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Slippery When Wet: The Eleventh Circuit Doubles Down on Its Risk-Reward Calculus for Cruise Guests

I. INTRODUCTION

Mary Brady's vacation turned into a nightmare when she was severely injured after slipping and falling on a puddle of water on Carnival Cruise's Lido Deck.[1] Brady boarded the Carnival *Sunshine* on a hot, sunny day, and immediately went to the Lido Deck to meet her family and friends for lunch.[2] As she made her way across the crowded deck, Brady was looking forward and did not see a puddle of colorless liquid on the ground.[3] Brady stepped in the liquid and her foot came flying out from underneath her.[4] When Brady fell, she fractured her hip, forcing her to abandon her vacation and seek medical attention, culminating with hip-replacement surgery.[5] Brady did not notice any wet areas on the deck and did not see any caution signs.[6] Carnival maintained that the company was under no obligation to warn passengers of potential "slippery when wet" hazards. However, a photo taken at the scene showed a caution sign on the Lido Deck, some twenty feet away from the puddle on which Brady slipped.[7]

1. Brady v. Carnival Corp., 33 F.4th 1278, 1280 (11th Cir. 2022).
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.* at 1283.

Brady sued Carnival for negligence under general maritime law and Carnival moved for summary judgment.[8] The district court explained that to succeed on her negligence claim, Brady must establish that: "(1) Carnival had a duty to protect [Brady] from the slipping and falling; (2) Carnival breached that duty; (3) the breach actually and proximately caused [Brady's] slip-and-fall; and (4) [Brady] suffered actual harm."[9] The district court granted Carnival's motion on the basis that Carnival lacked a duty to protect Brady because the ship's "crewmembers had neither actual nor constructive notice of the *particular* puddle that caused [Brady's] fall."[10] The United States Court of Appeals for the Eleventh Circuit *held* that the issue of notice turns more broadly on whether the defendant was aware, more generally, of the dangerous condition because cruise line operators' have a duty to warn passengers of known dangers that are not open and obvious. *Brady v. Carnival Corp.*, 33 F.4th 1278, 1281-82 (11th Cir. 2022).

II. HISTORICAL BACKGROUND

The Eleventh Circuit "review[s] a district court's grant of summary judgment de novo," considering the facts and drawing all reasonable inferences "in the light most favorable to the non-moving party."[11] Summary judgment is proper if the movant shows that "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."[12] A "genuine" dispute exists if "a jury applying [the applicable] evidentiary standard could reasonably find for either the plaintiff or the defendant" as to the material fact.[13] "[T]he substantive law will identify which facts are material."[14]

The cruise ship owners' liability is governed by maritime tort law.[15] In analyzing a maritime slip and fall case, a court applies general principles of negligence law.[16] To prevail on maritime negligence claims, a plaintiff must prove that (1) the defendant had a duty to protect the plaintiff from a particular injury; (2) the defendant breached that duty;

8. *Id*. at 1280.

9. Brady v. Carnival Corp., 19-22989-CIV, 2020 WL 8836063, at *2, 2020 AMC 436 (S.D. Fla. Dec. 31, 2020), *rev'd and remanded*, 33 F.4th 1278 (11th Cir. 2022).

10. *Brady*, 33 F.4th at 1280 (emphasis added).

11. OSI, Inc. v. United States, 525 F.3d 1294, 1297 (11th Cir. 2008).

12. Fed. R. Civ. P. 56(a).

13. Anderson v. Liberty Lobby, Inc., 447 U.S. 242, 255 (1986).

14. *Id*. at 248.

15. Everett v. Carnival Cruise Lines, 912 F.2d 1355, 1358, 1991 AMC 700 (11th Cir. 1990).

16. Carroll v. Carnival Corp., 955 F.3d 1260, 1264 (11th Cir. 2020) (quoting Daigle v. Point Landing, Inc., 616 F.2d 825, 827 (5th Cir. 1980)).

(3) the breach actually and proximately caused the plaintiff's injury; and (4) the plaintiff suffered actual harm.[17] A negligence determination is usually "a fact-intensive inquiry highly dependent upon the given circumstances."[18]

Regarding the defendant's duty to protect the plaintiff from a particular injury, the United States Supreme Court has stated that "a shipowner owes the duty of exercising reasonable care towards those lawfully aboard the vessel who are not members of the crew."[19] The Eleventh Circuit has stated that a defendant cruise liner owes "a duty of 'ordinary reasonable care under the circumstances.'"[20] Furthermore, the cruise ship operator must have possessed actual or constructive notice of the risk-creating condition for a court to impose liability where "the menace is one commonly encountered on land and not clearly linked to nautical adventure."[21] The Eleventh Circuit has stated that the notice requirement's purpose is to ensure that ship owners will not be made "insurers of passenger safety."[22] A cruise ship operator, however, has a duty to warn only of known dangers that are not open and obvious.[23]

A. Open and Obvious Conditions

"[T]here is no duty to warn of dangers that are open and obvious," regardless of notice.[24] In determining the open and obvious condition, the court asks "whether a reasonable person would have observed the condition and appreciated the nature of the condition."[25] "Open and obvious conditions are those that should be obvious by the ordinary use of one's senses."[26] For example, a cruise ship operator has no duty to warn a passenger who slips and falls on the ship's deck after it rains because an

17. *Id*.

18. Souran v. Travelers Ins. Co., 982 F.2d 1497, 1506 (11th Cir. 1993).

19. Kermarec v. Compagnie Generale Transatlantique, 358 U.S. 625, 630, 1959 AMC 597 (1959).

20. K.T. v. Royal Caribbean Cruises, Ltd., 931 F.3d 1041, 1044, 2019 AMC 1817 (11th Cir. 2019) (quoting Keefe v. Bahama Cruise Line, Inc., 867 F.2d 1318, 1322, 1990 AMC 46 (11th Cir. 1989)).

21. Keefe v. Bahama Cruise Line, Inc., 867 F.2d 1318, 1322, 1990 AMC 46 (11th Cir. 1989).

22. Everett v. Carnival Cruise Lines, 912 F.2d 1355, 1358 n.3, 1991 AMC 700 (11th Cir. 1990).

23. *See, e.g*., Samuels v. Holland Am. Line-USA, Inc., 656 F.3d 948, 954, 2011 AMC 2441 (9th Cir. 2011).

24. Aponte v. Royal Caribbean Cruise Lines Ltd., 739 Fed. Appx. 531, 536, 2018 AMC 1580 (11th Cir. 2018) (unpublished).

25. *Id*. at 537 (citing Lancaster v. Carnival Corp., 85 F. Supp. 3d 1341, 1345 (S.D. Fla. 2015); Lugo v. Carnival Corp., 154 F. Supp. 3d 1341, 1345-46 (S.D. Fla. 2015)).

26. Lancaster v. Carnival Corp., 85 F. Supp. 3d 1341, 1344 (S.D. Fla. 2015).

outside deck that is wet from rain, and therefore could be slippery, is an open and obvious danger.[27] However, the fact that the condition is "capable of being observed does not necessarily make it open and obvious to a reasonable person."[28] For example, the Eleventh Circuit held that a genuine issue of material fact existed as to whether a puddle of soap was open and obvious where the court was not persuaded "that a reasonably prudent person, through the exercise of common sense and the ordinary use of his senses would have clearly seen the 'clearish' puddle of soap on the floor."[29]

B. Actual and Constructive Notice

Actual notice is established when the defendant knows about the dangerous condition.[30] Constructive notice may be established in at least two ways.[31] First, constructive notice may be established through evidence of previous "substantially similar incidents."[32] "The 'substantial similarity' doctrine does not require identical circumstances."[33] Instead, a plaintiff may 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."[34] For example, in *Taiariol v. MSC Crociere S.A.*, the plaintiff was injured after slipping on the metal nosing of a step outside of the cruise ship's theater.[35] The plaintiff attempted to prove constructive notice by presenting evidence of incidents where passengers allegedly fell down a step due to no handrail or tripping on electrical cords.[36] The Eleventh Circuit rejected this evidence and held that, although the plaintiff was "not required to show that another passenger" on the same ship during the plaintiff's trip "slipped on the same step," the plaintiff at least had to show evidence that

27. *See* Luther v. Carnival Corp., 99 F. Supp. 3d 1368, 1371 (S.D. Fla. 2015).
28. *Aponte*, 739 Fed. Appx. at 537.
29. *Id*.
30. Newbauer v. Carnival Corp., 26 F.4th 931, 935 (11th Cir. 2022) (citing Amy v. Carnival Corp., 961 F.3d 1303, 1308 (11th Cir. 2020)).
31. Tesoriero v. Carnival Corp., 965 F.3d 1170, 1178, 2020 AMC 214 (11th Cir. 2020), *cert. denied*, 209 L. Ed. 2d 549 (Apr. 19, 2021).
32. *Id*.
33. Sorrels v. NCL (Bahamas) Ltd., 796 F.3d 1275, 1287, 2015 AMC 2525 (11th Cir. 2015).
34. *Tesoriero*, 965 F.3d at 1178-79.
35. Taiariol v. MSC Crociere S.A., 667 Fed. Appx. 599, 600, 2017 AMC 416 (11th Cir. 2017).
36. *Id*. at 601.

another passenger, while aboard one of the defendant's ships, slipped on the nosing of one of the ship's steps.[37]

Second, a plaintiff can establish constructive notice by showing "that the 'defective condition existed for a sufficient period of time to invite corrective measures.'"[38] For example, cruise ship employees' testimony that the ship sometimes posts warning signs on the pool deck after it rains is enough to create an issue of material fact as to whether there is notice that the deck could be slippery when wet.[39]

A warning sign is not necessarily sufficient to establish constructive notice, however.[40] A causal connection must exist between the warning sign and the danger.[41] For example, the Eleventh Circuit rejected a plaintiff's argument that a "watch your step" sticker showed that the cruise line had notice that the step was slippery. Instead, the court held that the sticker's purpose was to warn passengers that a step was there.[42]

Further, in *Carroll v. Carnival Corp.*, the Eleventh Circuit reversed a grant of summary judgment for the defendant cruise line and held that there was a genuine issue of material fact regarding the cruise line's notice, because evidence showed that the cruise line took corrective measures to prevent the injury that occurred.[43] The plaintiff sued the cruise line for negligence after she fell and injured herself due to a lounge chair protruding into the walkway.[44] The plaintiff presented testimony from cruise ship employees explaining that they were trained to make sure that the chairs were not protruding into or blocking the walkway.[45] The Eleventh Circuit held that the protruding chair that injured the plaintiff was a known danger because the testimony showed that Carnival had taken corrective measures by repositioning the lounge chairs to maintain a clear walkway.[46]

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37. *Id*.

38. Guevara v. NCL (Bahamas) Ltd., 920 F.3d 710, 720, 2019 AMC 1160 (11th Cir. 2019) (quoting Monteleone v. Bahama Cruise Line, Inc., 838 F.2d 63, 65, 1988 AMC 1146 (2d Cir. 1988)).

39. Sorrels v. NCL (Bahamas) Ltd., 796 F.3d 1275, 1289, 2015 AMC 2525 (11th Cir. 2015).

40. *Guevara*, 920 F.3d at 721.

41. *Id*.

42. *Id*.

43. Carroll v. Carnival Corp., 955 F.3d 1260, 1266 (11th Cir. 2020).

44. *Id*. at 1263.

45. *Id*. at 1266.

46. *Id*.

C. Risk-Creating Condition

The circuit courts define the applicable risk-creating conditions in different ways. For example, the Ninth Circuit defines the risk-creating condition as "the particular hazard."[47] In *Mansoor*, the passenger sued a cruise line operator for an injury he sustained when he slipped and fell on spilled food.[48] The Ninth Circuit held that a cruise ship operator was not liable where it did not have notice of the particular spilled food that allegedly caused the plaintiff to slip and fall.[49]

Similarly, the Second Circuit also requires that the defendant have actual or constructive notice of the particular hazard.[50] For example, in *Lee v. Regal Cruises, Ltd.*, the plaintiff sued a cruise ship for injuries resulting from a slip and fall on a staircase aboard the ship.[51] The Second Circuit held that the cruise line operator was not liable where it was not aware of the particular ice cubes and liquid on the staircase that allegedly caused the plaintiff to slip.[52]

The Eleventh Circuit disagrees with its sister circuits and views the risk-creating condition in a more general way.[53] The court in *Carroll* found that there was a genuine issue of fact regarding the cruise line's notice despite a lack of evidence that the cruise line knew that the specific injury-causing lounge chair was protruding into the walkway.[54] The court did not require evidence that employees took corrective measures to prevent passengers from tripping over the *specific* chair that caused the plaintiff's injuries.[55] Instead, the court relied on more general evidence showing that the cruise line took corrective measures to prevent people from tripping over all of the lounge chairs in the walkway.[56]

III. THE COURT'S DECISION

In the noted case, the United States Court of Appeals for the Eleventh Circuit reaffirmed its precedent set in *Carroll* and concluded "that a rational jury could find for" Brady on the duty element of her negligence claim.[57] First, the court held that Carnival need not have notice

47. Mansoor v. ZAANDAM M/V, 274 Fed. Appx. 553 (9th Cir. 2008).
48. *Id*.
49. *Id*.
50. *See* Lee v. Regal Cruises, Ltd., 116 F.3d 465 (2nd Cir. 1997).
51. *Id*. at 1.
52. *See id*. at 2.
53. *Carroll*, 955 F.3d at 1265.
54. *Id*. at 1266.
55. *See id*. (emphasis added).
56. *Id*.
57. Brady v. Carnival Corp., 33 F.4th 1278, 1282 (11th Cir. 2022).

of the *specific* puddle on which Brady slipped to be held liable for negligence based on her injury.[58] Second, the court held that factual disputes remained as to whether Carnival had actual or constructive notice of the risk-creating condition.[59]

The court affirmed that the relevant "risk-creating condition" was not, as the district court determined, the existence of the particular puddle Brady slipped on.[60] Instead, the important issue was "whether Carnival knew, more generally, that the area of the deck where Brady fell had a reasonable tendency to become slippery—and thus present a danger to passengers—due to wetness from the pool."[61] The court reasoned by analogy to the facts in *Carroll*, where there was no evidence that Carnival was aware that the exact chair that caused the plaintiff's fall was sticking out into the walkway.[62] Instead, the court in *Carroll* relied on testimony from Carnival employees showing that the employees took general corrective measures, like repositioning the lounge chairs on the deck to maintain a clear walkway, to prevent people from tripping over the lounge chairs on the deck.[63] The court in *Carroll* found that evidence of general corrective measures was enough to withstand summary judgment on the issue of notice to Carnival.[64]

The Eleventh Circuit stated that the district court "erred . . . in its framing of the relevant hazard."[65] According to the court, pursuant to *Carroll*, the issue of actual or constructive notice of the risk-creating condition turns more broadly on "(1) whether Carnival had notice that the area where Brady fell had a reasonable tendency to become wet; and (2) whether it 'had actual or constructive knowledge that the pool deck where [Brady] fell could be slippery (and therefore dangerous) when wet.'"[66] Interestingly, the court noted that even if it disagrees with the *Carroll* decision, it is bound to follow prior precedent.[67]

First, regarding whether Carnival knew that the deck area was reasonably likely to become wet, the court looked at the evidence on record.[68] Maurice Vega, a representative for Carnival, "admitted in an

58. *Id*. (emphasis added).
59. *Id*. at 1284.
60. *Id*. at 1281.
61. *Id*.
62. *Id*. (emphasis added).
63. *Id*. (citing Carroll v. Carnival Corp., 955 F.3d 1260, 1262-63 (11th Cir. 2020).).
64. *Id*. at 1282 (citing *Carroll*, 955 F.3d at 1265).
65. *Id*. at 1283.
66. *Id*. at 1282 (quoting Sorrels v. NCL (Bahamas) Ltd., 796 F.3d 1275, 1288, 2015 AMC 2525 (11th Cir. 2015).).
67. *Id*. (citing Arias v. Cameron, 776 F.3d 1262, 1275 (11th Cir. 2015)).
68. *Id*.

interrogatory response that . . . 'the Lido Deck area . . . is reasonably expected to become wet due to . . . passengers' use of the swimming pool.'"[69] He continued to note, however, that "'caution cones were in place.'"[70] Furthermore, a witness to the fall recalled hearing a crewmember state that there were safety cones on the Lido Deck.[71] Lastly, Carnival's casualty report also maintained that a "'caution sign was in place.'"[72] The court explained that when read in the light most favorable to Brady, Carnival's interrogatory response and the company's own casualty report "link the placement of the caution sign to the expectation of wet conditions on the pool deck."[73] A rational factfinder could thus conclude that the warning sign was placed, or was intended to be placed, on the Lido Deck near the location of the fall.[74] Moreover, the court asserted that a rational factfinder could also conclude that Carnival's placement of the warning sign near the pool shows that Carnival knew, more generally, that the deck would regularly become wet from its passengers' use of the swimming pool.[75] As a result, the court explained that a jury could find for Brady on the question of whether Carnival had notice that the area where Brady fell had a reasonable tendency to become wet.[76]

Second, regarding whether Carnival had actual or constructive knowledge that the Lido Deck where Brady fell could be slippery, and thus dangerous when wet, the court again relied on *Carroll*, which stated that evidence that a ship owner has taken corrective action can establish notice of a dangerous or defective condition.[77] According to the court, a reasonable jury could draw an inference from the placement of the warning sign in the general area of Brady's fall that Carnival knew that the Lido Deck would become slippery when wet.[78] Further, it does not matter that the caution sign was not placed exactly where Brady fell, as the deck where the sign was placed is made of the same material as the deck where Brady fell.[79] If a jury believes that the sign indicates that Carnival had notice that the Lido Deck would become slippery when wet,

69. *Id*.
70. *Id*.
71. *Id*.
72. *Id*.
73. *Id*. at 1283.
74. *Id*. at 1282-83.
75. *Id*. at 1283.
76. *Id*. at 1282.
77. *Id*. at 1281 (citing Carroll v. Carnival Corp., 955 F.3d 1260, 1262-65 (11th Cir. 2020).).
78. *Id*. at 1283.
79. *Id*.

then a jury could reasonably infer that Carnival knew that the area where Brady slipped would pose the same danger.[80] The court noted that there is also evidence from an interrogatory response to "indicate that Carnival lacked notice."[81] However, it is a jury's responsibility to weigh the conflicting evidence.[82] Thus, the court held that Carnival's repeated admissions that warning signs were present in the vicinity of Brady's fall created "a genuine issue of material fact as to Carnival's notice" and reversed and remanded "for the district court to address . . . Carnival's alternative argument" regarding the "open-and-obvious nature of the hazard."[83]

IV. ANALYSIS

The Eleventh Circuit has stated that the purpose behind the requirement of actual or constructive notice of the risk-creating condition is that ship owners should not be made "insurers of passenger safety."[84] In *Brady*, however, the court seems to have made it easier for plaintiffs to plead the relevant risk-creating condition by allowing less specificity.[85] This will potentially create a slippery slope—all the result of a slippery deck—and transform cruise line operators into insurers of their passengers' safety, effectively broadening the companies' liability.[86] On the other hand, other legal parameters, such as the open and obvious condition doctrine, may protect the defendant cruise lines from potential greater liability.[87]

Instead of requiring Brady to present evidence that Carnival had actual or constructive knowledge of the specific puddle Brady slipped on, Brady only had to show evidence that Carnival knew, or had reason to know, that the Lido Deck regularly became wet and that the deck would become slippery when wet.[88] The court's decision may allow plaintiffs to defeat a motion for summary judgment by using evidence from the general location where the injury occurred to show notice.[89] Thus, this

80. *Id*.

81. *Id*. at 1284 (internal quotation marks omitted) (quoting Amy v. Carnival Corp., 961 F.3d 1303, 1310 (11th Cir. 2020)).

82. *Id*. (citing *Amy*, 961 F.3d at 1310.).

83. *Id*. (internal citations omitted).

84. Everett v. Carnival Cruise Lines, 912 F.2d 1355, 1358 n.3, 1991 AMC 700 (11th Cir. 1990).

85. *See Brady*, 33 F.4th at 1281.

86. *See id*.

87. *See* Aponte v. Royal Caribbean Cruise Lines Ltd., 739 Fed. Appx. 531, 537, 2018 AMC 1580 (11th Cir. 2018) (unpublished).

88. *Brady*, 33 F.4th at 1281.

89. *See id*. at 1282

decision may broaden the scope of liability for cruise line operators by potentially making a cruise ship operator liable for any slip-and-fall on the Lido Deck, regardless of whether the cruise line operator was aware of the actual injury-inducing harm.[90]

Further, the court found that the warning sign placed twenty feet away from Brady's fall functioned as corrective action sufficient to create a genuine issue of material fact regarding Carnival's notice that the Lido Deck would become slippery when wet.[91] Allowing general corrective measures taken by employees, such as the warning sign in *Brady*, to be sufficient evidence to create a genuine issue of material fact regarding notice broadens cruise line operators' liability, because cruise line employees are trained and obligated to take corrective action regarding harms that have not even occurred.[92] In other words, this policy of corrective measures, in accordance with tort law more generally, simply reflects the cruise line's proactive approach to both protecting passengers from the hazards of travel on a cruise ship and, at the same time, protecting the company itself from lawsuits.[93] Thus, while the Eleventh Circuit may be best served by encouraging cruise lines to post general warnings aboard ships—so as to reduce litigation and the burden on the court system to hear these cases—paradoxically, the court may be the very reason why cruise lines cannot defeat a motion for summary judgment in these slip-and-fall cases.[94]

On the other hand, from a social and political perspective, it may be beneficial to allow injured plaintiffs to defeat a motion for summary judgment by showing more general evidence. For the sake of access to the courts, the judicial system may want to allow injured plaintiffs greater leeway to obtain redress from large cruise line corporations for injuries suffered aboard a cruise ship. For example, Mary Brady and the plaintiff in *Carroll* were provided opportunities to further prove their cases and potentially receive redress for their injuries when their cases would have otherwise been dismissed.[95] Moreover, other parameters established by the law, like the open and obvious condition doctrine, may mitigate the negative impacts of this decision.[96] A cruise ship operator may be able to defeat a negligence claim by showing that a reasonable person, through

90. *See id*. at 1283.
91. *Id*.
92. Carroll v. Carnival Corp., 955 F.3d 1260, 1266 (11th Cir. 2020).
93. *See id*.
94. *See id*.
95. *See id*. at 1262.
96. *See* Aponte v. Royal Caribbean Cruise Lines Ltd., 739 Fed. Appx. 531, 536, 2018 AMC 1580 (11th Cir. 2018) (unpublished).

the exercise of common sense and the ordinary use of his senses, would have clearly seen the condition.[97] For example, Carnival may be able to defeat a motion for summary judgment by showing that an outside deck, next to a swimming pool and commonly expected to become wet due to passengers' use of the pool, and therefore could be slippery, is an open and obvious danger.[98]

V. CONCLUSION

In the noted case, the Eleventh Circuit reaffirmed its position in *Carroll* that the issue of notice of the risk-creating condition should be viewed in a broader context.[99] As a result, Brady did not have to show evidence of notice of the particular hazard to defeat Carnival's motion for summary judgment.[100] Further, the court explained that a warning sign some twenty feet from Brady's slip-and-fall was evidence of corrective action that may establish constructive notice on behalf of Carnival.[101] Although the court's decision may be beneficial to injured plaintiffs that cannot show notice of the specific hazard, it may also expand the scope of cruise line operators' liability, turning them into insurers for their passengers' safety.[102]

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97. *Id*. at 537.

98. *See* Brady v. Carnival Corp., 33 F.4th 1278, 1281 (11th Cir. 2022).; *see also* Luther v. Carnival Corp., 99 F. Supp. 3d 1368, 1371 (S.D. Fla. 2015).

99. *Brady*, 33 F.4th at 1281.

100. *Id*. at 1282.

101. *Id*. at 1283.

102. *See* Everett v. Carnival Cruise Lines, 912 F.2d 1355, 1358 n.3, 1991 AMC 700 (11th Cir. 1990).