UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 1:21-cv-22726-KMM

SHERRI BRITT,

Plaintiff,

v.

CARNIVAL CORPORATION,

Defendant.
_____/

ORDER

THIS CAUSE came before the Court upon Defendant Carnival Corporation's ("Defendant" or "Carnival") Motion Dismiss Plaintiff's Complaint. ("Mot.") (ECF No. 10). Therein, Defendant moves to dismiss Count V of Plaintiff's Complaint ("Compl.") (ECF No. 1).[1] *See generally* Mot. Plaintiff Sherri Britt ("Plaintiff") filed a response. ("Resp.") (ECF No. 13). Defendant replied. ("Reply") (ECF No. 15). The Motion is now ripe for review. As set forth below, Defendant's motion to dismiss Count V of Plaintiff's Complaint is GRANTED.

I. BACKGROUND[2]

This case arises under the Court's diversity jurisdiction pursuant to 28 U.S.C. § 1332 and under the Court's admiralty and maritime jurisdiction pursuant to 28 U.S.C. § 1333. Compl. ¶ 3.

[1] Defendant's Motion opens by stating that Defendant "moves to dismiss Plaintiff's Complaint for Damages and Demand for Jury Trial," and concludes by requesting that this Court dismiss Plaintiff's Complaint. Mot. at 1, 6. However, the arguments in the Motion are directed only at Count V, and Defendant clarifies in a footnote that it does not seek to dismiss Counts I through IV at this time. *Id.* at 2 n.2.

[2] The following background facts are taken from the Complaint ("Compl.") (ECF No. 1) and are accepted as true for purposes of ruling on this Motion to Dismiss. *Fernandez v. Tricam Indus., Inc.*, No. 09-22089-CIV, 2009 WL 10668267, at *1 (S.D. Fla. Oct. 21, 2009).

Plaintiff is a citizen and resident of Oklahoma. *Id.* ¶ 1. Defendant is a Panamanian corporation with its principal place of business in Florida. *Id.* ¶ 2. Plaintiff alleges that the amount in controversy in this maritime personal injury case exceeds $75,000. *Id.* ¶ 3.

Plaintiff alleges that she was a fare-paying passenger aboard the Carnival *Glory*, a cruise ship owned and/or operated by Defendant. *Id.* ¶¶ 10–11. On July 22, 2019, Plaintiff claims that she slipped and fell on the top step/deck of an exterior staircase on the *Glory* located between decks nine and ten by the Seaside Theater. *Id.* ¶¶ 10, 14. Plaintiff claims the staircase was wet, unreasonably slippery, and had worn-out and missing non-skid tape. *Id.* ¶ 14. According to Plaintiff, she was told by two of Defendant's crewmembers working in the area that other crewmembers had recently mopped the area where she slipped and fell. *Id.* ¶ 15. However, Defendant failed to place warning signs in the area where Plaintiff slipped and fell to warn her of the condition of the step or deck. *Id.* ¶ 16.

According to Plaintiff, the surface she slipped on had a liquid on it or lacked non-slip or non-skid surfaces, thus rendering it unreasonably slippery. *Id.* ¶ 17. Plaintiff was not aware that the surface she slipped on was wet, missing non-skid material, or was unreasonably dangerous. *Id.* ¶ 18. However, Plaintiff alleges that Defendant knew the exterior stairs of the Carnival *Glory* and its sister ships—all ships of the *Conquest* Class of Carnival ships—were high-risk areas for falls. *Id.* ¶¶ 20, 24. Defendant had, on previous occasions, placed warning signs on the *Glory* and its sister ships in the area where Plaintiff fell when that area was wet or could become wet. *Id.* ¶¶ 21–22. And, it was Defendant's policy that warning or caution signs be set up whenever a floor was being mopped, and that those signs remain in place until the floor dried. *Id.* ¶ 23.

On July 27, 2021, Plaintiff filed a Complaint against Defendant, alleging five claims: negligent maintenance of the deck (Count I); negligent design and construction (Count II);

negligent failure to warn (Count III); general negligence (Count IV); and negligence against Defendant for the acts of its employees based on vicarious liability (Count V[3]). *See generally* Compl.

Now, Defendant moves to dismiss Count V of the Complaint for failing to state a claim.

II. LEGAL STANDARD

Federal Rule of Civil Procedure 12(b)(6) provides that a court may dismiss a complaint for failing to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation and internal quotation marks omitted). This requirement "give[s] the defendant fair notice of what the claim is and the grounds upon which it rests." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (internal citation and alterations omitted). The court takes the plaintiff's factual allegations as true and construes them in the light most favorable to the plaintiff. *Pielage v. McConnell*, 516 F.3d 1282, 1284 (11th Cir. 2008). A complaint must contain enough facts to plausibly allege the required elements. *Watts v. Fla. Int'l Univ.*, 495 F.3d 1289, 1295–96 (11th Cir. 2007). A pleading that offers "a formulaic recitation of the elements of a cause of action will not do." *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 555). "[C]onclusory allegations, unwarranted deductions of facts or legal conclusions masquerading as facts will not prevent dismissal." *Oxford Asset Mgmt., Ltd. v. Jaharis*, 297 F.3d 1182, 1188 (11th Cir. 2002).

III. DISCUSSION

Defendant argues that Count V of Plaintiff's Complaint must be dismissed because it is an

[3] The fifth count of Plaintiff's Complaint was misnumbered as a duplicate Count IV. The Court refers to the fifth count as "Count V" for the sake of clarity.

attempt to plead around maritime law's notice requirement for direct liability claims by pleading a premises liability claim under a theory of vicarious liability pursuant to *Yusko v. NCL (Bahamas), Ltd.*, 4 F.4th 1164 (11th Cir. 2021). *See generally* Mot. Plaintiff responds that *Yusko* makes clear that a plaintiff may plead a negligence claim under either a theory of direct liability, vicarious liability, or both, and that Count V of the Complaint is not an attempt plead a direct liability claim under a theory of vicarious liability to avoid maritime law's notice requirement. *See generally* Resp. In reply, Defendant reiterates that Count V represents a direct liability claim pled as a vicarious liability claim, and that notice of a risk-creating condition is required even when a shipowner's crewmembers created the risk. *See generally* Reply.

As set forth below, the Court finds that Count V of Plaintiff's Complaint is an attempt to plead direct-liability negligent maintenance and failure to warn claims under a vicarious liability theory. Thus, because Count V does not allege Defendant's notice, the Court dismisses Count V of the Complaint. The Court first reviews general principles of negligence under maritime law.

A. Maritime Negligence Principles.

This case is governed by Federal maritime law. "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). "[I]t is a settled principle of maritime law that a shipowner owes a duty of exercising reasonable care towards those lawfully aboard the vessel who are not members of the crew." *Smith v. Royal Caribbean Cruises, Ltd.*, 620 F. App'x 727, 729 (11th Cir. 2015) (quoting *Doe v. Celebrity Cruises, Inc.*, 394 F.3d 891, 908 (11th Cir. 2004) (citation omitted)). However, "[a] carrier by sea does not serve as an insurer to its passengers; it is liable only for its negligence." *Weiner v. Carnival Cruise Lines*, No. 11-cv-22516, 2012 WL 5199604, at *2 (S.D. Fla. Oct. 22, 2012) (citing *Kornberg v. Carnival Cruise Lines, Inc.*,

741 F.2d 1332, 1334 (11th Cir. 1984)).

"To prevail on a maritime tort claim, a plaintiff 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." *Smith*, 620 F. App'x at 730 (citing *Chaparro v. Carnival Corp.*, 693 F.3d 1333, 1336 (11th Cir. 2012) (other citations omitted)). The Eleventh Circuit has held that "[t]he ordinary reasonable care under the circumstances standard . . . as a prerequisite to imposing liability, requires that the shipowner have had actual or constructive notice of the risk creating condition, at least where, . . . the risk is one just as commonly encountered on land (or, in a pool built on land) and not clearly linked to nautical adventure." *Id.* (citing *Keefe v. Bahama Cruise Line, Inc.*, 867 F.2d 1318, 1322 (11th Cir. 1989)). "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." *Tesoriero v. Carnival Corp.*, 965 F.3d 1170, 1178 (11th Cir. 2020), *cert. denied*, 141 S. Ct. 2516 (2021).

B. Count V Must Be Dismissed.

Despite the notice requirement discussed above, the Eleventh Circuit, in *Yusko v. NCL (Bahamas), Ltd.*, 4 F.4th 1164 (11th Cir. 2021), made clear that "a passenger need not establish that a shipowner had actual or constructive notice of a risk-creating condition to hold a shipowner liable for the negligent acts of its employees." *Yusko*, F.4th at 1170. That is, notice is not required for negligence claims under a vicarious liability theory. *See id.*

Nonetheless, Defendant argues that (1) Count V of the Complaint is a premises liability claim dressed as a vicarious liability claim, (2) *Yusko* still requires notice in cases where a

passenger seeks to hold a shipowner liable for maintaining negligent premises, (3) *Yusko* requires more than pleading the negligent conduct of an unknown crewmember identified through double hearsay, and (4) Eleventh Circuit precedent still requires notice even where a cruise line's employee created a risk-creating condition. Mot. at 3–5 (citing *Pizzino v. NCL (Bahamas) Ltd.*, 709 F. App'x 563 (11th Cir. 2017)).

Plaintiff responds that (1) she has elected to proceed under both direct and vicarious liability theories, as permitted under *Yusko,* (2) Plaintiff's allegations must be accepted as true and Plaintiff is not required to specifically name the negligent employee in the Complaint, (3) Defendant fails to address that this case can be both a premises liability case and a vicarious liability case, and (4) the cases Defendant relies upon pre-date *Yusko*. Resp. at 2–6.

In reply, Defendant reiterates its argument that this is a premises liability case made out under a vicarious liability theory, and that Plaintiff must still satisfy the notice requirement "even when the alleged negligence of an employee created the dangerous condition that harmed the plaintiff." Reply at 2. (citing *Pizzino*, 709 F. App'x at 566–67).

The Court agrees that Count V must be dismissed.

First, Count V of Plaintiff's Complaint is a claim for negligence premised on a theory of vicarious liability. It is important for the Court to precisely identify the negligent conduct alleged in Count V of Plaintiff's Complaint. As noted earlier, Plaintiff claims that she slipped and fell on the top step or deck of an exterior staircase that was wet, unreasonably slippery, and had worn-out or missing non-skid tape. Compl. ¶ 14. The area had just been mopped by Defendant's employees, there was still liquid on the surface, and no warning signs were in place. *Id.* ¶¶ 15–17. Thus, in Count V, Plaintiff alleges that Defendant's employees who mopped the step or deck were negligent for failing to put caution signs in the area, cordon off the wet area until it dried, remain in the area

to warn passengers of the wet step or deck, dry the step or deck, or otherwise exercise reasonable care under the circumstances. *Id.* ¶ 59.

As much as Plaintiff argues that she seeks to hold Defendant vicariously liable for its employees' "negligent mopping," what Plaintiff, in effect, seeks to hold Defendant vicariously liable for is its employees' negligently creating and then failing to warn about a dangerous condition on the premises *i.e.*, a wet deck or step. Here, Plaintiff claims she fell because one or more of Defendant's employees mopped, got the deck or steps wet, and then left. *Id.* ¶¶ 56–59. All the breaches of duty alleged in Count V of the Complaint describe Defendant's employees' actions in relation to the condition of the subject deck or step she claims she slipped on. *See id.* ¶ 59. At bottom, the employees' negligent mopping allegedly created a dangerous condition on the premises of the ship, and the resulting injury was from Plaintiff allegedly slipping on that dangerous condition. Therefore, the employees' negligent mopping is in fact a claim for negligent maintenance of Defendant's premises and negligent failure to warn.

Second, the Court does not read *Yusko* so broadly as to permit negligent maintenance and failure to warn claims brought under a vicarious liability theory.[4] It is true the Eleventh Circuit recognized that while notice is required only for negligence claims under a direct liability theory, "the notice requirement does not—and was never meant to—apply to maritime negligence claims proceeding under a theory of vicarious liability." *Yusko*, 4 F.4th at 1167.

However, in finding that negligence claims made out under a vicarious liability theory do not require a plaintiff to prove the defendant's actual or constructive notice, the Eleventh Circuit

[4] In *Yusko*, a passenger on a cruise ship volunteered to participate in a dance competition. *Yusko*, 4 F.4th at 1166. She was paired with a professional dancer employed by the ship. *Id.* She alleged that, after dancing for less than one minute, the professional dancer employed by the ship released her hands as she leaned away, causing her to fall backwards and hit her head on the floor. *Id.*

observed that:

> A plaintiff is the master of his or her complaint and may choose to proceed under a theory of direct liability, vicarious liability, or both. It may be true that, in some cases, it will easier for a passenger to proceed under a theory of vicarious liability than under one of direct liability. ***But common sense suggests that there will be just as many occasions where passengers are limited to a theory of direct liability***. Sometimes, as in *Keefe*, a passenger will not be able to identify any specific employee whose negligence caused her injury. ***In other cases, a passenger will seek to hold a shipowner liable for maintaining dangerous premises (as in Everett), for failing to warn of dangerous conditions off-ship (as in Chaparro)***, or for negligence related to the actions of other passengers (as in *K.T.*).

Id. at 1170 (emphasis added). Thus, *Yusko* contemplates, and this Court agrees, that claims stemming from the negligent maintenance of a ship's premises or failure to warn will be made out under a direct liability theory, which requires notice. *See Chaparro v. Carnival Corp.*, 693 F.3d 1333, 1336 (11th Cir. 2012); *Everett v. Carnival Cruise Lines*, 912 F.2d 1355, 1358 (11th Cir. 1990).

Further, as this Court noted in *Quashen v. Carnival Corp.*, the Eleventh Circuit, in *Yusko*, "explicitly reaffirmed *Everett*'s requirement of notice for claims of negligent maintenance against shipowners." __ F. Supp. 3d __, No. 20-CV-22299, 2021 WL 5978472, at *18 (S.D. Fla. 2021) (citing *Everett v. Carnival Cruise Lines*, 912 F.2d 1355, 1358 (11th Cir. 1990)). Accordingly, this Court, in *Quashen*, declined to excuse the notice requirement for a negligent maintenance claim that alleged that the defendant's employees negligently repaired a door stopper. *Id.* This Court observed that:

> If [p]laintiff were permitted to assert a negligent maintenance claim premised on a vicarious liability theory, that would allow [p]laintiff to bypass the notice requirement simply by identifying an employee involved in Carnival's mere creation or maintenance of a defect. Such a ruling would entirely dilute the notice requirement—which is a mainstay of Federal maritime tort law.

Id. This same concern in the context of negligent mopping has been expressed in previous cases, as well:

> Such an exception in vicarious liability cases would effectively eliminate the notice requirement in many negligence cases under federal maritime law—Carnival, or any corporate entity, almost exclusively acts through agents. A routine direct, premises liability claim could simply be recast as a vicarious liability claim to avoid having to plead and prove notice. For example, a claim that the cruise line negligently maintained the premises would be re-spun into a claim that the janitor employed by the cruise line negligently missed a spot.

Navarro v. Carnival Corp., No. 19-21072-CIV, 2020 WL 7480861, at *2 (S.D. Fla. Dec. 18, 2020).

Given that the Eleventh Circuit in *Yusko* explicitly reaffirmed the notice requirement for negligent maintenance claims in *Everett* and for negligent failure to warn claims in *Chaparro v. Carnival Corp.*, 693 F.3d 1333 (11th Cir. 2012), this Court declines to excuse the notice requirement in this case for Count V—Plaintiff cannot maintain a vicarious liability claim arising from allegations that Defendant's employees negligently mopped, and therefore negligently maintained Defendant's premises and failed to warn. Under *Yusko*, claims for negligent maintenance and failure to warn are "limited to a theory of direct liability," which requires notice. *Yusko*, 4 F.4th at 1170. Accordingly, Count V of Plaintiff's Complaint must be dismissed.

IV. CONCLUSION

UPON CONSIDERATION of the Motion, the pertinent portions of the record, and being otherwise fully advised in the premises, it is hereby ORDERED AND ADJUDGED that Defendant Carnival Corporation's Motion to Dismiss (ECF No. 10) is GRANTED. It is FURTHER ORDERED that Count V of Plaintiff's Complaint is DISMISSED WITH PREJUDICE.

DONE AND ORDERED in Chambers at Miami, Florida this 29th day of December, 2021.

K. MICHAEL MOORE
UNITED STATES DISTRICT JUDGE

c: All counsel of record