APPENDIX A

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 17-10259
Non-Argument Calendar

D.C. Docket No. 1:16-cv-21140-KMM

LEIGH ANNE MARSHALL,

Plaintiff-Appellant,

versus

ROYAL CARIBBEAN CRUISES, LTD.,

Defendant-Appellee.

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

(November 30, 2017)

Before JORDAN, JULIE CARNES, and JILL PRYOR, Circuit Judges.

PER CURIAM:

Leigh Marshall brought this maritime personal injury action against Royal Caribbean Cruises for injuries she allegedly sustained while on board the

Enchantment of the Seas on March 5, 2016. It had rained off and on throughout that day, and it was undisputed that Ms. Marshall and her traveling companions were aware of the rain and the wetness of the external surfaces of the ship. Near midnight, as Ms. Marshall reached the bottom of a flight of external stairs she was descending, she slipped on a puddle on the deck at the bottom of the stairs and twisted her ankle.

Following discovery, the district court granted summary judgment in favor of Royal Caribbean, concluding that any alleged danger presented by the wet external deck was open and obvious, and that Royal Caribbean had no duty to specifically warn Ms. Marshall of the wetness. The court also found that Ms. Marshall had failed to present sufficient evidence that Royal Caribbean had actual or constructive notice of any dangerous condition regarding the wet floor or the staircase. Ms. Marshall now appeals.

After reviewing the record and the parties' briefs, and for the reasons outlined in the district court's thorough and well-reasoned discussion of the duty owed by Royal Caribbean to Ms. Marshall, as well as the open and obvious nature of the danger presented, we affirm. First, Ms. Marshall cannot establish that Royal Caribbean had a duty to warn her about the wet or slippery nature of the external decks because it was an open and obvious condition of which she was or should have been aware. *See Isbell v. Carnival Corp.*, 462 F. Supp. 2d 1232, 1238 (S.D. Fla. 2006) (under federal maritime law, an operator of a cruise ship has a duty to warn of

"known dangers which are not apparent and obvious"); *see also Samuels v. Holland Am. Line-USA Inc.*, 656 F.3d 948, 951, 953-54 (9th Cir. 2011) (citing *Isbell*). Second, Royal Caribbean had no duty to protect Ms. Marshall from any dangerous condition of which it had no actual or constructive notice. *See Keefe v. Bahama Cruise Line, Inc.*, 867 F.2d 1318, 1322 (11th Cir. 1989) ("as a prerequisite to imposing liability, [the carrier must] have had actual or constructive notice of the risk-creating condition"). Third, the district court properly found that Ms. Marshall failed to present evidence showing that Royal Caribbean created the dangerous wet condition on the deck or designed or manufactured the staircase. *See Thomas v. NCL (Bahamas), Ltd.*, 203 F. Supp. 3d 1189, 1194 (S.D. Fla. 2016) ("a cruise line cannot be held liable for an alleged improper design if the plaintiff does not establish that the ship-owner or operator was responsible for the alleged improper design"). Nothing in the record creates a genuine issue of material fact regarding any of these issues, and the district court did not err in granting summary judgment to Ms. Marshall.

Accordingly, we affirm.

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Eleventh Circuit

No. 17-10259

District Court Docket No.
1:16-cv-21140-KMM

LEIGH ANNE MARSHALL,

Plaintiff-Appellant,

versus

ROYAL CARIBBEAN CRUISES, LTD.,

Defendant-Appellee.

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

JUDGMENT

It is hereby ordered, adjudged, and decreed that the opinion issued on this date in this appeal is entered as the judgment of this Court.

Entered: November 30, 2017
For the Court: DAVID J. SMITH, Clerk of Court
By: Djuanna Clark

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 17-10259-GG

LEIGH ANNE MARSHALL,

Plaintiff-Appellant,

versus

ROYAL CARIBBEAN CRUISES LTD.,

Defendant-Appellee.

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

(Filed Jan. 23, 2018)

BEFORE: JORDAN, JULIE CARNES and JILL PRYOR, Circuit Judges.

PER CURIAM:

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

ENTERED FOR THE COURT:

/s/ [Illegible]
UNITED STATES CIRCUIT JUDGE

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

Case No. 0:16-cv-21140-KMM

LEIGH ANNE MARSHALL,

Plaintiff,

v.

ROYAL CARIBBEAN CRUISES LTD.,

Defendant. /

OMNIBUS ORDER

THIS CAUSE came before the Court upon Defendant Royal Caribbean Cruises Ltd.'s ("RCCL") Motion for Summary Judgment (ECF No. 50)[1] and Plaintiff Leigh Anne Marshall's Motion for Partial Summary Judgment and Sanction of a Negative Inference (ECF No. 53).[2] The Motions are now ripe for review. For the reasons set forth below, RCCL's Motion for Summary Judgment is GRANTED and Plaintiff's Motion for Partial Summary Judgment is DENIED.

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[1] Plaintiff filed a Response (ECF No. 71), and RCCL replied (ECF No. 75). Plaintiff also filed a Supplement to Plaintiff's Response (ECF No. 84).

[2] RCCL filed a Response (ECF No. 69), and Plaintiff replied (ECF No. 78). Plaintiff also filed a Supplement to the Reply (ECF No. 84).

I. BACKGROUND[3]

This is a maritime personal injury action brought by Plaintiff Leigh Anne Marshall ("Plaintiff" or "Marshall") against RCCL for damages allegedly sustained by Plaintiff while on board the vessel *Enchantment of the Seas*. *See* Defendant's Statement of Undisputed Material Facts ("Def's 56.1") (ECF No. 50). Plaintiff went on a cruise aboard the *Enchantment of the Seas* with her mother, sister, and niece. *Id.* ¶ 3. On March 5, 2016, Plaintiff and her family left the ship on an excursion to the Atlantis hotel in Nassau, Bahamas. *Id.* ¶ 5. Because it was raining on and off throughout the day, Plaintiff spent much of the excursion indoors. *Id.* ¶¶ 6-8. Plaintiff and her family returned to the ship in the evening and proceeded to dinner in the main dining room at 8:30 p.m., during which Plaintiff had roughly two double shots of whiskey. *Id.* ¶ 9. Plaintiff and her family left the dining room between 9:30 and 10:30 in the evening and went to R-Bar, where Plaintiff had a few more libations. *Id.* ¶ 10. After about an hour at R-Bar, Plaintiff went back to her stateroom because she learned that the party would be moved due to inclement weather. *Id.* Plaintiff, her sister, and her niece left

[3] The facts are taken from the First Amended Complaint ("Am. Compl.") (ECF No. 19), RCCL's Statement of Undisputed Material Facts which is incorporated into its Motion for Summary Judgment (ECF No. 50), Marshall's Statement of Undisputed Material Facts which is incorporated into her Motion for Summary Judgment (ECF No. 53), and additional facts incorporated into Marshall's Response to RCCL's Motion for Summary Judgment (ECF No. 71), and a review of the corresponding record citations and submitted exhibits.

their stateroom cabin between 11:30 p.m. and 12:00 p.m. [sic] to smoke cigarettes. *Id.* ¶ 11. They walked to the pool deck on Deck 9 to attend a party, however that party was canceled due at least in part to rain. *Id.* ¶ 14; *see also* Pl.'s Statement of Undisputed Facts, ¶ 14 (ECF No. 71). Upon learning that the party moved to Deck 11, Plaintiff and her family made their way towards Deck 11 by ascending an exterior stairway; they had no troubles with the ascent in any way. *Id.* ¶ 15, 17. Upon reaching the top of the staircase on Deck 11, they discovered that the door to the Viking Crown Lounge was locked and thus began their descent to Deck 10. *Id.* ¶ 16. Plaintiff's niece went down the stairs first, followed by Plaintiff, and then Plaintiff's sister. *Id.* As Plaintiff's foot touched the surface of the deck she slipped on the wet deck surface and rolled her ankle. *Id.* ¶ 20. The area was lit such that Plaintiff could see the deck well enough to walk. *Id.* ¶ 23. There were no warning signs alerting Plaintiff that the floor was wet. Pl's Statement of Material Undisputed Facts ("Pl.'s 56.1") (ECF No. 71), ¶ 34.

The Amended Complaint (ECF No. 19) asserts one count of negligence against RCCL. RCCL now moves for summary judgment on Plaintiff's negligence claim and Plaintiff cross-moves for summary judgment on the issue of RCCL's actual or constructive notice of the alleged dangerous condition.

II. LEGAL STANDARD

Summary judgment is appropriate where there is "no genuine issue as to any material fact [such] that the moving party is entitled to judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *see also* Fed R. Civ. P. 56. A genuine issue of material fact exists when "a reasonable jury could return a verdict for the non-moving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). "For factual issues to be considered genuine, they must have a real basis in the record." *Mann v. Taser Int'l, Inc.*, 588 F.3d 1291, 1303 (11th Cir. 2009) (citation omitted). Speculation or conjecture cannot create a genuine issue of material fact sufficient to defeat a well-supported motion for summary judgment. *Cordoba v. Dillard's, Inc.*, 419 F.3d 1169, 1181 (11th Cir. 2005).

The moving party has the initial burden of showing the absence of a genuine issue as to any material fact. *Clark v. Coats & Clark, Inc.*, 929 F.2d 604, 608 (11th Cir. 1991). In assessing whether the moving party has met this burden, the court must view the movant's evidence and all factual inferences arising from it in the light most favorable to the non-moving party. *Denney v. City of Albany*, 247 F.3d 1172, 1181 (11th Cir. 2001). Once the moving party satisfies its initial burden, the burden shifts to the non-moving party to come forward with evidence showing a genuine issue of material fact that precludes summary judgment. *Bailey v. Allgas, Inc.*, 284 F.3d 1237, 1243 (11th Cir. 2002); *see also* Fed. R. Civ. P. 56(e). "If reasonable minds could differ on the inferences arising from undisputed facts,

then a court should deny summary judgment." *Miranda v. B & B Cash Grocery Store, Inc.*, 975 F.2d 1518, 1534 (11th Cir. 1992). But if the record, taken as a whole, cannot lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial, and summary judgment is proper. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

III. DISCUSSION

RCCL argues that it is entitled to summary judgment because: (1) the alleged danger was open and obvious and RCCL had no duty to warn the Plaintiff of such danger; and (2) Plaintiff has not met her burden of demonstrating that RCCL had actual or constructive notice of a dangerous condition prior to Plaintiff's fall. Plaintiff, on the other hand, argues that the issue of whether the danger was open and obvious is an issue of fact that cannot be decided upon summary judgment. Plaintiff also argues that RCCL had actual and constructive notice of the risk-creating condition as evidenced by a warning sign on a nearby shuffleboard area.

Plaintiff cross-moves for partial summary judgment on the issue of RCCL's actual and constructive notice of the risk-creating condition. Plaintiff also moves for the sanction of a negative inference for RCCL's failure to preserve video footage of the incident.

Based on the undisputed record evidence, the Court reasons that no rational trier of fact could find that RCCL had a duty to warn Plaintiff of the allegedly

dangerous condition. Because there is no genuine issue as to any material fact, RCCL is entitled to summary judgment on Plaintiff's negligence claim.

A. Applicable Law

"Claims arising from alleged tort actions aboard ships sailing in navigable waters are governed by general maritime law." *Luther v. Carnival Corp.*, 99 F.Supp.3d 1368, 1370 (S.D. Fla. 2015) (citing *Keefe v. Bahama Cruise Line, Inc.*, 867 F.2d 1318, 1320 (11th Cir. 1989)). In analyzing a maritime tort case, courts "rely on general principles of negligence law." *Chaparro v. Carnival Corp.*, 693 F.3d 1333, 1336 (11th Cir. 2012) (citation omitted). "Cruise ship operators are not an all-purpose insurer of a passenger's safety." *Lugo v. Carnival Corp.*, No. 1:15-CV-21319-KMM, 2015 WL 9583280, at *3 (S.D. Fla. Dec. 31, 2015); *Weiner v. Carnival Cruise Lines*, No. 11-CV-22516, 2012 WL 5199604, at *2 (S.D. Fla. Oct. 22, 2012) ("A carrier by sea does not serve as an insurer to its passengers; it is liable only for its negligence.").

To establish a negligence claim, "a plaintiff must allege that (1) the defendant had a duty to protect the plaintiff from a particular injury; (2) the defendant breached that duty; (3) the breach actually and proximately caused the plaintiff's injury; and (4) the plaintiff suffered actual harm." *Chaparro*, 693 F.3d at 1336. The failure to show sufficient evidence of each element is fatal to a plaintiff's negligence cause of action. *Isbell v. Carnival Corp.*, 462 F.Supp.2d 1232, 1237 (S.D. Fla.

2006) ("Each element is essential to Plaintiff's negligence claim and Plaintiff cannot rest on the allegations of [the] complaint in making a sufficient showing on each element for the purposes of defeating summary judgment.").

A cruise ship operator owes its passengers "the duty of exercising reasonable care under the circumstances of each case." *Torres v. Carnival Corp.,* ___ Fed. Appx. ___, No. 14-13721, 2015 WL 7351676, at *5 (11th Cir. Nov. 20, 2015) (quoting *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625, 632, 79 S.Ct. 406, 3 L.Ed.2d 550 (1959)). This standard of care "requires, as a prerequisite to imposing liability, that the carrier have had actual or constructive notice of the risk-creating condition." *Keefe*, 867 F.2d at 1322. Further, a cruise ship operator's duty of reasonable care "includes a duty to warn passengers of dangers of which the carrier knows or should know, but which may not be apparent to a reasonable passenger." *Poole v. Carnival Corp.*, No. 14-20237-CIV, 2015 WL 1566415, at *5 (S.D. Fla. Apr. 8, 2015). However, there is no requirement to warn of dangers that are open and obvious. *Smith*, 620 F. App'x. at 730; *Smolnikar v. Royal Caribbean Cruises Ltd.*, 787 F.Supp.2d 1308, 1322 (S.D. Fla. 2011). "Open and obvious conditions are those that should be obvious by the ordinary use of one's senses." *Lancaster v. Carnival Corp.*, 85 F.Supp.3d 1341, 1344 (S.D. Fla. 2015). Whether a danger is open and obvious is determined from an objective, not subjective, point of view. *Flaherty v. Royal Caribbean Cruises, Ltd.*, No. 15-22295, 2015 WL 8227674, at *3

(S.D. Fla. Dec. 7, 2015) (internal quotation and citation omitted); *John Morrell & Co. v. Royal Caribbean Cruises, Ltd.*, 534 F.Supp.2d 1345, 1351 (S.D.Fla.2008) ("Individual subjective perceptions of the injured party are irrelevant in the determination of whether a duty to warn existed.") The "mere implication of actual or constructive notice is insufficient to survive summary judgment." *Taiarol*, 2016 WL 1428942, at *5 (internal citation omitted).

B. RCCL Had No Duty to Warn of an Open and Obvious Condition

Plaintiff alleges that RCCL failed to warn her of the wet and slippery condition of the deck and stairs between Decks 10 and 11, the site of Plaintiff's fall. The relevant facts are as follows. Plaintiff, who was not a first-time cruiser, and her family had dinner in the main dining room the evening of the accident. Plaintiff had roughly two double shots of whisky at dinner and then a few more drinks at R-Bar. After about an hour at R-Bar, Plaintiff went back to her cabin where she changed into a sundress and flip-flops.[4] At approximately 11:30 pm, Plaintiff and her family were on their way to a party on Deck 9 but learned that the party had moved, at least in part, because of the rain. Plaintiff and her family then proceeded towards Deck 11, where another party was being held, by ascending an exterior stairway. At the top of the stairway, they

[4] Plaintiff testified that the flip-flops were about a year old and well-worn such that they had "molded to [her] foot." *See* Marshall Dep. at 93:15-94:7.

realized that the door to the lounge was locked and went back down the stairs. Plaintiff's niece went down the stairs first without issue but Plaintiff, as she stepped off of the bottom stair, slipped and injured herself. Plaintiff could see where she was going but did not see that the deck was wet, although others testified that they could. There were no signs in that particular area warning Plaintiff of the wet floor. Under these circumstances, a reasonable person walking on an exterior deck and stairway would have perceived the outdoor conditions through the "ordinary use of [her] senses" and would have concluded based on the circumstances as a whole that the deck's surface and steps would likely be more slippery than usual. *See Frasca v. NCL (Bahamas), Ltd.*, 654 Fed. App'x 949, 952 (11th Cir. 2016).

Plaintiff relies upon the Court of Appeals' decision in *Frasca* in support of her opposition to RCCL's motion for summary judgment. 654 Fed. App'x 949. In *Frasca*, the Court of Appeals reversed the district court's grant of summary judgment on the issue of whether the dangerous condition was open and obvious. There, the district court reasoned that a reasonable person would have concluded that the deck's surface "would likely be slicker than usual" because the deck was visibly "wet and shiny" and there were puddles on the surface. *Id.* at 952. However, plaintiff introduced an expert report suggesting that the deck in question was *unreasonably* slippery when wet and this report was bolstered by the fact that one of plaintiff's travel companions also slipped when exiting onto the deck. *Id.* at 952-3. Here,

Plaintiff does not argue that the deck where Plaintiff slipped was unreasonably slippery[5], and her travel companions had no difficulty navigating the deck's surface.

Plaintiff argues that the condition was not "open and obvious" and even if it was RCCL was negligent in that it failed to maintain the premises in a reasonably safe manner. The risk-creating condition—the presence of rain water on the deck's surface—was a condition which a reasonable person in Plaintiff's position would have been aware of.[6] *See Smith*, 620 Fed. App'x

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[5] Plaintiff *does* argue that the shuffleboard "area was at risk of becoming dangerously slippery, and Defendant knew this and was on notice of this." *See* Pl.'s Br. (ECF No. 71) at 11-12. Alas, Plaintiff did not fall on the shuffleboard court and the Court finds this argument unpersuasive.

[6] Plaintiff testified as follows:

> Q. But the accident happened at the bottom of the staircase, correct?
>
> A. Stepping from the last step and then whenever I stepped, when my foot touched the deck that's when my ankle rolled.
>
> Q. And what caused your ankle to roll?
>
> A. It was wet.
>
> Q. And how do you know that?
>
> A. Because after I busted my ass, my hands were wet.

Marshall Dep. at 108:14-24 (ECF No. 50-1).

Plaintiff's sister testified as follows:

> Q. . . . What was the weather like when you walked out there [pool deck smoking area] at that time?
>
> A. It had been raining.

at 730 (holding that defendant did not breach its duty of reasonable care by failing to warn plaintiff of a condition which he, "*or a reasonable person in his position*, would be aware") (emphasis added)); *Luther v. Carnival Corp.*, 945 F. Supp. 2d at 1351 (finding a slippery deck caused by water from rain or mist was an open and obvious condition). Plaintiff's reliance upon *Thomas v. NCL (Bahamas), Ltd.*, ignores the particular circumstances surrounding her fall. First, the substance upon which the plaintiff there slipped was not a puddle as a result of rain or mist but a "clear, gooey, slimy substance." No. 15-23035-CIV-Williams, 2016 WL 5793952, *3 (S.D. Fla. Aug. 25, 2016). The nature of the puddle's substance is a relevant factor for the Court to consider in determining whether the condition was open and obvious. Second, the facts here make it abundantly clear that Plaintiff was aware that it had been raining on and off all day: Plaintiff's excursion to Nassau was

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> Q. Okay. Was it still raining when you walked out there?
>
> A. I don't remember if it was, you know, kind of drizzling, but I do know that it had been raining because everything was wet. And there was no party and I think they moved the party that was supposed to be at the pool, they moved it if I recall [to] the 11th floor because of the rain.
>
> Q. Okay. When you say you walked out and everything was wet, are you saying like the deck was wet? I mean when you say everything, what are you – in your mind what are you saying?
>
> A. I just remember looking around and thinking, oh, it rained.

Folsom Dep. at 33:13-34:6 (ECF No. 50-3).

affected by the weather; a party on the ship was relocated due to the rain; and Plaintiff's travel companions were aware of the fact that the deck was wet in certain areas. A reasonable person in Plaintiff's position would have been aware of the possibility of a puddle forming on an exterior surface of a cruise ship following a day of periodic rain.

Accordingly, the Court finds that RCCL had no duty to warn of an open and obvious condition.

C. <u>RCCL's Actual or Constructive Notice</u>

"[F]ederal courts need not even reach the defendant's actual or constructive notice of a risk-creating condition if they determine that [the] condition was an open and obvious danger." *Smith*, 620 Fed. App'x at 730. Assuming *arguendo*, that the Court was to find that the risk-creating condition was *not* open and obvious, RCCL's liability then turns on whether it had actual or constructive notice of the alleged dangerous condition. Courts routinely grant summary judgment in favor of a defendant when a plaintiff fails to present evidence on the issue of notice. *See Lipkin v. Norwegian Cruise Ling* [sic] *Ltd.*, 93 F. Supp. 3d 1311, 1324 (S.D. Fla. 2015) ("Because Plaintiff has failed to cite any evidence in the record showing that [defendant] had actual or constructive notice of the risk-creating condition alleged in the complaint . . . summary judgment in favor of [defendant] is appropriate in this matter."); *Thomas v. NCL (Bahamas) Ltd.*, No. 13-24682-CIV, 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"); *Cohen v. Carnival Corp.*, 945 F. Supp. 2d 1351, 1355 (S.D. Fla. 2013) (granting summary judgment where plaintiff "presented no evidence that [defendant] had actual or constructive notice of the alleged risk-creating condition," noting such evidence could include a "record of any accident reports, passenger comment reviews or forms, or reports from safety inspections alerting [defendant] of any potential safety concern"). The crux of Plaintiff's argument is that RCCL had constructive notice of the risk-creating condition because of a warning sign in a nearby area that reads "slippery when wet."[7] Plaintiff also argues that RCCL's failure to preserve video footage of the incident prior to about five or six minutes before her incident warrants the sanction of a negative inference for spoliation. In essence, Plaintiff argues that if such video had existed it would have shown that the area was in substantially the same condition for such a length of time that Defendant had constructive notice as a matter of law.

A stand-alone claim based on a cruise ship owner's "alleged duty to take actions to reduce or eliminate foreseeable risks before they manifest, where such claim is unconnected to [the passenger's] specific accident" is

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[7] Plaintiff also argues that evidence or prior substantially similar incidents put RCCL on constructive notice of the risk-creating condition. As discussed *supra*, the Court finds the evidence of prior similar incidents lacking and shall not consider it on summary judgment.

unsupported by maritime law. *Salazar v. Norwegian Cruise Line Holdings, Ltd.*, No. 15-21544, 2016 WL 2961584, at *1611 (S.D. Fla. May 23, 2016) (internal citation omitted). "[A] warning sign or label may be evidence that a defendant had actual or constructive notice of a dangerous condition." *Lipkin v. Norwegian Cruise Line Ltd.*, 93 F. Supp. 3d 1311, 1323 (S.D. Fla. 2015). Here, however, the "slippery when wet" sign on a shuffleboard[8] court near the scene of Plaintiff's fall is not evidence of constructive notice. First, the sign warning passengers that the shuffleboard area is slippery when wet was permanently affixed and thus has no bearing on the need for a warning on that particular evening. *See* Viswanathan Dep. at 122:24-123:10 (ECF No. 71, Ex. 3). Second, the record reflects that the material composition of the shuffleboard court flooring is different from the flooring at the base of the stairway. *See* Mayer Dep. at 40:19-23 (ECF No. 71, Ex. 8) ("It's a shuffleboard court, so it's harder in nature. It's designed to accommodate a shuffleboard game as opposed to the Bolidt surface that appears in the rest of the picture, which is designed for people walking.") Additionally, Plaintiff cites to testimony of RCCL employees regarding the signage and purpose of such guidance, but that testimony speaks exclusively to the shuffleboard area. *See* Campos Dep. at 48:6-17; Viswanathan Dep. at 123:2-10. A permanently affixed "slippery when wet" sign placed in an area with different

[8] "Shuffleboard is an offshoot of the ancient principle of lawn bowling, but in the method of play more closely resembles the game of curling on ice." *Cusano v. Kotler*, 159 F.2d 159, n. 4 (3d Cir. 1947) (internal citation omitted).

flooring provides no actual or constructive notice to RCCL that the flooring where Plaintiff fell is similarly slippery.[9]

Constructive notice may also be demonstrated where a defendant is aware of the existence of a dangerous condition for a sufficient length of time. *Thomas*, 2016 WL 5793952, *3. Plaintiff argues that summary judgment on the issue of notice is warranted because the eighteen-minute closed-circuit television ("CCTV") footage of Plaintiff's accident shows that the scene was virtually identical at the time of the accident and five minutes prior to the accident. Specifically, Plaintiff contends that additional video surveillance prior to the accident would have revealed the length of time the puddle of rain water was on the floor and thus establish RCCL's actual or constructive knowledge of the puddle. Even if the video showed that the rain water puddle existed at some point prior to the video start, the puddle was an *open and obvious* condition and therefore RCCL's notice is irrelevant. *See Smith*, 620 Fed. App'x at 730; *see also* Folsom Dep. at 33:21-22 ("I do know that it had been raining because *everything*

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[9] The cases to which Plaintiff cites are not precisely on point. In *Harnesk v. Carnival Cruise Lines, Inc.*, 1991 WL 329584, at *3 (S.D. Fla. Dec. 27, 1991), the Court made a finding of fact that defendants had actual notice of "the unreasonably dangerous coaming because they installed two strips of tape one inch thick lettered 'Watch Your Step.' " The warning signs in *Harnesk* were placed on the door and on the top of the coaming (elevated threshold) itself. In *Cohen v. Carnival Corp.*, 945 F. Supp. 2d 1351, 1356 (S.D. Fla. 2013), the Court reviewed the record regarding alleged warning signs. There, the court found no evidence of a warning sign at the bottom of the staircase where plaintiff fell.

was wet") (emphasis added). The record does not support an inference of constructive notice and the Court shall not, as Plaintiff urges, make a negative inference on this point.

D. <u>RCCL Did Not Breach Its Duty to Maintain</u>

Plaintiff argues that even if an open and obvious condition precludes a failure-to-warn claim, defendant RCCL had a duty to maintain the premises in a reasonably safe manner. Plaintiff argues that the premises were not maintained in a reasonably safe manner for the following reasons: (1) RCCL lacks a policy related to the cleaning up of rainwater; (2) RCCL could have employed a more slip resistant type of flooring; (3) RCCL failed to warn passengers that the door to the lounge on Deck 11 was locked; (4) RCCL failed to deploy fin stabilizers at the time of the accident; and (5) RCCL failed to correct an alleged design defect in the subject stairway.

In order to prevail on a negligence claim for a failure to maintain, a plaintiff must establish that "(1) the defendant had a duty to protect the plaintiff; (2) the defendant breached that duty; and (3) the defendant's breach was the proximate cause of the plaintiff's injuries and resulting damages." *Lipkin*, 93 F.Supp.3d at 1325. To establish breach of this duty, a plaintiff must show that the owner of the premises "failed to maintain the premises in a reasonably safe condition, or that the defendant failed to warn the plaintiff of a concealed peril of which it either knew or should have

known." *Id.* (internal citation omitted). A defendant cannot be found liable where it is not shown that there was actual or constructive notice of the dangerous condition. *Id.* The Court has already concluded that the record does not support a finding that RCCL had actual or constructive notice of the allegedly dangerous condition and that the condition was open and obvious. The puddle of rainwater on the exterior cruise ship deck following a day of intermittent rain and inclement weather which was known to passengers is not a concealed peril.

However, Plaintiff "need not prove notice where she also alleges that Defendant created the dangerous condition." *Harrison v. Royal Caribbean Cruises, Ltd.*, No. 1:12-cv-24111-UU, 2013 WL 12101117, at *3 (S.D. Fla. Sept. 18, 2013) (internal citation omitted). The record does not support a finding that RCCL's lack of a policy to clean up rainwater and the locked door on Deck 11 are evidence that it breached its duty to maintain the premises in a reasonably safe manner. Plaintiff "cannot avoid summary judgment on some generalized theory of foreseeability that is divorced from the particular events in question." *Weiner v. Carnival Cruise Lines*, No. 11-22516, 2012 WL 5199604, at *4 (S.D. Fla. Oct. 22, 2012). Plaintiff's argument that she would not have climbed up the subject steps had she known that the door on Deck 11 was locked is not tantamount to the creation of a dangerous condition. The Court also notes that Plaintiff does not allege that she was directed to use the external stairway to reach Deck 11 in order to reach her destination.

The record is also clear that the conditions at the time of the accident did not warrant the usage of fin stabilizers. A "[f]in stabilizer extends below the waterline, and its purpose is to counteract or count—offset the rolling motion of a vessel." Mayer Dep. at 34:26 (ECF No. 71, Ex. 8). They are deployed when the ship is traveling at six or seven knots or above and "the conditions warrant minimizing the rolling motion of the ship." *Id.* at 73:18-22. At the time of Plaintiff's accident, the ship would have been traveling rather slowly and the fin stabilizers would not have been deployed. *Id.* at 74:1-9. The fin stabilizers were not extended at the time of Plaintiff's fall. *See* Campos Dep., ECF No. 71, Ex. 2 at 79:11-14. Plaintiff asks the Court to find that whether the fin stabilizers should have been deployed presents an issue of fact for the jury to decide. The record is clear that there was no need for the fin stabilizers to be deployed and that there is little, if any, utility in deploying them when traveling at a slower speed such as the *Enchantment of the Seas* was traveling that evening. Plaintiff has not provided any compelling evidence indicating that the fin stabilizers should have been deployed. Thus, the Court finds that the failure to deploy fin stabilizers does not present an issue of fact as to whether RCCL created the hazardous condition.

RCCL's flooring selection similarly does not provide a basis for liability here. "A cruise line is not liable for any alleged improper design if the plaintiff does not establish that the ship-owner or operator was responsible for the alleged improper design." *Mendel v. Royal*

Caribbean Cruises, Ltd., 2012 WL 2367853, *2 (citing *Groves v. Royal Caribbean Cruises Ltd.*, No. 11-10815, 2012 WL 933236, *1 (11th Cir. Mar. 20, 2012)). The Court of Appeals has affirmed the grant of summary judgment where a plaintiff failed to offer evidence that the ship-owner was responsible for the design of the stairs which plaintiff slipped and fell on, causing injury. *Rodgers v. Costa Crociere, S.P.A.*, 410 Fed. App'x 210, 212 (11th Cir. 2010). Plaintiff argues that there is evidence that RCCL "approved of and can change the flooring" on the *Enchantment of the Seas* and that RCCL should have employed a type of flooring that is more slip resistant. *See* Pl's Br. at 16 (ECF No. 71). Plaintiff cites to the deposition testimony of RCCL's Chief Officer Safety Michael Mayer (ECF No. 71-8) wherein Mayer testified regarding different types of flooring on the ship. Mayer Dep. at 56:18-22; 58:1-4. When asked if RCCL has the ability to "change the surface of its decks if it believes that it may be inadequate or unsafe," Mayer responded

> . . . [Y]ou can always change flooring, and I've seen it done in the past, not necessarily different products, but different colors. My general understanding is a great deal of analysis goes into the type of flooring and where the flooring goes; and, yes, if there was an injury with a high incidence or an area with a high incidence of injuries, there would be thought put in place to consider a different type of flooring.

Mayer Dep. at 61:17-25. At best, Mayer's testimony indicates that RCCL is able to change the flooring color.

Additionally, as Chief Officer Security [sic], Mayer may suggest changes but does not have any direct input regarding changes made to flooring. *Id.* at 65:24-66:5.

In a similar vein, Plaintiff argues that the design of the last step of the subject staircase—such that the elevation above the ship deck is to a "dangerously greater degree than the difference in elevation between the steps immediately above it"—creates a genuine issue of material fact as to Defendant's creation of these conditions. ECF No. 78 at 5.[10] However, there is no evidence that RCCL designed the subject staircase. Plaintiff's attempts to pin liability on RCCL for breach of a duty to maintain the stairway and flooring in a reasonably safe manner both fail.[11] The Court's analysis with respect to the duty to maintain need not go further.

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[10] The Court notes that Plaintiff does not argue that RCCL designed the stairway. Accordingly, a negligent design claim as to the stairway fails. Testimony by Plaintiff's expert, De Caso, regarding the step and stairway design in support of a negligent design claim is moot. *See Groves v. Royal Caribbean Cruises, Ltd.*, No.09-20800, 2011 WL 109639, *1 (S.D. Fla. Jan. 11, 2011) ("[B]ecause no negligent design theory is possible in this case, the expert's testimony as to the design flaws in the relevant areas of this vessel is moot.").

[11] There is no evidence on the record that RCCL has actual or constructive knowledge of the alleged risk-creating condition posed by the last step before the deck surface. Specifically, there is no evidence in the record that RCCL knew or should have known that the last step prior to reaching the deck posed any risk-creating condition for its passengers. *See Cohen v. Carnival Corp.*, 945 F. Supp. 2d 1351, 1355 (S.D. Fla. 2013) (finding the cruise ship had no actual or constructive knowledge of the alleged risk of descending a gangplank leading off of a ship).

IV. MOTIONS TO STRIKE, EXCLUDE, AND IN LIMINE

The Parties filed several motions seeking to strike or exclude certain testimony, as well as motions in limine. Pursuant to Rule 702 of the Federal Rules of Evidence, expert testimony is admissible if:

> Scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

F.R.E. 702. "Rule 702 compels the district courts to perform the critical 'gatekeeping' function concerning the admissibility of expert *scientific* evidence." *U.S. v. Frazier*, 387 F.3d 1244, 160 [sic] (emphasis in original) (citing *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 589, n.7, 597 (2006)). The court must also act as gatekeeper with respect to the admissibility of technical expert evidence. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147 (1999).

In determining the admissibility of expert testimony under Rule 702, the Court considers whether:

> (1) The expert is qualified to testify competently regarding the matters he intends to address; (2) the methodology by which the

> expert reaches his conclusions is sufficiently reliable as determined by the sort of inquiry mandated in *Daubert;* and (3) the testimony assists the trier of fact, through the application of scientific, technical, or specialized expertise, to understand he [sic] evidence or to determine a fact in issue.

Finestone v. Florida Power & Light Co., No. 03-14040-CIV, 2006 WL 267330, *8 (S.D. Fla. Jan. 6, 2006) (internal citations omitted).

A. RCCL's Motion to Strike (ECF No. 51)

RCCL moved to strike certain expert testimony of Francisco J. De Casa Basalo and William F. Landsea (ECF No. 51). Plaintiff filed a response (ECF No. 72) and RCCL replied (ECF No. 76). RCCL argues that Plaintiff has not established the proper foundation for the admission of certain expert testimony of Dr. De Caso Basalo, a civil and structural engineer, and that he should be precluded from offering any speculative and unreliable expert testimony at trial. RCCL argues that Landsea's opinions regarding economic losses are unreliable and speculative and do not meet the standards of Rule 702 and that his opinions should be stricken.

Specifically, RCCL moves to exclude certain testimony of Francisco J. De Caso Basalo regarding: (1) the likelihood that the design failure of the stairway caused the fall, and (2) the likelihood that inadequate

or defective illumination on the landing surface at Deck 10 may have been a contributing factor.

Having found that the record does not support a finding that RCCL was responsible for the design of the subject stairway, Dr. De Caso Basalo's testimony regarding the alleged design failure is now irrelevant. *Rodgers v. Costa Crociere, S.P.A.*, 410 Fed. App'x at 212 (holding that neither the facts nor the law supported plaintiff's negligent design theory of liability where there was no evidence that defendant actually designed the stairs or hand rails where plaintiff fell).

Dr. De Caso Basalo's opinion regarding the allegedly defective illumination as a possible contributing factor are excluded because he did not inspect the lighting of the vessel in the area of Plaintiff's fall during a similar time of day and thus his opinion is speculative at best and lacks probative value. *Allison v. McGhan Med. Corp.*, 184 F.3d 1300, 1311-12 (11th Cir. 1999).

RCCL moves to strike William Landsea, an economist, as an expert based on unreliable methods and speculation, a lack of information and documentation, and impermissible inferences. The issue of Plaintiff's economic losses is now moot, thus the motion to strike the testimony of expert Landsea is now moot as well.

B. Plaintiff's Motion in Limine (ECF No. 54)

Plaintiff seeks to preclude counsel for RCCL, as well as any witnesses called by RCCL, from introducing

certain evidence to the jury regarding Plaintiff's bankruptcy and prior litigation as well as evidence of Plaintiff's consumption of alcoholic beverages without a prior order from the Court. The motion is denied as moot.

C. RCCL's Motion in in [sic] Limine (ECF No. 52)

RCCL moves to preclude evidence of testimony concerning prior and subsequent dissimilar incidents. *See* ECF No. 52. Plaintiff seeks to introduce evidence of eight prior incidents which Plaintiff argues are substantially similar to her accident and thus put RCCL on notice of a risk-creating condition.

The "substantial similarity" doctrine does not demand identical circumstances, and "allows for some play in the joints depending on the scenario presented and the desired use of the evidence." *Sorrels v. NCL (Bahamas) Ltd.*, 796 F.3d 1275, 1287 (11th Cir. 2015). In *Sorrels*, the Court of Appeals held that the district court acted within its discretion when it found that none of the twenty-two other slip and fall incidents plaintiffs sought to introduce could be considered. There, none of the twenty-two accidents took place in the exact location where plaintiff fell, only three of the twenty-two passengers reported slipping on the same substance as plaintiff, and of those three, two passengers were wearing different footwear which could be found to be a contributing factor to the accident. *Id.* Plaintiff bears the burden of proof to establish that

prior incidents occurred under substantially similar conditions to those of Plaintiff's incident. *See Hessen v. Jaguar Cars, Inc.*, 915 F.2d 641, 649-50 (11th Cir. 1990).

In response to an interrogatory seeking information as to "any prior incidents or complaints of incidents of persons (1) slipping or tripping on any exterior stairways, including any exterior stairways leading between Decks 8 through 11; and (2) slipping or tripping at the foot or base of any stairway that comes into contact with the soft Bolidt floor surfaces on Deck 9 or 10," RCCL provided information regarding eight incidents that took place on the *Enchantment of the Seas* for the three year period prior to Plaintiff's accident and through July 27, 2016. *See* RCCL's Answers to Pl.'s Second Interrogatories (ECF No. 71-5) at 2. Of these eight incidents, the majority are easily dispelled as dissimilar.[12] Plaintiff highlights the similarities of an incident involving Ms. Kimberly Johnson, who slipped on wet stairs while using the external staircase between Decks 9 and 10. However, this incident also did not occur on the same surface where Plaintiff's accident occurred. Plaintiff's argument that the similarity is evident from a similar use of terminology with respect to the injury ("rolled" vs. "rowed") is unavailing—the description of Ms. Johnson's ankle injury provides no insight into the circumstances which led to her

[12] Passengers Denise Chinery-Hesse, Kerry Hamann, Ashley McPipkin, Glenn Morris, Tyrese Pearsal, and Linda Wood all fell *on* the stairs, unlike Plaintiff who testified that she slipped and fell on the deck's surface. *Id.*

injury nor can the Court extrapolate a connectedness to Plaintiff's injury. Finally, the only remaining incident that is alleged to be "substantially similar" is one involving Mr. Ronald Whitecotton who slipped on a puddle. However, Plaintiff has not established that Mr. Whitecotton's incident is substantially similar to Plaintiff's accident. The location of the incident has not been established on the record and without this information it is unknown whether the flooring was of the same material as the one Plaintiff slipped upon. The record is also devoid of any evidence regarding other environmental factors prior to Mr. Whitecotton's fall. The Court finds that Plaintiff has not met her burden of proof and evidence of these eight incidents is precluded.

Accordingly, UPON CONSIDERATION of the motion, the pertinent portions of the record, and being otherwise fully advised in the premises, it is ORDERED AND ADJUDGED that the Motion (ECF No. 52) is GRANTED.

V. CONCLUSION

For the foregoing reasons, it is hereby ORDERED AND ADJUDGED that Defendant RCCL's Motion for Summary Judgment (ECF No. 50) is GRANTED and Plaintiff's Motion for Summary Judgment (ECF No. 53) is DENIED.

It is further ORDERED AND ADJUDGED that:

1. RCCL's Motion to Strike (ECF No. 51) is GRANTED IN PART.
2. Plaintiff's Motion in Limine (ECF No. 54) is DENIED AS MOOT.
3. RCCL's Motion in in [sic] Limine (ECF No. 52) is GRANTED.
4. All other pending motions are DENIED AS MOOT.
5. The Clerk of Court is instructed to CLOSE the case.

DONE AND ORDERED in Chambers at Miami, Florida, this 6th day of January, 2017.

Kevin Michael Moore
2017.01.06 17:39:16-05'00'

/s/ Kevin Michael Moore
K. MICHAEL MOORE
CHIEF UNITED STATES
DISTRICT JUDGE

c: All counsel of record