UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 19-21896-CIV-ALTONAGA/Goodman

GYJUANNA TWYMAN
and **MICHAEL TWYMAN**,

Plaintiffs,
v.

CARNIVAL CORPORATION
and **CARNIVAL PLC**,

Defendants.
_____/

ORDER

THIS CAUSE is before the Court on Defendants, Carnival Corporation and Carnival PLC's (collectively "Carnival['s]" or "Defendants['s]") Motion to Dismiss Second Amended Complaint [ECF No. 37]. Plaintiffs filed a Response to the Motion [ECF No. 47]; to which Defendants filed a Reply [ECF No. 50]. The Court has carefully considered the Second Amended Complaint ("SAC") [ECF No. 31], the parties' written submissions, the record, and applicable law.

I. BACKGROUND

This case arises out of the death of cruise ship passenger, Nicholas Twyman ("Decedent"). (*See generally* SAC). Plaintiffs, Gyjuanna Twyman and Michael Twyman are Decedent's parents, and Gyjuanna Twyman is the personal representative of Decedent's estate. (*See id.* ¶¶ 1–2). Plaintiffs reside in Indiana (*see id.* ¶ 1), and Carnival is a foreign corporation with its base of operations in Miami, Florida (*see id.* ¶¶ 3–4).

On May 13, 2018, Plaintiffs were passengers aboard Defendants' vessel, the Carnival Sunshine. (*See id.* ¶ 13). The cruise included a stop at the Grand Turk Cruise Center (the "Cruise Center"), which opened in 2006 and was designed exclusively for ships owned and operated by

Carnival. (*See id.* ¶¶ 10–13). Carnival owned, operated, managed, maintained, and/or controlled the Cruise Center. (*See id.* ¶ 11).

On May 15, 2018, prior to arriving at the Cruise Center, Decedent approached the vessel's shore excursion desk and inquired whether there was an available jet ski excursion in Grand Turk. (*See id.* ¶ 14). A Carnival crewmember informed Decedent that Carnival operated the Cruise Center and "[t]here was not a formal shore excursion in Grand Turk involving jet skis, but that jet skis would be available for rent by the hour . . . ." (*Id.* (alterations added)). Shortly thereafter, Plaintiffs approached the shore excursion desk with the same inquiry and received the same response from the same crewmember. (*See id.* ¶ 15). Plaintiffs understood from the crewmember's representations that the jet ski vendors operating from the Cruise Center had authority to act for and on behalf of Carnival. (*See id.* ¶ 16).

On May 16, 2018, the Carnival Sunshine arrived at Grand Turk and Plaintiffs joined other passengers at the Cruise Center's private beach. (*See id.* ¶¶ 17–18). Decedent located a jet ski rental facility, operated by a local company, Wet Money Enterprise[1] (*see id.* ¶ 19), and rented three jet skis (*see id.* ¶ 21). When Decedent, his father, and a fellow passenger rented the jet skis, they were not given any instructions by Wet Money Enterprise "other than being told where the 'kill switch' was on the jet skis and to not ride 'too close' to the cruise ship which was docked nearby[.]" (*Id.* ¶ 21 (alteration added)). Decedent — a first-time jet ski operator — was not warned or instructed as to the maneuverability of the jet ski, nor was he aware of the need to throttle while turning. (*See id.* ¶¶ 21–22).

While operating the jet ski, Decedent collided into his fellow passenger's jet ski and was

[1] The parties variously identify the jet ski vendor as "Wet Money Enterprise" and "Wet Money Enterprises." The Court identifies the vendor as "Wet Money Enterprise," the way it is first introduced in the Second Amended Complaint. (*See* SAC ¶ 19).

thrown into the water. (*See id.* ¶¶ 24–25). Representatives from either the Cruise Center or Wet Money Enterprise arrived at the scene but did not attempt to rescue Decedent. (*See id.* ¶ 26). As Decedent remained non-responsive in the water, his father jumped off his own jet ski into the water, lifted Decedent onto the jet ski, and raced to the Cruise Center's beach. (*See id.* ¶ 27). There were no first responders or lifeguards present on the beach to aid Decedent, and his mother — a registered nurse who witnessed the accident from the beach — rushed to the scene and performed CPR on Decedent. (*See id.* ¶¶ 29–30).

Approximately fifteen minutes later, paramedics arrived with an Automated External Defibrillator (AED). (*See id.* ¶¶ 31, 33). The paramedics were unaware of how to use the AED, requiring Decedent's mother to lead the medical response. (*See id.* ¶ 33). Despite these efforts, Decedent remained unresponsive and later died. (*See id.* ¶ 35). An autopsy revealed Decedent's cause of death to be multiple blunt force injuries and drowning. (*See id.* ¶¶ 35–36).

On May 10, 2019, Plaintiffs filed this action against Carnival. (*See* Compl. [ECF No. 1]). On August 5, 2019, Plaintiffs filed the operative Second Amended Complaint. (*See generally* SAC).

Counts I to IV of the Second Amended Complaint are all brought under the Death on the High Seas Act, 46 U.S.C. section 30302. Count I alleges negligent operation of the Cruise Center by Defendants. Count II alleges the negligence of Carnival Corporation based on a failure-to-warn theory. Count III alleges the negligence of Carnival Corporation in directing Plaintiffs to the jet ski rental operation at the Cruise Center. Count IV alleges negligence against Defendants under an apparent agency or agency by estoppel theory.

Count V is a claim by Michael Twyman against Defendants for negligent infliction of emotional distress. And finally, Count VI is a claim by Gyjuanna Twyman against Defendants for

negligent infliction of emotional distress. (*See generally* SAC). Carnival moves to dismiss all counts for failure to state claims for relief. (*See generally* Mot.).

II. LEGAL STANDARD

"To survive a motion to dismiss [under Rule 12(b)(6)], a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (alteration added; quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Although this pleading standard "does not require 'detailed factual allegations,' . . . it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Id.* (alteration added; quoting *Twombly*, 550 U.S. at 555). Pleadings must contain "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555 (citation omitted). Indeed, "only a complaint that states a plausible claim for relief survives a motion to dismiss." *Iqbal*, 556 U.S. at 679 (citing *Twombly*, 550 U.S. at 556).

To meet this "plausibility standard," a plaintiff must "plead[] factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* at 678 (alteration added; citing *Twombly*, 550 U.S. at 556). "The mere possibility the defendant acted unlawfully is insufficient to survive a motion to dismiss." *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252, 1261 (11th Cir. 2009) (citation omitted), *abrogated on other grounds by Mohamad v. Palestinian Auth.*, 566 U.S. 449 (2012).

When reviewing a motion to dismiss, a court must construe the complaint in the light most favorable to the plaintiff and take the factual allegations therein as true. *See Brooks v. Blue Cross & Blue Shield of Fla., Inc.*, 116 F.3d 1364, 1369 (11th Cir. 1997) (citing *SEC v. ESM Grp., Inc.*, 835 F.2d 270, 272 (11th Cir. 1988)).

III. DISCUSSION

Carnival argues Plaintiffs: (1) improperly assert, for the first time in the Second Amended Complaint, time-barred claims on behalf of Michael and Gyjuanna Twyman; (2) fail to state negligence claims because they inadequately allege Carnival was on notice of a dangerous condition, and the dangers associated with riding jet skis are open and obvious; (3) fail to state a negligence claim under a theory of apparent agency or agency by estoppel because they inadequately allege the existence of an apparent agency relationship between Carnival and Wet Money Enterprise; and (4) fail to state claims of negligent infliction of emotional distress because they inadequately allege sufficient facts to establish that either Michael or Gyjuanna Twyman was in the zone of danger. (*See generally* Mot.; Reply). The Court addresses each argument in turn.

A. Limitations Period

Carnival contends Plaintiffs' newly asserted claims in Counts I to IV are barred by a one-year contractual limitations period provided in their cruise ticket contracts. (*See* Mot. 6–9). Specifically, Carnival asserts its ticket contract contains a one-year limitations clause for personal injury claims, and the newly asserted claims in the Second Amended Complaint, filed more than one year after Plaintiffs' injuries, should be dismissed as time-barred. (*See id.*).

Plaintiffs offer no rebuttal to Carnival's contention the ticket contract terms are valid and apply to their claims. (*See* Resp. 4–5). Instead, Plaintiffs argue the newly asserted claims relate back to the timely filed initial Complaint. (*See id.*). According to Plaintiffs, the Complaint provided Carnival with "ample and sufficient notice" of the additional, individual claims now asserted. (*Id.* 5). To this, Carnival briefly addresses the relation-back doctrine, insisting nothing prevented Plaintiffs from filing Counts I to IV in their initial Complaint or their Amended Complaint [ECF No. 17], and consequently, Plaintiffs fail to meet the prerequisite notice

requirement. (*See* Reply 2–3 (alteration added)). The Court agrees with Plaintiffs.

"Federal Rule of Civil Procedure 15(c) governs relation back of amendments to pleadings in federal court, and provides several ways in which an amended pleading can relate back to an original pleading." *Saxton v. ACF Indus., Inc.*, 254 F.3d 959, 962 (11th Cir. 2001). Otherwise time-barred claims relate back to the filing date of an earlier complaint if the amended complaint "asserts a claim . . . that arose out of the conduct, transaction, or occurrence set out — or attempted to be set out — in the original pleading." *Ferretti v. NCL (Bahamas) Ltd.*, No. 17-cv-20202, 2018 WL 1449201, at *2 (S.D. Fla. Mar. 22, 2018) (alteration added; quoting Fed. R. Civ. P. 15(c)(1)(B)). The "critical issue" in relation-back determinations "is whether the original complaint gave notice to the defendant of the claim now being asserted." *Moore v. Baker*, 989 F.2d 1129, 1131 (11th Cir. 1993) (citing *Woods Expl. & Producing Co., Inc. v. Aluminum Co. of Am.*, 438 F.2d 1286, 1299–1300 (5th Cir. 1971)). "'When new or distinct conduct, transactions, or occurrences are alleged as grounds for recovery, there is no relation back, and recovery under the amended complaint is barred by limitations if it was untimely filed.'" *Id.* (quoting *Holmes v. Greyhound Lines, Inc.*, 757 F.2d 1563, 1566 (5th Cir. 1985)).

Plaintiffs' newly asserted claims relate back to the date of the initial Complaint. In all versions of their pleadings, Plaintiffs seek to hold Carnival responsible for the same alleged negligent conduct and occurrences that ultimately led to Decedent's jet ski accident and Plaintiffs' injuries. *See Ferretti*, 2018 WL 1449201, at *2 (denying motion to dismiss where the plaintiff's newly asserted claims in the amended complaint arose out of the same conduct, transactions, or occurrences set forth in the initial complaint). As to notice, Plaintiffs' amendments simply restate the original claims with greater particularity and on behalf of all Plaintiffs. Indeed, Counts I to IV

of the Second Amended Complaint are not only titled identically[2] to the corresponding counts in the original Complaint, but they are also predicated on the same factual events[3] Plaintiffs described in the Complaint. The allegations in the earlier pleadings sufficiently apprised Carnival that Plaintiffs were seeking to hold it liable under the theories the Second Amended Complaint asserts. *See Bailey v. Carnival Corp.*, 369 F. Supp. 3d 1302, 1306 (S.D. Fla. 2019) (finding newly asserted non-delegable duty claim related back where original complaint provided notice to the defendant of the new claim being asserted).

Carnival's reliance on *Cliff v. Payco General American Credits, Inc.*, 363 F.3d 1113 (11th Cir. 2004), fails to persuade. (*See* Reply 2–3). In *Cliff*, the Eleventh Circuit Court of Appeals held the defendant did not have the notice required for relation back where the plaintiff originally pleaded state and federal claims limited to Florida consumers and later sought to expand the federal claims to a nationwide class. *See* 363 F.3d at 1131–33. According to Carnival, Plaintiffs' case is the same. (*See* Reply 2). Not so. As explained, Plaintiffs' initial Complaint provided Carnival with sufficient notice of the claims now being asserted in Counts I to IV; the Second Amended Complaint merely adds *claims* against Carnival on behalf of previously-named Plaintiffs rather than brings in new *plaintiffs* Carnival was unaware of.

For these reasons, the Court determines the Second Amended Complaint relates back; and

[2] (*Compare* Compl. ¶¶ 37–42 (describing Count I as "negligent operation of Carnival's [Cruise Center] . . ." (alterations added; block letters omitted)), *with* SAC ¶¶ 70-75 (describing Count I as "negligent operation of Carnival's [Cruise Center] . . ." (alterations added; block letters omitted))).

[3] (*Compare* Compl. ¶¶ 13–33 (setting forth allegations of "The Incident" involving the Decedent) (block letters omitted)), *with* SAC ¶¶ 13–38 (setting forth allegations of "The Incident" involving the Decedent) (block letters omitted))).

therefore, Plaintiffs' claims are not time-barred by the parties' ticket contract.

B. Negligence Claims (Counts I, II, and III)

Carnival raises two principal arguments in support of the request for dismissal of the negligence claims in Counts I, II, and III. (*See generally* Mot.). First, Defendants contend Plaintiffs fail to adequately allege they were on notice of a dangerous condition. (*See id.* 9–15). Second, Defendants maintain the risks associated with riding jet skis are open and obvious, and so do not trigger a duty to warn. (*See id.* 15–16).

To properly state a negligence claim under federal maritime law,[4] a plaintiff must allege four elements: "(1) a legal duty on the defendant to protect the plaintiff from particular injuries; (2) the defendant's breach of that duty; (3) the plaintiff's injury being actually and proximately caused by the breach; and (4) the plaintiff suffering actual harm from the injury." *Heller v. Carnival Corp.*, 191 F. Supp. 3d 1352, 1357 (S.D. Fla. 2016) (internal quotation marks and citation omitted). Carnival owes its passengers a duty of "reasonable care under the circumstances." *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625, 632 (1959) (holding "the owner of a ship in navigable waters owes to all who are on board . . . the duty of exercising reasonable care under the circumstances of each case" (alteration added)). A carrier's duty of reasonable care includes a "duty to warn of known dangers beyond the point of debarkation in places where passengers are invited or reasonably expected to visit." *K.T. v. Royal Caribbean Cruises, Ltd.*, 931 F.3d 1041, 1046 (11th Cir. 2019) (internal quotation marks and citation omitted). To state a negligence claim, the plaintiff must allege the defendant breached its duty by "creating a dangerous

[4] Carnival asserts, and Plaintiffs do not dispute, admiralty jurisdiction and maritime law are applicable to this negligence action. (*See* Mot. 3–4; Resp. 5); *see also Aronson v. Celebrity Cruises, Inc.*, 30 F. Supp. 3d 1379, 1392 (S.D. Fla. 2014) ("In a claim based on an alleged tort occurring at an offshore location during the course of a cruise, federal maritime law applies, just as it would for torts occurring on ships sailing in navigable waters." (citations omitted)).

condition of which it was actually or constructively aware, . . . and of which it had failed to warn [plaintiff] under reasonable foreseeability . . . ." *Torres v. Carnival Corp.*, 635 F. App'x 595, 601 (11th Cir. 2015) (alterations added; citations omitted).

Carnival asserts Counts I, II, and III fail to allege sufficient facts to show Carnival knew or should have known of a dangerous condition, giving rise to a duty of warn. (*See* Mot. 9–15). As a prerequisite to liability, a defendant must have actual or constructive notice of the condition that created the risk to the passenger. *See Keefe v. Bahama Cruise Line, Inc.*, 867 F.2d 1318, 1322 (11th Cir. 1989) (finding the duty of care owed by a shipowner to its passengers is "ordinary reasonable care under the circumstances . . . which requires, as a prerequisite to imposing liability, that the carrier have had actual or constructive notice of the risk-creating condition" (alteration added)).

Plaintiffs contend Carnival knew or should have known of the dangerous conditions – further described below – because Carnival's ownership, operation, and inspections of the Cruise Center should have revealed the unsafe conditions with the specific jet ski rental vendor, Wet Money Enterprise, that was operating at the Cruise Center. (*See* Resp. 6–15). Carnival disagrees, stating even if it owned and operated the Cruise Center,[5] Plaintiffs have not established Carnival knew or should of known of any dangerous condition associated with Wet Money Enterprise or

[5] Carnival disputes Plaintiffs' characterization it owns and operates the Cruise Center (or the private beach) where Decedent rented jet skis and later died. (*See* Mot. 14, Reply 3); (*see also* Mot. 14 n.3 ("In fact, all beaches in Grand Turk are public and operated and controlled by local authorities.")). In resolving a motion to dismiss, the Court must accept factual allegations as true. *See Aronson*, 30 F. Supp. 3d at 1395 (accepting as true plaintiff's allegation defendant-cruise line owned or managed shore excursion for purposes of motion to dismiss, even though defendant disputed that characterization). To the extent Plaintiffs allege Carnival's role as owner and operator of the Cruise Center imposes additional duties beyond the duty to warn, that issue is better suited for summary judgment or trial, as Carnival's role and the location of the Cruise Center present factual questions unsuitable for resolution on a motion to dismiss. *See id.* ("As Celebrity's role in the excursion is a factual question, Celebrity's argument about the scope of the duty of care it owed to passengers is an issue better left for summary judgment.").

jet skiing in general. (*See* Reply 3–4).

Plaintiffs allege: (1) the Cruise Center was owned, operated, managed, maintained and/or controlled by Carnival; (2) Carnival represented jet skis would be available to rent at the Cruise Center; (3) Carnival directed its passengers to the jet ski rental vendors operating from the Cruise Center, including Wet Money Enterprise; (4) Carnival had crewmembers and personnel at the Cruise Center; (5) Carnival knew or should have known, based on inspections and its operation of the Cruise Center, of the possible dangers involved in having Wet Money Enterprise rent jet skis to passengers without adequate operational instructions; (6) Decedent rented a jet ski from Wet Money Enterprise at the Cruise Center; (7) Wet Money Enterprise failed to provide Decedent adequate operational instructions; and (8) Decedent died while operating a jet ski when he and another participant collided. (*See generally* SAC). Like the allegations supporting a negligence claim in *Chaparro*, Plaintiffs' factual allegations of notice relating to the dangers involved with Wet Money Enterprise and the Cruise Center are sufficient to survive a motion to dismiss. *See Chaparro*, 693 F.3d at 1337 (reversing the district court and finding failure to warn adequately pleaded where the plaintiff alleged the defendant-cruise line knew or should have known of specific danger of gang violence at a specific beach location).

The Court is not persuaded by Carnival's reliance on *Joseph v. Carnival Corp.*, No. 11-20221-Civ, 2011 WL 3022555 (S.D. Fla. July 22, 2011). (*See* Mot. 10–11; Reply 5–6). In *Joseph,* the plaintiff failed to state a claim for negligence because there were no allegations the defendant-cruise line had knowledge of the dangerous condition that led to the defendant's death or identify the specific parasailing vendor involved. *See* 2011 WL 3022555, at *3–4. By way of example, the plaintiff failed to allege the defendant "knew or had reason to know[] of any incidents associated with the latent dangers of parasailing involving the specific vendor engaged by" the

decedent — in fact, plaintiff "d[id] not even identify the specific parasail vendor in her Second Amended Complaint or allege that Carnival knew such vendor existed;" nor did the plaintiff "allege that the decedent's accident was caused by any particular" danger which may make parasailing hazardous. *Id.* at *3 (alterations added).

Contrary to Carnival's insistence, *Joseph* is not "factually identical to Plaintiffs [sic] claim." (Reply 6). Plaintiffs have alleged Carnival's knowledge of a specific dangerous condition — a vendor providing jet ski rentals without adequate operational instructions; the vendor involved — Wet Money Enterprise; and the location of the dangerous condition — Carnival's Cruise Center. These factual allegations support Plaintiffs' claim that Carnival either knew or should have known about the danger posed by Wet Money Enterprise's failure to provide adequate instructions while operating at the Cruise Center. *See, e.g.*, *McLaren v. Celebrity Cruises, Inc.*, No. 11-23924-Civ, 2012 WL 1792632, at *9 (S.D. Fla. May 16, 2012) (distinguishing *Joseph* and finding the plaintiff stated a viable negligence claim where the claim was narrow and particular to the dangerous condition that caused her injury).

Carnival's citation to *Koens v. Royal Caribbean Cruises, Ltd.*, 774 F. Supp. 2d 1215 (S.D. Fla. 2011), is equally unpersuasive. (*See* Mot. 10, 15). In *Koens*, the plaintiff failed to allege the defendant-cruise line had notice of dangerous conditions specific to the excursion, or the location where the injury occurred. *See* 774 F. Supp. 2d at 1220 ("Here, there are no allegations in either of the Complaints that [the defendant] knew or should have known of dangerous conditions on either the [third-party excursion] or on the grounds of [the location where the excursion took place]." (alterations added)). In contrast, Plaintiffs allege Carnival had notice of a dangerous condition specific to both the vendor involved, Wet Money Enterprise, and the location of the accident, the Cruise Center. *See McLaren*, 2012 WL 1792632, at *9 (denying motion to dismiss

where the plaintiff alleged the defendant owed a duty to warn based upon its knowledge of a dangerous condition specific to both the excursion involved and the place of the accident).

Carnival argues Plaintiffs' allegations in paragraph 48 are generalized form allegations, insufficient to establish notice. (*See* Mot. 11). Paragraph 48 alleges

> Considering that CARNIVAL had crewmembers and/or personnel stationed on CARNIVAL's property (CARNIVAL's Grand Turk Cruise Center) and/or considering that CARNIVAL monitored and/or conducted inspections on such property . . . CARNIVAL would know and/or would have discovered that Wet Money Enterprises did not adhere to industry standards in the jet ski rental industry.

(SAC ¶ 48 (alterations added)).

In making this argument, Carnival overlooks Plaintiffs' factual allegations supporting an inference Carnival knew or should have known of the risk-creating condition associated with the specific vendor. Plaintiffs allege Carnival owns, operates, manages, maintains, and controls the Cruise Center (*see id.* ¶ 49); where vendors, including Wet Money Enterprise, offer jet ski rental services to Carnival passengers (*see id.* ¶ 47). As the operator and owner of the Cruise Center, Carnival monitors and inspects the property, during which Carnival discovered or should have discovered the dangers Wet Money Enterprise presented. (*See id.* ¶¶ 47–50). These additional factual allegations, connecting the inspections and operation of the Cruise Center to the dangerous condition, adequately "nudge[] [Plaintiffs'] claims across the line from conceivable to plausible." *Twombly*, 550 U.S. at 570 (alterations added); *see also Chaparro*, 693 F.3d at 1337.

Carnival expends considerable effort disputing specific notice allegations in the Second Amended Complaint, insisting none of the notice allegations is sufficient to establish Carnival had notice of the dangerous conditions that allegedly caused Decedent's accident. (*See* Mot. 15). Certainly, *some* of Plaintiffs' allegations, standing alone, are far too general and conclusory to demonstrate Carnival was on notice of a dangerous condition involving Wet Money Enterprise and the Cruise Center. Yet, the Court will not ignore the other facts alleged, which, as explained,

"are plausible and raise a reasonable expectation that discovery could supply additional proof of Carnival's liability." *Chaparro*, 693 F.3d at 1337. Plaintiffs have pleaded enough facts at this stage to allow their claims to go forward.

The Court turns briefly to Carnival's argument it had no duty to warn Plaintiffs of the risks associated with jet skis, as the danger is open and obvious. (*See* Mot. 15–16). The question of whether a danger is open and obvious is properly addressed after a factual record has been developed.[6] *See Heller*, 191 F. Supp. 3d at 1359 (collecting cases); *see also, e.g.*, *Prokopenko v. Royal Caribbean Cruises Ltd.*, No. 10-20068-Civ, 2010 WL 1524546, at *2 (S.D. Fla. Apr. 15, 2010) ("[T]he 'open and obvious' question requires a context specific inquiry and necessitates development of the factual record before the Court can decide whether, as a matter of law, the danger was open and obvious." (alteration added)); *Flaherty v. Royal Caribbean Cruises, Ltd.*, No. 15-22295-Civ, 2015 WL 8227674, at *3 (S.D. Fla. Dec. 7, 2015) ("[I]t is . . . generally accepted that the legal question of whether a condition is open and obvious is better decided after some factual development." (alterations added; citations omitted)). This is especially the case considering a court's conclusion a danger is open and obvious is not a complete bar to recovery. *See Belik v. Carlson Travel Grp., Inc.*, 864 F. Supp. 2d 1302, 1309 (S.D. Fla. 2011) ("Even when a person engaging in a noncontact sport such as diving knows of an open and obvious danger, the person may still recover damages under the principles of comparative negligence if the elements

[6] The two primary cases on which Carnival relies involve motions for summary judgment rather than motions to dismiss. (*See* Mot. 16); *see Hodges v. Summer Fun Rentals, Inc.*, 203 F. App'x 89, 91–92 (9th Cir. 2006) (affirming summary judgment because rental agency did not owe a duty to warn about the obvious dangers of "wake jumping" or operating a personal water craft too close to another vessel); *John Morrell & Co. v. Royal Caribbean Cruises, Ltd.*, 534 F. Supp. 2d 1345, 1351 (S.D. Fla. 2008) (granting summary judgment because "[t]he inherent dangers of operating a motor vehicle, such as a dune buggy (which [plaintiff] concedes is substantially similar to an automobile), are commonly known and most people in the United States become familiar with them in their every day lives." (alterations added)).

of the tort have been proven." (internal quotation marks, citation, and alteration omitted)). The Court will not resolve the issue on the present record.

Plaintiffs have adequately pleaded negligence claims against Carnival[7] in Counts I, II, and III.

C. Agency-Based Negligence Claim (Count IV)

Count IV of the Second Amended Complaint alleges Carnival is liable for the negligence of the jet ski vendors at the Cruise Center, including Wet Money Enterprise, based on a theory[8] of apparent agency or agency by estoppel. (*See* SAC ¶¶ 90–98). Under federal maritime law, a defendant can be held vicariously liable through the doctrine of apparent agency. *See Smolnikar v. Royal Caribbean Cruises Ltd.*, 787 F. Supp. 2d 1308, 1324 (S.D. Fla. 2011) (citing *Archer v. Trans/Am. Servs., Ltd.*, 834 F.2d 1570, 1573 (11th Cir. 1988)). Apparent agency is established when: (1) the alleged principal causes, through some manifestation, a third party to believe an alleged agent has authority to act for the benefit of the principal; (2) such belief is reasonable; and (3) the third party reasonably acts on such belief to her detriment. *See id.* (citation omitted).

Carnival argues[9] Plaintiffs fail to sufficiently plead the existence of an apparent agency relationship between Carnival and Wet Money Enterprise. (*See id.*). Specifically, Carnival insists

[7] Defendants do not dispute Plaintiffs have properly pleaded the remaining elements of breach, causation, and damages with the requisite particularity.

[8] "Apparent agency is not a cause of action but rather a theory of liability." *Rojas v. Carnival Corp.*, 93 F. Supp. 3d 1305, 1310 (S.D. Fla. 2015) (internal quotation marks and citations omitted). "[T]o hold a principal liable for the negligence of an apparent agent, a plaintiff must sufficiently allege the elements of apparent agency in addition to the elements of the underlying negligent act of the agent for which the plaintiff seeks to hold the principal liable." *Id.* (alteration added).

[9] Carnival first argues because Plaintiffs have failed to state plausible negligence claims, the claim for negligence based on apparent agency or agency by estoppel must be dismissed. (*See* Mot. 16–17). This issue is easily dispensed with as Plaintiffs adequately plead negligence claims against Carnival.

Plaintiffs failed to establish the reasonableness element of their claim. (*See id.* 17).

In support of apparent agency, Plaintiffs allege: (1) a Carnival crewmember represented to Plaintiffs that Carnival operates the Cruise Center (*see* SAC ¶¶ 14–15); (2) Carnival maintains a shore excursion desk aboard the Carnival Sunshine where a Carnival crewmember advised Plaintiffs jet skis would be available to rent at the Cruise Center (*see id.* ¶¶ 14–15, 92); (3) Plaintiffs believed — based on these representations by a Carnival crewmember — jet ski vendors at the Cruise Center, including Wet Money Enterprise, had authority to act on behalf of Carnival (*see id.* ¶¶ 16, 94–95); (4) Plaintiffs' belief was reasonable given the representations made by Carnival prior to the rental of jet skis from Wet Money Enterprise (*see id.* ¶ 94); and (5) Plaintiffs detrimentally relied on these representations, as they would not have rented jet skis from Wet Money Enterprise had they known it was not operated by Carnival (*see id.* ¶ 96). Plaintiffs have plausibly and adequately pleaded all three elements of apparent agency, and thus dismissal is not warranted.

Carnival states even if it made the alleged representations, Plaintiffs' belief in an agency relationship is not reasonable, and reasonableness is a requisite element of the claim. (*See* Mot. 17 (citing *Doonan v. Carnival Corp.*, 404 F. Supp. 2d 1367, 1372 (S.D. Fla. 2005)). *Doonan* is off point. *See* 404 F. Supp. 2d at 1372. First, the *Doonan* court denied the defendant-cruise line's motion to dismiss an apparent agency claim, as it was "unwilling to conclude that there [were] no conceivable facts under which the Plaintiffs would be entitled to relief." *Id.* (alteration added). Second, Carnival's argument regarding the reasonableness of Plaintiffs' belief in the crewmember's manifestations is a question of fact not suitable for resolution on a motion to dismiss. *See Lienemann v. Cruise Ship Excursions, Inc.*, No. 18-21713-Civ, 2018 WL 6039993, at *6 (S.D. Fla. Nov. 15, 2018) (finding Carnival's reasonableness argument premature at motion-

to-dismiss stage, because "the existence of an agency relationship is a question of fact under the general maritime law." (quoting *Franza v. Royal Caribbean Cruises, Ltd.*, 772 F.3d 1225, 1236 (11th Cir. 2014) (internal quotation marks omitted))).

Accepting Plaintiffs' allegations as true, Plaintiffs could reasonably believe Wet Money Enterprise, operating from the Cruise Center, was authorized to act on Carnival's behalf. As in *Doonan*, there are conceivable facts under which Plaintiffs would be entitled to relief. *See Doonan*, 404 F. Supp. 2d at 1372. Count IV is not dismissed.[10]

D. Negligent Infliction of Emotional Distress (Counts V and VI)

Last, Plaintiffs assert claims of negligent infliction of emotional distress for Michael Twyman in Count V and Gyjuanna Twyman in Count VI. (*See* SAC ¶¶ 99–104). To state a claim, Plaintiffs must allege "mental or emotional harm (such as fright or anxiety) that is caused by the negligence of another and that is not directly brought about by a physical injury, but that may manifest itself in physical symptoms." *Chaparro*, 693 F.3d at 1337–38 (quoting *Consol. Rail Corp. v. Gottshall*, 512 U.S. 532 (1994)). Federal maritime law has adopted the "zone of danger" test. *See Tassinari v. Key W. Water Tours, L.C.*, 480 F. Supp. 2d 1318, 1320 (S.D. Fla. 2007) ("Claims of negligent infliction of emotional distress under maritime law of the United States must survive the zone of danger test." (citations omitted)). "The zone of danger test limits recovery for emotional injury to those plaintiffs who sustain a physical impact as a result of a defendant's negligent conduct, or who are placed in immediate risk of physical harm by that conduct." *Martins v. Royal Caribbean Cruises Ltd.*, 174 F. Supp. 3d 1345, 1354 (S.D. Fla. 2016) (citation omitted). "[P]laintiffs must allege more than merely being a witness to a traumatic event to sufficiently plead

[10] Because Plaintiffs sufficiently allege a claim based on a theory of apparent agency, the Court does not decide whether the claim also survives on an agency-by-estoppel theory. *See Heller*, 191 F. Supp. 3d at 1362 n.13.

[negligent infliction of emotional distress]; the plaintiff must be, at least, threatened with imminent physical impact." *Id.* at 1355 (alterations added; citation and emphasis omitted).

Carnival asserts[11] Plaintiffs "have not pled sufficient facts to establish either Michael or Gyjuanna Twyman were [sic] in the zone of danger of the jet ski collision." (Mot. 18). The Court agrees only with Carnival's assessment of Decedent's mother's claim.

As to Decedent's father, Plaintiffs allege: (1) he was in the immediate area and entered the water following the jet ski collision (*see* SAC ¶¶ 27, 100); (2) he "feared the immediate risk of being struck by other jet skis and/or other watercrafts traveling in the vicinity of . . . [Decedent's] unresponsive body when he was attempting to rescue his son" (*id.* ¶ 28 (alterations added)); (3) he "feared the immediate risk of drowning as he struggled to lift his son's unresponsive body out of the water and onto a jet ski in order to transport . . . [Decedent's] body to shore for emergency medical assistance" (*id.* ¶ 28 (alterations added)); and (4) he experienced various physical manifestations of his emotional distress due to being involved in the death of his son and by actively participating in the rescue efforts (*see id.* ¶¶ 100, 102). These allegations are sufficient to state a cause of action for negligent infliction of emotional distress, as the allegations place Decedent's father in the zone of danger. *See Chaparro*, 693 F.3d at 1338 (finding complaint stated viable claim where the plaintiffs alleged they were in fear of their lives, witnessed victim's shooting and death, and experienced various physical manifestations of their emotional distress); *see also Crusan v. Carnival Corp.*, No. 13-cv-20592, 2015 WL 13743473, at *3 (S.D. Fla. Feb. 24, 2015) (finding the plaintiffs stated viable negligent infliction of emotional distress claims where they alleged they were the victims of Carnival's negligence, were within the zone of danger

[11] Carnival also contends that because Plaintiffs have failed to state plausible negligence claims, Plaintiffs' negligent infliction-of-emotional-distress claims must be dismissed. (*See* Mot. 18). As previously explained, Plaintiffs allege viable negligence claims.

as a result of that negligence, and experienced emotional distress that manifested itself physically).

Despite these allegations, Carnival contends the father seeks to expand the zone of danger to any tangential risk that might follow a traumatic event. (*See* Mot. 19–20). According to Carnival, Plaintiffs have failed to allege facts showing the father was placed in immediate risk of physical harm from the specific collision that led to Decedent's death. (*See id.* at 19). Put another way, the father may only recover if he suffered "a near miss" from the jet ski collision. (*Id.*).

Carnival overlooks the fact the zone of danger test permits recovery for negligent infliction of emotional distress if "a plaintiff is placed in immediate risk of physical harm by defendant's negligent conduct." *Chaparro*, 693 F.3d at 1337–38 (internal quotations and citations omitted). Applying that rule here, the father's allegations — witnessing Decedent's accident and death; attempting to provide emergency medical assistance; fearing immediate risk of drowning and an impending collision; and experiencing various physical manifestations of his emotional distress — as a result of Carnival's negligent conduct, at the motion-to-dismiss stage, sufficiently support a valid claim of negligent infliction of emotional distress.

Turning to Decedent's mother, Carnival contends Plaintiffs' allegations show she was outside the zone of danger of the jet ski collision because she was on the beach when the accident occurred. (*See* Mot. 19). Plaintiffs attempt to place the mother in the zone of danger with allegations she had to "physically attempt to rescue and resuscitate [Decedent] because of the lack of adequate first responders on the scene." (Resp. 24 (alteration added; internal quotation marks and emphasis omitted) (quoting SAC ¶ 104)). The attempt fails.

On this point, *Blair v. NCL (Bahamas) Ltd.*, 212 F. Supp. 3d 1264 (S.D. Fla. 2016), is instructive. In *Blair*, the mother and sibling of a deceased cruise passenger brought suit against the defendant-cruise line for a fatal drowning accident that occurred while the decedent was

swimming in the ship's pool. *See id.* at 1266–67. The plaintiffs brought negligent-infliction-of-emotional-distress claims, alleging they were "exposed to the risk of physical harm based on the lack of a lifeguard" and "fear[ed] for their safety as a result of the alleged negligence relating to the delayed and inadequate medical care provided [to the decedent]." *Id.* at 1271 (alterations added). According to the plaintiffs, this exposure and fear placed them "within the zone of danger." *Id.* The court disagreed, finding because the plaintiffs "never entered the pool during the drowning or resuscitation efforts and never needed medical attention," they were in "no immediate risk of physical harm" nor in "fear for their safety" as a result of the defendant's negligent conduct. *Id.*[12]

Plaintiffs maintain the mother was within the zone of danger as she was an "active participant in the traumatic and injury producing event caused by Carnival's negligent conduct" (Resp. 24 (emphasis omitted)) — namely, "Carnival's failure to promulgate an adequate protocol for the provision of emergency medical assistance to swimmers and failure to have adequate first responders" (*id.* 23). According to Plaintiffs, the mother was placed in immediate risk of harm because she not only feared "physical and heat exhaustion" as she performed CPR on Decedent (SAC ¶ 34), but also feared the immediate risk of being electrocuted or electrically shocked using an AED on Decedent's wet body (*see id.*). Construing these allegations in the light most favorable to Plaintiffs, the allegations do not place Decedent's mother in the "zone of danger" required to state a claim of negligent infliction of emotional distress. Decedent's mother, like the plaintiffs in *Blair*, "never entered the [water] during the drowning or resuscitation efforts and never needed

[12] The court in *Blair* allowed one negligent infliction-of-emotional-distress claim to proceed. *See* 212 F. Supp. 3d at 1271–72. It did so because that plaintiff "not only witnessed his sister's drowning and the failed attempts to save her, but also was himself placed in immediate risk of physical harm by his own near drowning in the pool caused by [the defendant-cruise line's] failure to have a lifeguard." *Id.* at 1271 (alteration added).

medical attention;" and thus, was neither in "immediate risk of physical harm based on [Carnival's] failure to employ lifeguards" nor in "fear for [her] safety as a result of the alleged negligence relating to the delayed and inadequate medical care provided." 212 F. Supp. 3d at 1271 (alterations added). In short, while these allegations describe emotional events, the allegations do not state a claim for negligent infliction of emotional distress for Decedent's mother.

IV. CONCLUSION

For the foregoing reasons, it is

ORDERED AND ADJUDGED that Defendants, Carnival Corporation and Carnival PLC's Motion to Dismiss Second Amended Complaint **[ECF No. 37]** is **GRANTED in part** and **DENIED in part** as follows:

1. The Motion is **GRANTED** as to Count VI.
2. The Motion is **DENIED** as to Counts I, II, III, IV, and V.
3. Defendants shall file an answer to the Second Amended Complaint **[ECF No. 31]** consistent with this Order by **October 29, 2019**.

DONE AND ORDERED in Miami, Florida, this 16th day of October, 2019.

Cecilia M. Altonaga

CECILIA M. ALTONAGA
UNITED STATES DISTRICT JUDGE

cc: counsel of record