UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 1:17-20773-Civ-WILLIAMS/TORRES

SALLY JORDAN,

Plaintiff,

v.

CELEBRITY CRUISES, INC.

Defendant.

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REPORT AND RECOMMENDATION
ON DEFENDANT'S *DAUBERT* MOTION
AND MOTION FOR SUMMARY JUDGMENT

This matter is before the Court on Celebrity Cruises, Inc.'s ("Defendant") *Daubert* motion to strike Plaintiff's expert, Randall Jaques ("Mr. Jaques"), and motion for summary judgment against Sally Jordan ("Plaintiff"). [D.E. 44-45]. On June 27, Plaintiff responded to Defendant's motions [D.E. 53-54][1] and Defendant replied on July 5, 2018. [D.E. 59-60]. Therefore, Defendant's motions are now ripe for disposition. After careful consideration of the motions, responses, replies, relevant authority, and for the reasons discussed below, Defendant's motions should be **GRANTED**.[2]

[1] Plaintiff filed an amended response in opposition to Defendant's *Daubert* motion on July 2, 2018. [D.E. 55].

[2] On July 5, 2018, the Honorable Kathleen Williams referred Defendant's motions to the undersigned Magistrate Judge for disposition. [D.E. 57].

I. BACKGROUND

On or about January 12, 2016, Plaintiff alleges that she was a passenger on Defendant's cruise ship, the *Celebrity Summit*. During the cruise, Plaintiff was seriously injured when she slipped and fell in the bathroom of her cabin room. Plaintiff claims that Defendant (1) failed to properly maintain a bathroom in a reasonably safe condition, (2) failed to properly refrain from creating unreasonably dangerous conditions, (3) knew of the condition at issue in this case for a sufficient amount of time to exercise due care, and (4) failed to have a non-slip mat[3] placed directly inside the step-over entry to the bathroom. As a result of Defendant's negligence, Plaintiff states that she has suffered physical pain, including mental and emotional distress along with a fractured coccyx. Plaintiff has also incurred medical expenses and suffered a permanent physical handicap. Accordingly, Plaintiff demands judgment against Defendant for damages, including pre-judgment interest, costs, and all damages allowable by law.

II. APPLICABLE PRINCIPLES AND LAW

A. Daubert Standard

The decision to admit or exclude expert testimony is within the trial court's discretion and the court enjoys "considerable leeway" when determining the admissibility of this testimony. *See Cook v. Sheriff of Monroe County, Fla.*, 402 F.3d 1092, 1103 (11th Cir. 2005). As explained in *Daubert v. Merrell Dow Pharm., Inc.*,

[3] Plaintiff's amended complaint refers to the bath mat as a "mat/towel." [D.E. 5]. The item is a small white towel similar to those used in hotels as a mat to step on the outside of a shower/bath. For the purposes of this Report and Recommendation, we use "towel mat" and "bath mat" interchangeably.

509 U.S. 579 (1993), the admissibility of expert testimony is governed by Fed. R. Evid. 702.[4] The party offering the expert testimony carries the burden of laying the proper foundation for its admission, and admissibility must be shown by a preponderance of the evidence. *See Allison v. McGhan Med. Corp.*, 184 F.3d 1300, 1306 (11th Cir. 1999); *see also United States v. Frazier*, 387 F.3d 1244, 1260 (11th Cir. 2004) ("The burden of establishing qualification, reliability, and helpfulness rests on the proponent of the expert opinion, whether the proponent is the plaintiff or the defendant in a civil suit, or the government or the accused in a criminal case.").

"Under Rule 702 and *Daubert*, district courts must act as 'gate keepers' which admit expert testimony only if it is both reliable and relevant." *Rink v. Cheminova, Inc.*, 400 F.3d 1286, 1291 (11th Cir. 2005) (citing *Daubert*, 509 U.S. at 589). The purpose of this role is "to ensure that speculative, unreliable expert testimony does not reach the jury." *McCorvey v. Baxter Healthcare Corp.*, 298 F.3d 1253, 1256 (11th Cir. 2002). Also, in its role as "gatekeeper," its duty is not "to make ultimate conclusions as to the persuasiveness of the proffered evidence." *Quiet Tech. DC-8, Inc. v. Hurel-Dubois UK Ltd.*, 326 F.3d 1333, 1341 (11th Cir. 2003)

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[4] Rule 702 states:

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

To facilitate this process, district courts engage in a three part inquiry to determine the admissibility of expert testimony:

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

City of Tuscaloosa, 158 F.3d 548, 562 (11th Cir. 1998) (citations omitted). The Eleventh Circuit refers to the aforementioned requirements as the "qualification," "reliability," and "helpfulness" prongs and while they "remain distinct concepts"; "the courts must take care not to conflate them." *Frazier*, 387 F.3d at 1260 (citing *Quiet Tech*, 326 F.3d at 1341).

Furthermore, in determining the *reliability* of a scientific expert opinion, the Eleventh Circuit considers the following factors to the extent possible:

> (1) whether the expert's theory can be and has been tested; (2) whether the theory has been subjected to peer review and publication; (3) the known or potential rate of error of the particular scientific technique; and (4) whether the technique is generally accepted in the scientific community. Notably, however, these factors do not exhaust the universe of considerations that may bear on the reliability of a given expert opinion, and a federal court should consider any additional factors that may advance its Rule 702 analysis.

Quiet Tech, 326 F.3d at 1341 (citations omitted). The aforementioned factors are not "a definitive checklist or test," *Daubert*, 509 U.S. at 593, but are "applied in case-specific evidentiary circumstances," *United States v. Brown*, 415 F.3d 1257, 1266 (11th Cir. 2005). While this inquiry is flexible, the Court must focus "solely on principles and methodology, not on conclusions that they generate." *Daubert*, 509

U.S. at 594-95. It is also important to note that a "district court's gatekeeper role under *Daubert* 'is not intended to supplant the adversary system or the role of the jury.'" *Quiet Tech*, 326 F.3d at 1341 (quoting *Maiz v. Virani*, 253 F.3d 641, 666 (11th Cir. 2001)). Rather, "[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking but admissible evidence." *Daubert*, 509 U.S. at 580; *see also Chapman v. Procter & Gamble Distrib., LLC*, 766 F.3d 1296, 1306 (11th Cir. 2014) ("As gatekeeper for the expert evidence presented to the jury, the judge 'must do a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue.'") (quoting *Kilpatrick v. Breg, Inc.*, 613 F.3d 1329, 1335 (11th Cir. 2010)).

B. Summary Judgment Standard

"The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

> A party asserting that a fact cannot be or is genuinely disputed must support the assertion by: (A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or (B) showing that materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

Fed. R. Civ. P. 56(c)(1). "On summary judgment the inferences to be drawn from the underlying facts must be viewed in the light most favorable to the party

opposing the motion." *Matsushita Electric Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 597 (1986) (quoting another source).

In opposing a motion for summary judgment, the nonmoving party may not rely solely on the pleadings, but must show by affidavits, depositions, answers to interrogatories, and admissions that specific facts exist demonstrating a genuine issue for trial. *See* Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323–24 (1986). The existence of a mere "scintilla" of evidence in support of the nonmovant's position is insufficient; there must be evidence on which the jury could reasonably find for the nonmovant. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). "A court need not permit a case to go to a jury . . . when the inferences that are drawn from the evidence, or upon which the non-movant relies, are 'implausible.'" *Mize v. Jefferson City Bd. Of Educ.*, 93 F.3d 739, 743 (11th Cir. 1996) (citing *Matsushita*, 475 U.S. at 592–94)).

At the summary judgment stage, the Court's function is not to "weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson*, 477 U.S. at 249. In making this determination, the Court must decide which issues are material. A material fact is one that might affect the outcome of the case. *See id.* at 248 ("Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted."). "Summary judgment will not lie if the dispute about a

material fact is 'genuine,' that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id*

III. ANALYSIS

A. Defendant's Daubert Motion [D.E. 45]

Defendant's *Daubert* motion seeks to strike Plaintiff's expert, Mr. Jaques, because he is unqualified to render any opinions in this case. Plaintiff hired Mr. Jaques as an expert to determine: (1) the cause of Plaintiff's fall, (2) whether the bath mat was folded in compliance with Celebrity's policies, and (3) whether the towel was a hazard for passengers. While Mr. Jaques claims to be a maritime safety expert on a cruise line's conduct, Defendant argues that he has no bachelor or advanced degrees in any field and that his work experience is limited to law enforcement/security duties (including jobs onboard vessels not associated with Defendant).[5]

At a scene inspection following Plaintiff's fall, Defendant contends that Mr. Jaques conducted an unscientific and unreliable test of the slipperiness of the bath mat on the floor by pushing a towel around with his hand. Defendant points out that courts have repeatedly stricken Mr. Jaques as an expert because of his lack of expert qualifications, his unreliable methodologies, and his unhelpful conclusions. *See, e.g.*, *Leroux v. NCL (Bahamas Ltd.)*, 2017 WL 2645755 (S.D. Fla. June 19,

[5] Mr. Jaques' experience has been primarily in law enforcement. He began his career in the maritime industry as a chief shipboard security officer, working on several vessels until December 2007. As a chief security officer, Mr. Jaques was responsible for supervising small commercial motor vessels. In addition to his experience in cruise line safety and security, Mr. Jaques served as a police officer in Miami, Florida. Since 2008, Mr. Jaques has operated his own maritime security and safety consultancy firm.

2017); *Johnson Smith v. Norwegian Cruise Line*, 14-cv-23810-FAM [DE 59]; *Farley v. Oceania Cruises, Inc.*, 2015 WL 1131015 (S.D. Fla. Mar. 12, 2015); *Mendel v. Royal Caribbean Cruises Ltd.*, 2012 WL 2367853 (S.D. Fla. June 21, 2012); *Umana-Fowler v. NCL (Bahamas) Ltd.*, 2014 WL 4832297 (S.D. Fla. Sept. 19, 2014); *Johnson v. Carnival Corp.*, 07-cv-20147-UU [D.E. 150]; *Burdeaux v. Royal Caribbean Cruises Ltd.*, 11-dv-22798-CA [D.E. 86]; *Lancaster v. Carnival Corp.*, 14-cv-20322 [D.E. 148] (limiting testimony). Defendant also suggests that the flaws in Mr. Jaques' expert report are abundant and that he should be precluded from providing any expert testimony in this case.

In sum, Defendant contends that Mr. Jaques' opinions are inadmissible because (1) they will not assist the trier of fact, (2) they are unreliable and unsupported by any methodology, and (3) Mr. Jaques is unqualified. Accordingly, Defendant seeks to strike Mr. Jaques' as an expert witness because he fails to satisfy any of the requirements under Fed. R. Evid. 702, 703, or *Daubert*.

1. ***Qualifications***

Mr. Jaques offers three numbered opinions in his expert report:

> (1) Celebrity should be aware of the tile surface and the instability of the tile surface with a shower towel mat on it, and should have properly placed this floor mat so as to avoid slip/trip and fall accidents which are foreseeable to the cruise lines, however unforeseeable for the passenger as to the hazard posed;
>
> (2) Celebrity did not follow their own policy and procedures and placing the shower mat in its proper folded position either in thirds in front of the shower threshold or to the side of the toilet. What the cabin stewardess did was to improperly place the towel during the turndown service on evening of the 3rd night of the voyage between 8:00 p.m. and 9:00 p.m. What should have taken place was for the stewardess to

> place the towel off to the side of the toilet or away from the shower floor where a passenger would step on it. At the very least, if in this case, if it were folded in thirds in front of the shower, instead of in half, Mrs. Jordan told me her foot would have missed the towel, which is the goal of the policy. My measurements confirm this;
>
> (3) Celebrity Cruises safety committee members and the executive committee members of the ship should have corrected this improper way of placing towel mats during the daily walk about inspections. They had from at approximately 9:00 p.m. at the latest to sometime after midnight (at least three hours) to inspect and correct the shower towel mat placement. The shipboard management should have realized they had a hazardous situation and should have taken corrective action, especially since this is a tile flooring that is unreasonably slippery when wet or dry with a towel on it, especially one folded over.

[D.E. 4-2].

However, Defendant argues that Mr. Jaques is unqualified to give any expert testimony for several important reasons. *See Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 154 (1997) (stating that Rule 702 requires that the expert be qualified and that his testimony assist the trier of fact). First, Defendant claims that Mr. Jaques does not have a bachelor's degree (or any other advanced degree) and that his personal background in law enforcement has no relevance to facts of this case. Second, Defendant claims that Mr. Jaques is unqualified because he has no experience on slip resistance testing, shipboard housekeeping policies, or the supervision of housekeeping employees. And third, Defendant suggests that Mr. Jaques has no background relevant to an individual stepping onto a bathmat, the standards for stateroom bathroom inspections, or any work experience in biomechanics, human factors, or ergonomics. Because Mr. Jaques lacks any relevant experience,

Defendant concludes that he must be precluded from providing any expert testimony.

An expert may be qualified to testify in multiple ways: '"by knowledge, skill, experience, training, or education"' and "not necessarily unqualified simply because her experience does not precisely match the matter at hand." *Furmanite Am., Inc.*, 506 F. Supp. 2d at 1129 (citing *Maiz,* 253 F.3d at 665, 669). "Determining whether a witness is qualified to testify as an expert 'requires the trial court to examine the credentials of the proposed expert in light of the subject matter of the proposed testimony.'" *Clena Investments, Inc. v. XL Specialty Ins. Co.*, 280 F.R.D. 653, 661 (S.D. Fla. 2012) (quoting *Jack v. Glaxo Wellcome, Inc.,* 239 F.Supp.2d 1308, 1314–16 (N.D. Ga. 2002)). "In other words, a district court must consider whether an expert is qualified to testify competently regarding the matters he intends to address." *Clena Investments, Inc.*, 280 F.R.D. at 661 (citing *City of Tuscaloosa,* 158 F.3d at 562–63).

Determining an expert's qualifications is not a stringent inquiry "and so long as the expert is minimally qualified, objections to the level of the expert's expertise [go] to credibility and weight, not admissibility." *Vision I Homeowners Ass'n, Inc. v. Aspen Specialty Ins. Co.*, 674 F. Supp. 2d 1321, 1325 (S.D. Fla. 2009) (citations omitted); *see also Johnson v. Big Lots Stores, Inc.,* 2008 WL 1930681, *14 (E.D .La. Apr. 29, 2008) (summarizing *Rushing v. Kansas City S. Ry. Co.,* 185 F.3d 496, 507 n. 10 (5th Cir. 1999), as "explaining that after an individual satisfies the relatively low threshold for qualification, the depth of one's qualification may be the subject of

vigorous cross-examination"); *see also Martinez v. Altec Indus., Inc.,* 2005 WL 1862677, *3 (M.D. Fla. Aug. 3, 2005) (quoting *Rushing,* 185 F.3d at 507 ("As long as some reasonable indication of qualifications is adduced . . . qualifications become an issue for the trier of fact rather than for the court in its gate-keeping capacity")). After a review of the relevant issues and an expert's qualifications, "the determination regarding qualification to testify rests within the district court's discretion." *Clena Investments, Inc.*, 280 F.R.D. at 661 (citing *Berdeaux v. Gamble Alden Life Ins. Co.,* 528 F.2d 987, 990 (5th Cir. 1976) (footnote omitted)).

Defendant's arguments are well taken. At no point in Mr. Jaques' expert report does he explain how his work experience applies to the facts of this case or the opinions he offers. For example, nothing in Mr. Jaques' work experience supports opinion #1 that Defendant "should [have] be[en] aware of the tile surface," the "instability of the tile surface," or that Defendant should have placed the bath mat "properly . . . so as to avoid slip/trip and fall accidents which are foreseeable to the cruise lines." [D.E. 45-2]. Even if we ignore the lack of experience, opinion #1 is defective because it contains impermissible legal conclusions.[6] Another noticeable shortcoming is that Mr. Jaques' expert report contains no findings regarding any alleged "instability of the tile surface," and his declaration does not address how his work experience relates to tile instability. Making matters worse, Mr. Jaques never indicates that he has ever investigated a shipboard accident where a passenger

[6] "[A]n expert witness may not testify as to his opinion regarding ultimate legal conclusions." *United States v. Delatorre*, 308 F. App'x 380, 383 (11th Cir. 2009) (citing *Montgomery v. Aetna Cas. & Sur. Co.,* 898 F.2d 1537, 1541 (11th Cir. 1990) ("A witness ... may not testify to the legal implications of conduct; the [district] court must be the jury's only source of law.")).

slipped and fell on a bath mat while he was employed aboard a ship. For these reasons, Mr. Jaques is unqualified to render opinion #1.

Mr. Jaques' second opinion is equally defective because he has no work experience in training or supervising housekeeping staff on the proper method of folding bath mats. And without any work experience on housekeeping policies, it is unclear how Mr. Jaques is qualified to offer an opinion on how towels are to be properly folded to avoid slip and falls. For instance, Mr. Jaques opines that "the goal of the policy to fold towels in thirds (versus halves) is to avoid Plaintiff from stepping on the towel." [D.E. 54-1]. But, Mr. Jaques never supports that assertion with any facts nor does he present any work experience that qualifies him to testify about the safety purposes of Defendant's towel arrangements in passenger bathrooms. The fact that Defendant has a standard passenger bathroom policy does not lead to the conclusion that there was an underlying safety purpose. The purpose of the towel arrangement could be related to aesthetic purposes, uniformity of items in the bathroom, or for the convenience of the customers. Mr. Jaques' declaration is also unhelpful because while he has been a cruise passenger on twenty voyages, his observations on other cruise lines do not rise to the level of an industry standard for bath mats. Therefore, Mr. Jaques is unqualified to render opinion #2.

Mr. Jaques' experience is also inadequate to support opinion #3 because his background as a security officer does not render him an expert to determine when a bathroom tile floor becomes unreasonably slippery. Put differently, Mr. Jaques'

work experience in security never involved conducting coefficient of friction tests to determine whether a floor is unreasonably slippery as measured against industry standards. Mr. Jaques also does not have any specialized training in tile floor slip resistance training and while he has conducted 15 coefficient of friction slip tests on vessels, none of them occurred while he was working as a ship security officer. Therefore, we conclude that Mr. Jaques is unqualified to support his contentions in opinion #3 because he lacks the education, training, and shipboard work experience in slip resistance to be qualified as an expert. Because Mr. Jaques has no experience in engineering, housekeeping policies on bath mat placements, training and supervision of housekeepers, or practices for slip resistance in cruise ship bathroom floors, he is unqualified under *Daubert* and Defendant's motion to strike him as an expert should be **GRANTED**.

2. ***Methodology***

Defendant's next argument is that Mr. Jaques' opinions and testimony are inadmissible because they are unsupported by any reliable methodology and fail to rely on a single study, article, or authority as support. "The reliability standard is established by Rule 702's requirement that an expert's testimony pertain to 'scientific . . . knowledge,' since the adjective 'scientific' implies a grounding in science's methods and procedures, while the word 'knowledge' connotes a body of known facts or of ideas inferred from such facts or accepted as true on good grounds." *Daubert*, 509 U.S. at 580. This entails an assessment of whether the "methodology underlying the testimony is scientifically valid." *Id*. at 592. The four

non-exhaustive factors used to evaluate the reliability of a scientific expert opinion include the following:

> (1) whether the expert's theory can be and has been tested; (2) whether the theory has been subjected to peer review and publication; (3) the known or potential rate of error of the particular scientific technique; and (4) whether the technique is generally accepted in the scientific community.

Frazier, 387 F.3d at 1262 (citations omitted).

Defendant suggests that Mr. Jaques' experience fails to provide "sufficient foundation rendering reliable *any* conceivable opinion the expert may express." *Frazier*, 387 F.3d at 1262 (emphasis in original). As support, Defendant relies on *Farley v. Oceania Cruises, Inc.*, 2015 WL 1131015, at *1 (S.D. Fla. Mar. 12, 2015). In *Farley*, Judge O'Sullivan struck Mr. Jaques as an expert witness where he sought to provide maritime liability and safety opinions regarding "safety issues and the applicable standards of care and policies and procedures in the cruise ship industry for maintaining clear passageways for the safety of passengers and crew members and to opine regarding the cause of [the p]laintiff's fall . . . ." *Id.* Mr. Jaques opined that the cruise line was "careless and negligent" and that the cruise line was "at fault" for the passenger's injury. *Id.* The Court found that Mr. Jaques' methodology failed for several reasons because (1) "Mr. Jaques failed to inspect the vessel where the accident took place or interview any crew members," (2) "[h]e d[id] not cite to any publications or experiments to support his opinions with respect to lounge chair safety," and (3) "d[id] not provide a detailed explanation of how his experience supports his opinions or what materials he consulted (other than the

policies and procedures of competitor cruise line operators) to reach his conclusions." *Id*. at *8.

We agree that Mr. Jaques' methodology (or lack thereof) suffers from many, if not all, of the deficiencies identified in *Farley*. First, his expert report simply lists a number of conclusory statements without any foundation. Second, he fails to indicate whether his opinions were subject to any verification or peer review, or how his experience specifically informed his opinions. Neither his report nor his testimony references a single study, article, or authority to support his opinions. *See Johnson v. Carnival Corp*., No. 07-20147-Civ-UNGARO (finding that "Plaintiff's assertions fall far short of demonstrating *how* Jaques' experience leads to his conclusions and opinions, *why* his experience is a sufficient basis for his opinions, and *how* his experience is reliably applied to the facts of Plaintiff's case.") (citations omitted).

Third, Mr. Jaques' opinions and testimony are not "tethered to any supporting materials or sources" and there are no studies, peer-reviewed materials, treatises, sources, data nor anything else underlying his views. *Farley*, 2015 WL 1131015, at *7. As an example, Mr. Jaques described his methodology for testing the slip resistance of the towel on top of the bathroom floor as applying one pound of pressure to a towel and moving it around the floor:

> I applied 1 pound of pressure to the towel as it was laid out on the tile floor as stated by the plaintiff on the night of the accident. On a dry surface the towel slides forward and bunches up.

[D.E. 45-2]. In his supplemental report, Mr. Jaques further explained that exact measurements were unnecessary in determining the cause of Plaintiff's fall:

> [T]he force that I applied at an angle was through my hand; however an exact measurement of the force is unnecessary, because it is well known in our industry that given the light weight of the shower towel mat, it will move at some angle of application, regardless of its coefficient of friction to the floor.

Id.

Mr. Jaques' opinions lack any scientific methodology because he merely placed his hand on a bath mat and pushed it around a floor. We can find no case – and Plaintiff failed to cite any – where this method or anything remotely close to it has been recognized as a reliable scientific methodology for arriving at an expert opinion on determining the slip resistance of a floor. Mr. Jaques' method is also unreliable because he compares his height to Plaintiff's to approximate the angle at which her foot stepped onto the bath mat. Yet, Mr. Jaques fails to include any supporting scientific rationale that demonstrates this is an acceptable methodology under *Daubert*.

In sum, Mr. Jaques' expert report fails at every turn because he fails to present any objective criteria into his method of testing the slip resistance properties of the towel on top of a dry tiled floor. Mr. Jaques did not measure the weight of the towel, its dimensions, or its composition. He also failed to reference the composition of the bathroom tile surface, to cite an accepted coefficient of

friction standard applicable to the floor, and to opine that Defendant's bathroom floor fell below an acceptable standard for coefficient of friction.[7] For these reasons, Mr. Jaques' methodology does not satisfy *Daubert* and Defendant's to strike him as an expert should be **GRANTED**.

3. ***Helpfulness***

Defendant's final argument is that Mr. Jaques' opinions will not assist or help the trier of fact. Specifically, Defendant contends that Mr. Jaques' opinions are unhelpful because they are conclusory and fail to offer anything beyond the comprehension of a layperson. Defendant also claims that Mr. Jaques' opinions are improper because they (1) substitute an artificially heightened standard of care, (2) instruct the fact-finder on which result to reach, and (3) present confusing testimony.

"[E]xpert testimony is admissible if it concerns matters that are beyond the understanding of the average lay person" and offers something "more than what lawyers for the parties can argue in closing arguments." *Frazier*, 387 F.3d at 1262-63 (citations omitted). While "[a]n expert may testify as to his opinions on an ultimate issue of fact . . . he 'may not testify as to his opinion regarding ultimate legal conclusions.'" *Umana-Fowler v. NCL (Bahamas) Ltd.*, 49 F. Supp. 3d 1120, 1122 (S.D. Fla. 2014) (quoting *Delatorre,* 308 F. App'x at 383). The Eleventh Circuit has also made clear that "merely telling the jury what result to reach is unhelpful

[7] Without an applicable standard against which to compare, no reliable conclusion or opinion on the unreasonable of slipperiness can be made.

and inappropriate." *Umana-Fowler*, 49 F. Supp. 3d at 1122 (citing *Montgomery v. Aetna Cas. & Sur. Co.*, 898 F.2d 1537, 1541 (11th Cir. 1990)).

Mr. Jaques' expert reports are unhelpful because his conclusions lack any supporting facts and contradict Plaintiff's testimony. Mr. Jaques lists, for example, "materials reviewed" in his Rule 26 report and indicates that he reviewed all depositions. [D.E. 45-2]. However, he states in a parenthetical on the first page of the report that he has *not* been provided any depositions in the preparation of his report.[8] The inconsistencies in Mr. Jaques' expert report do nothing other than undermine Plaintiff's contention that his testimony will be helpful to the trier of fact.

Putting aside that problem, Mr. Jaques' expert report is unhelpful because it makes many claims without any supporting facts that are contradicted by the underlying record. For example, Mr. Jaques opines that Plaintiff "was not aware that the half folded over towel mat was a hazard in her path because the towel placement is *deceiving* when you look down at it and step into the bathroom." *Id.* (emphasis added). But, Mr. Jaques fails to explain how the placement of a bath mat can be deceiving when Plaintiff testified that she saw the bath mat and intentionally stepped on it:

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[8] Given the many inconsistencies between Mr. Jaques and Plaintiff, it appears that Mr. Jaques did not review any deposition materials in the preparation of his report.

> Q: . . . When you went into the bathroom, did you notice anything about the bathroom?
> A: Yes, I noticed the bath mat was on the floor.

[D.E. 45-1, 89:1-4].

> Q: You saw the bath mat before you stepped on it?
> A: Yes.
> Q: Did you turn the light on before you walked into the bathroom?
> A: Yes.
> Q: And you looked down at the floor?
> A: Yes.

Id. at 89:19-90:1.

> Q: Now, you opened the cabin door that night. You had the light on. You looked down. There was nothing obstructing your view of the floor, was there?
> A: No.
> Q: And there was nothing that made the mat camouflaged in any way, was there?
> A: No

Id. at 98:5-15.

Indeed, the record presented shows that Plaintiff could have moved the towel mat before stepping on it, but decided to proceed anyways:

> Q: Could you have reached down and moved the mat before stepping into the bathroom?
> A: Could I? Yes.

Id. at 100:23-14.

> Q: All right. So you saw the mat there, and you intentionally stepped on it?
> A: Yes.

Id. at 101:24-102:1. Mr. Jaques' opinions are therefore unhelpful because they are contradicted by the underlying record and "[e]xpert evidence based on a fictitious

set of facts is just as unreliable as evidence based on no research at all." *Guillory v. Domtar Indus. Inc.*, 95 F.3d 1320, 1331 (5th Cir. 1996).

Another notable inconsistency occurs when Mr. Jaques opines on the slip resistant properties of the bathroom floor when *wet*. But, Plaintiff testified that the floor was *not* wet and that there were no slippery or foreign substances on it at the time of her fall.

> Q: When you went into the cabin that night and you had your accident, was there anything wet on the floor?
> A: No.

Id. at 112:15-18.

> Q: On the night of your accident, you didn't notice any foreign substance on the bathroom floor?
> A: No.

Id. at 124:8-11.

> Q: The night of your incident, you didn't notice any oily or slippery type of substance on the floor of the cabin bathroom?
> A: No.
> Q: Is it accurate to say that the thing that made your foot slip as you stepped in was the bath mat as opposed to some other foreign substance on the floor?
> A: I don't know why the mat slipped.

Id. at 123:18-124:1.

Mr. Jaques' expert reports are also defective because they include impermissible legal conclusions. For example, Mr. Jaques states that "Mrs. Jordan did nothing to contribute to her accident and subsequent injuries." [D.E. 45-2]. Mr. Jaques' expert reports suffer from the same deficiencies as in *Higgs v. Costa Crociere S.p.A. Co.*, 2016 WL 4370012 (S.D. Fla. Jan. 12, 2016). In *Higgs*, Judge

Cohn found that Mr. Jaques' expert report contained impermissible legal conclusions because it included statements that "Costa is at fault" and that the crew "was careless." As a result, Judge Cohn struck all of those statements because they ran afoul of Eleventh Circuit precedent and *Daubert*.

The same reasoning applies here. Mr. Jaques' opinion – that Plaintiff did nothing to contribute to her accident is an impermissible legal conclusion – is defective because under *Daubert* an expert "may not testify as to his opinion regarding ultimate legal conclusions." *Delatorre*, 308 F. App'x 380, 383 (11th Cir. 2009) (citing *Montgomery,* 898 F.2d at 1541). Indeed, the Eleventh Circuit has reportedly held that legal conclusions or statements instructing what conclusion the jury should reach are impermissible under *Daubert*. *See Cook ex rel. Estate of Tessier v. Sheriff of Monroe Cnty., Fla.*, 402 F.3d 1092, 1112 n.8 (11th Cir. 2005) ("[C]ourts must remain vigilant against the admission of legal conclusions") (citations & quotations omitted); *see also Montgomery*, 898 F.2d 1541 (11th Cir. 1990) ("An expert may not . . . merely tell the jury what result to reach."). "A witness also may not testify to the legal implications of conduct; the court must be the jury's only source of law." *Montgomery*, 898 F.2d 1541 (citing *United States v. Poschwatta,* 829 F.2d 1477, 1483 (9th Cir. 1987); *United States v. Baskes,* 649 F.2d 471, 479 (7th Cir. 1980)). Because Plaintiff's expert reports include legal conclusions, we have no choice but to find that Defendant's *Daubert* motion to strike Mr. Jaques and all of his expert testimony should be **GRANTED**.

B. Defendant's Motion for Summary Judgment [D.E. 44]

On June 11, 2018, Defendant filed a motion for summary judgment against Plaintiff because (1) the risk of slipping on a bath mat is open and obvious, and (2) Plaintiff failed to adduce any evidence that Defendant was on notice of the risk-crating condition. [D.E. 44]. Claims arising from alleged tort actions aboard ships sailing in navigable waters are governed by general maritime law. *See Keefe v. Bahama Cruise Line, Inc.*, 861 F.2d 1318, 1320 (11th Cir. 1989). Absent an applicable statute, general maritime law is "an amalgam of traditional common-law rules, modifications of those rules and newly created rules" drawn from state and federal sources. *East River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 864-65 (1986). Maritime law may be supplemented by state law principles so long as application of the state law does not place "substantive admiralty principles" at risk. *In re Amtrak Sunset Ltd. Train Crash in Bayou Canot, Ala. on Sept. 22, 1993*, 121 F.3d 1421, 1426 (11th Cir. 1997); *see also Yamaha Motor Corp., U.S.A., v. Calhoun*, 516 U.S. 199, 210 (1996); *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 409 (1953).

As a sea carrier, Defendant does not serve as strict liability insurer to its passengers, meaning Defendant can only be liable for negligence. *See Kornberg v. Carnival Cruise Lines, Inc.,* 741 F.2d 1332, 1334 (11th Cir. 1984); *Keefe,* 867 F.2d at 1322. This means that "the owner of a ship only owes passengers a 'duty of reasonable care' under the circumstances." *Sorrels v. NCL (Bahamas) Ltd.*, 796 F.3d 1275, 1279–80 (11th Cir. 2015) (citing *Kermarec v. Compagnie Generale*

Transatlantique, 358 U.S. 625, 632 (1959); *Gibboney v. Wright,* 517 F.2d 1054, 1059 (5th Cir. 1975)). "[T]o prevail in a negligence action the plaintiff must show that: (1) the defendant owed plaintiff a duty; (2) the defendant breached that duty; (3) the defendant's breach was the proximate cause of plaintiff's injuries; and (4) the plaintiff suffered damages." *Weiner v. Carnival Cruise Lines*, 2012 WL 5199604, at *2 (S.D. Fla. Oct. 22, 2012) (citing *Isbell v. Carnival Corp.,* 462 F. Supp. 2d 1232, 1236 (S.D. Fla. 2006)). Each element is essential to a negligence claim and, at this stage of the proceedings, it is established that a "[p]laintiff cannot rest on the allegations of her complaint in making a sufficient showing on each element for the purposes of defeating summary judgment." *Isbell*, 462 F. Supp. 2d at 1236–37 (citing *Tipton v. Bergrohr GMBH-Siegen,* 965 F.2d 994, 999 (11th Cir. 1992)); *Taiariol v. MSC Crociere, S.A.*, 2016 WL 1428942, at *3 (S.D. Fla. Apr. 12, 2016), *aff'd*, 677 F. App'x 599 (11th Cir. 2017) ("The failure to show sufficient evidence of each element is fatal to a plaintiff's negligence cause of action."). Because the accident in this case occurred aboard a cruise ship, these elements must be evaluated in connection with federal maritime law. *See Smolnokar v. Royal Caribbean Cruises Ltd.,* 787 F. Supp. 2d 1308, 1315 (S.D. Fla. 2011) ("Federal maritime law applies to actions arising from alleged torts 'committed aboard a ship sailing in navigable waters.'").

The reasonable care under the circumstances standard, as a prerequisite to imposing liability, also requires that the ship owner have had actual or constructive notice of the risk-creating condition, at least where, the risk is one just as commonly

encountered on land (and not clearly linked to nautical adventure). *Keefe,* 867 F.2d at 1322. "But 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." *Smith v. Royal Caribbean Cruises, Ltd.*, 620 F. App'x 727, 730 (11th Cir. 2015). In other words, if a condition is not obvious and obvious, liability attaches only to those "dangers the cruise line knows or reasonably should have known." *Smolnikar*, 787 F. Supp. 2d at 1322 (citing *Carlisle v. Ulysses Line Ltd., S.A.*, 475 So. 2d 248, 251 (Fla. 3d DCA 1985) (cruise line owners have a duty to warn that "encompasses only dangers of which the carrier knows, or reasonably should have known"); *Goldbach v. NCL (Bahamas) Ltd.,* 2006 WL 3780705, at *2 (S.D. Fla. Dec. 20, 2006) (same)). In other words, this duty only extends to "those dangers which are not apparent and obvious to the passenger." *Luby v. Carnival Cruise Lines, Inc.*, 633 F. Supp. 40, 41 (S.D. Fla. 1986) (*citing N.V. Stoomvaart Maatschappij Nederland v. Throner,* 345 F.2d 472 (5th Cir. 1965)); *see also Cohen v. Carnival Corp.*, 945 F. Supp. 2d 1351, 1357 (S.D. Fla. 2013) ("[T]here is no duty to warn of dangers that [are] of an obvious and apparent nature.") (internal quotation marks omitted).

In this case, Plaintiff's theory of liability is that Defendant breached its duty of care because a bath mat was not folded correctly. If Defendant had complied with its own policies and procedures, Plaintiff believes that she would not have been injured. Plaintiff relies on her expert, Mr. Jaques, who testified that the purpose of

folding the towel in thirds or quarters is to keep it from creating a stepping hazard.[9] Because Defendant failed to comply with its own policies, Plaintiff concludes that there is evidence that Defendant was negligent and that Defendant's motion for summary judgment should therefore be denied.

If we assume that the risk-creating condition was not open and obvious[10], Defendant's liability turns on whether it had either actual or constructive notice of the risk-creating condition. "Courts routinely grant summary judgment in a defendant's favor when a plaintiff fails to adduce evidence on the issue of notice." *Taiariol*, 2016 WL 1428942, at *4, *aff'd*, 677 F. App'x 599 (11th Cir. 2017) *(*citing *Lipkin v. Norwegian Cruise Line Ltd.*, 93 F. Supp. 3d 1311, 1324 (S.D. Fla. 2015) ("Because Plaintiff has failed to cite any evidence in the record showing that [Defendant] had actual or constructive notice of the risk-creating condition alleged in the complaint . . . summary judgment in favor of [Defendant] is appropriate in this matter."); *Thomas v. NCL (Bahamas) Ltd.,* 2014 WL 3919914, at *4 (S.D. Fla. Aug. 11, 2014) (granting summary judgment where "[t]he unrefuted evidence in the record instead indicates a lack of actual or constructive notice"); *Cohen*, 945 F. Supp. 2d at 1355 (granting summary judgment where plaintiff "presented no

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[9] Of course, we need not rely on Mr. Jaques' testimony because, as stated above, his expert opinions contain an abundance of flaws that fail at every turn under *Daubert*.

[10] Plaintiff argues that Defendant has the burden to prove not only that the condition itself was open and obvious but that the *dangerousness* of the condition was also open and obvious. Plaintiff's argument is persuasive because there is nothing open and obvious about a dry floor with a towel mat on it. If Defendant's position was correct, anything would be open and obvious irrespective of its associated danger. That cannot be the law.

evidence that [Defendant] had actual or constructive notice of the alleged risk-creating condition," noting such evidence could include "a record of any accident reports, passenger comment reviews or forms, or reports from safety inspections alerting [Defendant] of any potential safety concern")).

Courts have also found that, at this stage of the case, "mere implication of actual or constructive notice is insufficient to survive summary judgment." *See Lipkin*, 93 F. Supp. 3d at 1323 (citation omitted); *see also Thomas*, 2014 WL 3919914, at *4; *Cohen*, 945 F. Supp. 2d at 1357 (citing *Adams v. Carnival Corp.*, 2009 WL 4907547, at *5 (S.D. Fla. Sept. 29, 2009) (finding plaintiff needed "specific facts" rather than "mere implication" to demonstrate notice)). Here, implication is all that Plaintiff offers because she failed to adduce any evidence of prior passenger accidents or injuries occurring while stepping onto a towel inside a bathroom to put Defendant on notice of a risk-creating condition. *See Pizzino v. NCL (Bahamas) Ltd.*, 709 F. App'x 563, 565 (11th Cir. 2017). Indeed, Plaintiff has not provided any evidence to refute Safety Officer Baferos's testimony that there has never been a claim involving *any* bathroom from the time he started working for Defendant in 2004 through the time of his 2018 deposition. The record is simply devoid of any reference to an accident that would have alerted Defendant to a dangerous condition in its bathrooms, especially situations involving a dry bath mat.

Even assuming that Defendant knew of the alleged danger with respect to a dry bath mat, there is also no evidence that the condition existed over a period of time to allow for corrective action. And without prior complaints from other

passengers and with regular servicing of the cabin bathrooms, Defendant cannot be deemed to have negligently disregarded a risk to Plaintiff's safety. This means that Plaintiff cannot survive summary judgment by the mere implication of notice because specific facts are needed to demonstrate that the risk-creating condition was detectable and that Defendant had sufficient time to allow for corrective action. *See Adams v. Carnival Corp.*, 2009 WL 4907547, at *5 (S.D. Fla. Sept. 29, 2009).

Moreover, Plaintiff's lack of evidence runs counter to the Eleventh Circuit's "substantial similarity doctrine" which requires a party to provide evidence of "conditions substantially similar to the occurrence in question" that "caused the prior accident." *Jones v. Otis Elevator Co.*, 861 F.2d 655, 661–62 (11th Cir. 1988) (citation omitted); *see also Sorrels v. NCL (Bahamas) Ltd.*, 796 F.3d 1275, 1287–88 (11th Cir. 2015) (affirming district court's ruling that "evidence of 22 other slip and fall incidents" aboard defendant's vessel did not meet the "substantial similarity doctrine" as none of the falls occurred where plaintiff fell, other injured passengers wore varying styles of footwear, and additional factors were involved).

If we viewed this issue through a general foreseeability lens, the outcome would be the same because there is no evidence that the type of slip and fall that Plaintiff experienced "occurred with enough frequency to impute constructive notice" to Defendant of a dangerous condition in the cabin bathrooms. *See Weiner*, 2012 WL 5199604, at *5 (finding no evidence "that spills and accidents of the sort" Plaintiff experienced occurred enough to "impute constructive notice"); *see also Mercer v. Carnival Corporation*, 2009 WL 302274, at *2 (S.D. Fla. Feb. 9, 2009)

(rejecting argument that cruise line "had actual or constructive notice of the dangerous propensities of high gloss hardwood floors being in close proximity to the bathroom," where plaintiff fell after exiting the shower, because plaintiff failed to produce "any evidence to support his contention that [cruise line] had notice of the allegedly dangerous condition").

As for Plaintiff's final argument that the floor was unreasonably slippery and that this produces an issue of fact for the jury, this contention lacks merit because it relies on the expert opinions of Mr. Jaques. Mr. Jaques' opinions do not competently establish that a dangerous condition existed in Plaintiff's bathroom because his expert reports are flawed under *Daubert*. But, even if we ignore the fact that Mr. Jaques is not a competent expert, the disposition of Defendant's motion would be no different because of the way in which Mr. Jaques conducted his tests of the bathroom floor. Mr. Jaques tested the supposed slipperiness of the bath mat on the tile floor by putting his hand on top of the towel and pushing it at an angle. Not only is pushing a towel on a floor an unscientific method devoid of any reliable methodology, Mr. Jaques failed to report a standard acceptable coefficient of friction for the floor or bath mat. Mr. Jaques is of no help to Plaintiff because his opinion on the slipperiness of the bathroom amounts to nothing more than speculation which "does not create a genuine issue of fact; instead it creates a false issue, the demolition of which is a primary goal of summary judgment." *Hedberg v. Ind. Bell Tel. Co.,* 47 F.3d 928, 931–32 (7th Cir. 1995). Because Plaintiff has failed to adduce evidence that Defendant was on notice of prior passenger accidents or injuries

occurring while stepping onto a bath mat inside a cabin bathroom, Defendant's motion for summary judgment should be **GRANTED**.

IV. CONCLUSION

For the foregoing reasons, the Court **RECOMMENDS** that Defendant's *Daubert* motion to strike Mr. Jaques and Defendant's motion for summary judgment be **GRANTED**. [D.E. 44-45].

Pursuant to Local Magistrate Rule 4(b) and Fed. R. Civ. P. 73, the parties have fourteen (14) days from service of this Report and Recommendation within which to file written objections, if any, with the District Judge. Failure to timely file objections shall bar the parties from *de novo* determination by the District Judge of any factual or legal issue covered in the Report *and* shall bar the parties from challenging on appeal the District Judge's Order based on any unobjected-to factual or legal conclusions included in the Report. 28 U.S.C. § 636(b)(1); 11th Cir. Rule 3-1; *see, e.g., Patton v. Rowell,* 2017 WL 443634 (11th Cir. Feb. 2, 2017); *Cooley v. Commissioner of Social Security,* 2016 WL 7321208 (11th Cir. Dec. 16, 2016).

DONE AND SUBMITTED in Chambers at Miami, Florida, this 25th day of July, 2018.

/s/ *Edwin G. Torres*
EDWIN G. TORRES
United States Magistrate Judge