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' MOTION FOR PARTIAL SUMMARY JUDGMENT AGAINST DEFENDANT

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The Plaintiffs, ALAN WIEGAND, et al., by and through undersigned counsel and pursuant to Federal Rule of Civil Procedure 56 and this Court's Local Rule 56.1, hereby respectfully move this Honorable Court for summary judgment against Defendant, ROYAL CARIBBEAN CRUISES LTD. ("Royal Caribbean"), on Plaintiffs' claims of general negligence and negligent failure to maintain and against Royal Caribbean's affirmative defense of comparative negligence. As grounds thereof, Plaintiffs state as follows:

SUMMARY JUDGMENT AS TO NOTICE AND LIABILITY IS WARRANTED HEREIN. THE EVIDENCE IS UNDISPUTED THAT ROYAL CARIBBEAN WAS ENTIRELY AWARE OF THE PRECISE RISK THAT LED TO CHLOE'S PREVETABLE DEATH AND TOOK NO REASONABLE STEPS TO PREVENT IT.

AS TO NOTICE, FIRST, ROYAL CARIBBEAN HAD A WRITTEN "GUEST CONDUCT POLICY" IN PLACE WHICH PROHIBITED PASSENGERS FROM STANDING ON THE SUBJECT RAILING. SECOND, A FORMER ROYAL CARIBBEAN CHIEF SECURITY OFFICER TESTIFIED THAT THIS RAILING AND SUBJECT WINDOWS WERE A WELL-KNOWN HAZARD FOR YEARS. THIRD, A FORMER PASSENGER TESTIFIED AS TO A NEAR-FALL INCIDENT THAT ALMOST TOOK THE LIFE OF A SMALL CHILD JUST TWO YEARS PRIOR TO THE SUBJECT INCIDENT. FOURTH, ROYAL CARIBBEAN ITSELF TESTIFIED IT WAS REQUIRED TO TAKE CERTAIN FALL PREVENTION MEASURES REGARDING THE AREA WHERE CHLOE FELL. AS SUCH, ROYAL CARIBBEAN'S NOTICE IS UNDISPUTED AND SUMMARY JUDGMENT SHOULD BE ENTERED.

AS TO LIABILITY, THE RECORD EVIDENCE IS UNDISPUTED THAT ROYAL CARIBBEAN FAILED TO FOLLOW THE UNIVERSALLY FOLLOWED INDUSTRY STANDARD OF ABIDING BY WINDOW FALL PREVENTION CODES. LITERALLY THOUSANDS OF CHILDREN UNDER 5 YEARS OLD ARE INJURED OR KILLED EACH YEAR FROM ACCIDENTAL WINDOW FALLS. RESPONSIBLE CORPORATIONS FOLLOW SIMPLE STEPS THAT SAVE CHILDREN'S LIVES, SUCH AS LIMITING A WINDOW OPENING TO NO MORE THAN 4 INCHES. HEREIN, ROYAL CARIBBEAN DID NOTHING TO PROTECT CHLOE FROM THIS KNOWN DANGER. ACCORDINGLY, SUMMARY JUDGMENT AS TO LIABILTY SHOULD BE ENTERED AND THIS MATTER SHOULD BE TRIED BY A JURY AS TO DAMAGES ONLY.

I. INTRODUCTION

The instant matter involves the tragic death of 18-month-old Chloe Wiegand ("Chloe"), who fell from a pool deck window during a Royal Caribbean cruise. As tragic as the incident was, perhaps more tragic is the fact that it was entirely preventable.

It was preventable because, before this incident, Royal Caribbean ***knew*** that the pool deck windows, which are next to a children's waterpark, were a fall hazard for small children. Royal

Caribbean ***knew*** that passengers were sitting, standing and climbing on, over and across railings. Royal Caribbean ***knew*** parents placed children on the railings and next to open windows. Royal Caribbean ***knew*** that, even without adults placing them near the windows, children could still access the windows by climbing the furniture placed right next to the railings. All of this was ***known*** because Royal Caribbean's Guest Conduct Policy (and crewmembers) warned passengers of these dangers, and there were numerous incidents involving these hazardous circumstances, including one child's near-fall incident merely two years before Chloe's death.

However, Royal Caribbean, chose to ignore those incidents and hazardous circumstances and failed to take any reasonable, simple steps that would have saved Chloe's life. And even after this incident, Royal Caribbean continued to ignore the clear, known dangers, and chose instead to defend this case by blaming Chloe's grandfather (non-party Salvatore Anello), by lying to authorities, by attempting to deceive this Honorable Court, and by destroying evidence specifically requested by Plaintiffs' counsel and the U.S. Coast Guard.[1] As shown herein, Royal Caribbean's corporate misconduct in this matter appears to know no bounds.

ROYAL CARIBBEAN'S EGREGIOUS POST-INCIDENT CONDUCT

For starters, the Ship's Captain wrote 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. [Exhibit 9, p. 2)]. This statement was shown to be a lie because the Captain admitted under oath that, despite his previous statement to the U.S. Coast Guard, ***Mr. Anello's upper body was never outside of the window frame at any point while Mr. Anello was in the area***.[2] As such, it is quickly seen that this blatant lie from the Ship's Captain was the genesis of the Puerto Rican authorities ultimately pressing (baseless) criminal charges against Mr. Anello.

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[1] Contemporaneous with the instant motion, Plaintiffs are filing a Motion for Sanctions for Spoliation of Evidence.

[2] Whether Mr. Anello's upper body ever passed **outside** the actual window frame is a critical point because Mr. Anello's testimony has always been that he thought this was a wall of glass and that Chloe was going to bang on the glass like she always did at her older brother's hockey games. This wall of glass next to the children's water park has a highly unusual configuration. [*See* Exhibit 23, pp. 3-26]. Royal Caribbean falsely attempted to tell this story that Mr. Anello's body passed **outside** the window frame so it would be unbelievable that Mr. Anello would not know the window was in fact open.

Nonetheless, Royal Caribbean doubled down on the Captain's lie to the Coast Guard by again lying to a United States Federal District Court. In Royal Caribbean's Motion to Dismiss filed in this case, Royal Caribbean stated to this Honorable Court that the CCTV footage "unquestionably confirm[ed]" that Mr. Anello "leaned his upper body **out** [of] the window[,]" picked Chloe up, and then "held her by and **out** of the open window for thirty[-]four seconds before he lost his grip and dropped Chloe out of the window." [D.E. 7, pp. 1-2] (emphasis added).

Royal Caribbean then clarified in its motion what it meant by Mr. Anello's "upper body," stating: "When [Mr. Anello] arrives at the open window, and while Chloe is on the floor, Mr. Anello leans his **upper-torso** over the wooden railing and **out of the window frame** for approximately eight seconds." [Id. at p. 4] (emphasis added). Royal Caribbean then explained to this Court the importance of this information: "Because Mr. Anello had himself leaned out the window, he was well aware that the window was open." [Id. at p. 5].

All of these statements and arguments Royal Caribbean made to this Honorable Court are demonstrably false.[3] As such, the grounds upon which Royal Caribbean relies on in an attempt to establish Mr. Anello's alleged awareness of the open window fail because:

(1) the Ship's Captain recanted his statement that Mr. Anello's upper body was ever outside of the window frame;

(2) video analysis confirmed that Mr. Anello's upper body was inside the vessel the entire time; and

(3) video analysis revealed that Chloe's body was also inside the vessel and never **outside** of the window frame until the moment of her fall.

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[3] Further proof of Royal Caribbean's demonstrably false statements are found in Royal Caribbean's most recent incident description provided to this Honorable Court [D.E. 118]. Therein Royal Caribbean drastically deviated from its original false narrative. First, Royal Caribbean changed its argument that Mr. Anello held Chloe "out" of the window (as stated in its Motion to Dismiss [D.E. 7, pp. 1-2]), and now says Mr. Anello "lifted her ***to*** an open window[.]" [D.E. 118, p. 2] (emphasis added). Second, Royal Caribbean changed its argument that Mr. Anello was leaning "out of the window frame" (as stated in its Motion to Dismiss [D.E. 7, pp. 1, 4-5]), and now instead says Mr. Anello "leaned over the ***railing.***" [D.E. 118, p. 2] (emphasis added). So, at the outset of the case Mr. Anello leaned out of the open window and held Chloe out of the window. Now, Mr. Anello is doing no such thing. Royal Caribbean's "moving target" narratives are indicative of the veracity of each position Royal Caribbean has taken, and continues to take.

As if the lies to the Coast Guard and this Honorable Court were not enough, Royal Caribbean took its corporate misconduct a step further by knowingly and intentionally destroying critical CCTV footage from prior to the incident. As shown fully herein (and in Plaintiffs' Motion for Sanctions for Spoliation of Evidence), within two days of the incident, **both** the U.S. Coast Guard and the Wiegand family attorneys requested the CCTV footage which showed *who* opened the subject window and *when* it was opened. Royal Caribbean admits it was aware of both requests, but nonetheless, Royal Caribbean **knowingly and intentionally destroyed the CCTV footage** which would have complied with the requests. This blatant misconduct must be sanctioned by this Honorable Court, as it shows a clear intent to deprive the Wiegands (and the Coast Guard) of the truth as to why a window was allowed to be left open just feet from a children's play area.

Notwithstanding Royal Caribbean's merciless efforts to frame an innocent man, intentionally destroy evidence, and mislead this Honorable Court (and the U.S. Coast Guard and the Puerto Rican authorities), this case is simple. Royal Caribbean was on notice that children could fall through the pool deck windows. Yet Royal Caribbean did not have any of the fall prevention devices that are standard within the hotel/resort industry.[4] If ***any*** of the well-established fall prevention devices were in place at the time of the incident, Chloe would still be alive.

Perhaps more importantly, **there is not a single piece of evidence to support the argument that Mr. Anello was aware the window was open**. Simply put, Mr. Anello made an honest mistake, but because of Royal Caribbean's failure to take any steps to protect its youngest passengers, it turned into a fatal tragedy.

For these reasons, and those outlined below (and in Plaintiff's Statement of Material Facts in support of Summary Judgment, attached as Exhibit 1), Plaintiffs move for partial summary judgment on the claims of general negligence and negligent failure to maintain (Counts I and II, respectively), as well as on Royal Caribbean's affirmative defense of comparative negligence.

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[4] A cruise ship is a "floating resort," as the Captain of the *Freedom of the Seas* stated in his deposition. [*See* Exhibit 17, 25:11-26:4]. The subject window was located on the pool deck, adjacent to a children's water play area – a hotel/resort facility of the cruise ship. Thus, standards applicable to the hotel industry apply here – just as restaurant industry standards would apply to the ship's restaurants, as discussed in further detail below.

II. SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate when the facts properly supported by the record and taken in the light most favorable to the non-moving party "show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The movant bears the initial burden of proving that no genuine issue of material fact exists. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-24 (1986). A material fact is one that "might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505 (1986). There is no genuine issue of material fact when "the record taken as a whole could not lead a rational trier of fact to find for the non-moving party." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). The Court's function is not to "weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Liberty Lobby*, 477 U.S. at 249. "All reasonable doubts about the facts should be resolved in favor of the non-movant." *Herzog v. Castle Rock Entm't*, 193 F.3d 1241, 1246 (11th Cir. 1999) (citation omitted).

III. Summary Judgment should be entered against Royal Caribbean as to Plaintiffs' claims of general negligence and negligent failure to maintain (Counts I and II, respectively) based on the undisputed fact that Royal Caribbean breached its duty to provide reasonable care by failing to follow the industry standard to utilize fall prevention devices on the pool deck windows, despite being on notice that the windows presented a fall hazard.

In order to prevail on a maritime negligence claim, a plaintiff must show that: (1) the defendant owed the plaintiff a duty; (2) the defendant breached that duty; (3) the breach was the proximate cause of the plaintiff's injury; and (4) the plaintiff suffered damages. *See Chaparro v. Carnival Corp.*, 693 F.3d 1333, 1336 (11th Cir. 2012) (internal citation omitted).

Herein, the undisputed facts show that Royal Caribbean was on notice that the pool deck windows were fall hazards. Despite such notice, Royal Caribbean failed to follow the industry standard to utilize fall prevention devices on the windows. Summary judgment should therefore be entered as to Royal Caribbean's notice of the risk-creating condition and breach of its duty. After entry of summary judgment, the matter should proceed to a jury to determine damages only.

A. It is undisputed that Royal Caribbean was on notice that the pool deck windows were a fall hazard.

As a prerequisite to imposing liability, the standard of reasonable care requires that "the carrier have had actual or constructive notice of the risk-creating condition". *Keefe v. Bahama Cruise Line, Inc.*, 867 F.2d 1318, 1322 (11th Cir. 1989). Actual notice exists when the shipowner knows of the unsafe condition, while constructive notice, on the other hand, exists when "the shipowner ought to have known of the peril to its passengers, the hazard having been present for a period of time so lengthy as to invite corrective measures." *Lebron v. Royal Caribbean Cruises Ltd.*, No. 19-10115, 2020 WL 3397596, at *2 (11th Cir. June 19, 2020) (citing *Keefe*, 867 F.2d at 1322); *see also Elardi v. Royal Caribbean Cruises, Ltd.*, 19-CV-25035, 2020 WL 6870878, at *5 (S.D. Fla. Oct. 16, 2020) (Graham, J.).

In this case, it is undisputed that Royal Caribbean had actual notice of the risk that children could fall through the pool deck windows, based on (1) Royal Caribbean's warnings to passengers as to the dangers of sitting, standing and climbing on, over or across railings; (2) previous incidents, safety meetings, and remedial actions taken to address the fall hazards according to Royal Caribbean's former Chief Security Officer; (3) a child's near-fall incident witnessed and disclosed to Royal Caribbean by a passenger; and (4) Royal Caribbean's fall preventative (albeit, inadequate) measures.

1. Royal Caribbean's Guest Conduct Policy establishes Royal Caribbean's notice of the dangers involved with passengers sitting, standing and/or climbing on, over or across railings.

First, Royal Caribbean advised all passengers that sitting, standing and/or climbing on, over or across railings was unsafe and prohibited, which unequivocally establishes notice. As such, Royal Caribbean was not just aware and on notice of the precise danger that led to Chloe's death, Royal Caribbean expressly prohibited the conduct, in writing.

Pursuant to binding precedent, "[e]vidence that a ship owner has taken corrective action[,]" including "warning passengers about a danger posed by a condition[,]" can establish notice of such dangerous condition. *Amy v. Carnival Corp.*, 961 F.3d 1303, 1308-09 (11th Cir. 2020) (citing *Carroll v. Carnival Corp.*, 955 F.3d 1260, 1265 (11th Cir. 2020)). In *Amy*, a three-year-old child, climbed and (depending on the testimony) either fell over or through a guard rail aboard a Carnival vessel and suffered head injuries. *Amy*, 961 F.3d at 1305. The Eleventh Circuit reversed summary

judgment, based, in part, on the warnings Carnival crewmembers provided to passengers, stating as follows: "Carnival warned passengers not to 'climb up rails,' 'try to sit on them,' 'try to get selfies [or] lean[ ] over' them because 'accidents can happen' and 'there have been passengers [who] have fallen off.'" *Amy*, 961 F.3d at 1309.

The Eleventh Circuit reached a similar conclusion in the case of *Sorrels v. NCL (Bahamas) Ltd.*, 796 F.3d 1275 (11th Cir. 2015), where crewmembers testified that the cruise line regularly placed warning signs advising passengers that the deck was "slippery when wet," and such testimony was enough to consider whether the cruise line had actual or constructive knowledge of the risk-creating condition. *Id.* at 1288-89.

In this case, Royal Caribbean's Guest Conduct Policy was expressly incorporated in the Cruise Ticket Contract,[5] and it was enacted to "ensure that all guests enjoy a… ***safe and secure*** cruise vacation experience." [Exhibit 4, p. 2] (emphasis added). Notable to this incident was the following policy/warning contained in Royal Caribbean's Guest Conduct Policy:

> ***Unsafe Behavior*** **Prohibited**
> ….
> ***Sitting, standing***, jumping, laying or ***climbing on, over or across any*** exterior or interior ***railings*** or other protective barriers is ***strictly prohibited***.

[Exhibit 4, p. 2] (emphasis added).

Royal Caribbean therefore warned its passengers that sitting, standing and/or climbing on, over or across railings was unsafe and prohibited. The warning is strikingly similar to the aforementioned warning at issue in *Amy*, where crewmembers warned passengers in the mandatory safety drill not to climb rails. Addressing its sufficiency, the Eleventh Circuit explicitly rejected the trial court's viewing of the warning as "too generic," finding instead that "Carnival's warning and the falling-over danger posed by the Deck 14 guard rail line[d] up," and "certainly" contained a "sufficient connection" between the warning and the danger. *Amy*, 961 F.3d at 1309; *see also Guevara v. NCL (Bahamas) Ltd.*, 920 F.3d 710, 721-22 (11th Cir. 2019) (a "watch your step" warning was sufficiently connected to a danger posed by a small step down).

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[5] Upon booking the cruise, Royal Caribbean provided all passengers (including the Plaintiffs) a Guest Ticket Booklet, which included the Cruise Ticket Contract. [Exhibit 3]. The Guest Conduct Policy was referenced throughout the package, and a link to the entire Guest Conduct Policy was contained in the Cruise Ticket Contract. [Id. at 12]. Compliance with the Guest Conduct Policy was "a condition of boarding and remaining onboard any of [Royal Caribbean's] ships[.]" [Exhibit 4, p. 2].

Similar to the Eleventh Circuit's analysis in *Guevara*, common sense dictates that the warning contained in Royal Caribbean's Guest Conduct Policy served to caution passengers of the falling over danger posed by sitting, standing and/or climbing on, over or across "any exterior or interior railings," which would apply to the subject railing. And as in *Amy*, the falling over danger posed by the subject railing lines up and is sufficiently connected with the warning contained in Royal Caribbean's Guest Conduct Policy. Therefore, pursuant to binding precedent, Royal Caribbean was on notice of such danger.

It is also worth mentioning that Royal Caribbean had such notice for an extended period of time. In fact, while the link in Plaintiffs' Cruise Ticket Contract is now redirected to the 2020 version of the Guest Conduct Policy, previous versions contained the same warning. Specifically, as evident from the 2015 version of the Guest Conduct Policy [Exhibit 4, p. 12], Royal Caribbean had been on notice of the danger involved with "[s]itting, standing, laying or climbing on, over or across any exterior or interior railings or other protective barriers" since *at least* four years before this incident. [Id. at p. 13]. And based on the fact that it was listed ***first*** under "Unsafe Behavior," it is clearly this was a common problem. [Id.].

2. Elton Koopman, a former Chief Security Officer aboard the subject vessel, establishes Royal Caribbean's notice of the windows' fall hazards as well as the foreseeability of passengers leaning over the railing and of adults placing children next to the subject windows and on railings.

Second, while he was the Chief Security Officer aboard the subject vessel, Elton Koopman personally witnessed repeated incidents of fall hazards involving the pool deck windows, he attended numerous safety meetings where such fall hazards were discussed, and he contributed in the effort to rectify the hazard by keeping the windows closed and warning passengers.

Once again, the foregoing falls squarely within the type of "corrective action" that the Eleventh Circuit consistently deems sufficient to establish a cruise line's notice. *See Amy*, 961 F.3d at 1308; *Carroll*, 955 F.3d at 1265; *Sorrels*, 796 F.3d at 1288-89; *see also Guevara*, 920 F.3d at 721-22. In addition to the warnings discussed above, crewmembers physically removing the dangerous condition is another type of "corrective action" establishing notice. *See Morrison v. Royal Caribbean Cruises, Ltd.*, 19-21220-CIV, 2020 WL 5440580, at *10 (S.D. Fla. Sept. 10, 2020) (finding notice based on testimony that crewmembers "would move an ashtray [i.e., the alleged dangerous condition] if it was spotted in a walkway or aisle").

Herein, Mr. Koopman establishes Royal Caribbean's notice of the pool deck windows' fall hazards based on safety meetings identifying the hazards, along with the "corrective actions" Royal Caribbean previously took to address such hazards, including warning parents and **physically closing** the windows.

More specifically, Mr. Koopman attended "several safety meetings" where the fall hazards of the pool deck windows were discussed. [*See* Exhibit 19, 36:10-24, 40:21-18, 45:21-46:2]. For instance, the security department discussed the fall hazards involved with kids leaning over the windows, with their bodies "hanging out on the side… leaning over to the outside of the ship." [Id. at 36:10-24]. It was also discussed on "numerous occasions" how dangerous it was to have the furniture in such close proximity to the windows due to children accessing the windows by climbing the furniture. [Id. at 48:13-24]. In order to address the fall hazards, the security department and Mr. Koopman recommended that the pool deck windows remain closed and for crewmembers to monitor the area due to the risk of overboard incidents. [Id. at 36:24-37:16, 49:7-22]. Mr. Koopman also personally recommended that the crewmembers working in the area not let people open the windows and not let the "kids hang through the windows." [Id. at 39:1-11].

In addition, Mr. Koopman personally observed on "numerous occasions" adults lifting children up to the railing and next to open pool deck windows. [Id. at 56:5-57:8, 108:16-22, 118:25-119:19, 121:23-122:6]. In those occasions when he saw parents with their children on the railing or next to open windows, he would close the window and inform them about the safety concerns, including that "they can fall through the window[.]" [Id. at 67:25-68:23, 109:4-110:3, 122:11-15]. He personally addressed passengers related to safety concerns with the windows "almost every cruise." [Id. at 57:10-14].

Mr. Koopman further testified that the fall hazards with the pool deck windows was a particular problem on embarkation day – *which is when the subject incident occurred* – because passengers were seeing everything for the first time and "not considering the hazard." [Id. at 38:2-10]. So, according to Mr. Koopman, it was the crewmembers' duty to inform the passengers of those hazards. [Id.].

Accordingly, it is without question that Royal Caribbean was on notice of the foreseeability of passengers leaning over the railing and of adults placing children on the railings or next to open windows, based on the "numerous" incidents that occurred during Mr. Koopman's tenure with

Royal Caribbean.[6] Consistent with binding precedent, it is also without question that the pool deck windows aboard the subject vessel were an identified fall hazard by Royal Caribbean, especially as it related to the risk that children could fall through the windows. [Id. at 41:20-12; 42:21-43:15; 69:7-16; 182:17].

3. **<u>Belinda Craft, a prior passenger, further establishes Royal Caribbean's notice of the window fall hazard and the foreseeability of children's accessibility to the windows.</u>**

Next, passenger Belinda Craft notified Royal Caribbean, both verbally and in writing, about a child's near-fall incident involving the same window area aboard a sister-ship within two years of this incident.

In *Aponte v. Royal Caribbean Cruise Lines Ltd.*, 739 Fed. Appx. 531 (11th Cir. 2018), the Eleventh Circuit noted that a "proprietor may be held to have constructive knowledge if the plaintiff shows that an employee of the proprietor was in the immediate area of the dangerous condition and could have easily seen… and removed the hazard." *Id.* at 537 (citing *Alterman Foods, Inc. v. Ligo*n, 246 Ga. 620, 272 S.E.2d 327, 330 (1980)); *see also Horne v. Lines*, No. 15-21031-CIV, 2016 WL 4808791, at *5 (S.D. Fla. Jan. 25, 2016) (finding the cruise line had actual notice of assault through passenger calls to security). Further, when reviewing motions for summary judgment, courts often consider the existence of any "passenger comment reviews or forms" alerting the cruise line as to a potential safety concern. *See, e.g., Morrison*, 2020 WL 5440580, at *9; *Cohen v. Carnival Corp.*, 945 F. Supp. 2d 1351, 1355-56 (S.D. Fla. 2013); *Smolnikar v. Royal Caribbean Cruises, Ltd.*, 787 F. Supp. 2d 1308, 1323-24 (S.D. Fla. 2011).

Herein, Mrs. Craft went on a Royal Caribbean cruise aboard the *Liberty of the Seas*[7] in May 2017, merely two years before this incident. [*See* Exhibit 20, 7:21-8:3]. During her cruise, she was in the children's water park area, next to the same type of glass wall involved in this

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[6] This is also consistent with the opinion of Plaintiffs' expert, Thomas Lodge, who explained that, because the wall of glass had an "outward angle" of "floor-to-ceiling" windows "readily utilized in observation decks, "Royal Caribbean should have known that adult passengers would lift young children up to the leaning rail to enhance their view," because those are "foreseeable actions," and Royal Caribbean should therefore have "taken corrective measures to mitigate the fall hazard." [Exhibit 29, 262:10-264:7; *see also* Exhibit 28, p. 17].

[7] The *Liberty of the Seas* is a "sister ship" of the *Freedom of the Seas*. This means they are within the same class of vessels as the subject vessel, and therefore, both vessels have the same specifications and layout, and the pool deck window configuration is **identical**. [*See* Exhibit 17, 18:6-19-15; *see also* Exhibit 16, 193:2-17].

incident. [Id. at 19:4-22:15; *see also* Exhibit 21]. While in the area, she witnessed a child climb on a chair, then on to a table, and toward the window railings. [*See* Exhibit 20, 19:4-22:15]. She brought her husband's attention to the child, and by that time, the child was "hanging halfway out of the window." [Id.]. Mrs. Craft's husband immediately grabbed the child and prevented him from falling through the window. [Id.].

After the incident, Mrs. Craft verbally notified a Royal Caribbean crewmember about the child's near-fall incident, and she told the crewmember the window should not have been able to be opened. [Id. at 28:4-19, 78:9-79:23, 80:7-11]. Then, after the incident, Mrs. Craft filled out a survey of the cruise and submitted it to Royal Caribbean. [Id. at 30:10-32:7, 82:20-83:21]. Within the comments she submitted with her survey, Mrs. Craft again notified Royal Caribbean of the child's near-fall incident and of the windows not being safe enough to be near a children's water park area due to the fall hazard. [Id.].

Therefore, Royal Caribbean had notice of the safety concerns with regard to the pool deck windows' fall hazards generally, and with regard to children's access to the windows specifically.[8]

4. Royal Caribbean's requirement to take measures to prevent overboard incidents from the pool deck windows establishes notice that the windows were fall hazards.

Lastly, it is undisputed that Royal Caribbean had notice of the fall hazards involved with the pool deck windows because it took preventative measures to address such hazard, **as required**.

The Eleventh Circuit's *Amy* opinion is again instructive on this point. As already discussed, the Eleventh Circuit made clear that "corrective action" by a ship owner "can establish notice of a dangerous... condition." *Amy*, 961 F.3d at 1308 (citing *Carroll*, 955 F.3d at 1265). The Court went on to find that "[p]erhaps the most accessible and intuitive to a reasonable jury" was the fact that Carnival admitted, *inter alia*, the "guard rails' general purpose [was] to prevent people from getting from one side to the other" and "a child can get through a sufficiently wide space[.]" *Amy*, 961 F.3d at 1310. The Eleventh Circuit therefore determined the testimony could establish notice based on Carnival implementing standards to prevent the dangerous condition of children falling through the guard rails. *Id.* at 1310.

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[8] Plaintiffs' experts, Mr. Lodge and Mr. Fore, also opined as to the foreseeability of children accessing the windows by climbing furniture, as well as the prevalence of falls resulting from same. [*See* Exhibit 28, pp. 15-16; *see also* Exhibit 29, 134:8-137:15, 259:12-260:4; *see also* Exhibit 27, 112:14-113:5].

Applied to this case, it is undisputed that Royal Caribbean was well aware of the overboard hazard involved with windows because, as in *Amy*, it implemented standards to prevent passengers generally and children specifically from falling through those windows. For instance, the Ship's Captain, Frank Martinsen, testified that the "obvious" purpose of the railing in front of the pool deck windows was to prevent people from going overboard:

> **Q: So… you said the safety is the railing. Is the railing intended to be some type of measure to prevent people from going overboard?**
>
> A: ***Obviously that's the whole purpose of having a railing***, having a certain height that you, like a railing on your balcony, you know, if you don't have that, you may fall over, right.
>
> **Q: So the railing on the ship is meant to be a protective measure to prevent people from going overboard?**
>
> A: Not -- ***yes, yes, it's safety of course***.
>
> [37:7-19]

In addition to the Ship's Captain, Royal Caribbean's corporate representative elaborated on the three fall preventative measures Royal Caribbean had in place for both adults and children: (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." [depo 65:3-66:11]. Royal Caribbean further testified:

> **<u>Page 68, Line 21</u>:**
>
> **Q: Okay. So you talked about three preventative measures… [W]hat's the purpose of those three preventative measures?**
>
> A: The purpose of those three measures are to ensure that children and adults -- I mean, we don't have windows that are -- for the purpose of having guard rails near the windows and having windows at a certain height. ***They're fall prevention measures.***
>
> ….
>
> **<u>Page 73, Line 11</u>:**
>
> **Q: And it's Royal Caribbean's position that these three codes or laws require the prevent -- the fall prevention measures that were in place at the time of the incident?**
>
> A: They require heights of a certain -- or a certain height and, yes, all the three and -- and we had those in place.

….

<u>Page 74, Line 20</u>:

Q: And what's the -- according to these regulations that you've laid out, what is the purpose of having the railing meeting a certain height?

A: ***To ensure falls don't occur.***

<u>Page 123, Line 11</u>:

Q: So… what is it Royal Caribbean did prior to this incident to prevent children from falling out of windows?

A: We have our fall prevention measures.

[depo; 68:21-69:5; 73:11-17; 74:20-24; 123:11-17].

Royal Caribbean therefore admits it was in fact required to take preventative measures to avoid having adults and children fall through the pool deck windows. To be clear, similar to the plaintiff in *Amy*, Plaintiffs maintain Royal Caribbean's preventative measures were insufficient to comply with its duty of care, which is discussed next. Notwithstanding, pursuant to binding precedent, there is no question that the preventative measures it *did* take are sufficient to establish Royal Caribbean's notice of the danger involved with passengers generally, and children specifically, falling through the pool deck windows.

As such, based on the preventative measures implemented by Royal Caribbean to prevent overboard incidents from the pool deck windows, it is undisputed that Royal Caribbean had notice of such hazard before this unfortunate incident that killed Chloe, warranting summary judgment as to the element of notice.

B. <u>Royal Caribbean breached its duty of care by failing to implement the industry standard requiring fall prevention devices on windows.</u>

Despite Royal Caribbean's undisputed notice of the danger that children could fall through windows, the undisputed evidence also proves that Royal Caribbean failed to implement the industry standard, which required fall prevention devices on windows and would have saved Chloe's life herein.

The U.S. Supreme Court's seminal case of *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625 (1959), held that "the owner of a ship in navigable waters owes to

all who are on board for purposes not inimical to his legitimate interests the duty of exercising reasonable care under the circumstances of each case." *Id.* at 632. "One way of establishing what is reasonable under the circumstances is to present evidence of industry practice or guidelines." *Whelan v. Royal Caribbean Cruises Ltd.*, 1:12-CV-22481-UU, 2013 WL 5595938, at *3 (S.D. Fla. Aug. 12, 2013); *see also Sorrels v. NCL (Bahamas) Ltd.*, 796 F.3d 1275, 1282 (11th Cir. 2015) ("[e]vidence of custom within a particular industry, group, or organization is admissible as bearing on the standard of care in determining negligence."); *Reinhardt v. Royal Caribbean Cruises, Ltd.*, 1:12-CV-22105-UU, 2013 WL 11261341, at *7 (S.D. Fla. Apr. 2, 2013) ("Failure to abide by industry practice may… constitute[] a breach of the duty to exercise reasonable care under the circumstances.").

Herein, the standard of care was established by the ASTM International ("ASTM") as well as the hotel industry, and Royal Caribbean complied with neither.

1. **<u>RCCL failed to comply with the ASTM window standards because it is undisputed that the pool deck windows did not have any fall prevention guards, screens or devices that limited the window openings to four inches.</u>**

It is undisputed that the pool deck windows of Royal Caribbean's vessel did not have any fall prevention guards, screens or opening limiting devices that restricted the window openings to four inches, which did not comply with the ASTM standards.

"As related to the ASTM, binding Eleventh Circuit law states that even though the ASTM provides ergonomic design criteria from a human-machine perspective for the design and construction of maritime vessels, **such standards are appropriately used when establishing the standard of care in passenger cruise ship cases**." *Peck v. Carnival Corp.*, 16-20214-CIV, 2017 WL 7726728, at *6 (S.D. Fla. July 13, 2017) (citing *Sorrels*, 796 F.3d at 1282). "***Additionally, where the hazard alleged is not unique to the maritime environment, it is <u>not necessary to apply only maritime standards</u> (which seemingly do not exist)***." *Peck*, 2017 WL 7726728, at *6 (citing *Cook*, 2012 WL 1792628 at *2) (emphasis added).[9]

[9] Logic (and the absence of maritime standards expressly applicable to cruise ship passenger facilities) also dictates that standards from identical land-based industries would apply to the identical services on cruise ships – i.e., hotel industry standards for hotel services; water park industry standards for water parks and slides; restaurant industry standards for restaurants; bar industry standards for bars, etc. The hotel industry standard applicable to Royal Caribbean's pool deck windows is addressed in the section below.

The hazard involved in this case – children falling out of windows – is certainly not unique to the maritime environment. In fact, falls from windows have long been a leading cause of injury to children under the age of five. [*See* Exhibit 26, p. 5] (citation omitted). According to a 19-year study conducted between 1990 and 2008, an estimated 98,415 children in total (or 5,180 children per year) were injured to the point of requiring hospital treatment in the United States. [Id.] Yet the hazard was not unique in this country either; rather, it was an international problem that regularly occurred in residences, high-rise condominiums, hotels, etc. [Id. at pp. 5-7, 11-15, 26-30; *see also* Exhibit 25].

Studies (conducted since the early 1970s) also concluded that falls from windows were preventable. [Id. at pp. 12-15]. In the mid-1990s, at the urging of the United States Consumer Product Safety Commission,[10] the ASTM formed a committee to develop standards for devices that would protect younger children from the possibility of falling out of windows, and it developed two standards: ASTM F2006 and F2090. [Id. at p. 16]. The ASTM F2006, applicable herein, provided three types of window fall prevention devices: guards, screens and opening limiting devices that restricted window openings to four inches, so the head/torso of a small child would not be capable of passing through the space. [Id. at pp. 16-17]. Royal Caribbean's pool deck windows did not have any of those fall prevention devices. [*See* Exhibit 11; No. 1; *see also* Exhibit 16, 104:11-25; *see also* Exhibit 26, p. 17].

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.[11] [*See* Exhibit 16, 76:10-77:14]. To that end, the ISM Code explicitly required Royal Caribbean to "establish safeguards against ***all identified risks***[.]" [Exhibit 26, p. 57] (citing §1.2.2 of the ISM Code) (emphasis added). As already established, children falling from windows was indeed an "identified risk," even by Royal Caribbean itself, and the ASTM standards provided "safeguards" for such risk. As such, the ASTM window standards were effectively incorporated into SOLAS and the ISM Code. [*See* Fore depo, 134:9-16, 136:17-25].

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[10] *See, e.g.,* 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-)

[11] The ISM Code was adopted by the International Maritime Organization ("IMO") under Authority of the SOLAS Treaty.

Accordingly, because the hazard was not unique to the maritime environment, the ASTM window standards are "appropriately used" to establish the "standard of care" in this case, pursuant to binding precedent. *See Peck*, 2017 WL 7726728, at *6; *see also Sorrels*, 796 F.3d at 1282. Furthermore, because the ASTM window standards provided "safeguards" against the "identified risk" of children falling out of windows, Royal Caribbean was required to comply with the standards. Consequently, Royal Caribbean's undisputed failure to abide by the ASTM code as it relates to the pool deck windows amounts to a breach of its duty, warranting summary judgment.

2. **Royal Caribbean also fell below the hotel industry standard, which limited window openings to four inches.**

In addition to the ASTM window standards, Royal Caribbean also fell below the hotel industry standard, which limited window openings to four inches.

It is undisputed that the subject cruise ship was a floating hotel or "resort". [*See* Exhibit 16, 127:16-128:25; *see also* Exhibit 17, 25:11-26:4; *see also* Exhibit 26, p. 23]. In fact, the ship's hotel function accounted for the vast majority of the ship. [*See* Exhibit 26, p. 23] ("According to [shipbuilder] Meyer Turku, the "Functions and Space Demands" of the vessels they fabricate, including the *Freedom of the Seas*, are a ratio of 25-30% Ship Function and ***70-75% 'Hotel Function[.]'"***) (emphasis added).

This is consistent with the Captain's testimony, wherein he explained that the ship has three departments: "deck, engine, and hotel." [*See* Exhibit 17, 24:4-25:10]. While the deck and engine departments have approximately 60-65 crewmembers each, the hotel department has "well over 1,000." [Id.]. Thus, the hotel department is approximately ***fifteen times bigger*** than the other two departments on the ship. Importantly, the ship's pool deck, including the pool deck windows, fell under the scope of the hotel department. [*See* Exhibit 16, 129:2-6].

Considering that the hazard of children falling through windows is not unique to the maritime environment, and considering further that the hotel department was responsible for the pool deck windows aboard the floating hotel, the hotel industry standard is admissible to determine the standard of care Royal Caribbean should have used in this case. *See Sorrels*, 796 F.3d 1275, 1282 (11th Cir. 2015) ("[e]vidence of custom within a particular industry, group, or organization is admissible as bearing on the standard of care in determining negligence."). To that point, two of the world's largest hotel companies – Marriott International and Hilton Worldwide – both require all of their hotels to restrict window openings to four inches in an effort to prevent children

from falling through their windows. [*See* Exhibit 26, pp. 24-25, 68-71]. 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.[12] [Id.]. In stark contrast to the hotel industry standard, Royal Caribbean's window opened a total of 52.5 inches. [*See* Exhibit 23, p. 45].

Consequently, summary judgment is also warranted based on Royal Caribbean's failure to comply with the hotel industry standard to limit window openings to four inches.

IV. Summary judgment should also be entered against Royal Caribbean as to its fourth affirmative defense because Plaintiffs were not comparatively negligent by having their child supervised by the child's grandfather. Further, besides Mr. Anello, there were no other "third persons" involved in the incident.

Among the affirmative defenses raised by Royal Caribbean is the comparative negligence of Plaintiffs and of unidentified third persons. Specifically, Royal Caribbean's fourth affirmative defense states, in part, as follows:

> RCL alleges that… Plaintiffs' own acts of negligence amount to a superseding cause that cuts off any causal connection between RCL's alleged negligence and Chloe's injuries. Alternatively, RCL alleges that Chloe's damages were caused either in whole or in part by the acts and/or omissions of third persons for whom RCL is not responsible and that amount to a superseding cause that cuts off any causal connection between RCL's alleged negligence and Decedent's injuries.

[D.E. 50, p. 5, ¶4]

Maritime law recognizes the doctrine of comparative negligence, including personal injury cases. *See In re Gozleveli*, 12-61458-CV, 2015 WL 3917089, at *4 (S.D. Fla. June 25, 2015). In addition, the Supreme Court has held, the superseding cause doctrine, which serves to exculpate the defendant from liability entirely, is applicable in admiralty cases. *See Exxon Co., U.S.A. v. Sofec, Inc.*, 517 U.S. 830, 836-837 (1996).

It is well settled that the defendant bears the burden of proof on its affirmative defense at trial. *Thorsteinsson v. M/V Drangur*, 891 F.2d 1547, 1550-51 (11th Cir. 1990). "[O]n a plaintiff's motion for summary judgment, the defendant bears the initial burden of showing that the affirmative defense is applicable." *United States v. Tubbs*, 19-CV-80553-CIV, 2019 WL 7376706,

[12] Along those same lines, other cruise lines, including Carnival and Disney, similarly comply with industry standards in order to protect passengers generally, and children specifically, from falling through windows. [*See* Exhibit 26, pp. 32-42].

at *2 (S.D. Fla. Nov. 22, 2019) (citing *Blue Cross and Blue Shield v. Weitz*, 913 F.2d 1544, 1552 (11th Cir. 1990)). "Upon such a showing, the burden shifts to plaintiff regarding that affirmative defense." *Tubbs*, 2019 WL 7376706, at *2 (citing *Weitz*, 913 F.2d at 1552, n. 13). When the defendant fails to come forward with evidence sufficient to support an affirmative defense, summary judgment is appropriate. *See RPM Nautical Found., Inc. v. New Stock Island Properties, LLC*, 11-10086-CIV, 2013 WL 11328445, at *4 (S.D. Fla. Mar. 20, 2013)

Herein, Royal Caribbean has not set forth any evidence to support its affirmative defense that the Wiegands' comparative negligence was the cause of the incident.[13] Likewise, Royal Caribbean has not set forth any evidence that unidentified "third persons" were even involved in the incident, let alone caused or contributed to it.

Indeed, Royal Caribbean's explicit position is that Mr. Anello was the "sole" cause of the incident. [*See* Exhibit 16, 47:2-169; 57:13; 143:18-20]. To be clear, Plaintiffs vehemently dispute Royal Caribbean's characterization of Mr. Anello's actions, and Plaintiffs vehemently dispute that it was unforeseeable for a child to be placed on the railing. As addressed above, Royal Caribbean's former crewmember testified Royal Caribbean was well aware of adults placing children on the window railings and next to the windows. [*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]. Yet, putting aside Mr. Anello's actions (which Plaintiffs will address in a separate motion), it is undisputed that Royal Caribbean maintains Mr. Anello was the "sole" cause of the incident. By definition then, there could be no other cause of the incident, such as the negligence of Mr. Wiegand, Mrs. Schultz-Wiegand and/or unidentified "third persons."

This is consistent with the evidence, which shows that when Mrs. Schultz-Wiegand had to address an issue related to the cruise, she had Chloe's grandfather, Mr. Anello, supervise Chloe. [*See* Exhibit 10, No. 11; *see also* Exhibit 13, 24:6-25:17; *see also* Exhibit 15, 152:17-153:5]. Generally speaking, there is nothing negligent about having a grandfather supervise a child; and as it relates specifically to this family, there were no previous incidents to indicate it was negligent for the Wiegands to entrust Chloe with her grandfather. [*See* Exhibit 12, 55:13-19, 60:3-6; *see also* Exhibit 14, 165:23-166:8, 177:24-178:4; *see also* Exhibit 15, 32:25-36:16, 134:12-17]. Royal Caribbean failed to prove otherwise.

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[13] To the extent its fourth affirmative defense includes any negligence on the part of 18-month-old Chloe as a Plaintiff, Royal Caribbean agreed to eliminate such defense. [D.E. 56, pp. 7-8].

Simply put, there is not a shred of evidence to suggest that Chloe's parents were negligent in any way in entrusting Chloe to Anello's care. Thus, summary judgment should therefore be entered against Royal Caribbean as to its fourth affirmative defenses relating to the Plaintiffs and unidentified "third persons."

WHEREFORE, based on the foregoing, this Honorable Court should enter summary judgment against Royal Caribbean consistent with the instant motion, as well as any and all further relief this Court deems just and proper.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on February 8, 2021, I electronically filed the foregoing document with the Clerk of 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 via 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

By: /s/ Michael Winkleman
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Case No. 19-cv-25100-DLG

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