UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 19-24668-CIV-LENARD/O'SULLIVAN

DEBORAH REED,

Plaintiff,

v.

ROYAL CARIBBEAN CRUISES, LTD.,
a foreign corporation, and JOHN DOE,

Defendant.

_____/

PLAINTIFF'S AMENDED RESPONSE TO DEFENDANT'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

Plaintiff, DEBORAH REED, by and through her undersigned counsel, and pursuant to Fed. R. Civ. P. 56(a), responds to Defendant ROYAL CARIBBEAN CRUISES, LTD.'s Memorandum of law in Support of its Motion for summary. In support of her response, Plaintiff states as follows:

I. INTRODUCTION.

This is a personal injury case in which Plaintiff alleges that Defendant failed to provide adequate monitoring and security. On April 12, 2019, Plaintiff was accosted while she was a fare paying passenger aboard the RCCL *Vision of the Seas*. For approximately ten to fifteen minutes prior to being grabbed by an unruly, erratic, intoxicated, and dangerous JOHN DOE, JOHN DOE demonstrated this behavior in the presence of Defendant's passengers and crew members. Despite the fact that Defendant knew or should have known that JOHN DOE'S erratic, intoxicated, and/or dangerous behavior posed a risk to passengers such as Plaintiff, Defendant ignored these behaviors and failed to prevent JOHN DOE from accosting and grabbing Plaintiff against her will, forcibly spinning her around, and then suddenly, and without notice, releasing Plaintiff, causing Plaintiff to fall. Furthermore, JOHN DOE continued to grab Plaintiff against her will even after she fell, causing further damage to her. As a result, Plaintiff suffered traumatic injuries that include, but are not limited to, a fractured wrist which required surgery.

II. SUMMARY JUDGMENT STANDARD.

Summary judgment is appropriate when the pleadings, depositions, affidavits, and exhibits show that there is no genuine issue of material fact, and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a), (c); *Celotex v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 265 (1986). An issue of fact is "material" if it is a legal element of the claim under the applicable substantive law which might affect the outcome of the case. *Allen v. Tyson Foods, Inc.*, 121 F. 3d 642, 646 (11th Cir. 1997). An issue of fact is "genuine" if the record taken as a whole could lead a rational trier of fact to find for the nonmoving party. *Id.*

When evaluating a motion for summary judgment, a court must view all the evidence and all factual inferences drawn therefrom in the light most favorable to the nonmoving party and determine whether the evidence could reasonably sustain a jury verdict for the nonmovant. *Celotex*, 477 U.S. at 322-23; *Tyson*, 121 F.3d at 646.

"[O]nce the moving party has met its burden of showing a basis for the motion, the nonmoving party is required to 'go beyond the pleadings' and present competent evidence designating 'specific facts showing that there is a genuine issue for trial.'" *United States v. $183,791.00*, 391 F. App'x 791, 794 (11th Cir. 2010) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986)). Thus, the nonmoving party "may not rest upon the mere allegations or denials of his pleadings, but [instead] must set forth specific facts showing that there is a genuine issue for trial." *See Anderson v. Liberty Lobby, Inc.*, 106 S. Ct. 2505 at 2510 (1986). "Likewise, a [nonmovant] cannot defeat summary judgment by relying upon conclusory assertions." *Maddox Jones v. Bd. of Regents of Univ. of Ga.*, 2011 WL 5903518, at *2 (11th Cir. Nov. 22, 2011).

Finally, Defendant claimed, in response to Plaintiff's motion for leave to supplement her motion for summary judgment response, that unwanted touching was not alleged to be an issue in Plaintiff's pleadings. However, this is not correct. See, e.g., [DE 35 at ¶ 15] ("Plaintiff did not consent to any touching between the two."); see also, e.g., Id. at ¶ 24(g) (Alleging that Defendant breached its duty of care because it "[f]ailed to prevent uninvited physical contact aboard RCCL's ships[.]").

III. COMPARATIVE FAULT AND THE OPEN AND OBVIOUS DOCTRINE.

Although a cruise ship owner's duty to warn its passengers of certain risks aboard the vessel is discharged where the risk is "apparent and obvious" to passengers, *see Smith v. Royal*

Caribbean Cruises, Ltd., 620 F. App'x 727, 730 (11th Cir. 2015), "the issue of openness and obviousness of the danger is a fact issue which cannot be disposed of by summary judgment." *See Johns v. Pettibone Corp.*, 769 F.2d 724, 726 (11th Cir. 1985). More importantly, as the Honorable Judge Ursula Ungaro succinctly stated,

> the 'open and obvious danger' doctrine cited by Defendant **only applies to negligence claims predicated upon a failure to warn of a danger**. *See, e.g., Luby v. Carnival Cruise Lines, Inc*., 633 F.Supp. 40, 42 (S.D. Fla. 1986). A plaintiff **can still recover damages** against a defendant **under the principle of comparative negligence**, which maritime law applies, *see Kermarec*, 358 U.S. at 627, **even if plaintiff is injured by an open and obvious danger**. *See Mazzeo v. City of Sebastian*, 550 So.2d 1113, 1116-17 (Fla. 1989).

Johnson v. Carnival Corp., No. 07-20147-CIV, 2007 WL 9624463, at *3 (S.D. Fla. Dec. 13, 2007) (emphasis added); *see also Frasca v. NCL (Bahamas), Ltd.*, 654 F. App'x 949, 955 (11th Cir. 2016); s*ee also Smith*, 620 F. App'x at 730. In this regard, "maritime law follows a **pure comparative negligence theory**[ ] . . . [and] where a jurisdiction employs a comparative fault theory rather than contributory fault, the fact finder is tasked with apportioning percentage of fault of liability rather than holding that the entrustee is completely barred from recovery." *In re Gozleveli*, 2015 WL 3917089, at *5 (S.D. Fla. June 25, 2015) (emphasis added).

Indeed, the United States Court of Appeals for the Eleventh Circuit recently clarified the law on this matter, reasoning the same as in *Johnson*, and holding that,

> [T]**he Third Restatement of Torts treats the open and obvious nature of a dangerous condition as a factor to be considered in a comparative fault analysis—not as a bar to liability** for negligently maintaining premises. See id. ("An entrant who encounters an obviously dangerous condition and who fails to exercise reasonable self-protective care is contributorily negligent. Because of comparative fault, however, the issue of the defendant's duty and breach must be kept distinct from the question of the plaintiff's negligence."). As the Third Restatement of Torts notes, **a contrary rule that would preclude liability because a risk is open and obvious would "sit[ ] more comfortably—if not entirely congruently—with the older rule of contributory negligence as a bar to recovery."** *Id*.
>
> We think **the approach of the Third Restatement of Torts is consistent with maritime tort principles, and we adopt it**. For starters, it aligns with the Supreme Court's adoption of comparative negligence in maritime cases. *See Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625, 628–29, 79 S.Ct. 406, 3 L.Ed.2d 550 (1959) (holding that because maritime law governed the plaintiff's negligence claim, the district court erred "in instructing the jury that contributory negligence ... would operate as a complete bar to recovery," and that

> "[t]he jury should have been told instead that [the plaintiff's] contributory negligence was to be considered only in mitigation of damages"); *Smith & Kelly Co. v. S/S Concordia TADJ*, 718 F.2d 1022, 1029–30 (11th Cir. 1983) (applying comparative fault principles in a maritime case).
>
> Accordingly, **even if the risk was open and obvious, that does not preclude Mrs. Carroll's negligent maintenance claim**. *See Lewis v. Langenfelder & Son*, No. 2:01cv804 & 2:02cv622, 2004 WL 2996780, at *6 (E.D. Va. Aug. 17, 2004) ("If the nature of the gap between the vessel and the shore was a dangerous condition, it was created by the defendant through its employees, and the defendant had a duty to correct this condition, regardless of whether it was open and obvious. The decedent's decision to proceed despite this condition may have been contributorily negligent, but this conclusion is not a per se bar to recovery under the law of admiralty.").

Carroll v. Carnival Corp., 955 F.3d 1260, 1268–69 (11th Cir. 2020) (emphasis added) (footnote omitted). This means that the only hypothetical way a district court could dispose of an entire negligence claim on summary judgment based on the open and obvious doctrine would be if it weighed the comparative fault of a plaintiff for somehow failing to apprehend a dangerous, albeit obvious, condition against Defendant's comparative fault for its role in the presence of this condition in the first place, and assigned 100% of the fault to the plaintiff. However, this hypothetical scenario should not occur, because U.S. district courts are not supposed to weigh evidence when ruling on motions for summary judgment. *Thomas v. NCL (Bahamas), Ltd.*, 203 F. Supp. 3d 1189, 1191 (S.D. Fla. 2016) (citing *Anderson*, 477 U.S. at 249).

Since Plaintiff's operative complaint includes allegations of negligence not solely predicated on a failure to warn, the open and obvious doctrine cannot function to dismiss Plaintiff's case. See e.g., [DE 35 at ¶24(a)(k)] ("d. Failed to adequately monitor aggressive and/or unruly passengers; and/or e. Failed to enforce its "Guest Conduct Policy" and/or other internal policies and/or guidelines regarding unruly, drunken, and/or excessive behavior that affects other passengers; and/or f. Failed to effectively monitor alcohol consumption of passengers participating in the RCCL sponsored dance parties; g. Failed to prevent uninvited physical contact aboard RCCL's ships[.]"); *see also* [DE 35 at ¶63(a)(i)]. In this regard, while the jury is entitled to apportion a percentage of fault to Plaintiff for her own incident if it sees fit, it also is entitled to apportion a percentage of fault to Defendant. *See e.g., Johnson v. Carnival Corp.*, No. 07-20147-CIV, 2007 WL 9624463, at *3 (S.D. Fla. Dec. 13, 2007).

IV. PLAINTIFF'S FAILURE TO WARN CLAIMS SHOULD NOT BE DISMISSED, AS THE DANGERS WERE NOT OPEN AND OBVIOUS AS A MATTER OF LAW.

As an initial matter, Plaintiff notes that it is absurd that Defendant argues in one breath that the applicable dangers should have been obvious to Plaintiff, but somehow not also obvious to Defendant itself. Notwithstanding this absurdity, the question is not whether a condition itself was open and obvious, but whether the **danger** of the condition was open and obvious. *Petersen v. NCL (Bahamas) Ltd.*, 748 F. App'x 246, 250 (11th Cir. 2018), cert. denied, 139 S. Ct. 2775 (2019) ("Furthermore, we agree that, although the wetness of the deck was open and obvious, the unreasonably slippery state of the deck may not have been open and obvious to a reasonable person."); *Frasca v. NCL (Bahamas), Ltd.*, 654 F. App'x 949, 952 (11th Cir. 2016); *Knickerbocker v. Bimini SuperFast Operations*, LLC, 2014 WL 12536981, at *8 (S.D. Fla. Nov. 21, 2014); *Samuelov v. Carnival Cruise Lines, Inc.*, 870 So. 2d 853 (Fla. 3d DCA 2003); *Kloster Cruise Ltd. v. Grubbs*, 762 So. 2d 552 (Fla. 3d DCA 2000). Likewise, this Honorable Court held,

> The Court cannot say, as a matter of law, that the "handholding rule" posed an open and obvious danger to passengers. **It should be up to the trier of fact, after hearing the evidence presented at trial, to determine whether this practice is actually dangerous, and if so, whether it was open and obvious**. The Court cannot grant summary judgment for the Defendant on this ground.

Flaherty v. Royal Caribbean Cruises, Ltd., No. 15-22295-CIV, 2017 WL 487063, at *6 (S.D. Fla. Feb. 3, 2017) (emphasis added). In this regard, even the cases Defendant itself cites, it is clear that the evidence must be interpreted in the light most favorable to Plaintiff when ruling on Defendant's motion, and therefore these cases actually support Plaintiff's position rather than Defendant's. *See, e.g*., *Yusko v. NCL (Bahamas) Ltd*., 424 F. Supp. 3d 1231, 1236 (S.D. Fla. 2020) ("Upon review of the video recording of the incident, viewed in the light most favorable to Plaintiff, there is a dispute of fact as to whether Kaskie's manner of dancing was unreasonably or unforeseeably dangerous.").

Here, Plaintiff testified that she "had observed this male passenger approximately ten to fifteen minutes before he accosted [her], **but** [she] assumed that RCCL was also aware of his unruly, erratic, intoxicated, and dangerous behavior, and [she] assumed that RCCL had security ready that would have protected [her] if this male passenger started to accost [her]." [DE 57-2 at ¶4] (emphasis added). Thus, Plaintiff was clearly not aware of the extent of the danger she was in, because she was not aware that Defendant was not watching the dance and would not

intervene to help if this passenger accosted her. As to whether she bears some responsibility for trusting Defendant too much, the jury can apportion fault as it sees fit, **but even as to the duty to warn**, there is sufficient evidence on the record to establish that a reasonable person would not have been aware of the danger they were in while dancing with this passenger since a reasonable passenger might also have reasonably assumed that Defendant was watching the dance and looking out for the safety of its passengers.

Moreover, to the extent that Defendant argues that Plaintiff's injury statement says "losing balance while dancing" as the cause of Plaintiff's fall, Plaintiff's sister testified that "[m]y sister had started this report. It was too painful for her to write. So I took over writing it for her because of her injury." [DE 113-1 at 28:14-17]; see also Id. at 27:20-25 ("Yes, that's my writing, and I am filling this out, and it's asking me what I believe caused this accident, and I am answering it in my own words saying 'losing balance while dancing.'").

Finally, Defendant mentions "assumption of risk" in passing, but to the extent Defendant is trying to argue that the open and obvious doctrine can be an absolute bar to recovery under the assumption of the risk doctrine, that doctrine is explicitly not applicable under general Maritime Law (which Defendant does not dispute this case is governed by). Indeed, the former United States Court of Appeals for the Fifth Circuit, which is controlling in this district per *Bonner v. City of Prichard, Ala.*, 661 F.2d 1206, 1208 (11th Cir. 1981), has explicitly held that "**the doctrine of assumption of the risk has no place in general federal maritime law**." *Movible Offshore Co. v. Ousley*, 346 F.2d 870, 873 (5th Cir. 1965). This holding has been recognized and followed in this district. *Najmyar v. Carnival Corp.*, No. 1:17-CV-22448-UU, 2017 WL 7796327, at *2 (S.D. Fla. Aug. 28, 2017) ("[T]he doctrine of assumption of the risk has no place in general federal maritime law.").

Therefore, Plaintiff respectfully submits that there are genuine issues of material fact as to whether a reasonable person, such as Plaintiff, should have appreciated the extent of danger Plaintiff was in. As such, summary judgment on Defendant's duty to warn is improper.

V. PLAINTIFF HAS ABUNDANT EVIDENCE OF NOTICE

a. Constructive Notice Based on the Length of Time of the Dangerous Behavior.

"[E]vidence of substantially similar accidents is but one of the ways a plaintiff may prove a defendant's constructive notice of a defective condition." *Thomas v. NCL (Bahamas), Ltd.*, 203 F. Supp. 3d 1189, 1192 (S.D. Fla. 2016). For example, testimony from Defendant's employees is

sufficient to create an issue of fact on notice. *Thomas*, 203 F. Supp. 3d at 1193 (citing *Doudeau v. Target Corp.*, 572 Fed.Appx. 970, 972 (11th Cir. 2014). In *Aponte v. Royal Caribbean Cruise Lines Ltd*., 2018 WL 3083730 (11th Cir., June 22, 2018), the U.S. Court of Appeals for the Eleventh Circuit found that a plaintiff had presented sufficient evidence of notice of a puddle of soap that caused a plaintiff's incident where

> [g]iven *Aponte*'s description of the soap bottle (roughly one foot tall and three inches in diameter) and the amount of soap on the floor (roughly one-and-a-half feet in diameter), it is **reasonable to infer** both that the soap on the floor came from the bottle and that Aponte would have heard the relatively large bottle hitting the floor if it had fallen while he was in the restroom. Yet Aponte testified that he did not hear anything hit the floor or any noise other than the door opening and closing when the crewmember left the restroom. **These facts suggest that the soap bottle had fallen to the floor before Aponte entered the restroom and that the puddle of soap was present on the floor while the crewmember was dumping water into the first sink**.

Id. at *4 (emphasis added). Likewise, another way constructive notice can be established is by showing that a dangerous condition existed for a length of time such that a defendant should have known of its existence in the exercise of due care. see *Thomas*, 203 F. Supp. 3d at 1191-93 (Finding an issue of fact on notice where CCTV footage showed an employee cleaning the area where the plaintiff slipped **five minutes** before the incident, and where there was fifteen minutes of footage not showing anyone spilling a drink, or otherwise creating the puddle where the plaintiff slipped, prior to his incident).

As to the instant case, the opinion and order of *Lebron v. Royal Caribbean Cruises Ltd*., 818 F. App'x 918, 921 (11th Cir. 2020) is the most instructive. In that case, the Eleventh Circuit Court of Appeals reversed a directed verdict where the District Judge found that the plaintiff did not have sufficient evidence as a matter of law to support a finding of notice. However, the Eleventh Circuit reversed, noting that,

> Despite Royal Caribbean's apparent knowledge that poorly maintained ice can lead to accident and injury, Mr. Lebron's daughter, Claudia Lebron, testified that the ice had "gouges" and was "flakey" at the time they started skating. **Claudia testified she noticed the gouges and flakiness approximately ten to fifteen minutes before Mr. Lebron fell and sustained his injury**. While Claudia admitted on cross examination that she didn't tell any Royal Caribbean employee about the gouges or flakiness, this admission is not fatal to constructive notice.

> The question is whether Royal Caribbean should have known, not whether it actually knew, about the gouges in the ice. *Keefe*, 867 F.2d at 1322. In any event, **Claudia's testimony could lead a reasonable jury to infer the gouges in the ice existed for at least ten minutes before Mr. Lebron's accident**.
>
> Assuming the jury credited Claudia's testimony, as we must, the next question is whether Royal Caribbean should have noticed the gouges in the ten to fifteen minutes leading up to Mr. Lebron's fall. *See Keefe*, 867 F.2d at 1322 (explaining the hazard must be present "for a period of time so lengthy as to invite corrective measures"). To answer this question, we need look no further than testimony from Royal Caribbean employees. Royal Caribbean's corporate representative testified that it is Royal Caribbean's policy to station a crew member near the entrance of the ice rink. Royal Caribbean's chief safety officer, who investigated Mr. Lebron's fall, confirmed there were three employees supervising the ice rink at the time of the incident. And according to Royal Caribbean's ice rink manager, one of these employees was specifically responsible for "watching the ice." **This testimony establishes that Royal Caribbean employees were in the immediate vicinity of the ice and provides a sufficient basis for constructive notice**. *See Aponte v. Royal Caribbean Cruise Lines Ltd.*, 739 F. App'x 531, 536 (11th Cir. 2018) (holding where a crewmember in the immediate vicinity of a puddle of soap, a reasonable fact finder could conclude the crewmember knew or should have known about the puddle of soap).

Lebron, 818 F. App'x at 920-21. Here, Plaintiff declared that "[o]n April 12, 2019, [Plaintiff] was accosted by an unruly, erratic, intoxicated, and dangerous male passenger, who twirled [her] against [her] will." [DE 57-2 at ¶3]. Similar to the testimony of Claudia Lebron, the Plaintiff in the instant case declared that she "had observed this male passenger approximately **ten to fifteen minutes before he accosted** [her], but [she] assumed that RCCL was also aware of [JOHN DOE'S] **unruly, erratic, intoxicated, and dangerous behavior**, and [she] assumed that RCCL had security ready that would have protected [her] if this male passenger started to accost [her]." [DE 57-2 at ¶4] (emphasis added). In this regard, and contrary to Defendant's claims that the only evidence Plaintiff has regarding notice is that this male passenger was "kind of loud, kind of clumsy[,]" [DE 84 at p. 17], "[Plaintiff] **observed [JOHN DOE] stumbling, not keeping his**

balance well, and not keeping proper distance with his fellow passengers." [DE 57-2 at ¶5] (emphasis added). Moreover, as Plaintiff's travel companion, Ms. Tracy Lou Powel, declared,

> While we were on the dance floor, a man appeared to grab Ms. Reed's hand against her will, Ms. Reed did not reach out for him, and **Ms. Reed was trying to pull away from him immediately after he grabbed her and she continued to do so until she fell**. She did not appear to consent to dancing with this man, nor to being grabbed in this way, nor to being twirled, and this twirling caused her to fall.
>
> Furthermore, after Ms. Reed fell, this man appeared to grab Ms. Reed's wrists against her will while she was on the floor, and **I was yelling at him telling him to stop, but he continued to grab Ms. Reed, which I would describe as erratic, irrational, and improper behavior**.
>
> This man appeared to be grabbing Ms. Reed while she was on the floor very strongly and harmfully such that Ms. Reed's skin on her wrist broke.

See Powell Declaration, [DE 97-1 at ¶¶4-6] (emphasis added); see also [DE 113-2 at 13:17-15:21, 33:2-25] (In regard to JOHN DOE's dangerous behavior, Ms. Powell testified that "I would say yeah, it was a little erratic because personally, I don't feel like you grab a stranger's hands and just start pulling them back and forth. **So yeah, I would characterize that as erratic**.") (emphasis added); see also [DE 113-2 at 37:1-6] (Furthermore, Ms. Powell testified that "when he was reaching down, that's the closest I had been to him and that's when I could smell alcohol. So I can't say he was completely intoxicated, **but I did smell alcohol on his breath**" and this likewise supports Plaintiff's position that John Doe was impaired in some capacity prior to her incident. [DE 113-2 at 37:1-6] (emphasis added)). As the CCTV footage of Plaintiff's incident shows, this unwanted grabbing continued for at least a minute after Plaintiff's fall, meaning that Defendant continued to be on constructive notice of this man's dangerous behavior for at least 11 to 16 minutes when considering his actions even after Plaintiff fell.

In this regard, Mr. Collins also testified that John Doe's behavior was erratic prior to Plaintiff's incident. See Id. at 35:24-36:8 ("Q So that was the first time you appreciated any sort of movement s from the dance partner that were -- would you -- let me strike that. Would you call -- would you characterize his movements as erratic? A Yeah. Q Could you explain why? A I would have come up to the person and asked if I could dance instead of just grabbing or taking ahold of someone's hand."); see also Id. at 37:6-17 ("Q Would you characterize those

movements prior to them dancing as aggressive? A Somewhat. Q Can you explain? A Well, aggressive is, in my view, that you just walk up and just start dancing or taking a person and start dancing instead of walking up, getting the person 's attention and asking a question, and typically at that point, both people would reach out to each other. In this case, it appeared that he walked up and immediately grabbed her hands.").

Plaintiff also notes that Defendant also appears to be asserting that Plaintiff cannot establish notice in regards to the over-service of JOHN DOE at the time of the subject incident. [DE 84 at p. 19]. However, Plaintiff has the receipts of JOHN DOE that accosted Plaintiff, which show that JOHN DOE was served at least six alcoholic beverages within four hours, see [DE 92-1], and Defendant should have followed its policy of refusing "to serve alcoholic beverages to any guest who does not consume alcohol responsibly[,]" *see* Defendant's Response to Plaintiff's Fifth RFP, [DE 97-2 at p. 9]; *see also* Defendant's Response to Plaintiff's Second RFP, [DE 97-3 at p. 6] ("The Bar Manager is also responsible for ensuring that all bar staff, who may not have been on duty the previous evening, are made aware of the issues and pay close attention to the guest's future conduct.").

Defendant also fails to mention the receipts for JOHN DOE's alcohol purchases for the days prior to the incident as well, which clearly show that Defendant knew that he was consuming a large amount of alcohol prior to the incident, and therefore was on constructive notice that he might continue to consume such a large quantity of drinks on the date of Plaintiff's incident, and should have stopped him from doing so. In this regard, Defendant has finally produced the bar receipts from the days leading up to the date of the subject incident, [DE 114-1], which show Mr. Morris routinely ordering multiple drinks many, many throughout the days prior to Plaintiff's incident (in addition to throughout the times of the day of the incident prior to Plaintiff's incident as already discussed). In this regard, Plaintiff notes that *Broberg v. Carnival Corp.*, 798 F. App'x 586, 590 (11th Cir. 2020), cited in Defendant's response to Plaintiff's request to supplement her motion for summary judgment response, is distinguishable from her case, but not for the reasons Defendant points out. The main reason this case is distinguishable is because **one** of Plaintiff's allegation, namely negligent supervision of Plaintiff and the subject activity, does not require that Plaintiff prove that John Doe was intoxicated, and moreover because Plaintiff, unlike the Plaintiff in *Broberg*, does have evidence besides just the receipts that John Doe was a potential danger to Plaintiff, namely Plaintiff's testimony itself that he

appeared to be unruly and erratic, but that she simply assumed RCCL was supervising her activity. See [DE 57-2 at ¶ 4].

Plaintiff also respectfully submits that regardless of whether JOHN DOE was intoxicated when he grabbed Plaintiff without her consent, he was exhibiting unruly, erratic, intoxicated, and dangerous behavior, and based on the eleven to sixteen minutes that JOHN DOE was exhibiting this behavior, Defendant should have noticed it and at the very least pulled JOHN DOE aside and checked to make sure JOHN DOE wasn't a danger to his fellow passengers.

b. Prior Incidents.

Evidence of a substantially similar incident is sufficient to establish that a Defendant was on notice of a risk creating condition. *See*, *e.g.*, *Beretta v. Home Lines, Inc.*, No. 88 CIV. 7436 (LBS), 1990 WL 91737, at *3 (S.D.N.Y. June 26, 1990) (**one accident is sufficient to a create question of fact on notice**) (emphasis added).[1] Such prior accidents only need to be "substantially similar," not identical. *Weeks v. Remington Arms Co., Inc.*, 733 F.2d 1485, 1491-92 (11th Cir. 1984); *Ramos v. Liberty Mut'l Ins. Co.*, 615 F.2d 334, 339 (5th Cir. 1980). When evidence of similar incidences is used to establish notice, "the rule requiring substantial similarity of those accidents to the accident at issue should be relaxed." *Jackson v. Firestone Tire and Rubber Co.*, 788 F. 2d 1070, 1083 (5th Cir. 1986); *Schmelzer v. Hilton Hotels Corp.*, 2007 WL 2826628, at *2 (S.D.N.Y. 2007). In *Jones v. Otis Elevator Co.*, 861 F.2d 655, 661-62 (11th Cir. 1988), the Eleventh Circuit held that evidence of prior incidents in which an elevator had been found shut down without an actual rider or accident were nevertheless admissible to establish the company's notice of potential problems in a subsequent lawsuit by a passenger, who was injured when the elevator did not stop at the ground level, but instead hit the bottom of the elevator shaft several times causing injuries. In *Sorrels v. NCL (Bahamas) Ltd.*, 796 F.3d 1275 (11th Cir. 2015), the Eleventh Circuit, while discussing another case cited by Defendant, held that "[t]he 'substantial similarity' doctrine **does not require identical circumstances**, and

[1] If more than one prior incident was needed, this would be illogical. If this were the case, this Honorable Court would be required to weigh the evidence to determine what precise number of priors were required in each case before it, and it would also have to weigh those priors such that one very similar prior might count as two barely substantially similar priors, and so forth. This, of course, would run afoul of the rule that courts are not to weigh evidence on summary judgment. *See Thomas v. NCL (Bahamas), Ltd.*, 203 F. Supp. 3d 1189, 1191 (S.D. Fla. 2016).

allows for some play in the joints depending on the scenario presented and the desired use of the evidence." *Id.* at 1287-88 (citing *Borden, Inc. v. Florida East Coast Railway Co.,* 772 F.2d 750, 752 (11th Cir. 1985)).[2] Substantial similarity means that the accidents must have occurred **under similar circumstances or** share the same cause. *Croskey v. BMW of North America, Inc.*, 532 F.3d 511, 518 (6th Cir. 2008); *see also Hessen for Use & Benefit of Allstate Ins. Co. v. Jaguar Cars, Inc.*, 915 F.2d 641, 649 (11th Cir. 1990)).

Here, Defendant provided over thirty-five prior **incidents that share similar circumstances** to Plaintiff's fall, namely that these incidents all involved dancing. *See* Chart of Priors, [DE 97-4]. Like the court in *Jones* found, this is sufficient to put Defendant on notice, because even though all of the circumstances in each dancing event may not be identical to those in Plaintiff's, they do put Defendant on notice that these events are places where passengers routinely get injured, and therefore Defendant should have crew members watching areas where it organizes or sanctions dancing more carefully to watch out for potential dangers, just like the prior incidents of elevator malfunctions in *Jones* were sufficient to put the defendant in that case on notice that there may have been problems with its elevators.

More specifically, a number of prior incidents that were disclosed involve similar unruly passengers of one kind or another, such as the incident involving Ruiping Li, who fell on the *Voyager of the Seas* on April 25, 2016 and "**Was Pushed By Other People And Fell Down**. Her Right Joint Was Broken. -asked Colleague To Give Me Ice In Service Desk For Urgent Support. -went Downstairs And Saw The Doctor. - had Simple Treatment By Doctor." *See* [DE 97-4 at p. 1] (emphasis added). Another such passenger was Emma Ashton, who fell on the *Legend of the Seas* on December 25, 2016, who according to Defendant's notes "Fell Down On Her Left Wrist, Was Pushed Away By Other Guest[,]" and who, according to her report, was dancing,

> On Dancefloor, Othe[r] [ ]guest On The Cruise **Spun Around** With Arms And Legs And **Knocked Approx 5 Other Guest Over** Including Myself. As A Result I Twisted My Ankle And Fell On My Left Wrist Which Took All Of My Weight. **15 Minutes Prior To The Incident We Had Asked For This Patron To Be Removed Due To His Disorderly State**."

[2] While it is true that the 11th Circuit upheld the District Court's ruling that the prior incidents were not substantially similar, it did so under the abuse of discretion standard, and it appears likely, based on its reasoning and citation to *Borden*, that it would have found that the prior incidents were similar if it was exercising its own discretion.

See [DE 97-4 at p. 1] (emphasis added). And moreover, Tysen Urry also suffered a fall on the *Voyager of the Seas* on January 4, 2017, and stated that he was "standing / Dancing On Podium In Front Of Solarium Pool & **Got Pushed From Behind By Stranger & Fell** Into Pool & My Head Hit Bottom Of Pool." See [DE 97-4 at p. 1] (emphasis added). Likewise, Kim O'Connor suffered an injury when, on February 1, 2018 on the Radiance of the Seas, she "Was dancing and lady from behind as ship list **ran into the back of me and pushed me into the wall**, shoulder took the impact[.]" See [DE 97-4 at p. 2] (emphasis added). These incidents certainly are similar to Plaintiff's incident because they all either involved passengers pushing each other without the other's consent, which is analogous to grabbing passengers without their consent, or, as in the case of Emma Ashton, involve a passenger who was in a **disorderly state** for **approximately fifteen minutes prior** to **spinning around and injuring** other passengers. To require any more similarity would be to require identical circumstances, which the Eleventh Circuit is clear is not the standard. *See, e.g., Sorrels v. NCL (Bahamas) Ltd.*, 796 F.3d at 1287-88.

Furthermore, Defendant's guest security supervisor, Charlie Electores, testified as follows:

> Q.· ·Mr. Electores, have you ever investigated an incident aboard a Royal Caribbean ship where there was some suggestion that one passenger was intoxicated, had too much to drink, and touched or grabbed, inappropriately, another passenger? Have you ever investigated anything like that?
> MR. PEREZ: Object to form.
> THE WITNESS: Can I continue, sir? Can I answer that question?
> MR. PEREZ:· Yes, you can.
> THE WITNESS:· To be honest with you, sir, I have a lot of investigation with that kind of incident. I encounter a lot of investigation with that incident.
> BY MR. ARONFELD:
> **Q.· ·Have you ever investigated an incident of any kind that involved an unwanted touching, an unwanted grabbing by one passenger to another that occurred around the Centrum area or dance floor, in that area**?
> MR. PEREZ:· Form.
> THE WITNESS: Yes, sir.
> BY MR. ARONFELD:
> Q.· ·How many of those types of incidents have you investigated before, Mr. Electores?
> A.· ·**I have encountered a lot of incidents, more of a serious incident.**
> **Q.· ·More than a dozen times?**
> **A.· ·More than that, sir.· More than that**.
> . . .

> Q.· ·So has that ever happened, in your experience, at or around the Centrum? Has any bar staff called you and said, Hey, we've got somebody who's had a little too much to drink here?
> MR. PEREZ: Form.
> THE WITNESS: At that time when the incident took place?
> Q.· ·No, no. Just in general, before Mrs. Reed's incident, have you ever gotten a call from bar staff at or near the Centrum that says, Hey, we've got somebody here who's had a little too much?
> A.· ·No.· No, sir.
> Q.· ·I don't mean the day of Mrs. Reed. I just mean during your experience working for Royal Caribbean. Not that day, just in times before.
> MR. PEREZ:· Form.
> THE WITNESS:·It's very rare it happens in the Centrum. Most of the incidents took place at the disco late at night, but during the dance activity, we don't have much, any information about guests being aggressive in that place.
> BY MR. ARONFELD:
> Q.· ·I understand you say it's rare. I understand that, Mr. Electores, but has it ever happened, in your experience, at the Centrum?
> A.· ·**In the same ship, as far as I remember, there was a verbal argument at that time. Once I remember in that place, in the Centrum**.
> Q.· ·And who called you when that happened? Did bar staff call you?
> A.· ·Yeah, the bar staff. But when I get there, the bar staff already deescalated the situation.
> Q.· ·Oh, good.
> A.· ·Before I get there.
> Q.· ·So the bar staff is supposed to alert you --
> MR. PEREZ:· Form.
> Q.· ·-- if a passenger -- they're supposed to contact you --
> MR. PEREZ:· Form.
> THE WITNESS: **Anybody can alert us, because we are only for security on duty at that time. Right, we are -- we have a duty also, we have duty all over the ship. So any crew members are well trained, because we are also trained for see something, say something.**
> **Q.· ·They're supposed to do that, correct?**
> **A.· ·Yes, they're supposed to do that**.

See Deposition of Charlie Electores, [DE 109-1 at 26:17-27:18, 30:9-32:4] (emphasis added) (highlighting added). As another Court ruled on in the case of *Fisher v. Bumbo Int'l Tr.*, No. 1:14-CV-22209-UU, 2014 WL 12042519, at *6 (S.D. Fla. Aug. 27, 2014),

> Plaintiffs argue[d] that their evidence of prior incidents [we]re substantially similar because the accidents occurred when children fell out of the Bumbo seat. Plaintiffs also argue[d] that the other incidents [we]re not too remote because they occurred over the course of five years prior to D.F.'s injury. Defendants argue[d] that Plaintiffs c[ould] only introduce evidence of incidents that occurred while the

> Bumbo seat was used on a raised surface with a Play Tray attachment that resulted in physical injury.

Id. at *6. The *Fisher* Court ruled that,

> [t]he question of substantial similarity asks whether the other incidents are "**similar enough** to allow the jury to draw a reasonable inference concerning Defendant's notice" of the Bumbo seat's alleged dangers. *Whelan*, 2013 WL 5583966, at *3. The alleged dangers of the Bumbo seat are that infants can cause the seat to tip over and fall, and become injured from the fall. Accordingly, **it does not matter if the fall is occurring from an elevated surface or from the ground. So long as an infant is physically injured from such a fall, Defendants are on notice that such a danger exists**. Similarly, a prior incident involving a Bumbo seat without an attached play tray does not make the incident dissimilar. The play tray is not a safety feature, and with or without the play tray, prior similar incidents would put Defendants on notice that there is a danger children may fall out of the Bumbo seat.

Id. (emphasis added). Regardless of any discovery order entered in this case, which would not be binding when ruling on a motion for summary judgment (which does not implicate the same proportionality and burden concerns for the Defendant as discovery does), this Honorable Court has before it similar evidence as in *Fisher*, namely evidence that it had notice of the danger of unwanted physical touching, and that this had been a problem for previous passengers that it needed to address, which it particularly could have foreseen in a dance event such as Plaintiff's.

As such, Defendant clearly has notice of the danger of unruly passengers, both in general, but here, particularly in the context of dance events/activities, and therefore should have known that it needed to watch the subject dance for such unruly behavior.

c. Defendant's Policies and Procedures.

Finally, Defendant's alleged policies and procedures provide record evidence of how a reasonable Defendant would have behaved differently as well. *Holderbaum v. Carnival Corp.*, 2015 WL 5006071, at *5 (S.D. Fla. Aug. 23, 2015); *see also Pustka v. Printpack Inc.*, 168 F. App'x 583, 584 (5th Cir. 2006) (A defendant had more than a duty to simply promulgate these policies and procedures, it had a duty to enforce them and to properly carry them out); *see also Lebron v. Royal Caribbean Cruises, Ltd.*, No. 16-24687-CIV, 2018 WL 5113943, at *7 (S.D. Fla. Aug. 14, 2018), report and recommendation adopted sub nom. *Lebron v. Royal Carribean Cruises Ltd.*, No. 16-24687-CIV, 2018 WL 5098870 (S.D. Fla. Aug. 28, 2018) ("Thus, the safety video warning, **as well as RCL's policies**, are sufficient to create an inference that RCL had

actual or constructive knowledge that the failure of a passenger to have properly fitted and fully laced skates could be dangerous.") (emphasis added).

Moreover, the United States Court of Appeals for the Eleventh Circuit recently considered whether evidence of a Defendant's policies and procedures can be evidence of notice, and found as follows,

> In addition to the testimony of Mr. Symotiuk, there was also the testimony of a Carnival security officer, Manolyn Saldo. **She testified that part of her duties included patrolling Deck 11 and moving any lounge chairs that were blocking the walkway**. See D.E. 44 at ¶¶ 39–41. The assistant chief security officer, Siddhartha Kokate, likewise **testified that because passengers sometimes pull out chairs and do not put them back in place, they can create an "unsafe condition," so it is part of the staff's duties to take corrective action and remove that hazard**. See D.E. 44-6 at 14; D.E. 44 ¶¶ 45–47.
>
> As in Guevara and Sorrels, **a reasonable jury could view this testimony as evidence that Carnival has taken corrective measures—i.e., adopting a policy of keeping the chairs in-line and/or in the upright position and instructing employees to ensure that they are not blocking the walkway—due to a known danger. This is enough to withstand summary judgment on the issue of Carnival's notice**.

Carroll v. Carnival Corp., 955 F.3d 1260, 1266 (11th Cir. 2020) (emphasis added). Here, Defendant has a policy and procedure that inappropriate or abusive behavior "is not permitted." *See* Deposition Transcript of Defendant's Corporate Representative, [DE 97-5 at 18:10-13]. Specifically, the inappropriate or abusive behavior that is prohibited includes "uninvited physical contact[,] . . . [and] any other illegal or offensive conduct." *See Id.* at 18:15-19:2. Here, as previously discussed, Plaintiff declared that she "had observed [JOHN DOE] approximately **ten to fifteen minutes before he accosted** [her], but [she] assumed that RCCL was also aware of his **unruly, erratic, intoxicated, and dangerous behavior**, and [she] assumed that RCCL had security ready that would have protected [her] if this male passenger started to accost [her]." [DE 57-2 at ¶4] (emphasis added). In this regard, and contrary to Defendant's claims that the only evidence Plaintiff has regarding notice is that JOHN DOE was "kind of loud, kind of clumsy[,]" [DE 84 at p. 17], "[Plaintiff] **observed this male passenger stumbling, not keeping his balance well, and not keeping proper distance with his fellow passengers**." [DE 57-2 at ¶5] (emphasis added). Moreover, as Plaintiff's travel companion, Ms. Tracy Lou Powel, declared,

> While we were on the dance floor, a man appeared to grab Ms. Reed's hand against her will, Ms. Reed did not reach out for him, and **Ms. Reed was trying to**

> **pull away from him immediately after he grabbed her and she continued to do so until she fell**. She did not appear to consent to dancing with this man, nor to being grabbed in this way, nor to being twirled, and this twirling caused her to fall.
>
> Furthermore, after Ms. Reed fell, this man appeared to grab Ms. Reed's wrists against her will while she was on the floor, and **I was yelling at him telling him to stop, but he continued to grab Ms. Reed, which I would describe as erratic, irrational, and improper behavior**.
>
> This man appeared to be grabbing Ms. Reed while she was on the floor very strongly and harmfully such that Ms. Reed's skin on her wrist broke.

See Powell Declaration, [DE 97-1 at ¶¶4-6] (emphasis added). As such, Plaintiff respectfully submits that,

> a reasonable jury could view this testimony as evidence that [Defendant] has taken corrective measures—i.e., adopting a policy of [prohibiting uninvited physical contact] [. . .]—due to a known danger. This is enough to withstand summary judgment on the issue of [Defendant]'s notice.

Carroll, 955 F.3d at 1266 (emphasis added).

In sum, Plaintiff respectfully submits that all of the above evidence and more "allows the inference that the cruise ship operator had 'actual or constructive knowledge . . . [of the danger of these risk creating conditions].'" *Frasca v. NCL (Bahamas), Ltd.*, 654 F. App'x 949, 954 (11th Cir. 2016) (quoting *Sorrels v. NCL (Bahamas) Ltd.*, 796 F.3d 1275 (11th Cir. 2015)). Therefore, there are an abundance of genuine issues of material fact, Defendant's motion should be denied, and instead, summary judgment should be entered against Defendant's affirmative defenses as set out in Plaintiff's Motion for Summary Judgment. [DE 82]. *See Eli Research, LLC*, 2015 WL 5934632, at *4.

WHEREFORE, Plaintiff, DEBORAH REED, respectfully requests that the Court deny Defendant's motion in total, and all other relief this Honorable Court deems just and appropriate.

CERTIFICATE OF SERVICE

We hereby certify that on February 8, 2021, we electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or *pro se* parties identified on the below Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

Respectfully submitted,
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