

FRASCA V. NCL: THE “DEGREE OF SLIPPERINESS” APPLICATION DESTROYS THE OPEN AND OBVIOUS DEFENSE IN CRUISE SHIP SLIP AND FALL LITIGATION

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I. INTRODUCTION

What do *you* think of when you are walking and you see a puddle on a shiny (slick) deck in front of you? When you hear the word “slippery,” do you think of it as anything except potentially dangerous? Picture this: You are onboard a cruise ship on the open seas; you are heading to the outside weather deck and upon leaving the interior of the ship, you notice that it has been raining and there is a puddle of water on the shiny deck in your path. You look to your friends, who are with you, and the first one out the door turns to the group and says that the deck looks slick. Although you have the ability to get to your destination through any number of different paths onboard, you proceed outside. Your friend slips on the puddle, and then you decide to walk through the same puddle. You slip, injure yourself, and sue. After working your way up to the Eleventh Circuit Court of Appeals, the court finds in your favor, declaring that although you observed the deck was wet *and* you recognized that it could be slick *before* slipping on the puddle yourself, the degree of slipperiness was not obvious. Introduce: *Frasca v. NCL*.¹

Every year an enormous amount of people ply the seas aboard any number of cruise ships around the world.² Combine the elation of being aboard one of mankind’s engineering marvels, the presence of alcohol, and the motion of the ocean, accidents will inevitably occur. Even without all of these factors, accidents routinely happen aboard these vessels. “Every jurisdiction must determine the circumstances in which a tort [cruise ship] defendant may be relieved of liability because of the nature of the fault or defect.”³ Of the approximately forty-six cruise companies globally,⁴ roughly fourteen are headquartered in the United

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1. *Frasca v. NCL (Bahamas), Ltd.*, 564 F. App’x 949 (11th Cir. 2016).

2. *Cruise Industry Overview-2017*, FLORIDA-CARIBBEAN CRUISE ASSOCIATION, <http://www.f-cca.com/downloads/2017-Cruise-Industry-Overview-Cruise-Line-Statistics.pdf> (last visited Dec. 11, 2017) (24.2 million passengers cruising globally in 2016).

3. John M. Church, *Recent Developments: Broussard v. State and the Not So Obvious Application of the Open and Obvious Doctrine*, 74 LA. L. REV. 857, 857 (2014).

4. *2018 Worldwide Cruiseline Market Share*, CRUISE MARKET WATCH, <http://www>.

States, making up approximately 80.5% of the passengers carried around the world.⁵ Of the companies headquartered in the U.S., at least nine of those companies, carrying 64% of the passengers globally,⁶ have forum selection clauses mandating litigation in Florida.⁷ Recently, the Eleventh Circuit, notorious

cruisemarketwatch.com/market-share/[https://perma.cc/QF4T-LZVQ].

5. *Id.*; *Azamara Club Cruises*, FLORIDA CARIBBEAN CRUISE ASSOCIATION, <http://www.fcca.com/member-lines/Azamara-Club-Cruises.html> (Showing the corporate address as 1050 Caribbean Way Miami, FL 33132); *Carnival Cruise Line*, FLORIDA CARIBBEAN CRUISE ASSOCIATION, <http://www.fcca.com/member-lines/carnival-cruise-line.html> (Showing the corporate address as 3655 N.W. 87th Avenue, Miami, FL 33178); *Celebrity Cruise Line*, FLORIDA CARIBBEAN CRUISE ASSOCIATION, <http://www.fcca.com/member-lines/celebrity-cruises.html> (Showing the corporate address as 1050 Caribbean Way, Miami, FL 33132); *Costa Cruises*, FLORIDA CARIBBEAN CRUISE ASSOCIATION, <http://www.fcca.com/member-lines/costa-cruise-lines.html> (Showing the corporate address as 200 South Park Rd., Hollywood, FL 33021); *Cunard Line*, FLORIDA CARIBBEAN CRUISE ASSOCIATION, <http://www.fcca.com/member-lines/cunard-line.html> (Showing the corporate address at 24305 Town Center Drive, Santa Clarita, CA 91355); *Disney Cruise Line*, FLORIDA CARIBBEAN CRUISE ASSOCIATION, <http://www.fcca.com/member-lines/disney-cruise-line.html> (Showing the corporate address as Lake Buena Vista, FL 32830); *MSC Cruises (USA) Inc.*, FLORIDA CARIBBEAN CRUISE ASSOCIATION, <http://www.fcca.com/member-lines/msc-cruises-usa.html> (Showing the corporate address as 6750 North Andrews Avenue, Fort Lauderdale, FL 33309); *Holland America Line*, FLORIDA CARIBBEAN CRUISE ASSOCIATION, <http://www.fcca.com/member-lines/holland-america-line.html> (Showing the corporate address as 50 Third Ave. W, Seattle, WA 98119); *Norwegian Cruise Line*, FLORIDA CARIBBEAN CRUISE ASSOCIATION, <http://www.fcca.com/member-lines/norwegian-cruise-line.html> (Showing the corporate address as 7665 Corporate Center Drive, Miami, FL 33126); *Company Information*, OCEANIA CRUISES, <https://www.oceaniacruises.com/corporate/contact-us/> (Showing the corporate address as 7665 Corporate Center Drive Miami, Florida 33126); *Princess Cruises*, FLORIDA CARIBBEAN CRUISE ASSOCIATION, <http://www.fcca.com/member-lines/princess-cruise-line.html> (Showing the corporate address as 24305 Town Center Drive Santa Clarita, CA 91355); *Contact*, REGENT SEVEN SEAS CRUISES, <https://www.rssc.com/about/contact> (Showing the corporate address as 7665 Corporate Center Drive Miami, Florida 33126); *Royal Caribbean International*, FLORIDA CARIBBEAN CRUISE ASSOCIATION, <http://www.fcca.com/member-lines/royal-caribbean-international.html> (Showing the corporate address as 1050 Caribbean Way, Miami, FL 33132); *Seabourn*, FLORIDA CARIBBEAN CRUISE ASSOCIATION, <http://www.fcca.com/member-lines/seabourn-cruise-lines.html> (Showing the corporate address as 300 Elliott Ave West Seattle, WA 98119).

6. *2018 Worldwide Cruiseline Market Share*, CRUISE MARKET WATCH, [http://www.cruisemarketwatch.com/market-share/\[https://perma.cc/QF4T-LZVQ\]](http://www.cruisemarketwatch.com/market-share/[https://perma.cc/QF4T-LZVQ]).

7. *Ticket Contract*, CARNIVAL CRUISE LINES, <https://www.carnival.com/about-carnival/legal-notice/ticket-contract.aspx> [hereinafter CARNIVAL] (“Any and all disputes . . . shall be referred to and resolved . . . solely in Miami-Dade County, Florida, U.S.A. to the exclusion of any other forum.”) [https://perma.cc/8SKS-TJAN]; *Legal Information*, AZAMARA CLUB CRUISES, <https://www.azamarclubcruises.com/legal-information> [hereinafter AZAMARA] (“You consent to the exclusive jurisdiction . . . in, the state or federal courts located in Dade County, Florida.”) [https://perma.cc/QJ9H-KG2L]; *X Cruise/Cruisetour Ticket Contract*, CELEBRITY CRUISE LINES,

for cruise ship litigation, effectively eliminated one of the most common defenses of cruise ship defendants in slip and fall incidents. This Note analyzes the Eleventh Circuit’s decision against Norwegian Cruise Lines (NCL) in *Frasca v. NCL* and its introduction of the “degree of slipperiness” standard to the well-utilized “open and obvious” defense. This case is an important turning point, not only within the Eleventh Circuit, but also within the nation because it introduces a test and standard that is extremely damaging to cruise ship defendants. *Frasca*’s potentially far-reaching implications form a critical point within maritime law not only for multinational cruise ship defendants, but also for the passengers sailing these vessels every year. This Note introduces a new perspective to the decision of this case by analyzing it from a maritime law policy view and applying these arguments to reach an opposing position.

Part II details a history of the case as it sails through the legal system. Part III goes briefly through the early and more recent history of the precedent and policy of uniformity within the body of maritime law. Part IV outlines the evolution of precedent within the Eleventh Circuit in regard to cruise ship open and obvious cases. Part V describes the Circuit split and the controversy it creates nationwide. Part VI explores whether the Supreme Court of the United States should take up a future case on this matter to resolve the split and restore uniformity to this area of law, as well as other novel solutions.

<https://www.celebritycruises.com/content/dam/celebrity/pdf/Celebrity-Cruise-Ticket-Contract.pdf> [hereinafter CELEBRITY] (“[A]ll disputes . . . shall be litigated . . . before the United States District Court for the Southern District of Florida located in Miami Dade County, Florida.”) [<https://perma.cc/8TNH-Q9RT>]; *Legal Information*, ROYAL CARIBBEAN INTERNATIONAL, <http://www.royalcaribbean.com/legal.do> [hereinafter ROYAL] (“[A]ny action at law or in equity arising out of or relating to these terms shall be filed only in, the state or federal courts located in Dade County, Florida.”) [<https://perma.cc/Y2S4-8WFW>]; *Guest Ticket Contract*, NORWEGIAN CRUISE LINES, <https://www.ncl.com/sites/default/files/Guest-Ticket-Contract-11-2015.pdf> [<https://perma.cc/U2GR-3Z4S>] [hereinafter NORWEGIAN] (“[A]ll claims . . . shall be commenced, filed and litigated, if at all, before the United States District Court for the Southern District of Florida in Miami, Florida.”), *Ticket Contract*, OCEANIA CRUISES INC., (Sept. 2018) <https://www.oceaniacruises.com/Documents/Legal/10812/US-TicketContract.pdf> [hereinafter OCEANIA] (“[A]ny dispute . . . shall be litigated, if at all, before the United States District Court for the Southern District of Florida in Miami.”) [<https://perma.cc/2NZ3-V9TU>]; *Ticket Contract*, REGENT SEVEN SEAS CRUISES, <https://www.rssc.com/media/hostedfiles/legal/UK-TicketContract.pdf> [hereinafter REGENT] (“[A]ny dispute . . . shall be litigated, if at all, before the United States District Court for the Southern District of Florida in Miami.”) [<https://perma.cc/N4B8-N6CM>]; *Terms and Conditions*, MSC CRUISES, <https://www.msccruisesusa.com/en-us/Terms-Conditions.aspx> [hereinafter MSC] (“For all Cruises which include any port in the USA or which embarks or disembarks in the USA (USA Voyages), any dispute of any kind or nature whatsoever between Passenger and the Company. . . shall be resolved exclusively by the United States District Court for the Southern District of Florida. . . .”); *Cruise Contract*, DISNEY CRUISE LINE, <https://disneycruise.disney.go.com/contracts-terms-safety/cruise-contract/united-states/> [hereinafter DISNEY] (“All claims, disputes and matters whatsoever . . . relating to this cruise contract shall be litigated . . . in Brevard County, Florida, U.S.A. . . .”).

II. BACKGROUND

A. *Frasca v. NCL: Factual Background*

Thomas Frasca and his wife flew to Hawaii and met their friends Steve and Tish Stanner to celebrate the Stanners' 25th Wedding Anniversary aboard NCL's Pride of America Cruise Ship.⁸ After boarding the ship, the couples unwound by the pool and eventually returned to their rooms to relax.⁹ After resting up and eating dinner aboard the ship, the party headed toward the deck outside with Mr. Stanner exiting the restaurant doors first, followed by Mrs. Stanner, Mrs. Frasca, and Thomas Frasca, in that order.¹⁰ By the time that the party headed toward the outside deck following dinner, the weather was misty with intermittent rain.¹¹ The decks were well lit and visibly wet and shiny; there was a heavy fog in the air; and there were puddles of water on the deck's surface.¹²

The party was aware of the condition of the deck: Mrs. Stanner admitted that "[they] noticed that it had rained or was raining and that the flooring surface was wet."¹³ Mr. Stanner, being first out the door, told Mrs. Frasca that "[the deck] was slick."¹⁴ Mr. Frasca noted himself that he saw that "[i]t was misting" and saw "what possibly could have been a wet deck."¹⁵ After taking a couple of steps, Mr. Frasca slipped and fell on the very water he "possibly" noticed and his party commented out loud was slick.¹⁶ After the ship pulled into Maui, Frasca received medical treatment at the emergency room of the medical center onshore.¹⁷ After returning home to Illinois, Mr. Frasca got an MRI, which revealed that his right hamstring had detached from the bone.¹⁸ He then underwent surgery to repair the hamstring, followed by over a year of physical therapy.¹⁹

B. *Frasca v. NCL: Procedural History*

Mr. Frasca (Plaintiff) sued Norwegian Cruise Lines (Defendant) on a single

8. *Frasca v. NCL (Bahamas), Ltd.*, No. 12-20662-CIV, 2014 WL 1385806, at *1 (S.D. Fla. 2014).

9. *Id.*

10. *Id.*; Appellee, *NCL (Bahamas) Ltd. d/b/a NCL; Norwegian Cruise Lines; NCL America's Answer Brief at 2, Frasca v. NCL (Bahamas), Ltd.*, 564 F. App'x 949 (11th Cir. 2016) (No. 14-11955-B), 2015 WL 1910033 at *5 "(DE 137-2, pp. 7, 29; DE 137-3, p. 24-25) Stephen Stanner exited first, followed by Tish Stanner, Barbara Frasca, and Plaintiff."

11. *Frasca*, 2014 WL 1385806, at *7.

12. *Frasca v. NCL (Bahamas), Ltd.*, 564 F. App'x 949, 952 (11th Cir. 2016).

13. *Frasca*, 2014 WL 1385806, at *7.

14. *Id.*

15. *Id.*

16. *Frasca*, 564 F. App'x at 951; *Frasca*, 2014 WL 1385806, at * 7.

17. *Frasca*, 564 F. App'x at 950.

18. *Id.*

19. *Id.*

count of negligence, alleging failure to warn of the slippery condition and failure to maintain the vessel.²⁰ Defendant moved for summary judgment on Mr. Frasca’s failure to warn claim,²¹ asserting that the hazard was open and obvious.²² The District Court for the Southern District of Florida granted Defendant’s Motion for Summary Judgment on three grounds.²³ First, although “Plaintiff alleged in his complaint that the water on the deck came from a leak in the ceiling overhanging part of the deck,” he presented no evidence of this.²⁴ “Instead, as the litigation progressed, it became clear that the water on the deck resulted from precipitation . . . [b]ut Plaintiff never amended his complaint to that effect.”²⁵ Second, “Plaintiff saw that the deck was wet before he slipped, and Defendant was under no obligation to warn Plaintiff of such an ‘open and obvious’ condition.”²⁶ “And third, the district court held that Plaintiff adduced insufficient evidence to show that Defendant was on notice that the deck was dangerously slippery when wet.”²⁷ The district court also entered summary judgment in favor of Defendant on Plaintiff’s negligent maintenance claim, explaining that the Plaintiff had not adequately pled such a claim, and even if he had, there was no evidence in the record to establish a genuine issue of material fact.²⁸

On appeal, the Eleventh Circuit Court of Appeals reversed the order of summary judgment, concluding that a jury could credit an experts’ report and testimony that a “reasonable person would have known that the deck would be slippery, but not *as* slippery as it actually was.”²⁹ From the expert report introduced by the Plaintiff, “a reasonable jury could conclude that the *degree of slipperiness* on the deck was not open and obvious.”³⁰ Additionally, the Eleventh Circuit held that the safety video played in passenger cabins, warning passengers that the “outside decks will get wet from spray and sea air *and can become very slippery*” raised enough of a question as to whether the Defendant had notice as to preclude summary judgment.³¹

20. *Id.*

21. *Id.* at 950-51.

22. *Id.* at 951.

23. *Id.*

24. *Id.*

25. *Id.*; Frasca v. NCL (Bahamas), Ltd., No. 12-20662-CIV, 2014 WL 1385806, at *4-6 (S.D. Fla. 2014). (The district court reasoned that Frasca only brought up the rainwater “claim” in the summary judgment opposition and thus denied the claim citing footnote 27 in GeorgiaCarry.Org, Inc. v. Georgia, 687 F.3d 1244, 1258 n.27 (11th Cir. 2010)).

26. *Frasca*, 564 F. App’x at 951.

27. *Id.*

28. *Id.*

29. *Id.* at 952-53.

30. *Id.* at 953.

31. *Id.* at 953-54 (citing Sorrels v. NCL (Bahamas) Ltd., 796 F.3d 1275 (11th Cir. 2015)).

III. MARITIME LAW: THE HISTORY OF UNIFORMITY AND SUPREME COURT STANDARDS

A. History and Early Precedent of Uniformity

Maritime law standardizes a traditionally international activity. The concept and necessity of uniformity bred “maritime law” from the beginning of the age of sail so that merchants sailing from country to country—the only form of international trade in the early centuries besides on horse and foot—would not be at the whim of the individualized rules of their foreign ports of call. Charles Haight preached that allowing the people of the maritime community to predict what doctrines would govern their trade and essentially “be of one language and of one speech” is a desirable goal.³² Maritime activity today is a global activity with multiple nations present within one hull:³³ the vessel flagged in one nation, chartered from another, crewed from multiple nations, and insured from yet another. Uniformity of the law governing the passage of a ship and its activities while it traverses the globe is ever critical.

In the vast chronicle of maritime law, it only anchors in American jurisprudence for a fraction of its global existence. Maritime law holds a certain mystique in its ancient history, as it predates almost every other type of law and has a seemingly elevated status above other areas of the law. It has been said that this body of law has its authority derived from a “brooding omnipresence in the sky,”³⁴ however, its authority is grounded right here on the seas.

Maritime law is rooted from the Rhodian Sea Code, dating back to the Babylonian time as early as 500 B.C.E., and the Medieval Sea codes, dating back to 1000 A.D.³⁵ Eventually, maritime law evolved to the laws of Oléron around 1100 A.D., which became the basis for maritime regulations for all Northern Europe, and in turn, attributed to early English Maritime Law.³⁶ After breaking from England in 1777, the new United States took English admiralty laws with it.³⁷ As noted in the 1858 case, *Jackson v. The Magnolia*, “[t]he admiralty law of

32. Charles S. Haight, Jr., *Babel Afloat: Some Reflections on Uniformity in Maritime Law*, 28 J. MAR. L. & COM. 189, 190 (1997).

33. James Allsop, *Maritime Law: The Nature and Importance of its International Character*, 34 TUL. MAR. L.J. 555, 565 (2010).

34. See *S. Pac. Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting); See also Ernest A. Young, *The Last Brooding Omnipresence: Erie Railroad Co. v. Tompkins and the Unconstitutionality of Preemptive Federal Maritime Law*, 43 ST. LOUIS. U. L.J. 1349, 1349-50 (1999) (“‘There is no federal general common law.’ . . . Holmes was in dissent. The fight he was losing was *Southern Pacific Co. v. Jensen*, which held that the general common law of admiralty preempted contrary state law . . . [T]he *Jensen* doctrine remains good law in admiralty. . . . [T]here remains a general federal common law of admiralty that exists wholly apart from federal statutes or constitutional provisions. There is still . . . a ‘brooding omnipresence’ over the sea.”).

35. NICHOLAS J. HEALY ET AL., *CASES AND MATERIALS ON ADMIRALTY* 1 (5th Ed. 2012).

36. *Id.*; see also Haight, *supra* note 32, at 191.

37. *Jackson v. The Magnolia*, 61 U.S. 296, 313 (1857).

England . . . was the admiralty law of the United States at the period of the adoption of the Constitution.”³⁸ Syncing the U.S. common law from its commencement with English maritime law was a step towards uniformity, as the English system was rooted in the ancient sea codes and already valued uniformity.³⁹ Nonetheless, American maritime law ebbs and flows regarding its value of uniformity.

To set the stage, Justice Bradley made famous the notion of uniformity within maritime law in the *Lottawanna* case:

One thing, however, is unquestionable; the Constitution must have referred to a system of law coextensive with, and operating uniformly in, the whole country. It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several States, as that would have defeated the uniformity. . . .⁴⁰

As early as 1873, the Supreme Court of the United States looked to international maritime law while emphasizing the importance of uniformity: “[w]e may also look at the law of the two great maritime nations, England and France, as well calculated to throw light upon this question, for ‘uniformity is almost the essence of the maritime law.’”⁴¹

B. More Modern Uniformity Precedent and Policy Within Maritime Law

More recently, the Supreme Court, in dealing with maritime law, is still concerned with one principle policy of maritime law: achieving uniformity in the exercise of admiralty jurisdiction.⁴²

The Supreme Court declares the general maritime law.⁴³ It must do this free from inappropriate common law concepts.⁴⁴

As the admiralty law upon the subject must be gathered from the accepted practice of courts of admiralty . . . we are bound in answering this question to examine the sources of this law and its administration in the courts of civilized countries, and to apply it, . . . “having regard to our own legal history, Constitution, legislation, usages, and adjudications.”⁴⁵

38. *Id.*

39. Allsop, *supra* note 33, at 557 (citing *Luke v. Lyde*, 2 Burr 882, 887 (1759) (“[T]he maritime law is . . . the general law of nations.”)).

40. *The Lottawanna*, 88 U.S. 558, 574 (1874); *see also* Allsop, *supra* note 33, at 557 n.4.

41. *The Epsilon*, 8 F.Cas 744, 746 (E.D.N.Y. 1873) .

42. C. Taylor Simpson, *Sailing the Statutory Seas Toward Uniformity in Maritime Tort Law: Miles v. Apex Marine*, 15 TUL. MAR. L. J. 449, 458 (1991) (discussing *Miles v. Apex Marine Corp.*, 111 S. Ct. 317, 323 (1991); and *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 386-88, (1970)); *Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573, 577 (1974)).

43. *Kermarec v. Compagnie Generale Transatlantique*, 79 S. Ct. 406, 409-10 (1959) (citing *The Lottawanna*, 21 Wall. 558 (1874); *The Max Morris*, 137 U.S. 1, 11 S. Ct. 29 (1890)).

44. *Id.*

45. *The Osceola*, 189 U.S. 158, 168-69 (1903) (stating that if the answer doesn’t exist within

The admiralty law should not import concepts into the U.S. general maritime law that would go against its “traditions of simplicity and practicality.”⁴⁶

The Supreme Court recognized the dangers of arbitrarily overruling prior decisions of maritime law when it stated the following in *Moragne v. States Marine*:

Very weighty considerations underlie the principle that courts should not lightly overrule past decisions. Among these are the desirability that the law furnishes a clear guide for the conduct of individuals, to enable them to plan their affairs with assurance against untoward surprise; the importance of furthering fair and expeditious adjudication by eliminating the need to re-litigate every relevant proposition in every case; and the necessity of maintaining public faith in the judiciary as a source of impersonal and reasoned judgments. The reasons for rejecting any established rule must always be weighed against these factors.⁴⁷

Moragne reiterates the necessity of uniformity, “Such uniformity . . . will give effect to the constitutionally based principle that federal admiralty law should be ‘a system of law coextensive with, and operating uniformly in, the whole country.’”⁴⁸ The Supreme Court and Congress comprise the remedy for non-uniform maritime law.⁴⁹ These branches—together or separate—are the appropriate forums for ensuring that maritime law operates uniformly throughout the United States.⁵⁰

Courts acknowledge that due to the specialization of maritime law, federal courts may not always have the answers to litigants’ problems. Recognizing this, the Supreme Court devised a solution: Federal courts in admiralty may adopt state law to answer a maritime question, as long as it is not contrary to existing maritime law.⁵¹ In fact, one seminal maritime cruise ship tort case in the Eleventh

American jurisprudence, we should look to other maritime jurisdictions for answers to maritime law issues).

46. See *Kermarec*, 79 S. Ct. at 410 (citing *The Lottawanna*, 21 Wall. at 575).

47. *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 403 (1970).

48. *Id.* at 401-02 (1970) (citing *The Lottawanna*, 21 Wall. at 575).

49. HEALY ET AL., *supra* note 35, at 68. (“Whether in state court, the U.S. Supreme Court has the ultimate power to produce a uniform maritime law—when it decides to take the case, and if it decides that uniformity is required.”).

50. *Miles v. Apex Marine Corp.*, 498 U.S. 19, 33, 37 (1990) (“Today we restore a uniform rule applicable to all actions for the wrongful death of a seaman”); see also *Kermarec*, 79 S. Ct. at n.10 (noting its restoration of uniformity within maritime law due to differing results between multiple different jurisdictions throughout the U.S.); see generally *The Jones Act*, 46 U.S.C. § 30104; see generally *Death on the High Seas by Wrongful Act*, 46 U.S.C. §§ 761-768 (1934); see generally *Carriage of Good at Sea*, 46 U.S.C. §§ 1300-15 (1936).

51. *S. Pac. Co. v. Jensen*, 244 U.S. 205, 216-17 (1917) (the Supreme Court of the United States agreed to decide if the New York statute “conflicts with the general maritime law.” In doing so, the Court formulated several criteria for determining when state law may not displace the

Circuit Court of Appeals followed this precedent.⁵²

C. Compounding the Confusion of Maritime Law: Florida State Open and Obvious Doctrine Applied to Federal Maritime Torts

The “saving to suitors” clause reserves the right of maritime plaintiffs to bring some of their claims in state court.⁵³ Keeping with the policy of maritime uniformity, the substantive law between the two jurisdictions, state and federal, should be the same.⁵⁴ It would not make sense to allow a plaintiff to bring the same claim in a state court, or federal maritime court, and have different outcomes.

In 2000, the Third District Court of Appeals (DCA) heard the case of *Kloster Cruises v. Grubbs*.⁵⁵ In this case, the Grubbs were on the top deck of a cruise ship watching the departure from its port.⁵⁶ When Karen Grubbs entered the doorway to the interior of the ship, she slipped on the metal threshold and fell, breaking her hip.⁵⁷ During the trial, Norwegian Cruise Lines (the parent company of Kloster)

general maritime law: “[N]o such [state] legislation is valid if it contravenes the essential purpose expressed by an act of Congress or works material prejudice to the characteristic features of the general maritime law or interferes with the proper harmony and uniformity of that law in its international and interstate relations.”).

52. *Compare Kermarec*, 79 S. Ct. at 408-09 (holding that the District Court for the Southern District of New York “was in error in ruling that the governing law in this case was that of the State of New York. Kermarec was injured aboard a ship upon navigable waters. It was there that the conduct of which he complained occurred. The legal rights and liabilities arising from that conduct were therefore within the full reach of the admiralty jurisdiction and measurable by the standards of maritime law.” The New York law held that contributory negligence on Kermarec’s part would operate as a complete bar to recovery. “The jury should have been told instead that Kermarec’s contributory negligence was to be considered only in mitigation of damages” as this was already established federal maritime law established in *The Max Morris*, 137 U.S. 1, 11 S. Ct. 29, 34 L. Ed. 586.)

53. HEALY ET AL., *supra* note 35, at 68-69 (“Congress expressly shared some admiralty and maritime cases with the state courts in the Judiciary Act of 1789, retroceding concurrent jurisdiction in the ‘saving to suitors’ clause . . . [Concurrent jurisdiction] was a phrase employed by admiralty lawyers to indicate that within the same family of maritime cases, the plaintiff in [one case] might take the case to federal court, and the plaintiff in [another case] might take the case to state court.”).

54. *Milstead v. Diamond M Offshore, Inc.*, 676 So. 2d 89, 94-95 (La. 1996) (“Thereafter, this Court unanimously reversed finding that state courts are not bound to apply the federal doctrine of *forum non conveniens* because it is not a substantive feature of general maritime law. *Miller v. American Dredging Co.*, 595 So. 2d 615, 619 (La.1992).”). The Court draws a distinction between if the substantive or procedural law is affected by the preemption by federal law, and finds that the effect on substantive law is more important to maritime law uniformity.

55. *Kloster Cruise Ltd. v. Grubbs*, 762 So. 2d 552 (Fla. Dist. Ct. App. 2000).

56. *Id.* at 554.

57. *Id.*

asked for a jury instruction that was denied.⁵⁸ “Norwegian argued that it was entitled to an instruction on the open and obvious nature of the doorway.”⁵⁹ In addressing this issue on appeal, the Third DCA held that the “instruction was properly denied because while it is true as a general proposition that a property owner has no duty to warn of such dangers, there are important limitations on the rule, two of which apply here.”⁶⁰ “First, it is the dangerous condition of an object which must be open and obvious, not simply the object itself.”⁶¹ “Second, a property owner is not absolved of responsibility where the owner has reason to believe that others will encounter the dangerous condition, regardless of the open and obvious nature of the condition.”⁶²

While it is true that a state court hearing an admiralty case under the saving to suitors clause may utilize state substantive law, it may only do so if it does not contradict or frustrate established federal maritime law.⁶³ Here, federal maritime law concepts existed utilizing different standards than the land-based tort concept applied by the court; *Everett v. Carnival Cruise Lines* and *Keefe v. Bahama Cruise Line* (cited in *Everett* as the legal standard) were already decided and available as precedent for the state court to use as the maritime law standard for slip and fall cruise ship cases.⁶⁴ Instead, the Third DCA decided to take a land-based open and obvious instruction and utilized *Keefe* only when analyzing the duty owed.⁶⁵ Norwegian argued that the notice portion of *Keefe* should be included in the instruction, but the Third DCA ignored this, only utilizing *Keefe*

58. *Id.* at 555.

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.* (citing *Pittman v. Volusia County*, 380 So. 2d 1192 (Fla. 5th DCA 1980)). *Pittman* is a land-based torts case that requires a determination of the nature and extent of the duty owed to an invitee by an occupier of premises.

63. *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 222-23 (1986) (The “saving to suitors” clause of 28 U.S.C. §1333 allows a person injured in a maritime tort to sue for damages in state court.); *American Dredging Co. v. Miller*, 510 U.S. 443, 447 (1994) (Under 28 U.S.C. § 1333, a state court exercising *in personam* jurisdiction may adopt any state remedy unless it “works material prejudice the characteristic features of the general maritime law or interferes with the proper harmony and uniformity of [the general maritime law] in its international and interstate relations.”).

64. See *infra* Part IV.B for a discussion of *Everett v. Carnival Cruise Lines*, 912 F.2d 1355 (11th Cir. 1990). Neither *Keefe v. Bahama Cruise Line*, 867 F.2d 1318 (11th Cir. 1989) nor *Everett* discuss that a property owner is “not absolved of responsibility where the owner has reason to believe that others will encounter the dangerous condition regardless of the open and obvious nature of the condition.” *Everett* was decided ten years prior to *Grubbs* and utilized *Keefe* exclusively as the standard. By the state court utilizing a different standard at the state level, this has effectively gone against the policy of uniformity. Additionally, the use of the term “owner” seems to imply that the standard being utilized is referencing invitee standards which were abolished in *Kermarec v. Compagnie Generale Transatlantique*, 79 S. Ct. 406, 410 (1959).

65. *Kloster Cruise Ltd. v. Grubbs*, 762 So. 2d 552, 555-56 (Fla. Dist. Ct. App. 2000).

for the duty owed to passengers.⁶⁶ While *Grubbs* was parallel to *Everett*, the state court ignored *Everett* as a controlling precedent for charging negligence and only took a portion of *Keefe*, while *Everett* adopted *Keefe* in whole as the standard.⁶⁷

An additional danger of the saving to suitors clause is that state common law concepts find their way into the federal maritime doctrine.⁶⁸ Attorneys utilize state holdings as persuasive in their case at the district or appellate level, and, if persuasive enough, state law can then become precedent.⁶⁹ This may drive a wedge into the national uniformity of maritime law mandated so many times before by the Supreme Court.⁷⁰

IV. THE ELEVENTH CIRCUIT BIRTH AND DEATH OF THE OPEN AND OBVIOUS DOCTRINE FROM *LUBY* TO *SORRELS*

The open and obvious doctrine predates the United States itself,⁷¹ and has its

66. *Id.* (“Norwegian repeatedly requested a set of instructions, which together stated that Norwegian’s duty was to ‘exercise reasonable care under the circumstances which requires as a prerequisite to imposing liability, notice on the part of the cruise line’ . . . Applicable case law appears to indicate that a prerequisite to imposing liability on a carrier such as Norwegian is that ‘the carrier have had actual or constructive notice of the risk-creating condition, *at least where . . . the menace is one commonly encountered on land and not clearly linked to nautical adventure.*’ . . . However, we do agree with Norwegian that ‘the extent to which the circumstances surrounding maritime travel are different from those encountered in daily life and involve more dangers to a passenger, will determine how high a degree of care is reasonable in each case.’ *Keefe*, 867 F.2d 1318 at 1322 (quoting *Rainey v. Paquet Cruises, Inc.*, 709 F.2d 169, 172 (2d Cir.1983)). Thus, upon retrial, the parties may request jury instructions which appropriately reflect the degree to which the danger at issue here is unique to maritime travel and whether Norwegian’s conduct involved an appropriate degree of care in light of those matters.”).

67. Compare *Grubbs*, 762 So. 2d at 555-56, with *infra* Part IV B.

68. *Knickerbocker v. Bimini SuperFast Operations, LLC*, No. 13-24500-CIV, 2014 WL 12536981, at *7 (S.D. Fla. 2014) (The Federal District Court cites *Grubbs*, 762 So.2d at 555, which is a state case that is citing the land based tort law case *Pittman v. Volusia County*, 380 So.2d 1192 (Fla. 5th DCA 1980)).

69. *Frasca v. NCL (Bahamas), Ltd.*, No. 12-20662-CIV, 2014 WL 1385806, at *7 (S.D. Fla. 2014) (*Frasca* cited to two state cases as persuasive in his arguments: *Grubbs*, 762 So.2d at 555 and *Samuelov v. Carnival Cruise Lines, Inc.*, 870 So.2d 853 (Fla. 3d DCA 2003)).

70. *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 402 (1970) (citing *The Lottawanna*, 21 Wall. at 575).

71. Ann K. Dittmeier, *Premises Liability: The Disappearance of the Open and Obvious Doctrine*, 64 MO. L. REV. 1021, 1023 (1999) (discussing that “Originally, [landowners] were not held to the same standard because they were viewed as sovereign over their land, with the right to use it as they chose.”); see also *id.* at n. 26 (“This view originated in England during the time of feudalism, when the landowning class controlled much of the law”). See Lucinda S. Ingram, *Missouri Retreats From the Known or Obvious Danger Rule in Premises Liability*, 54 MO. L. REV. 241, 243 (1989); see I. J. SANDERS, *ENGLISH BARONIES, A STUDY OF THEIR ORIGIN & DESCENT*, 1086-1327, at vii (1960) (noting that Writs of Summons for the last general feudal levy of the

foundation in the belief that landowners had no duty to protect invitees from obvious conditions because “invitees [were], in most circumstances, expected to protect themselves from obvious dangers.”⁷² At common law, a tortfeasor who was negligent was deemed to have been contributorily negligent, causing traditional negligence to operate “on an all-or-nothing basis,” in that any amount of negligence by the plaintiff would completely bar recovery.⁷³ “In admiralty, the movement toward comparative negligence started at an early date in the form of equal division of damages in collision cases.”⁷⁴ In 1890, the United States Supreme Court eliminated contributory negligence as a bar to recovery all together in maritime personal injury cases.⁷⁵ However, it was not until sixty-nine years later that the common law designations of licensees and invitees were abandoned for passengers onboard vessels.⁷⁶ One of the earliest maritime passenger open and obvious cases was *The Lackawanna*.⁷⁷ In *The Lackawanna*, the United States District Court for the Southern District of New York became the first court to apportion fault on a percentage basis in a maritime personal injury case.⁷⁸ The plaintiff passenger, although negligent, was awarded one third of his damages; the court cited *The Max Morris* without discussion.⁷⁹

A. Luby v. Carnival Cruise Lines, Inc.: *The Open and Obvious Case*

In 1984, Elizabeth Luby and her husband, Michael Luby, boarded the MARDI GRAS, owned by Carnival Cruise Lines, Inc.⁸⁰ After arriving at her cabin, Mrs. Luby entered the bathroom, approached the wash basin, and tripped over a coaming or ledge that surrounded the shower.⁸¹ “The shower curtain was drawn so that the ledge around the shower was unexposed. “At the time of her

English kingdom were issued in 1385).

72. James P. End, *The Open and Obvious Doctrine: Where does it Belong in Our Comparative Negligence Regime?*, 84 MARQ. L. REV. 445, 459 (2000).

73. MARC A. FRANKLIN ET AL., TORT LAW AND ALTERNATIVES: CASES AND MATERIALS 435 (10th Ed. 2016) (“When the defense of contributory negligence was established, plaintiff was completely barred from recovery.”).

74. David R. Owen & J. Marks Moore, III, *Symposium: Maritime Personal Injury: Comparative Negligence in Maritime Personal Injury Cases*, 43 LA. L. REV. 941, 941 (1983).

75. *The Max Morris v. Curry*, 137 U.S. 1 (1890).

76. *Kermarec v. Compagnie Generale Transatlantique*, 79 S. Ct. 406, 410 (1959) (“The distinctions which the common law draws between licensee and invitee were inherited from a culture deeply rooted to the land, a culture which traced many of its standards to a heritage of feudalism . . . For the admiralty law at this late date to import such conceptual distinctions would be foreign to its traditions of simplicity and practicality.”).

77. *The Lackawanna*, 151 F. 499, 499-500 (S.D. N.Y. 1907).

78. *Id.* at 501.

79. *Id.* (only apportioning one third damages due to the plaintiff’s disregard of an obvious danger).

80. *Luby v. Carnival Cruise Lines*, 633 F. Supp. 40, 41 (S.D. Fla. 1986).

81. *Id.*

fall, the ship was still at the dock and there was no rocking or pitching of the ship.”⁸² “Additionally, there was no lack of visibility and the bathroom floor was clean and dry.”⁸³

The plaintiffs argued that the cruise ship “breached its duty by (a) concealing the ledge from Mrs. Luby and (b) by failing to warn her of its existence.”⁸⁴ In addressing Part A of the breach of the duty, the court concluded that “it [was] clear then that the presence of the ledge behind the shower curtain was, or should have been, obvious to Mrs. Luby by the ordinary use of her senses.”⁸⁵ However, the court cited *N. V. Stoomvaart Maatschappij “Nederland” v. Throner* to support its holding.⁸⁶ The court went further to hold that the cruise company “is entitled to expect, as a matter of law, that Mrs. Luby would perceive that which would be obvious to her upon the ordinary use of her senses.”⁸⁷ Accordingly, the court concluded that “the defendant did not breach its duty of care by concealing the ledge to Mrs. Luby as a matter of law.”⁸⁸

Luby continued to be cited (citing *Throner*) as the seminal case for the defense of open and obvious hazards in failure to warn cases.⁸⁹ Notably, *N. V. Stoomvaart Maatschappij “Nederland” v. Throner*—utilized in *Luby* to support the proposition of the open and obvious defense—may not in fact stand for such a proposition, or was very obscurely relied upon, as *Throner* is all of two sentences long. It seems likely that anyone citing *Throner* for the proposition that there is no duty to warn under the open and obvious doctrine has likely never read this case. Further, *Throner*, as utilized in *Luby*, applied only to the “duty to not conceal,” which is applicable to the ledge portion of the argument, not the “failure to warn” portion of the argument, as the court distinctly broke the duty into two sections.⁹⁰ In footnote three, the court alluded that the duty not to conceal the ledge would have been more appropriate to a negligent design claim, however that was not pled.⁹¹ Broken out separately, the “failure to warn” substantive law

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.* at 42.

86. *Id.* at 41 n.1.

87. *Id.* at 42.

88. *Id.*

89. *Lundquist v. Celebration Cruise Operator, Inc.*, No. 12-CV-60655, 2013 WL 12145942, at *2, (S.D. Fla. 2013); *Isbell v. Carnival Corp.*, 462 F.Supp.2d 1232, 1237 (S.D. Fla. 2006); *Frasca v. NCL (Bahamas), Ltd.*, 564 F. App’x 949, 952 (11th Cir. 2016); *Luther v. Carnival Corp.*, 99 F.Supp.3d 1368, 1370 (S.D. Fla. 2015); *Burdeaux v. Royal Caribbean Cruises, Ltd.*, No. 11-22798-CIV, 2012 WL 3202948, at *3 (S.D. Fla. 2012).

90. *Luby v. Carnival Cruise Lines*, 633 F. Supp. 40, 41-42 (S.D. Fla. 1986) (*Throner* is cited in paragraph II, which discusses the duty not to conceal the ledge. The court comes to a legal conclusion in this section and then goes onto a second analysis in paragraph III regarding the duty to warn, which does not cite *Throner* at all.).

91. *Id.* at 42 n.3 (“The Court notes that plaintiff did not allege or attempt to prove a design defect in the ledge . . . Defendant, however, in support of its motion for summary judgment,

that *Luby* relies upon is again Florida state land-based common law, analogizing a dimly lit step in a home to the shower ledge and holding that the drawn curtain concealment of the ledge does not transform a ledge into an inherently dangerous condition.⁹² The structure of the opinion, being broken out into two paragraphs, neither of which overlap with discussions of the other, makes clear that the inherently dangerous condition in paragraph III is different than an open and obvious condition in paragraph II.⁹³ Regardless of the fact that the federal court relied upon land-based tort law in the failure to warn case, the true “duty to warn” holding from *Luby*, therefore, is not about open and obvious hazards, but rather, inherently dangerous conditions.⁹⁴

B. Everett v. Carnival Cruise Lines: Confusing the Precedents

“On January 13, 1986, the Everetts were passengers on Carnival’s cruise ship, ‘Holiday’.”⁹⁵ “While walking along a passenger walkway on the Lido deck of the ship, Mrs. Everett tripped and fell [over a metal threshold], sustaining injuries to her left shoulder and arm.”⁹⁶ The lower court, in addressing a negligence claim, utilized Florida tort law to instruct the jury.⁹⁷ The Eleventh Circuit recognized that although the controlling case, *Keefe v. Bahama Cruise Line*, was not decided at the time of the lower court’s ruling, the district court’s view that Florida law

submitted the affidavit of Joseph Farcus, an architect with experience in the interior design of cruise ships. In his affidavit, Joseph Farcus asserted his expert opinion that the bathroom was properly designed. Where, as here, an issue is one of the kind on which expert testimony must be presented, and the affidavit of the expert is uncontradicted, summary judgment is proper.”)

92. *Id.* at 42 (citing *Schoen v. Gilbert*, 436 So.2d 75 (Fla.1983)) (“The Court also held that ‘[b]ecause a difference in floor levels is not an inherently dangerous condition, even in dim lighting, a homeowner has no duty to warn of such condition as a matter of law.’ Similarly, in the case at bar, this Court determines that a drawn shower curtain does not transform a ledge into an inherently dangerous condition. Accordingly, the defendant had no duty to warn of the ledge’s existence as a matter of law.”).

93. *Id.* at 41-42.

94. *Id.* at 42 (“[T]his Court determines that a drawn shower curtain does not transform a ledge into an inherently dangerous condition. Accordingly, the defendant had no duty to warn of the ledge’s existence as a matter of law.”).

95. *Everett v. Carnival Cruise Lines*, 912 F.2d 1355, 1357 (11th Cir. 1990).

96. *Id.*

97. *Id.* at 1358 (“The district court based its instruction on *Pogue v. Great Atlantic & Pacific Tea Co.*, 242 F.2d 575 (5th Cir.1957), in which the former Fifth Circuit analyzed Florida tort law in the context of a slip and fall case and held that a premises owner who creates a dangerous condition is charged with knowledge of its existence. . . . The district court gave the following instruction to the jury: To recover for injuries sustained in her fall, Lottie Everett must show either that Carnival Cruise Lines, Inc. (1) had actual notice of the condition of which she complains; OR (2) that the dangerous condition existed for such a length of time that in the exercise of ordinary care, Carnival Cruise Lines should have known of it; OR (3) that Carnival Cruise Lines negligently created or maintained its premises.”).

controlled this issue was incorrect because this was a maritime tort, and therefore, federal admiralty law should control.⁹⁸ The court reasoned that the federal maritime law applicable to this issue was “clearly set out in *Keefe v. Bahama Cruise Line*,” which held that “the ‘benchmark against which a shipowner’s behavior must be measured is ordinary reasonable care under the circumstances . . . which requires . . . the carrier have had actual or constructive notice of the risk-creating condition,’” and thus the instruction—charging negligence under 3 possible conditions—erroneously extended the maritime standard.⁹⁹

However, *Luby*, which also involved a slip and fall aboard a cruise ship dealing with a failure to warn, was decided only four years prior and was not listed as a controlling precedent in this case, despite the fact that *Everett* mentioned the failure of adequate warning.¹⁰⁰ This may have been because the parties chose not to argue a failure to warn claim, or this may very well have been pled at the lower level and neither party took an issue with it. With only the appellate decision for us to analyze, the court appears not to address what seems to be a controlling precedent. Similarly, *Grubbs*, decided ten years later and parallel to this case, utilizes *Keefe* as controlling precedent for duty, but does not recognize *Everett* even though both involve erroneous jury instructions applying state law over federal maritime law.¹⁰¹

C. Smith v. Royal Caribbean: *A Win for Open and Obvious*

In February 2012, Smith and his wife took a cruise aboard Royal Caribbean’s *Liberty of the Seas* cruise ship.¹⁰² Smith, as a self-confessed recreational swimmer, “went to an outdoor pool aboard the ship.”¹⁰³ “Upon arriving at the pool, Smith noticed that the water in the pool looked green, cloudy, and murky . . . [n]onetheless, Smith decided to enter the pool.”¹⁰⁴ “Smith made several attempts to swim the length of the pool underwater”—eyes open, with no goggles, and without coming up for air.¹⁰⁵ “On Smith’s third attempt to swim the

98. *Id.* (“The federal maritime law applicable to this issue was clearly set out in *Keefe v. Bahama Cruise Line*, in which the plaintiff sued to recover for injuries sustained when she slipped and fell on the dance floor of a cruise ship.”). However, footnote three in the case recognizes that *Keefe* was not decided at the time of the lower court’s decision. *Everett*, 912 F.2d 1355 at n.3 (“The District Court, however, did not have the benefit of the *Keefe* opinion in rendering its opinion.”).

99. *Id.* at 1358-59 (“The district court’s instruction clearly went beyond the *Keefe* standard and was therefore erroneous.”).

100. *Id.* at 1357 (“At the time of the accident, the threshold had affixed to it yellow and black signs saying ‘Watch Your Step.’ But the signs were worn and not highly visible.”); *Luby v. Carnival Cruise Lines*, 633 F. Supp. 40, 41-42 (S.D. Fla. 1986).

101. Compare *Everett*, 912 F.2d 1355, with *Kloster Cruise Ltd. v. Grubbs*, 762 So. 2d 552, 555-56 (Fla. Dist. Ct. App.).

102. *Smith v. Royal Caribbean Cruises, Ltd.*, 620 F. App’x 727, 728 (11th Cir. 2015).

103. *Id.*

104. *Id.*

105. *Id.*

length of the pool . . . Smith hit his forehead on the wall of the pool.”¹⁰⁶ As he exited the pool, Smith “immediately noticed that his right arm was not functioning properly and he used his left arm to use the ladder.”¹⁰⁷ Smith sued Royal for negligent maintenance and failure to warn claims.¹⁰⁸ The district court excluded the use of Smith’s expert, and after exclusion, granted Royal’s Motion for Summary Judgment.¹⁰⁹ Smith appealed and the Eleventh Circuit held that “federal courts need not even reach the defendant’s actual or constructive notice of a risk-creating condition if they determine that condition was an open and obvious danger. The duty to warn in the maritime tort context extends to only known dangers which are not apparent and obvious.”¹¹⁰ The Eleventh Circuit ultimately held that since the danger was open and obvious by the defendant’s own account, Royal Caribbean had no duty to warn.¹¹¹ However, the Florida law precedent that was utilized contradicted federal maritime law in that at least two different Supreme Court admiralty cases have preempted a similar state law barring contributory negligence.¹¹² With *Pope* and *Kermarac* as precedent, the Florida law barring recovery for contributory negligence is contrary to maritime law, and thus, should have been stricken per *Jensen*.¹¹³

C. Rosenfeld v. Oceania Cruises, Inc.: *Death of the Open and Obvious Slip Defense*

While not an open and obvious case itself, *Rosenfeld* is the nail in the coffin for conflating the open and obvious defense with the standard allowing expert

106. *Id.*

107. *Id.*

108. *Id.* at 727.

109. *Id.* at 729.

110. *See id.* at 730 (citing *Luby v. Carnival Cruise Lines, Inc.*, 633 F. Supp. 40, 41 n.1, 42 (S.D. Fla. 1986); as well as citing *Mosher v. Speedstar Div. of AMCA Int'l, Inc.*, 979 F.2d 823, 826 (11th Cir. 1992) (“under Florida law, obvious danger bars failure-to-warn claims.”)).

111. *Id.* (“Here, the risk-creating condition, the alleged cloudiness of the water, was open and obvious to plaintiff Smith by his own account . . . Defendant Royal did not breach its duty of reasonable care by failing to warn him of a condition of which he, or a reasonable person in his position, would be aware.”).

112. *Kermarac v. Compagnie Generale Transatlantique*, 79 S. Ct. 406, 408-09 (1959) (The New York law held “that contributory negligence on Kermarac’s part would operate as a complete bar to recovery. . . . The jury should have been told instead that Kermarac’s contributory negligence was to be considered only in mitigation of damages[.]” as this was already established federal maritime law established in *The Max Morris*, 137 U.S. 1, 14-15, 11 S. Ct. 29, 33); *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 408-09 (1953) (holding that Pennsylvania courts must apply the admiralty rule that contributory negligence is no bar to recovery).

113. *S. Pac. Co. v. Jensen*, 244 U.S. 205, 216-17 (1917) (“[N]o such [state] legislation is valid if it . . . works material prejudice to the characteristic features of the general maritime law or interferes with the proper harmony and uniformity of that law . . .”).

testimony for a “failure to warn” claim in slip and fall cases.¹¹⁴

Lydia Rosenfeld was onboard an Oceania Cruises vessel, the *M/V Nautica*, as a passenger, when she slipped and fell on a ceramic floor at the buffet line.¹¹⁵ This was a slip and fall case, however, Rosenfeld asserted a negligence claim arising from “[d]efendant’s [alleged] failure to choose an adequate flooring surface for the area where the accident occurred.”¹¹⁶ “Rosenfeld’s principal theory of the case was that Oceania’s choice of ceramic tile flooring for the Terrace Café area was unreasonable, given Oceania’s knowledge that the area was heavily trafficked and susceptible to spills.”¹¹⁷

“[T]he district court excluded [the expert’s] proposed testimony as unhelpful, explaining that ‘[s]uch conclusions are properly left for the Court or jury to decide.’”¹¹⁸ Oceania argued that the expert’s “methods failed to accurately test for wet conditions, and that his conclusions were ‘imprecise and unspecific’ and based on ‘incorrect assumption[s]’ about the location of Rosenfeld’s fall.”¹¹⁹ However, the Eleventh Circuit held that “based on the facts of this case, these arguments attack the weight and the persuasiveness of [the expert’s] testimony, not its admissibility[.]” and “[a] qualified expert who uses reliable testing methodology may testify as to the safety of a defendant’s choice of flooring, determined by the surface’s coefficient of friction[, COF.]”¹²⁰ Notably, this was a negligent design case, not a failure to warn claim.

Slipping further down the slope, *Rosenfeld* was one of the main cases relied upon in *Sorrels v. NCL*.¹²¹ “While on a cruise in 2012, Teresita Sorrels slipped on the pool deck of NCL’s *Norwegian Sky*—which was wet from rain”¹²² “Mr.

114. *Rosenfeld* is cited as precedent in both *Sorrels* and *Frasca* cases. *Sorrels v. NCL (Bahamas) Ltd.*, 796 F.3d 1275, 1279 (11th Cir. 2015) (“Evidence concerning a surface’s COF is generally presented through the testimony of an expert witness, who opines on the appropriate COF industry standard and on whether the surface in question meets that standard. *See, e.g., Rosenfeld v. Oceania Cruises, Inc.*, 654 F.3d 1190, 1193-94 (11th Cir. 2011)); *Frasca v. NCL (Bahamas), Ltd.*, 654 F. App’x 949, 953 n.2 (11th Cir. 2016) (“But even if the expert did not test the location where the slip occurred, the report would not be inadmissible on that basis. *See Rosenfeld v. Oceania Cruises, Inc.*, 654 F.3d 1190, 1194 (11th Cir. 2011) (“[The ship owner] argues that [the expert]’s . . . [tests were] based on ‘incorrect assumption[s]’ about the location of [the plaintiff]’s fall. However, . . . these arguments attack the weight and the persuasiveness of [the expert]’s testimony, not its admissibility. [The ship owner] can raise these arguments on retrial through ‘vigorous cross-examination’ and ‘presentation of contrary evidence.’”).

115. *Rosenfeld*, 654 F.3d at 1191.

116. *Id.* at 1192.

117. *Id.* at 1193.

118. *Id.*

119. *Id.* at 1194.

120. *Id.* at 1193, 1194.

121. *Sorrels v. NCL (Bahamas) Ltd.*, 796 F.3d 1275, 1281-82 (11th Cir. 2015) (“[W]e have held that expert testimony relating to the COF of a flooring surface can be helpful to a jury in a slip and fall case. *See Rosenfeld*, 654 F.3d at 1193[.]”).

122. *Id.* at 1279.

and Mrs. Sorrels argued that NCL created a dangerous condition by failing to properly maintain the pool deck where Mrs. Sorrels slipped and by failing to warn passengers of the danger.”¹²³ “To help establish the duty and breach elements of their negligence claims, Mr. and Mrs. Sorrels had Dr. Ronald Zollo, a civil engineer, conduct COF testing on the deck.”¹²⁴ The Eleventh Circuit, in its opinion, utilized *Rosenfeld* to justify that “[e]vidence concerning a surface’s COF is generally presented through the testimony of an expert witness, who opines on the appropriate COF industry standard and on whether the surface in question meets that standard.”¹²⁵ *Sorrels*, however, is a negligent maintenance and warning case.¹²⁶ The court began the opinion in *Sorrels*¹²⁷ utilizing a land-based tort case to justify that “[i]n slip and fall cases involving an allegedly dangerous or defective surface, the question of liability sometimes turns on (or is at least informed by) the surface’s coefficient of friction (COF), which is, in layman’s terms, ‘the degree of slip resistance.’”¹²⁸ Thus, the first inkling of the “degree of slipperiness,” made famous in *Frasca*, appeared.

E. Applying Luby & Sorrels to Frasca: How Obvious is Obvious Enough?

In *Frasca*, the Eleventh Circuit recognized that maritime law governed this claim.¹²⁹ Under maritime law in the Eleventh Circuit, an operator of a cruise ship has no duty to warn of dangers that are open and obvious.¹³⁰ The Eleventh Circuit then held that to defeat summary judgment, *Frasca* must raise a genuine issue of material fact as to *both* (1) whether defendant had either actual or constructive

123. *Id.* at 1286. The claims in *Frasca* and *Sorrels* parallel. *Compare id.* (“Mr. and Mrs. Sorrels argued that NCL created a dangerous condition by failing to properly maintain the pool deck where Mrs. Sorrels slipped and by failing to warn passengers of the danger.”), *with Frasca v. NCL (Bahamas), Ltd.*, No. 12-20662-CIV, 2014 WL 1385806, at *3 (S.D. Fla. Apr. 9, 2014) (“*Frasca* now claims that NCL ‘did not take the appropriate action to construct and maintain the deck in reasonable non skid transition [sic] and/or warn of the dangerous condition of the deck when wet.’”).

124. *Sorrels*, 796 F.3d at 1280.

125. *Id.* at 1279 (citing *Rosenfeld v. Oceania Cruises, Inc.*, 654 F.3d 1190, 1193-94 (11th Cir. 2011)).

126. *Id.* at 1286.

127. Judge Jordan, who decided *Sorrels*, *id.* at 1278, is the same judge who wrote the opinion for *Frasca*, *Frasca v. NCL (Bahamas), Ltd.*, 654 F. App’x 949, 949 (11th Cir. 2016). It should be noted that the *Frasca* opinion cited *Rosenfeld* (which was most likely fresh in Judge Jordan’s mind from deciding *Sorrels* one year prior) under the open and obvious discussion at footnote two. *Frasca*, 654 F. App’x at 953 n.2.

128. *Sorrels*, 796 F.3d at 1278-79 (citing *Mihailovich v. Laatsch*, 359 F.3d 892, 896, 921 n.2 (7th Cir. 2004)).

129. *Frasca*, 654 F. App’x at 951 (citing *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 534 (1995)).

130. *Id.* at 952 (citing *Luby v. Carnival Cruise Lines, Inc.*, 633 F. Supp. 40, 41 (S.D. Fla. 1986)).

notice of the decks slipperiness and (2) whether the dangerous condition was open and obvious.¹³¹

In examining “whether the dangerous condition was open and obvious,” the court in *Frasca* utilized general tort law standards of Georgia to guide their analysis, asking whether a reasonable person would have observed the deck’s wetness and appreciated its resultant slickness.¹³² Utilizing this legal standard, the court applied it to the facts: that the deck was well lit; there was a “heavy fog” or mist in the air; the deck was visibly “wet and shiny,” and; there were “puddles of water” on the deck’s surface, concluding that “a reasonable person approaching the outer deck would have perceived the outdoor conditions through the ‘ordinary use of [his] senses’ and would conclude, based on those conditions, that the deck’s surface would likely be slicker than usual.”¹³³ However, despite satisfying the objective view test, and although the court reiterated that a reasonable person would have known that the deck would be slippery, the Eleventh Circuit took the analysis a step further. The court went on to uphold the introduction of the expert’s report, which stated that the deck was *unreasonably* slippery.¹³⁴ The court concluded that even though *a reasonable person* would find that the deck was slippery, which is the appropriate standard,¹³⁵ a jury could conclude that the *degree of slipperiness* was not open and obvious.¹³⁶ The court came to this conclusion in an odd manner, stating that “[t]he [expert’s] report suggests that a reasonable person would have known that the deck would be slippery, but not as slippery as it actually was.”¹³⁷ Ironically, and similar to *Everett*, where the Eleventh Circuit realized that the lower court extended the standard past the point of logical, the Eleventh Circuit was the one extending the standard here.¹³⁸

There was no need to use an expert to introduce the “coefficient of friction” into the *Frasca* case. Firstly, *Frasca* was a failure to warn case; use of coefficient of friction experts originally occurred in a negligent maintenance case.¹³⁹ The

131. *Id.*

132. *Id.* (“We deal first with the question whether the dangerous condition was open and obvious. At the outset, we note that, as with general tort law, our analysis is guided by the ‘reasonable person’ standard. *Lamb by Shepard v. Sears, Roebuck & Co.*, 1 F.3d 1184, 1189-90 (11th Cir. 1993) (applying Georgia law and stating that “[w]hether a danger is open and obvious is determined “on the basis of an objective view” and that “the subjective perceptions of the . . . injured party are irrelevant[.]””).

133. *Id.* at 952 (citing *Luby*, 633 F. Supp. at 42).

134. *Id.*

135. *Id.* (“Under these 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.” *Luby*, 633 F. Supp. at 42.).

136. *Id.* at 953.

137. *Id.* at 952-53.

138. *Everett v. Carnival Cruise Lines*, 912 F.2d 1355, 1358-59 (11th Cir. 1990) (“The district court’s instruction clearly went beyond the *Keefe* standard and was therefore erroneous.”).

139. *Rosenfeld v. Oceania Cruises, Inc.*, 654 F.3d 1190, 1192 (11th Cir. 2011).

court in *Frasca* concluded that “a reasonable person . . . 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.”¹⁴⁰ This is no different than previous cases with open and obvious defenses, where observing the condition was held to be sufficient.¹⁴¹ Secondly, an expert is appropriate where his or her “specialized knowledge will help the trier of fact understand the evidence.”¹⁴² If a passenger needs a specialist to determine that the floor is slippery, this does not apply a reasonable person standard or ordinary senses, as is the legal standard from *Luby* and announced in *Frasca*. Further, allowing the use of an expert as in *Sorrels* was erroneous, because this is not a negligent maintenance or design case. The court in *Sorrels* utilized a prior holding from *Rosenfeld* that allowed an expert to testify that a floor was slippery in order to prove failure to choose adequate flooring, not to prove the obviousness of a condition in a failure to warn claim.¹⁴³ “Obvious,” by its definition, means “easily discovered, seen, or understood,”¹⁴⁴ and therefore, determination of obviousness should not require the use of an expert because it would not be helpful to the jury on this issue. In *Frasca*, the plaintiff and others in his party observed the potential hazard, and the presiding judge stated that this was sufficient to meet the *Luby* standard.¹⁴⁵ Based on the current Eleventh Circuit standard laid out in *Luby*, summary judgment was proper in this case. The additional steps used in *Frasca*, beyond the conclusion that a reasonable person could observe through the use of their ordinary senses, lead to a test that frustrates the “simplicity and practicality” intended of maritime law.¹⁴⁶

While the standard for summary judgment is widely known to any practicing lawyer or first year law student, it is worth briefly recapping, as this particular case hinges on the denial of summary judgment. The Eleventh Circuit in *Frasca* relied on a combination of Eleventh Circuit summary judgment precedent, as well as Supreme Court standards. 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.”¹⁴⁷ Additionally, speculation or conjecture does not create a genuine issue of material fact.¹⁴⁸ The moving party has the initial burden

140. *Frasca*, 654 F. App’x at 952.

141. *E.g.*, *Smith v. Royal Caribbean Cruises, Ltd.*, 620 F. App’x 727, 730 (11th Cir. 2015).

142. FED. R. EVID. 702; *see also* MICHAEL H. GRAHAM, EVIDENCE LAW MASTERY 421 (2016).

143. *Sorrels v. NCL (Bahamas) Ltd.*, 796 F.3d 1275, 1282 (11th Cir. 2015) (citing *Rosenfeld*, 654 F.3d at 1193 (“A qualified expert who uses reliable testing methodology may testify as to the safety of a defendant’s choice of flooring, determined by the surface’s coefficient of friction.”)).

144. *Obvious*, MERRIAM-WEBSTER ONLINE DICTIONARY, <https://www.merriam-webster.com/dictionary/obvious> (last updated Aug. 27, 2018), [<https://perma.cc/77AQ-CH3S>].

145. *Frasca*, 654 F. App’x at 952.

146. *Kermarec v. Compagnie Generale Transatlantique*, 79 S. Ct. 406, 410 (1959) (in *Kermarec*, importing land based tort designations into a Maritime Law case went against the “[Maritime Law] traditions of simplicity and practicality.”).

147. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *see also* FED. R. CIV. P. 56.

148. *Cordoba v. Dillard’s, Inc.*, 419 F.3d 1169, 1181 (11th Cir. 2005).

of showing the absence of a genuine issue as to any material fact.¹⁴⁹ In assessing whether the moving party has met this burden, the court must view the movant’s evidence and all factual inferences arising from it in the light most favorable to the non-moving party.¹⁵⁰ Once the moving party satisfies its initial burden, the burden shifts to the non-moving party to come forward with evidence showing a genuine issue of material fact that precludes summary judgment.¹⁵¹ “If reasonable minds could differ on the inferences arising from undisputed facts, then a court should deny summary judgment.”¹⁵² But if the record, taken as a whole, cannot 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.¹⁵³

In the appellate brief and reply brief, Frasca denies having knowledge of the puddle or seeing the puddle prior to his slip.¹⁵⁴ Applying the Eleventh Circuit’s stated standard of taking this fact as most favorable to Frasca, and crediting his lack of knowledge with the inference that he was unaware of the condition prior to his slip, summary judgment was still proper, as the standard for open and obvious is objective and not subjective.¹⁵⁵ As explained above, the Eleventh Circuit noted that based on the uncontested conditions, a reasonable person would have concluded that “the decks surface would be slicker¹⁵⁶ than usual.”¹⁵⁷ The court even confirmed this when it held that the report from the expert for Mr. Frasca suggests that “a reasonable person would have known that the deck would be slippery,¹⁵⁸ but not as slippery as it actually was.”¹⁵⁹ The court then utilized the term slippery two more times in the paragraph, concluding that a jury could find that the hazard was not open and obvious because the “*degree* of slipperiness on deck was not open and obvious.”¹⁶⁰ The court went beyond the standard and was,

149. *Clark v. Coats & Clark, Inc.*, 929 F.2d 604, 608 (11th Cir. 1991).

150. *Denney v. City of Albany*, 247 F.3d 1172, 1181 (11th Cir. 2001).

151. *Clark*, 929 F.2d at 608.

152. *Miranda v. B & B Cash Grocery Store, Inc.*, 975 F.2d 1518, 1534 (11th Cir. 1992).

153. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

154. Reply Brief at *6, *Frasca v. NCL (Bahamas), Ltd.*, 654 F. App’x 949 (11th Cir. 2016) (No. 14-11955-B), 2015 WL 2437672.

155. *Frasca*, 654 F. App’x at 952 (“[W]hether a danger is open and obvious is determined ‘on the basis of an objective view’ and that ‘the subjective perceptions of the . . . injured party are irrelevant[.]’”).

156. *Slick*, MERRIAM-WEBSTER ONLINE DICTIONARY, <https://www.merriam-webster.com/dictionary/slick> (last updated Sept. 3, 2018) [<https://perma.cc/2G2D-56Q4>] (suggesting extreme smoothness that results in a slippery surface) (synonym discussion).

157. *Frasca*, 654 F. App’x at 952.

158. *Slippery*, MERRIAM-WEBSTER ONLINE DICTIONARY, <https://www.merriam-webster.com/dictionary/slippery> (last updated Aug. 30, 2018) [<https://perma.cc/6HPD-7VL5>] (causing or tending to cause something to slide or fall). Thus, even at the very basic level of slippery, this is a hazard. Anything more slippery as suggested by the Eleventh Circuit is just extra, as the baseline ‘slippery’ meets the threshold of a hazard.

159. *Frasca*, 654 F. App’x at 952-53.

160. *Id.* at 953.

therefore, in error.

The district court originally granted summary judgment to Norwegian after it filed a motion alleging among other arguments, the open and obvious nature of the puddle.¹⁶¹ In opposition, Frasca filed a motion that asserted a claim for negligent construction and maintenance and failure to warn of the dangerous condition of the deck when wet.¹⁶² The district court held it improper to assert a new claim at the summary judgment stage,¹⁶³ and upheld summary judgment, because “the only claim pled is the one alleging that Frasca slipped because a leak in the ceiling caused liquid to pool on the deck. As Frasca now admits, that claim has *no* factual support. As such, summary judgement for NCL is warranted.”¹⁶⁴ The district court compared this case to a previous slip and fall on a cruise ship where summary judgment was granted because the plaintiff switched his claim of liability due to a slippery substance on the tile floor causing the floor to be unreasonably dangerous, to a claim of negligent construction and maintenance.¹⁶⁵

On appeal, the Eleventh Circuit held that the district court erred because this was not a new claim, and that Frasca did make a claim of negligent maintenance in his original complaint.¹⁶⁶ The Eleventh Circuit cited to Frasca’s complaint, noting that he pled that “[Defendant] breached its duty to [plaintiff] by failing to maintain this area in a reasonably safe condition[.]”¹⁶⁷ The Eleventh Circuit did not mention that the only factual allegation *in the complaint* to support this original claim is the allegation that “liquid had leaked from the ceiling and puddled on the plastic.”¹⁶⁸ However, the current standard across every circuit is that to survive a motion to dismiss, “a plaintiff must ‘plead factual matter that, if taken as true, states a claim’ that is plausible on its face.”¹⁶⁹ This requires that a

161. Frasca v. NCL (Bahamas), Ltd., No. 12-20662-Civ, 2014 WL 1385806, at *3, *6 (S.D. Fla. Apr. 9, 2014).

162. *Id.* at *3 (“After NCL filed its summary judgment motion, Frasca asserted *another* new theory of liability. . . .Frasca *now* claims that NCL ‘did not take the appropriate action to *construct* and maintain the deck in a reasonable non-skid transition [sic] and/or warn of the dangerous condition of the deck when wet.’”).

163. *Id.* at *4 (citing *Gilmour v. Gates, McDonald & Co.*, 382 F.3d 1312, 1314-15 (11th Cir. 2004)). The Court also cited footnote 27 in *GeorgiaCarry.Org, Inc. v. Georgia*, 687 F.3d 1244, 1258 n.27 (11th Cir. 2010) (declining to consider additional facts first raised in summary judgement briefing). Footnote 27 also cites *Gilmour*.

164. *Id.* at *6 (emphasis added).

165. *Id.* (citing *Weiner v. Carnival Cruise Lines*, No. 11-CV-22516, 2012 WL 5199604 (S.D. Fla. Oct. 22, 2012)) (“Judge Scola carefully dissected the allegations in the complaint and concluded that they all related to the presence of a foreign substance (just like Frasca’s allegations relate only to the pooled liquid from the leaky ceiling), not negligent construction and selection of the tile flooring.”).

166. Frasca v. NCL (Bahamas), Ltd., 654 F. App’x 949, 955 (11th Cir. 2016).

167. *Id.*

168. *Id.* at 954-55; *see also* Complaint for Damages and Demand for Jury Trial ¶ 5, Frasca v. NCL (Bahamas), Ltd., 654 F. App’x 949 (11th Cir. 2016) (No. 1:12CV20662), 2012 WL 5215549.

169. *GeorgiaCarry.Org, Inc. v. Georgia*, 687 F.3d 1244, 1254 (citing *Ashcroft v. Iqbal*, 556

plaintiff include factual allegations for each essential element of his or her claim.¹⁷⁰ As such, in Frasca’s original complaint, the only factual allegation to support his negligent maintenance claim was the water from the leaking pipe.¹⁷¹ Once Frasca admitted that this factual allegation, the *only* allegation in support of a negligence maintenance claim, was faulty, at that very moment his claim evaporated with his erroneous factual support.¹⁷² To then claim a *second* negligent design *and* maintenance claim, and utilize a different set of factual allegations to support this claim in a motion to oppose summary judgment, was improper, as the district court concluded.¹⁷³ Thus, the Eleventh Circuit incorrectly overruled the district court’s grant of summary judgment. The Eleventh Circuit justified its reasoning in holding that the district court erred by citing *GeorgiaCarry.Org* to support its grant of summary judgment; however, the district court’s reasoning was much more substantial and well-reasoned.¹⁷⁴ The following section shows that the Eleventh Circuit’s application of the open and obvious doctrine is inconsistent with its application in other jurisdictions.

V. THE CIRCUIT SPLIT: THE ROGUE ELEVENTH CIRCUIT

The Eleventh Circuit has rendered irreconcilable decisions based on similar fact patterns less than one year apart. In *Sorrels*, the court held that slippery equals dangerous;¹⁷⁵ yet ten months later, in *Frasca*, the same court held that slippery is not necessarily dangerous.¹⁷⁶

One substantial reason for lack of standardization in maritime law today is that maritime decisions in federal courts are adjudicated by twelve different United States Circuit Courts of Appeals with 179 different judges that do not

U.S. 662, 666 (2009)).

170. *Id.* (citing *Randall v. Scott*, 610 F.3d 701, 707 n.2 (11th Cir. 2010) (“[C]omplaints . . . must now contain either direct or inferential allegations respecting all the material elements necessary to sustain a recovery under some viable legal theory.”)).

171. Complaint for Damages and Demand for Jury Trial, *supra* note 168, ¶ 5.

172. *Frasca v. NCL (Bahamas), Ltd.*, No. 12-20662-Civ, 2014 WL 1385806, at *5 (S.D. Fla. Apr. 9, 2014) (“Frasca asks the Court to disregard [the allegation regarding the leak from the ceiling] because his counsel informally explained it away by saying it is a mistaken allegation caused by a deficient cut and paste from another complaint.”) *Id.* at *6.

173. *Id.* at *4-6.

174. *Id.* at *3-6. The court devoted three pages of its opinion to why it was improper to bring up a new claim at the summary judgement stage, citing many additional cases in support besides *GeorgiaCarry.Org*.

175. *Sorrels v. NCL (Bahamas) Ltd.*, 796 F.3d 1275, 1288 (11th Cir. 2015) (“Rather, the issue is whether NCL had actual or constructive knowledge that the pool deck where Mrs. Sorrels fell could be slippery (and therefore dangerous) when wet. . . .”).

176. *Frasca v. NCL (Bahamas), Ltd.*, 654 F. App’x 949, 953 (11th Cir. 2016) (“A jury could credit the expert’s testimony and conclude that the deck’s visible wetness and the weather conditions would not alert a reasonable observer to the *extent* of the deck’s slipperiness.”).

have to rely on each other for binding precedent.¹⁷⁷ Making this problem increasingly worse, each of the over 667 different district court judges may reach his or her own conclusions regarding maritime law or, worse, utilize state law if there is no binding precedent on point with the issue.¹⁷⁸ Therefore, when there is a split or a conflict at the circuit level, this makes uniformity exponentially harder among the district courts by “creating alternative precedents to select from.”¹⁷⁹

Currently, the Eleventh Circuit handles a majority of the cruise ship litigation due a number of cruise companies, carrying a significant portion of the cruising population, putting a Miami Forum Selection Clause into their contracts.¹⁸⁰ The “degree of slipperiness” standard developed in the Eleventh Circuit has started changing the standard in this circuit.¹⁸¹ While *Frasca* is an unpublished Eleventh Circuit case and is, therefore, not controlling precedent within the circuit,¹⁸² lawyers and judges at the lower level are treating it as such. As of now, the *Frasca* “degree of slipperiness test” precedent is making its way around the Eleventh Circuit.¹⁸³ Additionally, within the Eleventh Circuit, Norwegian made a strong showing in their appellate brief that within this jurisdiction, visible rainwater on a surface was recognized as slippery as a matter of law.¹⁸⁴ In the

177. *U.S. Court of Appeals Authorized Additional Judgeships*, AUTHORIZED ADMINISTRATIVE OFFICE OF THE U.S. COURTS, <http://www.uscourts.gov/sites/default/files/appealsauth.pdf> [<https://perma.cc/F2ZX-4XP7>]; see also Robert D. Peltz, *The Myth of Uniformity in Maritime Law*, 21 TUL. MAR. L.J. 103, 136 (1996).

178. *U.S. District Courts Authorized Additional Judgeships*, AUTHORIZED ADMINISTRATIVE OFFICE OF THE U.S. COURTS, <http://www.uscourts.gov/sites/default/files/districtauth.pdf> [<https://perma.cc/YEN5-TC2Z>]; Peltz, *supra* note 177, at 114.

179. Peltz, *supra* note 177, at 136.

180. *2018 Worldwide Cruiseline Market Share*, CRUISE MARKET WATCH, <http://www.cruisemarketwatch.com/market-share/>; CARNIVAL, *supra*, note 7; AZAMARA, *supra*, note 7; CELEBRITY, *supra*, note 7; ROYAL, *supra*, note 7; NORWEGIAN, *supra*, note 7; OCEANIA, *supra*, note 7; REGENT, *supra*, note 7

181. *Sorrels v. NCL (Bahamas) Ltd.*, 796 F.3d 1275, 1288 (11th Cir. 2015) (The Eleventh Circuit is ignoring its own holding in *Sorrels* that when something is slippery, it is dangerous.); *Luby v. Carnival Cruise Lines*, 633 F. Supp. 40, 42 (S.D. Fla. 1986) (Additionally, by allowing an expert to conduct sophisticated coefficient of friction tests, the Court has essentially ignored its holding from *Luby*, that the standard for open and obvious is observing the hazard through the ordinary use of one’s senses.)

182. 11TH CIR. R. 36-2.

183. *Geyer v. NCL (Bahamas), Ltd.*, 204 F. Supp. 3d 1354, 1358 (S.D. Fla. Aug. 31, 2016); *Marshall v. Royal Caribbean Cruises, Ltd.*, No. 0:16-cv-21140-KMM, 2017 WL 5308902, at *3-4 (S.D. Fla. Jan. 6, 2017); *Marsh v. Celebrity Cruises, Inc.*, No. 1:17-cv-21097-UU, 2017 WL 6498107, at *4 (S.D. Fla. Dec. 13, 2017) (this case conflated the holding in the District court with the Appellate holding.); *Thomas v. NCL (Bahamas), Ltd.*, 203 F. Supp. 3d 1189, nn.1-2 (S.D. Fla. Aug. 25, 2016).

184. Appellee Answer Brief at *28-30, *Frasca v. NCL (Bahamas), Ltd.*, 654 F. App’x 949 (11th Cir. 2016) (No. 14-11955-B), 2015 WL 1910033. NCL listed over 10 cases within this jurisdiction where the court recognized the fact that rain may render a surface slippery as a matter

Fifth Circuit, the court analogized a rain-soaked deck to icy steps, using an example straight out of the Restatement.¹⁸⁵ However, in that case, the example was discussing when the invitee *had* to traverse the danger, such as a set of stairs. Here, even without having to analogize, the Restatement Second of Torts provides a clear example in a maritime context, that coming upon a hazard where there was a route around it, would be considered open and obvious.¹⁸⁶ Therefore in *Frasca*, when there were multiple other routes for the party to get to its destination not involving the rain soaked deck, this should have been considered an open and obvious hazard.

VI. SOLUTIONS GOING FORWARD: HOW TO RESTORE UNIFORMITY

A. Restoration through a Future Grant of Certiorari

Overall, the “degree of slipperiness” standard first introduced in *Rosenfield*, since misapplied, and now solidified in *Frasca* and its progeny, is a violation of the policy of a uniform maritime law. This arbitrary standard will have tremendous repercussions in deepening the fracture between Circuits dealing with this specific area of law. Such discrepancy should be taken up to the Supreme Court at the earliest possible point and settled once and for all to help reunify maritime law on this topic.¹⁸⁷ Any defense of “obvious” is now subject to a

of law. Additionally, NCL reiterated the standard from *Luby*: “Defendant is entitled to expect, as a matter of law, that [plaintiff] would perceive that which would be obvious to her upon the ordinary use of her senses.” *Id.* at *28.

185. *Helaire v. Mobile Oil Co.*, 709 F.2d 1031, 1038 (5th Cir. 1983) (“While in the usual case there is no obligation to protect the invitee against dangers which are known to him or which are so obvious and apparent to him that he may not reasonably be expected to discover them, ‘this is certainly not a fixed rule . . . In any case where the occupier, as a reasonable man, should anticipate an unreasonable risk of harm to the invitee notwithstanding his knowledge, warning, or the obvious nature of the condition, something more in the way of precautions may be required. This is true, for example, . . . where the condition is one such as icy steps, which cannot be negotiated with reasonable safety even though the invitee is fully aware of it. . . . In all such cases the jury may be permitted to find that obviousness, warning or even knowledge is not enough.’ [W. Prosser, *The Law of Torts* § 61] at 394-95 (emphasis added). If we consider the condition of the rainsoaked deck on the supply vessel analogous to the ice-laden steps on a landowner’s property described by Dean Prosser, we conclude that an owner may be liable, assuming Restatement § 343A applies, if “as a reasonable man” he should have anticipated that ice had built up on the steps and that this ice created an unreasonable risk of harm.”).

186. RESTATEMENT (SECOND) TORTS § 343A cmt. g, illus. 9 (AM. LAW. INST. 1965) (“The A Steamship Company is engaged in unloading a passenger ship. Its pier is encumbered with trunks, baggage trucks, and many other large visible objects, but there is ample room for passage between them. B, a passenger leaving the ship, is preoccupied with her own thoughts, and stumbles over a trunk and is injured. The A Company is not liable to B.”).

187. HEALY ET AL., *supra* note 35, at 68 (“[T]he U.S. Supreme Court has the ultimate power to produce uniform maritime law when it decides to take the case, and if it decides that uniformity

degree analysis. The Eleventh Circuit did not attempt uniformity; its analysis did not examine whether other jurisdictions or the Supreme Court applied this standard within general maritime law; nor did the Eleventh Circuit discuss the concept of uniformity before creating its own interpretation of what obvious is.¹⁸⁸ As stated earlier, even within the Eleventh Circuit there exists in one instance the classification of an *obvious* hazard being treated as dangerous as a matter of law, and in another instance there is a very similar case where obvious is not enough.¹⁸⁹ Because we currently have a non-uniform standard within maritime law, this will lead cruise ship defendants to forum shop, exacerbating the problem with the principle of uniformity and national harmonization within maritime law.¹⁹⁰

B. Restoration Through Reintroduction of Admiralty Courts

“Because the purpose of a national uniform maritime law is to create uniform results regardless of where a case is actually filed, there is no valid reason not to apply uniform procedural and [substantive] rules in all maritime cases.”¹⁹¹ Author Robert Peltz suggests, and I agree, that one of the best ways to get both the substantive and procedural features in sync would be to reintroduce the specialization of courts of admiralty.¹⁹² One way to solve this disuniformity problem would be to digress back to pre-1776, where Courts of Vice Admiralty were separate from common law courts.¹⁹³ Other international jurisdictions utilize separate admiralty courts.¹⁹⁴ While not every level of the system needs to be specialized, specialization at the upper level will help to corral the differing district courts into harmony and provide a consolidated base of binding case law

is required.”); *Miles v. Apex Marine Corp.*, 498 U.S. 19, 27 (1990) (“[T]he constitutionally based principle that federal admiralty law should be ‘a system of law coextensive with, and operating uniformly in, the whole country.’” *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 402 (1979), quoting *The Lottawanna*, 21 Wall. 558, 575 (1875)).

188. *See Frasca v. NCL (Bahamas), Ltd.*, 654 F. App’x 949 (11th Cir. 2016).

189. *Compare* cases cited *supra* notes 176-77.

190. *American Dredging Co v. Miller*, 510 U.S. 443, 463 (1994) (“[B]y sanctioning Louisiana’s law, a rule explicable only by some desire to disfavor maritime defendants, the Court condones the forum shopping and disuniformity that the admiralty jurisdiction is supposed to prevent.”).

191. Peltz, *supra* note 177, at 135.

192. *Id.* at 136.

193. HEALY ET AL., *supra* note 35, at 4 (“[I]n 1720 [British] Parliament created courts of vice admiralty for a series of American districts to administer the English admiralty jurisdiction and the customs laws . . . In America, [after the revolution], there was a collection of quite different systems of courts.”); see also CARL UBBELOHDE, *THE VICE-ADMIRALTY COURTS AND THE AMERICAN REVOLUTION* (1960), for a more in depth discussion of vice admiralty courts in colonial America.

194. *E.g., Admiralty Court*, HM COURTS & TRIBUNALS SERV., <https://www.gov.uk/courts-tribunals/admiralty-court> [<https://perma.cc/Z8YU-UD8P>].

to pull from.¹⁹⁵ Because of the saving to suitors clause, this would not solve the issue of differing state court constructions in admiralty; however, it would provide the state courts a more uniform model to follow.¹⁹⁶

“The establishment of a separate appellate Admiralty Court can be accomplished by an act of Congress” the same way that other specialty courts have been created.¹⁹⁷ Congress has been the force to determine the organization and the allocation of power exercised by the federal courts.¹⁹⁸ The United States has already recognized that when an area of law has such specified nuances, it deserves its own jurisdiction. Even within admiralty we require that certain actions can only be brought in a district court because they are exclusively “in admiralty[,]” but this is more of a costume than an actual specialized court.¹⁹⁹ There are various examples of specialized courts created by Congress: United States Tax Court, Bankruptcy Court, Court of Federal Claims Procedure, Court of International Trade, the Federal Circuit Court of Appeals, Court of Appeals for Veterans Claims, and the Court of Military Appeals.²⁰⁰

C. Restoration through Congressional Legislation

A large majority of the sea going nations have recognized the need and utility of uniformity, showcased by their membership in international bodies working towards that goal.²⁰¹ Since the founding of the Comité Maritime International (hereinafter “CMI”) in 1897,²⁰² the nations that are members to this body have worked towards creating mutual treaties and conventions to harmonize how maritime business is conducted. The U.S. has delegates at the table for this process.²⁰³ Although the U.S. is a member party to the CMI, which has produced over twenty conventions to create uniform conduct, the U.S. has only ratified

195. Peltz, *supra* note 177, at 136; *see also* Joseph W. Mead, *Stare Decisis in the Inferior Courts of the United States*, 12 NEV. L.J. 787, 789-90 (2012).

196. Peltz, *supra* note 177, at 136.

197. *Id.*

198. First Judiciary Act, ch. 20, § 9, 1 Stat. 76, 76-77 (1789); Act of Feb. 26, 1845, ch. 20, 5 Stat. 726, 726-27 (extending the jurisdiction of the District courts to certain cases).

199. HEALY ET AL., *supra* note 35, at 254 (citing 46 U.S.C.A. § 31307 “This chapter supersedes any state statute conferring a lien on a vessel to the extent the statute establishes a claim to be enforced . . . *in rem* against the vessel.”).

200. Peltz, *supra* note 177, at 137; 26 U.S.C. § 7441; 28 U.S.C. § 151; *id.* § 1491; *id.* § 1581; *id.* § 1295; 38 U.S.C. § 7252; 10 U.S.C. § 867.

201. *Member States, IGOs and NGOs*, INTERNATIONAL MARITIME ORGANIZATION, <http://www.imo.org/en/About/Membership/Pages/Default.aspx> [<https://perma.cc/727Z-TPE4>] (reflecting that 174 states are members); *see also National Maritime Law Associations*, COMITÉ MAR. INT’L, <http://comitemaritime.org/members/national-maritime-law-association/> [<https://perma.cc/TF2Z-PT3W>] (reflecting 51 member states).

202. Haight, *supra* note 32, at 194.

203. *Id.*

three of them, or approximately fifteen percent.²⁰⁴ While the percentage of CMI conventions ratified by the U.S. is rather bleak, the U.S. seems to be far more willing to ratify the conventions put forth by the International Maritime Organization, ratifying twenty-eight of the fifty-nine conventions, or approximately forty-seven percent.²⁰⁵ While definitely a nudge in the direction of uniformity, the conventions the U.S. has been a signatory on still represent only a fraction of the issues within maritime law, such as safety of life at sea (SOLAS), pollution, and navigation issues.²⁰⁶ Within the IMO, there has been very little harmonization through conventions of maritime legal tort topics.²⁰⁷ While the statutes ratified regarding safety of life at sea could be utilized in a negligence per se capacity, this seems to be the closest achievement to international legal tort harmonization that exists to date.

Moving out of the international realm, U.S. maritime law has seen standardization internally through the passing of a number of maritime related statutes.²⁰⁸ The U.S. set uniform rules on the administration of maritime tort law relating to maritime workers, including the Jones Act, LHWCA, and the DOHSA.²⁰⁹ This federal unification in the protection of maritime workers may be due to the fact that the United States views maritime workers as unusually defenseless, and thus, similar to wards of the state.²¹⁰ While workers make up a

204. *Id.* at 194-95; see also *Status of the Ratifications of and Accessions to the Brussels International Maritime Law Conventions*, COMITÉ MAR. INT'L, 367, 373, 377, 463 <http://comitemaritime.org/wp-content/uploads/2018/05/Status-of-the-Ratifications-of-and-Accessions-to-the-Brussels-International-Maritime-Law-Conventions.pdf> [<https://perma.cc/2FVB-NBDH>].

205. *Status of IMO Treaties*, INTERNATIONAL MARITIME ORGANIZATION, <http://www.imo.org/en/About/Conventions/StatusOfConventions/Documents/Status%20-%202019.pdf> (showing the U.S. as a signatory for 27 conventions) [<https://perma.cc/5NAU-X49K>]; *Member States*, INTERNATIONAL MARITIME ORGANIZATION, <http://www.imo.org/en/About/Membership/Pages/MemberStates.aspx> (showing the U.S. as a signatory to the IMO Convention).

206. *Status of IMO Treaties*, INTERNATIONAL MARITIME ORGANIZATION, <http://www.imo.org/en/About/Conventions/StatusOfConventions/Documents/Status%20-%202019.pdf> (showing the conventions that the U.S. is a signatory to and topics covered.)

207. *Compare Introduction to IMO*, INTERNATIONAL MARITIME ORGANIZATION, <http://www.imo.org/en/About/Pages/Default.aspx> (“IMO measures cover all aspects of international shipping—including ship design, construction, equipment, manning, operation and disposal—to ensure that this vital sector for remains safe, environmentally sound, energy efficient and secure.”), and *Status of IMO Treaties*, INTERNATIONAL MARITIME ORGANIZATION, <http://www.imo.org/en/About/Conventions/StatusOfConventions/Documents/Status%20-%202019.pdf> (Showing the lack of tort based topics that the conventions have covered to date).

208. Ernest A. Young, *It's Just Water: Toward the Normalization of Admiralty*, 35 J. MAR. L. & COM. 469, 477 (2004) (citing THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW § 2-1, at 87 (4th ed. 2004)).

209. Jones Act 46 U.S.C. § 30104 (2018.); Longshore and Harbor Workers Compensation Act 33 U.S.C. §§ 901-950 (2018); Death on the High Seas Act 46 U.S.C. §§ 30301-30308 (2018).

210. *Harden v. Gordon*, 11 F. Cas. 480, 485 (C.C.D. Me. 1823) (No. 6047) (“[Seamen] are

significant portion of the individuals affected by maritime issues, there is another large maritime population that is not offered a similar uniformity of protection: cruise ship passengers.²¹¹ This may be either because maritime workers and seamen have been around much longer than the recreational cruise industry,²¹² or possibly because until very recently, maritime law relied on land based tort law for passengers,²¹³ which was relatively established and standardized.²¹⁴

VII. CONCLUSION

Based on the historical standard of the Supreme Court, the Eleventh Circuit, and the principles of the general maritime law, *Frasca v. NCL* was erroneously decided and the Eleventh Circuit drew the wrong conclusions from established precedents. There was no need to introduce a “degree of slipperiness” standard. Stated another way, the court introduced a “degree of obviousness” standard. This is equivalent to comparing a hole in the ground versus a larger hole. They are both dangerous, and the degree to which one is more dangerous than the other is irrelevant and repetitive to the point of its obviousness.

“Open and obvious” does not require a spectrum of obviousness. The standard is whether the reasonable person would have perceived the condition as dangerous through the ordinary use of their senses.²¹⁵ There is no need to introduce a coefficient of friction analysis into a decision regarding if something is open and obvious on a negligent failure to warn claim. The coefficient of friction arguments and fact finding should be reserved for claims of negligent design and or maintenance. As stated previously, *Frasca* has started to spawn a progeny of cases that now utilize the “degree of slipperiness test” for slip and fall claims.²¹⁶ The cruise industry should petition for certiorari to resolve this issue at

emphatically the wards of the admiralty[.]”); Martin J. Norris, *The Seaman as Ward of the Admiralty*, 52 MICH. L. REV. 479, 479 (1954).

211. Crewmembers, Workers & Passengers, GILMAN BEDIGIAN, LLC TRIAL ATTORNEYS, <https://www.gilmanbedigian.com/martime-workers-passengers-injuries.html> (“Maritime law was established to protect the maritime industry, both employers and employees of the industry, and not passengers. Maritime laws are not consumer-centered. . . .”)

212. DR. JEAN-PAUL RODRIGUE & DR. THEO NOTTEBOOM, *THE GEOGRAPHY OF TRANSPORT SYSTEMS* 249 (3rd Ed. 2013) (“From the mid-nineteenth century liner services supported long distance passenger transportation between continents, particularly between Europe and North America...The early goal of the cruise industry was to develop a mass market since cruising was until [the 1960’s] an activity for the elite.”).

213. *Kermarec v. Compagnie Generale Transatlantique*, 79 S. Ct. 406, 409-11 (1959). (“But this Court has never determined whether a different and lower standard of care is demanded if the ship’s visitor is a person to whom the label ‘licensee’ can be attached.”).

214. *See generally* RESTATEMENT (SECOND) OF TORTS (AM. LAW INST. 1977).

215. *Luby v. Carnival Cruise Lines, Inc.*, 633 F. Supp. 40, 42 (S.D. Fla. 1986).

216. *Geyer v. NCL (Bahamas) Ltd.*, 204 F. Supp. 3d 1354, 1358 (S.D. Fla. 2016); *Galarza v. Carnival Corporation*, No. 15-24380-CIV-ALTONAGA/O’Sullivan, 2016 WL 7539223, at *3 (S.D. Fla. Aug. 9, 2016).

the next available opportunity. In the alternative, the cruise industry should lobby Congress to enact legislation, attempting to provide some national uniformity to this area of law, such as they did with the Jones Act and LHWCA. The cruise industry is enormous,²¹⁷ and a Supreme Court ruling or legislation in this area of law would be a large step towards uniformity within maritime law. With an established standard of using common sense and the ordinary use of one's senses to determine if a hazard is open and obvious, the advantages of avoiding experts benefit both the cruise industry and the cruise plaintiff. "The confidence of people in their ability to predict the legal consequences of their actions is vitally necessary to facilitate the planning of primary activity and to encourage the settlement of disputes without resort to the courts."²¹⁸ The courts do not want to reanalyze cases and issues of law that have already been established.²¹⁹ However, that is exactly the situation the Eleventh Circuits "degree of slippery" analysis has created. The Eleventh Circuit Court of Appeals' refinement to the law has created a test that is contrary to maritime law's traditions of simplicity and practicality,²²⁰ and that offers no guidance or predictability,²²¹ ultimately contributing to the decline of uniformity in maritime law, and frustrating the adjudication of maritime issues.

217. *Cruise Industry Overview-2017*, Florida-Caribbean Cruise Ass'n, <http://www.fcca.com/downloads/2017-Cruise-Industry-Overview-Cruise-Line-Statistics.pdf> [<https://perma.cc/Q4KS-DRC2>] (24.2 million passengers cruising globally in 2016).

218. *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 403 (1970); *see also* Peltz, *supra* note 178, at 138.

219. *Moragne*, 398 U.S. at 404 ("Certainly the courts could not provide expeditious resolution of disputes if every rule were fair game for de novo reconsideration in every case.").

220. *Cf. Kermarec v. Compagnie Generale Transatlantique*, 79 S. Ct. 406, 410 (1959) (citing *The Lottawanna*, 88 U.S. (21 Wall.) 558, 575 (1875)). ("should not import concepts that go against the [Maritime Law] traditions of simplicity and practicality.").

221. *Cf. Moragne*, 398 U.S. at 403 ("Very weighty considerations underlie the principle that courts should not lightly overrule past decisions. Among these are the desirability that the law furnish a clear guide for the conduct of individuals. . . . The reasons for rejecting any established rule must always be weighed against . . . [t]he confidence of people in their ability to predict the legal consequences of their actions."); *see also* Haight, *supra* note 32, at 190 ("Those who strive to achieve a uniform maritime law, nationally and internationally, seek to have the people of the maritime community . . . 'be of one language and of one speech,' so that rights and obligations may be certain and predictable.").