ARTICLE FOR AAJ
LITIGATION AT SUNRISE

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CRUISE SHIP SLIP AND FALLS; A PRIMER.

VENUE. The action must be filed in the venue designated in the passenger ticket. *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 111 S.Ct. 1522, 1528, 113 L.Ed.2d 622 (1991).

The following are the venues selected by some of the cruise lines as of the date of this paper:

CARNIVAL CRUISE LINES: Miami

ROYAL CARIBBEAN CRUISES LTD.: Miami

NORWEGIAN CRUISE LINES: Miami

CELEBRITY CRUISE LINES: Miami

OCEANIA CRUISES: Miami

SEABOURN (The Yachts of Seabourn): Miami

CELEBRATION CRUISE LINES: Ft. Lauderdale

COSTA CROCIERE: Ft. Lauderdale

DISCOVERY CRUISES: Ft. Lauderdale

MSC CRUISES: Ft. Lauderdale

SILVERSEA CRUISES: Ft. Lauderdale

DISNEY CRUISE LINE: Orlando

CRYSTAL CRUISES: California

CUNARD LINE: Los Angeles

PRINCESS CRUISES: Los Angeles

HOLLAND AMERICA LINE: Seattle

STATUTES OF LIMITATIONS. The statutes of limitations is also designated in the passenger ticket. The limitation for most if not all lines is one year. That limitation has been held to be enforceable.

DUTIES OWED. The cruise lines' duties under the maritime law is the "duty to exercise reasonable care for the safety of its passengers". See, *Hall vs. Royal Caribbean Cruises, Limited*, 888 So. 2d 654 (Fla. 3d DCA 2004), 2004 A.M.C. 1913; citing *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625, 79 S. Ct. 406, 3 L. Ed. 2d 550 (1959); *The Moses Taylor*, 4 Wall. 411, 71 U.S. 411, 18 L. Ed. 397 (1866); *Carlisle v. Ulysses Line Ltd*., 475 So. 2d 248 (Fla. 3d DCA 1985). The duty also has been described as a "duty to exercise reasonable care under the circumstances". See, *Harnesk vs. Carnival Cruise Lines, Inc*, 1992 AMC 1472, 1991 WL 329584 (S. D. Fla. 1991). The Defendant's "duty is to warn of dangers known to the carrier in places where the passenger is invited to, or may reasonably be expected to visit." See, *Carlisle vs.*

Ulysses Line Limited, S.A., 475 So. 2d 248 (Fla. 3d DCA 1985). *Vierling v. Celebrity Cruises,* 339 F.3d 1309, 1319-20 (11th Cir. 2003)("Courts sitting in admiralty have long recognized an obligation on the part of a carrier to furnish its passengers with a reasonably safe means of boarding and leaving the vessel, that this obligation is non-delegable, and that even the 'slightest negligence' renders a carrier liable.

DUTY OWED TO GET THE PASSENGERS SAFELY ON AND OFF THE SHIP.

The shipowner owes a duty to provide safe ingress and egress to its passengers. This extends beyond the vessel to all means to getting ashore and back. *Samulov v. Carnival Cruise Lines, Inc.,* 870 So.2d 853 (Fla. 3d DCA 2003); *Chan v. Society Expeditions, Inc*., 123 F.3d 1287 (9th Cir. 1997). The contract of carriage imposes a duty on the carrier to transport passengers safely. See *Kermarec v. Compangie Generale Transatlantique* 358 U.S 625, 632, 79 S.Ct. 406 (1959); *Keefe v. Bahama Cruise Line, Inc*., 867 F.2d 1318, 1321 (11th Cir. 1989).

Where an entity holds itself out and conducts itself as the carrier, it owes a duty to passengers to provide them with safe transportation from the ship to shore. *Chan v. Society Expeditions, Inc*., 123 F.3d 1287, 1291 (9th Cir. 1997). 1 Norris, The Law of Maritime Personal Injuries, §3:6, 8:16, 66-67, 81-83 (where a vessel cannot tie up to a dock and tenders or launches are used, carrier must maintain a reasonably safe means of transport from the vessel to shore). cited approvingly in *Chan v. Society Expeditions, Inc*., 123 F.3d 1287, 1292 (9th Cir. 1997). It also cites 1 Norris, The Law of Maritime Personal

Injuries, §3:6, p. 66-67, that contract provisions relieving the carrier of liability to a cruise ship passenger for injuries occurring while in a launch are likely void as violations of public policy.

Providing safe ingress and egress is essential, because leaving at various ports is the sine qua non of cruise ship travel.. "Where a passenger or cruise vessel puts into numerous ports in the course of the cruise, these stopovers are the sine qua non of the cruise. In such a situation, the shipowner has a duty to exercise a high degree of care in seeing to the safe embarking and disembarking of the passengers". *Isahm v. Pacific Far East Line Inc*., 476 F.2d 835, 837 (9th Cir. 1973).

OPEN AND OBVIOUS. It is Hornbook law that **it is the dangerousness of the condition or the object which must be open and obvious, not simply the object itself.** This concept was expressed in a maritime case which involved a slip on a raised threshold or combing in *Kolster Cruise Limited vs. Grubbs*, 762 So. 2d. 552 (Fla. 3d DCA 2000). In *Grubbs*, the defendant cruise line (Kolster owned Norwegian Cruise Line) argued that the raised threshold or combing was open and obvious. However, the plaintiff apparently slipped on the combing and the slipperiness of it was not apparent. The court in *Grubbs* said:

> [W]hile it is true as a general proposition that a property owner had no duty to warn of such dangers, there are important limitations on the rule, two of which apply here. **First, it is the dangerous condition of an object which must be open an obvious, not simply the object itself**. …**Second, a property owner is not absolved of responsibility when the owner has reason to believe that others will encounter the dangerous condition regardless of the open and obvious nature of the condition.** *Pittman v. Volusia County*, 380 So.2d 1192 (Fla. 5th DCA 1980). The dangerous object at issue in this case is a

> threshold leading into the ship which is designed for passengers to pass through. The length of the metal threshold and drain are roughly equal to the length of an ordinary shoe. **Clearly, Norwegian must have anticipated that some passengers would step over the threshold and other passengers would, with some frequency, step onto the threshold or drain cover.**

(Emphasis added). *Kolster Cruise Limited vs. Grubbs*, 762 So. 2d. at 555.

This same cruise line raised this same defense in *Samulov v. Carnival Cruise Lines, Inc.*, 870 So.2d 853 (Fla. 3d DCA 2003). In that case, the Plaintiff also slipped and fell on a wet deck which was open to the wind and rain. (In *Samulov*, the deck was on a tender for which Carnival has responsibility). The District Court of Appeal reversed a directed verdict in favor of Carnival, and said:

> 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. *Kloster Cruise Ltd. V. Grubbs*, 762 So.2d 552, 555 (Fla. 3d DCA 2000). **The fact that passengers would have to cross the wet, slippery, exposed upper deck of the tender should have been reasonably anticipated by Carnival.** Therefore, the trial court erred by directing a verdict and should have allowed the case to proceed to a jury verdict.

(Emphasis added). *Samulov*, 870 So. 2d at 856.

The doctrine of open and obvious **applies only to the duty** of the premises owner or the premises manager **to provide notice** of a dangerous condition. This was explained recently in the case of *Aaron v. Palatka Mall, LLC.*, 908 So.2d 574 (Fla. 5th DCA 2005). In *Aaron,* the District Court of Appeal **reversed a summary judgment for the defendant** mall. In that case, the plaintiff alleged that the mall breached its duty to maintain the premises in a safe condition and to warn her of the dangerous condition, mainly the poor lighting and failure to maintain crowd control. This, according to the

plaintiff, led to a situation where a woman pushing a stroller within a crowd caught hold of the heel of the plaintiff causing her to fall and suffer serious injuries.

The court in *Aaron* explained that "the courts generally agree that the obvious danger doctrine does not apply when negligence is predicated on breach of the duty to maintain the premises in a reasonably safe condition." (Emphasis added). The Court in *Aaron* cited *Marriott Int'l Inc., v. Perez-Melendez,* 855 So. 2d 624 (Fla. 5th DCA 2003) in which the District Court of Appeal said:

> [T]he courts have consistently held that while the open and obvious danger doctrine may in certain circumstances discharge the duty to warn, **it does not discharge the landowner's duty to maintain the property in a reasonable safe condition.** *Knight v. Waltman,* 774 So. 2d 731 (Fla. 2d DCA 2000); *Kersul v. Boca Raton Cmty. Hosp., Inc.,* 711 So. 2d 234 (Fla. 4th DCA 1998); *Regency Lake Apartments Associates, Ltd., v. French,* 590 So. 2d 970 (Fla. 1st DCA 1991); *Hogan v. Chupka,* 579 So. 2d 395, 396 (Fla. 3d DCA 1991); *Pittman v. Volusia County,* 380 So. 2d 1192 (Fla. 5th DCA 1980). In *Pittman*, this court explained why the doctrine does not extend to the duty to maintain the premises in a reasonably safe condition: The fallacy is in the premise that the discharge of the occupier's duty to warn by the plaintiff's actual knowledge necessarily discharges the duty to maintain the premises in a reasonably safe condition by correcting dangers of which the occupier has actual or constructive knowledge. To extend the obvious danger doctrine to bar a plaintiff from recovery by negating a landowner's or occupier's duty to invitees to maintain his premises in a reasonably safe condition would be inconsistent with the philosophy of *Hoffman v. Jones,* 280 So. 2d 431 (Fla. 1973), that liability should be apportioned according to fault. *Pittman,* 380 So. 2d at 1193-94 (footnotes omitted); *see also Hogan,* 579 So. 2d 396 (citing *Pittman).*

(Emphasis added). Aaron, 908 So.2d at 577-578.

In *Miller v. Slabaugh,* 909 So. 2d 588 (Fla. 2d DCA 2005), the appellate court held that the trial court erred in concluding that the **absence of a railing on a stairway** was an open and obvious condition for which the defendants could not be held liable as a

matter of law. In *Miller*, the plaintiff was assisting the landowners in moving a mattress and box spring when he fell from a stairway without a railing. The Court **reversed summary judgment** for Defendant and said:

> A number of decisions similarly recognized that while the open and obvious nature of a condition may discharge a landowners duty to warn, it does not discharge the landowner's duty to maintain the premises in a safe condition "[i]f the landowners should anticipate that harm should occur despite the invitees knowledge of the danger." *Knight*, 774 So.2d at 734; see also *Green*, 752 So.2d at 702; *Arauz vs. Truesdell*, 698 So.2d 872, 874 (Fla. 3d DCA 1997). **A plaintiff's knowledge of a dangerous condition does not negate a defendant's potential liability for negligently permitting the dangerous condition to exist; it simply raises the issue of comparative negligence and precludes summary judgment.** *Fenster vs. Publix Supermarkets, Inc.*, 785 So.2nd 737, 739 (Fla. 4th DCA 2001).

(Emphasis added). *Miller*, 909 So.2d at 589.

DUTY TO INSPECT. The cruise line has a duty to inspect, not just to react. The duty of the land or premises owner is not only to react to hazards of which it has knowledge but also to inspect and find hazardous conditions and remove them. A defendant is deemed to have constructive notice "if, in the exercise of reasonable care, [the defendant] ought to have known about or discovered the alleged dangerous condition ...." *Ribitzki v. Canmar Reading & Bates*, 111 F.3d 658, 663 (9th Cir.1997). This implies a duty of reasonable inspection. *Id.* Further, constructive notice "requires that a defective condition exist for a sufficient interval of time to invite corrective measures." *Monteleone*, 838 F.2d at 65. See, *Galentine v. Holland America Line-Westours, Inc.*, 333 F.Sup 2d 991 (W.D. Wash. 2004). Therefore, if by reasonable inspection, Defendant could have discovered the dangerous condition, then Defendant will be deemed to have constructive knowledge.

NOTICE CAN BE ACTUAL OR CONSTRUCTIVE. Under the maritime law, the Defendant ship owner is charged with the responsibility for any defective condition of which ship owner had actual or constructive notice. The Florida Third District Court of Appeal in a maritime case, reversed a summary judgment in favor of the cruise line in a slip and fall case and announced the law as follows:

> Generally speaking, the ship owner is responsible for all defective conditions aboard ship of which the ship owner has **actual or constructive notice.** *Everett v. Carnival Cruise Lines, Inc*., 912 F. 2d 1355, 1358 (11th Cir. 1990): *Keefe v. Bahamas Cruise Lines, Inc*., 867 F. 2d 1318, 1322 (11th Cir. 1989). …**Constructive notice**, on the other hand, requires that the defective condition exist aboard ship for a **sufficient interval of time** to invite corrective measures. *Monteleone v. Bahamas Cruise Line, Inc*., 838 F 2d 63, 65 (2d Cir. 1988). We have said in another slip and fall action involving a puddle of water that constructive notice may be proved by circumstantial evidence such as the **size of the puddle**. See, *Grayson v. Carnival Cruise Lines, Inc*., 576 So. 2d 417 (Fla. 3d DCA 1991).

(Emphasis added). Erickson v. Carnival Cruise Lines, 649 So. 2d at 943. In *Erickson*, the Third DCA reversed a summary judgment granted in favor of Carnival Cruise Lines where the Plaintiff "slipped and fell in a clear puddle of water approximately 3-5 feet in diameter". *Erickson v. Carnival Cruise Lines*, 649 So. 2d at 942.

In *Grayson,* the appellate court also reversed a summary judgment in favor of the Defendant cruise line. In *Grayson,* Plaintiff testified that "he stepped from the stairs directly into a puddle 1-2 inches deep and approximately 6' x 12' in diameter and immediately slipped and fell". *Grayson v. Carnival Cruise Lines*, 576 So. 2d at 417.

In *Grayson*, the Third DCA also said that whether the size of the puddle "was sufficient to present a jury question as to whether the puddle existed for ample time to

charge the company with constructive notice of the hazards existence". See, *Teate v. Winn Dixie*, 524 So. 2d 1060 (Fla. 3D DCA 1988) (Constructive knowledge of dangerous condition may be proved by circumstantial evidence), review denied, 534 So.2d 402 (Fla. 1988)." *Grayson v. Carnival Cruise Lines*, 576 So. 2d at 417.

NOTICE: LENGTH OF TIME ON THE DECK. Evidence of notice can be circumstantial. In *Wal-Mart Stores, Inc. v. Reggie*, 714 So.2d 601 (Fla. 4th DCA 1998), the fast-food restaurant inside a Wal-Mart store maintained its garbage containers at the entrance to the restaurant. A customer slipped and fell on the **overflowing garbage from those containers**. The appellate court found that constructive notice could be inferred two ways: the length of time the condition had existed or "by evidence that the condition occurred in that area with sufficient **regularity** as to be foreseeable". *Wal-Mart*, 714 So.2d at 603.

Case law in Florida holds that a defendant can be liable when a plaintiff has slipped on the defendant's premises where the defendant had knowledge of the hazard or the condition had **existed long enough so that the defendant had constructive knowledge** of the hazard. *See, Gonzalez v. B&B Cash Grocery Stores, Inc.*, 692 So.2d 297 (Fla. 4th DCA 1997). This constructive notice can be **inferred from the amount of time** the substance has been on the floor. *See, Gonzalez v. B&B Cash Grocery Stores, Inc.*, 692 So.2d 297 (Fla. 4th DCA 1997).

Where a substance had remained on the floor of a grocery store **at least 15 to 20 minutes prior** to the customer's slip and fall, the grocery store was charged with

constructive knowledge of the condition, judgment for the plaintiff was affirmed in *Winn-Dixie Stores, Inc. v. Williams*, 264 So.2d 862 (Fla. 3d DCA 1972).

In *Gonzalez v. Tallahassee Medical Center, Inc*., 629 So.2d 945 (Fla. 1st DCA 1993), the appellate court reversed summary judgment, finding that a genuine issue of material fact existed where a plaintiff had slipped and fallen in a liquid. The court found that reasonable inferences could be made that the spill had existed for **at least 15 minutes** where the **liquid became syrupy.** *Gonzalez*, 629 So.2d at 947.

One of the ways to show constructive notice of the dangerous condition is to provide evidence as to the length of time the substance was on the floor.

NOTICE: WARNING SIGNS. Notice of a dangerous condition can be proven through the fact that the cruise line posted warning signs. See, e.g., *Carnival Cruise Lines v. Mabrey*, 438 So.2d 937 (Fla. 3d DCA 1983); (where the Court said: "First, it is evident that the Defendant did have knowledge that the deck was dangerous, since it had posted at the entrance to the deck a sign waning "slippery when wet.").

NOTICE: PRIOR ACCIDENTS.

Evidence of prior occurrences or accidents is discoverable in an action for negligence. See, *Hessen v. Jaguar Cars*, 915 F.2d 641 (11th Cir. 1990). In *Hessen*, the 11th Circuit affirmed the judgment for the Plaintiff in a case in which evidence of similar prior accidents was admitted at trial, and said:

> Evidence of similar occurrences may be offered to show a Defendant's notice of a particular defect or danger, the magnitude of the defect or danger involved, the Defendant's ability to correct a known defect, the lack of safety for intended uses, the

> strength of a product, the standard of care, and causation. *Borden* 772 F.2d at 754; see, e.g., *Ramos v. Liberty Mutual Insurance Co.,* 615 F.2d 334, 338-39 (5th Cir. 1980).

Hessen, 915 F.2d at 650.

Certainly, the test for **admissibility** of other prior complaints or conditions is substantial similarity. See, e.g., *Hessen v. Jaguar Cars,* 915 F.2d 641 (11th Cir. 1990). See also *Jones v. Otis Elevator Co.*, 861 F.2d 655, 661-62 (11th Cir. 1988); *Borden, Inc., v. Florida East Coast Railway*, 772 F.2d 750, 755 (11th Cir. 1985); *Jones and Laughlin Steel Corp. v. Matherne*, 348 F.2d 394, 400 (5th Cir. 1965).

However, this is not the test for discoverability. Note also that the existence and facts surrounding the prior accidents in *Hessen* was admissible through Plaintiff's expert. Further, the test even for admissibility is only "substantial" similarity, not identical set of circumstances, see, e.g. *Hessen v. Jaguar Cars,* 915 F.2d 641 (11th Cir. 1990); *Thomas v. Reading, Blue Mountain and Northern Railroad Company,* _____ F. Supp. _____ (E.D. Penn, 2003)(Case No: 2:01-cv-05834-AB September 15, 2003).

NO NOTICE REQUIRED: ONGOING, REPETITIVE CONDITION. Where there is evidence of an ongoing or repetitive condition, no notice of the condition on that day is required. See, e.g., *Wal-Mart Stores, Inc. v. Reggie*, 714 So.2d 601(Fla. 4th DCA 1998) in which a Wal-Mart customer slipped and fell as a result of garbage overflowing from containers. Held: Constructive notice can be inferred "by evidence that the condition occurred in that area with sufficient regularity as to be foreseeable". *Wal-Mart*, 714 So. 2d at 603.

NO NOTICE REQUIRED: DEFENDANT CAUSED CONDITION.

Plaintiff is not required to prove notice in order to show negligence where the Defendant created the unsafe or foreseeable hazardous condition. See, for example, *Baker v. Carnival Corporation*, ____F 2d _____. Case No. 06-21527 Civ-Huck/Simonton (S.D. Fla. December 5, 2006) in which Judge Huck denied in part Defendant's Motion to Dismiss complaint in a passenger case against the cruise line and said: "Where it is alleged, however, that Defendant created an unsafe or foreseeably dangerous condition, a Plaintiff need not prove notice in order to show negligence. *Rockey v. Royal Caribbean Cruises, Ltd.*, 2001 WL 420993 at 4-5 (S.D. Fla. 2001)." *Baker* at Page 4 See also, *Dianne Hayman v. Carnival Corporation*, United States District Court S.D. Fla. Case No. 05-22205 Civ- Gold/Turnoff Order Denying Motion for Summary Judgment, dated November 27, 2007. See also, *McDonough v. Celebrity Cruises, Inc.*, 64 F. Supp. 2d 259 (S.D. N.Y. 1999) where the court denied Defendant's Motion for Summary Judgment and said:

> To be sure, in a number of cases courts have granted summary judgment or judgment as a matter of law in favor of defendants where the plaintiff, injured while on a cruise due to a defective condition on-board the ship, could proffer no evidence whatsoever that the ship's operator had notice of the condition. *See Monteleone*, 838 F.2d at 65-66 (no notice that defective screw protruded from brass stairway "nosing"); *Rainey*, 709 F.2d at 172 (no proof that appellee had actual or constructive notice of presence of stool on dance floor); *Cummiskey*, 719 F.Supp. at 1188-90 (no notice of wetness of ship's lounge area); *Marchewka v. Bermuda Star Lines, Inc.*, 937 F.Supp. 328, 335 (S.D.N.Y.1996) (no notice of problems with bunk bed ladder); *Lee v. Regal Cruises, Ltd.*, 916 F.Supp. 300, 303 (S.D.N.Y. 1996) (no notice of presence of melting ice cubes on staircase), *aff'd*, 116 F.3d 465, 1997 WL 311780 (2d Cir.1997). Dismissal was appropriate in those cases because, under "ordinary negligence principles," a ship's owner or operator is "held responsible for

defective conditions aboard ship only when it had actual or constructive notice of them." *Calderera*, 1993 WL 362406, at *3.

However, those cases involved "otherwise safe areas where the sudden emergence or presence of an object (the protruding screw, the stool on the dance floor) brought about a defective and dangerous condition," *Friedman*, 1997 WL 698184, at *3, and not a contention by the plaintiff that the defendant(s) themselves *created* unsafe or foreseeably hazardous conditions. This is an important distinction. *See Lee*, 916 F.Supp. at 303 n. 2 ("In a maritime case, of course, the owner may be liable also on the basis of unseaworthiness or for negligently creating a dangerous condition that causes an accident.") (citations omitted); *Saia v. Misrahi*, 129 A.D.2d 621, 621-22, 514 N.Y.S.2d 256 (2d Dep't 1987) ("Where ... a theory of liability submitted to the jury is that the appellant itself created a dangerous condition which led to the ... injury, notice is not an essential part of the cause of action."). To require a plaintiff to also establish notice in a case where the defendant's own activities created a foreseeable and unreasonable risk of harm would be inappropriate. Such a requirement would have the absurd result that negligence actions could only be brought after a dangerous condition or practice created by a defendant claimed a previous victim, whose own recovery would be barred by the absence of notice.

Plaintiffs do not really posit that Defendants were negligent in failing to remedy a defective condition of which they had actual or constructive notice, but rather that they were negligent in creating a situation in which it was foreseeable that cruise passengers could drop a heavy coconut and injure passengers below. Such a claim is akin less to the cases Defendants cite concerning defects than to other cases, both state and federal, that discuss the general liability of defendants due to the foreseeable uses of their property or premises. *See, e.g.*, *Stagl v. Delta Airlines, Inc.*, 52 F.3d 463, 470-73 (2d Cir.1995) (holding that plaintiff, injured by a rogue passenger's baggage, raised issues of fact precluding summary judgment as to airline's allegedly negligent management and design of baggage claim area); *Seiders v. Testa*, 464 A.2d 933, 935 (Me.1983) ("[I]n the case at bar, the jury rationally could have found the defendants negligent, either in placing their tables and chairs in such a configuration that the plaintiff was likely to encounter the obstacle that she did while attempting to arise, or in failing to foresee that patrons could easily move the lightweight tables and chairs around so as to bring about the same result."); *Cruz v. New York City Transit Auth.*, 136 A.D.2d 196, 197, 526 N.Y.S.2d 827,

> 829 (2d Dep't 1988) (holding that, because alleged defect involving subway railing was created by defendant, "actual notice" of the "defect" was established for purposes of a *prima facie* case); *Philpot v. Brooklyn Nat. League Baseball Club*, 303 N.Y. 116, 121, 100 N.E.2d 164, 167 (1951) (finding plaintiff injured by bottle thrown or dropped at Ebbets Field to be entitled to jury determination whether "the means adopted by the defendant ... were sufficient to protect the plaintiff as a spectator ... from risk of bodily harm reasonably to be foreseen from the misuse or mishandling of empty glass beverage bottles."). Moreover, that the specific injuries suffered by McDonough were, in part, caused by the intervening act(s) of another passenger does not automatically extinguish liability, provided that the intervenor's actions were "a normal or foreseeable consequence of the situation created by the defendant's negligence." *Stagl*, 52 F.3d at 473 (*quoting Derdiarian v. Felix Contracting Corp.*, 51 N.Y.2d 308, 315, 434 N.Y.S.2d 166, 169, 414 N.E.2d 666, 670 (1980)); *see Aponte v. Trans World Airlines, Inc.*, No. 94 Civ. 6337(LMM), 1996 WL 527339, at *3 (S.D.N.Y. Sept. 16, 1996) (same); RESTATEMENT (SECOND) OF TORTS § 302A (1965) ("An act or an omission may be negligent if the actor realizes or should realize that it involves an unreasonable risk of harm to another through the negligent or reckless conduct of the other or a third person.").

McDonough, 64 F. Supp. 2d at 264-5.

See also, Marlow v. Food Fair Stores, Inc., 284 So.2d 490 (Fla. 3d DCA 1973), (evidence of store employees' creation of dangerous condition or of store's knowledge of such condition was for jury), cert. denied, 291 So.2d 205 (Fla. 1974); see also *Riles v. Robinson*, 548 So.2d 295 (Fla. 4th DCA 1989); *Devoe v. Western Auto Supply Co.*, 537 So.2d 188 (Fla. 2d DCA 1989).

In the case of *Sinfort v. Food Lion, LLC*, 908 So. 2d 521 (Fla. 5th DCA 2005), the District Court of Appeal reversed a summary judgment for the Defendant supermarket in a slip and fall case where the supermarket had filed an affidavit by its manager that said that the floor had been inspected 15 minutes before the accident. The Court held that this

affidavit, which goes to notice, had nothing to do with the allegation that the refrigerated displays leaked water that created the dangerous condition.

NO NOTICE REQUIRED: NEGLIGENT MAINTENANCE.

Notice also need not be shown where there is evidence of **negligent maintenance**. "Actual or constructive knowledge is irrelevant in cases not involving transitory, foreign substances (i.e., the typical banana peel case), if ample evidence of negligent maintenance can be shown." *Mabrey v. Carnival Cruise Lines, Inc*., 438 So. 2d 937, 938 (Fla. 3d DCA 1983). See also, *Carr v. School Board of Pascoe County*, 921 So. 2d 825 (Fla. 2d DCA 2006) (where Judgment NOV for the Defendant was reversed even though the Plaintiff did not show any notice on the part of the school board that a bench had been moved over into or near the line of travel of high schoolers running on the track. Because the coaches were there to supervise the students, and because there was evidence that the bench was in or near the line of travel at the time the whistle blew, the evidence could create a jury question "under either a negligent maintenance or constructive notice theory as presented in the standard jury instruction"). Citing *Owens*, 802 So 2d at 315; Eve*rett v. Rest. Catering Corp*., 738 So. 2d 1015 (Fla. 2d DCA 1999); Fla. Stat. Sec. 768.0710 (1), (2)(b) (2002). *Carr v. School Board of Pascoe County*, 921 So. 2d 825 (Fla. 2d DCA 2006). See, also *Owens v. Publix Supermarkets, Inc*. 802 So. 2d 315, 320 n. 4. (Fla. 2001).

In *Smith v. Southern Gulf Marine Co.,* 791 F.2d 416 (5th Cir. 1986), the Court held that it did not matter how long the Plaintiff showed that the dangerous condition existed (that is vomit at a doorway of a vessel). The Court said: **"Regardless of how**

long the dangerous condition existed, the question is simply whether Southern Gulf should have discovered it at the time the passengers were about to disembark. We hold in the affirmative." (Emphasis added). *Smith*, 791 F. 2d at 422. The 5th Circuit in *Smith* reversed a judgment for the Defendant and remanded.

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