UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 17-21537-FAM

KARL M. BROBERG, Individually, and
as Administrator of the Estate of
SAMANTHA JOYCE BROBERG,

Plaintiff,

v.

CARNIVAL CORPORATION, d/b/a
CARNIVAL CRUISE LINES,

Defendant.
_____/

**DEFENDANT'S TRIAL BRIEF**

Defendant Carnival Cruise Line ("Carnival") submits this trial brief in advance of the bench trial in this case, and states:

**Introduction**

Decedent, Samantha Broberg ("Decedent"), was a passenger onboard the Carnival *Liberty* for a "girl's cruise" with two of her close friends. They cruised without family or spouses. Decedent and her friends drank throughout the first day of the cruise. Late that evening, Decedent fell overboard after climbing an exterior deck railing. The overboard incident was not reported to Carnival until the middle of the next day. Carnival reported the overboard to the Coast Guard which instructed Carnival to maintain course and advised it would search for her. She was never found and is presumed dead. Decedent's husband, Karl Broberg ("Plaintiff"), brought this action against Carnival under the Death on the High Seas Act, claiming that its alleged negligence was the legal cause of her death.

After this Court's ruling on Carnival's motion for partial summary judgment, "[t]he remaining claim to be tried by the Court is the alleged negligence for excessive service of alcohol." [ECF No. 78 p. 6]. Indeed, the sole remaining theory of negligence is over service of alcohol. As outlined below and will be proven at trial, the critical issue on the claim is notice. Plaintiff must prove that Carnival knew or should have known that Decedent was an imminent danger to herself. Decedent was an experienced drinker to say the least. Plaintiff described his wife as a "functional alcoholic" who frequently carried a large tumbler filled with vodka and water around the house. She had a drinking problem, but could maintain the appearance of sobriety—a critical fact of which Carnival was wholly unaware. Decedent's drinking got to the point where Plaintiff had a talk with her about quitting or cutting back—again something Carnival did not know.

On the cruise, Decedent's friends left her at the end of the night at the casino bar because they thought she was fine and not in danger. She did not appear intoxicated or in any danger to Carnival's bartenders. Decedent's own negligence is apparent. She knew how alcohol affected her. She made a conscious decision to drink, and knew how she was when she did. If indeed she drank to the point of being a danger to herself that danger was not evident to Carnival and was self-created. She steadily climbed on top of the railing unassisted before slipping backward and falling overboard. This was not a safe or reasonable thing to do even sober because even then she could slip, lose her balance, and fall overboard.

The Death on the High Seas Act allows a decedent's spouse, parent, child, or dependent relative to recover pecuniary, *i.e.*, economic, damages. Plaintiff cannot recover loss of support because his wholly-owned and controlled company paid her salary.[1] Decedent's step-children—

[1] Plaintiff is a successful thoroughbred horse trainer, owning multiple business entities relating to the enterprise.

Plaintiff's children from his previous marriage—are not entitled to damages from Decedent's death.

**The Evidence**

Decedent was a 33-year-old passenger onboard the Carnival *Liberty* for a four-day Caribbean cruise departing from Galveston, Texas. She cruised with her friends Amy Brady and Sarah Churman for a "girl's cruise." Plaintiff (Decedent's husband), her two daughters, Aaliyah (then 15), Ryleigh (then 8) and her two step-children with Plaintiff, Savannah (then 11) and Kalee (then 7), did not cruise with her.

Decedent was a "functional alcoholic." Decedent was adept at hiding her intoxication from others while drinking. She walked around their house daily with a Yeti tumbler (a large insulated stainless steel mug) of Tito's vodka and water—her drink of choice. Plaintiff essentially had an intervention with Decedent six to nine months prior to the cruise about her drinking. Plaintiff believes that Decedent used alcohol as a crutch to deal with their children. Decedent tried to cut down on her drinking in the months leading up to the cruise. Plaintiff's toxicology expert, Michael Whitekus, notes in his report that alcoholics and heavy drinkers like Decedent are able to consume more alcohol than most people before exhibiting signs of intoxication.

Decedent purchased seven double Tito's vodkas and two beers over the course of the first day and evening on board. She bought her first drink after 1:00 p.m., a double Tito's vodka purchased at a bar near the pool. She spent much of the first day on the cruise at the ship's casino bar. She and her two friends continued to drink throughout the afternoon. At approximately 8:00 p.m., Decedent met another passenger, Angelo Karakozis, at the casino bar and they went back to his cabin to have sex. Decedent was not drunk in Karakozis's estimation, and certainly was

not a danger to herself. She was not stumbling, slurring her words, and conversed without difficulty. Decedent and Karakozis went to the ship's nightclub afterward around 11:00 p.m. Decedent later left Karakozis and returned to the casino bar.

Carnival's bartender, Marilyn Mazon, served Decedent at 11:40 p.m. Mazon will testify that Decedent did not appear to be intoxicated or a danger to herself. Carnival's bartender, Anali Vasquez, served Decedent her last drink at 12:51 a.m. She will also testify at trial that Decedent did not appear visibly intoxicated or a danger to herself. Both bartenders—that served Decedent her last two rounds—will testify that Decedent did not appear an imminent danger to herself.

Indeed, this fact is confirmed by Decedent's friends, the people who knew her best. Around 11:15 p.m., Churman and Brady decided to go to the ship's comedy show. Decedent wanted to continue the festivities, so they left her at the casino bar believing that she was fine. The comedy show was full so Churman and Brady decided to go back to their cabin to sleep. They went back to the casino bar and asked Decedent whether she wanted to leave, but she wanted to stay. Churman saw her "laughing and having a good time." Churman has known Decedent since they were in the fifth grade, and she thought Decedent was sober enough to be left on her own. Brady says that Decedent was drunk, "however she was lucid, speaking coherently and in control of her facilities." They saw Decedent talking to three men at the casino bar, with one caressing her back. The next morning when Brady and Churman woke up and Decedent was not in their cabin, they thought she might still be at the casino bar. When they did not find her there, they went to breakfast. Only around mid-day did they report to Carnival that she might be missing.

Decedent had left the casino bar with another passenger, Israel Cervantes, sometime after 1:00 a.m. Carnival's casino supervisor saw Decedent leave the casino at this time with a man

(presumably Cervantes), and she walked fine and was not stumbling. She went to the pool deck with Cervantes. At 1:57 a.m., she climbed up on the pool deck's more than three-and-a-half foot high exterior railing and sat on the rail with her back to the ocean. She fell backwards over the railing in to the water below.

## The Law

### 1. An over service of alcohol claim requires proof that Carnival had notice Decedent was in imminent and serious danger.

General maritime law applies to cases alleging torts committed aboard ships sailing in navigable waters. *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625 (1959). Under general maritime law, a shipowner owes its passengers a duty of reasonable care under the circumstances. *Id*. It is well-established that a cruise line is not liable to passengers as an insurer; there must be some failure to exercise due care before liability can be imposed. *Monteleone v. Bahama Cruise Line, Inc.*, 838 F.2d 63, 64 (2d Cir. 1988).

"A cause of action for over service of alcohol sounds in negligence." *Doe v. NCL (Bahamas) Ltd.*, 2012 WL 5512347, *6 (S.D. Fla. Nov. 14, 2012). To establish negligence, the plaintiff must prove: (1) the defendant had a duty to protect the plaintiff from a particular injury; (2) the defendant breached that duty; (3) the breach actually and proximately caused the plaintiff's injury; and (4) the plaintiff suffered actual harm. *Chaparro v. Carnival Corp*., 693 F.3d 1333, 1336 (11th Cir. 2012). To impose liability, Carnival must have actual or constructive knowledge of the specific risk-creating condition; at least where, like here, the menace is one commonly encountered on land and not clearly linked to nautical adventure. *Keefe v. Bahama Cruise Lines, Inc.*, 867 F.2d 1318, 1327 (11th Cir. 1989); *Pizzino v. NCL (Bahamas) Ltd.*, 709 F. App'x 563, 565 (11th Cir. 2017). The mere fact that an accident occurs does not give rise to a

presumption of notice. *Malley v. Royal Caribbean Cruises, Ltd.*, 713 F. App'x 905, 908 (11th Cir. 2017).

Simply alleging that a passenger is intoxicated does not impute notice on the cruise line; "[i]t may well be that passengers often become intoxicated on cruise ships and that, in context, this series of events was insufficient to reasonably put the defendant on notice that the plaintiff was in serious danger." *Doe v. Royal Caribbean Cruises, Ltd.*, 2011 WL 6727959, *4 (S.D. Fla. Dec. 21, 2011). Instead, the determination turns on whether a "reasonable defendant would have been on notice of the impending danger to the plaintiff" due to the alleged over-service of alcohol. *Doe*, 2012 WL 5512347 at *6; *see also Hall v. Royal Caribbean Cruises, Ltd.*, 888 So. 2d 654 (Fla. Dist. Ct. App. 2004) (passenger stated a cause of action where injured ". . . .after having been served alcohol by the vessel's employees to and obviously past the point of intoxication[.]").

The determination is not simply whether a passenger is intoxicated. *Id*. (quoting *Doe v. Royal Caribbean Cruises, Ltd.*, 2011 WL 6727959, *4 (S.D. Fla. Dec. 21, 2011)). Plaintiff must establish that Carnival knew or should have known that Decedent was in imminent or serious danger as a result of her intoxication. To this end, the *Doe* court made two specific observations that are relevant here: (1) the cruise line is not negligent by serving a certain number of drinks over a certain number of hours; and (2) mere notice that a passenger is intoxicated does not place the cruise line on notice that the passenger is in serious danger such that liability may attach. *Id*.

Plaintiff cannot show that Carnival was on notice that Decedent was in danger. The evidence is that Decedent was a heavy drinker. She knew best how alcohol affected her body, not Carnival. The last two bartenders that served Decedent believed that she appeared in control of

her faculties, even if under the influence. A third-party passenger that Decedent was with for three hours before her fall did not think she was intoxicated or a danger to herself.

Decedent left the casino bar with another passenger, taking an elevator up to the pool deck with him. She left under her own power without issue. Decedent spontaneously sat herself up on a chest-high railing and fell backwards off the ship. The causal link between her drinking and her death is attenuated at best. *See Thompson v. Oceania Cruises, Inc.*, 2015 WL 12562892, *4 (S.D. Fla. Oct. 13, 2015).

In the end, liability in this case turns on Carnival's knowledge. "Whether in admiralty or under the common law the bedrock of liability for negligence is knowledge. . . . [L]iability is established when it is shown that the peril, being of the defendant's creation, was known to the defendant but not to the person injured; but no liability is predicable of the injury where it appears that the injured person's knowledge of the danger surpassed or equaled that of the defendant." *Sabine Towing & Transp. co. v. St. Joe Paper Co.*, 297 F. Supp. 748, 752 (N.D. Fla. 1968) (quoting 23 FLA. JUR. NEGLIGENCE § 74)).

Decedent and her friends had superior knowledge to Carnival regarding Decedent's ability to regulate her alcohol consumption, appearance when intoxicated, and ability to handle alcohol consumed. Armed with this knowledge, Decedent's friends left her at the casino bar at the end of the night believing she was safe. They, unlike Carnival, knew Decedent for years. Carnival cannot be held liable, *i.e.*, found to have notice of the risk, for over service of alcohol where Decedent's friends believed she was fine. That Decedent had a certain number of drinks or may have been drunk is not enough for Carnival to be held liable. It must be on notice that she was in imminent danger. Carnival was not.

**2. Decedent's consumption of alcohol and sitting on the guard rail were negligent.**

Passengers must exercise reasonable care for their own safety as any ordinarily prudent person would. *Feigelman v. Royal Caribbean Cruises, Ltd.*, 2011 WL 13220498, *2 (S.D. Fla. Apr. 11, 2011); *Wendell v. Holland-America Line*, 30 F.R.D. 162 (S.D.N.Y. 1961); *Higgs v. Costa Crociere, S.p.A.*, 2016 WL 4375434, *4 (S.D. Fla. Jan. 14, 2016). Decedent did not.

Voluntary intoxication is a defense to negligence. *Loughran v. Firestone Tire & Rubber Co.*, 749 F.2d 1519, 1522 (11th Cir. 1985); *Miles v. General Motors Corp.*, 262 F.3d 720 (8th Cir. 2001) (surveying case law); *Caron v. NCL (Bahamas) Ltd.*, 2017 WL 1382238 (S.D. Fla. Apr. 14, 2017); *see also Aguilar v. Standard Oil Co.*, 318 U.S. 724, 730 (1943) ("Deliberate acts of indiscretion" like voluntary intoxication abrogate a seaman's right to maintenance and cure). "Evidence of plaintiff's intoxication is normally relevant in tort cases, particularly when the law uses a comparative negligence standard of apportionment of liability." *Collins v. Marriott Int'l, Inc.*, 749 F.3d 951, 960 (11th Cir. 2014). Becoming intoxicated shows the passenger's own lack of due care. *See Powers Carnival Corp.*, 2013 WL 12157800 (S.D. Fla. Jan. 29, 2013) (admitting evidence that the passenger was a "belligerent drunk"). This is especially so because Decedent knew her own drinking propensities.

Voluntary intoxication is such a strong defense to tort liability that another Court in this District has applied Florida's statutory voluntary intoxication defense to a cruise line injury maritime action. *E.g., Johnson v. Carnival Corp.*, 2007 WL 9624457 (S.D. Fla. Dec. 11, 2007). This Court should follow its lead and apply it as well. In *Johnson*, an intoxicated passenger became injured after diving into a shallow pool. The issue was whether Florida's voluntary intoxication defense found in section 768.36(2), Florida Statutes, could supplement general maritime law and apply to the passenger's negligence claim. The defense provides that a plaintiff

may not recover in any civil action where she was (a) under the influence of any alcoholic beverage or drug to the extent that the plaintiff's normal faculties were impaired; and (b) was more than 50 percent at fault for her own harm. FLA. STAT. §768.36(2).

In applying the defense to a maritime negligence action, the court held that it did not work material prejudice to the features of general maritime law nor did it interfere with its harmony and uniformity. *Johnson*, 2007 WL 9624457 at *4. Florida and general maritime law both apply principles of comparative negligence, and the defense existed without issue in Florida's tort framework. *Id*. In addition, courts sitting in admiralty have not proscribed voluntary intoxication as a defense to tort liability. *Id*. at *3. Florida's voluntary intoxication defense can properly supplement maritime law's negligence structure. *Id*. at *4. If this Court finds that Decedent was 50 percent or more at fault, it should bar her claim outright under Florida's voluntary intoxication defense.

Plaintiff may argue that Decedent's voluntary intoxication cannot be considered negligent because Carnival served her the alcohol. This argument is specious. One of the seminal cases allowing an over service of alcohol claim to proceed against a cruise line, *Hall v. Royal Caribbean Cruises, Ltd.*, 888 So. 2d 654 (Fla. Dist. Ct. App. 2004), held that the allegations against the cruise line stated a cause of action specifically because the passenger's own decision to drink would be reviewed to determine whether the cruise line exercised reasonable care under the circumstances.

The *Hall* court reversed an order granting a motion to dismiss, finding that over service of alcohol was a cognizable negligence theory. The *Hall* passenger alleged that "after having been served alcohol by the vessel's employees to and obviously past the point of intoxication, he staggered from a lounge, and while unable to look after himself fell down two flights of open

stairways." *Id*. at 654. The court noted that the passenger suffered from a "self-imposed" disability as a result of his voluntary intoxication. *Id*. at 655. Further, the court specifically noted that "[u]nder maritime law, of course, comparative negligence is a viable defense." *Id*. at n. 2. Other Courts in this District have analyzed a passenger's intoxication for purposes of comparative negligence based on *Hall* where they are served drinks by the cruise line. *E.g.*, *Doe v. NCL (Bahamas) Ltd.*, 2012 WL 5512314, *4 (S.D. Fla. Nov. 14, 2012). Decedent's decision to drink must be analyzed with and against Carnival's conduct and must be taken into account for purposes of comparative negligence.

Decedent's drinking was not the only negligence on her part. She also decided to climb up and sit on an exterior railing of the ship ten decks above the ocean below. The railing was chest-high on Decedent, and was certainly not meant for sitting. She had to hoist herself up onto the railing and turn around to even sit down. Sober or drunk this was incredibly foolish and negligent. But for doing this, Decedent would not have fallen overboard.

**3. Plaintiff's damages are limited by the Death on the High Seas Act**

The Death on the High Seas Act provides Plaintiff with his exclusive remedy against Carnival and it limits the constellation of recoverable damages in this case. Plaintiff is only entitled to recover certain economic damages as a result of Decedent's death.

The decedent's personal representative may maintain an action "for the exclusive benefit of the decedent's spouse, parent, child, or dependent relative" for "the fair compensation for the pecuniary loss sustained[.]" *Id*.; 46 U.S.C. §30303. "In the DOHSA setting, it is well established that recoverable damages include loss of support, loss of services of the decedent, loss of nurture, guidance, care and instruction, loss of inheritance, and those funeral expenses actually paid by

the dependents." *Rohan ex rel. Rohan v. Exxon Corp.*, 896 F. Supp. 666, 672-73 (S.D. Tex. 1995) (citing Thomas J. Schoenbaum, Admiralty and Maritime Law §7-2 (1987)).

**a. Plaintiff and their children cannot recover loss of support.**

Decedent did not provide any financial support to Plaintiff or their children. Death on the High Seas Act actions do not allow the decedent's estate to recover lost future wages in and of themselves. *Atl Sounding Co, Inc. v. Townsend*, 557 U.S. 404, 419 (2009) (citing *Miles v. Apex Marine, Corp.*, 498 U.S. 19 (1991)). They must be proven as part of the lost inheritance or support damages. *Rohan*, 896 F. Supp. at 673. Damages for loss of inheritance require a conclusive showing that the decedent would have accumulated property that the wrongful death beneficiary would have inherited. *Id*. (citing *Nygaard v. Peter Pan Seafoods, Inc.*, 701 F.2d 77, 80 (9th Cir. 1983)). Recovery for loss of support includes all the financial contributions that the decedent would have made to her dependents had she lived. *Id*. Courts must reduce loss of support damages for the decedent's personal consumption, expenditures, and taxes, and then discount them to their net present value. *United States v. English*, 521 F.2d 63, 71-72 (9th Cir. 1975).

Plaintiff employed Decedent through one of his companies involved with horse training. This was money already coming from Plaintiff; it was not additional income for the Plaintiff or his family. Her salary was an expense to Plaintiff. This was confirmed by Plaintiff at his updated deposition. His new girlfriend, Breezy Gaarz, now works in the same position that Decedent formerly occupied and not surprisingly makes the same $1,000/week salary (more like an allowance) as Decedent previously made. Decedent was certainly not providing financial support to Plaintiff or to their dependents; there are no loss of support damages in this case.

**b. Decedent's step-children are not entitled to recover damages.**

Plaintiff and Decedent had four children total, each with two of their own from previous relationships. Decedent's two step-children are not entitled to recover any damages under the Death on the High Seas Act. *In re Air Crash Near Nantucket Island, Ma., on Oct. 31, 1999*, (2003 WL 21913235 (E.D.N.Y. Aug. 8, 2003). A step-child is not considered the decedent's "child" under the Death on the High Seas Act. *Petition of the United States*, 418 F.2d 264, 271 (1st Cir. 1969); *id*. at *2. Step-children may only recover as a "dependent relative." *Martins v. Royal Caribbean Cruises Ltd.*, 216 F. Supp. 3d 1347, 1368 (S.D. Fla. 2016). Dependency is defined under the statute as "the existence of a legal or voluntarily created status where the contributions are made for the purpose and have the result of maintaining or helping to maintain the dependent of her customary standard of living." *Id*. Simply put, step-children can only recover where they can show they were financially dependent on the decedent at the time of her death. *Id*.; *Tello v. Royal Caribbean Cruises, Ltd.*, 946 F. Supp. 2d 1340 (S.D. Fla. 2013); *Oldham v. Korean Air Lines, Co., Ltd.*, 127F.3d 43, 51 (D.C. Cir. 1997).

Neither of Decedent's step-daughters were financially dependent on her as outlined above. Plaintiff was the sole financial source of income for the entire family. They cannot recover any Death on the High Seas Act damages, which are purely economic, based on Decedent's death.

**c. Loss of nurture, guidance, and instruction are not a substitute for pain and suffering or lost companionship.**

Plaintiff may try to couch nonpecuniary damages for loss of companionship and pain and suffering as recoverable Death on the High Seas Act damages under the guise of loss of nurture, guidance, and instruction. This aspect of the damages is not a vehicle for Plaintiffs to recover unquantifiable awards on behalf of their children.

Loss to children of the nurture, instruction and physical, intellectual, and moral training they would have received from a parent, but for the parent's wrongful death, may constitute a pecuniary loss, and may be a recoverable element of damages under DOHSA. *Solomon v. Warren*, 540 F.2d 777 (5th Cir. 1976).[2] At the same time, "the wrongful death of a parent standing alone is an insufficient predicate to support recovery by a child of the loss of parental nurture." *Id*. at 788. Damages for loss of nurture, guidance, and instruction are not synonymous with damages for lost parental companionship and affection which remain nonpecuniary and unrecoverable under the Death on the High Seas Act. *Id*. at 789. Although these damages cannot be computed with any degree of mathematical certainty, they are not substitutes for pain and suffering or other damages not allowed under Death on the High Seas Act. *Id*. at 788.

To establish loss of nurture, guidance, and instruction, "the evidence must show that the deceased parent was fit to furnish such training and that training and guidance had actually been rendered by the parent during his or her lifetime to their children." *Id*. Further, these damages end upon the child reaching the age of majority and diminish in value as the child reaches such age. *Id*. at 789. The implicit justification for these damages is to compensate children for the training they receive "during the formative years of [ ] minority." *Rubin v. Aggressor Fleet, Ltd.*, 2009 WL 10679969, *2 (E.D. La. Apr. 15, 2009).

Decedent's step-children, Savannah and Kalee, are not entitled to any damages for loss of nurture and guidance as a result of Decedent's death. They are not dependent relatives under the statute.

Decedent's oldest daughter, Aaliyah, was 15 at the time of the incident and is over 18 now. Decedent's youngest daughter, Ryleigh, was 8 at the time of the incident and is 11 now.

[2] Opinions of the Former Fifth Circuit handed down prior to October 1, 1981, are adopted as binding precedent in the Eleventh Circuit. *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (*en banc*).

Their damages for loss of nurture and guidance are necessarily different as the oldest child was near, and now at, the age of majority at the time of Decedent's death. Before this Court could even consider awarding any such damages to Decedent's natural children, it must find that (1) Decedent was fit to render guidance and training to her children and (2) that she actually did so during her life.

**Conclusion**

Carnival acted reasonably under the circumstances and was not on notice that Decedent was in imminent danger. Decedent's own negligence—in becoming intoxicated, climbing up on and sitting on a deck railing, or both—was the cause of her injury. Even assuming liability, Plaintiff's damages under the Death on the High Seas Act are limited and further reduced by her comparative negligence. This Court should enter judgment for Carnival.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I certify that on August 6, 2018, I served the foregoing document with the Clerk to the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or *pro se* parties identified on the attached service list in the manner specified, either by transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive Notices of Electronic Filing.

*/s/ Cameron W. Eubanks*
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**SERVICE LIST**

**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF FLORIDA**

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