UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 1:20-cv-21192-KMM

JUDITH WILLIS,

Plaintiff,

v.

ROYAL CARIBBEAN CRUISES, LTD.,

Defendant.
_____ /

ORDER

THIS CAUSE came before the Court upon Defendant Royal Caribbean Cruises Ltd.'s ("Defendant") Motion for Summary Judgment. ("Mot.") (ECF No. 44). Plaintiff Judith Willis ("Plaintiff") filed a response in opposition. ("Resp.") (ECF No. 46). Defendant filed a reply. ("Reply") (ECF No. 52). The Motion is now ripe for review.

I. BACKGROUND

This is a maritime negligence action arising under the Court's diversity jurisdiction pursuant to 28 U.S.C. § 1332,[1] or in the alternative, arising under the Court's admiralty jurisdiction. Plaintiff seeks damages for injuries she suffered after falling during Defendant's muster drill when she was a passenger aboard Defendant's cruise ship, *Anthem of the Seas*. *See generally* Am. Compl.

Plaintiff commenced this action on March 18, 2020, asserting claims against Defendant for

[1] Plaintiff is a resident and citizen of New Jersey. ("Am. Compl.") (ECF No. 19) ¶ 1. Defendant is an entity incorporated in the Republic of Liberia with its principal place of business in Florida. *Id.* ¶ 2. Plaintiff alleges that the amount in controversy exceeds $75,000.00. *See id.* ¶ 3.

general negligence and negligent failure to warn.[2] *See generally* (ECF No. 1). On May 4, 2020, the case was stayed to permit Plaintiff to complete medical treatment in connection with her injuries. (ECF No. 8). On September 17, 2021, the Court granted Plaintiff's motion to reopen this case because she had undergone surgery and was prepared to proceed. (ECF No. 21). Concurrent with her Motion to Reopen Case, Plaintiff also filed the operative Amended Complaint. Therein, Plaintiff alleges that, on May 4, 2019, she was a paying passenger aboard the *Anthem*. Am. Compl. ¶ 9. While on the *Anthem*, Plaintiff was directed by Defendant's crewmembers to participate in a mandatory muster drill. *Id.* ¶ 11. Plaintiff alleges that, during that drill, Defendant's crewmember "instructed and rushed the Plaintiff to move towards a small and awkward space within the theatre as part of the mandatory muster drill." *Id.* Plaintiff claims that she fell and was injured as a result. *See id.* Plaintiff alleges that Defendant created the following dangerous conditions aboard the *Anthem*:

> (1) mandating that all passengers participate in Defendant's mandatory muster drill, without special considerations for passengers who are physically unfit to participate; (2) rushing passengers through the mandatory muster drill exercise, without regard for their physical condition and/or physical abilities; [and] (3) requiring a dangerous amount of passengers aboard the vessel to participate in Defendant's mandatory drill at the same time.

Id. ¶ 12. Thus, the Amended Complaint asserts the following claims against Defendant: general negligence ("Count I"); negligent failure to warn ("Count II"); and negligence for the actions of its crewmembers based on vicarious liability ("Count III"). *See generally id.*

The facts surrounding Plaintiff's incident are not complex or disputed. They can be summarized as follows: after Plaintiff arrived at the designated muster drill location in a theater

[2] The case was reassigned to the undersigned on September 16, 2021. (ECF No. 20).

aboard the *Anthem*, she fell when descending a step because she felt rushed to sit down by one of Defendant's crewmembers. The undisputed facts, in greater detail, are as follows.[3]

On May 4, 2019, Plaintiff was a passenger aboard the *Anthem of the Seas*, a cruise ship operated by Defendant. Def.'s 56.1 ¶ 1 (citing Am. Compl. ¶¶ 10–11); Pl.'s Resp. 56.1 at 1 ¶ 1 & 2 ¶¶ 1–2; Def.'s Reply 56.1 ¶ 2. The Parties do not dispute that Plaintiff claims she was directed by one of Defendant's crewmembers, Valeriya Artyushenko ("Artyushenko"), to participate in a mandatory muster drill, and that, during that drill, Plaintiff fell and became injured because Plaintiff felt rushed. Def.'s 56.1 ¶ 2 (citing Am. Compl. ¶ 11); Pl.'s Resp. 56.1 at 1 ¶ 2; *see also* Pl.'s Resp. 56.1 at 3 ¶ 5; Def.'s Reply 56.1 ¶ 5.

Plaintiff arrived at a theater on deck four of the *Anthem* for a mandatory muster drill. Def.'s 56.1 ¶ 3(a) (quoting Deposition of Judith Willis ("Willis Dep.") (ECF No. 43-1) at 68:19–69:1); Pl.'s Resp. 56.1 at 1 ¶ 3. In describing the incident, Plaintiff testified as follows:

[3] The undisputed facts are taken from Defendant's Statement of Material Facts ("Def.'s 56.1") (ECF No. 43), Plaintiff's Response Statement of Material Facts ("Pl.'s Resp. 56.1") (ECF No. 47), Defendant's Reply Statement of Material Facts ("Def.'s Reply 56.1") (ECF No. 51), and a review of the corresponding record citations and exhibits. The Court notes that Plaintiff has adduced additional facts that do not comply with Local Rule 56.1. Specifically, Plaintiff's additional facts in her Response Statement of Material Facts do not "begin[] with the next number following the movant's last numbered paragraph." S.D. Fla. L.R. 56.1(b)(2)(D). For the sake of clarity, the Court references all facts in Plaintiff's Response Statement of Material Facts using both the page number and paragraph number provided. Plaintiff further fails to comply with the Local Rules by citing to evidence in her Response that is not referenced in her Response Statement of Material Facts, specifically, Exhibits B, C, & D to her Response to Defendant's Motion for Summary Judgment. (ECF Nos. 46-2, 46-3, and 46-4). In so doing, Plaintiff deprives Defendant of the opportunity to dispute facts derived from those materials through the mechanism to do so provided under the Local Rules, S.D. Fla. L.R. 56.1(a)(1)–(3), thus the Court disregards that record evidence where Plaintiff relies upon it in her Response. *See Reese v. Herbert*, 527 F.3d 1253, 1268 (11th Cir. 2008) ("The proper course in applying Local Rule 56.1 at the summary judgment stage is for a district court to disregard or ignore evidence relied on by the respondent—but not cited in its response to the movant's statement of undisputed facts—that yields facts contrary to those listed in the movant's statement.").

> **Q.** . . . . What happened when you arrived at the theater?
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> **A.** Well, they swiped us in our cards. I said you swipe us in? He said, yeah, we have to know that everybody is here. So -- and a few people after me too. So we went in and this Valeri[y]a [Artyushenko] her name is comes up to me and says, You're late. Hurry up. Get a seat.
>
> So I felt, you know, she was attacking me. So I said all right. And I went to the edge of the steps, and I looked around. I said, where are the seats? There were tons of people there.
>
> So she said, follow me. She really had an attitude. So I held on, and I went down. And she said go in there. She points to a place. I went over there, and there was a pole. And then there was like 6 inches [of] room, and then there was the next banister, the hand.
>
> I said, I can't fit in there. She said -- I'm fat, you know. I can't. So she said go in there. I said I can't go in there. I can't climb. I'm old. I'm fat. So she says, oh, come on, follow me. So I held on again, and I stepped down and I went down. I don't know what happened. I went down. She was rushing me.

Def.'s 56.1 ¶ 3(b) (quoting Willis Dep. at 69:12–70:13); Pl.'s Resp. 56.1 at 1 ¶ 3.

Plaintiff testified that she fell because she felt rushed and pressured by Artyushenko. *See* Def.'s 56.1 ¶ 3(c) (quoting Willis Dep. at 79:1–19) ("**Q.** Okay. And what do you believe caused you to fall? **A.** Her rushing me. The pressure of her, and I was very upset. She had me upset then. I was nervous from her. **Q.** Okay. **A.** I held on. I really don't know why I fell, you know, but I know she was rushing me."); Pl.'s Resp. 56.1 at 1 ¶ 3.

When Plaintiff told Artyushenko, "I can't go in there. I can't climb. I'm old. I'm fat," in response to Artyushenko directing Plaintiff to an area within the theater to sit, Plaintiff testified that Artyushenko responded as follows:

> **Q.** Okay. So you told Valeria, I can't fit in there. . . . And then what happened?
>
> **A.** She said, oh, follow me. So, you know, she wanted me to hurry up. So I followed her. I went down. I think I may have gone down a step holding on. Then I don't know if there was a space there and I had to get the next railing. I'm not sure about that, but I know I was holding the railing. And I stepped down, and I went down. She was rushing me.

Def.'s 56.1 ¶ 3(c) (quoting Willis Dep. at 79:1–19); Pl.'s Resp. 56.1 at 1 ¶ 3.

It is undisputed that no one was directly in front of Plaintiff on the steps, nothing was blocking her view, and no passengers or crewmembers were on the steps when Plaintiff fell. Def.'s 56.1 ¶ 3(d) (quoting Willis Dep. at 83:17–84:3); Pl.'s Resp. 56.1 at 1 ¶ 3. It is also undisputed that the lights in the theater were on at the time Plaintiff fell, and the lighting was adequate for Plaintiff to see. Def.'s 56.1 ¶ 3(e) (quoting Willis Dep. at 84:15–25) ("**Q.** Okay. The lighting was adequate for you to see? **A.** Yeah."); Pl.'s Resp. 56.1 at 1 ¶ 3. Plaintiff testified that she did not slip on any liquid or foreign substance on the stairs, or trip on any kind of foreign object on the stairs. Def.'s 56.1 ¶ 3(g) (quoting Willis Dep. at 88:13–23); Pl.'s Resp. 56.1 at 1 ¶ 3.

Plaintiff also testified that she was looking down at and could see the steps in front of her, and that there was nothing obstructing her view of the steps. Def.'s 56.1 ¶ 3(h) (quoting Willis Dep. at 89:6–12); Pl.'s Resp. 56.1 at 1 ¶ 3. Plaintiff was also aware that she was proceeding down the steps when she fell, was not surprised by the presence of any steps, and does not otherwise know why she fell. Def.'s 56.1 ¶ 3(i) (quoting Willis Dep. at 89:18–90:2); Pl.'s Resp. 56.1 at 1 ¶ 3. As Plaintiff testified, "I just took a step down and I went down." Willis Dep. at 88:18–19.

The Parties also do not dispute that Plaintiff was walking at her regular pace when she fell:

> **Q.** I know -- I know you said Valeria was -- Valeria was rushing you, but were you walking quickly or running at the time that you fell?
>
> **A.** No, I can't do that. No. I was walking my regular pace, because they were announcing it at that time. So I figured we all have time to get there.

Def.'s 56.1 ¶ 3(f) (quoting Willis Dep. at 87:1–8); Pl.'s Resp. 56.1 at 1 ¶ 3. [4]

[4] Based on Plaintiff's deposition testimony, it seems that Plaintiff was referring to walking to the theater where the muster drill would be held, as she further testified as follows:

> **Q.** Okay. How about when you got into the theater and you were going down the

The Parties do not dispute that, at the time of the incident, it was Defendant's policy to provide passengers with reasonable accommodations in connection with Defendant's muster drills. Pl.'s Resp. 56.1 at 4 ¶ 7 (citing Deposition of Amanda Campos, Defendant's Corporate Representative ("Campos Dep.") (ECF No. 46-1) at 23:3–11); Def.'s Reply 56.1 ¶ 7. However, Defendant adds that Plaintiff never requested an accommodation for her physical limitations. Def.'s Reply 56.1 ¶ 7 (quoting Deposition of Randall Jaques, Plaintiff's Expert Witness ("Jaques Dep.") (ECF No. 43-2) at 27:1–28:1).[5]

Plaintiff claims that she injured her neck, lower back, both arms, and her hips, and has suffered a loss of earning capacity because of the incident. Def.'s 56.1 ¶ 6 (citing (ECF No. 43-3) at 5–6); Pl.'s Resp. 56.1 at 2 ¶ 6. Defendant disputes that Plaintiff suffered neck pain because of the incident, and more generally, that its conduct caused Plaintiff's injuries. Pl.'s Resp. 56.1 at 3 ¶ 3; Def.'s Reply 56.1 ¶ 3 (citing (ECF No. 51-1)) (stating that Plaintiff's ship medical records from after the incident make no mention of neck pain). Defendant contends that no medical reports have been disclosed opining that the incident caused a disability, aggravation of preexisting injuries, or a loss of earning capacity. Def.'s 56.1 ¶ 7. In response, Plaintiff points to a one-

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stairs, were you walking quickly or faster than normal?
A. I don't -- I don't think so because I don't go -- you mean walking into the theater?
Q. No. Going down the stairs where you fell?
A. No. I don't know how fast I was going. I know I hold on. You know, I'm careful on steps. I really am. I wasn't running down the steps. I was just -- maybe I was trying to take a faster step because she was saying come on. I don't know.

Willis Dep. at 87:9–21. In any event, however, the Parties do not appear to dispute that Plaintiff was not rushing down the stairs.

[5] Defendant has both included Mr. Jaques deposition testimony in its Statement of Material Facts in support of its Motion for Summary Judgment, *see* Def.'s 56.1 ¶ 4, and moved to exclude Mr. Jaques as an expert, *see* (ECF No. 41).

paragraph letter from one of her treating physicians, dated March 9, 2022, which she characterizes as a Rule 26(a)(2)(B) expert report. Pl.'s Resp. 56.1 at 2 ¶ 7 (quoting March 9, 2022 Letter from Dr. Joseph M. Kozel ("Dr. Kozel Let.") (ECF No. 46-8)). The Letter states that Plaintiff had never complained of neck pain until a June 19, 2019 medical visit when she relayed to Dr. Kozel that she had fallen on a cruise.[6]

Now, Defendant moves for summary judgment on Plaintiff's negligence claims. *See generally* Mot.

II. LEGAL STANDARD

Summary judgment is appropriate where there is "no genuine issue as to any material fact [such] that the moving party is entitled to a judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) (quoting Fed. R. Civ. P. 56). A genuine issue of material fact exists when "a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) (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

[6] In a different paragraph of her Response Statement of Material Facts, Plaintiff characterizes this one-paragraph letter as a "causation opinion." Pl.'s Resp. 56.1 at 3 ¶ 3. Defendant has moved to preclude Plaintiff from offering any opinions from Dr. Kozel because his letter does not actually opine that Plaintiff's injuries were caused by the incident. (ECF No. 42) at 7–8. The Court discusses Dr. Kozel's one-paragraph letter further below.

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).

III. DISCUSSION

Defendant argues that it is entitled to summary judgement because Plaintiff fails to establish a cause of action against Defendant. Mot. at 2. Specifically, Defendant asserts that (1) there is no record evidence that a dangerous condition existed, (2) there is no record evidence that Defendant had notice of any dangerous condition, assuming one existed, (3) there is no record evidence that Defendant's crewmember was negligent sufficient to establish that Defendant is vicariously liable, and (4) separately, Plaintiff fails to point to nonspeculative evidence of proximate causation and damages. *See generally id.*

In response, Plaintiff asserts that (1) Defendant owed Plaintiff a heightened duty of care because a muster drill is a unique maritime peril, (2) there is record evidence that Defendant created a dangerous condition that caused Plaintiff's injuries, (3) Plaintiff clearly identified the dangerous condition as the unsafe manner in which Defendant's crewmember conducted the muster drill, (4) Defendant had notice of this dangerous condition in light of prior substantially

similar incidents, (5) Defendant is vicariously liable because its employee, Artyushenko, was negligent, and (6) Plaintiff has adduced evidence of causation and damages. *See generally* Resp.

In reply, Defendant argues that (1) Defendant did not owe her a heightened duty of care, (2) Plaintiff fails to point to any evidence of a dangerous condition, negligence, or notice, (3) the evidence in the record is insufficient to establish that Defendant's crewmember breached a duty owed to Plaintiff, and (4) Plaintiff does not point to any record evidence that her fall on the *Anthem* caused her neck injury. *See generally* Reply.

The Court begins by reviewing principles that apply to negligence actions arising from conduct on cruise ships.

A. Applicable Maritime Negligence Principles.

This case is governed by Federal maritime law. *See Guevara v. NCL (Bahamas) Ltd.*, 920 F.3d 710, 720 (11th Cir. 2019) ("Maritime law governs actions arising from alleged torts committed aboard a ship sailing in navigable waters."). "[I]t is a settled principle of maritime law that a shipowner owes a duty of exercising reasonable care towards those lawfully aboard the vessel who are not members of the crew." *Smith v. Royal Caribbean Cruises, Ltd.*, 620 F. App'x 727, 729 (11th Cir. 2015) (quoting *Doe v. Celebrity Cruises, Inc.*, 394 F.3d 891, 908 (11th Cir. 2004) (citation omitted)). However, "[a] carrier by sea does not serve as an insurer to its passengers; it is liable only for its negligence." *Weiner v. Carnival Cruise Lines*, No. 11-cv-22516, 2012 WL 5199604, at *2 (S.D. Fla. Oct. 22, 2012) (citing *Kornberg v. Carnival Cruise Lines, Inc.*, 741 F.2d 1332, 1334 (11th Cir. 1984)). "To prevail on a maritime tort claim, a plaintiff must show that (1) the defendant had a duty to protect the plaintiff from a particular injury; (2) the defendant breached that duty; (3) the breach actually and proximately caused the plaintiff's injury; and (4) the

plaintiff suffered actual harm." *Smith*, 620 F. App'x at 730 (citing *Chaparro v. Carnival Corp.*, 693 F.3d 1333, 1336 (11th Cir. 2012) (other citations omitted)).

B. Duty Owed to Plaintiff.

A threshold question before the Court is what duty Defendant owed to Plaintiff. Plaintiff argues that Defendant owed her a heightened duty of care because Defendant's muster drill is a unique maritime peril that passengers do not encounter on land. Resp. at 3–5. In contrast, Defendant argues that a heightened duty of care does not apply because, under the circumstances of this case, Plaintiff was not exposed to a unique maritime peril. Reply at 2–4.

It is *well-established* that a cruise line operator owes its passengers a duty of reasonable care under the circumstances. *See, e.g.*, *Chaparro v. Carnival Corp.*, 693 F.3d 1333, 1336 (11th Cir. 2012) ("Concerning the duty element in a maritime context the Supreme Court held in *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625, 630, 79 S. Ct. 406, 409, 3 L. Ed. 2d 550 (1959), that 'a shipowner owes the duty of exercising *reasonable care* towards those lawfully aboard the vessel who are not members of the crew.'") (emphasis in original); *Brown v. Carnival Corp., et al.*, 202 F. Supp. 3d 1332, 1338 (S.D. Fla. 2016) ("Generally, ship owners and operators do not owe a heightened or special duty of care to their passengers."); *Ceithaml v. Celebrity Cruises, Inc.*, 207 F. Supp. 3d 1345, 1350 (S.D. Fla. 2016) ("Pursuant to federal maritime law, the duty of care that cruise operators owe passengers is ordinary reasonable care under the circumstances, 'which requires, as a prerequisite to imposing liability, that the carrier have actual or constructive notice of the risk-creating condition.'") (quoting *Keefe v. Bahama Cruise Line, Inc.*, 867 F.2d 1318, 1322 (11th Cir. 1989)).

Plaintiff references the following language from *Keefe v. Bahama Cruise Line*, in addition to the testimony of Defendant's corporate representative, the testimony of Plaintiff's expert

witness, Mr. Randall W. Jaques, and a provision of the Safety of Life at Sea ("SOLAS") regulations, to support that a muster drill is a unique maritime peril for which Defendant owed her a heightened duty of care:

> Accordingly, we hold that the benchmark against which a shipowner's behavior must be measured is ordinary reasonable care under the circumstances, a standard which requires, as a prerequisite to imposing liability, that the carrier have had actual or constructive notice of the risk-creating condition, at least where, as here, the menace is one commonly encountered on land *and not clearly linked to nautical adventure*.

Resp. at 3 (quoting *Keefe v. Bahama Cruise Line, Inc.*, 867 F.2d 1318, 1322 (11th Cir. 1989)) (emphasis in original).

However, Plaintiff's argument fails for two reasons. First, Plaintiff's facts and record evidence in support of her heightened duty of care argument are identified only in her Response and are not included in her Response Statement of Material Facts, *compare* Resp. at 4–5, *with* Pl.'s Resp. 56.1, which as noted earlier violates the Local Rules. Second, Defendant correctly observes that Plaintiff expressly pled in her Amended Complaint that Defendant owed her a duty of *reasonable care* under the circumstances. Reply at 3; *see also* Am. Compl. ¶ 14 ("At all times material hereto, it was the duty of Defendant to provide Plaintiff with reasonable care under the circumstances."); *id.* ¶ 18 (same); *id.* ¶ 23 (same but applied to Defendant's crewmembers). Plaintiff cannot amend her Amended Complaint by way of a response to a motion for summary judgment. *See Gilmour v. Gates, McDonald & Co.*, 382 F.3d 1312, 1315 (11th Cir. 2004) ("A plaintiff may not amend her complaint through argument in a brief opposing summary judgment."). On this basis alone, the Court can and does conclude that Defendant did not owe her a heightened duty of care, because Plaintiff, as the master of her complaint, does not seek to hold Defendant to a heightened duty of care and only does so at the current stage of this action.

Independently, the Court notes that Plaintiff points the Court to no Eleventh Circuit cases that have applied the heightened duty of care she seeks. The cases Plaintiff cites are either from outside the Eleventh Circuit or apply a duty of reasonable care. *See Keefe*, 867 F.2d at 1322 (noting the existence of a heightened care standard but applying ordinary care); *Rainey v. Paquet Cruises*, Inc., 709 F.2d 169, 172 (2d Cir. 1983) (same); *Harnesk v. Carnival Cruise Lines, Inc.*, No. 87-2328-CIV-DAVIS, 1991 WL 329584, at *5 (S.D. Fla. Dec. 27, 1991) ("Defendants owed a duty of reasonable care under the circumstances to Plaintiff on board the Carnivale. A combination of factors made the entrance to the Restroom where Plaintiff sustained injury unreasonably dangerous under the circumstances.").

The Court further notes that the one case Plaintiff cites as applying a heightened duty of care did so for circumstances where a heightened duty of care would not be applied within this Circuit. *Compare Weiss v. Holland Am. Line Inc.*, No. C12-2105 RSM, 2014 WL 1569204, at *5 (W.D. Wash. Apr. 18, 2014) (holding a defendant cruise ship operator to a heightened duty of care where "the risk-creating condition was [not] the charity walk in itself but rather the occurrence of the charity walk during weather conditions with rough seas, near-gale winds, and moderate swells"), *with Kressly v. Oceania Cruises, Inc.*, 718 F. App'x 870, 872–73 (11th Cir. 2017) (declining "to adopt a heightened standard of care for vessels when they transport passengers during tumultuous weather").[7] In fact, *Kressly* expressly states that "the federal maritime law in

[7] It is also not clear that a heightened duty of care would apply in the Ninth Circuit. In *Weiss*, the court summarized the Ninth Circuit case *In re Catalina Cruises, Inc.*, 137 F.3d 1422 (9th Cir. 1998), as holding a vessel operator to a high standard of care because "the hazard-creating condition was specific to the passage of the vessel on the high seas." *Weiss*, 2014 WL 1569204, at *5. However, in *Kressly*, the Eleventh Circuit observed that the Ninth Circuit "merely clarified that 'where the risk is great because of high seas, an increased amount of care and precaution is reasonable.'" *Kressly*, 718 F. App'x at 872 (quoting *In re Catalina Cruises*, 137 F.3d at 1425-26). Indeed, in *In re Catalina Cruises*, the Ninth Circuit found that the district court had "correctly noted that a shipowner owes a duty of reasonable care to those aboard the ship who are not

this circuit is clear that the owner of a vessel in navigable waters owes passengers a duty of reasonable care under the circumstances." *Kressly*, 718 F. App'x at 872 (citing *Sorrels v. NCL (Bahamas) Ltd.*, 796 F.3d 1275, 1279 (11th Cir. 2015)); *see also Amy v. Carnival Corp.*, 961 F.3d 1303, 1308 n.4 (11th Cir. 2020) ("Our prior precedent forecloses Amy's argument for a heightened duty of care."); *Carroll v. Carnival Corp.*, 955 F.3d 1260, 1264 (11th Cir. 2020) ("With respect to the duty element, a cruise line like Carnival owes its passengers 'a "duty of reasonable care" under the circumstances.'" (citation omitted)).

The Court recognizes that Plaintiff has pointed to evidence that muster drills are uniquely maritime. However, based on the undisputed facts of this case, the Court would be strained to find that the risks associated with causing someone to feel rushed to take a seat in a theater are clearly linked to nautical adventure. The fact that Plaintiff felt rushed to take a seat in connection with a muster drill does not change this Court's conclusion that the duty of reasonable care applies in this case.[8]

In sum, the Court finds that Defendant owed Plaintiff a duty of reasonable care under the circumstances.

C. Counts I and II.

Having determined that Defendant owed Plaintiff a duty of care reasonable under the circumstances, the Court turns to Defendant's arguments that Plaintiff fails to point to record

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crewmembers," but that "where the risk is great because of high seas, an increased amount of care and precaution is reasonable." *In re Catalina Cruises*, 137 F.3d at 1425-26.

[8] Plaintiff testified: "**Q.** Okay. And was -- had any portion of the muster drill started at the time that you fell? **A.** No, no. Because everybody had to be in the theater. They were swiping people. That's why they were waiting for late people, because they have to swipe everybody in, you know, before they start." Willis Dep. at 85:1–8.

evidence that any dangerous condition existed and, relatedly, that Defendant had notice of any dangerous condition.

Defendant argues that there is no record evidence that any dangerous condition existed. Mot. at 4–6. Specifically, Defendant asserts that Plaintiff's testimony makes clear that she did not slip or trip, nothing blocked her view, the lighting was sufficient, and she knew she was stepping down. *Id.* at 4–5. Defendant further argues that, despite her testimony that she felt rushed, her expert witness testified[9] that muster drills must be conducted with a sense of urgency, and in any event, Plaintiff was not rushing. *Id.* at 5. Separately, Defendant argues that Plaintiff fails to establish that Defendant had actual or constructive notice of any dangerous condition because no dangerous condition existed. *Id.* at 5–6. Last, Defendant argues that the mere fact that Plaintiff suffered an injury is not sufficient to establish that a dangerous condition existed. *Id.* at 6 (quoting *O'Brien v. NCL (Bahamas) Ltd.*, 288 F. Supp. 3d 1302, 1309 (S.D. Fla. 2017), *abrogated on other grounds by Tesoriero v. Carnival Corp.*, 965 F.3d 1170, 1180 (11th Cir. 2020)).

In response, Plaintiff argues that her Amended Complaint clearly identifies the dangerous conditions as the dangerous way in which it runs its muster drill. Resp. at 6. Specifically, Plaintiff asserts that the dangerous condition was that Defendant (1) required passengers to participate in the muster drill without special considerations for those passengers who are physically unfit to participate, (2) rushed passengers through the muster drill without regard for their physical condition or abilities, and (3) required a dangerous number of passengers to participate in the

[9] As noted earlier, Defendant has moved to strike Plaintiff's expert, Mr. Randall Jaques, and preclude him from offering opinion testimony, *see generally* (ECF No. 41), even though Defendant quotes Mr. Jaques's undisputed deposition testimony in its Statement of Material Facts, *see* Def.'s 56.1 ¶ 4(a)–(e). Plaintiff does not point to Mr. Jaques's deposition testimony or expert opinions in support of her constructive notice and causation arguments, *see generally* Resp., thus the Court finds that it need not resolve Defendant's motion to strike Mr. Jaques, *see Fuentes v. Classica Cruise Operator Ltd, Inc.*, No. 20-14639, slip op. at 14–15 (11th Cir. May 3, 2022).

muster drill at the same time. *Id.* (quoting Am. Compl. ¶ 12). In support, Plaintiff points to (a) her deposition testimony wherein she states she felt rushed, (b) the testimony and opinions of her expert wherein he opined that Defendant should have considered Plaintiff's functional limitations, (c) the testimony of Defendant's corporate representative regarding Defendant's expectations regarding safety, accommodations, and muster drills, and (d) Defendant's crowd management training materials.[10] *Id.* at 6–13. As to notice, Plaintiff responds that there have been three other incidents that she contends are substantially similar to her incident. *Id.* at 14–17 (citing (ECF Nos. 48-1, 48-2, 48-3)).

In reply, Defendant argues that, at bottom, Plaintiff brings this action "because she felt rushed and/or because she was not provided an unspecified accommodation." Reply at 4. Defendant further notes that Plaintiff's own deposition testimony was that she was walking at a regular pace and did not communicate any request for an accommodation. *Id.* And Defendant argues that Plaintiff's subjective feeling that she was being rushed is not a dangerous condition. *Id.* ("Plaintiff's mere belief that she was being rushed or pressured is insufficient to maintain her negligence claim."). As to notice, Defendant points to its Motion *in Limine*, wherein it seeks to exclude Plaintiff's evidence of substantially similar incidents because they are not substantially similar to Plaintiff's incident. *Id.* at 5; *see also* (ECF No. 42) at 2–6.

It is well-established that the ordinary reasonable care under the circumstances standard requires "as a prerequisite to imposing liability . . . that the shipowner have had actual or constructive notice of the risk-creating condition." *Smith*, 620 F. App'x at 730 (citing *Keefe*, 867 F.2d at 1322). "In other words, a cruise ship operator's duty is to shield passengers from known

[10] Plaintiff did not reference Defendant's Crowd Management Training within her Response Statement of Material Facts.

dangers (and from dangers that should be known), whether by eliminating the risk or warning of it. Liability for a cruise ship operator thus 'hinges on whether it knew or should have known' about the dangerous condition."[11] *Tesoriero v. Carnival Corp.*, 965 F.3d 1170, 1178 (11th Cir. 2020), *cert. denied*, 141 S. Ct. 2516 (2021).

"Actual notice exists when the defendant knows of the risk creating condition." *Bujarski v. NCL (Bahamas) Ltd.*, 209 F. Supp. 3d 1248, 1250 (S.D. Fla. 2016) (citing *Keefe*, 867 F.2d at 1322). In the absence of actual notice, a plaintiff must establish constructive notice. The Eleventh Circuit has provided the following guidance:

> We have identified at least 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." [*Guevara v. NCL (Bahamas) Ltd.*, 920 F.3d 710, 720 (11th Cir. 2019)] (alterations adopted) (quoting *Monteleone v. Bahama Cruise Line, Inc.*, 838 F.2d 63, 65 (2d Cir. 1988)). *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.* (quotation marks and citation omitted). On the other hand, the fact that the cruise line runs the ship is not enough—constructive notice of a risk cannot be imputed merely because a shipowner "created or maintained" the premises. [*Everett v. Carnival Cruise Lines*, 912 F.2d 1335, 1358–59 (11th Cir. 1990)].

Tesoriero, 965 F.3d at 1178–79.

Further, "[w]hen the non-moving party bears the burden of proof on an issue at trial," as Plaintiff does in this case on her general negligence and negligent failure to warn claims, "the moving party need not 'support its motion with affidavits or other similar material negating the opponent's claim,' in order to discharge this initial responsibility." *Rice-Lamar v. City of Ft. Lauderdale*, 232 F.3d 836, 840 (11th Cir. 2000) (quoting *Celotex*, 477 U.S. at 434). "Instead, the

[11] In addition, "[u]nder federal admiralty law, a cruise ship has no duty to warn of known dangers that are open and obvious." *Krug*, 745 F. App'x at 866. The Court does not address whether the dangerous conditions Plaintiff alleges were an open and obvious condition because the Parties do not address it in their briefing.

moving party simply may 'show'—that is, point out to the district court—that there is an absence of evidence to support the nonmoving party's case." *Id.* (quoting *Celotex*, 477 U.S. at 325) (alterations incorporated). Here, Defendant points the Court to the lack of record evidence as to Defendant's actual or constructive notice of any dangerous condition, assuming one existed.

With the burden shifting, Plaintiff responds that there is evidence of three substantially similar incidents sufficient to create a genuine issue of fact whether Defendant had constructive notice that the way in which it conducted its muster drill was dangerous. Resp. at 14–17; *see also* Pl.'s Resp. 56.1 at 4 ¶ 10 (citing (ECF Nos. 48-1, 48-2, 48-3)). As noted above, Defendant disputes that these incidents are substantially similar to Plaintiff's incident and has separately moved to exclude evidence of these prior incidents. Def.'s Reply 56.1 ¶ 10; *see* (ECF No. 42) at 2–6.

To resolve whether there is a genuine issue of fact material regarding Defendant's constructive notice, the Court finds it necessary to resolve Defendant's Motion *in Limine* to the extent Defendant seeks to exclude evidence of prior incidents.

1. Defendant's Motion *in Limine*.

Defendant seeks to preclude Plaintiff from offering evidence of prior incidents. *See generally* ("Def. MIL") (ECF No. 42).

"In fairness to the parties and their ability to put on their case, a court should exclude evidence *in limine* only when it is clearly inadmissible on all potential grounds." *United States v. Gonzalez*, 718 F. Supp. 2d 1341, 1345 (S.D. Fla. 2010) (citation omitted). "The movant has the burden of demonstrating that the evidence is inadmissible on any relevant ground." *Id.* (citation omitted). "Unless evidence meets this high standard, evidentiary rulings should be deferred until trial so that questions of foundation, relevancy, and potential prejudice may be resolved in proper context." *Palmetto 241 LLC v. Scottsdale Ins. Co.*, No. 19-cv-22195-BLOOM/Louis, 2020 WL

2736646, at *1 (S.D. Fla. May 26, 2020) (citation and internal quotation marks omitted). "Likewise, '[i]n light of the preliminary or preemptive nature of motions *in limine,* any party may seek reconsideration at trial in light of the evidence actually presented and shall make contemporaneous objections when evidence is elicited.'" *Id.* (citation and internal quotation marks omitted); *see also In re Seroquel Prods. Liab. Litig.*, Nos. 06-md-1769-Orl-22DAB, 07 cv 15733 Orl-22DAB, 2009 WL 260989, at *1 (M.D. Fla. Feb. 4, 2009) ("The court will entertain objections on individual proffers as they arise at trial, even though the proffer falls within the scope of a denied motion *in limine*.") (citation omitted).

Defendant argues that the prior incidents Plaintiff seeks to introduce are not substantially similar to her incident. Def. MIL at 2–6,

Under the "substantial similarity doctrine," a party must provide evidence of "conditions substantially similar to the occurrence in question" that "caused the prior accident." *Taiariol v. MSC Crociere, S.A.*, No. 0:15-CV-61131-KMM, 2016 WL 1428942, at *4 (S.D. Fla. Apr. 12, 2016), *aff'd*, 677 F. App'x 599 (11th Cir. 2017) (citing *Jones v. Otis Elevator Co.*, 861 F.2d 655, 661–62 (11th Cir. 1988) (citation omitted); *see also Sorrels*, 796 F.3d at 1287–88 (affirming district court's ruling that "evidence of 22 other slip and fall incidents" aboard defendant's vessel did not meet the "substantial similarity doctrine" as none of the falls occurred where plaintiff fell, other injured passengers wore varying styles of footwear, and additional factors were involved) (other citations omitted). In addition, "the prior accident must not have occurred too remote in time." *Jones v. Otis Elevator Co.*, 861 F.2d 655, 662 (11th Cir. 1988). "The 'substantial similarity' doctrine does not require identical circumstances, and allows for some play in the joints depending on the scenario presented and the desired use of the evidence." *Sorrels*, 796 F.3d at 1287.

Here, Plaintiff points to three incidents that she argues are substantially similar because all three involved dangerous conditions similar to what Plaintiff alleges, occurred within three years before Plaintiff's incident, and involved Defendant's muster drill aboard Defendant's vessels. (ECF No. 48) at 2–3. In reply, Defendant argues that each of the three prior incidents differs from Plaintiff's incident in significant ways. The Court reviews each incident in reverse.

First, the July 30, 2018 incident involving Barnes Boyle on the *Enchantment* is not substantially similar to Plaintiff's incident. There, Mr. Boyle fell *after the muster drill* when "someone ran into him" causing him to "f[a]ll into a lady in a scooter." (ECF No. 46-7) at 2. Mr. Boyle stated that the cause was "to[o] many people trying to move at the same time," and noted that the incident could have been avoided if he could have "gone to a different muster station." *Id.* Although Plaintiff pleads in her Amended Complaint that Defendant required a dangerous number of passengers to participate in the muster drill at the same time, Am. Compl. ¶ 12, the undisputed facts in this case are that Plaintiff believes she fell because she felt rushed to take a seat by Defendant's crewmember as she was descending a step, not because someone in a crowd ran into her. *See* Def.'s 56.1 ¶ 3(c) (quoting Willis Dep. at 79:1–19); Pl.'s Resp. 56.1 at 1 ¶ 3. Unlike Mr. Boyle, Plaintiff did not fall because she was pushed by a crowd leaving the muster drill. For this reason, the Court finds that evidence of Mr. Boyle's incident is not substantially similar to Plaintiff's incident and is therefore inadmissible as evidence of Defendant's constructive notice.

Second, the March 6, 2017 incident involving Mary Daniels is not substantially similar to Plaintiff's incident. There, Ms. Daniels fell when she "tripped trying to get [her] walker over the doorway and was pushed or stumbled." (ECF No. 46-6) at 2. Ms. Daniels's Guest Injury Statement states that the cause was that she was "pushed because of crowd *leaving after muster drill*." *Id.* (emphasis added). Ms. Daniels wrote that she would not have been injured if she had

been permitted to report to a muster location for the elderly and persons with disabilities. *Id.* Although Plaintiff pleads in her Amended Complaint that Defendant required passengers to participate in the muster drill without regard to their physical limitations, Am. Compl. ¶ 12, the undisputed facts in this case, again, are that Plaintiff believes she fell because she felt rushed to take her seat at the start of a muster drill, not because she was pushed by a crowd leaving the muster drill. *See* Def.'s 56.1 ¶ 3(c) (quoting Willis Dep. at 79:1–19); Pl.'s Resp. 56.1 at 1 ¶ 3. Unlike Ms. Daniels, Plaintiff did not fall because too many people were moving after the muster drill. For this reason, the Court finds that evidence of Ms. Daniels's incident is not substantially similar to Plaintiff's incident and is therefore inadmissible as evidence of Defendant's constructive notice.

Last, Defendant seeks to exclude evidence of the October 20, 2018 incident involving James Bennetts on the *Independence*. There, Mr. Bennetts fell when he "trip[p]ed up a ste[]p on the way to the muster drill in the main restaurant." (ECF No. 46-5) at 2 (alteration incorporated). Mr. Bennetts wrote that the cause was "concentrating on where the stewert [sic] was telling us to go." *Id.* In response to the question, "What could you (or anyone else) have done to avoid this incident?", Mr. Bennetts wrote only the words, "no rushing." *Id.* Plaintiff argues that this incident is substantially similar to Plaintiff's incident because both Plaintiff and Mr. Bennetts "i) . . . were concentrating on where the steward was telling them to go; and ii) they felt rushed." (ECF No. 48) at 5. Plaintiff also notes that both incidents involve the "same conditions in the sense of a muster drill that a passenger says was not safe because they were 'rushed.'" *Id.* Defendant argues that Plaintiff has not met her burden of establishing that the two incidents are substantially similar, as Mr. Bennetts's injury statement does not indicate who was rushing him. (ECF No. 49) at 1–2 ("There is no indication in Mr. Bennets' incident if a crewmember was rushing him, a family

member was rushing him[,] or if he was simply referring to himself as rushing.").

The Court agrees that Plaintiff attempts to read circumstances into Mr. Benentts's injury statement that are not expressed. Noticeably absent from Mr. Bennetts's injury statement is any indication whether he was being rushed, and if so, who was rushing whom. This is particularly important where Plaintiff pleads that Defendant created a dangerous condition by rushing passengers through its muster drills without regard for their physical condition. *See* Am. Compl. ¶ 12. Also absent from Mr. Bennetts's injury statement is any connection between being rushed and Mr. Bennetts's physical condition. In contrast and as noted in detail above, Plaintiff testified that certain physical limitations precluded her from taking a seat where Defendant's crewmember initially instructed her to sit at the start of the muster drill, and then Plaintiff fell for reasons unknown to her because she felt rushed. Further, whereas Mr. Bennetts tripped, it is not disputed that Plaintiff did not trip on anything. Willis Dep. at 88:20–23; *see* Def.'s 56.1 ¶ 3(g); Pl.'s Resp. 56.1 at 1 ¶ 3. Although there is "play in the joints" with respect to substantially similar incidents, the Court cannot conclude that Mr. Bennetts's incident is substantially similar to Plaintiff's incident solely because it contains the two words "no rushing." For this reason, the Court finds that evidence of Mr. Bennetts's incident is not substantially similar to Plaintiff's incident and is therefore inadmissible as evidence of Defendant's constructive notice.

Accordingly, the Court will GRANT Defendant's Omnibus Motion *in Limine* (ECF No. 42) to the extent it seeks to exclude evidence of the three incidents discussed above. In all other respects, Defendant's Omnibus Motion *in Limine* is DENIED AS MOOT.[12]

[12] In its Omnibus Motion *in Limine*, moved to preclude Plaintiff from introducing (1) evidence of the prior incidents discussed above, (2) evidence or testimony regarding Plaintiff's loss of earnings capacity and future wages, and (3) the opinions of her treating physicians beyond those arising from treatment. *See generally* Def. MIL.

2. Whether Plaintiff Establishes a Genuine of Fact Regarding Constructive Notice.

Having determined that Plaintiff may not introduce Mr. Bennetts's, Ms. Daniels's, and Mr. Boyle's prior incidents as evidence of Defendant's constructive notice, the Court now turns to whether Plaintiff has adduced evidence sufficient to create a genuine issue of material fact as to Defendant's constructive notice. Because Defendant pointed to the absence of evidence, the burden shifts to Plaintiff to point the Court to admissible evidence of Defendant's constructive notice sufficient to create a genuine issue of material fact. Plaintiff points the Court only to evidence of the three prior incidents discussed above,[13] Resp. at 14–17, which the Court has determined are not substantially similar to her incident, and thus, inadmissible.

Accordingly, Plaintiff fails to adduce record evidence sufficient to establish a genuine issue of material fact regarding Defendant's constructive notice of the dangerous conditions she advances in this litigation. On this basis, Defendant is entitled to summary judgment on Plaintiff's general negligence (Count I) and negligent failure to warn (Count II) claims.

D. Count III.

In Count III of the Amended Complaint, Plaintiff asserts a separate claim for general negligence against Defendant based on vicarious liability for the conduct of its crewmember, Artyushenko.[14] Plaintiff's Amended Complaint lists seven (7) ways in which Defendant or its

[13] Plaintiff's Response Statement of Material Facts includes an additional, disputed fact that reads, "At the time of Plaintiff's May 4, 2019 incident, Defendant was on notice of dangerous conditions Plaintiff has alleged to have cause[d] her injuries." Pl.'s Resp. 56.1 at ¶ 9. The evidence cited in support is the testimony of Defendant's corporate representative discussing the three incident reports noted above.

[14] Plaintiff's Amended Complaint can be read as treating all three claims asserted as vicarious liability claims. In Counts I and II, Plaintiff asserts "it was the duty of Defendant to provide Plaintiff with reasonable care." Am. Compl. ¶¶ 14, 18. However, both counts conclude with "Defendant and/or its crewmember for which it is vicariously liable . . . ." *Id.* ¶¶ 17, 22. In contrast,

crewmembers breached the duty of reasonable care owed to her. *See* Am. Compl. ¶ 24.

Defendant argues that Plaintiff fails to adduce evidence sufficient to establish a genuine issue of material fact regarding the negligence of Defendant's crewmember, Artyushenko. Specifically, Defendant argues that, to the extent Plaintiff testified she felt rushed by Artyushenko, Plaintiff's own expert testified that muster drills must be conducted with a sense of urgency. Mot. at 8. Defendant also notes that Plaintiff's subjective feeling of being rushed is not relevant as the applicable standard is an objective one. *Id.* In sum, Defendant argues that there is no evidence that Artyushenko acted negligently. *Id.* at 9. Separately, Defendant argues that Plaintiff fails to adduce evidence that the incident proximately caused her injuries. On this point, Defendant argues that Plaintiff has not disclosed any medical expert reports or opinions pursuant to Federal Rule of Civil Procedure 26(a)(2)(B). *Id.*

In response, Plaintiff argues that Artyushenko acted unreasonably under the circumstances and caused Plaintiff's injuries. In support, Plaintiff points to (1) her deposition testimony wherein she states she informed Artyushenko of her physical limitations when Artyushenko directed her to take a seat in a specific location in the theater, (2) Defendant's corporate representative testified that Defendant expects its crewmembers to conduct the muster drill in a way that will not cause injury to passengers, and (3) the testimony of her cruise ship safety expert, Mr. Jaques, who testified that Defendant should have considered Plaintiff's functional limitations and accommodated her. Resp. at 18. On the issue of proximate causation, Plaintiff points to (a) her deposition testimony in which she stated she hurt her neck when she fell, (b) her May 4, 2019 neck

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Plaintiff expressly titles Count III as a negligence claim against Defendant based on vicarious liability and asserts that "it was the duty of Defendant and/or its crewmembers to provide Plaintiff with reasonable care." *Id.* ¶ 23. The Court attributes this lack of clarity to less than careful drafting, and construes the Amended Complaint as asserting only Count III as a claim based on vicarious liability given the duties of care alleged within each count.

MRI, Pl.'s Resp. 56.1 at 2 ¶ 7, and (c) the one-paragraph letter from Dr. Kozel, which she characterizes as a Rule 26(a)(2)(B) expert report. Resp. at 18–19.

In reply, Defendant argues that Plaintiff "cites no actual language from the crewmember that made her feel [rushed], and even if she did, that is insufficient to establish a breach of duty." Reply at 5–6. On the issue of proximate causation, Defendant notes that Dr. Kozel's one-paragraph letter does not actually opine on whether Plaintiff's fall on the cruise caused the injury to her neck. *Id.* at 6. Defendant also argues that expert testimony is required to establish medical causation for conditions not readily observable. *Id.* (citing *Rivera v. Royal Caribbean Cruise, Ltd.*, 711 F. App'x 952, 954 (11th Cir. 2017)).

In setting forth a claim for negligence against a cruise line defendant based on a theory of vicarious liability, a plaintiff need not establish notice. *See Yusko v. NCL (Bahamas), Ltd.*, 4 F.4th 1164, 1167 (11th Cir. 2021) ("[T]he notice requirement does not—and was never meant to—apply to maritime negligence claims proceeding under a theory of vicarious liability."). However, a plaintiff must still adduce record evidence sufficient to establish the elements of negligence under maritime law.

The Court finds that Plaintiff fails to adduce evidence that creates a genuine issue of material fact as to the element of causation, which is a basis to grant summary judgment in favor of Defendant as to Count III and an alternative basis to grant summary judgment in favor of Defendant as to Counts I and II.

It is not disputed that Plaintiff alleged in her Amended Complaint that she injured her neck, lower back, both arms, and her hips in connection with the incident. Def.'s 56.1 ¶ 6; Pl.'s Resp. 56.1 at 2 ¶ 6. What is disputed is whether Plaintiff has adduced sufficient evidence that her injuries were caused by the incident on the *Anthem*. Plaintiff's evidence of her bodily injury includes her

testimony describing her neck pain that radiates down to her hands, *see* Willis Dep. at 41:15-42:21, and a report from a June 3, 2019 MRI of her cervical spine noting that Plaintiff has disk herniations at the C5-6 and C4-5 levels, *see* Pl.'s Resp. 56.1 at 2 ¶ 7(citing (ECF No. 46-9)). Plaintiff's pain and disk herniations in her neck are "non-readily observable." *See Harrell v. Carnival Corp.*, No. 19-22667-CIV, 2021 WL 6927557, at *5 (S.D. Fla. Dec. 3, 2021) ("Although Carnival is correct that the record is devoid of any expert testimony as to medical causation, 'the absence of an expert witness does not foreclose [Harrell's] ability to establish causation regarding her readily observable injuries.' Accordingly, Carnival is entitled to partial summary judgment as to Harrell's 'non-readily observable' injuries, specifically her fractured or sprained ankle, nerve damage, CRPS, depression, post-traumatic stress disorder, and anxiety." (citation omitted)); *see also Jones v. Royal Caribbean Cruises, Ltd.*, No. 12-20322-CIV, 2013 WL 8695361, at *6 (S.D. Fla. Apr. 4, 2013) ("Plaintiff's pain in his back cannot possibly be deemed the result of a 'readily observable' medical condition.").

In *Rivera v. Royal Caribbean Cruises, Ltd.*, the Eleventh Circuit observed that expert medical testimony is required to understand the nature of non-readily observable injuries, such as in this case:

> The district court found that Rivera had not met her burden as to proximate causation, and we agree. Without medical expert testimony, it is not possible to distinguish between the ailments Rivera experienced before the fall and those she experienced after—and due to—the fall. Further, *due to the nature of the injuries that she alleges*—including, for example, back pain, depression, anxiety, and vision issues—*expert testimony is simply required in order to even understand the nature and extent of the injuries*. Thus, as Rivera has not met her burden with respect to proximate causation, we affirm the district court's grant of summary judgment to Royal Caribbean.

Rivera v. Royal Caribbean Cruises Ltd., 711 F. App'x 952, 954–55 (11th Cir. 2017) (emphasis added).

Plaintiff argues that, as her treating physician, Dr. Kozel need not provide a written report because he is a non-retained expert under Rule 26(a)(2)(C). Resp. at 19 (quoting *Jones*, 2013 WL 8695361, at *5). Plaintiff is correct that, as her treating physician, Dr. Kozel need not prepare a Rule 26(a)(2)(B) expert report to testify on the issue of causation because he is a non-retained expert disclosed under Rule 26(a)(2)(C). *See* Def. MIL at 7–8 (stating that Dr. Kozel was disclosed under Rule 26(a)(2)(C)); *Torres v. Wal-Mart Stores E., L.P.*, 555 F. Supp. 3d 1276, 1289–98 (S.D. Fla. 2021); *In re Denture Cream Prod. Liab. Litig.*, No. 09-2051-MD, 2012 WL 5199597, at *4 (S.D. Fla. Oct. 22, 2012), *on reconsideration in part*, No. 09-2051-MD, 2012 WL 13008163 (S.D. Fla. Nov. 14, 2012) ("When a treating physician testifies regarding opinions 'formed and based upon observations made during the course of treatment,' the treating physician need not produce a Rule 26(a)(2)(B) report. By contrast, treating physicians offering opinions beyond those arising from treatment are experts from whom full Rule 26(a)(2)(B) reports are required." (citations omitted)); *Jones*, 2013 WL 8695361, at *3–5. Defendant notes in its Reply Statement of Material Facts and argues in its Reply and its Motion *in Limine* that none of the medical records disclosed, nor Dr. Kozel's letter, offer an opinion on causation. Def.'s Reply 56.1 ¶ 3; Reply at 6; Def. MIL at 7.

While Plaintiff is correct that Dr. Kozel need not disclose an expert report on the issue of causation because he is her treating physician, the only medical expert evidence in the record to which Plaintiff points the Court is Dr. Kozel's one-paragraph letter, which reads in full as follows:

> The above named person has been a patient in this medical practice since 2012. She has been seen on a regular basis because of a number of comorbid medical illnesses. During that period of time there had been no complaint of neck pain until her visit on June 19, 2019. During that visit she did describe a fall that occurred while being on a cruise and related having been seen by an orthopedic surgeon who had requested an MRI of the cervical spine because of pain which she had been suffering from since her fall. The MRI did indeed show multi-level disc disease of the cervical spine. There had never been any prior radiologic study of the spine to

> my knowledge to which any comparison could be made. I hope this information has been helpful.

Dr. Kozel Let. Plaintiff's attempt to recast Dr. Kozel's one-paragraph Letter as a Rule 26(a)(2)(B) expert report that opines on causation is tenuous. *See* Resp. at 19; Pl.'s Resp. 56.1 3 ¶ 3. Dr. Kozel's Letter does not comply with any of the requirements of Rule 26(a)(2)(B). *Compare* Dr. Kozel Let., *with* Fed. R. Civ. P. 26(a)(2)(B) (i)–(vi). While Dr. Kozel need not prepare an expert report, the Letter is patently not an expert report.

Separately, the Letter contains no readily identifiable opinion. At best, the one-paragraph Letter appears to corroborate Plaintiff's testimony that she has neck pain, reference Plaintiff's MRI results, and, drawing inferences in Plaintiff's favor, describe a *correlation* between Plaintiff's injuries and the incident on the *Anthem* without unambiguously connecting the two—Dr. Kozel's letter does not actually *opine* that the incident on the *Anthem caused* Plaintiff's injuries.[15] *See generally* Dr. Kozel Let. Rather, the Letter implicitly limits whatever causation-related inferences that may be drawn from it by noting there "had never been any prior radiologic study of the spine to [Dr. Kozel's] knowledge to which any comparison could be made." *Id.* For these reasons, the Court finds that the Letter does not contain Dr. Kozel's opinion on causation.

No other medical experts, either non-retained treating physicians or retained medical experts, are identified in Plaintiff's Response or her Response Statement of Material Facts. In addition, Plaintiff adduces no deposition testimony or identifiable opinions from any medical expert. Plaintiff does not even adduce deposition testimony from Dr. Kozel. Nor, apart from the MRI result, does Plaintiff include any medical records from which inferences regarding causation

[15] At one point in her Response to Defendant's Motion for Summary Judgment, Plaintiff refers to the Letter as a Rule 26(a)(2)(B) report (*i.e.*, an expert report), Resp. at 19, which stands in opposition to her response to Defendant's Motion *in limine*, wherein she states that, as a treating physician, Plaintiff need not disclose an expert report. (ECF No. 48) at 8.

may be drawn. The only medical expert evidence before the Court is Dr. Kozel's one-paragraph letter discussed above. Plaintiff has not borne her burden of bringing forth medical expert evidence opining on the issue of causation. *See Rivera*, 711 F. App'x at 954–55. Accordingly, Defendant is entitled to summary judgment on all negligence claims in the Amended Complaint for which causation is an essential element.

IV. CONCLUSION

UPON CONSIDERATION of the Motions, the pertinent portions of the record, and being otherwise fully advised in the premises, it is hereby ORDERED AND ADJUDGED that Defendant's Omnibus Motion *in Limine* (ECF No. 42) is GRANTED IN PART and DENIED AS MOOT IN PART. It is FURTHER ORDERED AND ADJUDGED that Defendant's Motion of Summary Judgment (ECF No. 44) is GRANTED. PURSUANT to Federal Rule of Civil Procedure 58, final judgment shall be entered by separate order. The Clerk of Court is INSTRUCTED to CLOSE this case. All pending motions, if any, are DENIED AS MOOT.

DONE AND ORDERED in Chambers at Miami, Florida, this 4th day of May, 2022.

K. MICHAEL MOORE
UNITED STATES DISTRICT JUDGE

c: All counsel of record