UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 1:23-cv-21936-KMM

ALVIN SCOTT,

Plaintiff,

v.

CARNIVAL CORPORATION,

Defendant.
_____/

ORDER

THIS CAUSE came before the Court upon Defendant Carnival Corporation's ("Defendant" or "Carnival") Motion for Summary Judgment. ("Mot.") (ECF No. 32). Plaintiff Alvin Scott ("Plaintiff") filed a Response in opposition. ("Resp.") (ECF No. 35). Defendant filed a Reply. ("Reply") (ECF No. 39). Plaintiff filed a Sur-Reply. ("Sur-Reply") (ECF No. 44). The Motion is now ripe for review.

I. BACKGROUND[1]

This is a maritime personal injury action in which Plaintiff seeks to recover damages for injuries he sustained as a result of a slip-and-fall accident while aboard Defendant's cruise ship, *Horizon*. *See generally* Compl. Plaintiff alleges that on May 26, 2022, while walking toward the entrance of the dining area on Deck 10, he encountered a Carnival employee who advised Plaintiff to take an alternate route due to a large amount of water on the pool deck. *Id.* ¶ 9. However, upon

[1] The facts herein are taken from Plaintiff's Complaint ("Compl.") (ECF No. 1), Defendant's Statement of Material Facts ("Def.'s 56.1") (ECF No. 31), Plaintiff's Response to Defendant's Statement of Material Facts ("Pl.'s Resp. 56.1") (ECF No. 36), Defendant's Reply Statement of Material Facts ("Def.'s Reply 56.1") (ECF No. 38), and a review of the corresponding record citations and exhibits.

entering the area into which he was directed, Plaintiff immediately discovered that the deck in this area was also covered in water. Def.'s 56.1 at 2–3; Pl.'s Resp. 56.1 at 1. In describing the condition of the subject area, Plaintiff testified that water from an overflowing pool was "pumping like oil all over the floor" and there was water "all over the deck." *Id.* Plaintiff proceeded to walk across the wet pool deck and toward the entrance of the dining area. *Id.* However, when Plaintiff entered the dining area, he stepped across a carpeted runner and onto a tile floor where he slipped and fell. *Id.* Plaintiff testified that he did not observe any water or other transitory liquid on the floor of the dining area where he fell. *Id.* As a result of his slip and fall, Plaintiff sustained physical injuries including an injury to his back which required surgical repair. Resp. at 1.

Plaintiff commenced the instant action against Defendant on May 25, 2023. *See generally* Compl. Plaintiff alleges that Defendant was negligent when it allowed the pool to overflow onto the deck and an employee then directed him to walk through the flooded area into the dining area. *Id.*; Resp. at 1–2. Plaintiff further alleges that the employee who was assigned to oversee the overflowed area was negligent in that he failed to cordon the area off and directed Plaintiff to walk through the flooded area. Compl. ¶¶ 42–45; Resp. at 2. In his Complaint, Plaintiff asserts claims against Defendant for (1) negligence ("Count I"), (2) negligent maintenance ("Count II"), (3) negligent failure to warn ("Count III"), and (4) vicarious liability ("Count IV"). *See generally* Compl. Defendant now moves for summary judgment on all four of Plaintiff's 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). "For factual issues to be considered genuine, they must have a real basis in the record." *Mann v. Taser Int'l, Inc.*, 588 F.3d 1291, 1303 (11th Cir. 2009) (citation omitted). Speculation cannot create a genuine issue of material fact sufficient to defeat a well-supported motion for summary judgment. *Cordoba v. Dillard's, Inc.*, 419 F.3d 1169, 1181 (11th Cir. 2005).

The moving party has the initial burden of showing the absence of a genuine issue as to any material fact. *Clark v. Coats & Clark, Inc.*, 929 F.2d 604, 608 (11th Cir. 1991). In assessing whether the moving party has met this burden, a court must view the movant's evidence and all factual inferences arising from it in the light most favorable to the non-moving party. *Denney v. City of Albany*, 247 F.3d 1172, 1181 (11th Cir. 2001).

Once the moving party satisfies its initial burden, the burden shifts to the non-moving party to present evidence showing a genuine issue of material fact that precludes summary judgment. *Bailey v. Allgas, Inc.*, 284 F.3d 1237, 1243 (11th Cir. 2002); *see also* Fed. R. Civ. P. 56(e). "If reasonable minds could differ on the inferences arising from undisputed facts, then a court should deny summary judgment." *Miranda v. B & B Cash Grocery Store, Inc.*, 975 F.2d 1518, 1534 (11th Cir. 1992). But if the record, taken as a whole, could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial, and summary judgment is proper. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

III. DISCUSSION

Defendant argues that is entitled to summary judgment on all four claims asserted by Plaintiff. *See generally* Mot. Specifically, Defendant asserts that (1) there is no evidence of a dangerous condition, (2) assuming there was a dangerous condition, it was open and obvious

negating a duty to warn, (3) there is no evidence of negligent maintenance, (4) there is no evidence that Defendant had notice of the alleged dangerous condition, (5) there is no evidence of negligence on the part of crewmembers that could be imputed to Defendant under a vicarious liability theory, and (5) Plaintiff cannot establish the necessary tort elements of causation and damages. *Id.* at 2.

In response, Plaintiff argues that (1) there is record evidence of a dangerous condition, (2) there is record evidence of negligent maintenance, (3) Plaintiff is not required to identify an employee by name and there is record evidence of an employee's negligence, (4) Plaintiff is not required to prove notice for his vicarious liability claim, (5) there is record evidence that Defendant was on actual notice of the dangerous condition, and (6) there is sufficient evidence of causation. *See generally* Resp.

A. Defendant's Rule 30(b)(6) Deposition

Before turning to the merits of Defendant's Motion, the Court begins by addressing Plaintiff's argument regarding Defendant's Rule 30(b)(6) deposition. In his Response, Plaintiff claims that Defendant "failed to produce a corporate representative witness who was prepared and capable of answering the questions from the noticed topics and . . . failed to produce any document to the Plaintiff." Resp. at 4. Defendant disputes this characterization and states that its witness was prepared and answered questions on all areas of inquiry to which Defendant had not objected. Reply at 1. While Plaintiff devotes nearly seven pages of his Response to the purported inadequacies of Defendant's representative's testimony, it is not clear what relief, if any, Plaintiff seeks. "Although summary judgment should not be granted until the party opposing the motion has had an adequate opportunity for discovery, . . . the party opposing the motion for summary judgment bears the burden of calling to the district court's attention any outstanding discovery." *City of Miami Gardens v. Wells Fargo & Co.*, 931 F.3d 1274, 1286 (11th Cir. 2019) (internal quotation marks and citation omitted). To date, Plaintiff has sought no relief regarding

Defendant's objections to the areas of inquiry and document request for the Rule 30(b)(6) deposition. Moreover, the deadline for the Parties to complete discovery was December 16, 2023. *See* (ECF No. 10). Therefore, by failing to seek any particular relief regarding Defendant's Rule 30(b)(6) deposition, Plaintiff has "effectively consented to adjudication of the issues raised in the summary-judgment motion based on the existing record by failing to avail itself of the opportunity to seek further discovery." *City of Miami Gardens*, 931 F.3d at 1286.

B. Applicable Maritime Negligence Principles

"Maritime law governs actions arising from alleged torts committed aboard a ship sailing in navigable waters." *Guevara v. NCL (Bahamas) Ltd.*, 920 F.3d 710, 720 (11th Cir. 2019) (citing *Keefe v. Bahama Cruise Line, Inc.*, 867 F.2d 1318, 1320–21 (11th Cir. 1989)). "In analyzing a maritime tort case, [courts] rely on general principles of negligence law." *Chaparro v. Carnival Corp.*, 693 F.3d 1333, 1336 (11th Cir. 2012) (quoting *Daigle v. Point Landing, Inc.*, 616 F.2d 825, 827 (5th Cir. 1980)). "To prevail on a negligence claim, 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.'" *Guevara*, 920 F.3d at 720 (quoting *Chaparro*, 693 F.3d at 1336). "Each element is essential to Plaintiff's negligence claim and Plaintiff cannot rest on the allegations of [his] complaint in making a sufficient showing on each element for the purposes of defeating summary judgment." *Isbell v. Carnival Corp.*, 462 F. Supp. 2d 1232, 1236–37 (S.D. Fla. 2006).

"A cruise-ship operator 'is not liable to passengers as an insurer, but only for its negligence.' The mere fact of an accident causing injury is insufficient to establish that a dangerous condition existed." *D'Antonio v. Royal Caribbean Cruise Line, Ltd.*, 785 F. App'x 794, 796 (11th Cir. 2019) (quoting *Keefe*, 867 F.2d at 1322); *see also Miller v. NCL (Bahamas) Ltd.*, No. 1:15-CV-22254-UU, 2016 WL 4809347, at *4 (S.D. Fla. Apr. 6, 2016) ("Generally, ship

owners and operators do not owe a heightened or special duty of care to their passengers."). Rather, "[u]nder maritime law, the owner of a ship in navigable waters owes passengers a duty of reasonable care under the circumstances." *Sorrels v. NCL (Bahamas) Ltd.*, 796 F.3d 1275, 1279 (11th Cir. 2015) (internal quotation marks and citation omitted).

The duty of reasonable care requires, "as a prerequisite to imposing liability, that the carrier have had actual or constructive notice of the risk-creating condition." *Keefe*, 867 F.2d at 1322. "In other words, a cruise ship operator's duty is to shield passengers from known dangers (and from dangers that should be known), whether by eliminating the risk or warning of it." *Tesoriero v. Carnival Corp.*, 965 F.3d 1170, 1178 (11th Cir. 2020). Thus, a cruise-ship operator's liability often "hinges on whether it knew or should have known about the dangerous condition." *Guevara*, 920 F.3d at 720; *see also D'Antonio*, 785 F. App'x at 797. "The mere fact that an accident occurs does not give rise to a presumption that the setting of the accident constituted a dangerous condition. *Miller*, 2016 WL 4809347, at *4.

Moreover, to establish the owner of a ship in navigable waters breached its duty of care, a plaintiff must show: "(1) a dangerous condition existed; (2) the vessel's operator had actual notice of the dangerous condition; or (3) if there was no actual notice, that [d]efendant had constructive notice of the dangerous condition for an interval of time sufficient to allow the vessel's operator to implement corrective measures." *Stewart v. Carnival Corp.*, 365 F. Supp. 3d 1272, 1275 (S.D. Fla. 2019) (quoting *Reinhardt v. Royal Caribbean Cruises, Ltd.*, No. 1:12-CV-22105-UU, 2013 WL 11261341, at *4 (S.D. Fla. Apr. 2, 2013)).

C. Evidence of a Dangerous Condition

Defendant first argues that it is entitled to summary judgment on Counts I, II, and III, because there is no evidence establishing that any dangerous condition existed. *See* Mot. at 4–5.

Specifically, Defendant contends that, "other than Plaintiff's testimony," there is no evidence that the pool on Deck 10 overflowed on the date of the incident. *Id.* Defendant further argues that Plaintiff testified that he slipped and fell in an interior dining room, not near the pool, and that he was unaware of any transitory substance being present at the location where he did slip. *Id.* at 5.

In response, Plaintiff argues that there is sufficient record evidence of a dangerous condition, specifically "a large accumulation of water" on Deck 10. Resp. at 11–12. In support, Plaintiff points to his deposition testimony in which he stated that he fell after traversing through water from an overflowed pool that "was pumping like oil," that a Carnival employee was aware of the situation, and that the employee directed Plaintiff through the water into an area with a tiled floor. *Id.* at 11. Additionally, Plaintiff argues that Defendant's corporate representative "admitted that a large accumulation of water as described by Plaintiff represents a hazard to passengers, and admitted that its crew members should have cordoned off the area instead of directing passengers to walk through it." *Id.*

Viewing the evidence in the light most favorable to Plaintiff, the Court finds that there is a genuine dispute of material fact as to whether a dangerous condition existed. Here, Plaintiff alleges that the dangerous condition which caused him to fall was "a large accumulation of water" on Deck 10." Resp. at 5, 11; *see also* Compl. ¶ 18(b) (describing the dangerous condition as "transient liquid on the floor around the Deck [10] pool and Guy's Burger Bar"). "Plaintiffs are generally the masters of their complaints and can thus choose how to plead their theory of liability." *Wiegand v. Royal Caribbean Cruises Ltd.*, No. 21-12506, 2023 WL 4445948, at *2 (11th Cir. July 11, 2023) (citing *Yusko v. NCL (Bahamas), Ltd.*, 4 F.4th 1164, 1170 (11th Cir. 2021)). As such, the Eleventh Circuit has noted that courts "routinely accept[] the plaintiff's definition of the dangerous condition(s) that caused his injury." *Id.* The Court must therefore focus only on

whether Plaintiff has adduced sufficient evidence establishing the existence of "a large accumulation of water" on Deck 10 on the date of the incident.

Defendant claims there is no evidence that the pool on Deck 10 overflowed on the date of the incident "other than Plaintiff's testimony." Mot. at 4; *see also* Reply at 2. "As a general principle, a plaintiff's testimony cannot be discounted on summary judgment unless it is blatantly contradicted by the record, blatantly inconsistent, or incredible as a matter of law, meaning that it relates to facts that could not have possibly been observed or events that are contrary to the laws of nature." *Feliciano v. City of Miami Beach*, 707 F.3d 1244, 1253 (11th Cir. 2013). Further, "a litigant's self-serving statements based on personal knowledge or observation can defeat summary judgment." *United States v. Stein*, 881 F.3d 853, 857 (11th Cir. 2018). Here, Plaintiff repeatedly testified during his deposition that he personally observed water "pumping like oil all over the floor" and there was water "all over the deck." Def.'s 56.1 at 2. Although Defendant argues that it has no record of a pool overflowing on the date of the incident, the Court cannot say that Plaintiff's testimony is blatantly contradicted by the record or incredible as a matter of law. Accordingly, based on the evidence in the record, the Court finds that Plaintiff has sustained his burden of presenting evidence sufficient to create a genuine issue of material fact regarding the existence of a dangerous condition.

D. Open and Obvious

Defendant next argues that it is entitled to summary judgment on Plaintiff's negligent failure to warn claim (Count III) because, even if a dangerous condition existed, it had no duty to warn Plaintiff of such a condition because it was open and obvious. Mot. at 5–6. In his Response, Plaintiff does not address Defendant's argument that any danger posed by a large accumulation of water on the pool deck is open and obvious. *See generally* Resp.

To establish Defendant's liability for failure to warn, Plaintiff must demonstrate that the alleged dangerous condition was not open and obvious. *See Frasca v. NCL (Bahamas), Ltd.*, 654 F. App'x 949, 952 (11th Cir. 2016) ("[A]n operator of a cruise ship has a duty to warn of known dangers that are not open and obvious."). The question of whether a dangerous condition is open and obvious is guided by the "reasonable person" standard. *Id.* Thus, "[i]n deciding whether a dangerous condition is open and obvious, the Court must determine 'whether a reasonable person would have observed the condition and appreciated the nature of the condition.'" *Hoover v. NCL (Bahamas) Ltd.*, 491 F. Supp. 3d 1254, 1256 (S.D. Fla. 2020) (quoting *Aponte v. Royal Caribbean Cruise Lines Ltd.*, 739 F. App'x 531, 537 (11th Cir. 2018)). 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, 1345–46 (S.D. Fla. 2015); *see also Lancaster v. Carnival Corp.*, 85 F. Supp. 3d 1341, 1344 (S.D. Fla. 2015) (noting that open and obvious conditions are "discernible through common sense and the ordinary use of eyesight"). Therefore, the question here is whether a reasonable person would have observed the large accumulation of water on the pool deck and appreciated risk of slipping.

The Court finds instructive the Eleventh Circuit's opinion in *Frasca v. NCL (Bahamas), Ltd.*, 654 F. App'x 949 (11th Cir. 2016), a slip-and-fall case involving a slippery cruise deck. In that case, it was undisputed: "(1) the deck was well lit, (2) there was a heavy fog or mist in the air, (3) the deck was visibly wet and shiny, and (4) there were puddles of water on the deck's surface." *Id.* at 952 (cleaned up). The Eleventh Circuit concluded that under such circumstances "a reasonable person approaching the outer deck would have perceived the outdoor conditions through the ordinary use of his senses and would have concluded based on those conditions that the deck's surface would likely be slicker than usual." *Id.* (cleaned up).

Here, like in *Frasca*, the Court finds that a reasonable person in Plaintiff's position would have perceived the large accumulation of water on the deck and recognized any danger posed by slipping. Plaintiff testified that as soon as he entered the subject area he immediately saw water "pumping like oil all over the floor." Def.'s 56.1 at 2. Plaintiff observed that "[t]he water was all over the deck" and that "[y]ou couldn't go through neither door without hitting water." *Id.* Plaintiff then proceeded to walk through water that was "high enough to wet his socks." Resp. at 11. Further, as that Plaintiff chose not to address Defendant's open-and-obvious argument, he seemingly does not dispute that any danger posed by the condition of the subject area was open and obvious. *See generally id.* Under these circumstances, the Court agrees with Defendant that the slippery nature of the wet deck was a condition that was "open and obvious to any reasonably prudent person through the exercise of common sense and the ordinary use of their eyesight." *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).

Accordingly, because Defendant had no duty to warn Plaintiff of the open and obvious danger posed by the allegedly dangerous condition, the Court finds that Defendant is entitled to summary judgment on Count III and any other claims premised on Defendant's duty to warn.

E. Negligent Maintenance

Defendant next argues that it is entitled to summary judgment on Plaintiff's negligent maintenance claim (Count II) because there "no evidence regarding Defendant's maintenance of the pool or the flooring, much less any evidence that such maintenance was negligent." Mot. at 7. In response, Plaintiff claims that "Defendant itself has caused the lack of evidence" regarding the maintenance of the pool by failing to produce certain records requested by Plaintiff. Resp. at 12. Regarding Defendant's alleged negligent maintenance of the subject deck area, Plaintiff asserts

that Defendant's corporate representative "admitted that its own maintenance procedures require that the area should have been cordoned off until the maintenance was complete and the pool overflow corrected." *Id.*

Beginning with Plaintiff's claim that Defendant is responsible for the lack of evidence regarding the maintenance of the pool, Plaintiff does not dispute that he carries the burden of adducing evidence of Defendant's alleged negligent maintenance. "When the non-moving party bears the burden of proof on an issue at trial," as Plaintiff does here, "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, Fla.*, 232 F.3d 836, 840 (11th Cir. 2000) (quoting *Celotex*, 477 U.S. at 323). "Instead, the 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 negligent maintenance of the pool. *See* Mot. at 7. Plaintiff had ample opportunity to raise any discovery disputes regarding the pool maintenance prior to Defendant's summary judgment motion. Yet Plaintiff never did so. As such, the Court finds that Plaintiff has failed create a genuine issue of material fact as to Defendant's negligent maintenance of the pool.

Turning to the Defendant's maintenance of the pool deck, Plaintiff states that "the only record evidence is that the pool overflowed, Carnival employees were in the area, and failed to cordon off the area which are its maintenance procedures." Resp. at 1. The Court concludes that this evidence is insufficient to establish that Defendant's maintenance of the subject deck area was negligent. It is undisputed that Defendant's internal policies and procedures require that areas where there is a significant accumulation of water should be closed off to passengers by a physical

barrier. *See* Pl.'s Resp. 56.1 at 3; Def.'s Reply 56.1 at 2. However, there is no evidence in the record indicating how long any water had been on the deck of the subject area before Plaintiff's incident. As such, there is no evidence to suggest that Defendant was negligent in failing to promptly address the issue. *See Wish v. MSC Crociere S.A.*, No. 07-60980-CIV, 2008 WL 5137149, at *2 (S.D. Fla. Nov. 24, 2008). Plaintiff does not point to any other evidence to support his theory of negligent maintenance. Therefore, the Court finds that there is no record evidence showing that Defendant acted unreasonably with respect to any need to remedy or maintain the subject deck area. *See Roberts v. Carnival Corp.*, No. 1:19-CV-25281-KMM, 2021 WL 3887819, at *11 (S.D. Fla. May 25, 2021), *aff'd,* No. 21-11792, 2022 WL 2188010 (11th Cir. June 17, 2022).

Accordingly, Defendant has met its burden of demonstrating the absence of a genuine issue of material fact regarding the maintenance of both the pool and the subject deck area. Further, Plaintiff has failed to rebut Defendant's showing. Therefore, Defendant is entitled to summary judgment with respect to Count II, as well as any other claims premised upon a failure to maintain or remedy the pool and deck area.

F. Actual or Constructive Notice

Next, Defendant argues that there is no evidence establishing that it had notice of the alleged dangerous condition, which is an essential element for all of Plaintiff's direct liability negligence claims. *See* Mot. at 9–11; Reply at 7–8. Specifically, Defendant argues that even if the pool did overflow, there is no evidence as to how long it was overflowing, how much it was overflowing, whether it was overflowing long enough to invite corrective measures, or evidence of any substantially similar prior incidents. *See* Mot. at 9–11; Reply at 7–8. In response, Plaintiff argues that is record evidence that Carnival was on actual notice of the dangerous condition. Resp. at 16.

"Actual notice exists when the shipowner knows of the unsafe condition." *Lebron v. Royal Caribbean Cruises Ltd.*, 818 F. App'x 918, 920 (11th Cir. 2020) (citing *Keefe*, 867 F.2d at 1322). "A maritime plaintiff can establish constructive notice with evidence that the defective condition existed for a sufficient period of time to invite corrective measures." *Guevara*, 920 F.3d at 720 (cleaned up). "Alternatively, a plaintiff can establish constructive notice with evidence of substantially similar incidents in which 'conditions substantially similar to the occurrence in question must have caused the prior accident.'" *Id.* (quoting *Jones v. Otis Elevator Co.*, 861 F.2d 655, 661–62 (11th Cir. 1988)).

As for constructive notice, Plaintiff does not dispute Defendant's claim that there is no evidence of substantially similar prior incidents or that the defective condition existed for a sufficient period of time to invite corrective measures. *See generally* Resp. Nor does Plaintiff make any other argument regarding constructive notice. *Id.* Accordingly, the Court finds that Plaintiff has failed to adduce any evidence that Defendant had constructive notice of the dangerous condition.

Regarding actual notice, Plaintiff appears to argue that Defendant had actual notice of the dangerous condition because Plaintiff's testimony "shows that a Carnival employee was standing in the area of the overflowed pool and was plainly aware of it." Resp. at 16. Plaintiff argues that this employee "should have also been aware that the area to which he was directing Plaintiff had a tile floor." *Id.* The Court finds Plaintiff's argument regarding actual notice unavailing. First, Plaintiff does not cite to any authority to support of his position that actual notice can be imputed to Defendant based solely on the actions or knowledge of a crewmember. *See Jackson v. NCL Am.*, LLC, 730 F. App'x 786, 789 (11th Cir. 2018) (finding that cruise operator lacked actual notice that an onion peel constituted a dangerous condition regardless of whether "a crewmember

dropped the onion peel and created the dangerous condition"). Second, "[k]nowledge that the condition exists is not sufficient, the defendant must also know that the condition is dangerous." *Malley v. Royal Caribbean Cruises Ltd*, 713 F. App'x 905, 908 (11th Cir. 2017). Here, there is simply no evidence that Defendant itself knew the condition existed at the time of Plaintiff's fall, much less that posed a danger. "The mere implication of actual or constructive notice is insufficient to survive summary judgment; rather, a plaintiff must show specific facts demonstrating, at least, that the purported defect was detectable with sufficient time to allow for corrective action." *Lipkin v. Norwegian Cruise Line Ltd.*, 93 F. Supp. 3d 1311, 1323 (S.D. Fla. 2015) (cleaned up) (quoting *Cohen v. Carnival Corp.*, 945 F. Supp. 2d 1351, 1357 (S.D. Fla. 2013)).

Based the foregoing, the Court finds that Plaintiff fails to adduce record evidence sufficient to establish a genuine issue of material fact regarding Defendant's actual or constructive notice of any dangerous condition. On this basis, Defendant is entitled to summary judgment on Plaintiff's general negligence (Count I), negligent maintenance (Count II), and negligent failure to warn (Count III) claims.

G. Proximate Causation and Damages

Finally, Defendant argues that entitled to summary judgment on all Counts asserted by Plaintiff because there is no evidence establishing that the subject incident was the cause of Plaintiff's claimed damages. Mot. at 11. Specifically, Defendant contends that "no medical report or opinion has been disclosed under Rule 26(a)(2)(B) or (C) that the subject fall caused Plaintiff's claimed physical injuries." *Id.* at 12. Plaintiff raises three arguments in response: (1) Defendant has admitted to causation; (2) the treating physicians identified in Plaintiff's initial disclosures qualify as non-retained experts who are not required to file expert witness reports in order to testify

on causation; and (3) Plaintiff has retained an expert witness, Dr. Andrew Ellowitz, to render an opinion as to causation. Resp. at 17–18. In its Reply, Defendant argues that Plaintiff's initial disclosures do not satisfy the requirements of Rule 26(a)(2) and Plaintiff's disclosure of Dr. Ellowitz is untimely. Reply at 8. The Court begins by addressing Plaintiff's argument that Defendant has admitted to causation before turning to the sufficiency of Plaintiff's expert disclosures.

1. Medical Expert Testimony Is Required

First, Plaintiff argues that there is sufficient evidence as to causation because Defendant's corporate representative "admitted that Plaintiff's damages were caused by the incident which is the subject of this action." Resp. at 17. This argument is without merit. The Eleventh Circuit has expressly held in the maritime context that "non-readily observable injuries require medical expert testimony to prove causation." *Willis v. Royal Caribbean Cruises, Ltd.*, 77 F.4th 1332, 1338 (11th Cir. 2023); *see also Rivera v. Royal Caribbean Cruises Ltd.*, 711 F. App'x 952, 954 (11th Cir. 2017) ("When the causal link between alleged injuries and the incident at issue is not readily apparent to a lay person, expert medical testimony as to medical causation is typically required."). In this case, there is no dispute that Plaintiff's claimed injuries, namely "an injury to his back which required surgical repair," are non-readily observable. Resp. at 1; *see also Mann v. Carnival Corp.*, 385 F. Supp. 3d 1278, 1285 (S.D. Fla. 2019) ("Courts have recognized that soft-tissue injuries, such as lower back pain are not a 'readily observable' medical conditions and, therefore, expert testimony as to the cause of such injuries is required."). As such, Plaintiff must provide expert medical testimony in order to meet his burden as to causation. Any testimony given by Defendant's corporate representative is "clearly not medical expert testimony and thus [is] not sufficient to establish proximate cause." *Willis*, 77 F.4th at 1339.

2. Plaintiff's Expert Disclosures

As noted above, Defendant argues that it is entitled to summary judgment because Plaintiff has not disclosed any medical reports or opinions under Rule 26(a)(2)(B) or (C), and thus cannot prove the elements of causation or damages. Mot. at 12.

Federal Rule of Civil Procedure 26 requires a party to disclose "the identity of any [expert] witness it may use at trial" and other information that varies depending on the expert. Fed. R. Civ. P. 26(a)(2)(A). A detailed written report is required "if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony." Fed. R. Civ. P. 26(a)(2)(B). Expert witnesses outside that category are "not required to provide a written report," and the disclosure must simply state the subject matter of the witness's expected testimony and "a summary of the facts and opinions to which the witness is expected to testify." Fed. R. Civ. P. 26(a)(2)(C). "A party must make these disclosures at the times and in the sequence that the court orders." Fed. R. Civ. P. 26(a)(2)(D). Finally, under Rule 37(c), "[i]f a party fails to provide information or identify a witness as required by Rule 26(a) . . . , the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless." Fed. R. Civ. P. 37(c)(1).

Beginning with the non-retained experts, the Court agrees with Defendant that Plaintiff's initial disclosures are insufficient to establish causation and damages. *See* Reply at 8. Plaintiff is correct that treating physicians qualify as non-retained experts who are not required to file expert witness reports in order to testify on causation. *See Cedant v. United States*, 75 F.4th 1314 (11th Cir. 2023). However, Plaintiff's initial disclosures merely state that Plaintiff intends to call these witnesses to testify concerning "damages and opinions regarding causation." Resp. at 17. This

clearly fails to satisfy the disclosure requirements of Rule 26, which requires "a summary of the facts and opinions to which the witness is expected to testify." Fed. R. Civ. P. 26(a)(2)(C); *see also Rodriguez v. Walmart Stores E., L.P.*, No. 21-14300, 2022 WL 16757097, at *3 (11th Cir. Nov. 8, 2022).

Turning to Plaintiff's retained expert, Defendant asserts that Plaintiff never disclosed Dr. Ellowitz as a retained expert, and first sent his report to Defendant on January 19, 2024, the day Plaintiff filed his Response to Defendant's Motion for Summary Judgment. Reply at 8; *see also* (ECF No. 39-2). Pursuant to the Court's Scheduling Order entered on July 7, 2023, the Parties were required to complete their Rule 23(a)(2) expert disclosures by November 16, 2023. (ECF No. 10) ("Rule 26(a)(2) expert disclosures shall be completed one hundred thirty (130) days prior to the date of trial."). Further, "[a]ll discovery, including expert discovery" was to be completed by December 16, 2023. *Id.* Plaintiff does not dispute that no Rule 26(a)(2)(B) or (C) disclosures were served by the November 16, 2023 expert disclosure deadline. *See* Sur-Reply at 5–6. Because Plaintiff failed to disclose either his non-retained or retained expert witnesses by the deadline, the Court proceeds to consider whether the failure to disclose was substantially justified or harmless under Rule 37(c)(1).

As noted above, if a party fails to properly disclose an expert witness under Rule 26(a), the party may not use the witness "unless the failure was substantially justified or is harmless." Fed. R. Civ. P. 37(c)(1). "The non-disclosing party bears the burden of showing that the failure to comply with Rule 26 was substantially justified or harmless." *Hornsby v. Carnival Corp.*, No. 22-CV-23135, 2023 WL 8934518, at *4 (S.D. Fla. Dec. 27, 2023) (citing *Mitchell v. Ford Motor Co.*, 318 F. App'x 821, 824 (11th Cir. 2009)). In making this determination, the Court considers four factors: "(1) the importance of the excluded testimony; (2) the explanation of the party for its

failure to comply with the required disclosure; (3) the potential prejudice that would arise from allowing the testimony; and (4) the availability of a continuance to cure such prejudice." *Izquierdo v. Certain Underwriters at Lloyd's London*, No. 20-13772, 2021 WL 3197008, at *3 (11th Cir. July 29, 2021). "Courts have broad discretion to exclude untimely expert testimony." *Guevara*, 920 F.3d at 718.

First, the Eleventh Circuit has held that non-readily observable injuries require medical expert testimony to prove causation. *See Willis*, 77 F.4th at 1338. The Court therefore finds that the first factor, the importance of the excluded testimony, weighs against exclusion of Plaintiff's experts. Regarding the second factor, Plaintiff contends that Defendant's argument regarding timeliness should be "disregarded" by the Court because the Parties "mutually agreed to continue discovery, an agreement which Defendant took ample advantage of." Sur-Reply at 5. The Court finds this argument entirely unavailing. *See* Fed. R. Civ. P. 26(a)(2)(D) ("A party must make these disclosures at the times and in the sequence that the court orders."). For the third factor, "[p]rejudice generally occurs when late disclosure deprives the opposing party of a meaningful opportunity to perform discovery and depositions related to the documents or witnesses in question." *Bowe v. Pub. Storage*, 106 F. Supp. 3d 1252, 1260 (S.D. Fla. 2015) (citation omitted). Here, Plaintiff did not disclose his retained expert until the eve of trial, well after the expert disclosure, discovery, and pretrial motions deadlines had passed. Fourth and finally, the Court declines to grant a continuance or reopen discovery with trial scheduled to begin in approximately two weeks. After balancing the factors, the Court concludes that Plaintiff has failed to show that his failure to adequately disclose his medical experts was substantially justified or harmless.

No other medical experts, either non-retained treating physicians or retained medical experts, are identified in Plaintiff's Response, Response to Defendant's Statement of Material

Facts, or Sur-Reply. In addition, Plaintiff adduces no deposition testimony or identifiable opinions from any medical expert. Plaintiff has not borne his burden of bringing forth medical expert evidence opining on the issue of causation. *See Rivera*, 711 F. App'x at 954–55.

Accordingly, the Court concludes that Defendant is entitled to summary judgment on all Counts of Plaintiff's Complaint because causation is an essential element of each of Plaintiff's negligence claims. *See Isbell*, 462 F. Supp. 2d at 1238.[2]

IV. CONCLUSION

UPON CONSIDERATION of the Motion, the pertinent portions of the record, and being otherwise fully advised in the premises, it is hereby ORDERED AND ADJUDGED that Defendant's Motion for Summary Judgment (ECF No. 32) is GRANTED.

DONE AND ORDERED in Chambers at Miami, Florida, this 12th day of March, 2024.

K. M. Moore

K. MICHAEL MOORE
UNITED STATES DISTRICT JUDGE

c: All counsel of record

[2] Because Plaintiff is unable to adduce evidence sufficient to create a genuine issue of material fact as to causation, Plaintiff's vicarious liability claim (Count IV) also necessarily fails. *See Willis*, 77 F.4th at 1339 ("Because vicarious liability still requires causation, and Willis lacks evidence to satisfy that element, her claim that the district court erred in holding that she did not present sufficient evidence in support of her vicarious liability claim is a non-starter." (citing *Yusko*, 4 F.4th at 1167–68)).