UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 1:20-cv-22299-KMM

KIRSTEN QUASHEN,

Plaintiff,
v.

CARNIVAL CORPORATION,
a Panamanian Corporation d/b/a
CARNIVAL CRUISE LINE,

Defendant.
_____/

ORDER

THIS CAUSE came before the Court upon Defendant Carnival Corporation's ("Carnival" or "Defendant") Motion for Summary Judgment ("Mot.") (ECF No. 73). Plaintiff Kirsten Quashen ("Plaintiff") filed a response. ("Resp.") (ECF No. 91). Defendant filed a reply. ("Reply") (ECF No. 98). The Motion is now ripe for review.

I. BACKGROUND[1]

On June 3, 2019, Plaintiff was a passenger travelling onboard the Carnival *Inspiration* with her boyfriend, William Traxler ("Traxler"), and her friends, Stacey Moreland ("Moreland") and Matt Lockwood ("Lockwood"). Def.'s 56.1 ¶ 1; Pl.'s 56.1 Resp. ¶ 1.

At some point after 6:09 p.m., Plaintiff and Traxler went to Moreland and Lockwood's suite, Cabin U107, which included a balcony. Def.'s 56.1 ¶ 5; Pl.'s 56.1 Resp. ¶ 5. The balcony door in Cabin U107 was affixed with a sign ("Warning Sign"), stating:

[1] The undisputed facts are taken from Defendant's Statement of Material Facts to Motion for Summary Judgment ("Def.'s 56.1") (ECF No. 72), Plaintiff's Response Controverting Defendant's Statement of Material Fact to Summary Judgment ("Pl.'s 56.1 Resp.") (ECF No. 84), Defendant's Reply Statement of Material Facts to Motion for Summary Judgment ("Def.'s 56.1 Reply") (ECF No. 97), and a review of the corresponding record citations and exhibits.

AIR CONDITIONED
KEEP DOOR CLOSED

CAUTION
OPEN DOOR CAREFULLY
AS STRONG WINDS
MAY CAUSE DOOR TO CLOSE

Def.'s 56.1 ¶ 7 (citing Exhibit 4 to Deposition of Suzanne Vazquez ("Photo") (ECF No. 72-4) at 1). Plaintiff has disputed this based on the following: (1) the sign is posted only on the interior of the balcony door, but not the exterior, (2) the text below "air conditioned keep closed" is comparatively smaller, and (3) Carnival's expert conceded that the sign is not compliant with certain industry standards, including those established by the American National Standards Institute ("ANSI"). Pl.'s 56.1 Resp. ¶ 7 (citing Photo at 1; Suzanne Vazquez Deposition Transcript ("Corp. Rep. Dep. Tr.") (ECF No. 72-2) at 196).[2,3] Having reviewed the record evidence cited by Plaintiff, the Court finds that the text warning passengers of strong winds is slightly smaller than the text regarding air-conditioning and finds it undisputed that the sign was only posted on the interior of the balcony door. *See* Photo at 1; Corp. Rep. Dep. Tr. at 196; *see generally* Def.'s Reply 56.1 (raising no dispute as to the interior facing sign).

Additionally, Defendant's expert, David J. Martyn ("Martyn"), agreed that the Warning

[2] For the reasons set forth in Section II.A, *infra*, the Court finds that Plaintiff's expert, S. Wayne Sanders, must be excluded as an expert. Therefore, the Court need not consider any citations to his report or deposition testimony included in Plaintiff's 56.1 Response. The Court will not address paragraphs in Plaintiff's 56.1 Response that are supported solely by Mr. Sanders's testimony or reports.

[3] Local Rule 56.1 (b)(1)(B) requires pinpoint citations to line numbers of depositions in Statements of Material Facts, when appropriate. However, both Plaintiff and Defendant failed to properly include pinpoint citations to line numbers in depositions. In certain instances, the Court has included pinpoint citations herein based on its review of the record citations. However, in many instances, the citations reflect the pages of depositions that were cited by the Parties without pinpoint citations.

Sign did not comply with ANSI standards because the word "CAUTION" was not in black text with a yellow background. David Martyn Deposition Transcript ("Martyn Dep. Tr.") (ECF No. 80-1) at 189:12–191:12.[4] It is undisputed ANSI standards require specific language and warning symbols in circumstances where a risk of bodily harm exists. Pl.'s 56.1 Resp. ¶ 43; Def's 56.1 Reply ¶ 43.[5]

The balcony door had a closing mechanism that consists of a hydraulic piston and a spring control (hereinafter, "Door Stopper"). Def.'s 56.1 ¶ 10; Pl.'s 56.1 Resp. ¶ 10.

As the ship was leaving the port, Plaintiff, Traxler, Moreland, and Lockwood all went out on the balcony of Cabin U107. Def.'s 56.1 ¶ 6 (citing Plaintiff's Deposition Transcript ("Pl. Dep. Tr.") (ECF No. 72-1) at 58:1–7).[6] Traxler testified that he did not notice that there was anything wrong with the door at that time and that it closed normally. Def.'s 56.1 ¶ 6 (citing William Traxler Deposition ("Traxler Dep. Tr.") (ECF No. 72-3) at 55:6–15). Traxler also noted that there was no wind at that time. Pl.'s 56.1 Resp. ¶ 6 (citing Traxler Dep. Tr. at 55:14–15). Plaintiff testified that she recalled "seeing a sign about the air conditioning" on the door of the balcony before going out on the balcony for the first time, but did not recall reading the portion of the sign urging caution

[4] There is no dispute that the Warning Sign did not contain any other warnings, such as: (1) not to go onto the balcony in high winds, (2) not to open the balcony door in high winds, (3) to refrain from placing one's hand in the door jamb for balance, (4) that the door closing mechanism will cause the door to accelerate while closing when the door's closing sweep is at the final 12 degrees, (5) that the door closing mechanism may unexpectedly cease to function, or (6) that the balcony door poses a danger of crushing or amputation injury. Pl.'s 56.1 Resp. ¶ 44; Def.'s Reply 56.1 ¶ 44.

[5] Defendant clarifies, and Plaintiff has not disputed, that the ANSI standards are not binding guidelines for the relevant technical community. Def's 56.1 Reply ¶ 43 (citing *Johnson v. Manitowoc Boom Trucks, Inc*., 406 F. Supp. 2d 852, 864 (M.D. Tenn. 2005)).

[6] Plaintiff does not dispute this portion of paragraph 6 in Defendant's 56.1 Statement. Pl.'s 56.1 Resp. ¶ 6.

during conditions involving high winds. Def.'s 56.1 ¶ 8 (citing Pl.'s Dep. Tr. at 60:6–10); Pl.'s 56.1 Resp. ¶ 8 ("Not Disputed."). The group then returned inside the cabin to watch television; Traxler testified that he did not notice anything wrong with the balcony door when reentering the cabin. Def.'s 56.1 ¶ 8 (citing Traxler Dep. Tr. at 55:19–22); Pl.'s 56.1 Resp. ¶ 8.

Later, Plaintiff decided to return to the balcony by herself to see whether there were any sea lions or seals next to the ship. Def.'s 56.1 ¶ 11; Pl.'s 56.1 Resp. ¶ 11. Plaintiff testified that she "probably" closed the door behind her after stepping out onto the balcony and did not notice anything wrong with the door at that point. Def.'s 56.1 ¶ 12 (citing Pl.'s Dep. Tr. at 63:1–64:25). After remaining on the balcony for a couple of minutes, Plaintiff decided to return to the cabin. Def.'s 56.1 ¶ 12 (citing Pl.'s Dep. Tr. at 64:1–65:25). Plaintiff testified that the following occurred upon reentering the cabin:

> I opened the door, I believe with my left hand, opened the door wide enough that I could step in front of it, then I held the door with my right hand behind me. I put my left hand on the doorjamb so I could step over the threshold. And when I -- my body was inside the room, I let go of the door with my right hand and it immediately slammed shut on my finger.

Def.'s 56.1 ¶ 13; Pl.'s Dep. Tr. at 65:8–14.[7] Plaintiff testified that she did not have an opportunity to pull her hand away because the door closed so quickly after she let go of the door with her other hand. Pl.'s 56.1 Resp. ¶ 13 (citing Pl.'s Dep. Tr. at 68:19–21).

As a result of the above-described incident, Plaintiff lost a portion of her left-index finger above the top joint of the finger. Def.'s 56.1 ¶ 15; Pl.'s 56.1 Resp. ¶ 15.[8] Plaintiff received medical

[7] Plaintiff has raised numerous disputes as to the wording of paragraph 13 in Defendant's 56.1 Statement, and the Court has therefore opted to simply provide Plaintiff's exact testimony from her deposition. Pl.'s 56.1 Resp. ¶ 13.

[8] The Court finds that, based on the arguments set forth in favor of summary judgment by Defendant, the issue of whether Plaintiff was intoxicated is not material to the outcome of Defendant's Motion. Accordingly, the Court need not resolve any disputes as to whether Plaintiff

treatment on the *Inspiration* and the medical team was not able to reattach the severed portion of Plaintiff's finger because the tissue had become devitalized. Def.'s 56.1 ¶¶ 18–28; Pl.'s 56.1 Resp. ¶¶ 18–28.[9]

Traxler, Moreland, and Lockwood all testified at their depositions that the wind was blowing when Plaintiff was reentering Cabin U107 for the second time. Pl.'s 56.1 Resp. ¶ 13 (citing Matt Lockwood Deposition Transcript ("Lockwood Dep. Tr.") (ECF No. 83-5) at 31; Stacey Moreland Deposition Transcript ("Moreland Dep. Tr.") (ECF No. 83-6) at 56, 93; Traxler Dep. Tr. at 57, 60–61). Although Defendant appears to dispute whether the wind was blowing at the time of Plaintiff's incident, Def.'s Reply 56.1 ¶ 39, the Court finds that there is an issue of fact as to whether the wind was blowing in light of the above-cited deposition testimony.

On certain occasions, Carnival issues audible warnings and provides additional signage warning guests not to go on balconies due to high winds. Pl.'s 56.1 Resp. ¶ 39; Def.'s 56.1 Reply ¶ 39. It is undisputed that no such warning was issued that day. *Id.*

The doorway has a five-inch threshold that Plaintiff was required to step over to reenter the cabin. Pl.'s 56.1 Resp. ¶ 13 (citing Corp. Rep. Dep. Tr. at 202). Suzanne Vazquez ("Vazquez"), Carnival's corporate representative, acknowledged that thresholds can pose a "trip hazard" if a passenger does not use caution while stepping over them. *Id.* (citing Corp. Rep. Dep. Tr. at 202). Plaintiff stated at her deposition that she was wearing a "long skirt" at the time of the incident and the reason she placed her left hand on the door jamb was to enable her to step over the threshold.

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was intoxicated. Def.'s 56.1 ¶¶ 3–4, 17; Pl.'s 56.1 Resp. ¶¶ 3–4, 17. For the same reasons, the Court need not address whether Plaintiff had taken narcotic pain medication that day. Def.'s 56.1 ¶ 2; Pl.'s 56.1 Resp. ¶ 2.

[9] Because Plaintiff has declined to pursue her medical negligence claims any further, as discussed below, the Court need not fully recount the facts pertaining to her medical treatment because they are no longer material to Defendant's instant Motion.

Id. (citing Pl.'s Dep. Tr. at 65:21–23).

The Parties dispute exactly what caused the door to close so quickly. Def.'s 56.1 ¶ 14; Pl.'s 56.1 Resp. ¶ 14. At her deposition, Plaintiff recalled that Traxler initially believed that the wind caused the door to close so quickly. Pl.'s Dep. Tr. at 79:1–17. However, Plaintiff also stated that she later realized that the closing mechanism on the door was broken. *Id*. at 79:17–21. Plaintiff has submitted video evidence, taken by Lockwood, showing the operation of the door shortly after the incident took place, before any effort to replace the Door Stopper was made. (ECF No. 86). The video shows the door closing on its own, then getting stuck in place. *Id*. Then, after someone touches it, the door closes very quickly. *Id*. Immediately thereafter, the individual who captured the video touches the Door Stopper and demonstrates that it is loose. *Id*. From this evidence, a trier of fact could determine that the Door Stopper was not functioning properly because (1) the door got stuck, and (2) the door closed very quickly after someone appeared to touch it. *Id*. Accordingly, the Court finds that there is a dispute as to whether the Door Stopper was functioning properly at the time of the incident. The Court also find that there is enough evidence to create a dispute that the functionality of the Door Stopper, coupled with high winds, were the cause of the door closing on Plaintiff's finger.[10] Additionally, there is no dispute that, despite Plaintiff's request for Carnival to preserve physical evidence relating to this matter, the Door Stopper was subsequently lost when the *Inspiration* was sold for scrap parts during Carnival's "pause in global operations during the COVID-19 pandemic." Pl.'s 56.1 Resp. ¶¶ 36–

[10] Because the Court finds that sufficient evidence exists to create a dispute as to whether the incident was caused by the Door Stopper, high winds, or both, the Court need not resolve other factual disputes between the Parties as to whether there is evidence that the door was defective. Pl.'s 56.1 Resp. ¶ 14, 34–35, 51; Def.'s 56.1 Reply ¶ 51. The Court will proceed on the basis that there is sufficient evidence to create an issue of fact as to whether the Door Stopper was indeed defective.

37; Def.'s 56.1 Reply ¶¶ 36–37.

In addition, there was a prior incident in Cabin U107 involving the balcony door on March 17, 2019. Def.'s 56.1 ¶ 29; Pl.'s 56.1 Resp. ¶ 29. There, a passenger named Debra Mackey ("Mackey") was entering the cabin from the balcony and testified during her deposition that as she came inside "the door slammed really hard" and, despite her attempt to pull her hand away, closed on her finger. Pl.'s 56.1 Resp. ¶ 29; Debra Mackey Deposition Transcript ("Mackey Dep. Tr.") (ECF No. 83-6) at 12:6–18. Mackey further stated that there was "no pressure there to make [the door] close a little slower" and "it was like it was pushed shut." Mackey Dep. Tr. at 30:12–31:4.

There is no dispute that a work order was generated for maintenance on Cabin U107's balcony door following the March 17, 2019 incident. Def.'s 56.1 ¶ 30; Pl.'s 56.1 Resp. ¶ 30. Mackey testified at her deposition that someone came to repair the door "the same day." Def.'s 56.1 ¶ 30 (citing Mackey Dep. Tr. at 66:2–23). Mackey also responded "No" when asked whether she or her friends had any problems with the balcony door for the rest of the cruise. *Id*. (citing Mackey Dep. Tr. at 66:24–67:4). Vazquez testified that a carpenter, Johnson Carvalho ("Carvalho"), who responded to that work order found that the door was "closing a little fast so he adjusted it to tighten it, basically, so that it would close more slowly." Def.'s 56.1 ¶ 30 (citing Corp. Rep. Dep. Tr. at 50:14–18); Corp. Rep. Dep. Tr. at 48:13.

Plaintiff disputes the foregoing for the following reasons. First, Plaintiff argues that Carnival staff did not tell Mackey what was wrong with the door or that it was fixed. Pl.'s 56.1 Resp. ¶ 30 (citing Mackey Dep. Tr. at 32). Although the workmen did not tell Mackey what was wrong with the door, this does not dispute her testimony that the Carnival staff came by to repair the door and that she had no issues with it for the rest of her trip. Mackey Dep. Tr. at 66:2–23; 66:24–67:4. Second, Plaintiff argues that although Mackey reported that she had no further issues

with the door after the incident, she also did not return to the balcony for the rest of the trip. Pl.'s 56.1 Resp. ¶ 30 (citing Mackey Dep. Tr. at 32, 66–67). Plaintiff is correct that Mackey stated at her deposition that she did not use the door again for the rest of her trip. Mackey Dep. Tr. at 32:17. The Court finds it undisputed that Mackey testified that Carnival staff came to fix the door, but finds that Mackey's testimony does not stand for the proposition that the door was fixed.

The work order created following Mackey's March 17, 2019 incident states "U107 Balcony door is closing fast." List of Work Orders ("Work Orders") (ECF No. 85-10) at Bates 02088. The work order also indicates that the work order was closed. *Id.* Plaintiff does not dispute that a work order created for the repairs was closed. Pl.'s 56.1 Resp. ¶ 30 (citing Work Orders at Bates 02088). However, Plaintiff asserts there is no evidence as to exactly why repairs were made or if they were completed correctly. Pl.'s 56.1 Resp. ¶ 30 (citing Work Orders at Bates 02088). In light of the foregoing, having reviewed the record evidence cited by each Party, the Court finds it undisputed that there was a problem with the door, a work order was created, Carnival staff worked on the door, and the work order was subsequently closed. The Court also finds that the only evidence of exactly what repairs were made by Carvalho comes from Vazqeuz's testimony that the door was "closing a little fast so he adjusted it to tighten it, basically, so that it would close more slowly." Corp. Rep. Dep. Tr. at 50:14–18

Plaintiff also asserts that photos taken of the Carnival staff show that their repairs violated the manufacturer's instructions for the Door Stopper installed on the balcony door. Pl.'s 56.1 Resp. ¶ 30 (citing Mackey Photos of Carnival Staff ("Photos") (ECF No. 85-8) at 1–2). Specifically, Plaintiff points out that in the photos, the Carnival staff are not holding the wrench horizontally to the floor and notes that Defendant's expert, Martyn, agreed during his deposition that Carvalho should have been holding the wrench in a horizontal position. *Id.* (citing Martyn Dep. Tr. at 133:1–

14; Door Stopper Instructions ("Instructions") (ECF No. 85-9)). Additionally, Plaintiff points out that the photos show that the Carnival staff are repairing the Door Stopper while the components of the "link arm" are at angles of greater and less than 90 degrees, in each picture respectively. *Id.* (citing Photos at 1–2). Yet, Plaintiff also notes that Martyn agreed that to set the "closing force," the link arm connected to the door closer unit should be at 90 degrees to the face of the closing unit. Pl.'s 56.1 Resp. ¶ 30 (Martyn Dep. Tr. at 104:18–22). However, Defendant disputes the foregoing because Martyn also testified that there is no way to know exactly what the Carnival staff are doing in the photos and so it is not possible to tell whether they are installing or removing the Door Stopper. Def.'s 56.1 Reply ¶ 46 (citing Martyn Dep. Tr. at 133:1–134:25). However, it has been established, *supra*, that there is evidence that the door was "closing a little fast so [Carvalho] adjusted it to tighten it, basically, so that it would close more slowly." Corp. Rep. Dep. Tr. at 50:14–18. Accordingly, the Court finds that an issue of fact exists as to whether the photographs depict Carvalho tightening a screw in the Door Stopper in a manner that does not comply with the applicable instructions.

Plaintiff also states that evidence shows that Carnival was aware of the need to hold the wrench horizontally and adjust the Door Stopper at 90 degrees. Pl.'s 56.1 Resp. ¶¶ 45–46. Yet, Plaintiff only cites to the Door Stopper's instruction manual and Defendant's expert's testimony for this proposition—neither of which speak to Carnival's knowledge. *See* Martyn Dep. Tr. 98–99, 104–05, 124; *see also* Instructions. Accordingly, the Court finds that there is no evidence that Carnival was aware of the need to adjust the Door Stopper in the above-stated manner.

It is undisputed that a second work order was generated on March 28, 2019, which indicated that the door was malfunctioning, and that the second work order was "closed" on March 29, 2019. Def.'s 56.1 ¶ 31; Pl.'s 56.1 Resp. ¶ 31. Plaintiff adds, and Defendant does not dispute,

that the work order stated that the "balcony door stopper is broken" and does not indicate what repairs were made or if the door was working properly following their completion. Pl.'s 56.1 Resp. ¶ 31 (citing Work Orders at Bates Number 2089). There were no new work orders for repairs on the balcony door in Cabin U107 before Plaintiff's incident on June 3, 2019. Def.'s 56.1 ¶ 31; Pl.'s 56.1 Resp. ¶ 31.[11]

In addition to Plaintiff's and Mackey's incidents, the Court finds no dispute that another individual, Angela Biller ("Biller"), in a different cabin on the *Inspiration* reported that "she got her finger slammed in the balcony door when [she] walked out and let go of the door[.]" Pl.'s 56.1 Resp. ¶ 52 (citing Corp. Rep. Dep. Tr. at 138–42); Def.'s 56.1 Reply ¶ 52. Additionally, another individual named Eileen Simon ("Simon"), on a different ship, "claimed that after entering the cabin room from the balcony, her right index hand finger got caught between the door jamb and the closing door." Pl.'s 56.1 Resp. ¶ 52 (citing Corp. Rep. Dep. Tr. at 128–33; Def.'s 56.1 Reply ¶ 52. Simon reported that she "wasn't really paying attention" when she was walking through the door.[12] The Court finds no evidence that either of these incidents involved wind or a defective door.

The Court finds no dispute that Carnival is aware that high winds can cause balcony doors to "slam back." Pl.'s 56.1 Resp. ¶ 38 (citing Carnival Housekeeping Instructions ("Housekeeping Instructions") (ECF No. 85-11) at Bates Number 2078; Staff Captain Nunzio Arigo Deposition Transcript ("Arigo Dep. Tr.") (ECF No. 83-2) at 53:2–12; Def.'s 56.1 Reply ¶ 36–37. Defendant

[11] Plaintiff states, and Defendant does not dispute, that no work order was generated for repairs to the balcony door following Plaintiff's incident. Pl.'s 56.1 Resp. ¶ 31. However, Plaintiff does not dispute that there were no work orders placed for repairs to the balcony door in Cabin U107 between Mach 29, 20219 and June 3, 2019. Pl.'s 56.1 Resp. ¶ 31.

[12] Paragraph 52 of Plaintiff's 56.1 Response contains no suggestion that the incidents involving Biller and Simon relate in any way to wind or defective doors. Pl.'s 56.1 Resp. ¶ 52

also notes, and Plaintiff does not dispute, that Staff Captain Arrigo testified at his deposition that the door can slam shut during high winds, even if the Door Stopper is functioning properly. Def.'s 56.1 Reply ¶ 36–37 (citing Arigo Dep. Tr. at 53:2–12).

It is undisputed that the balcony doors are inspected by the housekeeping staff on a daily basis. Def.'s 56.1 ¶ 31; Pl.'s 56.1 Resp. ¶ 31, 38. However, Plaintiff adds, and Defendant does not dispute, that the housekeeping staff is instructed not to open balcony doors during high winds. Pl.'s 56.1 Resp. ¶ 31 (citing Housekeeping Instructions at Bates Number 2078). Therefore, there is no evidence that the balcony doors are inspected under conditions involving high wind.

Plaintiff states that Carnival is aware that passengers sometimes position their hands on the balcony door frame to navigate the door threshold. Pl.'s 56.1 Resp. ¶ 40 (Mackey Dep. Tr. at 46, 50; Corp. Rep. Dep. Tr. at 138–42). However, the portions of Mackey and Vazquez's depositions cited by Plaintiff do not stand for the proposition that Carnival is aware that passengers place their hands on the doorframe to navigate the threshold. Mackey Dep. Tr. at 46, 50; Corp. Rep. Dep. Tr. at 138–42. The first portion of Mackey's deposition cited by Plaintiff states "I can't tell you how it happened . . . I can't tell you how I was holding the door or how I walked in or what, but it slammed on my finger." Mackey Dep. Tr. at 46:12–19. In the second portion of Mackey's testimony, Mackey agrees that her left hand must have been on the door jamb. *Id*. at 50:1–4. Neither portion references the threshold. *Id*. at 46:1–25, 50:1–25. The portion of Vazquez's testimony cited by Plaintiff does not relate to thresholds. Corp. Rep. Dep. Tr. at 138–42. Plaintiff also asserts that "stepping over the 5-inch threshold requires passengers to use caution." Pl.'s 56.1 Resp. ¶ 40 (Corp. Rep. Dep. Tr. at 202–03). While it is true that Vazquez stated that stepping over a threshold may be a tripping hazard if caution is not used, she did not state that it would require placing one's hand into the doorjamb to do so. Corp. Rep. Dep. Tr. at 202–03. Accordingly, the

Court finds that there is no evidence supporting Plaintiff's assertion that Carnival was aware that passengers sometimes position their hands in balcony door frames to navigate the 5-inch raised threshold.

Plaintiff cites Martyn's deposition for the proposition that even when door stoppers are installed correctly, the door still accelerates just before closing through a "phenomenon called 'latching speed.'" Pl.'s 56.1 Resp. ¶ 41 (citing Martyn Dep. Tr. 180–82; Instructions at Bates Number 3969–70). In the portion of testimony cited by Plaintiff, Martyn testified that the "latching speed" feature is a "typical installation for a self-closing door that you encounter just about anywhere." Martyn Dep. Tr. at 182:1–4.

Plaintiff states that "Carnival is aware of the danger posed by machinery fatigue and door stoppers suddenly wearing out." Pl.'s 56.1 Resp. ¶ 42 (citing Corp. Rep. Dep. Tr. at 85–86). Plaintiff also states that this risk requires the implementation of a preventative maintenance program. Pl.'s 56.1 Resp. ¶ 42 (citing Corp. Rep. Dep. Tr. at 171–72; Arigo Dep. Tr. at 32). The Court has reviewed the portions of Vazquez's deposition and Arigo's deposition and finds that they do not stand for the exact proposition stated by Plaintiff. Rather, Vazquez indicated that door stoppers require "routine maintenance" and said nothing of a "danger" posed by the machinery. Vazquez at 85–86. Additionally, Arigo did not testify that the risk of door stoppers wearing out specifically requires a preventative maintenance plan, only that those procedures are necessary as a general matter and that it is Carnival's duty to minimize accidents on board. Arigo Dep. Tr. at 32, 110–11. Accordingly, the Court finds that the statements cited by Plaintiff stand for the proposition that Carnival is aware that routine maintenance is necessary to ensure doors are in working order.

Relatedly, there is no dispute that Vazquez testified to the effect that door closing

mechanisms are heavily-used and require routine maintenance. Pl.'s 56.1 Resp. ¶ 47; Def's 56.1 Reply ¶ 47.

Plaintiff states that "Carnival is aware that a balcony door that slams suddenly poses a risk of crushing injury, amputation injury, or both." Pl.'s 56.1 Resp. ¶ 43 (citing Corp. Rep. Dep. Tr. at 195–96; Mackey Dep. Tr. 46–50; Arigo Dep. Tr. at 52–53, 57). Defendant seeks to dispute this based on the actual testimony offered by Vazquez and Arigo, yet does not address Mackey's testimony cited by Plaintiff, which states that the door slammed closed on her finger. Def's 56.1 Reply ¶ 43; Mackey Dep. Tr. 46:12–19. While Mackey's testimony does not state with great specificity what happened, the Court agrees with Plaintiff that the incident involving Mackey made Carnival aware of the risk of a balcony door causing injury to a person.

It is undisputed that there were 36 work orders for various balcony doors on the Carnival *Inspiration* in the thirteen (13) months before Plaintiff's incident. Pl.'s 56.1 Resp. ¶ 43; Def's 56.1 Reply ¶ 43.[13] The Court has reviewed the work orders and finds that Plaintiff's characterization of the issues underlying these work orders as "problems" is fair given that each work order states a specific issue with the functionality of a door as the "subject". *See generally* Work Orders. The vast majority simply state something to the effect of "door will not close properly." *See generally id*.

On August 10, 2020, Plaintiff filed the operative Amended Complaint. ("Am Compl.") (ECF No. 8). Therein, Plaintiff brings the following claims: (1) negligent failure to maintain ("Count I"), Am. Compl. ¶¶ 38–50, (2) negligent failure to warn ("Count II"), *id*. ¶¶ 51–64, (3) negligent training and supervision of personnel ("Count III"), *id*. ¶¶ 65–74, (4) negligent medical

[13] That Defendant disputes Plaintiff's characterization of these work orders as evidence of "problems" is not supported by Vazquez's testimony.

care and treatment by employees or actual agents ("Count IV"), *id*. ¶¶ 75–83, and (5) negligence for vicarious liability based on apparent agency of medical personnel ("Count V"), *id*. at ¶¶ 84–105.

Now, Defendant moves for summary judgment as to all counts in the Amended Complaint. *See generally* Mot.

II. DISCUSSION

A. Defendant's Motion to Exclude Plaintiff's Expert S. Wayne Sanders.

Defendant argues in its 56.1 Reply that Plaintiff's expert S. Wayne Sanders ("Sanders") is unreliable and should be stricken for the reasons stated in its *Daubert* Motion, ("Def.'s *Daubert* Mot.") (ECF No. 75) at 18. *See* Def.'s 56.1 Reply ¶¶ 38, 50. Given the significance of Sanders's opinions to the arguments raised in Defendant's Motion for Summary Judgment, the Court will address whether Sanders's opinions should be excluded as a threshold issue.

Defendant argues that Sanders' testimony should be stricken because: (1) he is not providing specialized or technical knowledge that is not already possessed by a jury, (2) his testimony lacks any discernable methodology because his opinions are based purely on his experience, (3) Sanders does not explain how his experience supports his opinions, and (4) Sanders is unqualified to render his opinions because he has no training or education that is relevant to the vast majority of opinions he offers. *Id*. at 14–19.

In response, Plaintiff contends that Sanders has decades of experience in the area of safety and risk management. Plaintiff's *Daubert* Response ("Pl.'s *Daubert* Rep.") (ECF No. 87) at 11–12. Plaintiff also contends that Sanders has a reliable methodology for analyzing maintenance protocols and caution signage through his application of the "Safety Hierarchy"—which is a "a peer-reviewed methodology detailed in the American Society for Safety Professionals periodicals."

Id. at 12.

For the following reasons, the Court finds that Sanders must be excluded as an expert because his opinions are unreliable and would not assist a trier of fact.

1. Applicable Legal Standards.

Rule 702 of the Federal Rules of Evidence provides that:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if: (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case.

Fed. R. Evid. 702. The United States Supreme Court held in *Daubert v. Merrell Dow Pharmaceuticals, Inc.* that district courts—in determining if the requirements of Rule 702 have been met—should consider whether the methodology underlying an expert's testimony (1) can be and has been tested; (2) has been subjected to peer review and publication; (3) has a known or potential rate of error; and (4) is generally accepted in the scientific community. 509 U.S. 579, 593–94 (1993).

"Pursuant to Rule of Evidence 702, as well as *Daubert* and its progeny, 'district courts must act as gatekeepers, admitting expert testimony only if it is both reliable and relevant.'" *Finestone v. Fla. Power & Light Co.*, 272 F. App'x 761, 767 (11th Cir. 2008) (quoting *Rink v. Cheminova, Inc.*, 400 F.3d 1286, 1291 (11th Cir. 2005)) (alterations adopted). In this gatekeeping role, "district courts must engage in a rigorous inquiry to determine whether":

> (1) [T]he expert is qualified to testify competently regarding the matters he intends to address; (2) the methodology by which the expert reaches his conclusions is sufficiently reliable as determined by the sort of inquiry mandated in *Daubert*; and (3) the testimony assists the trier of fact, through the application of scientific, technical, or specialized expertise, to understand the evidence or to determine a fact in issue.

Rink, 400 F.3d at 1291–92 (quoting *City of Tuscaloosa v. Harcros Chems., Inc.*, 158 F.3d 548, 562 (11th Cir. 1998) (internal quotation marks omitted)). "The party offering the expert has the burden of satisfying each of these three elements by a preponderance of the evidence." *Id.* at 1292 (citing *Allison v. McGhan Med. Corp.*, 184 F.3d 1300, 1306 (11th Cir. 1999)).

2. Sanders's Opinions Lack Any Reliable Methodology.

The only methodology identified by Sanders, upon which he bases his opinions, is the so-called "Safety Hierarchy"—which was described in an article published by the American Society for Safety Professionals. Pl.'s *Daubert* Resp. at 12 (citing American Society for Safety Professionals Article ("Safety Article") (ECF No. 89-6)). The article relating to the Safety Hierarchy provided by Sanders describes the process as follows: (1) assess the hazard, (2) assess safer options such as elimination, substitution or simplification, (3) consider engineering controls, (4) consider administrative controls, and (5) consider PPE (such as safety glasses or earplugs, etc.). Safety Article at Bates Number 06607, 06611.

In *Jaquillard v. Home Depot U.S.A., Inc*, a court in the Southern District of Georgia granted a motion to exclude an expert who applied the Safety Hierarchy in a premises liability case because: (1) there was no evidence that the Safety Hierarchy has been peer reviewed in the premises liability context, (2) there was "no evidence that the Safety Hierarchy has been tested in a premises liability context," (3) the court could not find any instance in which the Safety Hierarchy had been utilized in a premises liability claim and could only find cases applying it in products liability cases, and (4) the plaintiff "provided no evidence of a known error rate regarding the Safety Hierarchy in any context, much less as applied to walking surfaces in a garden center." No. CV 410-167, 2012 WL 527421, at *6–7 (S.D. Ga. Feb. 16, 2012).

The *Jaquillard* Court is correct that the Safety Hierarchy is often used in products liability

cases. 2012 WL 527421, at *6–7 (citing *In re Stand 'N Seal*, 636 F. Supp. 2d 1333, 1338 (N.D. Ga. 2009) (noting expert in products liability case based her opinions in part on the Safety Hierarchy); *Covas v. Coleman Co*., No. 00–8541–CIV, 2005 WL 6166740, at *11 (S.D. Fla. May 22, 2008) (noting one of the bases that expert relied upon in forming his opinion regarding defective design of a heater was his personal knowledge of the Safety Hierarchy); *Martinez v. Terex Corp*., 241 F.R.D. 631, 637 (D. Ariz. 2007) (finding expert qualified to testify regarding general principles of Safety Hierarchy in defective design of concrete mixer case)).

The Court agrees with the reasoning in *Jaquillard* and finds that the Safety Hierarchy's application to premises liability cases is problematic in the absence of evidence that it has been tested for the purposes of assessing premises liability and in the absence of a known error rate.[14] These concerns sound loudly in this case because here, like in *Jaquillard*, there is no evidence regarding whether (1) the Safety Hierarchy has been tested for use in the premises liability context, and (2) there is a known error rate associated with the Safety Hierarchy.[15] Even more troubling is that there is no evidence that the Safety Hierarchy has ever been applied, in court or in the field, to the safety of doorways. In the absence of such evidence, the Court finds Sanders's reliance on the Safety Hierarchy to be highly unreliable.

Moreover, even if the Safety Hierarchy was a reliable method in this context, there is no

[14] The Safety Article contains no indication that the Safety Hierarchy has been tested in the field of premises liability or that there is a known error rate for the Safety Hierarchy as applied to premises liability. *See generally* Safety Article.

[15] The Court's research revealed a single case in which the Safety Hierarchy has been applied in a premises liability case: *Martin v. Omni Hotels Mgmt. Corp*., No. 615CV1364ORL41KRS, 2017 WL 2928154, at *5 (M.D. Fla. Apr. 19, 2017). In *Martin*, the court stated that the defendant failed to come forward with specific objections as to the reliability of the method as applied to the facts of this case. Here, for the reasons stated herein, the Court has found that Carnival has sufficiently set forth objections calling into question the reliability of the Safety Hierarchy as applied to the facts of this case and finds *Martin* to be distinguishable.

evidence that Sanders has "has reliably applied the principles and methods to the facts of the case." Fed. R. Evid. 702. Plaintiff contends that Sanders applied the Safety Hierarchy to this case to reach the conclusion that Carnival violated reasonable safety standards in three ways.

First, Plaintiff points to Sanders's opinion that Carnival failed to train its employees on how to properly maintain and replace the hydraulic door closer, and identifying faulty maintenance is one plausible explanation for the accident that amputated Plaintiff's finger. Pl.'s *Daubert* Resp. at 13 (citing Sanders Dep. Tr. at 45, 106, 143–44). However, the sole reference to the hierarchy in these citations is the following comment:

> I'm saying that from a safety professional standpoint and ***through the application of the hierarchy***, what was in the record that I was able to evaluate, which was not very much, it did not appear that Carnival was operating in what would be considered an acceptable standard practice or standard of care from a safety standpoint for maintaining the door components.

Sanders Dep. Tr. at 144:9–17. Thus, Sanders's deposition testimony does not spell out how he applied the Safety Hierarchy to conclude that Carnival failed to train its employees. Simply referencing a theory, without explaining how it is relevant, does not demonstrate that Sanders has utilized it as means of forming his opinion. Thus, the Court finds that this conclusory one-off reference to the Safety Hierarchy does not constitute a reliable application of the theory to the facts of this case.

Second, Sanders opines that Carnival's system for verifying that door repairs were performed properly was unreasonable and inadequate. Pl.'s *Daubert* Resp. at 13 (citing Sanders Dep. Tr. 133–37, 139, 150–52, 160–1); Sanders Safety Report ("Sanders Safety Rep.") (ECF No. 84-5) at 8). The sole reference to the hierarchy in the portions of Plaintiff's deposition cited by Plaintiff here is Sanders's statement that the Safety Hierarchy requires documenting and recording of risks that have happened in the past, and that they should be eliminated if possible. Sanders

Dep. Tr. at 150:4–19. However, again, Sanders does not explain how or why the theory requires what he says it requires, he simply states that it does. *Id*. Moreover, the portion of the report that serves as the basis for this opinion, which was referenced by Plaintiff, contains no reference to the Safety Hierarchy. *See* Sanders Safety Rep. at 8. Further, remarkably, the section entitled "opinion basis" on the same page of Sanders's report simply refers to Sanders's experience and contains no reference to the Safety Hierarchy. *See id*. Thus, there is simply no evidence that the Safety Hierarchy has been reliability applied in the formation of Sanders's opinions as to Carnival's systems for verifying maintenance.

And third, Plaintiff cites to Sanders's opinion that the Warning Sign on the door failed to meet ANSI standards and the criteria of the Safety Hierarchy. Pl.'s *Daubert* Resp. at 13 (citing Sanders Dep. Tr. 93–94, 98–100, 157–59, 163). During his deposition, Sanders referenced the Safety Hierarchy as to the issue of signage, stating during his deposition that warning signs are "low" on the hierarchy and are less effective. Sanders Dep. Tr. 93:17–94. In another instance, he says that the wind hazard should have been listed above the warning about the air-conditioning because it has "hierarchical priority" over air-conditioning. *Id*. at 158:23. Yet, Sanders does not explain why this is the case or cite to any scientific publication that applies the Safety Hierarchy in this manner. *Id*. Nor does he explain how warnings being "low" on the Safety Hierarchy dictates that the Warning Sign should have been formatted differently. *Id*. at 93:17–94. The Court finds that Sanders's references to the Safety Hierarchy are merely an attempt to cast his opinion as being informed by a scientific theory—when it is in fact not so. Moreover, the portion of Sanders's report dedicated to the adequacy of signage does not even reference the Safety Hierarchy, let alone spell out how it informs his opinion. Sanders Safety Rep. at 10. Without any actual explanation as to how the theory applies or evidence that it has ever been used to determine the sufficiency of

signage, the Court cannot find that Sanders "has reliably applied the principles and methods [of the Safety Hierarchy] to the facts of the case." Fed. R. Evid. 702.

In sum, the Court finds that the so-called "Safety Hierarchy" is an unreliable methodology for use in the field of premises liability and the Court will not allow it to serve as a trojan horse for Sanders's unscientific opinions—particularly in light of the fact that there is almost no evidence that he even applied the theory to the facts of this case.[16]

3. Sanders's Experience Alone Is Insufficient to Render His Opinions Reliable.

Having found that Sanders's reliance on the Safety Hierarchy does not render his opinions reliable under the strictures of Federal Rule of Evidence 702, the Court turns to whether his experience alone provides a sufficient basis for the opinions that he has offered.

Defendant argues that an expert cannot rely solely on his or her experience without explaining in detail how that experience and other materials consulted support the opinion rendered. Def.'s *Daubert* Mot. at 17–18 (citing *Farley v. Oceania Cruises, Inc.*, No. 13-20244-CIV, 2015 WL 1131015, at *1 (S.D. Fla. Mar. 12, 2015). In response, Plaintiff contends that Sanders's professional background provides him with the requisite expertise to offer expert testimony as to the various issues on which he opines. Pl.'s *Daubert* Resp. at 15. Plaintiff also argues that Sanders

[16] Insofar as Plaintiff contends that Sanders's opinions as to the sufficiency of warning signs under the ANSI standards are supported by reference to applicable guidelines from ANSI, the Court notes that Sanders did not even render an opinion as to the ANSI's guidelines until *after* Defendant's expert referenced those standards in his report by way of including reference to the ANSI guidelines in his rebuttal report. *See generally* Sanders Safety Rep. (containing no reference to ANSI standards); *see also* Sanders Rebuttal Report ("Sanders Rebuttal Rep.") (ECF No. 85-3) at 1–2. Setting aside that it appears Sanders was not even aware of the ANSI standards until after reading Martyn's report and that the reference in Sanders's Rebuttal Report to the ANSI standards is only a single sentence in length, Martyn conceded that the sign does not comply with the ANSI standards and the compliance with these standards is not in dispute for the purpose of the Motion for Summary Judgment. Martyn Dep. Tr. at 189:12–191:12. Accordingly, Sanders's opinions regarding ANSI standards are not relevant to the outcome of Defendant's instant Motion for Summary Judgment.

explained how his "specific work experience led him to reach his conclusions." *Id*. (citing Sanders Safety Rep. at 3).

Plaintiff has not identified any scientific expertise, technical training, or specialized education that would prepare Sanders to offer the opinions included in his report, rebuttal report, and deposition. *See generally* Resp. Indeed, Sanders admittedly has no training in architecture or engineering and has never received any formal education that would be relevant to the opinions offered in his report. Sanders Dep. Tr. at 28:24–30:18 (stating that he has no background in architecture or engineering). Thus, Sanders's only experience that is relevant to his expertise for the purposes of his testimony in this case comes from his professional experience. Sanders's curriculum vitae ("CV") details that he worked in loss prevention at Marriot Corporation for ten (10) years where, among other things, he worked to ensure premises safety and security. (ECF No. 89-5) at 2. Then, Sanders worked as a vice president at Entry Systems, Inc. for approximately four (4) years, where he assisted with "sales and marketing, client service, technical service, vendor agreements, inventory, accounts payable, accounts receivable, pricing, and consultation with clients to assess their security and safety system needs." *Id.* Sanders then co-founded Healthcare Team Training, LLC, where he "worked with clients in the healthcare industry by providing services that support their patient safety programs" for eight (8) years. *Id*. And finally, for the last eleven (11) years, Sanders has been a Vice President at Hospitality Safety & Security, Inc. where he "provide[s] services to clients in the areas of occupational safety and health management, and premises safety." *Id*. at 1. In his current role, he conducts approximately 60 facility reviews annually. *Id*.

In *United States v. Frazier*, the Eleventh Circuit stated that:

> the plain language of Rule 702 makes this clear: expert status may be based on "knowledge, skill, experience, training, or education." The Committee Note to the

> 2000 Amendments of Rule 702 also explains that "[n]othing in this amendment is intended to suggest that experience alone . . . may not provide a sufficient foundation for expert testimony." Fed. R. Evid. 702 advisory committee's note (2000 amends.).

387 F.3d 1244, 1261 (11th Cir. 2004) (emphasis removed). However, the *Frazier* Court continued: "[o]f course, the unremarkable observation that an expert may be qualified by experience does not mean that experience, standing alone, is a sufficient foundation rendering reliable any conceivable opinion the expert may express." *Id.* "The same criteria that are used to assess the reliability of a scientific opinion may be used to evaluate the reliability of non-scientific, experience-based testimony." *Id.* at 1262 (citing *Kumho Tire v. Carmichael*, 526 U.S. 137, 152 (1999); *see also Clark v. Takata Corp.*, 192 F.3d 750, 758 (7th Cir. 1999) ("In determining whether an expert's testimony is reliable, the *Daubert* factors are applicable in cases where an expert eschews reliance on any rigorous methodology and instead purports to base his opinion merely on 'experience' or 'training.'"). "Exactly how reliability is evaluated may vary from case to case, but what remains constant is the requirement that the trial judge evaluate the reliability of the testimony before allowing its admission at trial." *Id.* "[T]he trial judge must have considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable." *Id.* (citing *Kumho Tir*e, 526 U.S. at 152).

Where an expert's opinion is based solely or primarily on his or her experience, it is "the burden of the proponent of this testimony to explain how that experience led to the conclusion he reached, why that experience was a sufficient basis for the opinion, and just how that experience was reliably applied to the facts of the case." *Id.* at 1265. "'[T]he court's gatekeeping function requires more than simply 'taking the expert's word for it.'" *Id.* (quoting Fed. R. Evid. 702 advisory committee's note (2000 amends.)).

An "'expert cannot rely on 'experience' without explaining in detail how the experience

and other materials consulted support the opinion rendered.'" *Farley*, 2015 WL 1131015, at *7 (quoting *Umana–Fowler v. NCL (Bahamas), Ltd*., No. 13–cv–23491, 2014 WL 4832297, at *3 (S.D. Fla. Sept. 19, 2014) (quoting *Frazier*, 387 F.3d at 1265)) (emphasis removed). In *Farley*, the court excluded an expert's opinion, based solely on experience, where the expert:

> failed to inspect the vessel where the accident took place or interview any crew members. He [did] not cite to any publications or experiments to support his opinions with respect to lounge chair safety. [He did] not provide a detailed explanation of how his experience supports his opinions or what materials he consulted (other than the policies and procedures of competitor cruise line operators) to reach his conclusions.

Id. at *8.

The same is true in this case: (1) there is no evidence that Sanders inspected Cabin U107, (2) Sanders has not supported his opinions with any publications or experiments relating to the safety of doors, and (3) most importantly, he does not specifically explain how his experience supports his opinions. Rather, Sanders simply offers common sense conclusions based upon evidence in the record that could just as easily be reached by the trier of fact.

Remarkably, Plaintiff has not identified even a single instance in which Sanders recounts his relevant experience and explains how it is relevant to this case. Pl.'s *Daubert* Resp. at 10–15. The opinions contained in Sanders's report make no specific reference as to how any of his opinions are informed by his professional experience beyond a conclusory statement that his experience is the basis of his opinion. Sanders Safety Rep. at 8–10. For example, he opines in his report that Carnival failed to have an adequate maintenance program to inspect and repair failing equipment—yet, the paragraph dedicated to this opinion contains no reference to how Sanders's experience informs this opinion. This deficiency is emblematic of Sanders's testimony in general. Plaintiff states that on pages 3 and 4 of Sanders' Report, he relies on "his experience supervising and installing hydraulic door closers to opine that the door closer depicted in a video of Ms.

Quashen's cabin on the night of the accident was malfunctioning." Pl.'s *Daubert* Resp. at 14 (citing Sanders Safety Rep. at 3–4). Yet, in this portion of Sanders's Report, he simply recounts what he viewed in a video and concludes that the door was broken, *without a single reference to his professional experience*.

It is Plaintiff's burden to show how Sanders's "experience led to the conclusion he reached, why that experience was a sufficient basis for the opinion, and just how that experience was reliably applied to the facts of the case." *Fraizer*, 387 F.3d at 1265. For the reasons discussed above, the Court finds that Plaintiff has failed that burden and Sanders's experience alone is not a sufficient basis for the Court to find that his opinions are reliable.

4. Sanders's Opinions Will Not Assist the Trier of Fact.

The Court finds that Sanders's opinions will not assist the trier of fact because: (1) Sanders has not reliably applied the principles and methods of the Safety Hierarchy—insofar as the theory even applies at all—to the facts of the case, and (2) Sanders's experience alone is not an adequate basis for the Court to find his testimony to be reliable. *Farley*, 2015 WL 1131015, at *8 ("Having determined that Mr. Jaques' methodology is not reliable, the Court agrees with the defendant that his opinions will not assist the trier of fact.").

Accordingly, Defendant's *Daubert* Motion (ECF No. 75) is GRANTED IN PART as to Plaintiff's expert S. Wayne Sanders. The Court will therefore not rely on the following information cited in Plaintiff's 56.1 Response in ruling on Defendant's Motion for Summary Judgment: (1) Wayne Sanders Deposition Transcript (ECF No. 83-11); (2) Wayne Sanders Rebuttal Report (ECF No. 85-3); and (3) Wayne Sanders Safety Report (ECF No. 85-4).

B. Defendant's Motion for Summary Judgment.

Defendant argues that it is entitled to summary judgment for the following reasons. First,

Carnival was not on notice of a risk-creating decision and, therefore, Plaintiff's negligent maintenance claim must fail. Mot. at 3–5. Second, Defendant argues that it is entitled to summary judgment as to Plaintiff's negligent failure to warn claim because the risk-creating condition was open and obvious, and Carnival otherwise discharged its duty to warn. *Id*. at 5–7. Third, Defendant argues that summary judgment must be granted as to Plaintiff's negligent training and supervision claims because there is no record evidence to support either theory of negligence. *Id*. at 7–8. Similarly, Defendant argues that there is no record evidence to support any claim of medical negligence and summary judgment must be granted as to these claims as well. *Id.* at 8–11.

In response, Plaintiff contends that Carnival is liable for its employee's negligent maintenance, under a theory of vicarious liability, based on the Eleventh Circuit's decision in *Yusko v. NCL (Bahamas) Ltd*., 4 F.4th 1164, 1168 (11th Cir. 2021). Resp. at 4–6. Plaintiff also contends that Carnival was on actual and constructive notice of a risk-creating decision and the Court should deny summary judgment as to Plaintiff's claims of negligent failure to remedy a known danger, failure to train, and failure to supervise. *Id*. at 6–10. Plaintiff also argues that the Court should deny summary judgment for her negligent failure to warn claim because Carnival was aware of at least four dangers, but failed to give adequate warnings as to each of them. *Id*. at 11–16. Finally, with respect to her medical negligence claims, Plaintiff states that "based on testimony obtained in the final weeks of discovery, she is electing not to pursue these claims at trial." *Id*. at 11 n.4.

In reply, Defendant argues that the Court should grant summary judgment as to Plaintiff's medical negligence claims because she failed to raise any argument in rebuttal of the points made in Defendant's Motion. Reply at 1–2. Defendant also argues that the limited exception to the

notice-requirement identified in *Yusko* does not apply in this case and does not excuse Plaintiff's burden to prove notice. *Id*. at 2–4. Relatedly, Defendant contends that Plaintiff has failed to create a genuine issue of material fact regarding Carnival's notice of a risk-creating condition. *Id*. at 4–6. Defendant contends that the four risks identified by Plaintiff, with respect to failure to warn, were either open and obvious or Carnival otherwise discharged its duty to warn. *Id*. at 6–7. And finally, Defendant argues that Plaintiff has attempted to "wrap up" her negligent supervision and training claims with her negligent maintenance claim, and stresses that there is no evidence to support her negligent supervision and training claims on their own. *Id*. at 8–9.

Viewing the facts in the light most favorable to Plaintiff, the Court finds that Defendant is entitled to summary judgment as to Counts II, III, IV, and V of Amended Complaint, but not as to Count I.

1. Legal Standard and Applicable Law.

a. Legal Standard for Summary Judgment.

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) (citation omitted). "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. *See 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). 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); 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) (citation omitted). 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) (citation omitted).

b. Applicable Maritime Law.

"[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., 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 we apply, as a prerequisite to imposing liability, requires that the shipowner have had actual or constructive notice of the risk-creating condition, at least where, as here, 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)).

2. Carnival Is Not Entitled to Summary Judgment as to Plaintiff's Claim of Negligent Maintenance (Count I).

Defendant argues that it cannot be held liable for negligent failure to warn because it did not have actual or constructive notice of a risk-creating decision. Mot. at 3–5. Specifically, Defendant relies on *Horne v. Carnival Corp*., 741 F. App'x 607, 610 (11th Cir. 2018), wherein the Eleventh Circuit held that the defendant did not have notice based on two prior work orders that were issued for a door that later severed a passenger's finger. *Id*. Defendant argues that the reasoning in *Horne* should apply in this case because there is no evidence that the work orders relating to the Door Stopper in Cabin U107 were not completed. *Id*. Additionally, Defendant contends that the housekeeping staff regularly inspected the balcony doors and no door-related issues were reported by housekeeping staff in the three months leading up to Plaintiff's incident. *Id*. at 4–5. Defendant also argues that Plaintiff and her travel companions used the balcony door immediately before the incident and found that it was operating normally. *Id*. at 5.

In response, Plaintiff contends that Carnival is liable for negligent maintenance of the Door Stopper based on photographs Mackey took of the Carnival staff who were sent to conduct maintenance on the Cabin Door in U107 after her incident. Resp. at 4. Plaintiff argues that these photographs depict the Carnival staff adjusting the Door Stopper in a negligent manner. *Id*. at 5.

Specifically, Plaintiff contends that these photos demonstrate Carnival is liable for negligent maintenance under *Yusko*. *Id*. at 4–5.

Additionally, Plaintiff contends that Carnival had actual or constructive notice as to a risk-creating condition based on three separate grounds. *Id*. at 6. First, Plaintiff contends that Carnival had actual notice that the Door Closer on Cabin U107's balcony door was broken based on the incident involving Mackey and the fact that the balcony door was again the subject of a work order eleven days after that incident. *Id*. Plaintiff argues that *Horne* is distinguishable from this case because, here, the work orders describe the issues with the door and there was an incident that resulted in injury to a passenger. *Id*. at 7. Second, Plaintiff contends that Carnival had notice of risks associated with wind gusts causing balcony doors that function normally without wind to slam suddenly. *Id*. And third, Plaintiff contends that Carnival had actual or constructive notice that a door stopper can suddenly cease to function on its own, either by reaching the end of its life cycle or due to usage over time. *Id*. at 8 (citing Pl.'s 56.1 Resp. ¶ 47). On this point, Plaintiff contends that Carnival's failure to check the door stoppers under windy conditions constitutes both a negligent failure to maintain and a negligent failure to train and/or supervise. *Id*. at 9. Relatedly, Plaintiff argues that the danger posed by machinery fatigue requires the implementation of a preventative maintenance program to quell such risks. *Id*. at 10.

In reply, Defendant argues that Plaintiff cannot use allegations of vicarious liability to avoid having to prove that Carnival had notice as to whether the Door Stopper on Cabin U107's balcony door was defective because the Eleventh Circuit's opinion in *Yusko* does not extend to the facts of this case. Reply at 2–3. Additionally, Defendant argues that, in any event, there is no evidence proving negligence on the part of any of Carnival's crewmembers. *Id*. at 4.

Defendant also argues that there is no genuine issue of material fact regarding Carnival's

notice of a risk-creating condition. *Id*. at 4. Defendant contends that the incident involving Mackey does not put Carnival on notice of a risk creating condition because the Door Stopper in Cabin U107 was the subject of two intervening work orders and there were no reports of issues for the three months leading up to Plaintiff's incident. *Id*. at 4. Defendant contends that the subject balcony door was inspected daily by the housekeeping staff during the interim period. *Id*. at 5 (citing *Guevara v. NCL (Bahamas) Ltd*., 920 F.3d 710, 723 (11th Cir. 2019). Defendant also argues that the prior incidents involving Biller and Simon did not put Carnival on notice of a risk-creating decision because Plaintiff cannot show that her accident occurred in a substantially similar manner. *Id*. at 6 (citing *Taiariol v. MSC Crociere S.A*., 677 F. App'x 599, 601 (11th Cir. 2017)). Relatedly, Defendant contends that the prior work orders do not place Carnival on notice of a risk-creating condition. *Id*. (citing *Horne*, 741 F. App'x at 607). Finally, insofar as Plaintiff contends that Carnival should have put in place different maintenance programs, Defendant argues that Plaintiff's arguments amount to a "mode of operation" theory of negligence that is not recognized under Federal maritime law. *Id*. (citing *Malley v. Royal Caribbean Cruises, Ltd*., 713 F. App'x 905 (11th Cir. 2017); *Stewart-Patterson v. Celebrity Cruises, Inc*., No. 12-20902-CIV, 2012 WL 2979032, at *3 (S.D. Fla. July 20, 2012)

a. There Is Evidence That Carnival Had Constructive Notice as to the Defective Balcony Door in Cabin U107.

To succeed on a failure to maintain claim, there must be evidence that a defendant had actual or constructive notice of a dangerous condition. *Horne*, 741 F. App'x at 609. There are two ways that constructive notice can be shown. First, "a plaintiff can establish constructive notice by showing that a 'defective condition existed for a sufficient period of time to invite corrective measures.'" *Tesoriero v. Carnival Corp*., 965 F.3d 1170, 1178 (11th Cir. 2020) (quoting *Guevara v. NCL (Bahamas) Ltd*., 920 F.3d 710, 720 (11th Cir. 2019). Second, "a plaintiff can show

evidence of 'substantially similar incidents in which conditions substantially similar to the occurrence in question must have caused the prior accident.'" *Id*. (quoting *Guevara*, 920 F.3d at 720).

Here, for the reasons discussed below, the Court finds that while there is no evidence of actual notice that Cabin U107's balcony door was defective, there is a genuine issue of material fact as to whether there was constructive notice of the same.

There is no evidence that Carnival was on actual notice of a defective condition. Evidence that the balcony door was repaired on two occasions is insufficient to place a defendant on actual or constructive notice as to a dangerous condition. *Horne*, 741 F. App'x at 610 ("[T]he work orders alone do not create a genuine issue of fact about whether Carnival had actual or constructive notice that the door was in a dangerous condition at the time of the incident.").

However, there is evidence that Carnival was placed on constructive notice by a prior incident that occurred under substantially similar conditions. In its reply, while Defendant contends that the Biller and Simon incidents were not substantially similar to Plaintiff's incident, Defendant does not specifically respond to Plaintiff's assertion that the Mackey incident imparts constructive notice on Carnival. *See* Reply at 6. Defendant's reliance on Horne is unpersuasive because, in that case, the Eleventh Circuit specifically pointed out that there were no prior accidents involving the door—which indicates that the outcome would have been different if there had been. *Horne*, 741 F. App'x. at 610. Defendant's silence on this issue sounds loudly given that there is evidence showing that (1) Mackey's finger was caught in the exact same door, (2) the Door Stopper required maintenance after the Mackey incident, (3) Plaintiff's finger was subsequently caught in the door, and (4) the Door Stopper was defective. *See supra*, Section I. Accordingly, given the clear similarity between these two occurrences, the Court finds that there

is a genuine issue of material fact as to whether Carnival had constructive notice of the defect in the balcony door of Cabin U107. *Tesoriero*, 965 F.3d at 1178.[17]

b. General maritime law does not recognize a claim of negligence that is premised upon a company's general policies and operations.

Plaintiff's claim that Carnival's procedures for maintaining door stoppers constitutes negligent maintenance, negligent failure to train, or negligent supervision is essentially an attempt to hold Carnival liable for having a negligent mode of operation. The Supreme Court of Florida has explained this theory as follows:

> The duty of premises owners to maintain their premises in a safe condition is not exclusively limited to detecting dangerous conditions on the premises after they occur and then correcting them; the duty to exercise reasonable care may extend to taking actions to reduce, minimize, or eliminate foreseeable risks before they manifest themselves as particular dangerous conditions on the premises.

Stewart-Patterson v. Celebrity Cruises, Inc., No. 12-20902-CIV, 2012 WL 2979032, at *3 (S.D. Fla. July 20, 2012) (quoting *Markowitz v. Helen Homes of Kendall Corp*., 826 So.2d 256, 259 (Fla. 2002)). However, it is well settled that general maritime law does not recognize a claim of negligence that is premised upon a company's general policies and operations. *Malley*, 713 F. App'x at 910 ("No court has ever held that this claim exists in federal admiralty law."). The Eleventh Circuit has held that such a theory of negligence would be "at odds with admiralty law's

[17] In the three months following the March 28, 2019 work order, there were no issues reported by housekeeping regarding Cabin U107's balcony door and evidence shows that the door was routinely inspected by housekeeping. Def.'s 56.1 ¶ 31; Pl.'s 56.1 Resp. ¶ 31. Given that the balcony door of Cabin U107 was routinely inspected by housekeeping and there is no evidence as to exactly when the Door Stopper became defective, Plaintiff "has failed to make a sufficient showing that the dangerous condition was 'present for a period of time so lengthy as to invite corrective measures.'" *Guevara*, 920 F.3d at 723 (quoting *Keefe*, 867 F.2d at 1322)). However, Eleventh Circuit precedent is clear that constructive notice can be shown in two distinct ways—and, therefore, evidence of routine inspections and failure to show the existence of a dangerous condition for a substantial period of time do not defeat a finding of constructive notice based on evidence of substantially similar prior occurrences.

requirement that a cruise ship must have notice of the dangerous condition." *Id*. (citing *Keefe*, 867 F.2d at 1322); *see also Stewart-Patterson*, 2012 WL 2979032, at *3 ("[M]aritime law does not support a stand-alone claim based on Defendant's 'mode of operation' unconnected to Plaintiff's specific accident."). Accordingly, insofar as Plaintiff asserts that Carnival was negligent with respect to its policies and procedures for testing and maintaining door stoppers, such as to prevent risks posed by machinery fatigue, the Court finds that this theory of negligence is foreclosed by Eleventh Circuit precedent. *Id*.[18]

c. Carnival Is Not Vicariously Liable for the Negligence of its Employees under *Yusko*.

In *Yusko*, the Eleventh Circuit held that a plaintiff need not demonstrate notice where a maritime negligence claim is premised on a theory of vicarious liability. 4 F.4th at 1167. In that case, the Eleventh Circuit held that the defendant could be held vicariously liable for the negligence of a professional dancer and cruise ship employee where the employee "released her hands as she leaned away from him during a dance move, causing her to fall backward and hit her head on the deck." *Id*. at 1166. However, the Eleventh Circuit also stated:

> 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.*). Accordingly, we are confident that the notice requirement will have a robust field of operation despite our decision not to extend it to vicarious liability.

Id. at 1170 (emphasis added). In *Everett v. Carnival Cruise Lines*, the Eleventh Circuit found a

[18] Insofar as Plaintiff has included arguments relating to risks of wind in her response regarding notice of a defective door, Resp. at 7 –8, the Court notes that the risk of wind is unrelated to the question of Carnival's notice as to a defect in Cabin U107's balcony door at the time of Plaintiff's incident.

jury instruction stating "Carnival Cruise Lines negligently created or maintained its premises" to be improper. 912 F.2d 1355, 1358 (11th Cir. 1990). Specifically, the *Everett* Court held that this instruction improperly undermined the notice requirement under *Keefe* and, therefore, rejected the argument that "Carnival should have known that there was a danger of passenger injury because it was the owner and operator of the ship." *Id*. at 1359. Further, the *Everett* Court held that it would be an error for a jury to be able find negligence based on Carnival's "mere creation or maintenance of a defect." *Id*.

Plaintiff's arguments under *Yusko* fail for two reasons.

First, Defendant points out that Plaintiff has attempted to "shoehorn" this action into a vicarious liability claim under *Yusko*. Reply at 4. Indeed, the Amended Complaint does not assert a claim of vicarious liability arising from any negligent maintenance conducted by a Carnival employee. *See generally* Am. Compl. Rather, the only mention of vicarious liability in the Amended Complaint relates to allegations of negligent medical treatment in Count V. *See id*. at ¶¶ 84–105. Plaintiff's negligent maintenance claim does not even mention the words vicarious liability. *Id*. at ¶¶ 38–50. Plaintiff has never moved to amend her pleadings to include an allegation that Carnival is vicariously liable for its employee's negligent maintenance and the Court finds that Plaintiff's argument at this stage, premised on vicarious liability, is therefore "untimely and prejudicial to Defendant." *Smith v. Carnival Corp*., No. 19-CV-24352, 2021 WL 5327944, at *3 (S.D. Fla. Nov. 16, 2021) (finding arguments under *Yusko* to be improper where no allegation of vicarious liability was included in the complaint (citing *Marcia Bland v. Carnival Corp*., No. 16-cv-21592-Altonaga (S.D. Fla. Aug. 15, 2021) ("Simply put, the Court will not allow Plaintiff to assert a brand-new theory of liability over a year after the deadline for amending pleadings."); *Bahr v. NCL*, No. 19-cv-22973, 2021 WL 4034575, at *5 (S.D. Fla. Sept. 3, 2021) ("If Plaintiff

intended to plead negligence based upon a theory of vicarious liability, it was incumbent upon Plaintiff to make that clear.")); *see also Monaghan v. Worldpay US, Inc.*, 955 F.3d 855, 859 (11th Cir. 2020) ("[A] plaintiff cannot amend h[is] complaint through argument made in h[is] brief in opposition to [a] defendant's motion for summary judgment.") (quoting *Miccosukee Tribe of Indians of Fla. v. United States*, 716 F.3d 535, 559 (11th Cir. 2013)).

Second, even if the photographs did depict the Carnival staff conducting negligent maintenance, the Court finds that Plaintiff's claim still fails for failure to demonstrate notice. In *Everett*, the Eleventh Circuit held that Carnival's "mere creation or maintenance of a defect" alone is insufficient without evidence of notice. 912 F.2d at 1358. Therefore, under *Everett*, evidence that Carnival created a risky condition would, alone, would not be sufficient in the absence of evidence that Carnival had notice of the condition. *Id*. Given that the *Yusko* Court explicitly reaffirmed *Everett*'s requirement of notice for claims of negligent maintenance against shipowners, the Court finds that notice of a dangerous condition is still required, even where there is evidence that a shipowner's employee negligently created or maintained a defect. *Yusko*, 4 F.4th at 1170; *Everett*, 912 F.2d at 1358. If Plaintiff were permitted to assert a negligent maintenance claim premised on a vicarious liability theory, that would allow Plaintiff 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. Given that the *Yusko* Court, citing to *Everett*, explicitly mentioned negligent failure to maintain as a context in which notice is still required, the Court finds that the Eleventh Circuit did not intend to allow negligent maintenance claims to proceed under the guise of a vicarious liability claim in the absence of any evidence showing notice of a dangerous condition. *Yusko*, 4 F.4th at 1170. Accordingly, the Court finds that even if the

photographs cited by Plaintiff did show negligence, that would not excuse the notice requirement which Plaintiff has failed to meet.

Accordingly, for the reasons discussed above, the Court finds that Defendant has failed to meet its burden of demonstrating the absence of a genuine issue of material fact regarding Plaintiff's claim of negligent maintenance of the Door Stopper in Cabin U107 because there is evidence upon which a trier of fact could find that Carnival was on constructive notice as to a defect in the Door Stopper of Cabin U107. However, the Court finds that Plaintiff's arguments relating to vicarious liability are without merit. Accordingly, Defendant's Motion for Summary Judgment as to Count I is GRANTED IN PART and DENIED IN PART. Count I may proceed insofar as it is premised upon a theory of constructive notice—however, it may not proceed based upon a theory of vicarious liability.

3. Carnival is Entitled to Summary Judgment as to Plaintiff's Claim of Negligent Failure to Warn (Count II).

Defendant argues that it is entitled to summary judgment as to Plaintiff's negligent failure to warn claim because the condition was open and obvious and, in any event, Carnival fulfilled its duty to warn. Mot. at 5–7. Defendant argues that the risk of placing one's hand on a door jamb is open and obvious to a reasonable person. *Id*. at 6. Additionally, Defendant contends that Plaintiff's intoxication made her more likely to operate the door in an unsafe manner. *Id*. Defendant argues that the sign on the door renders risks associated with closing it to be open and obvious. *Id*. Defendant also contends that Carnival discharged its duty to warn by placing the Warning Sign on the door and points out that Plaintiff admitted to seeing the sign before she went on the balcony for the first time and even recalled that it warned about "air conditioning"—although she purports not to have read the portion relating to the risk of wind. *Id*. at 7.

In response, Plaintiff contends that Carnival failed to warn her of four known dangers.

Resp. at 10. First, Plaintiff contends that Carnival failed to warn Plaintiff as to the danger of opening ship balconies in high winds. *Id*. at 11. Plaintiff contends that Carnival was aware of these risks and failed to warn of the risk that doors might slam closed during high winds. *Id.* Plaintiff also notes that Carnival failed to issue any audible warnings as to high winds that day. *Id*. Plaintiff contends that the Warning Sign did not discharge Carnival's duty to warn because it did not explicitly warn passengers not to use balconies in high winds, which is what is instructed for the housekeeping crew. *Id*. at 14. Plaintiff also contends that the Warning Sign does not adequately convey that the door may close rapidly due to wind. *Id*. Plaintiff also argues that the Warning Sign is not compliant with ANSI signage requirements and therefore the presence of the sign does not discharge Plaintiff's duty to warn. *Id*. Second, Plaintiff argues that Carnival failed to warn that the doors pose a risk of serious injuries such as crushing and amputation. *Id*. at 15. Third, Plaintiff contends that Carnival knew or should have known that passengers occasionally grasp the doorframe for balance and that this poses a risk of injury, yet failed to warn passengers of this risk. *Id*. And fourth, Plaintiff submits that Carnival knew that the *Inspiration*'s door closing mechanism, when properly installed, accelerates just before closing through a phenomenon called "latching speed" and Carnival failed to warn passengers of related risks. *Id*.

In reply, Defendant contends that risks associated with opening and closing doors are open and obvious risks that people encounter in their daily lives. Reply at 7. Defendant also argues that the sign urging caution during high wind conditions is sufficiently clear and unambiguous to resolve via summary judgment. *Id*. at 8 (citing *Salinero v. Johnson & Johnson*, 400 F. Supp. 3d 1334, 1352 n.12 (S.D. Fla. 2019).

a. Carnival Adequately Discharged Its Duty to Warn Plaintiff as to Risks Posed by Wind.

"[A] cruise line's duty to its passengers includes 'a duty to warn of known dangers . . . in places where passengers are invited or reasonably expected to visit[.]'" *Petersen v. NCL (Bahamas) Ltd*., 748 F. App'x 246, 250 (11th Cir. 2018) (quoting *Chaparro*, 693 F.3d at 1336). However, "[a] cruise line does not 'need to warn passengers or make special arrangements for open-and-obvious risks.'" *Horne*, 741 F. App'x at 609 (quoting *Deperrodil v. Bozovic Marine, Inc.*, 842 F.3d 352, 357 (5th Cir. 2016); *Malley* 713 F. App'x at 908); *see also Smith, Ltd.*, 620 F. App'x at 730 (11th Cir. 2015). "Open and obvious conditions are those that should be obvious by the ordinary use of one's senses." *Lugo v. Carnival Corp.*, 154 F. Supp. 3d 1341, 1345 (S.D. Fla. 2015) (quoting *Lancaster v. Carnival Corp.*, 85 F. Supp. 3d 1341, 1344 (S.D. Fla. 2015)). "In determining whether a risk is open and obvious, we focus on 'what an objectively reasonable person would observe and do[] not take into account the plaintiff's subjective perceptions.'" *Horne*, 741 F. App'x at 609 (citing *Malley*, 713 F. App'x at 908).

In *Horne*, the Eleventh Circuit found that the risk of wind causing a door to slam so fast that a person could not remove his hand in time was not an open and obvious hazard. *Id*. at 609. Thus, the Court finds that the risk of wind causing the balcony door of Cabin U107 to unexpectedly slam shut was not open and obvious. *Id*.

Under maritime law, where a hazard is not open and obvious, a duty to warn arises where the defendant has notice of the dangerous condition. *Smith*, 620 F. App'x at 730 (citing *Cohen v. Carnival Corp*., 945 F. Supp. 2d 1351, 1357 (S.D. Fla. 2013). Here, the Court finds that there is evidence upon which a trier of fact could find that Carnival has notice of risks posed by wind with respect to doors. Indeed, Carnival has posted warnings regarding the dangers of wind, warns housekeepers not to open balcony doors during high wind conditions, and in some circumstances

audibly warns passengers to refrain from opening doors due to the dangers associated with wind. *See* Photo at 1; Housekeeping Instructions at Bates Number 2078; Pl.'s 56.1 Resp. ¶ 39; Def.'s 56.1 Reply ¶ 39. In light of the foregoing, the Court turns to whether there is a genuine issue of material fact as to whether Carnival discharged its duty to warn Plaintiff of risks associated with high winds—specifically the risk that the door might unexpectedly slam shut.

Often, the sufficiency of warnings are considered to be questions of fact for a jury. *See Nathans v. Carnival Corp.*, No. 17-23686-CIV, 2018 WL 6308694, at *5 (S.D. Fla. Aug. 31, 2018). For example, in *Radke v. NCL (Bahamas) Ltd.*, the court left it to the trier of fact to determine whether "wet floor signs" were close enough to a spill to warn a passenger as to the risk of slipping. No. 19-CV-23915, 2021 WL 1738929, at *7 (S.D. Fla. May 3, 2021). However, the Eleventh Circuit has stated, in the products liability context, that "'[w]hile in many instances the adequacy of warnings . . . is a question of fact,' the Florida Supreme Court has held that 'it can become a question of law where the warning is accurate, clear, and unambiguous.'" *Eghnayem v. Bos. Sci. Corp.*, 873 F.3d 1304, 1321 (11th Cir. 2017) (quoting *Felix v. Hoffmann-LaRoche, Inc.*, 540 So. 2d 102, 104 (Fla. 1989)).

In this case, affixed to the interior of the balcony door in Cabin U107 was a warning sign, stating:

AIR CONDITIONED
KEEP DOOR CLOSED

CAUTION
OPEN DOOR CAREFULLY
AS STRONG WINDS
MAY CAUSE DOOR TO CLOSE

Def.'s 56.1 ¶ 7 (citing Exhibit 4 to Deposition of Suzanne Vazquez ("Photo") (ECF No. 72-4) at 1). There is no dispute that the sign was visible because Plaintiff testified that she recalled "seeing

a sign about the air conditioning" on the door of the balcony before going out on the balcony for the first time. Def.'s 56.1 ¶ 8 (citing Pl.'s Dep. Tr. at 60:6–10); Pl.'s 56.1 Resp. ¶ 8 ("Not Disputed."). While Plaintiff equivocated as to whether she read the portion urging caution during conditions involving high winds, there is no evidence suggesting that she could not see the sign. *Id*.

It is hard to conceive of language that would more adequately convey risks associated with wind than a sign reading: "**CAUTION**[:] OPEN DOOR CAREFULLY AS STRONG WINDS MAY CAUSE DOOR TO CLOSE." *Id*.[19] Moreover, there is no evidence that the sign was not visible to Plaintiff or that she did not see the sign before walking onto the balcony. Def.'s 56.1 ¶ 8; Pl.'s 56.1 Resp. ¶ 8. Given the clarity of the warning and the undisputed visibility of the sign, the Court finds that there is no genuine issue of material fact that the Warning Sign adequately warned Plaintiff that strong winds may cause the door to close. *Eghnayem*, 873 F.3d at 1321. A rational trier of fact could not find that an individual who saw this sign was not warned of risks posed by wind and summary judgment is, therefore, proper. *Matsushita Elec.*, 475 U.S. at 587.[20]

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[19] The warning in this case is highly distinguishable from the sign on the door in *Horne* which read: "CAUTION—WATCH YOUR STEP—HIGH THRESHOLD." *Horne*, 741 F. App'x at 608. The Court agrees with Defendant that the sign in *Horne* had nothing to do with wind or the risk of the door closing, and the Eleventh Circuit's opinion in *Horne* therefore should not be read as offering any guidance as to the adequacy of the Warning Sign on Cabin U107's balcony door as it relates to wind.

[20] While Defendant's expert, Martyn, agreed that the Warning Sign did not comply with ANSI standards because the word "caution" was not in black text with a yellow background, Martyn Dep. Tr. at 189:12–191:12, the Court finds this does not create a genuine issue of material fact given that the Warning Sign contains a clear and unambiguous warning as to the exact risk at issue and Plaintiff admits to having read the sign before walking onto the balcony. Moreover, there is no evidence that these standards are binding or required. Pl.'s 56.1 Resp. ¶ 43; Def's 56.1 Reply ¶ 43.

b. The Other Risks Identified by Plaintiff in Her Response Are Open and Obvious.

Plaintiff identifies three other risks that Carnival allegedly failed to warn her of: (1) the risk of balcony doors causing serious injuries like crushing and amputation, (2) the risk of holding on to doorframes for balance while passing through a door, and (3) risks posed by the acceleration of a door just before it closes through the phenomenon known as "latching speed." Resp. at 15–16. In reply, Defendant contends that these are open and obvious risks that people encounter in their daily lives. Reply at 7.

"A cruise line does not 'need to warn passengers or make special arrangements for open-and-obvious risks.'" *Horne*, 741 F. App'x at 609 (quoting *Deperrodil*, 842 F.3d at 357 (5th Cir. 2016); *Malley*, 713 F. App'x at 908). "In determining whether a risk is open and obvious, we focus on 'what an objectively reasonable person would observe and do[] not take into account the plaintiff's subjective perceptions.'" *Id.* (citing *Malley*, 713 F. App'x at 908).

The Court finds that each of the three risks identified above are open and obvious risks that an individual encounters every time they pass through a door. Needless to say, placing one's hand on a door jamb while the door is closing poses an obvious risk of injury and an objectively reasonable person would not do so. Relatedly, the risk of injury associated with a door, as a general matter, is open and obvious.[21] And finally, with respect to latching speed, Defendant's expert Martyn testified that this is a "typical installation for a self-closing door that you encounter just

[21] The Court need not reach the issue of notice where a hazard is open and obvious. *Smith.*, 620 F. App'x at 730 ("[F]ederal courts need not even reach the defendant's actual or constructive notice of a risk-creating condition if they determine that condition was an open and obvious danger. The duty to warn in the maritime tort context extends to only known dangers which are not apparent and obvious.").

about anywhere." Martyn Dep. Tr. at 182:1–4.[22] The Court finds any risk relating to latching speed to be open and obvious because it would require an individual to place their hand in the space between the door jamb and the door—in the final moments just before the door closes—which poses an obvious risk that a reasonable person would take into account. In sum, these are open and obvious risks that are encountered by people in their daily lives and do not give rise to a duty to warn. *Smith*, 620 F. App'x at 730.

Accordingly, for the reasons discussed above, the Court finds that Defendant has met its burden of demonstrating the absence of a genuine issue of material fact regarding its duty to warn and Plaintiff has failed to rebut Defendant's showing. Therefore, Defendant is entitled to summary judgment with respect to Count II of the Amended Complaint.

4. Carnival Is Entitled to Summary Judgment as to Plaintiff's Claim of Negligent Training and Supervision (Count III).

Defendant contends that there is no evidence supporting Plaintiff's negligent training or supervision of personnel claim and it is therefore entitled to summary judgment as to that claim. Mot. at 7–8.[23] With respect to negligent supervision, Defendant argues that there is no evidence that Carnival had notice that a specific employee was unfit. *Id*. at 8. With respect to negligent training, Defendant contends that there is no evidence that Carnival failed to train any of its employees. *Id*.

[22] In the alternative, the Court finds that Plaintiff has cited to no evidence showing that Carnival was on notice of risks relating to latching speed. Pl.'s 56.1 Resp. ¶ 41 (citing Martyn Dep. Tr. 180–82; Instructions at Bates Number 3969–70).

[23] The manner in which Plaintiff has pleaded her negligent training and supervision claim is an impermissible shotgun pleading. *Reed v. Royal Caribbean Cruises, Ltd*., No. 19-24668-CIV, 2021 WL 2592914, at *9 (S.D. Fla. Apr. 23, 2021) (finding a claim including both negligent supervision and training to be an impermissible shotgun pleading). However, given the late stage of this litigation, the Court will proceed and probe whether there is a genuine issue of material fact as to either theory of negligence included in Count III.

In response, as noted above, Plaintiff addressed her negligent training and supervision claim alongside her negligent maintenance claim. Resp. at 2, 6–10. Plaintiff argues that the photos taken by Mackey are evidence that Carvalho was negligently trained because, in Plaintiff's view, the photos depict Carvalho failing to follow the manufacturer's instructions for the door stopper. *Id*. at 9. Plaintiff also argues that the lack of training materials as to proper door closer maintenance on the *Inspiration* constitutes negligent training and/or supervision. *Id*. Additionally, Plaintiff contends that Defendant's failure to check door stoppers during high wind conditions constitutes negligent supervision. *Id*. at 9–10. Finally, Plaintiff argues that Carnival's failure to implement a preventative maintenance program to quell the risk of machinery fatigue on balcony doors constitutes negligent training and supervision. *Id*. at 10.

In reply, Defendant begins by noting, as the Court has above, that Plaintiff appeared to "wrap up" her negligent training and supervision of personnel claim along with her negligent maintenance claim and, therefore, it is unclear whether Plaintiff is abandoning Count III as a stand-alone claim. Reply at 8. Defendant contends that insofar as Plaintiff argues a claim of negligent training based on the Mackey incident, the mere fact that an accident occurs does not give rise to a presumption of notice of a risk-creating condition. *Id*. at 8–9 (citing *Isbell v. Carnival Corp*., 462 F. Supp. 2d 1232, 1237 (S.D. Fla. 2006). Relatedly, Defendant argues that the photographs do not prove negligent maintenance and there is no evidence of negligent training or supervision because Sanders's opinions should be stricken. *Id*. Finally, Defendant's argument that maritime law does not recognize a negligent mode of operation theory, which was discussed above, is relevant here too. *Id*. at 6.[24]

[24] The manner in which Plaintiff addressed negligent maintenance, training, and supervision, all at once renders Defendant's arguments relating to mode of operation necessarily applicable to each claim of negligence.

"Negligent supervision 'occurs when, during the course of employment, the employer becomes aware or should have become aware of problems with an employee that indicated his unfitness, and the employer fails to take further actions such as investigating, discharge, or reassignment.'" *Doe v. Carnival Corp*., 470 F. Supp. 3d 1317, 1324 (S.D. Fla. 2020) (quoting *Doe v. NCL (Bahamas) Ltd*., No. 1:16-CV-23733-UU, 2016 WL 6330587, at *4 (S.D. Fla. Oct. 27, 2016) (quoting *Cruz v. Advance Stores Co*., 842 F. Supp. 2d 1356, 1359 (S.D. Fla. 2012)). "Accordingly, Plaintiff 'must allege that (1) the employer received actual or constructive notice of an employee's unfitness, and (2) the employer did not investigate or take corrective action such as discharge or reassignment.'" *Reed v. Royal Caribbean Cruises, Ltd*., No. 19-24668-CIV, 2021 WL 2592914, at *9 (S.D. Fla. Apr. 23, 2021) (citing *Cruz*, 842 F. Supp. 2d at 1359; (other citations omitted)). "Negligent training occurs when an employer was negligent in the implementation or operation of the training program and this negligence caused a plaintiff's injury." *Id*. (quoting *Doe*, 2016 WL 6330587, at *4) (internal quotation marks and citation omitted)).

To begin, insofar as Plaintiff argues that the photos of Carvalho are evidence of improper maintenance, the Court finds that these photos do not create a genuine issue of material fact as to negligent training or supervision for the following reasons. First, there is no evidence that Carnival was on notice of the manner in which Carvalho repaired the Door Stopper and therefore cannot be held liable for negligent supervision. *Reed*, 2021 WL 2592914, at *9. Second, the photos bear no rational connection to the implementation or operation of a training program and, therefore, are not evidence of negligent training. *Id*.

With respect to negligent training, Defendant is correct that there is no evidence supporting a claim of negligent supervision or training. Plaintiff argues that Carnival negligently trained its employees because Carnival failed to: (1) train its employees on door stopper maintenance, (2)

train its employees to check door stoppers during high winds, and (3) implement a preventative maintenance program to address machinery fatigue. Resp. at 9–10. Each of these bases for negligent training are not based on an existing aspect of Carnival's training protocols that it failed to implement. Rather, they are directed to risk management protocols that Carnival does not have. Courts in this district have granted summary judgment as to negligent training claims where there was no training policy in place that was applicable to a particular risk. *Diaz v. Carnival Corp.*, No. 20-22755-CIV, 2021 WL 3934138, at *7 (S.D. Fla. Aug. 20, 2021) ("[T]hese causes of action require a showing that an employe[r] 'was negligent in the implementation or operation of [a] training program,' yet Plaintiff admits that Carnival never provided any training to its employees in the operation of its motorized scooters."). This is important because, as noted above, it is well settled that general maritime law does not recognize a claim of negligence that is premised upon a company's general policies and operations. *Malley*, 713 F. App'x at 910 ("No court has ever held that this claim exists in federal admiralty law."). To this point, in *Diaz*, the court noted with respect to the plaintiff's allegation that the defendant was liable for failing to implement "adequate risk management procedures and the failure to implement safety standards":

> the fundamental flaw with Plaintiff's final two theories of liability lies in the lack of any showing that the alleged breach of failing to have risk management procedures and safety standards is a recognized duty under federal maritime law.

2021 WL 3934138, at *8. The same is true here—the Court finds that federal maritime law does not recognize a claim based on failure to implement risk management procedures. *Id.*; *see also Malley*, 713 F. App'x at 910.

The Eleventh Circuit's concern regarding "mode of operation" negligence, which is premised upon a company's policies and procedures, is that such a theory is "at odds with admiralty law's requirement that a cruise ship must have notice of the dangerous condition."

Malley, 713 F. App'x at 910 (*Keefe*, 867 F.2d at 1322). There is a significant difference between a cruise line that has a relevant training protocol but fails to implement it, and a cruise line that has no relevant training protocol at all. In the former circumstance, a cruise line is aware of its own training protocol and therefore could be said to have notice of the same. However, in the latter circumstance, a cruise line does not have notice of training protocols that do not exist. Thus, the Eleventh Circuit's concern regarding "mode of operation" negligence and the importance of the notice requirement in this context counsels strongly against finding evidence to support negligent training based on procedures that do not exist—as is the case here. *Id*. Accordingly, because Plaintiff has failed to adduce evidence that Carnival was negligent in the implementation or operation of the training program, summary judgment is warranted as to Plaintiff's negligent training claim.

Finally, with respect to negligent supervision, Plaintiff has not adduced evidence that Carnival was aware that any specific employee was unfit. Accordingly, Plaintiff has failed to create a genuine issue of material fact as to her claim of negligent supervision. *Reed*, 2021 WL 2592914, at *9 (requiring notice for negligent supervision claims).

Accordingly, for the reasons discussed above, Defendant has met its burden of demonstrating the absence of a genuine issue of material fact regarding Plaintiff's claim of negligent supervision and training. Further, Plaintiff has failed to rebut Defendant's showing. Consequently, Defendant is entitled to summary judgment with respect to Count III of the Amended Complaint.

5. Carnival Is Entitled to Summary Judgment as to Plaintiff's Claims of Negligent Medical Care (Count IV) and Vicarious Liability Based on Apparent Agency of Medical Personnel (Count V).

Finally, Defendant argues that there is no evidence to support Plaintiff's medical negligence claims and summary judgment must be granted as to these claims as well. Mot. at 8–11. In response, Plaintiff states that "based on testimony obtained in the final weeks of discovery, she is electing not to pursue these claims at trial." *Id*. at 11 n.4. Defendant contends that Plaintiff has failed to adduce evidence showing that material facts are in issue and the Court therefore must grant summary judgment. Reply at 1–2.

The Court has reviewed the relevant evidence cited by the Parties and finds that there is no genuine issue of material fact that would prevent the entry of summary judgment as to Plaintiff's medical negligence claims. Def.'s 56.1 ¶ 18–28; Pl.'s 56.1 Resp. ¶ 18–28. There is no evidence that any medical treatment given to Plaintiff by Carnival caused any further injury to her finger. *Id*. It is undisputed that Plaintiff's fingertip could not have been salvaged, even if she had been emergency evacuated from the vessel. Def.'s 56.1 ¶ 27; Pl.'s 56.1 Resp. ¶ 27. Indeed, Plaintiff's plastic surgeon has no criticism of the treatment that she received on the *Inspiration.* Pl.'s 56.1 Resp. ¶ 27 (citing Dr. John Compoginis Deposition Transcript (ECF No. 85-5) ("Compoginis Dep. Tr.") at 61:9–13). For these reasons, the Court finds that there is no evidence that a standard of care has been breached or that Plaintiff's suffered any further injury due to the actions or omissions of Carnival's medical staff and summary judgment is, therefore, proper as to Counts IV and V of the Amended Complaint. *Looney v. Moore*, 886 F.3d 1058, 1065 (11th Cir. 2018) (explaining the standards for medical malpractice).

IV. CONCLUSION

Accordingly, 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's Motion for Summary Judgment (ECF No. 73) is GRANTED as to Counts II, III, IV, and V and DENIED as to Count I. Additionally, for the reasons stated above, Count I may not proceed based on a theory of vicarious liability.

DONE AND ORDERED in Chambers at Miami, Florida, this 17th day of December, 2021.

K. MICHAEL MOORE
UNITED STATES DISTRICT JUDGE

c: All counsel of record