

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA**

Case No. 1:23-cv-21306-KMM

DEBORAH ANN HEALY, *et al*,

Plaintiffs,

v.

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

Defendant.

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**ORDER**

THIS CAUSE came before the Court upon Defendant NCL (Bahamas) Ltd. d/b/a Norwegian Cruise Line's ("NCL") Motion for Summary Judgment. ("Mot.") (ECF No. 44). Plaintiffs Deborah Ann Healy, individually and as personal representative of the Estate of Edmund John Healy, and Stephen Todd Healy, as personal representative of the Estate of Edmund John Healy, (collectively, "Plaintiffs") filed a Response in opposition. ("Resp.") (ECF No. 56). NCL filed a Reply. ("Reply") (ECF No. 66). The Motion is now ripe for review.

**I. BACKGROUND<sup>1</sup>**

This case arises from the death of NCL passenger Edmund John Healy, who passed away after he was injured during an ATV shore excursion in Mexico that was owned and operated by Vallarta Shore Excursions ("Vallarta") and/or Tropical Adventures ("Tropical"), non-party, shore

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<sup>1</sup> The facts herein are taken from the Corrected Amended Complaint ("Am. Compl.") (ECF No. 48), NCL's Statement of Material Facts ("Def.'s SOF") (ECF No. 40), Plaintiffs' Statement of Material Facts ("Pls' SOF") (ECF No. 55), Defendant's Reply Statement of Material Facts ("Def's Reply SOF"), and a review of the corresponding record citations and exhibits.

excursion independent contractors and subcontractors.<sup>2</sup> *See generally* Am. Compl. On or about April 6, 2022, Plaintiff Deborah Healy and her husband Edmund Healy (together, the “Healys”) were paying passengers aboard NCL’s cruise ship, the Norwegian Bliss. *Id.* ¶ 1. This was the Healys’ fourteenth cruise with NCL. Def’s SOF ¶ 1. As part of the cruise experience, NCL offered passengers the opportunity to go on various shore excursions at scheduled ports-of-call. Am. Compl. ¶ 3. The Healys reviewed NCL’s website, which listed the shore excursions available during their cruise. Def’s SOF ¶ 3. The Healys purchased a shore excursion from NCL titled “ATV Adventure & Village Tour” (the “Subject Tour”). Am. Compl. ¶ 4.

During the Subject Tour, the tour guide leader took the group on a cobblestone road down a hill with blind corners and sharp turns. *Id.* ¶ 63. As the group descended the cobblestone road, the tour guide “suddenly and unexpectedly stopped, without signaling or warning, which resulted in Edmund Healy’s ATV colliding with the leader’s ATV.” *Id.* ¶ 64. Deborah Healy, who was third in line descending the hill, was able to stop in time to avoid colliding with her husband’s and the leader’s ATVs. *Id.* ¶ 66. Deborah Healy witnessed Edmund Healy’s body and ATV go up into the air before the ATV landed on top of her husband. *Id.* ¶ 68. Edmund Healy died approximately ten minutes later from the injuries he sustained during the crash. *Id.* ¶¶ 72–73.

On April 5, 2023, Plaintiffs initiated the instant lawsuit against NCL. *See* (ECF No. 1). In their Corrected Amended Complaint,<sup>3</sup> Plaintiffs assert the following causes of action against NCL:

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<sup>2</sup> According to Plaintiffs’ Motion to Amend/ Correct the First Amended Complaint, NCL has taken the position that NCL contracted with Vallarta to conduct the Subject Tour, and Vallarta subcontracted with Tropical, who owned, operated, managed, and controlled the Subject Tour. *See* (ECF No. 35) at 1–2.

<sup>3</sup> On May 3, 2024, after Defendant filed the instant Motion, the Court granted leave for Plaintiffs to amend the First Amended Complaint to substitute all references to “Vallarta Shore Excursions” with “Vallarta Shore Excursions and/or Tropical Adventures.” *See* (ECF No. 47). The Court subsequently ordered the Parties to show cause as to whether the pretrial motions filed prior to

(1) negligence, carelessness, wantonness, and recklessness (“Count I”); (2) negligent selection and retention (“Count II”); negligent misrepresentation (“Count III”); (4) vicarious liability – ostensible agency (apparent agency) (“Count IV”); and negligent infliction of emotional distress (“Count V”). *See generally* Am Compl. Now before the Court is NCL’s Motion for Summary Judgment. *See* (ECF No. 44).

## 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 a judgment as a matter of law.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) (quoting Fed. R. Civ. P. 56). A genuine issue of material fact exists when “a reasonable jury could return a verdict for the nonmoving party.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (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 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, a 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).

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Plaintiffs filing the Corrected Amended Complaint should be rendered moot. *See* (ECF No. 50). In accordance with the Parties’ responses, the Corrected Amended Complaint (ECF No. 48) does not change or otherwise alter or amend Plaintiffs’ theories of liability or substantive allegations, *see* (ECF Nos. 52, 53), and thus the Corrected Amended Complaint (ECF No. 48) is the operative pleading.

Once the moving party satisfies its initial burden, the burden shifts to the non-moving party to present 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, could not 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**

NCL argues that it is entitled to summary judgment on all claims. *See generally* Mot. Specifically, NCL argues that (1) there is no evidence that NCL had actual or constructive notice of the allegedly dangerous conditions Plaintiffs claim were the cause of the incident, and no breach of duty was the cause of the incident with respect to Count I; (2) there is no evidence that NCL knew of any particular unfitness of Vallarta at the time it entered into an independent contractor relationship, nor during their 10–12 year relationship with respect to Count II; (3) there is no evidence that NCL misrepresented any material fact regarding the excursion, nor that the Healys sustained damages by virtue of justifiable reliance on any misrepresented fact with respect to Count III; (4) Plaintiffs cannot demonstrate that NCL represented to the Healys that Vallarta was its agent, nor that the Healys believed Vallarta was NCL’s agent with respect to Count IV; and (5) Mrs. Healy was not in the zone of danger to prevail on a negligent infliction of emotional distress claim with respect to Count V. *See id.* The Court addresses each argument in turn.

**A. Negligence, Carelessness, Wantonness, and Recklessness (Count I)**

To prevail on 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 v. Carnival Corp.*, 693 F.3d 1333, 1336 (11th Cir. 2012). “In a claim based on an alleged tort occurring at an offshore location during the course of a cruise, federal maritime law applies, just as it would for torts occurring on ships sailing in navigable waters.” *Aronson v. Celebrity Cruises, Inc.*, 30 F. Supp. 3d 1379, 1397, 1392 (S.D. Fla. 2014).

NCL argues that Plaintiffs have not satisfied (1) the duty element of their negligence claim because they cannot show that that NCL had actual or constructive notice of the dangerous conditions, and (2) that NCL's breach of duty was the cause of the incident.

*i. NCL's Duty to Plaintiffs*

NCL argues that there is no evidence that NCL had actual or constructive notice of the allegedly dangerous conditions Plaintiffs claim were the cause of the incident. *See* Mot. at 3–8. NCL takes issue with Plaintiffs' reference to NCL's department dedicated to “developing, promoting, marketing, coordinating, supervising, auditing, and monitoring shore excursions sold to its passengers,” as outlined in the Corrected Amended Complaint. *Id.* at 4. Specifically, NCL argues that there is no record evidence of any comment cards or publicly available reviews regarding the Subject Tour, which would have put NCL on notice of any dangerous conditions. *See id.* at 4–5. NCL also argues that Plaintiffs have not provided any evidence regarding information about Vallarta prior to the subject incident such that NCL knew or should have known that any aspect of the tour was negligently operated. *See id.* NCL further argues that there is no evidence that NCL's “familiarization tours” where crew members served as escorts on the subject

tours, evinced potentially dangerous conditions. *See id.* Furthermore, given the notice requirement may be satisfied by evidence of prior substantially similar incidents, NCL states that “at most” the record reflects that there was another subject tour in 2022, during which a passenger’s ATV struck a branch and they fell off, but Plaintiffs have not come forward with any evidence that this incident occurred due to substantially similar circumstances. *Id.* at 6.

In response, Plaintiffs provide several reasons for why NCL knew or should have known about the allegedly dangerous conditions of the Subject Tour including (1) NCL’s standard practices of monitoring the Subject Tour, (2) the dangerous terrain of the Subject Tour, (3) the dangerous equipment and inadequate training provided by Vallarta and/or Tropical, and (4) a substantially similar incident that took place several months prior to the subject incident. *See generally* Resp. at 4. Specifically, with respect to NCL’s monitoring of the Subject Tour, Plaintiffs state that it was NCL’s standard practice to familiarize itself with different excursions, including “familiarization trips” and “tour escorts” to monitor its shore excursions. Resp. at 4. Plaintiffs specifically point to NCL’s corporate representative David Guerra’s testimony that it is NCL’s “standard practice” for destination managers and the destination staff on board to occasionally visit the tours so they can familiarize themselves with the details. *Id.* at 4. Although there was no specific documentation concerning this tour, Mr. Guerra stated that these familiarization trips are “laid back” and there is no standard form for management to fill out about each trip. *Id.* NCL has been offering the tour for over 10 years prior to Mr. Healy’s death, which Plaintiffs assert indicates that NCL would have had ample opportunity to observe the allegedly dangerous conditions of the Subject Tour. *Id.* at 5. Plaintiffs further argue that NCL had a contractual right to inspect the Subject Tour pursuant to the “Tour Operator Practice Guidelines” that were in effect at the time of Mr. Healy’s death. *Id.* at 6. Plaintiffs conclude that given it was standard practice and a contractual

right to monitor the operations, NCL should have known about certain dangerous conditions such as “driving on cobblestone roads,” “driving down hills with blind corners/sharp turns,” and driving on a paved public highway. *Id.* at 5–6.

With respect to the Subject Tour’s equipment, Plaintiffs argue that any routine inspection would have put NCL on notice regarding the “inappropriate and inadequate equipment” such as the “badly worn tires,” “poor maintenance” and inadequate helmets. *Id.* at 6. Plaintiffs further argue that NCL should have known about the inadequacy of the safety instruction and cite to testimony from a fellow cruise passenger on the tour, Vito Spinelli, who stated that he was confused by the tour guide’s instructions regarding the passengers’ foot brake, which Plaintiffs later discovered were not accurate as to Mr. Healy’s ATV. *Id.*

Lastly, Plaintiffs argue that NCL had notice of the dangerous condition by virtue of a prior incident on the Subject Tour, which occurred in January 2022, three months before Mr. Healy’s accident. In the prior incident, which resulted in a lawsuit against NCL and Vallarta filed in this District, the plaintiffs allege that they “drove over an area of the road that contained a hidden defect causing the ATV to roll over.” *Id.* at 8. The plaintiffs further state that as a result, one party “fell off the ATV and smashed his head and face” while the other party “was ejected from the ATV and suffered, among other things, a broken left leg.” *Id.* The allegations in the negligence count of that complaint include “lack of proper safety equipment,” “inadequate instructions and training for riders and passengers,” and “inadequate training and supervision, and equipment for drivers and passengers.” *Id.* In Mr. Guerra’s deposition, Plaintiffs point to his comments that the accident occurred when “an ATV hit an exposed branch and the guest fell off the ATV, something of that nature.” *Id.* Plaintiffs state that they uncovered the complaint through their own diligence and ask that the Court take judicial notice of the allegations in the complaint. *Id.* Plaintiffs conclude that

there is ample evidence from which a reasonable jury could find that NCL knew or should have known about the dangerous conditions on the Subject Tour. *Id.*

In its Reply, NCL argues for the first time that its duty to warn extends only to those dangers which are not apparent and obvious to the passenger, and a reasonable person should have known about the dangers that operating an ATV may result in a collision. *See* Reply at 2–3. In support, NCL cites to *John Morrell & Co. v. Royal Caribbean Cruises, Ltd.*, 534 F. Supp. 2d 1345 (S.D. Fla. 2008), where the court found that the risks of riding a dune buggy were open and obvious and thus there was no duty to warn. *Id.* at 3.

It is well established that a cruise ship operator owes its passengers “the duty of exercising reasonable care under the circumstances of each case.” *Lugo v. Carnival Corp.*, 154 F. Supp. 3d 1341, 1345 (S.D. Fla. 2015); *see also Torres v. Carnival Corp.*, 635 F. App’x 595, 600–01 (11th Cir. 2015) (quoting *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625, 632 (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, at least where . . . the menace is one commonly encountered on land and not clearly linked to nautical adventure.” *Keefe v. Bahama Cruise Line, Inc.*, 867 F.2d 1318, 1322 (11th Cir. 1989).

Once the passenger leaves the ship, a cruise ship operator “only owes its passengers a duty to warn of known dangers in places where passengers are invited or reasonably expected to visit.” *Moseley v. Carnival Corp.*, No. 13–20416–CIV, 2013 WL 5913833, at \*3 (S.D. Fla. Oct. 31, 2013) (citing *Carlisle v. Ulysses Line Ltd., S.A.*, 475 So.2d 248, 251 (Fla. 3d DCA 1985)); *see also Chaparro*, 693 F.3d at 1336 (recognizing that the rule from *Carlisle* is “consonant with the federal maritime standard of ‘ordinary reasonable care under the circumstances’”); *Aronson*, 30 F.Supp.3d at 1395 (“Thus, where cruise ship passengers are invitees or expected visitors at offshore locations,

a ship operator's duty of care is limited to the duty to warn." A prerequisite to the imposition of liability for a shipowner's breach of a duty to warn its passengers is that the "carrier must have had 'actual or constructive notice of the risk-creating condition.'" *Wolf v. Celebrity Cruises, Inc.*, 683 F. App'x 786, 794 (11th Cir. 2017) (quoting *Keefe*, 867 F.2d at 1322). Thus, "[a] cruise line must warn passengers only of those dangers that the cruise line knows or reasonably should have known, and which are not apparent and obvious to the passenger." *Gayou v. Celebrity Cruises, Inc.*, No. 11-23359-CIV, 2012 WL 2049431, at \*5 (S.D. Fla. June 5, 2012) (internal quotation marks and citation omitted).

Here, the Court finds that there is a genuine issue of material fact as to whether NCL knew or reasonably should have known of the dangerous conditions on the Subject Tour. The crux of NCL's argument is that Plaintiffs have not uncovered any *physical* documentation where NCL recorded dangerous conditions based on its standard practices of taking familiarization trips in its 10-year history in working with Vallarta, together with its contractual right to monitor the Subject Tour's practices. However, Plaintiffs points to ample evidence where a jury could find that NCL *should have known* about the dangerous conditions alleged in the Corrected Amended Complaint, which include "driving on cobblestone roads," "driving down hills with blind corners/ sharp turns," "inadequate equipment," "inadequate helmets," and "inadequacy of the safety instruction." Resp. at 6–7. The Court is further persuaded by the evidence from Plaintiffs' ATV safety expert Thomas Yager (the "Yager Report"), who states, in light of the Subject Tour operating on a paved public highway, that the Special Vehicle Institute of America and the Consumer Product Safety Commission are strongly opposed to on-road operations for ATVs. *Id.* at 6. The Yager Report also includes photos of the badly worn overturned tires of Mr. Healy's ATV, which made the vehicle more difficult to control. *See id.* Plaintiffs further highlight the inadequacies of the

helmets, which were “one size fits most,” cost \$7.50, provided “no integral facial or eye protection” and were “inadequate for ATV or use on any motorized vehicle.” *Id.* at 7. Vito Spinelli, a fellow cruise passenger, also pointed out the inadequacy of safety instructions, which could potentially put NCL on notice of the dangerous conditions. *Id.* This includes confusion regarding an instruction to use the foot brake “for emergency use only,” which was an inaccurate instruction only applicable to the tour guide’s ATV, and not Mr. Healy’s. *Id.* The Court thus recognizes that there is a factual question as to whether NCL’s standard practices of routine inspection of the Subject Tour would have put NCL on notice of the alleged conditions described.

NCL’s argument that Plaintiffs failed to develop any evidence that another incident occurred under substantially similar circumstances as the subject incident is equally unpersuasive. Due to the potentially “prejudicial impact of prior occurrences or accidents, such evidence is only admissible if conditions substantially similar to the occurrence caused the prior accidents, and the prior incidents were not too remote in time.” *Hessen for Use & Benefit of Allstate Ins. Co. v. Jaguar Cars, Inc.*, 915 F.2d 641, 649 (11th Cir. 1990). Evidence of similar occurrences may be offered to demonstrate “a defendant’s notice of a particular defect or danger, the magnitude of the defect or danger involved, the defendant’s ability to correct a known defect, the lack of safety for intended uses, the strength of a product, the standard of care, and causation.” *Id.* Here, NCL likens the similar incident to nothing more than a fluke, where the vehicle struck a branch or “something of that nature.” *Resp.* at 8. However, the subject complaint specifically asserted in its negligence count against NCL “lack of proper safety equipment,” “inadequate instructions and training,” and “inadequate training and supervision, and equipment for the drivers and passengers,” all of which are allegations Plaintiffs set forth in the present action. *Id.* Plaintiffs raised this incident with Mr. Guerra during his deposition who claimed to lack knowledge as to the cause of the accident, the

names of the persons injured, and whether it occurred before or after Mr. Healy's incident. *Id.* The Court is not persuaded that NCL's ignorance to an incident that caused severe injuries to passengers over three months prior to Mr. Healy's fatal accident indicates that it did not have constructive notice of allegedly dangerous conditions. Accordingly, the Court finds that there is a genuine issue of material fact as to NCL's actual or constructive knowledge of the dangerous conditions of the Subject Tour.

Lastly, the Court is unpersuaded by NCL's argument, which it raises for the first time in its Reply, that the dangers of operating an ATV were so "apparent and obvious" that NCL thus had no duty to warn. There is a fundamental distinction between the case it cites, *Morrell*, 534 F. Supp. 2d at 1352, and the dangers the Healys encountered in the Subject Tour. Specifically, in *Morrell*, the accident involved a moped owned by another company crashing into a dune buggy, causing it to swerve and roll over. *See id.* at 1350. The plaintiff's claims were premised on Defendant's failure to warn that the dune buggy was dangerous and might be involved in an accident with another vehicle. *Id.* Although there is an inherent danger that a vehicle might be involved in a collision with vehicles driven carelessly by others, it is unreasonable to posit that the danger of driving over steep cobblestones and down hills, while receiving inadequate training and safety equipment, is a foreseeable risk that a participant of an ATV offshore excursion clearly assumes. *See also Smolnikar v. Royal Caribbean Cruises Ltd.*, 787 F. Supp. 2d 1308, 1323 (S.D. Fla. 2011) ("[I]t is simply unreasonable . . . that the danger of slamming into a tree at a high speed without adequate protection (as alleged by [Plaintiff]) is a risk inherent to participating in a zip line tour."). Thus, the Court cannot conclude as a matter of law that the dangers the Healys encountered were "apparent and obvious."

ii. *Breach of NCL's Duty Caused the Incident*

NCL next argues that there is no evidence that the dangers in place or NCL's failure to warn of them was the cause of the incident. *See Mot.* at 7. Specifically, NCL states that there is no evidence that Mr. Healy was struggling with the terrain and there is no way of knowing what Mr. Healy saw, why he did not or was not able to brake, or whether it was simply user error by Mr. Healy. *See id.* NCL states that Plaintiffs can only offer "speculation" that the condition of the ATVs caused the incident, given Mr. Healy is deceased. *Id.*

To establish that the breach of a defendant's duty was the proximate cause of the incident, a plaintiff must show "the defendant's breach was a substantial factor in bringing about the harm to the plaintiff." *Landivar v. Celebrity Cruises, Inc.*, 584 F. Supp. 3d 1150, 1159 (S.D. Fla. 2022) (citations omitted). Here, the Court finds that there is a genuine issue of material fact as to whether the dangerous conditions of the Subject Tour caused the incident. Plaintiffs point to several connections between the dangerous conditions surrounding the excursion and Mr. Healy's fatal accident. *Resp.* at 8–10. Specifically, the Yager Report provides that the inadequate safety instructions left Mr. Healy unprepared to handle driving the ATV through the difficult terrain, which consisted of paved, cobblestone streets and sharp turns of the Subject Tour's route. *Id.* at 9. With respect to the inadequate equipment, the Report points to the badly worn tires making the ATV more difficult to operate. *Id.* Lastly, Plaintiffs' forensic pathologist Dr. Stuart Graham's Report highlights the inadequacy of the helmets and establishes that Mr. Healy's injuries to the skull and brain are attributable to the failure of the helmet. *Id.* The fellow cruise passenger on the tour, Mr. Spinelli, further highlighted a dangerous instruction given during the training regarding use of the foot brake "for emergency use only," which the Yager Report confirms was not applicable to Mr. Healy's ATV and could have caused Mr. Healy to improperly brake. *Id.* at 7.

Taking the ample evidence Plaintiffs provide, the Court cannot merely “speculate” as to whether the dangerous conditions caused Mr. Healy’s accident. Rather, the evidence proffered by Plaintiffs through expert reports, Mrs. Healy, and a cruise passenger on the tour create a genuine issue of material fact as to whether such dangerous conditions were a “substantial factor in bringing about the harm.” *Landivar*, 584 F. Supp at 1159.

Accordingly, the Court declines to grant summary judgment with respect to Count I for negligence, carelessness, wantonness, and recklessness.

**B. Negligent Selection and Retention (Count II)**

NCL next argues that it is entitled to summary judgment on Plaintiff’s negligent selection and retention claim because there is no record evidence that NCL knew or had reason to know of any particular unfitness of Vallarta and/or Tropical prior to the subject incident. *See* Mot. at 8. As to NCL’s negligent selection of Vallarta and/or Tropical, Plaintiffs argue that NCL failed to diligently inquire into Vallarta and/or Tropical prior to hiring them to conduct the Subject Tour. *See* Resp. at 10–11. As to NCL’s negligent retention of Vallarta and/or Tropical, Plaintiffs argue that NCL should have known of the incompetence and dangerous conditions of the operation during the course of the contractual relationship. *Id.* at 12.

A plaintiff bringing a claim for negligent hiring or retention must demonstrate: “(1) the incompetence or unfitness of the contractor; (2) the defendant’s knowledge of the contractor’s incompetence or unfitness; and (3) that the contractor’s incompetence or unfitness proximately caused the plaintiff’s injuries.” *Woodley v. Royal Caribbean Cruises, Ltd.*, 472 F. Supp. 3d 1194, 1205 (S.D. Fla. 2020) (citing *Smolnikar*, 787 F. Supp. at 1323). However, “negligent selection or hiring and negligent retention are separate and distinct causes of action.” *Ferretti v. NCL (Bahamas) Ltd.*, No. 17-cv-20202-GAYLES/OTAZO-REYES, 2018 WL 3093547, \*2 (S.D. Fla.

June 22, 2018). “The only difference between negligent selection and negligent retention claims is ‘the time at which the [cruise line] is charged with knowledge of the [contractor’s] unfitness.’” *Smolnikar*, 787 F. Supp. 2d at 1318 n.7 (quoting *Garcia v. Duffy*, 492 So. 2d 435, 438 (Fla. 2d DCA 1986)). With negligent hiring, the inquiry relevant to the question of a defendant’s knowledge of their contractor’s incompetence is whether the defendant “diligently inquired” into the fitness of the contractor. *Id.* at 1319. However, with negligent retention, liability hinges on whether the defendant was aware or should have been aware of such unfitness “during the course of the contractor’s employment.” *Id.* at 1318 n.7.

The Court will separately address Plaintiffs’ claims for negligent selection and negligent retention of Vallarta, along with Vallarta’s sub-contractor Tropical. With respect to the negligent retention of Vallarta and/ or Tropical, the Court has already found that Plaintiffs provided sufficient evidence at summary judgment “during the course of [Vallarta/ Tropical’s] employment” to establish that NCL should have known about the dangerous conditions of the Subject Tour, including the allegedly dangerous terrain, the worn-down tires, inadequate training and safety instructions, and helmets lacking in effective facial protection. *See supra* Section III.A.i. Plaintiffs further highlight that NCL subcontracted with the company Tropical to conduct the Subject Tour, a violation of NCL’s agreement with Vallarta, which states that the tour operator “shall not be entitled to assign or subcontract this agreement without the prior written consent of [NCL].” *Id.* at 11. Mr. Guerra appeared unaware that Tropical was even operating the Subject Tour prior to the incident, nor was he able to provide any evidence that NCL had consented to Vallarta subcontracting the Subject Tour to Tropical. *Id.* That NCL was unaware of who was even operating these tours demonstrates its ignorance with respect to the possible dangers and incompetent management of the tour. With respect to the causation element, the Court has already

established that Plaintiffs have provided sufficient evidence at the summary judgment stage that the inadequate training and equipment, spurred from an incompetent tour, caused the incident. Accordingly, the Court cannot grant summary judgment with respect to the negligent retention of Vallarta and/or Tropical.

The Court now turns to the negligent selection claim, which turns on whether NCL “diligently inquired” into the fitness of Vallarta and/ or Tropical. NCL does not have any documentation from when it initially retained Vallarta around “10–12 years ago.” Resp. at 11. However, NCL points to its general decision-making procedures for vetting tours. Reply at 8. Mr. Guerra states that “[b]efore contracting with a tour operator for the first time, NCL conducts a general inquiry into the operator’s reputation and safety records and may consult with trade organizations or representatives of other cruise lines that already conduct business with the operator.” *Id.* NCL also points to its Shore Excursion Agreement between NCL and Vallarta, which incorporates by reference NCL’s Tour Operator Practice Guidelines, requiring independent tour operators to “ensure that all equipment is high quality, properly maintained, and used in accordance with local regulations.” *Id.* With respect to Tropical, however, NCL cannot point to any contract or evidence that it was even aware of Tropical’s operations. Resp. at 11. In its Reply, NCL mentions in one sentence pertaining to NCL’s general inquiry and vetting process, “the same line of reasoning speaks to Tropical’s reputation, although for a lesser time period, as they were subcontracted by Vallarta to operate the subject tour since 2016.” Reply at 8. From what the Court can gather, NCL purports to have ample guidelines in place to vet its contractors, yet, taking the facts most favorably to the nonmoving party, NCL is wholly unaware of any contractual agreement with the very contractor operating the tour it promotes to its passengers. There is no Shore Excursion Agreement governing their relationship, nor any operator practice guidelines, and NCL

cannot point to any vetting process or even a legal relationship between the two parties. Accordingly, NCL has not carried its burden to demonstrate that there is no genuine issue of material fact with respect to the negligent selection of Vallarta and/or Tropical Adventures.

**C. Negligent Misrepresentation (Count III)**

NCL next argues that it is entitled to summary judgment on the negligent misrepresentation claim because (1) the misrepresentations did not concern facts and thus are not actionable, (2) Plaintiffs cannot show they reasonably relied on the misrepresentations, and (3) there is no evidence the misrepresentations caused Plaintiffs' injuries. *See* Mot. at 9–13. In response, Plaintiffs argue that the Court already considered and rejected NCL's argument that the misrepresentations are not sufficiently factual to be actionable in its Order on NCL's Motion to Dismiss. *See* Resp. at 13. Plaintiffs further argue that they have testimony from Mrs. Healy that she and Mr. Healy reasonably relied on the misrepresentations and that there is extensive evidence supporting that NCL's tortious conduct caused the incident. *See id.* at 14–15.

To prevail on a claim for negligent misrepresentation, a plaintiff must demonstrate: “(1) [a] misrepresentation of a material fact; (2) that the representor made the misrepresentation without knowledge as to its truth or falsity or under circumstances in which he ought to have known of its falsity; (3) that the representor intended that the misrepresentation induce another to act on it; and (4) that injury resulted to the party acting in justifiable reliance on the misrepresentation.” *Ceithaml v. Celebrity Cruises, Inc.*, 207 F. Supp. 3d 1345, 1352–53 (S.D. Fla. 2016).

In the Corrected Amended Complaint, Plaintiffs allege that NCL made several misrepresentations and omissions of material fact to the Healys relating to the Subject Tour. *See* Am. Compl. ¶ 107. Specifically, Plaintiffs allege that: (1) NCL's website states that NCL “work[s] with reputable local tour operators”; (2) NCL's website “states that the Subject Tour will

include a detailed safety orientation”; (3) NCL’s website “features a picture of the wheels of several ATVs parked off-road on a flat sandy surface”; (4) NCL’s website “states the Activity Level is ‘moderate’ and not recommended only for ‘pregnant women’ and ‘guests with neck or back problems’”; and (5) “NCL’s website and NCL employees located at the Shore Excursion Desk aboard the Norwegian Bliss failed to inform the Healys about the unsafe characteristics of the Subject Tour.”<sup>4</sup> *Id.* ¶ 107(a)–(e). In the Court’s Order on NCL’s Motion to Dismiss, the Court found that the portion of Plaintiffs’ claim stating that NCL “works with reputable local tour operators” is not actionable. *See* (ECF No. 32) at 10. Thus, the Court will address the remaining statements.

The Court first turns to the question of whether the alleged misrepresentations are sufficiently factual to be actionable. As Plaintiffs point out in their Response, the Court has already held in its Order on NCL’s Motion to Dismiss that the remaining statements are sufficiently factual and are not merely non-actionable puffery. *See id.* Indeed, whether a misrepresentation is factual or non-actionable puffery is a question of law that may be assessed on a Motion to Dismiss. *Earthcam, Inc. v. Oxblue Corp.*, No. 1:11-CV-02278-WSD, 2012 WL 12836518 (N.D. Ga. Mar. 26, 2012) (“[T]he threshold inquiry of whether an alleged misrepresentation constitutes a statement of fact . . . or mere nonactionable puffery is a question of law which the Court may resolve when considering a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6).”) (citing

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<sup>4</sup> NCL raises only one argument with respect to this misrepresentation— that such a statement is an omission, not a statement, and thus “an omission by definition is not an affirmative misrepresentation of a material fact.” Mot. at 13. The relevant case law, however, supports that omissions may be actionable in a negligent misrepresentation dispute. *See, e.g., Woodley v. Royal Caribbean Cruises, Ltd.*, 472 F. Supp. 3d 1194 (S.D. Fla. 2020). Absent NCL providing a single case to the contrary, the Court declines to grant summary judgment on this omission.

*Cook, Perkiss and Liehe, Inc. v. Northern California Collection Service Inc.*, 911 F.2d 242, 245–46 (9th Cir. 1990)).

Since the Motion to Dismiss stage, Plaintiffs have provided additional evidence to support that there is a genuine issue of material fact as to the falsity of the relevant statements. *See* Resp. at 13. Regarding the “detailed safety instruction,” NCL maintains that the excursion began with an approximately 25 minute training where participants were instructed on how to use the throttle and brakes on their ATVs, signals the tour guides would use to indicate that they should turn, slow down, or accelerate, a description of the route the tour would take, and participants were invited to ask any questions they had. *See* Reply at 9. NCL further argues that this representation hinges on the word “detailed,” and whether Mrs. Healy believes it was not sufficiently “detailed” is a question of her opinion and not fact. *See id.* Plaintiffs present evidence from both Mrs. Healy and passenger Mr. Spinelli that this was not adequately “detailed” including a lack of instruction regarding which brake controlled the front and back of the ATV, and simple distinctions between the gear and ATV starter. *See* Resp. at 14. The Yager Report also details the inadequacies of the safety instruction. *Id.* Regarding the photo on NCL’s website of the ATV on a flat, sandy surface, along with the “intermediate” level description that the tour is suitable for everyone except pregnant women and people with neck or back problems, the Yager report provides information to support that the terrain constituted dangerous driving conditions that differed from the photograph. *Id.* Likewise, the Report highlights that such dangerous conditions would not be suitable for everyone outside of pregnant women and people with neck or back problems. *Id.* Accordingly, the Plaintiffs have adequately disputed NCL’s contention that there is “no evidence” with respect to the falsity of the alleged misrepresentations and the Court cannot grant summary judgment as to this issue.

The Court next turns to the Healys' reliance on the alleged misrepresentations. NCL largely argues that there is no way to know whether Mr. Healy relied on the alleged misrepresentations because he is deceased. *See* Mot. at 12. Plaintiffs, however, provide extensive testimony from Mrs. Healy at her deposition that she and Mr. Healy sat at a computer in the den of their home reviewing the different tour descriptions, which led them to select the Subject Tour based on the information provided. *See* Resp at 14. Moreover, NCL puts substantial weight on the disclaimer on the NCL webpage which states “[p]hotographs are for illustration purposes only used to represent the excursion experience and may not accurately depict the excursion, location, or activity indicated.” *Id.* That Plaintiffs’ reliance on the photograph is unreasonable in light of the disclaimer is equally unpersuasive. “[A] determination of reasonableness can be made as a matter of law if a prior disclaimer or disclosure prevents justifiable reliance on the representation.” *Gilmour v. Am. Nat. Red Cross*, 385 F.3d 1318, 1321 (11th Cir. 2004). Here, the photograph of the excursion is located within a 20-page printout of NCL’s website. *See* (ECF No. 9-2). The description of the Subject Tour can be found on page 15. *Id.* at 15. The disclaimer is located on page 12, at the bottom of the page in a font significantly smaller than the size of the font describing each of NCL’s recommended excursions, potentially difficult to locate for the naked eye. *Id.* at 12. Through the undersigned’s attempts to locate such disclaimer, this single statement amid pages of excursion descriptions is not enough for the Court to consider Plaintiffs’ reliance as unreasonable as a matter of law.

Lastly, on the issue of causation, the Court has already addressed that NCL has not met its burden with respect to NCL’s tortious conduct causing Plaintiffs’ injuries. Accordingly, summary judgment is not appropriate as to Count III for negligent misrepresentation.

**D. Apparent Agency (Count IV)**

NCL next argues that Plaintiffs' claim for apparent agency fails because there is no evidence that the Healys reasonably believed that Vallarta was NCL's agent. *See* Mot. at 13. Plaintiffs concede that summary judgment is appropriate as to their claim for apparent agency in light of the evidence adduced through discovery, including the language on the passenger ticket contract and the tickets for the subject tour stating that the tour was operated by an "independent contractor." Resp. at 16.

Accordingly, the Court grants summary judgment with respect to Count IV.

**E. Negligent Infliction of Emotional Distress (Count V)**

NCL lastly argues that summary judgment is appropriate with respect to Mrs. Healy's claim for negligent infliction of emotional distress ("NIED") because Mrs. Healy was not in "immediate risk of physical harm." Mot. at 15. In response, Plaintiffs assert that whether Mrs. Healy was immediately at risk of physical harm is a factual question to be resolved by a jury and NCL's argument merely reflects its "own spin on the evidence." Resp. at 17.

A claim for NIED requires a showing of "mental or emotional harm (such as fright or anxiety) that is caused by the negligence of another and that is not directly brought about by a physical injury, but that may manifest itself in physical symptoms." *Chaparro*, 693 F.3d at 1337–38 (quoting *Consol. Rail Corp. v. Gottshall*, 512 U.S. 532, 544, (1994)). Under federal maritime law, a plaintiff must be within the zone of danger, meaning that she must have been immediately at risk of physical harm caused by the defendant's negligence. *Id.* at 1338 (citations omitted). The requirement that the plaintiff has been threatened with physical impact bars allegations of merely bearing witness to a traumatic event. *Martins v. Royal Caribbean Cruises Ltd.*, 174 F. Supp. 3d 1345, 1355 (S.D. Fla. 2016).

The Court has already declined to grant summary judgment with respect to NCL's negligence and will thus address the question of whether Mrs. Healy was in the "zone of danger." Here, Mrs. Healy rode the same ATV behind Mr. Healy and claims that she saw the collision "at the moment of impact." Pls' SOF ¶ 42. She further states that she witnessed Mr. Healy "going up in the air" and witnessed the ATV bounce on Mr. Healy "and then bounce[], [and] continue[] to bounce." *Id.* ¶ 64. With respect to whether Mrs. Healy felt at risk of imminent harm, she testified that during the collision she "may have been within ten feet" of Mr. Healy at the moment of impact. *Id.* ¶ 41. She further states, "I was afraid because I could be in that accident. I could be, you know, involved in that. So I had to stop it. I had to stop the ATV for safety so that I wouldn't be in the accident. And so that – also that I wouldn't harm my husband, you know, because I could have driven over him." *Id.* Mrs. Healy's testimony contradicts NCL's argument that Mrs. Healy "never got close to her husband's ATV that she felt like she may impact or collide with him." Reply at 11. NCL further states that Mrs. Healy was moving "really slowly" on her ATV and did not "narrowly" avoid the crash. *Id.*

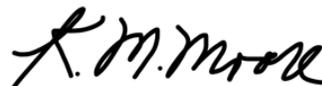
There is a clear factual dispute as to whether Mrs. Healy was in immediate risk of physical harm, such that the Court cannot rule as a matter of law that Mrs. Healy was not in the zone of danger. Accordingly, the Court declines to grant summary judgment with respect to Plaintiffs' NIED claim.

#### **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

NCL's Motion for Summary Judgment (ECF No. 44) is GRANTED IN PART and DENIED IN PART.

DONE AND ORDERED in Chambers at Miami, Florida, this 5th day of August, 2024.



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K. MICHAEL MOORE  
UNITED STATES DISTRICT JUDGE

c: All counsel of record