

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO. 19-25100-CIV-GRAHAM/McALILEY

ALAN WIEGAND, et al.,

Plaintiffs,

v.

ROYAL CARIBBEAN CRUISES LTD.,

Defendant.

**PLAINTIFFS' STATEMENT OF MATERIAL FACTS IN SUPPORT OF
MOTION FOR PARTIAL SUMMARY JUDGMENT AGAINST DEFENDANT**

The Plaintiffs, ALAN WIEGAND, et al., by and through undersigned counsel and pursuant to this Court's Local Rule 56.1, submit the following concise statement of material facts as to which there is no genuine issue to be tried:

**ROYAL CARIBBEAN'S NOTICE OF THE
PRECISE DANGER THAT LED TO CHLOE'S DEATH**

1. Falls from windows have for decades been a leading cause of injury to children under the age of five. [*See* Exhibit 26, p. 5; *see also* Exhibit 24, p. 1; *see also* Exhibit 25].

2. In the United States, an estimated 98,415 children in total (or 5,180 children per year) were injured to the point of requiring hospital treatment between 1990 and 2008. [*See* Exhibit 26, p. 5]. It was also an international problem that regularly occurred in residences, high-rise condominiums, hotels, etc. [*See* Exhibit 26, pp. 5-7, 11-15, 26-30; *see also* Exhibit 25].

3. Due to the high percentage of children fatalities and injuries, in the mid-1990s, the United States Consumer Product Safety Commission urged ASTM International ("ASTM") to develop standards for devices that would protect younger children from the possibility of falling

out of windows, and the ASTM developed two standards: ASTM F2006 and ASTM F2090. [See Exhibit 24, pp. 16-17; *see also* United States Consumer Product Safety Commission Release Number 00-126¹].

4. The ASTM F2006 provided three types of window fall prevention devices: guards, screens and opening control devices that restrict the window openings to four inches. [See Exhibit 26, p. 16; *see also* Exhibit 24]. According to the ASTM, “[t]hese devices use different strategies to prevent children from falling through open windows.” [Exhibit 24, p. 1]. For instance, while the guards and screens “provide a barrier to prevent a child from falling through an open window[,]” the “[w]indow opening control devices restrict the size of the open area of the window so that it is too small for a young child to fall through.” [Id.]. The four-inch restricted opening size is “drawn from related building codes and standards for openings in guardrail assemblies, and is universally accepted as the appropriate dimensions to prevent a child from passing through[.]” [Id.] (footnote omitted).

5. In an effort to prevent children from falling through windows, the hotel industry standard for window openings is to restrict such openings to four inches. [See Exhibit 26, pp. 24-25, 68-71]. This standard is followed by the world’s largest hotel companies, including Marriott International and Hilton Worldwide. These two companies alone comprise a combined total of 14,203 hotels with 2,384,158 rooms worldwide (in 131 countries), **all with window openings limited to four inches.** [Id.].

¹ United States Consumer Product Safety Commission Release Number 00-126, <https://www.cpsc.gov/Newsroom/News-Releases/2000/New-Standards-for-Window-Guards-To-Help-Protect-Children-From-Falls->.

6. Other cruise lines, including Carnival Corporation (“Carnival”) and Disney Cruise Line (“Disney”), comply with industry standards in order to protect passengers generally, and children specifically, from falling through windows. [*See* Exhibit 26, pp. 32-42].

7. Prior to the incident, Royal Caribbean was on notice of the foreseeability and hazard involved with passengers “[s]itting, standing, jumping, laying or climbing on, over or across any exterior or interior railings” because Royal Caribbean referred to such conduct as “Unsafe Behavior” and “strictly prohibited[.]” it, pursuant to its Guest Conduct Policy. [Exhibit 4, pp. 7, 13] (emphasis added).

8. Prior to the incident, Royal Caribbean was on notice of the foreseeability and fall hazard involved with passengers, including children, leaning over the railing of the pool deck windows and hanging out of the windows. [*See* Exhibit 18; *see also* Exhibit 19, 36:10-24, 39:1-11, 41:20-12, 42:21-43:15, 69:7-16, 182:17].

9. Prior to the incident, Royal Caribbean was on notice of the foreseeability and fall hazard involved with parents placing children on the railing of the pool deck windows and/or next to the windows while they were open. [*See* Exhibit 19, 67:25-68:23, 108:16-22, 109:4-110:3, 118:25-119:19, 121:23-122:6, 122:11-15; *see also* Exhibit 28, p. 17; *see also* Exhibit 29, 262:10-264:7].

10. Prior to the incident, Royal Caribbean was on notice of the foreseeability and fall hazard involved with children gaining access to the pool deck windows by climbing the furniture next to the windows and nearly falling. [*See* Exhibit 19, 36:24-37:16, 48:13-24, 49:7-22; *see also* Exhibit 20, 19:4-22:15, 28:4-19, 30:10-32:7, 78:9-79:23, 80:7-11, 82:20-83:21; *see also* Exhibit 28, pp. 15-16; *see also* Exhibit 29, 134:8-137:15, 259:12-260:3; *see also* Exhibit 27, 112:14-113:5].

11. At the time of the incident, Royal Caribbean was on notice of the hazard that children could fall through the pool deck windows based on the three fall preventative measures it was required to have in place to ensure that children did not fall through the windows: (1) “a window at the bottom that cannot open, that children cannot walk through”; (2) “a railing”; and (3) “a window that has a high height.” [See Exhibit 16, 65:3-66:11; 68:21-69:5; 73:11-17; 74:20-24; 123:11-17; *see also* Exhibit 17, 37:7-19].

12. At the time of the incident, Royal Caribbean did not implement the ASTM window standards to the pool deck windows. [See Exhibit 11, p. 3; *see also* Exhibit 16, 104:11-25; *see also* Exhibit 26, p. 17].

13. Instead, at the time of the incident, the subject pool deck windows opened 52.5 inches wide. [See Exhibit 23, p. 45].

14. At all times material hereto, the hazard involved in this case – children falling out of windows – was not unique to the maritime environment. [See Exhibit 26, pp. 5-7, 11-15, 26-30].

15. At all times material hereto, Royal Caribbean was required to abide by the standards imposed by the Safety of Life at Sea (“SOLAS”) as well as the International Safety Management (“ISM”) Code. [See Exhibit 16, 76:10-77:14].

16. At all times material hereto, the ISM Code required Royal Caribbean to “establish safeguards against all identified risks[.]” [See Exhibit 26, p. 57] (citing §1.2.2 of the ISM Code) (emphasis added).

17. At all times material hereto, the subject cruise ship was a floating hotel or a floating “resort”. [See Exhibit 16, 127:16-128:25; *see also* Exhibit 17, 25:11-26:4; *see also* Exhibit 26, p. 23].

18. At all times material hereto, the ship's hotel function accounted for the vast majority of the ship. [See Exhibit 26, p. 23; see also Exhibit 17, 24:4-25:10].

19. At all times material hereto, the ship's pool deck, including the pool deck windows, fell under the scope of the hotel department. [See Exhibit 16, 129:2-6].

THE SUBJECT INCIDENT

20. On July 7, 2019, Mr. Wiegand, Mrs. Schultz-Wiegand, Chloe, Chloe's brother, Mrs. Schultz-Wiegand's mother and stepfather, Mr. Anello, as well as other family members (collectively referred to as "the family") were passengers aboard the vessel, *Freedom of the Seas*. [D.E. 1, ¶¶9-10; see also D.E. 50, ¶10].

21. Royal Caribbean operated, managed, maintained, and controlled the *Freedom of the Seas*, and was its owner *pro hac vice*. [D.E. 50, ¶9].

22. The family boarded the vessel at approximately 1:15 p.m. on July 7, 2019. [See Exhibit 10, No. 11; see also Exhibit 5].

23. At approximately 2:40 p.m., Mrs. Schultz-Wiegand, Chloe, and Chloe's brother went to the H2O Zone aboard the vessel. [See Exhibit 10, No. 11; see also Exhibit 13, 21:9-15].

24. The H2O Zone was a children's water park on the vessel. [D.E. 1, ¶13; D.E. 50, ¶13].

25. At approximately 3:50 p.m., Mr. Anello went to the H2O Zone to supervise Chloe while Mrs. Schultz-Wiegand had to deal with forms for Royal Caribbean. [See Exhibit 10, No. 11; see also Exhibit 13, 24:6-25:17; see also Exhibit 14, 152:17-153:5].

26. CCTV footage preserved by Royal shows Chloe wandering freely around the water park area and Mr. Anello diligently following her around. [See Exhibit 15, 157:24-159:17; see also Exhibit 16, 168:12-169:17;].

27. Mr. Anello did not consume any alcohol at any time prior to the incident. [See Exhibit 15, 144:14-16, 146:23-147:4; *see also* Exhibit 16, 115:16-19].

28. Just after 4 p.m., Chloe walked over to the wall of glass on Deck 11, followed closely by Mr. Anello. [See Exhibit 10, No. 11; *see also* Exhibit 15, 158:11-159:1].

29. The wall of glass was located between 20 and 43.33 feet from the H2O Zone. [See Exhibit 23, p. 75; *see also* Exhibit 16, 145:9-13].

30. There was **no physical barrier around the H2O Zone**, separating the water play area from the subject wall of glass, containing the subject window. [See Exhibit 23, p. 73]. After the subject incident, the H2O Zone was replaced with “Splashaway Bay,” which includes numerous physical barriers around the water play area. [See Exhibit 16, 193:6-194:7, 197:10-22; *see also* Exhibit 22].

31. In close proximity to the subject wall of glass was fixed and moveable furniture, which could be easily climbed by children, including a stool, with a foot rail, with the stool top only 19 inches from the handrail, which was 15 inches from the window. [See Exhibit 21; *see also* Exhibit 20, 19:4-22:15, 28:4-19, 30:10-32:7, 78:9-79:23, 80:7-11, 82:20-83:21; *see also* Exhibit 28, pp. 15-16; *see also* Exhibit 29, 134:8-137:15, 259:12-260:3; *see also* Exhibit 27, 112:14-113:5].

32. The windows in the wall of glass violated the well-established ASTM codes because there were no window guards or window opening limiting devices restricting the window opening to less than 4 inches, to prevent a small child from passing through the window. [See Exhibit 26, p. 17 *see also*; Exhibit 11, p. 3; *see also* Exhibit 16, 104:11-25].

33. As Mr. Anello and Chloe were in front of the wall of glass, Chloe was standing by Mr. Anello’s feet, and Mr. Anello was looking down at Chloe. [See Exhibit 10, No. 11; *see also* Exhibit 30, 101:23-102:6, 166:3-167:21; *see also* Exhibit 15, 171:23-172:23].

34. Mr. Anello lifted Chloe to the railing for her to bang on the window because Chloe loved to bang on the glass at her brother's hockey games, and Mr. Anello believed there was glass in front of them. [See Exhibit 10, No. 11; *see also* Exhibit 2; *see also* Exhibit 14, 71:5-74:1, 76:9-11; *see also* Exhibit 12, 63:23-64:9; *see also* Exhibit 15, 131:15-132:4, 135:3-136:1, 159:12-161:13; *see also* Exhibit 6].

35. The distance between the inside edge of the hand railing and the subject window was 19 inches. [See Exhibit 23, p. 47].

36. During the time that Mr. Anello was in the window area, Mr. Anello's upper body was **never outside of the window frame**. [See Exhibit 17, 120:5-121:3, 122:10-14, 124:13-20; *see also* Exhibit 30, 189:20-192:1].

37. Similarly, while Mr. Anello held Chloe up, her body was never outside of the window frame, her foot was on the railing the entire time until moments before her fall, when she was extended forward to bang on the glass that Mr. Anello and Chloe thought to be in front of them. [See Exhibit 10, No. 11; *see also* Exhibit 15, 159:12-161:13; *see also* Exhibit 30, 107:23-110:20, 123:25-131:22, 133:18-134:19, 175:3-176:5, 193:20-197:13]. In fact, moments before her unfortunate death, Chloe's arm was extended forward in front of her as though to bang on the glass. [See Exhibit 31].

38. As Chloe leaned forward with her arm extended, there was no glass in the frame in front of her to support her, so she slipped from Mr. Anello's arms, falling through the open pane and down approximately 150 feet below onto the Pier in San Juan. [See Exhibit 10, No. 11; *see also* Exhibit 15, 108:14-109:5, 159:12-161:13; *see also* Exhibit 31].

39. Royal Caribbean's defense in this case is that Mr. Anello was the "sole" cause of the incident. [See Exhibit 16, 47:2-169; 57:13; 143:18-20].

40. Prior to this incident, there were no incidents relating to safety of the Wiegand children when Mr. Anello was supervising the children. [See Exhibit 12, 55:13-19, 60:3-6; see also Exhibit 14, 165:23-166:8, 177:24-178:4; See Exhibit 15, 32:25-36:16, 134:12-17].

ROYAL CARIBBEAN'S MISSTATEMENTS AND MISCONDUCT POST-INCIDENT

41. On July 8, 2019, the day after the subject incident, the Captain of the *Freedom of the Seas*, Frank Martinsen, reported the incident to the United States Coast Guard and the Bahamas Maritime Authority, as required by law. The Captain stated, in pertinent part:

... Mr. Salvatore [Anello] peeps out of the said open window looking down. At 16:05:25 H, Mr. Salvatore is seen picking up Ms. Chloe and ***putting her out of the said open window***. At 16:06:04 H, Mr. Salvatore is seen ***bending more outside the window...***

[Exhibit 8, p. 4] (emphasis added).

42. On July 10, 2019, the U.S. Coast Guard expressly asked Royal Caribbean for closed-circuit television (“CCTV”) footage preceding the incident, among other information, in an email that read as follows:

Good day Captain,

I wanted to thank you again for all your cooperation during this sensitive investigation. I would also like to ask a few more questions about this case due to the high media interest. We have had questions from media outlets regarding the window the toddler fell out of, mainly ***how long was the window open and who open [sic] the window***. According to some articles in the media, the step grandfather is stating he didn't know the window was open at the time of the incident. ***Is there video footage of the window being opened by either a passenger or crew member?*** Do any of the crew members working in the area where the toddler death occurred know how the [sic] long the window had been opened for? Also can we get written statements from the two crew members who notified the bridge of the incident? We want something in writing stating what they saw, if they have knowledge of ***when the windows were opened, who may have opened the windows*** and what they saw in the aftermath of the incident.

Please let me know if you need further clarification of our request. ***If you find CCTV footage of the windows of the 11th deck being opened, please let me know*** and we can send someone out to the ship when it returns on Sunday to collect it.

Thanks in advance!

[Exhibit 9, p. 3] (emphasis added).

43. On the same day (July 10, 2019), the Captain responded to the Coast Guard's requests, as follows:

Good evening,

In regards to your question please find my response below to your question:

1. How long was the window open and who open [sic] the window: Answer The window or any windows up on deck 11 do not have any set timing for opening or closing as they are part of the wind breakers structure, any body can open and close the window bracers as they see fit.

2. According to some articles in the media, the step grandfather is stating he didn't know the window was open at the time of the incident. Is there video footage of the window being opened by either a passenger or crew member?

Answer : According to camera 327 deck 11 pool deck port side *it is clear* that before he lift [sic] the baby he [sic] seen bending over the railing looking over and out of the window, his *upper body passing outside the window frame itself* at 1605.16 hrs aprox. as per provided video that was given to you, (please review video provided).

3. Also can we get written statements from the two crew members who notified the bridge of the incident?

Answer: Please find attached statement on file.

Please note that CM Safaraz Khan was the first reporter to the Bridge, the rest of the statements belong to other crew members who witnessed the incident.

4. Please let me know if you need further clarification of our request. If you find CCTV footage of the windows of the 11th deck being opened, please let me know and we can send someone out to the ship when it returns on Sunday to collect it.

Answer : As per my answer above, we don't have a specific schedule for wind breaker windows and **based on that we cant [sic] determine for how long the windows were open and who opened it.**

[Id. at p. 2] (emphasis added).

44. In response, the Coast Guard wrote: "Hi Captain Frank, Thank you very much for the information...*We will make this part of our investigation.*" [Id. at p. 1] (emphasis added).

45. It is undisputed that the Captain repeatedly lied to the U.S. Coast Guard. The Captain reported to the U.S. Coast Guard that Chloe's grandfather, Mr. Anello, had to know the window was open because Mr. Anello's "his upper body was outside the window frame itself" before Chloe fell. [Id. at p. 2]. This, however, was a lie because the Captain later admitted **under oath** that, despite his previous statement to the U.S. Coast Guard, **Mr. Anello's upper body was never outside the window frame at any point while Mr. Anello was in the window area.** [See Exhibit 17, 120:5-121:3, 122:10-14, 124:13-20, 130:10-131:19].

**ROYAL CARIBBEAN'S KNOWING AND
INTENTIONAL DESTRUCTION OF CRITICAL EVIDENCE**

46. The incident occurred on July 7, 2019. [D.E. 1, ¶¶11, 20]. **Less than 48 hours after the incident**, on July 9, 2019, Plaintiffs' counsel requested in writing that Royal Caribbean preserve "[a]ny and all video depicting the area of the incident for **12 hours prior to the incident**[" [Exhibit 7]. Again, the following day, on July 10, 2019, the Coast Guard requested CCTV footage showing who opened the window and when it was opened. [Exhibit 9, p. 3].

47. The Captain ignored the Coast Guard's question as to whether there was CCTV footage showing who opened the window. And the Captain ignored the Coast Guard's request to provide them CCTV footage of the windows being opened. Instead, the Captain simply said Royal Caribbean did not have a specific schedule for the windows to be opened, "**and based on that**["] Royal Caribbean could not determine who opened the windows or how long they were opened. [Exhibit 9, p. 2] (emphasis added). The captain's statement is simply true. The angle of one of the cameras that captured the subject incident plainly shows much of the subject area and would clearly show who opened and closed the subject windows.

48. Royal Caribbean did not comply with the Coast Guard's request to refer back to the CCTV and provide them with the footage of who opened the windows. Royal Caribbean merely

referred to a *nonexistent* “set timing for [the] opening or closing” of the windows, and because of that *nonexistent* schedule, Royal lied and said it was unable to determine who opened the windows. [Id.]

49. Despite clear requests from the Plaintiffs and the Coast Guard, Royal Caribbean failed to preserve CCTV footage depicting the window area 12 hours before the incident (as requested by Plaintiffs’ counsel); or depicting when and who opened the window (as requested by the U.S. Coast Guard). [See Exhibit 16, 161:9-188:2].

50. Instead, Royal Caribbean reviewed the footage requested, unilaterally determined it was not relevant, and retained **only 30 minutes of footage** prior to the incident from the two cameras that captured the incident. Thereafter, Royal Caribbean knowingly and intentionally destroyed the remaining CCTV footage. [Id.]. In doing so, Royal Caribbean violated its own internal policy to preserve at least one hour before the incident. [Id.]

51. Had Royal Caribbean complied with the requests by Plaintiffs’ counsel and the Coast Guard, Royal Caribbean would have been able to determine when the window was opened and whether it was a crewmember or a passenger who opened the window (i.e., an individual wearing a uniform or regular clothing). Royal Caribbean, however, refused to comply with the requests by Plaintiffs’ counsel and the Coast Guard.