* case is missing due to actions of a party, an essential element of a claim may be presumed" (citing *Pub. Health Tr. of Dade Cty. v. Valcin*, 507 So. 2d 596, 599 (Fla 1987))).[9] Notice is a necessary element of Tesoriero's *prima facie* case of negligence. And as I have explained, an examination of the defective chair may well have proven that Carnival knew or should have known of the chair's condition. So upon a finding of bad faith, it would have been appropriate for a court to give a spoliation sanction concerning that necessary evidence.[10]

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[9] We have explained that while federal law governs the imposition of spoliation sanctions, our opinion concerning sanctions can be "informed by [state] law" when, as here, it is consistent with federal spoliation principles. *Flury*, 427 F.3d at 943, 944.

[10] The panel opinion asserts that I espouse the position "that because evidence of notice would be necessary for Tesoriero to show a prima facie case of negligence, it must mean that the chair would have provided the evidence." Maj. Op. at 27. Nonsense. No fair reading of my dissent could support the panel opinion's claim. Indeed, as I have explained two other times in this dissent, *see supra* at 29, 44, an examination of the defective chair in this case could have yielded evidence that Carnival knew or should have

Second, courts have in fact awarded spoliation sanctions when destroyed evidence might have proven notice. In *Boston Boat*, for example, the court imposed a spoliation presumption "that the destroyed evidence would have demonstrated the existence of a dangerous condition *which Boston Boat knew about, should have known about or created.*" 310 F.R.D. at 523 (emphasis added). The panel opinion's attempt to distinguish *Boston Boat* on the dual bases that it imposed only a "rebuttable, permissible adverse inference" and that it "involved dramatic evidence of bad faith" once again misses the point. The point here is that when a court finds that evidence was destroyed in bad faith, spoliation sanctions can appropriately be imposed to establish a presumption of notice where the destroyed evidence itself, had it not been discarded, could have proven notice.

Here, for the reasons I have explained, the defective chair that Carnival destroyed may well have proven that Carnival had notice of the chair's dangerous condition, had Carnival not discarded the piece of furniture. So given an opportunity to evaluate the

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known of the chair's dangerous condition—that is, evidence of notice. Those explanations amply demonstrate the practical importance of the destroyed chair. *See Kronisch*, 150 F.3d at 128 ("[C]are should be taken not to require too specific a level of proof [because] . . . holding the prejudiced party to too strict a standard of proof regarding the likely contents of the destroyed evidence would subvert the prophylactic and punitive purposes of the adverse inference, and would allow parties who have intentionally destroyed evidence to profit from that destruction." (citation and internal quotation marks omitted)).

witnesses and other evidence at trial, a jury reasonably could have concluded, upon a sanctions-based presumption instruction, that an inspection of the chair would have revealed that Carnival knew or should have known of its dangerous condition. Since that is the case, particularly on a motion for summary judgment, where we must construe the facts in favor of the non-moving party, Tesoriero has established a material issue of fact concerning whether Carnival discarded the chair in bad faith.

Because a material question of fact exists as to the bad-faith issue, the district court should not have granted summary judgment. Rather, the court should have allowed a jury to resolve the bad-faith question of fact, along with all the other disputes of relevant fact in the case.[11] *Vodusek v. Bayliner Marine Corp.*, 71 F.3d 148, 157 (4th Cir. 1995) ("We conclude that the district court acted within its discretion in permitting the jury to draw an adverse inference if it found that Vodusek or her agents caused destruction or loss of relevant evidence. Rather than deciding the spoliation issue itself, the district court provided the jury with appropriate

[11] At the very least, the district court should have held an evidentiary hearing on the issue instead of resolving the material issue of fact against Tesoriero on the papers. *Cf. McDonald's Corp. v. Robertson*, 147 F.3d 1301, 1311 (11th Cir. 1998) (noting in the context of a motion for preliminary injunction that it is an abuse of discretion to fail to hold an evidentiary hearing where facts central to a party's claims are disputed); *Oldfield v. Pueblo De Bahia Lora, S.A.*, 558 F.3d 1210, 1216 (11th Cir. 2009) ("Because the material facts relating to the personal jurisdiction issues were not in dispute, there was no need for an evidentiary hearing.").

guidelines for evaluating the evidence."); *Kronisch*, 150 F.3d at 128 ("We believe that plaintiff has produced enough circumstantial evidence to support the inference that the destroyed MKULTRA files may have contained documents supporting (or potentially proving) his claim, and that the possibility that a jury would choose to draw such an inference, combined with plaintiff's circumstantial evidence, is enough to entitle plaintiff to a jury trial."); *United States v. Laurent*, 607 F.3d 895, 902 (1st Cir. 2010) ("A 'spoliation' instruction, allowing an adverse inference, is commonly appropriate in both civil and criminal cases where there is evidence from which a reasonable jury might conclude that evidence favorable to one side was destroyed by the other." (citing 4 L. Sand et al., *Modern Federal Jury Instructions* § 75.01 (instruction 75-7), at 75-16 to -18 (2010))).

The panel opinion simply concludes that Carnival acted consistently with its policies and that its policies do not "somehow establish bad faith." Maj. Op. at 23. But for the reasons I have explained, the record viewed in the light most favorable to Tesoriero cannot support that conclusion. So vacatur of the district court's entry of summary judgment and remand for trial is warranted here.

II.

Because Tesoriero has shown a material issue of fact with respect to bad faith concerning Carnival's disposal of the chair, summary judgment should not have been granted in this case. I therefore respectfully dissent.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 16-cv-21769-WILLIAMS

IRINA TESORIERO,

Plaintiff,

vs.

CARNIVAL CORPORATION,

Defendant. /

ORDER

(Filed Mar. 23, 2018)

THIS MATTER is before the Court on Magistrate Judge Edwin G. Torres's report and recommendation (the "Report") regarding the Parties' cross motions for summary judgment (DE 38; DE 39). The report recommends that Defendant's motion be granted and Plaintiff's motion denied. Plaintiff filed objections to the report on October 6, 2017 (DE 65) and Defendant filed a reply on October 19, 2017 (DE 66).

The Court has independently reviewed Judge Torres' comprehensive, 62-page Report; the objections and reply to the Report; the briefing filed by the Parties; and the record. For the reasons set out in the Report, the Court agrees that Defendant is entitled to summary judgment. Specifically, the Court agrees that Plaintiff has failed to produce evidence that would create a genuine issue of material fact regarding the absence of actual or constructive notice of the

risk-creating condition. Plaintiff maintains that notice is not required in cases where the doctrine of *res ipsa loquitur* applies, or in cases where Plaintiff has alleged negligent maintenance. But Judge Torres' detailed Report contains a very thorough analysis of these alternative arguments, and concludes that neither of those arguments warrant a denial of Defendant's summary judgment motion, because they are either not legally or are not factually supported on this record. The Court agrees. Finally, the Court notes that the arguments regarding Carnival's failure to preserve the broken chair that are presented in Plaintiffs motion for summary judgment, as discussed in the Report, do not amount to spoliation such that an adverse inference is warranted.

In her objections, Plaintiff contends that the Report misapplied the *res ipsa* standard under Maritime Law, that it erroneously rejected Plaintiff's negligent maintenance arguments, that it reached an erroneous conclusion regarding whether the cruise ship had constructive notice of the dangerous condition and on the issue of spoliation, and that it misapplied the summary judgment standard. The Court has considered Plaintiffs arguments with regard to each of these claims—which reiterate a number of the arguments made in their initial briefs—and finds them unavailing.

Accordingly, it is **ORDERED AND ADJUDGED** as follows:

1. The conclusions in the Report (DE 62) are **AFFIRMED AND ADOPTED** as set out above.

2. Defendant's Motion for Summary Judgment (DE 38) is **GRANTED**. Plaintiffs Motion for Summary Judgment (DE 39) is **DENIED**.

3. All remaining motions are **DENIED AS MOOT**.

DONE AND ORDERED in Chambers in Miami, Florida, this 23rd day of March, 2018.

/s/ [Illegible]
KATHLEEN M. WILLIAMS
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
Case No. 16-cv-21769-WILLIAMS

IRINA TESORIERO,

Plaintiff,

vs.

CARNIVAL CORPORATION,

Defendant. /

FINAL JUDGMENT

(Filed Apr. 4, 2018)

THIS MATTER is before the Court following the entry of an order granting Defendant's motion for summary judgment (DE 75). Accordingly, it is **ORDERED AND ADJUDGED** as follows:

1. Judgment is entered in favor of Defendant Carnival Corporation and against Plaintiff Irina Tesoriero. Plaintiff Irina Tesoriero shall take nothing from her claims.

2. All remaining motions are **DENIED AS MOOT**. The Clerk of the Court is directed to **CLOSE** this case.

DONE AND ORDERED in Chambers in Miami, Florida, this 3rd of April, 2018.

/s/ [Illegible]
KATHLEEN M. WILLIAMS
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 16-21769-Civ-WILLIAMS/TORRES

IRINA TESORIERO,

Plaintiff,

v.

CARNIVAL CORPORATION d/b/a CARNIVAL CRUISE LINES a/k/a CARNIVAL CRUISE LINE,

Defendant. /

REPORT AND RECOMMENDATION ON THE PARTIES' CROSS MOTIONS FOR SUMMARY JUDGMENT

(Filed Sep. 22, 2017)

This matter is before the Court on the parties' cross motions for summary judgment filed by Carnival Corporation's d/b/a Carnival Cruise Lines ("Defendant" or "Carnival") [D.E. 38] and Irina Tesoriero ("Plaintiff") [D.E. 39]. After Plaintiff and Defendant timely filed their respective responses and replies [D.E. 44-47], both of their motions are now ripe for disposition. After careful consideration of the motions, responses, replies, relevant authorities, the record in this case, and for the reasons discussed below, Defendant's motion should be **GRANTED**, Plaintiff's motion should be **DENIED**, and final judgment entered.

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[2] *I. BACKGROUND*

This action arises from an accident that occurred on June 26, 2015 at approximately 7:30 pm while Plaintiff sat on a chair in her cabin onboard the *Carnival Splendor*. Plaintiff claims that when she sat down on the chair, it suddenly collapsed, causing personal injuries, including an injury to her right arm.[1] The injury occurred when the chair allegedly came apart at the joints where the right front leg of the chair attaches to the seat and body of the chair. Plaintiff claims that Carnival was negligent and that her injury occurred because Carnival failed to warn, inspect, maintain, and repair the furniture in question.

Stateroom stewards assigned to each cabin are tasked with the responsibility of inspecting the condition of the cabin furniture and identifying any maintenance issues. These stewards service the cabin daily and their responsibilities include cleaning and checking all of the furniture to ensure that everything is structurally sound. They visually inspect the furniture and touch it to identify if anything is damaged or needs to be replaced or repaired. If a stateroom steward identifies any problems with the furniture, the issue is reported and recorded. And if a chair needs repair, it is immediately removed from a room. In the three years prior to Plaintiff's incident, there was one other

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[1] As a result of the accident, Plaintiff has allegedly suffered severe, debilitating, and permanent injuries to her right arm which has thus far required two surgeries.

incident where a passenger was injured because of a defective chair.[2]

[3] **II. APPLICABLE PRINCIPLES AND LAW**

"The court shall grant summary judgment 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).

> A party asserting that a fact cannot be or is genuinely disputed must support the assertion by: (A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or (B) showing that materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

FED. R. CIV. P. 56(c)(1). "On summary judgment the inferences to be drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion." *Matsushita Electric Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 597 (1986) (quoting another source).

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[2] The prior accident occurred in a different cabin and involved an outside metal balcony chair whereas the cabin chair at issue in this action was made out of wood.

In opposing a motion for summary judgment, the nonmoving party may not rely solely on the pleadings, but must show by affidavits, depositions, answers to interrogatories, and admissions that specific facts exist demonstrating a genuine issue for trial. *See* FED. R. CIV. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323–24 (1986). The existence of a mere "scintilla" of evidence in support of the nonmovant's position is insufficient; there must be evidence on which the jury could reasonably find for the nonmovant. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). "A court need not permit a case to go to a jury . . . when the inferences that are drawn from the evidence, or upon which the non-movant relies, are [4] 'implausible.'" *Mize v. Jefferson City Bd. Of Educ.*, 93 F. 3d 739, 743 (11th Cir. 1996) (citing *Matsushita*, 475 U.S. at 592–94).

At the summary judgment stage, the Court's function 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. In making this determination, the Court must decide which issues are material. A material fact is one that might affect the outcome of the case. *See id.* at 248 ("Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted."). "Summary judgment will not lie if the dispute about a material fact is 'genuine,' that is, if the

evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id*.

III. ANALYSIS

A. Carnival's Motion for Summary Judgment [D.E. 38]

Carnival's motion seeks summary judgment against Plaintiff because a prerequisite to the imposition of liability on a cruise ship operator is that the operator must have actual or constructive notice of a dangerous or risk-creating condition. Carnival argues that there is *no* evidence that it was ever on notice, either actual or constructive, of any alleged-risk creating condition with the chair in question prior to Plaintiff's use. Because there is purportedly no evidence that supports Plaintiff's claims under a negligence theory, Carnival argues that Plaintiff essentially seeks to hold it strictly liable as an insurer of her safety on the cruise. [5] Carnival contends that this is not the law and that Plaintiff is unable to demonstrate the existence of a genuine issue of material fact on the question of whether Carnival had actual or constructive notice. Carnival seeks summary judgment as a matter of law on all of Plaintiff's claims.

Plaintiff's response is that Carnival spoliated the evidence (allegedly eviscerating the notice requirement) and limited itself to a challenge only on a single theory of negligence liability in Plaintiff's complaint – notice and the duty to warn. Plaintiff also argues that *res ipsa loquitur* applies, so actual or constructive

notice is not required. And even if notice was required in this action, Plaintiff suggests that there are three persuasive reasons why Carnival had constructive notice of the defective chair. Accordingly, Plaintiff contends that Defendant's motion lacks any merit and should be denied.

1. Whether Carnival's Motion Fails to Comply with Rule 56

As an initial procedural matter, Plaintiff argues that Carnival's motion can be summarily denied because Carnival only challenges Plaintiff's "duty to warn" theory of negligence, but fails to challenge Plaintiff's "negligent maintenance" theory. As support, Plaintiff relies on the Eleventh Circuit's unpublished decision in *Frasca v. NCL (Bahamas), Ltd.*, 654 F. App'x 949, 955 (11th Cir. 2016). In that case, the Eleventh Circuit found that Plaintiff alleged a failure to warn and negligent maintenance as two separate theories under one count of negligence. After defendant moved for summary judgment, both parties field a joint stipulation of facts in which plaintiff stated that defendant did not take appropriate action to [6] maintain the deck in question. In response, defendant moved *in limine* to exclude all evidence of theories not presented in plaintiff's complaint, including a theory of negligent construction and maintenance of the deck. The district court addressed the motion *in limine* in its summary judgment order, and improperly granted summary judgment in favor of defendant without first giving notice to plaintiff and a reasonable time to respond to

defendant's arguments. *See* FED. R. CIV. P. 56(f). Because there was no evidence to suggest that the district court provided the parties such notice, the district court erred by *sua sponte* entering summary judgment in favor of defendant on plaintiff's negligent maintenance claim.

Here, Plaintiff suggests that Carnival's motion does not identify Plaintiff's claim for negligent maintenance and does not even refute the application of *res ipsa loquitur*. Instead, Carnival allegedly only mentions in its introduction that "[t]hat there is no evidence that Carnival was on notice, either actual or constructive, of any alleged-risk creating condition with the chair prior to Plaintiff's use." [D.E. 38]. Carnival's failure to seek summary judgment on the negligent maintenance theory is allegedly fatal to Carnival's motion because the adjudication of Plaintiff's claims is now inappropriate under Federal Rule of Civil Procedure 56. *See*, *e.g.*, *Gentry v. Harborage Cottages–Stuart, LLP*, 654 F.3d 1247, 1261 (11th Cir. 2011) ("In this case, the court entered judgment on claims not identified by Plaintiffs in their Rule 56 motion and without advance notice. This was error.").

Carnival's response is that Plaintiff incorrectly states that judgment may not be granted on a theory of liability not addressed in a party's motion for summary [7] judgment. Carnival believes that this is a clear misstatement of Federal Rule of Civil Procedure 56, which requires that a party identify "each claim or defense" on which summary judgment is sought. FED. R. CIV. 56(a). Carnival also suggests that this case does

not involve a sprawling multi-count complaint, but that Plaintiff sued for one claim: negligence. Thus, Plaintiff's contention that Carnival only moved for summary judgment on the "duty to warn" aspect of her negligence claim is supposedly belied by the record. Carnival points out that in its motion, Carnival recognized that Plaintiff's negligence claim included allegations that Carnival failed to "inspect, maintain, and repair: the furniture in question." [D.E. 38]. Because Plaintiff was certainly put on notice that Carnival is seeking summary judgment on her *entire* claim of negligence, Carnival suggests that Plaintiff's argument is simply wrong and misstates the law in support thereof.

We agree with Carnival that Plaintiff's argument lacks merit. In its introduction, Carnival acknowledges both of Plaintiff's theories of negligence – that Carnival (1) failed to maintain the chair in question, and (2) failed to warn Plaintiff of the dangerous condition. [D.E. 38]. As for Plaintiff's contention that Carnival did not refute the application of *res ipsa*, this argument lacks merit because there is no authority that requires Carnival when seeking summary judgment to anticipate Plaintiff's defenses to Carnival's motion. Furthermore, the procedural posture of this case is materially distinguishable from the facts presented in *Frasca* because (1) the Court is not *sua sponte* adjudicating Plaintiff's claims, (2) Defendant acknowledged both of Plaintiff's theories of negligence in its motion, (3) Defendant [8] stated its intention to dismiss all of Plaintiff's claims, and (4) Plaintiff was put on notice and given time to respond, as evidenced by Plaintiff's

lengthy response in opposition to Defendant's motion. As such, we find that Carnival complied with the requirements set forth in Rule 56 and that Plaintiff's argument is unpersuasive.

2. Carnival's Duty of Care under Federal Maritime Law

Turning to the merits of the matter raised by Carnival's motion, we begin by identifying the duty of care that applies to Carnival in this maritime action. As a sea carrier, Carnival does not serve as strict liability insurer to its passengers, meaning Carnival can only be liable for negligence. *See Kornberg v. Carnival Cruise Lines, Inc.*, 741 F.2d 1332, 1334 (11th Cir. 1984); *Keefe v. Bahama Cruise Line, Inc.*, 867 F.2d 1318, 1322 (11th Cir. 1989). "Generally, to prevail in a negligence action the plaintiff must show that: (1) the defendant owed plaintiff a duty; (2) the defendant breached that duty; (3) the defendant's breach was the proximate cause of plaintiff's injuries; and (4) the plaintiff suffered damages." *Weiner v. Carnival Cruise Lines*, 2012 WL 5199604, at *2 (S.D. Fla. Oct. 22, 2012) (citing *Isbell v. Carnival Corp.*, 462 F. Supp. 2d 1232, 1236 (S.D. Fla. 2006)). Because the accident in this case occurred aboard a cruise ship, the aforementioned elements must be evaluated in connection with federal maritime law. *See Smolnokar v. Royal Caribbean Cruises Ltd.*, 787 F. Supp. 2d 1308, 1315 (S.D. Fla. 2011) ("Federal maritime law applies to actions arising from alleged torts 'committed aboard a ship sailing in navigable waters.' "). Each element is ordinarily

essential to a negligence claim and, at this stage of the proceedings, it is established [9] that a "[p]laintiff cannot rest on the allegations of her complaint in making a sufficient showing on each element for the purposes of defeating summary judgment." *Isbell*, 462 F. Supp. 2d at 1236–37 (citing *Tipton v. Bergrohr GMBHSiegen*, 965 F.2d 994, 999 (11th Cir. 1992)); *Taiariol v. MSC Crociere, S.A.*, 2016 WL 1428942, at *3 (S.D. Fla. Apr. 12, 2016), *aff'd*, 677 F. App'x 599 (11th Cir. 2017) ("The failure to show sufficient evidence of each element is fatal to a plaintiff's negligence cause of action.").

It is also settled law "that a shipowner owes passengers the duty of exercising reasonable care under the circumstances." *Isbell*, 462 F. Supp. 2d at 1237 (citations omitted). And in meeting that standard of care, it "requires, as a prerequisite to imposing liability, that the carrier have actual or constructive notice of the risk-creating condition." *See Keefe*, 867 F.2d at 1322. "This duty includes a duty to warn passengers of dangers the cruise line knows or reasonably should have known." *Smolnikar v. Royal Caribbean Cruises Ltd.*, 787 F. Supp. 2d 1308, 1322 (S.D. Fla. 2011) (citing *Carlisle v. Ulysses Line Ltd., S.A.*, 475 So. 2d 248, 251 (Fla. 3d DCA 1985) (cruise line owners have a duty to warn that "encompasses only dangers of which the carrier knows, or reasonably should have known"); *Goldbach v. NCL (Bahamas) Ltd.*, 2006 WL 3780705, at *2 (S.D. Fla. Dec. 20, 2006) (same)). However, this duty only extends to "those dangers which are not apparent and obvious to the passenger." *Luby v. Carnival Cruise Lines,*

Inc., 633 F. Supp. 40, 41 (S.D. Fla. 1986) (*citing N.V. Stoomvaart Maatschappij Nederland v. Throner*, 345 F.2d 472 (5th Cir. 1965)); *see also Cohen v. Carnival Corp*., 945 F. Supp. 2d 1351, [10] 1357 (S.D. Fla. 2013) ("[T]here is no duty to warn of dangers that [are] of an obvious and apparent nature.") (internal quotation marks omitted).

3. Whether Carnival had Actual or Constructive Notice

Based on this duty of care, we turn to the traditional inquiry whether Carnival had actual or constructive notice of the collapsing chair. *See Keefe*, 867 F.2d at 1322 (requiring "as a prerequisite to imposing liability, that the carrier have actual or constructive notice of the risk-creating condition."). Plaintiff argues that there is sufficient evidence in the record for trial because Carnival had legally effective notice for three reasons: (1) a substantially similar incident occurred within the last three years, (2) the ship's management meetings establish Carnival's awareness of chairs in need of repair, and (3) the observable condition of the cabin chair's pegs show that the glue that held the legs together had worn away.

First, Plaintiff notes that on October 18, 2014, less than a year prior to Plaintiff's incident, another Carnival passenger, Tina Dalfonso, experienced a substantially similar incident involving the collapse of a chair when she tried to sit on it. Second, Plaintiff contends Carnival's meeting notes demonstrate that Carnival's

chairs experience wear and tear, and that approximately 20 to 40 were in need of repair at the time of the accident. And third, Plaintiff believes that her husband's observations demonstrate constructive notice to Carnival because he found worn away glue on the pegs of the cabin chair that suggest that the pegs became unglued some time ago and became loose. Coupled with Plaintiff's testimony that she did not sit in the chair prior to the incident and that the chair [11] remained untouched for at least 24 hours, Plaintiff argues that there is more than enough evidence to find that Carnival was on constructive notice of the dangerous chair in Plaintiff's cabin.

Carnival's response is that there is absolutely no record evidence establishing actual or constructive notice. In the three years preceding Plaintiff's incident, Carnival argues that there were no prior similar incidents involving the collapse of the type of cabin chair at issue in this case. The only prior incident that Plaintiff relies upon included a metal balcony chair in a different cabin, whereas this case involves a wood upholstered chair. Thus, Plaintiff believes that the isolated prior incident involved entirely different circumstances and is not nearly enough to impute constructive notice of any dangerous condition.

As for the meeting minutes that Plaintiff relies upon, Carnival believes those are also insufficient to show actual or constructive notice because the repairs referenced in those documents only address cosmetic issues such as varnishing, sanding, and repainting – not any structural issues, such as the broken chair in

Plaintiff's cabin. And finally, Plaintiff argues that the observations and speculative conclusions of Plaintiff's husband (who is not obviously an expert) is not enough to establish notice because Plaintiff's husband admits that "[i]t was obvious from the appearance of the pegs – *visible only after it fell apart* – that the pegs had been unglued and loose for a long time." [D.E. 44-3] (emphasis added). Plaintiff's husband also stated that "[t]he chair did not have any obvious or observable outward defects." *Id*. Carnival argues that maritime law does not impose any [12] heightened duty to completely disassemble a chair to conduct an inspection and that the testimony of Plaintiff's husband supports Carnival's contention that it had no obvious or observable defect. Therefore, Carnival believes it could not have been on notice of any dangerous condition especially when Plaintiff suggests that a cruise line should physically take apart chairs to determine if they are structurally sound.

Because the law purportedly imposes no such duty on Carnival, the mere fact that a chair collapsed coupled with the speculative assertion of Plaintiff's husband that the chair had been loose for a "long time" is allegedly insufficient to find that Carnival had constructive notice. Accordingly, Carnival argues that the evidence in the record demonstrates an absence of any prior notice of a deficiency with respect to the cabin chair or similar cabin chairs aboard the *Splendor* and therefore summary judgment must be granted.

Even assuming that a defective condition existed in this case, we agree with Carnival that the record

contains no evidence to show that Carnival actually knew of a defect in the cabin chair. This means that Plaintiff can only rely upon the allegation that Carnival had constructive notice. And "[c]onstructive notice 'requires that a defective condition exist for a sufficient interval of time to invite corrective measures.'" *Mirza v. Holland America Line Inc.*, 2012 WL 5449682, at *3 (W.D. Wash. Nov. 6, 2012) (quoting *Monteleone v. Bahama Cruise Line, Inc.*, 838 F.2d 63, 65 (2d Cir. 1988)).

Here, Plaintiff has presented no tangible evidence that Carnival had constructive notice or that it should have known that the cabin chair posed any [13] risk-creating condition for any passenger. "There is no evidence in the record of any accident reports, passenger comment reviews or forms, or reports from safety inspections alerting Carnival of any potential safety concern. . . ." *Cohen*, 945 F. Supp. 2d at 1355–56 (citing *Smolnikar v. Royal Caribbean Cruises, Ltd.*, 787 F. Supp. 2d 1308, 1323–24 (S.D. Fla. 2011) (finding that the cruise line had no actual or constructive notice of any risk-creating condition from a zipline tour operator because "Royal Caribbean had positive information about [the tour operator], and there is no evidence that Royal Caribbean received any form of notice regarding the existence of an alleged danger, as there were no accident reports from [the tour operator], or passenger comment forms or reviews, alerting Royal Caribbean as to a potential safety concern at traverse # 6 of the tour"); *Samuels v. Holland American Line–USA Inc.*, 656 F.3d 948, 953–54 (9th Cir. 2011) (finding that the cruise line did not have actual or constructive notice of

any danger to passengers to wading on a beach because there was no evidence in the record that any other passenger had ever been injured on that beach and the cruise line was not "aware of any similar accident, or any accident at all, that had previously occurred while a Holland American passenger was swimming on the Pacific Ocean side of Lover's Beach")).

Again, Plaintiff points instead to the same three reasons why Carnival had constructive notice. But, again, none are persuasive. Plaintiff first focuses on an incident that occurred nearly three years ago, but that incident involved a different cabin and a completely different type of chair. In fact, the chair at issue in the incident three years ago was a metal balcony chair that was exposed to the [14] elements whereas the chair in this case was upholstered with a wooden frame inside a cabin. As such, Plaintiff cannot meet the Eleventh Circuit's substantial similarity doctrine that requires a party to provide evidence of "conditions substantially similar to the occurrence in question" that "caused the prior accident." *Jones v. Otis Elevator Co.*, 861 F.2d 655, 661–62 (11th Cir. 1988) (citation omitted); *see also Sorrels v. NCL (Bahamas) Ltd.*, 796 F.3d 1275, 1287–88 (11th Cir. 2015) (affirming district court's ruling that "evidence of 22 other slip and fall incidents" aboard defendant's vessel did not meet the "substantial similarity doctrine" as none of the falls occurred where plaintiff fell, other injured passengers wore varying styles of footwear, and additional factors were involved); *Frasca*, 2014 WL 1385806, at *8 (determining that plaintiff was "unable to show that another

passenger slipped and fell where [plaintiff] fell, under similar conditions").

Furthermore, even if we ignore the differences of the metal balcony chair and view the issue through a general foreseeability lens, there is still not enough evidence that a single incident involving a broken chair from three years ago "occurred with enough frequency to impute constructive notice" to Carnival of a dangerous condition. *See Taiariol*, 2016 WL 1428942, at *6 ("Quite simply, there is no evidence that accidents like the subject incident frequently occurred in the Pantheon Theater or involved metal stair 'nosings,' to render steps—like the one at issue here—unreasonably dangerous to traverse."); *Weiner v. Carnival Cruise Lines*, 2012 WL 5199604, at *5 (S.D. Fla. Oct. 22, 2012) (finding no evidence "that spills and accidents of the sort" plaintiff experienced occurred enough to "impute [15] constructive notice"); *see also Mercer v. Carnival Corporation*, 2009 WL 302274, at *2 (S.D. Fla. Feb. 9, 2009) (rejecting argument that cruise line "had actual or constructive notice of the dangerous propensities of high gloss hardwood floors being in close proximity to the bathroom," where plaintiff fell after exiting the shower, because plaintiff failed to produce "any evidence to support his contention that [the cruise line] had notice of the allegedly dangerous condition"). Accordingly, Plaintiff's first argument fails.

The same holds true for Plaintiff's second argument that Carnival's meeting minutes constitute constructive notice. The housekeeping manager, Serhiy Bukaruv. testified that the meeting minutes only

reflect a list of chairs that require sanding, repainting, or varnishing. [D.E. 38-1 at 24, 27]. In other words, the chairs that are reflected on the meeting minutes only require cosmetic changes, not any structural issues. *See id*. at 46. And to the extent that chairs are identified to be structurally deficient, those are immediately replaced by staff members. Therefore, there is simply no tangible evidence to get to a jury based on Carnival's meeting minutes that do not reflect any chairs that require structural deficiencies, let alone the specific chair at issue in this case. Constructive notice could not be found on this basis as a matter of law.

Plaintiff's third argument to sustain her constructive notice theory is equally unpersuasive. Plaintiff contends that her husband's observations demonstrate constructive notice to Carnival because he found worn-away glue on the pegs of the cabin chair and that he determined the pegs became unglued some time ago and [16] became loose. Yet, Plaintiff's husband undermines her argument because his affidavit states "[i]t was obvious from the appearance of the pegs – *visible only after it fell apart* – that the pegs had been unglued and loose for a long time." [D.E. 44-3] (emphasis added). And Plaintiff's husband also claims that "[t]he chair did not have any *obvious or observable* outward defects." *Id*.

In other words, the husband's sworn observations actually support Carnival's position that no reasonable inspection could have discovered the dangerous condition without first deconstructing the cabin chair. And federal maritime law does not impose a daily duty to

deconstruct furniture to discharge a duty of reasonable care to passengers. *See*, *e.g.*, *Bush v. XYZ Ins. Co.*, 880 So. 2d 953, 956 (La. Ct. App. 2004) ("We find nothing in the statutes or jurisprudence that would suggest that such a great burden is on an owner of a thing to hire an expert to inspect it thoroughly before it is placed into use, and we decline to place such a burden on Merlin Computers here."); *Smith v. Bernfeld*, 226 Md. 400, 408 (1961) ("[N]o business man is required to provide an appliance or place of business free from the hazard of all mishaps. This is a task impossible to fulfill."). Plaintiff's husband is also not an expert, which further undermines the argument that the pegs became unglued some time ago and that Carnival had constructive notice. Accordingly, Plaintiff has failed to demonstrate in any way that Carnival had constructive notice of the cabin chair.

In sum, without prior complaints from Plaintiff or other passengers, and with regular inspections of all chairs in the cabins, the record presented simply does not [17] establish that Carnival had any actual or constructive notice of the defective cabin chair. As the Second Circuit stated nearly thirty years ago, we "simply cannot conclude that [Carnival's] failure to discover the [defective] condition . . . assuming as we do that it existed prior to the [incident] and in fact caused the [incident], constituted a lack of due care for which it should be held liable." *Monteleone*, 838 F.2d at 66.

Accordingly, under traditional negligence analysis that applies in this maritime action, summary judgment on Plaintiff's claim would be warranted as a

matter of law. Because there is no evidence in this record that Carnival possessed actual or constructive knowledge of the alleged risk-creating condition, summary judgment should be granted under Eleventh Circuit precedent that requires plaintiffs to satisfy this element when pursuing a negligence cause of action. *See*, e.g., *Everett v. Carnival Cruise Lines*, 912 F.2d 1355, 1358–59 (11th Cir. 1990) ("[T]he 'benchmark against which a ship owner's behavior must be measured 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.' "); *Keefe*, 867 F.2d at 1322; *Taiariol*, 677 F. App'x at 602 ("Because Taiariol failed to produce evidence that the defendant had notice, either actual or constructive, of the nosing's slippery condition, and because notice is a prerequisite to imposing liability, the district court did not err in granting summary judgment to the defendant.") (internal citation omitted); *Lipkin v. Norwegian Cruise Line Ltd.*, 93 F. Supp. 3d 1311, 1324 (S.D. Fla. 2015) ("Because [18] Plaintiff has failed to cite any evidence in the record showing that Norwegian had actual or constructive notice of the risk-creating condition alleged in the complaint, and because evidence of notice is a prerequisite to liability under maritime law, summary judgment in favor of Norwegian is appropriate in this matter.") (citing *Keefe*, 867 F.2d at 1322); *Thomas v. NCL (Bahamas) Ltd.*, 2014 WL 3919914, at *4 (S.D. Fla. Aug. 11, 2014) (granting summary judgment where "[t]he unrefuted evidence in the record instead indicates a lack of actual or constructive notice").

Indeed it is well settled that, at the summary judgment stage, "mere implication of actual or constructive notice is insufficient to survive summary judgment." *See Lipkin*, 93 F. Supp. 3d at 1323 (citation omitted); *see also Thomas*, 2014 WL 3919914, at *4; *Cohen*, 945 F. Supp. 2d at 1357. So for instance, in *Adams v. Carnival Corp.*, a passenger brought a negligence claim against a cruise line alleging that a defective pool deck collapsed and injured the plaintiff. *See* 2009 WL 4907547, at *1. The plaintiff in *Adams* presented no record evidence establishing that the defendant had actual or constructive notice as to any hazardous condition with respect to the chair in question. There was also no evidence that the defendant was aware of any other passengers experiencing problems with chairs on the pool deck. Hence, the court held that "[w]ithout specific facts demonstrating, at least, that the purported defect was detectable with sufficient time to allow for corrective action," the defendant was entitled to summary judgment. *Id*. at *5.

The same analysis applies here based on this record. Carnival's stateroom stewards service the individual cabins on a daily basis and that they are tasked [19] with the specific responsibility of inspecting the condition of the cabin furniture and identifying any maintenance issues. They conduct a visual inspection, and also touch the furniture to identify any damage to make certain that it is structurally sound. If any furniture needs to be repair or replaced, Carnival contends that it is immediately removed from the cabin. In the three years prior to Plaintiff's accident, there

were purportedly no substantially similar incidents and only one involving a chair in a passenger cabin.[3]

Therefore, even assuming all facts in the light most favorable to Plaintiff and drawing all factual inferences in Plaintiff's favor, Plaintiff has still failed to demonstrate the existence of a genuine issue of material fact as to whether Carnival possessed actual or constructive notice of the alleged risk-creating condition.

4. Whether Actual or Constructive Notice is Always Required

Plaintiff's alternative position on the question of notice is that notice is not required in two circumstances: (1) when the doctrine of *res ipsa loquitur* applies, and (2) when plaintiffs allege a negligent maintenance cause of action. Plaintiff concludes that *res ipsa* principles should be applied under the circumstances of this case, which would then require the negligence claim to proceed for trial irrespective of actual or constructive notice on Carnival's part. And Plaintiff otherwise argues that her negligent maintenance claim precludes Carnival from relying on the notice

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[3] Carnival points out that the other incident within the previous three years involved a broken metal balcony chair. Yet, Plaintiff's incident involved a different type of chair in a different cabin, and that the chair had different mechanical deficiencies. As such, Carnival believes that Plaintiff's accident is an isolated incident involving different circumstances that is not enough to impute constructive notice of any dangerous condition.

[20] element in its motion for summary judgment. We will tackle the more complicated *res ipa* issues first.

(a) Effect of Res Ipsa Loquitur Doctrine on Notice Requirement

Res ipsa loquitur is an evidentiary rule that "provides an injured plaintiff with a common-sense inference of negligence where direct proof of negligence is wanting." *Goodyear Tire & Rubber Co. v. Hughes Supply, Inc.*, 358 So. 2d 1339, 1341 (Fla. 1978); *Marrero v. Goldsmith*, 486 So. 2d 530 (Fla. 1986). In doing so, "it raises an inference of negligence which merely shifts the burden of going forward with the evidence to the defendant." *Louisiana & A. R. Co. v. Fireman" Fund Ins. Co.*, 380 F.2d 541, 543–44 (5th Cir. 1967). This doctrine means, in Latin, the "thing that speaks for itself" and it allows a plaintiff to prove negligence through circumstantial evidence. *See Rockey v. Royal Caribbean Cruises, Ltd.*, 2001 WL 420993, at *5 (S.D. Fla. Feb.20, 2001). The doctrine, like any other rule of evidence, is only brought into play where the situation makes it applicable. This means that "[i]t does not have to be pleaded in the complaint or 'noticed' by specific designation to the adverse party at pre-trial or at trial, since it is neither a cause of action nor a ground for recovery, nor an 'issue'." *Knight v. Otis Elevator Co.*, 596 F.2d 84, 90 (3d Cir. 1979).

Plaintiff contends that the rule, if applicable, forecloses the necessity of showing prior notice to give rise to liability. Plaintiff believes that the collapse of the

chair in question would not in the ordinary course of events have occurred without negligence on the part of the one in control of the chair – i.e. Carnival. And [21] because the doctrine may be applied to these facts, Plaintiff is absolved of the burden of showing prior notice. *See Mabrey v. Carnival Cruise Lines, Inc.*, 438 So. 2d 937 (Fla. 3d DCA 1983) ("[A]ctual or constructive knowledge is irrelevant in cases not involving transitory, foreign substances (*i.e.*, the typical banana peel case), if ample evidence of negligent maintenance can be shown." (citing *194th Street Hotel Corp. v. Hopf*, 383 So. 2d 739 (Fla. 3d DCA 1980)); *see also Millan v. Celebration Cruise Operator, Inc.*, 212 F. Supp. 3d 1301, 1306 (S.D. Fla. 2015) ("The Court concludes that a plaintiff is not required to show the defendant's actual or constructive notice of the defective condition in order to raise a *res ipsa loquitur* inference of negligence under maritime law. The Court therefore holds that Defendant Celebration's lack of actual or constructive knowledge of the risk-creating condition does not as a matter of law preclude Plaintiff from arguing the doctrine's application.").

Carnival responds, however, that the doctrine of *res ipsa loquitur* cannot apply here and, even if it did, Plaintiff is always required to show that Carnival had actual or constructive notice. Apart from that, Carnival also contends that federal law does not recognize the application of the doctrine for maritime negligence actions. As for the cases Plaintiff relies upon, Carnival suggests that they are noticeably distinguishable.

For example, in *O'Connor v. Chandris Lines*, which Plaintiff heavily relied upon, the issue was whether *res ipsa loquitur* was applicable to a collapsing bunk bed. 566 F. Supp. 1275 (D. Mass. 1983). Yet, the court in that case ruled after a [22] bench trial, not at summary judgment, that "[t]he evidence does not disclose any other probable explanation for the collapse of the bunk except the negligence of the defendant in permitting the bunk to be or remain in a defective condition." *Id.* at 1280. Carnival also points out that there was no evidence in the record about the length of time the bunk bed had been in service or the last time prior to the accident that it had been surveyed, or inspected (in contrast with the facts in this record).

Our review of this issue shows that, as an initial matter, courts have certainly split on the question of whether *res ipsa loquitur* applies in a negligence maritime action. However, we agree with Judge Williams's holding in *Millan* and the weight of authority in the Eleventh Circuit, that "a plaintiff is not required to show the defendant's actual or constructive notice of the defective condition in order to raise a *res ipsa loquitur* inference of negligence under maritime law." *Millan*, 212 F. Supp. 3d at 1306; *see also Great Am. Ins. Co. v. Pride*, 847 F. Supp. 2d 191, 205 (D. Me. 2012) ("The doctrine of *res ipsa loquitur*, which is fully applicable in admiralty, allows negligence to be proved by circumstantial evidence.").

As such, the "lack of actual or constructive knowledge of a risk-creating condition does not as a matter of law preclude Plaintiff from arguing the

doctrine's application." *Id*.; *see also United States v. Baycon Indus., Inc.*, 804 F.2d 630, 632-35 (11th Cir. 1986) (no requirement of actual or constructive notice for *res ipsa* in maritime negligence action); *Terry*, 3 F. Supp. 3d at 1372–74 (same); *O'Connor*, 566 F. Supp. at 1279–80 (same); *Burns v. Otis Elevator*, 550 So. 2d 21, 22 (Fla. 3rd DCA 1989) (actual or constructive notice of the defect is "immaterial" if the conditions for [23] the *res ipsa* doctrine are established). Because *res ipsa loquitur* may be raised in a federal maritime action and may obviate the need for Plaintiff to demonstrate actual or constructive notice in a federal maritime action, we find that Carnival's argument on this point lacks merit.

There is certainly some support for Carnival's theory that the notice element remains an essential component of a negligence claim, *res ipsa* or not. *See*, *e.g.*, *Tillson v. Odyssey Cruises*, 2011 WL 309660, at *7 (D. Mass. Jan. 27, 2011) *(*"Premier Yachts contends that a predicate for a *res ipsa loquitur* finding is that the Defendant had notice of the defective condition of the chair. This argument is supported by several cases in the maritime context.") (*citing Giacomelli v. Massachusetts Greyhound*, 1991 WL 229957 (Mass. App. Div. Nov. 4, 1991) (refusing to apply doctrine of *res ipsa loquitur* where the plaintiff did not detect any weakness in the chair, thereby making the defect not detectable from normal inspection and making it impossible for the defendant to have had notice of it)); *see also Adams*, 2009 WL 4907547, at *5 ("[T]he mere fact that an accident occurred or that [the plaintiff] asserts a *res ipsa*

loquitur action does not obviate the need to show that [the defendant] had notice."); *Hood v. Regency Maritime Corp.*, 2000 WL 1761000, at *4 (S.D.N.Y. Nov.30, 2000) ("Without notice of any sort . . . the defendants cannot be held liable for the injuries sustained by the plaintiff.").

Nevertheless, our review of the relevant caselaw shows that the majority view runs counter to Carnival's blanket argument that would obviate the need for the detailed analysis of the *res ipsa* doctrine that Plaintiff demands. The doctrine [24] could, if properly applied, govern a maritime action in federal court. After all, maritime law traditionally relies upon "general principles of negligence law." *Chaparro v. Carnival Corp.*, 693 F.3d 1333, 1336 (11th Cir. 2012). That is why the primary maritime standard of care is "ordinary reasonable care under the circumstances." *Keefe*, 867 F.2d at 1322. And that standard of care has been developed primarily by case law development in the federal courts. *Id*. at 1320-21 (citing *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625, 628, (1959)); *see also Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 259 (1979) ("Admiralty law is judge-made law to a great extent, . . . "); *Romero v. Int'l Terminal Operating Co.*, 358 U.S. 354, 360-61 (1959) (constitutional grant "empowered the federal courts . . . to continue the development of [maritime] law").

The most commonly cited factors in developing this body of federal law have been reason,[4] common sense,[5] fairness,[6] simplicity, practicality[7] and uniformity.[8] [25] When it comes to the *correct* application of the doctrine of *res ipsa loquitur* all these factors supporting recognition of the doctrine in maritime cases. The doctrine has been adopted in almost all the states of the union, so much so that it encompasses its own section of the Restatement (Second) of Torts. It is based on the well-established, common sense notion that if no plausible explanation, other than a defendant's

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[4] *See*, *e.g.*, *Kermarec*, 358 U.S. at 631-32; *Keefe*, 867 F.2d at 1322; *see also* Schoenbaum, *Admiralty & Maritime Law* § 5.2 (5th ed. 11/16 update) ("In admiralty the duty of care may be derived from three basic sources: (1) duly enacted laws, regulations, and rules; (2) custom; and (3) the dictates of reasonableness and prudence.") (citations omitted).

[5] *See*, *e.g.*, *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 503 (2008) ("The common sense of justice would surely bar penalties that reasonable people would think excessive for the harm caused in the circumstances.") (adopting punitive damage remedy as a matter of federal maritime law based on 1-to-1 ratio to compensatory damages).

[6] *See*, *e.g.*, *id.* at 502 (system of common law (governing maritime actions) "rests on a sense of fairness in dealing with one another.").

[7] *See*, *e.g.*, *Kermarec*, 358 U.S. at 631 ("For the admiralty law at this late date to import such conceptual distinctions would be foreign to its traditions of simplicity and practicality.").

[8] *See*, *e.g.*, *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 401 (1970) ("Our recognition of a right to recover for wrongful death under general maritime law will assure uniform vindication of federal policies, removing the tensions and discrepancies that have resulted from the necessity to accommodate state remedial statutes to exclusively maritime substantive concepts.").

negligence, could account for a plaintiff's injuries then the burden of proof should be borne by the defendant. *See*, *e.g.*, Restatement (Second) of Torts § 328D (1965). There is simply no persuasive reason why federal maritime law, premised as it is on recognition of traditional principles of reasonableness and fairness, should not also recognize its potential application to a proper set of facts just as so many other common law jurisdictions have.

Accordingly, we find that Carnival's arguments for wholesale rejection of the doctrine in maritime cases lack merit.

(b) Effect of Negligence Maintenance Claim on Notice Requirement

Plaintiff's next argument is that, even if *res ipsa loquitur* does not forego the notice requirement, the theory of negligent maintenance provides another possible exception. *See Mabrey*, 438 So. 2d at 937 ("[A]ctual or constructive knowledge is irrelevant in cases not involving transitory, foreign substances (*i.e.*, the typical banana peel case), if ample evidence of negligent maintenance can be shown." (citing *194th Street Hotel Corp.*, 383 So. 2d at 739).

[26] In response, Carnival contends that Plaintiff cannot defeat the notice requirement by alleging a negligent maintenance theory of liability and that the cases Plaintiff relies upon are completely inapposite. Carnival argues that the notice requirement is a bedrock tenet of maritime negligence actions and is,

therefore, different from the state law cases that Plaintiff seemingly relies upon. *See Everett v. Carnival Cruise Lines*, 912 F.2d 1355, 1358 (11th Cir. 1990) ("The district court's view that Florida law controlled this issue, however, was incorrect. Because this is a maritime tort, federal admiralty law should control."). Specifically, Carnival suggests that Plaintiff's reliance on *Mabrey* is misplaced because in that case the court determined that the defendant had notice of a dangerous condition because it posted a "Slippery When Wet" sign in the area. As such, *Mabrey* is supposedly inapposite because it involved a defect that was readily observable.

We agree with Carnival that Plaintiff has failed to present any persuasive authority supporting the proposition that, by alleging a negligent maintenance theory, a per se exception arises to the notice requirement under federal maritime law. Unlike the doctrine of *res ipsa loquitur*, Plaintiff fails to cite a single case where a court has agreed with this position in a federal maritime cause of action. And all of Plaintiff's authorities involve circumstances where a defendant was obviously put on notice.

Plaintiff also does not adequately explain why a negligent maintenance theory, as a practical matter, would alter the general rule under binding Eleventh [27] Circuit precedent that requires a plaintiff to demonstrate actual or constructive notice when pursuing a federal maritime negligence action. Therefore, we find that Plaintiff's argument, as it relates to negligent maintenance, lacks the requisite support to obviate the

notice requirement under federal maritime law. In sum, we hold that *res ipsa* may obviate the notice requirement in a federal maritime negligence action, but that merely alleging a negligent maintenance cause of action does not.

5. Whether Res Ipsa Loquitur May be Invoked in This Case

To determine whether *res ipsa loquitur* applies to the facts of this case, the Supreme Court in *Johnson v. United States*, 333 U.S. 46, 68 (1948) formulated a three part test: (1) the injured party was without fault, (2) the instrumentality causing the injury was under the exclusive control of the defendant, and (3) the mishap is of a type that ordinarily does not occur in the absence of negligence. *See Johnson*, 333 U.S. at 68. If a plaintiff can meet all three elements, the jury may receive a *res ipsa* jury instruction because "[r]*es ipsa loquitur* may supply an inference from which the jury may conclude the defendant was negligent," and "[w]hile such an inference of negligence can get the plaintiff to the jury, application of *res ipsa loquitur* simply permits, but ordinarily does not compel, the inference of negligence on the part of the defendant." *Fruge v. Penrod Drilling Co.*, 918 F.2d 1163, 1167 (5th Cir. 1990); *see also Grajales-Romero v. Am. Airlines, Inc.*, 194 F.3d 288, 296 n.8 (1st Cir. 1999) ("[T]he *res ipsa loquitur* instruction should be given if the three conditions of *res ipsa loquitur* are satisfied"); *Millan*, 212 F. Supp. 3d at [28] 1306 (finding that plaintiff met the three *res ipsa* elements and reserving "any decision

on whether a *res ispa loquitur* instruction will be appropriate until later in this case."); *Lobegeiger v. Celebrity Cruises, Inc.*, 2011 WL 3703329 (S.D. Fla. Aug. 23, 2011) ("The jury may receive a *res ipsa loquitur* instruction if the plaintiff establishes" the three required elements). And when the question is put before a jury, "the burden of proof remains on the plaintiff to convince the jury to accept the inference of negligence." *Fruge*, 918 F.2d at 1167. Whether a case is fit for the application of *res ipa* is a question of law whereas it is the jury's function to weigh any conflicting evidence and ultimately choose whether a plaintiff's inference is to be preferred or not.

"The doctrine of *res ipsa loquitur* (Latin for 'the thing speaks for itself') had its origins in the 19th–century English case, *Byrne v. Boadle*, 159 Eng.Rep. 299 (1863), in which a barrel of flour rolled out of a warehouse window and fell upon a pedestrian beneath." *Taylor v. Riddell*, 320 Ark. 394, 896 S.W.2d 891, 893 n.1 (1995). "[D]eveloped to assist in the proof of negligence where the cause is connected with an instrumentality in the exclusive control of a defendant," the doctrine "allows the jury to infer negligence from the plaintiff's evidence of circumstances surrounding the occurrence." *Schubert v. Target Stores, Inc.*, 369 S.W.3d 717, 720 (2010). The doctrine "simply recognizes what we know from our everyday experience: that some accidents by their very nature would ordinarily not happen without negligence." *Dermatossian v. N. Y. C. Transit Auth.*, 67 N.Y.2d 219, 226 (1986) (citations omitted). Generally speaking, *res ipsa* is "an often confused [29]

and often misused doctrine," because courts have sometimes inferred negligence "simply from the fact that an event happened." *St. Paul Fire & Marine Ins. Co. v. City of New York*, 907 F.2d 299, 302 (2d Cir. 1990).

Yet, the doctrine should only be applied in "rare instances," and in situations where "common sense alone dictates that someone was negligent." *Whitted v. Gen. Motors Corp.*, 58 F.3d 1200, 1207 (7th Cir. 1995); *see also Insurance Co. of the W. v. Island Dream Homes, Inc.*, 679 F.3d 1295, 1299 (11th Cir. 2012) ("Outside the relatively rare circumstances implicating the principle of *res ipsa [loquitur]*, it is well-settled that the mere occurrence of a mishap does not prove that the mishap resulted from tortious conduct.") (quoting *Clark v. Polk County*, 753 So. 2d 138, 143 (Fla. 2d DCA 2000)); *Family Thrift, Inc. v. Birthrong*, 336 Ga. App. 601, 605, 785 S.E.2d 547 (2016) ("[T]he doctrine of *res ipsa loquitur* should always be applied with caution and only in *extreme* cases.") (emphasis added) (quotation marks and citations omitted). The reason for the rare application of the *res ipsa* doctrine is because it often makes "the plaintiff's light burden nonexistent, and deprive[s] the jury of its traditional role of assigning fault in negligence actions and assigning weight to circumstantial evidence." *Estate of Larkins by Larkins v. Farrell Lines, Inc.*, 806 F.2d 510 (4th Cir. 1986); *Otis Elevator Co. v. Chambliss*, 511 So. 2d 412, 413 (Fla. 1st DCA 1987) ("The doctrine of res ipsa loquitur is a doctrine of 'extremely limited applicability.' ") (quoting *Goodyear Tire & Rubber Co. v. Hughes Supply, Inc.*, 358 So. 2d 1339

(Fla. 1978)). And more importantly, courts have recognized that *res ipsa* "is commonly raised by plaintiffs to escape a nonsuit, or a [30] dismissal of their cause since [if the doctrine applies] there is sufficient evidence to go to the jury." *Tillson*, 2011 WL 309660, at *6. The parties in this case do not dispute the first element of the *Johnson* test. As such, our inquiry begins with the second element on whether Carnival or Plaintiff was in exclusive control of the chair in question.[9]

(a) The Element of Legally Exclusive Control of the Chair

Plaintiff's strongest argument why Carnival remained in exclusive control of the chair follows from Carnival's concession that it has sole responsibility for the inspection, maintenance, repairs, and/or cleaning

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[9] We note that when plaintiffs move for summary judgment on the application of *res ipsa*, courts have generally been reluctant to rule in their favor merely upon a demonstration that the doctrine applies. *See*, *e.g.*, *Harms v. Lab. Corp. of Am.*, 155 F. Supp. 2d 891, 907 (N.D. Ill. 2001) ("Courts are very reluctant to grant summary judgment for a plaintiff under the doctrine of *res ipsa loquitur*."); *Morejon v. Rais Constr. Co.*, 7 N.Y.3d 203 (N.Y. 2006) (holding that summary judgment for a plaintiff on a *res ipsa loquitur* theory should be a rare event, granted "only when the plaintiff's circumstantial proof is so convincing and the defendant's response so weak that the inference of defendant's negligence is inescapable."); *Rathvon v. Columbia Pac. Airlines*, 30 Wash. App. 193, 633 P.2d 122, 130–31 (Wash. Ct. App. 1981) ("The doctrine of *res ipsa loquitur*, in and of itself, is thus insufficient to support a summary judgment for a plaintiff unless the facts are undisputed.").

of the furniture to ensure safe conditions. Plaintiff adds that neither she nor her family members mishandled the chair prior to its use. On the other hand, Carnival contends that Plaintiff was undoubtedly in exclusive control because she had access to the chair at the time of the accident and in the 24 hours preceding it.

"The element of *exclusive control* in the res ipsa analysis does not mean that the defendant's control of the instrumentality be 'literally exclusive.'" *Welch v. NCL (Bahamas) Ltd.*, 2016 WL 4921010, at *2 (S.D. Fla. Jan. 8, 2016) (citing *Colmenares* [31] *Vivas v. Sun All. Ins. Co.*, 807 F.2d 1102, 1105 (1st Cir. 1986)). And it also does not mean that Carnival must have physical control because "it is enough that the defendant, and not a third party was ultimately responsible for the instrumentality." *Colmenares* Vivas, 807 F.2d at 1106; *see also Victorias Milling Co. v. Panama Canal Co.*, 272 F.2d 716, 726 (5th Cir. 1959) ("The use of the term exclusive control in many cases has been superseded by the phrase right of control, which means that the instrument causing the damage need not be in the physical control of the defendant, but rather may be within the management and power to control of the defendant.") (citation omitted).

Instead, it is established that a defendant "charged with a nondelegable duty of care to maintain an instrumentality in a safe condition effectively has exclusive control over it for the purposes of applying res ipsa loquitur." *Id.* This means that exclusive control can be found even if a defendant shares responsibility with

another, or "if [a] defendant is responsible for the instrumentality even though someone else had physical control over it." *Id*. at 1106 (citing W. Keeton, D. Dobbs, R. Keeton & D. Owen, *Prosser & Keeton on the Law of Torts* § 39, at 250–51 (5th ed. 1984) (exclusive control requirement met in a variety of circumstances in which the defendant did not have sole responsibility or physical control over the injury-causing instrumentality); *Otis Elevator Co. v. Yager*, 268 F.2d 137, 143 (8th Cir. 1959) (property owner and not maintenance company had exclusive control over elevator); Restatement (Second) of Torts § 328D comment g (1965) (exclusive control [32] requirement may be met even though responsibility was shared or someone else had physical control)).

The First Circuit's decision in *Colmenares Vivas* is instructive on this point. In that case, a married couple fell and were injured when an airport escalator handrail stopped moving.[10] When the coupled sued the airport operator, the trial court granted defendant a directed verdict on the ground that the case could not go to the jury on the theory of *res ipsa* because the element of exclusive control had not been established. The

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[10] Although the facts in *Colmenares Vivas* are unrelated to maritime law, the Eleventh Circuit has recognized that federal maritime law is drawn from both state and federal sources, including "an 'amalgam of traditional common-law rules, modifications of those rules, and newly created rules' which includes a 'body of maritime tort principles.' " *Brockington v. Certified Elec., Inc.*, 903 F.2d 1523, 1530 n.2 (11th Cir. 1990) (quoting and citing *East River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 865 (1986)).

First Circuit held that because the airport owner had a duty to maintain safe escalators, it effectively had exclusive control over them even though it was plaintiff who was riding the escalator at the time of the injury.

Judge Scola's recent decision in *Welch* adheres to the same principle. In *Welch*, NCL was charged with the duty to maintain a pool ladder in a safe condition and the court found that defendant had exclusive control over it for the purpose of applying *res ipsa loquitur*. *See Welch*, 2016 WL 4921010, at *2. Specifically, Judge Scola determined that "NCL is charged with the duty to maintain the pool ladder in safe condition" and that "it 'effectively has exclusive control over the [pool ladder] for the purposes of applying res ipsa loquitur.'" *Welch*, 2016 WL 4921010, at *2 (citing *Colmenares Vivas*, 807 F.2d at 1106).

[33] Based on the current state of the law as to this second element of the *res ipsa* doctrine, we agree with both decisions and find that it was Carnival that had exclusive control over the chair in question because both parties agree that it had sole responsibility for the inspection, maintenance, repairs, and cleaning of the cabin chair. *See also Cardina v. Kash N' Karry Food Stores, Inc.*, 663 So. 2d 642, 643 (Fla. 2d DCA 1995) ("[t]he plaintiff's mere proximity to the instrumentality causing the injury does not negate the exclusivity of the defendant's control in the absence of any evidence that the plaintiff's conduct-or that of any other person-precipitated the accident."); *Terry v. Carnival Corp.*, 3 F. Supp. 3d 1363, 1373 (S.D. Fla. 2014) ("[T]he

prior inspections, compliance and repairs do not show that Carnival was not in exclusive control at the time of the cruise.").

In short, Carnival has presented no argument that it could delegate those duties of maintenance and repair to anyone else. Accordingly, Plaintiff has met the second element for application of the *res ipsa loquitur* analysis.

(b) A Collapsing Chair Does not Satisfy the Third Element

As for the third *res ipsa loquitur* requirement, that the mishap be of a type that ordinarily does not occur in the absence of negligence, Plaintiff contends that the collapse of the cabin chair fits the requisite criteria. The chair allegedly came apart underneath Plaintiff during the normal use of the chair and Plaintiff states that nobody ever attempted to use the chair before she did at the time it collapsed. Because Carnival purportedly offers nothing to show that the negligence could have been caused from some other person, or entity, Plaintiff believes that only Carnival [34] can be held responsible for an accident that would not have occurred absent negligence.

Yet, we find that Plaintiff has, as a matter of law, failed to meet her burden of satisfying this final element of the *Johnson* test. *See*, *e.g.*, *Ashland v. Ling-Temco-Vought, Inc.*, 711 F.2d 1431, 1441 (9th Cir. 1983) ("[W]e want to make clear that the burden is on and remains with plaintiffs to establish each of the *res ipsa*

elements."). *Res ipsa loquitur* presupposes that an accident would not have happened *but for* the negligence of the defendant and will generally only apply in unusual circumstances where "the accident leave[s] *no room for a presumption* other than negligence on the part of the defendant. Therefore, it should not be invoked in the face of a *competing reasonable inference* that the accident was due to a cause other than defendant's negligence." *Louisiana & A. R. Co.*, 380 F.2d at 544 (emphasis added) (citations omitted). As the Tenth Circuit has explained, an inference of *res ipsa loquitur* must fail when an injury may be attributed to another cause with equal fairness:

> If there is any other cause apparent to which the injury may with equal fairness be attributed, the reason for a *res ipsa loquitur* inference fails, and the rule should not be invoked. The mere happening of an accident does not dispense with the requirement that the injured party must make some showing that the defendant against whom relief is sought was in some manner negligent, where there are other probable causes of the injury.

Trigg v. City & Cty. of Denver, 784 F.2d 1058, 1061 (10th Cir. 1986); *see also Estate of Larkins by Larkins*, 806 F.2d 510 (4th Cir. 1986) ("Where varying explanations [35] are equally probable, *res ipsa loquitur* cannot apply.") (citing W. Prosser and W. Keeton, *Law of Torts*, 248-49, 257-58).

Here, we cannot say that a collapse of a cabin chair onboard this cruise ship meets the standard of "letting

the thing speak for itself." The only conclusion to draw from the record is that the evidence presented does not tell the whole story of why the chair collapsed. It would therefore be speculation to suggest that *only* Carnival's negligence could have caused the chair to collapse. There are also plausible explanations for other causes of the chair collapse that had nothing to do with Carnival.

For example, the facts are in dispute about whether Plaintiff, her family, or anyone else actually came into contact with the chair prior to the incident because Plaintiff occupied the cabin for more than 24 hours prior to the incident.[11] But on the other hand, a trier of fact could find those claims not credible and find instead that the primary cause of the chair

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[11] No doubt, Plaintiff denies having done anything to cause the chair to fail. Neither Plaintiff nor her family members purportedly interfered with the chair before Plaintiff engaged in a normal use of the chair by sitting in it:

> Q. Did you daughter, to your knowledge, step on the chair, stand on the chair, do anything of the like?
>
> A. No.
>
> Q. Nothing prior to the incident?
>
> A. No.
>
> Q. Did you husband, to your knowledge, stand on the chair?
>
> A. No.
>
> Q. Do anything other than – anything other with the chair that we wouldn't normally see someone do with the chair, is that correct?
>
> A. No.

Deposition of Plaintiff, at 134:2-14.

collapse was misuse by a passenger or her family. Because a passenger like the Plaintiff undoubtedly had physical possession [36] of the chair for a material period of time, this plausible explanation undermines the case for a *res ipsa* presumption against Carnival.

Similarly, even assuming that neither Plaintiff nor anyone else in her party ever abused the chair, that assertion cannot automatically foreclose other reasonable scenarios where other individuals or passengers who used that room before the Plaintiff may have been responsible for the collapsing chair. The same chairs remain in each cabin voyage after voyage, meaning hundreds, if not thousands, of different passengers of all different sizes use the cabin chairs. This plausible scenario also undercuts the Plaintiff's theory. *See Garner v. Halliburton Co.*, 474 F.2d 290, 297 (10th Cir. 1973) (finding that *res ipsa* does not apply in situations where the reason for the negligent conduct "might easily have been due to the act of a third party"); *CSX Transp., Inc. v. Exxon/Mobil Oil Corp.*, 401 F. Supp. 2d 813, 821 (N.D. Ohio 2005) ("The doctrine . . . does not apply if facts show a force beyond defendant's control may have caused the harm.") (citing *Cleveland R.R. Co. v. Sutherland*, 115 Ohio St. 262, 265 (1926)); *Harris v. Nat'l Passenger R.R. Corp.*, 79 F. Supp. 2d 673, 679 (E.D. Tex. 1999), *aff'd*, 234 F.3d 707 (5th Cir. 2000) (finding that "plaintiff cannot reduce the likelihood of other causes leaving only the defendant's negligence. The fact that [a] door could be opened by anyone, leaves open the significant possibilities of the

plaintiff's own negligence or a third-party's negligence as a cause for the accident.").

While Plaintiff "need not eliminate all other possible causes," of the reason for the collapsed chair, the Restatement (Second) of Torts establishes that a [37] plaintiff "must demonstrate the absence of equally probable alternative causes for the injury":

> It is . . . necessary to make the negligence point to the defendant. On this . . . the plaintiff has the burden of proof by a preponderance of the evidence; and in any case where there is no doubt that it is at least equally probable that the negligence was that of a third person, the court must direct the jury that the plaintiff has not proved his case.

Trigg, 784 F.2d at 1060–61 (quoting Restatement (Second) of Torts § 328D comment f (1965)).

Plaintiff's argument here cannot satisfy this burden. Given the record presented, Plaintiff's claims do not warrant an inference of *res ipsa loquitur* because "[n]either common sense nor anything in the record compels the conclusion that only poor maintenance or careless inspection will lead to a chair's breaking. It is quite plausible that the defect which caused the collapse developed slowly and was not detectable from normal inspection." *Giacomelli*, 1991 WL 229957, at *2. It is equally possible that Plaintiff, guests, visitors, or third parties beforehand mishandled the chair in such a way that Carnival could not detect that the chair was defective. These are merely some out of the many

competing inferences that can be drawn given the facts of this case. Thus, the *res ipsa* doctrine cannot apply "to a case having a divided responsibility where an unexplained accident may have been attributable to one of several causes, for some of which the defendant is not responsible." *Brown v. Guzman*, 1965 WL 168019, at *2 (V.I. Mun. Aug. 10, 1965) (citation and quotation marks omitted).

[38] Moreover, the facts presented simply do not rise to the level of an unusual event – often necessary for the doctrine to apply – that gives rise to an inference that Carnival *must* have been negligent. The Latin phrase of *res ipsa*, "the thing speaks for itself," means that a plaintiff's injury and the events surrounding it can by themselves show negligence. Examples of cases where *res ipsa* has been applied are noticeably distinguishable from the facts of this case, such as the derailment of a railway car, or a piano falling off a building. *See*, *e.g.*, *Newell v. Westinghouse Elec. Corp.*, 36 F.3d 576, 579 (7th Cir. 1994) ("The rule relieves a plaintiff who, for example, opens a new tin of chewing tobacco and finds inside a human toe, from having to show exactly what act was responsible for the toe's inclusion in his tobacco.") (citing *Pillars v. R.J. Reynolds Tobacco Co.*, 117 Miss. 490, 78 So. 365 (1918)); *Hubschman v. Antilles Airboats*, 440 F. Supp. 828 (D.V.I. 1977) (seaplane engines dying midflight); T. Slack, *Pfiffner v. Correa: Determining the Necessity of Expert Testimony in A Medical Malpractice Claim*, 41 Loy. L. Rev. 365, 374 (1995) ("Specific examples deal with a physician fracturing a leg during an

examination, dropping a knife, scalpel, or acid on a patient, or leaving a sponge in a patient's body.") (citations omitted). The aforementioned circumstances are not ordinarily subject to reasonable dispute because it is generally understood that these sorts if incidents cannot occur absent negligence.

We find that the recent decision in *Aubain v. Kazi Foods of the V.I., Inc.*, 2016 WL 4490614, at *1 (V.I. Super. Aug. 23, 2016), is persuasive. The defendant in *Aubain* operated a business (a Pizza Hut) where plaintiff alleged he was injured [39] when he sat on a bench and it collapsed underneath him on account of a loose wooden peg. The plaintiff claimed that he injured his chin, back, and hip in the fall, and defendant moved for summary judgment. Because plaintiff could not meet all the elements of a traditional negligence claim, plaintiff attempted to defeat defendant's motion for summary judgment by claiming that the accident was of a kind that did not occur in the absence of negligence. But the court granted summary judgment in favor of the defendant because "with the possible exception of 'slip-and-fall' cases, *it is hard to get less extraordinary than a 'sit-and-fall' case*" because "many in the community would say that even well-maintained furniture breaks and even recently-inspected pegs come loose." *Id*. at *7 (emphasis added). The court explained that this case was "just one of the 'many types of accidents which occur without the fault of anyone.'" *Id*. (citing Restatement (Second) of Torts § 328D comment c). Accordingly, the court held that the "balance of probabilities of what caused [plaintiff's] accident

would certainly 'be *reasonably questioned or disputed*,'" and that plaintiff could not "apply res ipsa loquitur to halt the entry of summary judgment," in favor of the defendant. *Id*. The court noted in particular that, although advisory, the comments to the Restatement (Second) of Torts noticeably do "not include broken benches, broken chairs, or any equivalent accidents as examples of the types of events that *do not* ordinarily occur unless someone has been negligent." *Id.* at *7 n.14 (emphasis added).

[40] We agree. Specifically, the Restatement states that far more unusual circumstances such as gas explosions, or train derailments apply to the doctrine of *res ipsa*:

> [T]here are many events, such as those of objects falling from the defendant's premises, the fall of an elevator, the escape of gas or water from mains or of electricity from wires or appliances, the derailment of trains or the explosion of boilers, *where the conclusion is at least permissible* that such things do not usually happen unless someone has been negligent. To such events res ipsa loquitur may apply.

Restatement (Second) of Torts § 328D comment c (emphasis added). While the Restatement is not binding authority, it is influential because (1) courts have continually relied upon it in a variety of contexts, and (2) federal maritime law is drawn from state and federal sources, including bodies of maritime tort principles.

We acknowledge that, based upon our own independent research, there is a split of authority on whether a collapsing chair can meet all three elements of *res ipsa*. In many decisions since the 1980s, courts have found that collapsing chairs often fail to meet the doctrine because of the many possible explanations for why a chair might collapse. *See*, *e.g.*, *Family Thrift, Inc.*, 336 Ga. App. at 605 (holding that *res ipsa* was inapplicable to a collapsing chair at a store's dressing room because "[c]ertainly, through normal wear and tear, a chair – especially a used chair donated to a thrift store – can cease fulfilling its intended function and create a hazardous condition without negligence on the part of any individual.") (citing *Watts & Colwell Builders, Inc. v. Martin*, 313 Ga. App. 1, 6, 720 S.E.2d 329 (2011) (holding that *res ipsa loquitur* was not applicable to find defendant liable for injury caused when the door to a bathroom stall fell off its hinges and knocked plaintiff to the [41] ground because the failure of a hinge could have occurred in the absence of negligence); *Ballard v. S. Reg'l Med. Ctr.*, *Inc.*, 216 Ga. App. 96, 99, 453 S.E.2d 123 (1995) (holding that *res ipsa loquitur* was not applicable to find defendant liable when a handrail pulled out from the wall because the accident was not of the type that ordinarily occurs only because of someone's negligence)); *Piligian v. United States*, 642 F. Supp. 193, 197 (D. Mass. 1986) ("[T]he Court rules that *res ipsa loquitur* does not permit an inference of negligence in this case because the Court is not persuaded that the chair would ordinarily collapse only if the United States had been negligent."); *Kilgore v. Shepard Co.*, 52 R.I. 151, 158 A. 720, 721

(1932) (finding that the doctrine of *res ipsa loquitur* has no application to a door and that "a chair should be placed in the same category."); *see also Bonilla v. Univ. of Montana*, 116 P.3d 823, 827 (Mont. 2005) (holding that the fact that a chair collapses "is insufficient evidence, by itself, to satisfy the Restatement's requirement under subsection 1(b) that other responsible causes must be 'sufficiently eliminated.' ").

On the other hand, some courts – primarily in older cases – have reached the opposite conclusion for a myriad of reasons. *See*, *e.g.*, *Gresham v. Stouffer Corp.*, 144 Ga. App. 553, 553, 241 S.E.2d 451 (1978) (holding that in the case of a restaurant chair, "a jury would be authorized to infer negligence from the evidence that the chair collapsed during ordinary use by the plaintiff.") (citing *Raffa v. Central School Dist*., 227 N.Y.S.2d 723 (1962); *Tuso v. Markey*, 61 N.M. 77, 80, 294 P.2d 1102 (1956) (holding that a plaintiff's "general allegations of negligence, [42] accompanied by an allegation and proof that the instrumentality causing the accident was under the exclusive control of appellees, warranted [the] application" of *res ipsa*) (citations omitted); *Van Staveren v. F. W. Woolworth Co.*, 29 N.J. Super. 197, 102 A.2d 59, 62 (N.J. Super. Ct. App. Div. 1954) (holding that the motion for a judgment in favor of the defendant was properly denied because the collapsing "stools had been installed at the counter in 1948 and since then had been in constant use," and "[i]t was acknowledged by the representative of the defendant that no inspection whatever had been made of the brackets, bolts, or adjustments beneath the seats of the

stools during the period from 1948 until the occurrence of the mishap in 1951."); *Rose v. Melody Lane of Wilshire*, 39 Cal. 2d 481, 247 P.2d 335, 338 (1952) ("Seats designed for use by patrons of commercial establishments do not ordinarily collapse without negligence in their construction, maintenance, or use.") (citations omitted)).

While none of the aforementioned cases are necessarily controlling, they demonstrate that the application of *res ipsa* has continually evolved since its inception and that jurisdictions have varied considerably in their interpretations. *See Holmes v. Bright Beginnings CDC*, 2017 WL 421642, at *4 (C.D. Cal. Jan. 30, 2017) ("As later courts repeated the phrase, it evolved into the name of a rule for determining whether circumstantial evidence of negligence is sufficient," and therefore "[t]he procedural and evidentiary consequences that follow from the conclusion that an accident 'speaks for itself' vary from jurisdiction to jurisdiction."). Since the first *res ipsa* case, where a barrel of flour rolled out of a warehouse [43] window and fell on a pedestrian, courts have both broadened and restricted the doctrine's application at various points in time. *See*, *e.g.*, *United States v. Kesinger*, 190 F.2d 529, 532 (10th Cir. 1951) ("The modern trend of authority is to hold the rule of *res ipsa loquitur* applicable to airplane accidents, and we hold that it was applicable under the facts and circumstances presented in the instant case.") (footnote omitted).

As an example, the meaning of exclusive control would have already foreclosed the application of *res*

ipsa in this case because this element was far more restrictive in the earlier twentieth century. Yet "the modern trend has been toward a more relaxed analysis of 'exclusivity,' one asking whether the defendant, as opposed to a third party, is likely, by virtue of a close (though perhaps not truly exclusive) relationship to the accident, to have relatively superior knowledge regarding the accident's cause." *Williams v. KFC Nat. Mgmt. Co.*, 391 F.3d 411, 427 n.9 (2d Cir. 2004). Florida state courts, for instance, have "expanded the doctrine far beyond its intended perimeters, both by liberalizing the elements requisite to its application and by allowing the development of inferences not only as to the incident itself but also as to pre-incident acts, such as manufacture or production." *Chambliss*, 511 So. 2d at 413–14; *see also* M. Johnson, Note, *Rolling the "Barrel" a Little Further*, 38 Wm. & Mary L.Rev. 1197, 1202–04 (1997) (describing the various American approaches to the doctrine of *res ipsa loquitur*).

After an exhaustive review of collapsing chair cases in both state and federal courts in the last one hundred years, we find that the *modern* trend reflects the [44] view that "[w]hile it may be assumed . . . that a chair does not ordinarily collapse except for the negligence of someone, it does not necessarily follow that the collapse of a chair . . . must imply the negligence of the proprietor." *Rose v. McMahon*, 10 Mich. App. 104, 107, 158 N.W.2d 791 (1968). As support for this view, we find that there are generally three types of cases where plaintiffs invoke the *res ipsa* doctrine. The first is where there is sufficient evidence that a defendant

caused plaintiff's injury. This is basically the type of situation in the 1863 case involving the falling barrel of flour. This is generally the easiest case to present to a jury because there are few to no competing inferences as to the cause of an accident; the only question presented is whether a specific defendant was actually negligent or not. *See*, *e.g.*, *State of Cal. By & Through Dep't of Fish & Game v. S.S. Bournemouth*, 318 F. Supp. 839 (C.D. Cal. 1970) ("Factually, this case presents an appropriate situation for the application of *res ipsa loquitur*. All of the traditional elements are present . . . it is clear that an oil spill of this size could occur only in an extremely limited number of ways – primarily as the result of pumping the bilges or an internal fuel oil transfer.").

The second type of case is where there is evidence that a plaintiff was injured on account of negligence, but there is an open question as to whether the defendant or someone else was at fault. *See*, *e.g.*, *Ybarra v. Spangard*, 25 Cal. 2d 486, 154 P.2d 687 (1944). And the third scenario involves the question of whether it was defendant's negligence, rather than some other non-negligent act, or the action of a third party (including the plaintiff) that caused the injury. As one might expect, the [45] third scenario, which is the case here, is the toughest to present to a jury because the inference that negligence occurred at all cannot be easily drawn. And even if negligence can be established, there remains an open question of who was the cause of that negligence.

The facts in our case squarely fit the third scenario. Hence, the authority in for these types of cases is much more uniform since the 1980s, whether the item in question was a chair or not. As an example, in a 1987 decision – *Otis Elevator v. Chambliss* – a Florida state appellate court reversed the trial court and held that an injured customer could not rely upon *res ipsa* where the customer failed to carry his burden of showing that an escalator's stopping was due to negligence. *See Chambliss*, 511 So. 2d at 413. The appellate court ruled that *res ipsa* could not apply even though Florida courts have liberalized the doctrine far beyond its intended perimeters. More specifically, the court found that *res ipsa* is *only* applicable where negligence is the probable cause of the accident in question and where the defendant is the probable actor. Because plaintiffs in *Chambliss* relied solely on the fact that the escalator stopped, they failed to meet "their initial burden of showing by appropriate evidence that negligence was the probable cause for the escalator's stopping." *Id*.

Although *Chambliss* is admittedly not a collapsing chair case, it remains persuasive because it stands for the principle that, in modern *res ipsa* cases involving the third scenario explained above, a plaintiff cannot merely rely on the fact that an accident occurred to apply the doctrine and defeat summary judgment. [46] *See*, *e.g.*, *De Zayas v. Bellsouth Telecommunications, Inc.*, 841 F. Supp. 2d 1257, 1261–62 (S.D. Fla. 2012) ("Plaintiffs have failed to present sufficient evidence of these elements to survive summary judgment . . .

Plaintiffs have failed to create a genuine dispute of fact as to whether there was an 'event' which caused 'an injury' – i.e., that any hazardous amount of pentachlorophenol was found in their water or on their property, or that there was an 'instrumentality' that 'caused' any injury."). *Chambliss* is also convincing because it involves an escalator, which courts have historically found to apply in the *res ipsa* context. Thus, *Chambliss* demonstrates that it is not necessarily the item (i.e. a chair or escalator) that automatically triggers the application of the *res ipsa* doctrine; it is the specific facts of each case and the evidence presented that must be carefully examined. This means that, while an item in one case may meet all the elements of *res ipsa*, another case involving the same item may not.

An equally persuasive case is a Georgia appellate court decision from 1995, where a plaintiff was injured as a result of a handrail being pulled out from a wall at a medical center. *See Ballard*, 216 Ga. App. At 96. The trial court granted summary judgment in favor of the defendant and the appellate court affirmed. The appellate court found that plaintiff could not rely on the doctrine of *res ipsa* because "it is not applicable when there is an intermediary cause which produced or *could* produce the injury, or where there is direct unambiguous testimony as to the absence of negligence by the defendant, or where there is no fair inference that the defendant was negligent." *Id*. at 99 (emphasis in original) (citations and quotation [47] marks omitted). Specifically, the court stated that "[a]lthough the devices that failed here (the screws and brackets

holding the handrail to the wall or the wall itself) are by no means as complicated as an escalator, they too can cease fulfilling their intended function and create a dangerous condition without someone's negligence." *Id*. (citations omitted). As such, the trial court properly granted defendant's motion for summary judgment because the elements of *res ipsa* could not be established given that this type of accident under the facts presented could have occurred for a variety of reasons.

Another analogous, but older, case to the facts presented is the decision in *Evansville Am. Legion Home Ass'n v. White*, 154 N.E.2d 109, 111 (Ind. 1958) *overruled on other grounds by McGlothlin v. M & U Trucking, Inc.*, 688 N.E.2d 1243 (Ind. 1997). In *Evansville*, a plaintiff attended a bingo game on the evening of the accident. After entering the bingo hall, she sat on a chair and it immediately collapsed. Plaintiff argued that *res ipsa* applied because an inference of negligence arose from the mere fact that a chair collapsed. Yet, the Indiana Supreme Court found that *res ipsa* could not apply because there was (1) no evidence of negligence, (2) no showing that the defendant had any prior knowledge of the defective chair, and (3) no suggestion that defendant had cause to suspect that the chair was defective. As such, there was no evidence that negligence proximately caused the injury more so than any other explanation for the chair's collapse. The court noted that "thousands of people had used the chairs, including the one in question during a period of some seven years without a single incident where one had collapsed [48] while at the hall." *Evansville Am.*

Legion Home Ass'n, 154 N.E.2d at 111. Accordingly, the Indiana Supreme Court found that *res ipsa* could not apply.

Every *res ipsa* case that we have reviewed since the 1980s that involves the third scenario – i.e. the situation of where it is unclear as to whether negligence occurred at all or if a third party (including the plaintiff) may be at fault – supports Carnival's contention that the doctrine cannot apply in this action. *See*, *e.g.*, *Loiacono v. Stuyvesant Bagels, Inc.*, 814 N.Y.S.2d 695, 696 (2006) (affirming the trial court's order granting the defendants' motion for summary judgment because the doctrine of res ipsa was inapplicable in a collapsing chair case because many customers sat on a chair before the injured plaintiff); *Harper v. Advantage Gaming Co.*, 880 So. 2d 948, 953 (La. Ct. App. 2004) ("[P]laintiff has not demonstrated factual circumstances which would show that the only reasonable conclusion is that defendants' breach of duty caused the accident. The testimony of the restaurant manager that the employees regularly checked the condition of the furniture during their daily cleaning and that other patrons had used the stools without any complaint that they were broken or unsteady does not support an inference that defendants were negligent.").

Given this record, the inconclusive evidence presented as to why the chair collapsed, and the fact that *res ipsa* is a "doctrine of extremely limited applicability," we cannot conclude that *only* Carnival's negligence could have resulted in the collapse of the cabin chair or that Carnival's alleged negligence is more probable

[49] than all other competing inferences. *See Monforti v. K-Mart, Inc.*, 690 So. 2d 631, 633 (Fla. 5th DCA 1997).

Accordingly, Plaintiff has failed to meet her burden in demonstrating that a *res ipsa* inference can be applied to the facts of this case because the thrust of her argument is merely that a chair collapsed and that she was injured. *See Ugaz v. Am. Airlines, Inc.*, 576 F. Supp. 2d 1354, 1369 (S.D. Fla. 2008) (finding no inference of negligence as a matter of law because the plaintiff had "shown nothing more than that [she] had been injured on the escalator," and "based on this fact alone it would not be likely that someone other than the [plaintiff] had been negligent.") (citations omitted). Without any other evidence, we do not have any way of inferring that (1) the reason for the chair's collapse was because of negligence, or (2) that Carnival was the probable actor of that negligence. In other words, there are many reasons as to why the cabin chair in this case could have collapsed, including (1) Carnival's negligence, (2) a non-negligent reason (i.e. wear and tear or a latent defect), (3) Plaintiff, (4) Plaintiff's guests or family members, or (5) the hundreds, if not, thousands of people that have occupied that room.

In short, if we adopted Plaintiff's position, the *res ipsa loquitur* doctrine, which should be applied only in the rarest of cases, would be a frequently used tool to bypass summary judgment in cases where no prior

actual or constructive notice was established. This cannot be the law, especially in this circuit.[12]

[50] Because Plaintiff cannot rely on the doctrine of *res ipsa* in this case, we are left with a case where actual or constructive notice has not been established, where we cannot merely presume that Carnival was negligent, and where the record does not allow for a jury to find in Plaintiff's favor. Consequently, we have no option but to grant Defendant's motion for summary judgment on Plaintiff's negligence claim. We, therefore, recommend that the motion be **GRANTED**.

B. Plaintiff's Motion for Summary Judgment [D.E. 39]

Plaintiff's first argument in her cross-motion is that she is entitled to summary judgment on Carnival's first affirmative defense, which alleges that "the negligence, actions, and/or misaction of the Plaintiff was the sole and proximate cause of any and all injuries and damages." [D.E. 5]. Plaintiff contends that Carnival can produce no record evidence that would allow a jury to find in its favor with respect to comparative fault. Therefore, Plaintiff suggests that summary judgment must be entered in her favor in connection with Carnival's first affirmative defense. Carnival's

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[12] *Cf. Pizzino v. NCL (Bahamas), Ltd.*, No. 16-16812, 2017 WL 4162194, at *3 (11th Cir. Sept. 20, 2017) (rejecting assertion that a cruise ship operator can be liable for negligence without notice even if it created the dangerous condition that injured a plaintiff).

only response is that it withdraws its first affirmative defense regarding the comparative negligence of Plaintiff. Therefore, partial summary judgment on this issue should be **MOOT**.

Next, Plaintiff advances the same arguments discussed above in that *res ipsa loquitur* applies to this case because (1) Carnival had exclusive control of the chair at the time of the incident and, that (2) the chair would not have broken absent negligence on behalf of Carnival. However, we have already discussed this issue above and find that Plaintiff simply repeats the same arguments presented in her [51] opposition to Defendant's motion. We find that Plaintiff has failed (1) to meet all of the elements of *res ipsa loquitur* and (2) to demonstrate that Carnival had actual or constructive notice of the cabin chair. Because Plaintiff has failed to establish all the elements of her negligence claim, Plaintiff's motion, on this basis, should be **DENIED**.

Plaintiff's final argument is that spoliation sanctions should be imposed because Carnival failed to preserve the cabin chair and that the failure to do so defeats Carnival's primary argument that it lacked actual or constructive notice. As a general rule, Carnival's disposal of the cabin chair may warrant sanctions in the form of either (1) dismissing the case altogether, (2) excluding expert testimony, or (3) instructing the jury that spoliation of evidence raises a presumption against Carnival. *See Flury v. Daimler Chrysler Corp.*, 427 F.3d 939, 945 (11th Cir. 2005). Plaintiff contends that Carnival's disposal of the chair constitutes

spoliation because Carnival knew or should have known that the chair caused injuries to Plaintiff and that Carnival removed the chair in bad faith.

Specifically, Plaintiff states that after the accident, she and her husband called guest services and sought medical attention on the ship after the incident occurred. Thereafter, Plaintiff claims that Carnival committed an affirmative act by removing the chair in full view of Plaintiff who lay injured on the floor.[13] [52] Plaintiff suggests that the undisputable fact remains that the cruise line took the broken chair and disposed of it under circumstances where it knew or should have known that Plaintiff was injured as a result of the chair's collapse. Plaintiff's husband then reported the incident through a passenger injury statement, which was completed approximately 30 minutes after the incident occurred. As such, Plaintiff believes that Carnival cannot explain away its disposal of the cabin chair as mere negligence because Carnival engaged in an affirmative act and Plaintiff alleges that Carnival should have known that the chair would be crucial evidence

[13] If cabin furniture is reported broken, a room steward removes the furniture and replaces it. If possible, the furniture will be fixed, otherwise it is disposed. Whether something is preserved in anticipation of litigation is a decision that is made by Carnival security personnel. Plaintiff did not speak to security personnel about her incident, and no investigation was launched into Plaintiff's accident. Therefore, Plaintiff's injury was classified as a non-reportable incident

in determining how the chair came apart, including the nature of the defect.[14]

"'Spoliation' is the intentional destruction, mutilation, alteration, or concealment of evidence.'" *Walter v. Carnival Corp.*, 2010 WL 2927962, at *2 (S.D. Fla. July 23, 2010) (citing *St. Cyr v. Flying J Inc.*, 2007 WL 1716365 at *3 (M.D. Fla. June 12, 2007)). To establish spoliation, Plaintiff must prove (1) that the missing evidence existed at one time, (2) that Carnival had a duty[15] to preserve the chair as evidence, and (3) that the evidence was crucial to Plaintiff being able to prove its prima facie case. *See Floeter v. City of Orlando*, 2007 WL 486633, at *5 (M.D. Fla. Feb. 9, 2007). "However, a party's failure to preserve evidence rises to the level of sanctionable spoliation 'only when the absence of that evidence is [53] predicated on *bad faith*," such as where a party purposely loses or destroys relevant evidence.'" *Walter*, 2010 WL 2927962, at *2 (citing *Bashir v. Amtrak*, 119 F.3d 929, 931 (11th Cir. 1997) (emphasis added)). And "[m]ere negligence" in losing or destroying records is not enough for an adverse inference, as "it does not sustain an inference of consciousness of a weak case." *Vick v. Texas Employment Comm'n*, 514

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[14] Carnival's medical staff determines if an injury is reportable to security, and an injury that requires anything beyond first aid is considered to be a reportable accident that gives rise to an anticipation of litigation.

[15] The duty to preserve evidence may arise prior to the commencement of litigation when a party contemplates litigation and it is reasonably foreseeable that the evidence is relevant to the litigation. *See St. Cyr v. Flying J Inc.*, 2007 WL 1716365, at *3 (M.D. Fla. June 12, 2007).

F.2d 734, 737 (5th Cir. 1975). In fact, even gross negligence is insufficient to make a finding of bad faith. *See*, *e.g.*, *Wandner v. Am. Airlines*, 79 F. Supp. 3d 1285, 1298 (S.D. Fla. 2015) ("Given this Circuit's requirement that an adverse inference flowing from spoliation requires the presence of bad faith, even grossly negligent discovery conduct does not justify that type of jury instruction."); *Selectica, Inc. v. Novatus, Inc.*, 2015 WL 1125051, at *3 (M.D. Fla. Mar. 12, 2015) (finding that gross negligence will not support the imposition of spoliation sanctions).

"If direct evidence of bad faith is unavailable, bad faith may be founded on circumstantial evidence when the following criteria are met: (1) evidence once existed that could fairly be supposed to have been material to the proof or defense of a claim at issue in the case; (2) the spoliating party engaged in an affirmative act causing the evidence to be lost; (3) the spoliating party did so while it knew or should have known of its duty to preserve the evidence; and (4) the affirmative act causing the loss cannot be credibly explained as not involving bad faith by the reason proffered by the spoliator." *Walter*, 2010 WL 2927962, at *2 (quoting *Calixto v. Watson Bowman Acme Corp.*, 2009 WL 3823390, at *16 (S.D. Fla. Nov. 16, 2009)).

[54] One possible flaw in Plaintiff's argument is that the evidence suggests that Carnival may not have reasonably anticipated litigation. "Once a party reasonably anticipates litigation, it is obligated to suspend its routine document retention/destruction policy and implement a 'litigation hold' to ensure the

preservation of relevant documents." *Goodman v. Praxair Services, Inc.*, 632 F. Supp. 2d 494, 511 (D. Md. 2009) (quoting *Thompson v. U.S. Dept. of Housing & Urban Development*, 219 F.R.D. 93, 100 (D. Md. 2003)); *U.S. ex rel. King v. DSE, Inc.*, 2013 WL 610531, at * 7 (M.D. Fla. Jan. 17, 2013) *Report and Recommendation adopted*, 2013 WL 608541 (M.D. Fla. Jan.15, 2014) (When party becomes aware of claims or defenses it has an obligation to conscientiously preserve all evidence that is relevant to those claims and defenses that is in existence when the duty to preserve attaches.).

Plaintiff appears to assume that because she called guest services and went to the medical center to complete a passenger injury statement that Carnival should have reasonably anticipated litigation. The passenger injury statement in this case is a one-page document that states, among other things, the date, time, room number, the witnesses of the accident, and what Plaintiff was doing at the time of the accident. After reviewing the passenger injury statement, it is noticeably short on details. The statement provides that Plaintiff called guest services and went to the medical center at 8pm. In answering the question of whether she was hurt, she states that the "[c]hair broke while sitting in it," and that her "arm landed on [the] shelf." [D.E. 44-8]. She also claims that she and her husband witnessed the [55] incident and that she was drying her hair at the time of the accident. In response to what happened in detail, she states again that she was drying her hair when the chair leg broke and that she

landed on her right arm with all her weight. Other than the miscellaneous details discussed above, the only other material statement on the form is that the accident occurred in her room and that a new chair would have avoided the accident.

"'The obligation to preserve evidence arises when the party has notice that the evidence is relevant to litigation or when a party should have known that the evidence may be relevant to future litigation.'" *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 216 (S.D.N.Y. 2003). "This notice may come at hands of differing events, but mostly commonly, a party is deemed to have notice of pending litigation if the party has received a discovery request, a complaint has been filed, or any time a party receives notification that litigation is likely to be commenced." *Oxford House, Inc. v. City of Topeka, Kansas*, 2007 WL 1246200, at *3 (D. Kan. Apr. 27, 2007). In other words, "[a] party has the requisite notice when it can reasonably anticipate impending litigation – that is, litigation that has 'more than a possibility' of occurring – to which the evidence would be relevant." *Garcia v. United States*, 2014 WL 12709430, at *1 (C.D. Cal. Sept. 3, 2014) (quoting *Realnetworks, Inc. v. DVD Copy Control Ass'n, Inc.*, 264 F.R.D. 517, 523–24 (N.D. Cal. 2009)). This means that "[a] general concern over litigation does not trigger a duty to preserve evidence," because there is "no duty to preserve relevant documents or evidence [56] until a potential claim [is] identified or future litigation [is] probable." *Realnetworks, Inc.*, 264 F.R.D. at 526.

Here, there does not appear to be any concrete evidence that future litigation was probable or that litigation was looming against Carnival. While "litigation often ensues when persons are injured in commercial premises such as those operated by the defendant," "that alone is not sufficient to transform [a] document from one prepared in the ordinary course of the defendant's business to one prepared in anticipation of litigation." *Danza v. Costco Wholesale Corp.*, 2012 WL 832289, at *2 (E.D.N.Y. Mar. 12, 2012). If Plaintiff had given Carnival sufficient notice of impending litigation, then that would have obviously created a duty for Carnival to preserve the broken chair.

Carnival's arguments are persuasive for several reasons. First, the medical staff determined that a reportable accident was not required in this case and that security need not be contacted.[16] Second, Plaintiff never states that she disagreed with a medical diagnosis, or that she spoke to security – or Carnival's management – herself to notify Carnival that she sought to classify the accident as a reportable offense. Third, there is no evidence that Plaintiff requested that the broken chair be preserved as an indicator that she planned to file suit. Fourth, Plaintiff's passenger injury statement was not a formal accident report. And fifth, Plaintiff's passenger injury statement is short on details and only establishes that (1) Plaintiff was

[16] Carnival's security staff determines whether something is preserved in anticipation of litigation.

drying her hair, (2) the chair broke, and (3) Plaintiff landed on her arm.

[57] And even if we assumed that Plaintiff had filed a formal accident report in this case, it is possible that Plaintiff has not met her burden of establishing that it was "'prepared exclusively and in specific response to imminent litigation' as opposed to in the normal course of business." *Vessalico v. Costco Wholesale Warehouse*, 2016 WL 3892403, at *2 (E.D.N.Y. July 14, 2016) (holding that accident reports are discoverable if there is nothing to suggest that it is prepared exclusively in anticipation of litigation); *see also Willis v. Westin Hotel Co.*, 1987 WL 6155, at *1 (S.D.N.Y. Jan. 30, 1987) ("[M]aterial prepared by non-attorneys in anticipation of litigation, such as accident reports and other investigative reports, is immune from discovery only where the material is prepared exclusively and in specific response to imminent litigation. The mere contingency that litigation may result does not give rise to the privilege.").

Of course, courts have also held that accident reports may be privileged where there is sufficient evidence, that upon the advice of legal counsel, the report was created in anticipation of litigation. *See*, *e.g.*, *Eisenberg v. Carnival Corp.*, 2008 WL 2946029, at *3 (S.D. Fla. July 7, 2008) ("[T]he accident report form utilized by Carnival was drafted by counsel for Carnival Cruise Lines and every completed accident report and photographs taken at the time of the accident are provided to counsel for Carnival following an accident. Based upon this sworn evidence, the Court finds that

at least one of the principle purposes for generating these reports is the preparation of Carnival's defense to litigation if it ensues. That is sufficient to trigger qualified work product production.") (citation omitted); [58] *Carnival Corp.*, 238 F.R.D. 318, 319 (S.D. Fla. 2006) (holding that a defendant cruise line's accident report regarding a slip and fall was not discoverable where the cruise line submitted an affidavit from its guest claims manager stating that it was the policy of the cruise line, upon the advice of its legal counsel, to investigate passenger injuries and create the accident report in anticipation of litigation); *Iaquinto v. Carnival Corp*., Case No. 05-21652-CIV-JORDAN (DE 18) (S.D. Fla. Nov. 18, 2005) (same); *Hickman v. Carnival Corp.*, 04-20044-CIV-UNGARO (DE 34) (S.D. Fla. Aug. 16, 2004) (finding cruise line accident report privileged where affidavit showed that it was prepared on the advice of counsel to provide claims handling information in anticipation of litigation).

Yet, in this case, Plaintiff has not necessarily met her burden of establishing that the passenger injury statement was prepared in direct anticipation of litigation.[17] And the document, by itself, does not as a per se rule automatically trigger a duty that Carnival should have anticipated litigation. Rather, the facts suggest that Plaintiff merely completed a form that was short on details, was not a formal accident report, and "appears to be a standard form that is completed in the

[17] For instance, Plaintiff does not point to any definite shift made by her or Carnival that deviates from Carnival acting in its ordinary course of business to acting in anticipation of litigation.

ordinary course of business whenever an accident occurs on Defendant's property." *Vessalico*, 2016 WL 3892403, at *2. Plaintiff appears to propose a rule where any routine passenger injury statement (let alone one that is scarce on details) puts a cruise ship on notice that litigation may ensue, even in circumstances where parties have not met any burden to support that position. As a consequence of that view, it [59] would require commercial operators, like Carnival, to preserve almost anything in question where a passenger was injured or became ill. *See*, *e.g.*, *McIntosh v. United States*, 2016 WL 1274585, at *34 (S.D.N.Y. Mar. 31, 2016) ("[T]o hold otherwise would essentially lay down a rule that prison officials should anticipate litigation whenever an inmate makes a complaint about any condition of his confinement.") (citation and quotation marks omitted).

Morever, assuming that Plaintiff had established all of the elements (including bad faith) of spoliation, it does not necessarily follow that an adverse inference against Carnival for the destruction of the cabin chair would establish that Carnival had actual or constructive notice. Stated differently, if we assume that the cabin chair was still in the possession of Carnival, it is not clear how we could determine that Carnival had notice. The most likely inference to draw from a collapsing chair is causation or damages in that the chair caused Plaintiff to fall and resulted in injuries to her arm.

Plaintiff does not address this point in her papers, nor does she explain how an adverse inference can be

drawn in this case (assuming that spoliation exists) to remedy her negligence claim. Plaintiff only states that Carnival's spoliation of the cabin chair gives rise to a presumption of negligence, which defeats Carnival's lack of notice argument. But, Plaintiff does not point to any case where a court has made an adverse inference to defeat the notice requirement in a negligence action, or, for that matter, any case where an inference is drawn where it is materially [60] disconnected from the alleged spoliation. This is one of many reasons as to why we cannot adjudicate Plaintiff's motion at this time.[18]

"Many of the considerations which guide whether a spoliation sanction is appropriate are factual matters that are best determined in the context of trial ruling, *after* dispositive motions are resolved. Therefore, to the extent that [Plaintiff] seeks a spoliation inference instruction at trial, her entitlement to this instruction may well turn on the precise nature of the proof at trial, and the credibility of various witnesses." *E.N. v. Susquehanna Twp. Sch. Dist.*, 2011 WL 2790266, at *3 (M.D. Pa. July 14, 2011) (emphasis added). Recognizing this principle and the need to assess the credibility of witnesses to fully resolve the question of whether Plaintiff has met all of the elements of spoliation (including bad faith), we find that Plaintiff's motion "should be deferred to a time closer to trial" because "'pretrial rulings regarding evidentiary questions]

[18] We recognize, however, that if Defendant's motion is granted as Recommended herein this aspect of the case will be moot.

should rarely be granted. . . .'" *Id*. (quoting *In re Paoli R. Yard PCB Litig.*, 916 F.2d 829, 859 (3d Cir. 1990)). Therefore, "we conclude that the appropriate course here is to deny this request that we find that spoliation sanctions are warranted here, without prejudice to [Plaintiff to] renew[ ] this request at the appropriate time, as determined by the trial judge. . . ." *E.N.*, 2011 WL 2790266, at *3 (M.D. Pa. July 14, 2011); *Zbylski v. Douglas Cty. Sch. Dist.*, 154 F. Supp. 3d 1146, 1172 (D. Colo. 2015) ("To the extent Plaintiff seeks preclusion of certain evidence . . . such sanctions are more appropriately determined by Chief Judge Krieger as the presiding judge, after she [61] resolves the pending motion for summary judgment and perhaps within the context of the admitted evidence and credibility of witnesses as offered at trial, with the assistance of findings reflected in this Order as she deems appropriate.").

IV. CONCLUSION

For the foregoing reasons, this Court **RECOMMENDS** that Defendant's Motion for Summary Judgment [D.E. 38] be **GRANTED** and that Plaintiff's Motion for Partial Summary Judgment [D.E. 39] be **DENIED**. With respect to Plaintiff's motion for a finding of spoliation sanctions, Plaintiff's motion should be **DENIED** on the merits or otherwise as moot.

Pursuant to Local Magistrate Rule 4(b) and Fed. R. Civ. P. 73, the parties have fourteen (14) days from service of this Report and Recommendation within which to file written objections, if any, with the District

Judge. Failure to timely file objections shall bar the parties from *de novo* determination by the District Judge of any factual or legal issue covered in the Report *and* shall bar the parties from challenging on appeal the District Judge's Order based on any unobjected-to factual or legal conclusions included in the Report. *See* 28 U.S.C. § 636(b)(1); 11th Cir. Rule 3-1; *Patton v. Rowell*, 2017 WL 443634 (11th Cir. Feb. 2, 2017); *Cooley v. Commissioner of Social Security*, 2016 WL 7321208 (11th Cir. Dec. 16, 2016).

DONE AND SUBMITTED in Chambers at Miami, Florida, this 22nd day of September, 2017.

/s/ *Edwin G. Torres*
EDWIN G. TORRES
United States Magistrate Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 18-11638-JJ

IRINA TESORIERO,

Plaintiff - Appellant,

versus

CARNIVAL CORPORATION,
d.b.a. Carnival Cruise Line,

Defendant - Appellee.

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

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

(Filed Sep. 11, 2020)

BEFORE: ROSENBAUM, GRANT, and HULL, Circuit Judges.

PER CURIAM:

The Petition for Rehearing En Banc is DENIED, no judge in regular active service on the Court having requested that the Court be polled on rehearing en banc.

(FRAP 35) The Petition for Rehearing En Banc is also treated as a Petition for Rehearing before the panel and is DENIED. (FRAP 35, IOP2)

ORD-42
