UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION
Case No. 19-CV-25100-DLG

ALAN WIEGAND and KIMBERLY SCHULTZ-WIEGAND, Individually and as Personal Representatives of the Estate of Chloe Wiegand, deceased minor,

Plaintiffs,

v.

ROYAL CARIBBEAN CRUISES LTD.,

Defendant.
_____/

ORDER

THIS CAUSE comes before the Court upon Plaintiffs' Motion for Partial Summary Judgment (ECF No. 188) and Defendant's Motion for Summary Judgment (ECF No. 135).

THE COURT has reviewed the Motions, Responses, Replies, each party's Statement of Material Facts, the pertinent portions of the record, and is otherwise fully advised in the premises.

I. BACKGROUND

On or about July 7, 2019, an eighteen-month-old girl ("Decedent"), fell from the arms of her grandfather ("Mr. Anello"), and through an open window on a vessel owned by Royal Caribbean Cruises Ltd. ("Defendant") (ECF No. 1). The Decedent fell 150 feet to the pier below, resulting in her death (ECF No. 1). On December 11, 2019, the mother and father of the Decedent ("Plaintiffs"),

filed the instant action against the Defendant, alleging general negligence, negligent failure to maintain, and negligent failure to warn (ECF No. 1).

II. LEGAL STANDARD

"The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The initial burden of establishing the absence of a genuine issue of material fact lies with the moving party. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). To discharge this burden, the movant must demonstrate that there is an absence of evidence to support the nonmoving party's case. Id. at 325. After the movant has met its burden under Rule 56(a), the burden of production shifts and the nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Electronic Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). The non-moving party must come forward with "specific facts showing that there is a genuine issue for trial." Id. at 587.

At the summary judgment stage, the judge'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." Anderson v. Liberty Lobby, 477 U.S. 242, 249 (1986); see also Moorman v. UnumProvident Corp., 464 F.3d 1260, 1267 n.1 (11th Cir. 2006)

("Credibility determinations at the summary judgment stage are impermissible."). In making this determination, the Court must decide which issues are material. A material fact is one that might affect the outcome of the case. See Anderson, 477 U.S. at 248. Notably, "[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." Id.

The Court must also determine whether the dispute about a material fact is indeed genuine. "Where the record taken as a whole would not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial'" and the court may grant the motion for summary judgment. Scott v. Harris, 550 U.S. 372, 380 (2007) (quoting Matsushita Elec. Indus. Co., 475 U.S. at 586–87). If however, reasonable minds could disagree on the inferences arising from the material facts, then the Court must deny the motion for summary judgment. Anderson, 477 U.S. at 248. In other words, the Court must consider whether the evidence is "such that a reasonable jury could return a verdict for the nonmoving party." Id.; see also Marine Coatings of Alabama, Inc. v. United States, 932 F.2d 1370, 1375 (11th Cir. 1991) ("A dispute [of fact] is 'genuine,' if the evidence is such that a reasonable jury could return a verdict for the nonmovant.") (citation omitted).

III. DISCUSSION

To prevail on a negligence claim, a plaintiff must show that (1) defendant had a duty to protect plaintiff from a particular injury; (2) the defendant breached that duty; (3) the breach actually and proximately caused plaintiff's injury; and (4) plaintiff suffered actual harm." Sorrels v. NCL (Bahamas) Ltd., 796 F.3d 1275, 1280 (11th Cir. 2015) (citing Franza v. Royal Caribbean Cruises, Ltd., 772 F.3d 1225, 1253 (11th Cir.2014)). Further, "the benchmark against which a shipowner's behavior must be measured is ordinary reasonable care under the circumstances, a standard which requires, as a prerequisite to imposing liability, that the carrier have had actual or constructive notice of the risk-creating condition." Id.

Plaintiffs argue partial summary judgment should be entered against Defendant as to its negligence claims, as well as Defendant's fourth affirmative defense, which alleges comparative negligence and superseding cause. Defendant argues summary judgment should be entered as to Plaintiffs' negligent failure to warn claim because the danger of placing a child by or on an open window is open and obvious. Defendant further argues it is entitled to summary judgment as to Plaintiffs' general negligence and negligent failure to maintain claims because it had no notice of the risk-creating danger, and Defendant is not liable for Mr.

Anello's conduct, which Defendant argues was the sole proximate cause of the child's death.

a. Defendant is entitled to summary judgment on Plaintiffs' negligence claims because it had no notice of the risk-creating danger.

Plaintiffs, in their Motion for Partial Summary Judgment and in their Response to Defendant's Motion for Summary Judgment, argue Defendant was on notice that the windows on the pool deck were a fall hazard. In support thereof, Plaintiffs produced evidence including Defendant's warnings to passengers of the risk of sitting, standing, and climbing on railings; a previous incident on a different ship wherein a child climbed on nearby furniture and nearly fell out of a window; testimony of Defendant's former Chief Security Officer regarding remedial measures taken to prevent falls; and the fall prevention measures put in place by the Defendant (ECF No. 188). In response to Plaintiffs' Motion, and in its own Motion for Summary Judgment, Defendant argues that this evidence fails to show that Defendant had knowledge of the risk-creating condition, which was Mr. Anello lifting the child through an open window. As such, Defendant argues it is entitled to summary judgment on Plaintiffs' claims because of the Defendant's lack of notice.

i. Prior Incident

As stated by the Eleventh Circuit, where a plaintiff offers evidence of prior instances to prove notice, "a plaintiff must

present evidence of accidents that are substantially similar to hers." Taiariol v. MSC Crociere S.A., 677 F. App'x 599, 601 (11th Cir. 2017)(citing Jones v. Otis Elevator Co., 861 F.2d 655, 661-62 (11th Cir. 1988) (stating that although "evidence of similar accidents might be relevant to the defendant's notice, conditions substantially similar to the occurrence in question must have caused the prior accident")).

In *Taiariol*, the plaintiff slipped on a protective cover placed on the edge of a step. Taiariol supported her argument that the ship owner was on notice of the slippery condition of the step with evidence of other passengers slipping and falling aboard the defendant's vessel. The Eleventh Circuit held, "the 'similar incidents' Taiariol presented are similar to her incident only to the extent that a person fell while on board one of the defendant's cruise ships." Taiariol, 677 F. App'x at 601. The Court further explained that Taiariol needed to show prior instances of passengers slipping because of the protective edge on the stairs. Similarly here, Plaintiffs present evidence of one near-fall incident which was dissimilar to the incident which caused the Plaintiffs' damages. The prior incident involved a child climbing on top of furniture placed nearby an open window, before a passenger lifted the child down, preventing them from falling through the window. In the instant case, the 18-month old Decedent did not climb up to the window or access the window on her own.

Instead, she was lifted over the safety handrailing and through the open window by an adult. As such, the prior incident was factually dissimilar, and insufficient to establish that the Defendant was on notice of the risk-creating condition.

ii. Remedial Measures, Policies, and Deposition Testimony of Former Chief Security Officer

Next, Plaintiffs argue Defendant's remedial measures and policies prohibiting passengers from sitting, standing, or climbing on railings indicate that Defendant had notice of the risk-creating condition. In support thereof, Plaintiffs quote *Amy*, an Eleventh Circuit case which states, "'warning passengers about a danger posed by a condition' can establish notice of such dangerous condition." (ECF No. 188). However, the very next line of that opinion states, "not all warnings ... will be evidence of notice; there must also be a connection between the warning and the danger." Amy v. Carnival Corp., 961 F.3d 1303, 1309 (11th Cir. 2020)(internal citations and quotations omitted). Here, the Defendant's warning for passengers not to sit, stand, or climb on railings is divorced from the risk-creating danger at issue in this case. Exhibit A to this Order contains still photographs extracted from the CCTV footage filed by Defendants (ECF No. 13). The video footage vividly reveals that Mr. Anello leaned his upper body over the wooden handrailing that is affixed in front of the

window, bent at the waist, for approximately eight seconds (ECF No. 13 at 8:05:11-19). During this time, Mr. Anello's arms were in front of him and situated between the wooden handrailing and the window opening. The video then shows him returning to an upright position and bringing his arms back in (ECF No. 13 at 8:05:18), squatting down (ECF No. 13 at 8:05:20-25), picking the Decedent up, and lifting her over the wooden handrailing (ECF No. 13 at 8:05:26-30). Mr. Anello is seen leaning his upper body over the wooden handrailing for the second time, as he holds the child out in front of him. Although the video does not show how far in front of the railing Mr. Anello held the child, the record evidence shows that the distance between the wooden handrailing and the window opening was about fifteen inches (ECF No. 134-11)[1]. Mr. Anello also testified that he believed he extended the Decedent out to the windowsill (ECF No. 134-5 at 163). The danger associated with Mr. Anello's conduct bears no significant connection to the Defendant's warnings to passengers. Accordingly, Plaintiffs' argument that these warnings indicate the Defendant's actual or constructive notice of the risk-creating danger must be rejected.

Finally, Plaintiffs argue that the fall prevention measures taken by Defendant, as well as testimony by Defendant's former Chief Security Officer that remedial measures were taken to prevent

[1] Exhibit K to Defendant's Statement of Material Facts shows that the distance from the exterior edge of the wooden handrailing to the window opening is about fifteen inches.

passengers from falling out of windows, indicate the Defendant's knowledge of the risk-creating condition. This argument fails for the same reason. Plaintiffs' evidence showing that Defendant took remedial measures, including installing guard rails, and maintaining specific window heights to ensure children could not access the open windows, shows that Defendant was on notice of the risk of children independently accessing windows, and individuals falling from windows generally. However, the true risk-creating danger here was Mr. Anello lifting a child up to an open window. The Plaintiffs have provided no evidence showing the Defendant was on notice of that danger.

b. Plaintiffs are entitled to summary judgment on Defendant's comparative negligence defense.

Defendant, in its Fourth Affirmative Defense, alleges, "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" (ECF No. 50).

Plaintiffs argue summary judgment should be entered as to Defendant's comparative negligence defense. This Court agrees.

While Defendant has made arguments that Mr. Anello's conduct caused the child's injuries, Mr. Anello is not a plaintiff in this matter. Defendant has made no argument and has produced no evidence indicating Plaintiffs – the child's parents – were negligent. "If a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by Rule 56(c), the court may... grant summary judgment if the motion and supporting materials – including the facts considered undisputed – show that the movant is entitled to it." See Fed.R.Civ.P. 56(e)(3). Accordingly summary judgment must be entered as to Defendant's affirmative defense based on comparative negligence.

c. Defendant is entitled to summary judgment on Plaintiffs' negligence claims because Mr. Anello's conduct was a superseding cause of the incident, severing the chain of causation between the Defendant's alleged negligence and the injury.

Defendant argues that summary judgment should be entered as to all of Plaintiffs' claims because the conduct of a third party, Mr. Anello, was the sole proximate cause of the Plaintiffs' injuries and his conduct constitutes an intervening cause.

Plaintiffs argue that the Defendant's intervening or superseding cause defense is prohibited by the applicable maritime law, which prohibits the apportionment of fault to a non-party. The Court rejects this argument. 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).

"Under Florida law a separate action is an intervening cause so as to cut off a defendant's liability only when it is "completely independent of, and not in any way set in motion by, the tortfeasor's negligence." Zinn v. United States, 835 F. Supp. 2d 1280, 1318 (S.D. Fla. 2011) (citing Lindsey v. Bell South Telecomm., Inc., 943 So.2d 963, 965 (Fla. 4th DCA 2006)). "[A]n intervening cause supersedes the prior wrong as the proximate cause of the injury by breaking the sequence between the prior wrong and the injury. However, [i]f an intervening cause is foreseeable the original negligent actor may still be held liable." Nat'l Union Fire Ins. Co. of Pittsburgh PA v. SPX Flow US, LLC, 428 F. Supp. 3d 1334, 1345 (S.D. Fla. 2019) (citing Goldberg v. Fla. Power & Light Co., 899 So.2d 1105, 1116 (Fla. 2005)). Therefore, the Court's inquiry turns on whether Plaintiffs have presented sufficient evidence from which a reasonable juror could find that Mr. Anello's conduct was foreseeable. The Court finds that Plaintiffs have failed to make such a showing.

Here, Mr. Anello pled guilty to the charge of negligent homicide stemming from the incident that is the subject of this lawsuit (ECF No. 134-5 at 211-212). The Eleventh Circuit has held, "[g]enerally, independent illegal acts of third persons are deemed unforeseeable and therefore the sole proximate cause of the injury,

which excludes the negligence of another as a cause of injury." Decker v. Gibson Prod. Co. of Albany, 679 F.2d 212, 215 (11th Cir. 1982). Plaintiffs have presented insufficient evidence to circumvent this presumption.

In denying Defendant's Motion to Dismiss (ECF No. 30), this Court stated, "the Defendant's [proximate cause] argument would be more appropriately addressed after discovery..." (ECF No. 41). Despite conducting extensive discovery, the Plaintiffs have failed to present evidence indicating that the Defendant knew or should have known that there was a risk of an adult lifting a child over the guardrail and through an open window. Further, Defendant presents evidence indicating the U.S. Coast Guard has no record of any prior incident reports involving similar incidents on any vessel. In the absence of any evidence indicating that the Defendant knew or should have known that individuals would act in the manner Mr. Anello did, this Court finds that no reasonable juror could find that Mr. Anello's conduct was foreseeable. See Salazar v. Norwegian Cruise Line Holdings, Ltd., 188 F. Supp. 3d 1312, 1318-19 (S.D. Fla. 2016)(A plaintiff "cannot avoid summary judgment on some generalized theory of foreseeability that is divorced from the particular events in question.")(citing Weiner v. Carnival Cruise Lines, No. 11-22516, 2012 WL 5199604, at *4 (S.D.Fla. Oct. 22, 2012)).

d. Defendant had no duty to warn of the open and obvious danger of placing a child on or through an open window.

A shipowner's duty of care "includes a duty to warn passengers of dangers of which the carrier knows or should know, but which may not be apparent to a reasonable passenger." Taiariol v. MSC Crociere, S.A., No. 0:15-CV-61131-KMM, 2016 WL 1428942, at *3 (S.D. Fla. Apr. 12, 2016). "Where a danger is open and obvious, there is no duty to warn." Yusko v. NCL (Bahamas) Ltd., 424 F. Supp. 3d 1231, 1234 (S.D. Fla. 2020)(citing Smith v. Royal Caribbean Cruises, Ltd., 620 F. App'x 727, 730 (11th Cir. 2015). "Open and obvious conditions are those that should be obvious by the ordinary use of one's senses." Lancaster v. Carnival Corp., 85 F.Supp.3d 1341, 1344 (S.D.Fla.2015).

In the instant case, the danger of lifting the Decedent over the handrailing and extending her out to the open window was open and obvious such that Defendant owed no duty to warn its passengers of the dangers of such conduct. First, photographs of the subject window show that it was surrounded by other windows which were tinted (ECF No. 134-11). As such, the subject window appeared to be a different color from the surrounding windows, indicating that the other windows were closed and the subject window was not. Further, video footage of the incident shows Mr. Anello leaning over the wooden handrailing toward the open window prior to lifting the Decedent up. Mr. Anello also testified that he first lifted

the Decedent and placed her feet on the wooden handrailing (ECF No. 134-5 at 160). He states that he then reached his hand out to touch the window but did not feel any glass (ECF No. 134-5 at 160). Despite not feeling any glass in front of him, and without confirming that the window was closed, Mr. Anello lifted the Decedent beyond the wooden handrailing and extended her body closer to the window opening (ECF No. 134-5 at 160), exposing her to the open window and the dock beneath where she ultimately fell to her death.

The inquiry involved in determining a defendant's duty to warn is objective, and "[i]ndividual subjective perceptions...are irrelevant in the determination of whether a duty to warn existed." John Morrell & Co. v. Royal Caribbean Cruises, Ltd., 534 F.Supp.2d 1345, 1351 (S.D.Fla.2008). Based on the record evidence which reveals that the windows surrounding the subject window were tinted; that Mr. Anello reached out in front of him and felt no glass in the window opening before extending the Decedent out to the window opening; that this incident took place on the 11th deck of the Defendant's vessel; and that Mr. Anello leaned his upper body over the wooden handrailing and out to the window opening before deciding to lift the Decedent up to the window, this Court finds that a reasonable person through ordinary use of his senses would have known of the dangers associated with Mr. Anello's conduct. Accordingly, the Defendant owed no duty to warn of it.

IV. CONCLUSION

Accordingly, it is hereby

ORDERED AND AJUDGED that Plaintiffs' Motion for Partial Summary Judgment (ECF No. 188) is hereby **GRANTED in part.** Summary judgment is entered in favor of Plaintiffs as to Defendant's comparative fault defense. Plaintiffs' Motion for Partial Summary Judgment is **DENIED** in all other respects.

It is further

ORDERED AND ADJUDGED that Defendant's Motion for Summary Judgment (ECF No. 135) is hereby **GRANTED.** Summary judgment is entered as to Plaintiffs' Complaint in its entirety. It is further

ORDERED AND ADJUDGED that that this case is **CLOSED** and any pending motions are **DENIED** as moot.

DONE AND ORDERED in chambers at Miami, Florida, this 13th day of July, 2021.

s/Donald L. Graham
DONALD L. GRAHAM
UNITED STATES DISTRICT JUDGE

cc: All Counsel of Record