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

Case No. 19-CV-25100-DLG

ALAN WIEGAND and KIMBERLY SCHULTZ-WIEGAND, Individually and as Personal Representatives of the Estate of Chloe Wiegand, deceased minor,

Plaintiff,

v.

ROYAL CARIBBEAN CRUISES LTD.,

Defendant.
_____/

**Order**

**THIS CAUSE** came before the Court upon Plaintiff's Motion to Strike Defendant's Affirmative Defenses that apportion fault to a non-party [D.E. 56].

**THE COURT** has considered the Motion, the pertinent portions of the record, and is otherwise fully advised in the premises.

**I. BACKGROUND**

On or about July 7, 2019, an eighteen-month-old girl ("Decedent"), fell from the arms of her grandfather ("Mr. Anello"), and through an open window on a vessel owned by Royal Caribbean Cruises Ltd. ("Defendant") [D.E. 1]. The Decedent fell 150 feet to the pier below, which led to her death [D.E. 1]. On December 11, 2019, the mother and father of the Decedent ("Plaintiffs"), filed

the instant action against the Defendant, alleging negligence [D.E. 1]. On April 10, 2020, the Defendant filed its Answer and Affirmative Defenses to the Plaintiffs' Complaint [D.E. 50]. On May 1, 2020, the Plaintiffs filed the instant Motion to Strike several of the Defendant's Affirmative Defenses. In particular, Plaintiff requests that this Court strike Affirmative Defenses 2, 3, 4, 5, 9 and 12 ("Affirmative Defenses"), due to the fact that these defenses apportioned fault to a non-party, Mr. Anello [D.E. 56].

The Second Affirmative Defense raises a comparative fault defense, stating that the Plaintiffs' injuries were wholly or partially caused by Mr. Anello's negligence [D.E. 50]. The Third Affirmative Defense raises a comparative fault defense, stating that the Plaintiffs' injuries were caused by their negligent entrustment of the Decedent to Mr. Anello [D.E. 50]. The Fourth and Fifth Affirmative Defenses raise a superseding cause defense, based on the alleged negligence of the Plaintiffs and Mr. Anello. [D.E. 50]. The Ninth Affirmative Defense states that the Defendant did not breach their duty to maintain safe conditions for their passengers as "no dangerous condition existed that caused or contributed to" the Plaintiffs' injuries, but if the conditions did exist, Mr. Anello's negligence in failing to observe an "open and obvious condition," was the proximate cause of Plaintiff's injuries [D.E. 50]. The Twelfth Affirmative Defense raises a

defense based on the assumption of risk by the Plaintiffs and Mr. Anello [D.E. 50].

## II. LEGAL STANDARD

When assessing a motion to strike, "the court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Fed. R. Civ. P. 12(f). However, "'a motion to strike is a drastic remedy,' which is disfavored by the courts." Simmons v. Royal Caribbean Cruises, Ltd., 423 F. Supp. 3d 1350, 1352 (S.D. Fla. 2019) (quoting Thompson v. Kindred Nursing Ctrs. E., LLC, F. Supp. 2d 1345 (M.D. Fla. 2002)). Generally, a motion to strike is denied "unless the matter sought to be omitted has no possible relationship to the controversy, may confuse the issues, or otherwise prejudice a party." Id. (citing Bank of Am., N.A. v. GREC Homes IX, LLC, No. 13-21718, 2014 WL 351962 (S.D. Fla. Jan. 23, 2014)). A motion to strike should be denied "unless it is clear that the matter to be stricken could have no possible bearing on the subject matter of the litigation," inter alia, "a motion to strike may be used to strike any part of the prayer for relief when the recovery sought is unavailable as a matter of law." Lopez v. Wachovia Mortg., No. 209-CV-01510-JAM-DAD, 2009 WL 4505919, at *5 (E.D. Cal. Nov. 20, 2009) (quoting Bassett v. Ruggles et al., 2009 WL 2982895 (E.D.Cal. Sept.14, 2009)).

## III. DISCUSSION

### a. Apportionment of Fault to a Non-party

The Eleventh Circuit has held that it is erroneous to apportion fault between a party and a non-party in a federal maritime action, because determinations of liability and causation should be settled "between two live opponents," rather than by a plaintiff and a defendant, in the absence of the non-party to whom liability is being apportioned. *Groff v. Chandris, Inc.*, 835 F. Supp. 1408, 1410 (S.D. Fla. 1993). The Fabre defense,[1] which states that under Florida comparative fault law, liability can be apportioned to non-parties, is not applicable in a federal maritime action. *See Id.* at 1409-1410.

Instead, under general maritime law, the "principles of joint and several liability under which a plaintiff may obtain judgment for the full amount against any and all joint tortfeasors without regard to percentage of fault," are binding. *Id.*(citing *Ebanks v. Great Lakes Dredge & Dock Co.*, 688 F.2d 716 (11th Cir. 1982)).

**b. Superseding Cause**

The Supreme Court has held, the superseding cause doctrine, which serves to exculpate the defendant from liability entirely, is applicable in admiralty cases. *Exxon Co., U.S.A. v. Sofec, Inc.*, 517 U.S. 830, 836-837 (1996).

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[1] The Florida Supreme Court decision, *Fabre v. Marin* states that "it is accepted practice to include all tortfeasors in the apportionment question. This includes nonparties who may be unknown tortfeasors, phantom drivers, and persons alleged to be negligent but not liable in damages to the injured party such as in the third party cases arising in the workmen's compensation area." 623 So. 2d 1182, 1187 (Fla. 1993) (citing *Bartlett v. New Mexico Welding Supply, Inc.*, 1982-NMCA-048, 98 N.M. 152, 646 P.2d 579)

**c. Assumption of Risk**

Generally, the assumption of risk defense is available in maritime cases where the defendant alleges the plaintiff assumed the risk. See In re Gozleveli No. 12-61458-CV, 2015 WL 3917089, at *4-5 (S.D. Fla. June 25, 2015)(holding, a party who was deemed to have negligently entrusted a jet ski to another party, who subsequently injured themselves operating the jet ski, was permitted to raise a defense based on the doctrine of assumption of risk); see also Edward Leasing Corp. v. Uhlig & Assocs., Inc., 785 F.2d 877, 886 (11th Cir.1986)(recognizing the assumption of risk defense is applicable in admiralty law).

Further, "[A]ny assumption of risk in admiralty, whatever its scope, must be applied in conjunction with the established admiralty doctrine of comparative negligence," to ensure that the assumption of risk defense in admiralty cases "is not a bar to recovery, but only mitigates damages." *In re Gozleveli* No. 12-61458-CV, 2015 WL 3917089, at *4-5 (S.D. Fla. June 25, 2015).

**d. Comparative Negligence**

Generally, "Maritime law recognizes the doctrine of comparative negligence...[c]omparative negligence is a theory of negligence where the plaintiff is entitled to damages even if he or she is found to be more at fault than the defendant, but damages awarded will be reduced by percentage of fault attributable to plaintiff." In re Gozleveli, No. 12-61458-CV, 2015 WL 3917089, at

*4 (S.D. Fla. June 25, 2015); see also *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 409, 74 S.Ct. 202, 204-205, 98 L.Ed. 143 (1953)(upholding lower courts' decision that comparative negligence applies in maritime cases).

**IV. ANALYSIS**

Plaintiffs request that this Court strike Defendant's Affirmative Defenses 2-5, 9, and 12, as they seek to apportion fault to a non-party.

Affirmative Defense No. 2 states, the Plaintiffs' "injuries were caused either in whole or in part by [Mr. Anello's] own acts of negligence". This defense explicitly seeks to apportion fault to Mr. Anello, and therefore, should be stricken.

Affirmative Defense No. 3 alleges the Plaintiffs negligently entrusted Mr. Anello with the care of the Decedent, and thus, the Plaintiffs "share in the responsibility with Mr. Anello and any award should be reduced accordingly by the principles of comparative fault" [D.E. 50]. By alleging that the Plaintiffs and Mr. Anello "share in the responsibility," the Defendant seeks to apportion some fault to Mr. Anello, a non-party. Therefore, Affirmative Defense No. 3 should be stricken.

Affirmative Defenses No. 4 and 5 allege that Mr. Anello's actions constitute a superseding cause that "cut off any causal connection between [the Defendant's] alleged negligence and [the Decedent's] injuries" [D.E. 50]. Under general federal maritime

law, a superseding cause defense, if successful, completely exculpates the defendant of any liability in the matter. See Exxon, 517 U.S. at 837-838 (1996). Therefore, Plaintiff's Motion to Strike Affirmative Defenses No. 4 and 5 should be denied.

Affirmative Defense No. 9 alleges, no dangerous condition existed, and alternatively, "if a dangerous condition did exist... Mr. Anello failed to observe an open and obvious condition, and it was the negligence of Mr. Anello in failing to use his own senses, which gave rise to the alleged accident." [D.E. 50]. The Defendant's first argument is improper because it simply disputes an element of a claim. See Boldstar Tech., LLC v. Home Depot, Inc., 517 F. Supp. 2d 1283, 1291 (S.D. Fla. 2007). ("[A]n affirmative defense which merely points out a defect or lack of evidence in the plaintiff's case is not an affirmative defense at all."). The Defendant's second argument seeks to apportion fault to Mr. Anello, a non-party. Therefore, Affirmative Defenses No. 9 should be stricken.

Affirmative Defense No. 12 raises an assumption of risk defense, stating the Plaintiffs and Mr. Anello assumed the risk involved with the alleged dangerous condition, and therefore, "RCL is not liable for [Plaintiffs'] injuries and alleged damages." [D.E. 50]. Defense No. 12 should be stricken as it apportions fault to Mr. Anello. Further, this Court has held that the assumption of risk doctrine must be applied in conjunction with comparative fault

in admiralty cases, to ensure the defense is not a bar to recovery, but merely mitigates damages [D.E. 50]. In re Gozleveli No. 12-61458-CV, 2015 WL 3917089, at *4-5. Affirmative Defense 12 should therefore be stricken, as it apportions fault to a nonparty, and it seeks to bar Plaintiffs' recovery entirely.

Accordingly, it is hereby **ORDERED AND ADJUDGED** that Plaintiffs' Motion to Strike Defendant's Affirmative Defenses [D.E. 58] is **GRANTED in part** as follows:

Defendant's Affirmative Defenses No. 2, 3, 9 and 12 are hereby **STRICKEN.**

The Plaintiffs' Motion to Strike Defendant's Affirmative Defenses No. 4 and 5 is **DENIED.**

**DONE AND ORDERED** in Chambers at Miami, Florida, this 20th day of July, 2020.

Donald L. Graham
DONALD L. GRAHAM
UNITED STATES DISTRICT JUDGE

cc: All Counsel of Record