UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

Case Number: 19-22667-CIV-MARTINEZ/OTAZO-REYES

SHARON S HARRELL,

Plaintiff,

v.

CARNIVAL CORPORATION,

Defendant.
_____/

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

THIS CAUSE comes before the Court upon Defendant's Motion for Summary Judgment. (Mot Summ. J., ECF No. 34). Defendant, Carnival Corporation ("Carnival"), moves for summary judgment on Plaintiff, Sharon S Harrell's ("Harrell"), single breach of contract claim. Plaintiff opposes this Motion. (Pl.'s Resp. Opp., ECF No. 41). After careful consideration, and being otherwise fully advised in the premises, the Court finds that Carnival's Motion for Summary Judgment is **GRANTED in part and DENIED in part**. This matter shall proceed to trial.

I. BACKGROUND[1]

Harrell filed a single-count complaint for negligence against Carnival. (Compl., ECF No. 1). On July 3, 2018, Harrell slipped and fell on a puddle of water on the Lido Deck, at the bottom of the jacuzzi stairs on Carnival's vessel, the Pride. (Def.'s Statement of Material Facts ("SOMF") ¶ 2; Pl.'s Am. Statement of Material Facts ("SOMF") at 2, ECF No. 94; *see also* Harrell Dep., at 117:9–118:19, ECF No. 33-1). Harrell testified that the puddle of standing water on the deck was

[1] The facts recited in this section are undisputed unless stated otherwise.

about five feet long. (Harrell Dep., 124:3–10). Harrell alleges that as a result of the fall, she suffered injuries, including "nerve damage to her left ankle, resulting in severe and ongoing pain and swelling with residual Complex Regional Pain Syndrome" ("CRPS"), depression, anxiety, and post-traumatic stress. (Compl. ¶¶ 6, 20; Def.'s SOMF ¶ 2). She also testified that while on the ship, she was diagnosed with a sprained ankle, but was later diagnosed with a fracture by one of her doctors. (Harrell Dep., at 140:14–16; 147:15–17). Harrell further alleges that Carnival breached its duty of care in maintaining the vessel. (Def.'s SOMF ¶ 4). She claims that her injuries have rendered her unable to continue working as an oven operator, and that she suffers severe and enduring pain and suffering. (Def.'s SOMF ¶ 10; Harrell Dep., at 52:3–53:12).

On November 20, 2020, Harrell made the following disclosure with respect to her treating physician, Dr. Peter Moyer:

> Dr. Moyer is expected to testify as a medical expert in the field of Foot and Ankle Specialists. Dr. Moyer is also expected to testify regarding the following subjects: the fields of medical podiatry, surgery and medicine, the procedures and criteria used by medical podiatrists to diagnose and treat diseases, *Ms. Harrell's causation of related injury, causation and the effects of those injuries*, the medical causes of those injuries and permanent impairment, injuries, disability and disfigurement, the reasonableness and necessity of medical treatment, and the reasonableness of incurred medical expenses

(*See* Pl.'s Resp. Def.'s *Daubert* Mot., at 9, ECF No. 73 (emphasis added)). On September 23, 2021, Magistrate Judge Otazo-Reyes found that Dr. Moyer could not testify as to causation because he did not provide a written report pursuant to Federal Rule of Civil Procedure 26(a)(2)(B). (Order Re: Defendant's *Daubert* Motion ("*Daubert* Order"), at 5, ECF No. 91). None of Harrell's experts have submitted expert reports to establish that the alleged incident was the proximate cause of Plaintiff's alleged CRPS, depression, post-traumatic stress, or any other injury which Harrell alleges. (Def.'s SOMF ¶ 12). While Harrell disputes this fact, she only states that "[i]t is not in the purview of health care providers to determine causation, particularly Defendant's

personnel" and that "Plaintiff's health care providers are in accord as to Plaintiff's symptomology[.]" (Pl.'s SOMF, at 6).

II. LEGAL STANDARD

Under Federal Rule of Civil Procedure 56, a court shall grant summary judgment if "the depositions, documents, electronically stored information, affidavits or declarations, stipulations . . . , or other materials . . . show . . . that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a), (c). Rule 56 requires entry of summary judgment "after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

"The moving party bears the initial burden to show, by reference to materials on file, that there are no genuine issues of material fact that should be decided at trial." *Clark v. Coats & Clark, Inc.*, 929 F.2d 604, 608 (11th Cir. 1991); *accord Kol B'Seder, Inc. v. Certain Underwriters at Lloyd's of London Subscribing to Certificate No. 154766 Under Cont. No. B0621MASRSWV15BND*, 766 F. App'x 795, 798 (11th Cir. 2019). "Only when that burden has been met does the burden shift to the non-moving party to demonstrate that there is indeed a material issue of fact that precludes summary judgment." *Clark*, 929 F.2d at 608. When the moving party has carried its burden, the party opposing summary judgment must do more than show that there is "metaphysical doubt" as to any material fact. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). Indeed, Rule 56 "requires the nonmoving party to go beyond the pleadings and, by her own affidavits, or by the depositions, answers to interrogatories, and admissions on file, *designate specific facts showing that there is a genuine*

issue for trial." *Celotex Corp.*, 477 U.S. at 324 (emphasis added); *Kol B'Seder, Inc.*, 766 F. App'x at 798.

At summary judgment, the Court is required to view the evidence and draw inferences in the light most favorable to the nonmovant. *See Matsushita Elec. Indus.*, 475 U.S. 574, 586 (1986); *Chapman v. Am. Cyanamid Co.*, 861 F.2d 1515, 1518 (11th Cir. 1988). "All reasonable inferences arising from the undisputed facts should be made in favor of the nonmovant. *Chapman*, 861 F.2d at 1518. "However, an inference based on speculation and conjecture is not reasonable." *Id.* (citing *Blackstone v. Shook & Fletcher Insulation Co.*, 764 F.2d 1480, 1482 (11th Cir. 1985)). "Where 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.'" *See Matsushita Elec. Indus.*, 475 U.S. at 587 (quoting *First Nat'l Bank of Ariz. v. Cities Servs. Co.*, 391 U.S. 253, 270 (1968)).

III. DISCUSSION

Defendant moves for summary judgment on Plaintiff's negligence claim. In support, it first argues that Harrell failed to adduce any evidence that Carnival had actual or constructive knowledge of the dangerous condition. In the alternative, Carnival contends that Carnival did not have a duty to warn Harrell of the dangerous condition because the condition was open and obvious. Finally, Carnival urges this Court to grant summary judgment in its favor because Harrell has failed to meet her burden of establishing causation.

Because Harrell alleges a tort committed aboard a ship sailing in navigable waters, this action is governed by maritime law. *See Keefe v. Bahama Cruise Line, Inc.*, 867 F.2d 1318, 1320–21 (11th Cir. 1989). In analyzing a maritime tort case, the Court relies on general principles of negligence law." *Chaparro v. Carnival Corp.*, 693 F.3d 1333, 1336 (11th Cir. 2012) (quoting *Daigle v. Point Landing, Inc.*, 616 F.2d 825, 827 (5th Cir. 1980)).

To prevail on a negligence claim, Harrell 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." *Guevara v. NCL (Bah.) Ltd.*, 920 F.3d 710, 720 (11th Cir. 2019) (quoting *Sorrels v. NCL (Bah.) Ltd.*, 796 F.3d 1275, 1280 (11th Cir. 2015)).

A. Duty

A shipowner owes its passengers the duty to exercise "reasonable care" under the circumstances. *Carroll v. Carnival Corp.*, 955 F.3d 1260, 1264 (11th Cir. 2020) (quoting *Sorrels*, 796 F.3d at 1279). As a prerequisite to imposing liability, Carnival must have had "actual or constructive notice of the risk-creating condition." *Id.* (quoting *Keefe v. Bah. Cruise Line, Inc.*, 867 F.2d 1318, 1322 (11th Cir. 1989)) (alternations omitted). "Thus, Carnival's liability 'hinges on whether it knew or should have known' of the dangerous condition'" *Id.*

Carnival contends that the alleged dangerous condition, namely, the puddle of water on the pool deck near the jacuzzi, was open and obvious and therefore Carnival cannot be held liable. Although Carnival argues this in the alternative, the Court addresses it first because Carnival misstates and misapplies the law on this respect. To begin with, Harrell brings suit against Carnival for negligent maintenance only, not negligent failure to warn of the dangerous condition. (*See* Compl. ¶ 16). Nowhere in the complaint does Harrell allege that Carnival was negligent for failing to warn her of the dangerous condition. Second, the Eleventh Circuit has held that the open and obvious nature of a dangerous condition is considered as a factor, and not a bar to liability for negligently maintaining premises, thus, Carnival's argument is inapplicable to this case. *Carroll*, 955 F.3d at 1268. Even assuming that the dangerous condition here were open and obvious,

Harrell's negligent maintenance claim would not be precluded only on that basis. *See id.* at 1269. The Court will therefore proceed to the remaining issues.

Carnival next argues that it lacked actual or constructive notice of the dangerous condition. Harrell, in turn, contends that Carnival had actual notice of the risk because Carnival has "experience in defense of slip and fall cases arising from liquid substances on the decks and floors of its ships[.]" (Pl.'s Resp. Opp., at 6 (emphasis added)). Harrell supports her contention by citing, without more, to nineteen cases where Carnival is a named defendant. To the extent Harrell is suggesting that these cases are similar slip and fall incidents such that they would put Carnival on notice of the dangerous condition at issue in this case, this argument fails. In arriving at this conclusion, this Court employs the "substantial similarity" doctrine. *Sorrels*, 796 F.3d at 1287. The "substantial similarity" doctrine applies when "one party seeks to admit prior accidents or occurrences involving the opposing party, in order to show, for example, notice, magnitude of the danger involved, the party's ability to correct a known defect," among other issues. *Tran v. Toyota Motor Corp..*, 420 F.3d 1310, 1316 (11th Cir. 2005). This doctrine "does not require that the past slip and fall cases involve identical circumstances, "and allows for some play in the joints depending on the scenario presented and the desired use of the evidence." *Id.*

Harrell cites to the nineteen cases and provides a brief description of the holding in each case but does not even attempt to show the similarities between the circumstances in those cases and the ones presented here. The Court has carefully considered each case and finds that they are not substantially similar to Harrell's case. First, the majority of these cases present conditions unlike the ones here in that the underlying incidents occurred in different cruise ships, different locations on the ship, and involved different liquid substances. While one of these cases took place on the Lido deck of the Carnival Pride, the plaintiff in that case slipped on water while walking

from the lounge chairs to one of the pools. *Nathans v. Carnival Corp.*, No. 17-23686-CIV, 2018 WL 6308694, at *1 (S.D. Fla. Aug. 31, 2018). There is no mention in that case that the incident occurred anywhere near the jacuzzi. Given the many factual differences between the prior accidents and Harrell's, Harrell has failed to show that conditions substantially similar to her fall also caused the prior accidents such that they would put Carnival on notice. *See Heath v. Suzuki Motor Corp.*, 126 F.3d 1391, 1396, 1397 n. 12 (11th Cir. 1997).

Notwithstanding, there are other facts in this case that prevent summary judgment. Harrell testified that there were warning signs around the jacuzzi to be careful with wet decks. (Harrell Dep., at 119:13–15). Further, despite not knowing how long the puddle of water had been on the deck for, Harrell testified that the puddle where she fell was about five feet long. (Harrell Dep., at 124:3–10). Harrell also testified that earlier on July 3, 2018, the day she fell, she walked past the Lido deck and could see that there were puddles of water on the deck. (*Id.* at 102:14–103:23, 104:17–19). This testimony could lead a reasonable juror to find that Carnival was on notice of the dangerous condition on the deck, and that the puddle where Harrell fell had been on the deck for an amount of time sufficient for Carnival to be on constructive notice of the water. Accordingly, viewing the evidence in the light most favorable to Harrell, the record in this case presents genuine issues of material fact as to whether Carnival had constructive notice of the dangerous risk and condition. *See Nathans*, 2018 WL 6308694, at *4 (citing *Rioux v. City of Atl.*, 520 F.3d 1269, 1274 (11th Cir. 2008) (holding courts "must view all the evidence and all factual inferences reasonably drawn from the evidence in the light most favorable to the nonmoving party")).

B. Causation

Finally, Carnival contends that Harrell cannot establish proximate causation because she failed to present expert testimony. When the causal link between a plaintiff's alleged injuries and the incident at issue is not readily apparent to a lay person, expert medical testimony as to medical causation is typically required. *Rivera v. Royal Caribbean Cruises Ltd.*, 711 Fed. App'x 952, 954 (11th Cir. 2017) (citing *Allison v. McGhan Med. Corp.*, 184 F.3d 1300, 1320 (11th Cir. 1999)); *Kellner v. NCL (Bah.), Ltd.*, No 15-23002-CIV, 2016 WL 4440510, at *1 (S.D. Fla. Aug. 22, 2016). This expert testimony must be based on a reliable methodology and satisfy the requirements of *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 585 (1993). Examples of readily observable physical injuries include, but are not limited to, bruising, abrasions, and swelling. *See Mann v. Carnival Corp.*, 385 F. Supp. 3d 1278, 1286 (S.D. Fla. April 22, 2019); *Aponte v. Royal Caribbean Cruises, Ltd.*, 2019 WL 943267, at *6 (S.D. Fla. Feb. 26, 2019).

Harrell alleges that, as a result of the fall, she suffered "nerve damage to her left ankle, resulting in severe and ongoing pain and swelling with residual [CRPS], depression, anxiety, and post-traumatic stress. (Compl. ¶¶ 6, 20). She also alleges that her treating physician advised her that "amputation may be her best course of action for treatment[.]" (*Id.* ¶ 21). Further, Harrell testified that she was diagnosed with a sprained ankle on the ship, but her doctor later diagnosed her with a fracture. (Harrell Dep., at 140:14–16; 147:15–17). Finally, Harrell testified that she reinjured her foot after the July 3, 2018 slip-and-fall incident on the cruise ship when she was helping her mother up from a chair. (Harrell Dep., at 81:20–82:25). That Plaintiff's fall can and did cause her fracture, nerve damage, CRPS, depression, anxiety, and post-traumatic stress "is not a natural inference that a juror could make through human experience." *See Allison*, 184 F.3d at 1320. Neither could a jury determine without expert testimony whether the incident Harrell

suffered after the fall was as a result of the slip-and-fall incident on the cruise. *See Rivera*, 711 Fed. App'x at 954. Given the nature of some of Harrell's alleged injuries, then, expert medical testimony as to causation is required as to the "non-readily observable" injuries.

That said, Harrell has proffered no expert testimony to prove that Carnival's breach was the proximate cause of her alleged injuries. In her final witness list, Harrell disclosed one of her treating physicians, Dr. Peter Moyer, as a testifying witness who intended to offer testimony as to causation; yet no expert report was furnished by Dr. Moyer pursuant to Federal Rule of Civil Procedure 26(a)(2)(A). Judge Otazo-Reyes aptly pointed out that "[a] treating physician providing lay testimony can testify narrowly, limited to personal knowledge resulting from providing medical care, involving consultation, examination, or treatment of a patient plaintiff." (*Id.* at 3 (quoting *Chapman v. Procter & Gamble Distrib., LLC*, 766 F.3d 1296, 1316 n.23 (11th Cir. 2014)). When a treating physician offers opinions beyond those that arise from his treatment, they are considered expert witnesses from whom a full Rule 26(a)(2)(B) report is required. (*Id.* (quoting *Torres v. First Transit, Inc.*, No. 17-CV-81162, 2018 WL 3729553, at *2) (S.D. Fla. Aug. 6, 2018)). After holding a *Daubert* hearing where Dr. Moyer testified, Judge Otazo-Reyes concluded that "Dr. Moyer may testify regarding his treatment of Plaintiff for pain, and his diagnosis of CRPS; however, Dr. Moyer may not offer any causation opinion as to whether Plaintiff fractured her foot or how." (*Daubert* Order, at 5). Harrell does not address directly her failure to present expert testimony to establish medical causation. Interestingly, she appears to agree that her treating physicians cannot determine causation but can only testify as to her symptoms at the time she was being treated. (Pl.'s SOMF, at 5–6 ("It is not within the purview of health care providers to determine causation[.]")).

With the exception of Harrell's swelling and immediate pain after the fall, all of Plaintiff's alleged injuries are not readily observable or susceptible to evaluation by lay persons and without any medical expert testimony on the medical causation of these injuries, it is not possible for a jury to understand the extent of the injuries and determine whether they were a result of the fall. *See Rivera*, 711 Fed. App'x at 955. Although Carnival is correct that the record is devoid of any expert testimony as to medical causation, "the absence of an expert witness does not foreclose [Harrell's] ability to establish causation regarding her readily observable injuries." *See Conden v. Royal Caribbean Cruises Ltd.*, No. 20-22956-CIV, 2021 WL 4973533, at *5 (S.D. Fla. June 21, 2021). Accordingly, Carnival is entitled to partial summary judgment as to Harrell's "non-readily observable" injuries, specifically her fractured or sprained ankle, nerve damage, CRPS, depression, post-traumatic stress disorder, and anxiety. *See Mann*, 385 F. Supp. 3d at 1286; *Conden*, 2021 WL 4973533, at *5 (citing *Whitehead v. City of Brandenton*, No. 8:13-cv-2845, 2015 WL 1810727, at *4 (M.D. Fla. Apr. 20, 2015)); *Aponte*, 2019 WL 943267, at *2 (granting summary judgment to the extent plaintiff claims damages for injuries for nerve damage to his right arm, post-traumatic stress disorder, depression, and chronic pain syndrome because no expert testimony was presented). Harrell may, however, testify as to her readily observable injuries, which include swelling and the immediate pain she experienced as a result of the fall (though not her residual pain, *i.e.*, CRPS). *See Aponte*, 2019 WL 943267, at *6 ("Establishing a link between Aponte's immediate pain, need for a wheelchair and morphine, and incurring various expenses, on the one hand, and the fall, on the other, does not appear to be beyond a factfinder's common knowledge and experience, depending on other evidence Aponte might present at trial."). Thus, summary judgment is denied as to Harrell's readily-observable injuries.

IV. CONCLUSION

For the foregoing reasons, it is **ORDERED AND ADJUDGED** that Defendant's Motion for Summary Judgment is **GRANTED IN PART** and **DENIED IN PART**, as stated herein.

DONE AND ORDERED in Chambers at Miami, Florida 3rd day of December, 2021.

JOSE E. MARTINEZ
UNITED STATES DISTRICT JUDGE

Copies furnished to:
Magistrate Judge Otazo-Reyes
All counsel of record