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SUPREME COURT
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2001 OCT -8 A 9: 31

NO. 56873-6-I

BY RONALD R. CARPENTER

by _____ SUPREME COURT
CLERK OF THE STATE OF WASHINGTON

JACK OLTMAN, BERNICE OLTMAN and SUSAN OLTMAN
Appellants/Petitioners,

v.

HOLLAND AMERICA CRUISE LINE USA, INC. and HOLLAND
AMERICA LINE, INC.

Respondents.

SUPPLEMENTAL BRIEF

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ORIGINAL

SUPPLEMENTAL BRIEF (Oltman v. Holland
America) //Appellants-Oltmans

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1. Identity of the Parties

The Petitioners to the Supreme Court are Appellants Jack Oltman, Bernice Oltman and Susan Oltman – each of whom were also the Plaintiffs in the trial court action (“the Oltmans”). We have also attempted to identify the Holland America Defendants, the Responding Party/Appellees, as “Holland America”.

2. Citation to Court of Appeals Decision

This appeal involves:

- a) the decision of Division 1 of the Court of Appeals, filed September 11, 2006 (originally attached as Appx. A to the Petition for Review); and
- b) the Court of Appeals Order Denying Plaintiff/Appellants’ Motion for Reconsideration, filed October 24, 2006 (originally attached as Appx. B to the Petition for Review).

3. Introduction

This Supplemental Brief seeks to further clarify the issues and assignments of error raised in the Petition for Review (and the Response and Reply). While it is our understanding that the Court will have before it the briefing filed by the Parties in the Court of Appeals, since those briefs contain a few arguments and assignments of error that were not

raised in the Petition for Review¹, for the purpose of this brief and where it helps crystallize the issues and arguments, we have attempted to include a summary of the substantive arguments made to the Court of Appeals while also attempting to infuse new case law that has developed since these issues were originally briefed..

4. ISSUES PRESENTED FOR REVIEW

- Issue 1: Whether it is proper for a Defendant to assert an affirmative defense of improper venue (to enforce a forum selection clause) when that Defendant failed to file a timely Answer **and** where the failure to timely answer caused actual prejudice to Plaintiff.
- Issue 2: Whether it is proper for a Party to cite (and physically provide) unpublished, state court cases to the trial court (cases in which the Defendants' counsel had acted as counsel) where, it is argued, the cases presented are irrelevant and serve no other benefit but to unfairly prejudice the proceeding;
- Issue 3: Whether a non-traveling Spouse can be held to a passenger cruise contract that she did not enter, sign or agree to, and where no argument was advanced by the moving party at the trial court to show how the non-contracting party could be held to the contract.
- Issue 4: Whether under the specific facts of this case, a cruise ship passenger ticket contract of adhesion, its forum selection clause and one year statute of limitation (reducing the state and federal three year limitations) is valid and enforceable under prevailing Washington State and United States Federal Law, when the

¹ Particularly, Assignments of Error, Issues 5 and 8 identified in the Oltmans' "Opening Brief" to the Court of Appeals were not included in the Petition for Review. Those assertions of error involve the allegation of fraud in the inducement by Holland America (Issue 5) and also the existence of material facts in dispute (Issue 8, pg 49 of Ct. App. Opening Brief). Thus those issues are excluded from briefing here.

passenger only receives the ticket at the time that he/she boards the cruise ship.

Issue 5: Whether Plaintiffs' claims set forth a basis for federal admiralty jurisdiction, and whether it was error for the trial court to decline to make findings on this issue.

Issue 6: Whether the Plaintiffs' filing in State court under the Savings to Suitors clause serves to deprive the federal court of subject matter jurisdiction for that particular case; thereby complying with the Defendant's forum selection clause.

5. STATEMENT OF THE CASE

The Petitioners respectfully rely on the Statement of the Case set forth in the Petition for Review and the more detailed Statement of Case found in the Appellants' opening brief to the Court of Appeals.

6. STANDARD OF REVIEW

Although the appellate court utilizes the *de novo* standard in reviewing the trial court's decision in relation to a motion for summary judgment, (including its examination of all rulings made in conjunction with the summary judgment hearing), *Folsom v. Burger*, 135 Wn.2d 658, 958 P.2d 301 (1998), recently, in July 2007, in *Dix v. ICT Group Inc.*, the Washington Supreme Court fashioned a new standard of review² in cases involving forum selection clauses:

² Compare, e.g., *MacPhail v. Oceaneering Int'l, Inc.*, 302 F.3d 274, 278 (5th Cir.2002) (“[T]he enforcement of a forum selection clause is an issue of law, and we review the district court's conclusions of law *de novo*.”)

We conclude that generally the **abuse of discretion** standard applies. Under this standard of review, a trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds...If the trial court's ruling is based on an erroneous view of the law or involves application of an incorrect legal analysis it necessarily abuses its discretion...Thus, the abuse of discretion standard gives deference to a trial court's fact-specific determination on enforceability of a forum selection clause, while permitting reversal where an incorrect legal standard is applied.

Dix v. ICT Group Inc., 160 Wash.2d 826 (2007) (emphasis added, internal citations omitted).

However, if a pure question of law is presented, the Court continued,

such as whether public policy precludes giving effect to a forum selection clause in particular circumstances, a **de novo** standard of review should be applied as to that question. *See Ang v. Martin*, 154 Wash.2d 477, 481, ¶ 9, 114 P.3d 637 (2005) (questions of law are reviewed de novo); *Motor Contract Co. v. Van Der Volgen*, 162 Wash. 449, 454, 298 P. 705 (1931) (question whether a contract is against public policy is a question of law).

Id. At 833-34. (emphasis added)

Because the assignments of error identified in this appeal involve both **questions of law** (including whether a later filed answer may preclude application of the defense of improper venue; whether it was error to not require the moving party to prove and thereafter for the court to apply the appropriate tests and make a finding that federal jurisdiction was present; and whether the utilization of the savings to suitors clause deprives the federal court of jurisdiction) and also **public policy** (enforcement of the forum selection clause in this case will altogether

deprive the Plaintiffs of their day in court and therefore is fundamentally unfair), the de novo standard of review should apply.³

7. ARGUMENT

Issue 1: Whether it is proper for a Defendant to assert an affirmative defense of improper venue (to enforce a forum selection clause) when that Defendant failed to file a timely Answer and where the failure to timely answer caused actual prejudice to Plaintiff.

For this first assertion of error, the base of the Oltmans' arguments have been in reliance on the clear language of Civil Rule 12(a) (with its employ of the term "shall") requiring a Defendant to file and serve an Answer within 20 days of service of the original complaint. In addition, the Oltmans have relied on Rule 12(h)(1) (Waiver or Preservation of Certain Defenses), which provides that an asserted defense (such as forum selection/improper venue) may be waived if not provided in an answer⁴

³ However, with respect to the Court's review of the trial court's application of the "reasonable communicative test", as well as the general enforceability of the forum selection clause under state law, the Court's review would be under the more deferential "abuse of discretion" standard (nothing however, that the trial court did not appear to employ the reasonable communicative test nor did the court make any findings of fact with respect to whether or not the forum selection clause was reasonably communicated to the Oltmans – and therefore this would seem to rise to an error of law and the application of the *de novo* standard of review, as well).

⁴ *Alexander v. Food Servs. of Am., Inc.*, 76 Wash.App. 425, 428-29, 886 P.2d 231 (1994) (failure to raise any matter constituting an avoidance or affirmative defense in a timely manner results in a waiver of the defense); *Northwest Land & Inv., Inc. v. New W. Fed. Sav. & Loan Ass'n*, 64 Wash.App. 938, 944, 827 P.2d 334 (affirmative defense may be waived if not timely raised), *review denied*, 120 Wash.2d 1002, 838 P.2d 1143 (1992).

(which, the Oltmans assert, must be made within the 20 day window required by Civil Rule 12).

However, at the moment there does not appear to be any case law that serves to uphold and enforce the mandatory language of these rules by providing a penalty when a party chooses to file an untimely reply. The same is true even if the late filing of the answer causes actual prejudice to the Plaintiff (as has occurred in the present case). Thus, Defendants, knowing this to be the case, are free to wait as long as possible before filing an Answer, including waiting until an applicable statute of limitations passes (to then move for dismissal for improper venue), or waiting until the Plaintiff moves for default.⁵

However, while there appears to be no Washington case law squarely on point, the situation appears to be a bit different when we discuss the deadline for filing an Answer or Reply to a Counterclaim, as the 20 day deadline may be more stringently applied. *Jansen v. Nu-West, Inc.*, 102 Wash.App. 432, 438, 6 P.3d 98 (2000), *review denied*, 143 Wash.2d 1006, 20 P.3d 945 (2001) (requiring that the Reply/Answer to the Counterclaim be filed within 20 days absent leave of court).

⁵ Thereby causing the Plaintiffs time and cost in bringing a motion for default, whereas a defendant who has appeared may file the response any time before the hearing on the motion, thereby curing the default without penalty. CR 55(a)(2)

With no Washington cases squarely on point, the Oltmans turned to the federal rules of civil procedure for guidance. From a review of federal case law addressing this issue, it was clear that a remedy was available and that penalties were in fact imposed on defendants for the late filing of an answer (particularly where prejudice was shown).⁶ Since our Washington state Civil Rules parallel and share lineage with the Federal Rules, we respectfully request that the Court adopt a similar rule for Washington State which holds that a Defendant must file and serve their answer within 20 days or risk having their affirmative defenses barred, particularly in cases where the action of the Defendants in a case (in not answering within 20 days) have caused actual prejudice to the Plaintiffs.⁷

Finally, while the Oltmans had moved to strike the affirmative defenses raised in the late answer (CP 34-64) and thereafter, again raised the motion to strike along with the allegation of prejudice in response to Holland America's Motion for Dismissal for improper forum (CP 205-307), should the issue of whether the Oltmans suffered actual prejudice by

⁶ Cf *Lexington Ins. Co. v. Swanson*, Slip Copy, 2007 WL 1585099 (W.D.Wash. 2007) (unless prejudice is shown, an affirmative defense may be raised in a late filed answer); *Rivera v. Anaya*, 726 F.2d 564, 100 Lab.Cas. P 34,508 (9th Cir. CA 1984)) (unless prejudice is shown, a defendant may raise an affirmative defense the period for answering has closed).

⁷ Such an interpretation would also be in line with Civil Rule 1 which requires that the rules be construed and administered "to secure the just, speedy, and inexpensive determination of every action."

Holland America's late answer be in dispute,⁸ then this issue would be best remanded to the trial court for further determination as to actual prejudice borne by the Plaintiffs.

Issue 2: Whether it is proper for a Party to cite (and physically provide) unpublished, state court cases to the trial court (cases in which the Defendants' counsel had acted as counsel) where the cases cited are irrelevant and serve no other benefit but to unfairly prejudice the proceeding;

In support of this assertion of error, the Oltmans cited Rule of Appellate Procedure 10.4(h) (prohibiting the citation of unpublished court of appeals decisions to the appellate courts) and *Johnson v. Allstate Insurance Company*, 108 P.3d 1273, 126 Wash. App. 510 (Wash.App.Div.2 2005) where the court held that unpublished court of appeal decisions should also not be cited to the trial court.⁹ Finally, the

⁸ And, the Oltmans assert that prejudice did in fact occur in this case where the Defendants could have filed their Answer (with their affirmative defenses) on or before the 20th day after they were served with the Summons and Complaint, and with that answer, the Plaintiffs could have been made aware of the Holland America's objection to suit in Washington state court prior to the running of the shortened statute of limitations. Thus, had Holland America filed within 20 days, the Plaintiffs assert that they could have had time to consider subsequently either re-filing their claim in the United States District Court before the expiration of the one year statute of limitations. (CP 205-307). Because there is uncertainty as to the date that Holland America's tortuous acts took effect, the Oltmans asserted in the Court of Appeals opening brief, pg 12 and in their Opposition to the Motion for Summary Judgment, CP 205-307 (pg 6, lines 7-12) that had Holland America timely answered, that the Oltmans could have re-filed in Federal District Court.

⁹ The Johnson court wrote,

We agree that Allstate improperly relied on our unpublished opinion and that the trial court also erred in relying on it. And Allstate's self-serving comment that it did not submit the opinion as controlling authority under RCW 2.06.040 does not remove the taint from its inappropriate action. Because we affirm the trial court's ruling, the only remedy available to the Johnsons would be sanctions. [citations omitted]

Oltmans cited *St. John Medical Center v. State of Washington*, 110 Wash.App. 51, 38 P.3d 383, FN5 (Wash.App. Div 2 2002), in which Division Two of the Court of Appeals recognized that trial court decisions that are not published are also prohibited from citation as authority (in the appellate court).

Issue 3: Whether a non-traveling Spouse can be held to a passenger cruise contract that she did not enter, sign or agree to, and where no argument was advanced by the moving party below.

For this assertion of error, in their Petition for Review, the Petitioner/Appellants cited longstanding law that holds that for a person/entity to be held to a contract, particularly a forum selection clause, the person/entity must be a party to the contract.¹⁰

And while a party may contractually agree to a forum which otherwise would not have personal jurisdiction over them, in order for *due process* to be satisfied, there must exist an actual agreement by the party to submit to the jurisdiction of a foreign court. *The Bremen v. Zapata Off-*

But Allstate did not cite an unpublished opinion to us, thus we are unable to impose appropriate sanctions. Nevertheless, we note with displeasure that Allstate ignored our longstanding prohibition against citing unpublished opinions,... We do not consider unpublished opinions in the Court of Appeals, and they should not be considered in the trial court...[citations omitted]. *Johnson v. Allstate Insurance Company*, 108 P.3d 1273, 126 Wash. App. 510 (Wash.App.Div.2 2005)

¹⁰ *Yakima County (West Valley) Fire Protection Dist. No. 12 v. City of Yakima*, 122 Wn.2d 371, 389, 858 P.2d 245, 255 (1993) ("Mutual assent is required for the formation of a valid contract."); *Shower v. Fischer*, 47 Wn.App. 720, 728-729, 737 P.2d 291, 295 (1987); *American Mobile Homes v. Seattle-First National Bank*, 115 Wn.2d 307, 321-322, 796 P.2d 1276, 1283-1284 (1990); *State ex rel. Elec. Prods. Consol. v. Superior*

Shore Co 407 U.S. 1, 9-10 (1972).¹¹ Alternatively, if a contract is not present, there must be some type of other relationship between the parties to make enforcement reasonable (such as an assignment or third party beneficiary, by which the non-contracting party may have acceded to the rights of the first party in interest).

In this respect, the moving party always has the initial burden of making a prima facie showing that the exercise of jurisdiction is justified, *Holland America Line v. Wärtsilä North Amer.* (9th Cir.2007) 485 F.3d 450, 455 (*Wärtsilä*); that is, the moving party must show that a contract exists, or failing a contract, that a special relationship exist. But there is no such contractual relationship in this case, as Susan Oltman did not travel on the cruise, nor enter into any agreement with Holland America. Moreover, Holland America failed to present and prove a special relationship to the trial court that would present an alternative to the necessity for an express contract and overcome the any challenge to lack of due process. Even had Holland America argued that Susan Oltman's loss of consortium claim was "derivative" of her husband's, this claim

Court, 11 Wn.2d 678, 679, 120 P.2d 484, 484-485 (1941); and *State ex rel. Lund v. Superior Court*, 173 Wn. 556, 558, 24 P.2d 79 (1933).

¹¹ Cf. *Kysar v. Lambert*, 76 Wash.App. 470, 484, 887 P.2d 431, 440 (1995), review denied, 126 Wash. 2d 1019, 894 P.2d 564 (1995) ("Where such forum-selection provisions have been obtained through 'freely negotiated' agreements and are not 'unreasonable and unjust,' their enforcement does not offend due process").

would have failed as Washington law recognizes loss of consortium as a separate claim, and not as a derivative one. *Green et al. v. A.P.C. et al*, 136 Wash.2d 87, 960 P. 2d 912 (1998). This also the conclusion that the United States District Court¹² came to before changing its decision based upon the Washington Court of Appeals decision which found that, despite the lack of privity and the independent nature of her claim, Susan Oltman should be held to have entered the contract.

In addition to the substantive legal hurdles of whether or not a non-party to a contract may be held to the terms of a contract, there also exists the procedural issue of Holland America having failed to have set forth any argument or basis, at all,¹³ that Susan Oltman could be held to the forum selection clause along with her husband and mother-in-law who had traveled on the cruise line (when she herself had not). The record is replete

¹² Pg 9 of the United State District Court's Order of 8/1/06 (Appendix B of Holland America's Response), reads:

B. The one-year limitation does not apply to Susan Oltman's claim for loss of consortium.

Finally, the court turns to Susan Oltman's loss of consortium claim. The one-year limitations period does not apply to this claim, because she was not a party to her husband's cruise contract. Defendants rely on Miller v. Lykes Bros. S.S. Co., 467 F.2d 464, 466-67 (5th Cir. 1972) for the proposition that a loss of consortium claim is subject to the same contractual limit as the injured party's claim. In Miller, however, as in other cases that Defendants cite, both the injured party and spouse claiming loss of consortium were passengers and were therefore subject to the same cruise contract. Susan Oltman, by contrast, was not a passenger with her husband.

with defenses, arguments and assertions that Plaintiff Susan Oltman's case against the Defendant should be separated from the Defendants' Motion for Summary Judgment because it was inapplicable to her,¹⁴ ¹⁵yet, there is no response from the Defendant, nor any findings of fact or conclusions of law from the trial court on this point.¹⁶

Issue 4: Whether a cruise ship passenger ticket contract of adhesion, its forum selection clause and one year statute of limitation (reducing the state and federal three year limitations) is valid and enforceable under prevailing Washington State and United States Federal Law, when the passenger only receives the ticket at the time that he/she boards the cruise ship.

Although the Oltmans' briefing to the Court of Appeals involved a more detailed analysis of both state and federal contract law relating to the validity and enforcement of contracts of adhesion and forum selection clauses, the Oltmans note the recent court decision of *Dix v. ICT Group*

¹³ Save a footnote in their trial court Reply Brief (and not in their actual opening Motion brief) on the Motion for Summary Judgment.

¹⁴ See e.g. CP 209, Plaintiffs' Response to Summary Judgment, CP 205-229, "[i]t must be made clear that because Plaintiff Susan Oltman did not enter into any agreement (nor had she seen or was made of aware of one), See Ex. C of S. Oltman, para 4-6 [CP 238-239], the purported cruise ship contract does not apply to Mrs. Oltman and therefore cannot be enforced against her whether in federal admiralty or under state law. The Defendants' have, of course, failed to address this issue at all. Because she is not suing under it and because she did not enter into it, the contract does not bind her and cannot be enforced against her."

¹⁵ Even the passenger contract itself limits its applicability to persons traveling under it. (CP 109, Ex. A, Decl. of Susan C. Lundgren, pg 14 "Important Notice to Passengers").

¹⁶ Plaintiffs note that an opposing party does not need to submit affidavits or responding materials unless the movant meets its burden. *Hash v. Childrens' Orthopedic Hosp. & Med. Ctr.*, 110 Wn. 2d 912, 757 P.2d 507 (1988) And, that the absence of a finding can be considered a negative finding in some cases. See *Smith v. King*, 106 Wn.2d 443, 451, 722 P.2d 796 (1986).

Inc., 160 Wash.2d 826 (2007) in which the Washington Supreme Court acknowledged the tests for validity and enforcement as originally set forth in cases such as *The M/S Bremen*, *supra*, and *Carnival Cruise Lines*, *infra*.

[A] forum-selection clause is presumptively valid and enforceable and the party resisting it has the burden of demonstrating that it is unreasonable, (2) a court may deny enforcement of such a clause upon a clear showing that, in the particular circumstance, enforcement would be unreasonable, and (3) the clause may be found to be unreasonable if (i) it was induced by fraud or overreaching, (ii) the contractually selected forum is so unfair and inconvenient as, for all practical purposes, to deprive the plaintiff of a remedy or of its day in court, or (iii) enforcement would contravene a strong public policy of the State where the action is filed.

We agree with this analysis, which is generally in agreement with statements in this state's appellate decisions. *See Bank of Am.*, 108 Wash.App. at 748, 33 P.3d 91 (a “party arguing that the forum selection clause is unfair or unreasonable bears a heavy burden of showing that trial in the chosen forum would be so seriously inconvenient as to deprive the party of a meaningful day in court”; “[a]bsent evidence of fraud, undue influence, or unfair bargaining power, courts are reluctant to invalidate forum selection clauses as they increase contractual predictability”); *Voicelink*, 86 Wash.App. 613, 937 P.2d 1158 (forum selection clauses are enforced unless they are unreasonable and unjust; resisting party has the heavy burden of proof; unreasonableness may be shown by evidence of fraud, undue influence, overweening bargaining power or such serious inconvenience as to deprive the party of a meaningful day in court)... *Dix*, 160 Wash.2d at 834-35.¹⁷

As was also the central issue in both *Dix*, 160 Wash.2d at 835-836 and *Bank of Am.*, 108 Wash.App. at 748, the major issue in the present

¹⁷ *Accord Holland America Line Inc. v. Wärtsilä Finland Oy. Et al.*, 485 F.3d 450, 457 (C.A.9 Wash.2007).

case relates to whether enforcement of the forum selection clause in this case would be against the public policy of this state and so seriously inconvenient as to deprive the party of a meaningful day in court. Since the Defendants were successful in moving to dismiss the companion federal court case as untimely under the shortened statute of limitations (contained in the cruise ship contract),¹⁸ enforcement of the forum selection clause would in fact deprive the party of their day in court altogether – and all without satisfying any of the rationales underlying enforcement as originally set forth by *Shute v. Carnival Cruise, infra* and *The M.S. Bremen, infa*.

In fact, one would be hard pressed to find a better example of unreasonable and unjust than a plaintiff being permanently barred from maintaining suit due to a forum selection clause, especially where the defendants filed an untimely affirmative defense, where the forum selection clause is not clear, where the fora are less than some 2 miles apart, where the plaintiff had in fact timely filed in state court pursuant to the savings to suitors clause, and where the plaintiffs believed that they would be prevented from having a jury trial in federal court.¹⁹

¹⁸ See Appendix B of Holland America's Responsive Brief to the Supreme Court.

¹⁹ Which is precisely what Holland America itself argued in attempting to convince the court to deny enforcement of a forum selection clause which would have Holland America litigate in France. *Arizona v. Components Inc.*, 66 F.3d 213, 217(9th Cir.1995).

Federal Law Analysis. Similar to the state law barriers to enforcement of the forum selection clause as being unreasonable and unjust under the circumstances, a like minded test has been set forth by the federal courts under *Carnival Cruise v. Shute*, 113 L.Ed. 2d 622, 111 S.Ct. 1522 (“Carnival Cruise” or “Shute”) and *Bobbi Jo Wallace*.²⁰ Pursuant to these seminal cases, cruise ship forum selection clauses must have been both reasonable communicated to the traveling passenger and, antecedent to that first issue, fundamentally fair under the circumstances.

(“Holland America argues that the French forum provision contravenes public policy because it deprives Holland America of its right to a jury trial. Because this argument was not raised below, it is waived.”)

²⁰ [The Ninth Circuit] employ[s] a two-pronged ‘reasonable communicativeness’ test . . . to determine under federal common law and maritime law when the passenger of a common carrier is contractually bound by the fine print of a passenger ticket. . . . [T]he ‘proper test of reasonable notice is an analysis of the overall circumstances on a case by-case basis, with an examination not only of the ticket itself, but also of any extrinsic factors indicating the passenger’s ability to become meaningfully informed of the contractual terms at stake.’ . . . Whether the ticket provides reasonable notice is a question of law. . . .

The **first prong** of the reasonable communicativeness test focuses on the physical characteristics of the ticket. Here we assess ‘ [f]eatures such as size of type, conspicuousness and clarity of notice on the face of the ticket, and the ease with which a passenger can read the provisions in question.’ * * *

The **second prong** of the reasonable communicativeness test requires us to evaluate ‘the circumstances surrounding the passenger’s purchase and subsequent retention of the ticket/contract.’ ‘The surrounding circumstances to be considered include the passenger’s familiarity with the ticket, the time and incentive under the circumstances to study the provisions of the ticket, and any other notice that the passenger received outside of the ticket.’ This prong allows us to examine more subjective, ‘extrinsic factors indicating the passenger’s ability to become meaningfully informed.’

Bobbie Jo Wallis v. Princess Cruises, Inc., 306 F.3d 827, 835-836 (9th Cir. 2002) (emphasis added) (hereinafter “*Bobbie Jo Wallis*”) (internal citations omitted).

In this case, the forum selection clause fails both tests, as the ticket was not only not communicated to the Oltmans ahead of their travel (as taking the light in the evidence most favorable to the Oltmans, they received the tickets only as they boarded the ship for travel)²¹ but even if it had been, it is still fundamentally unfair to enforce such a clause where it serves no purpose other than to deny the Oltmans day in court – which is exactly what Holland America seeks to do.

In *Carnival Cruise Lines, Inc. v. Shute*, 113 L.Ed. 2d 622, 111 S.Ct. 1522, unlike what the Defendants argued in their Motion for Summary Judgment, the U.S. Supreme Court did not hold that forum selection clauses in **all** cruise ship passenger adhesion contracts in all situations are automatically valid; instead, the Supreme Court recognized

²¹ Holland America has asserted that the “terms and conditions were available on their website” but they produced no evidence that the Oltmans were ever informed that the terms and conditions were in fact available. Holland America’s lack of evidence here to support their allegation is similar to the evidence presented in *Holland America v. Wärtsilä*, where the court wrote:

Holland America's jurisdictional claim rests on flimsy evidence: Holland America alleges that it conveyed its form terms (including the forum selection clause) to an unidentified email address ending in @wärtsilä.com, and that the Wärtsilä entities had notice of the terms because they appear on Holland America's website. The missing and critical evidence is telling. Holland America has not provided us any of the following via allegations or evidence: a copy of the terms email; the name of any person who might have been on the receiving end of the email; any evidence of any assent to the terms by either Wärtsilä or Wärtsilä Finland; the name, position, or the individual within Holland America who might have sent the email; or the purchase orders related to the claims at issue. . . . Such an unsubstantiated and vague statement does not establish a prima facie case for jurisdiction.

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that forum selection clauses must be reviewed under a standard of reasonableness and fairness. *Shute*, 499 U.S. at 595. Through *Shute*, the Supreme Court called on courts to conduct an exacting review of cruise line tickets to determine the validity of the terms and conditions contained therein. **“It bears emphasis that forum-selection clauses contained in form passage contracts are subject to judicial scrutiny for fundamental fairness.”** *Shute* at 633. (emphasis added). The Oltmans’ brief to the Court of Appeals at pp 31-36 delves into great and important detail on the application of *Shute* to the present case and the Oltmans respectfully refer the Court to review these pages for this argument.

The Defendants seek to enforce this vaguely drafted forum selection clause to simply try and avoid litigation, and not, for the reason cited in *Carnival* – which was to reduce costs. Reasonableness and fairness must be observed and the standards of reason and fairness (and the express naming of the King County Superior court as a suitable forum) dictate that the suit remain in that court.

Issue 5: Whether Plaintiffs claims set forth a basis for federal admiralty jurisdiction in the first place, and whether it was error for the trial court to refuse to make findings on this issue.

Even if the cruisetour contract is valid and enforceable, the burden is nevertheless on the Holland America (as the moving party) to have

proved to the trial court that the federal court would have jurisdiction over each of the claims of the Oltmans. This they failed to do and instead simply asserted that cruise ship contracts were maritime contracts and therefore governed by maritime law. But that is not the law. *Guidry v. Durkin*, 834 F.2d 1465 , 1469 (9th Cir. 1987).(Admiralty jurisdiction is lacking where the tort occurs, or the negligence took effect, solely on dry land.); and *Doonan v. Carnival Corporation*, 404 F.Supp.2d 1367, 1370 (S.D. Florida 2005) (Even in cruise ship injury cases, the court must determine whether there is admiralty jurisdiction over tort claims – looking to the tests of locality and maritime relationship).²²

Holland America clearly failed to set forth a basis for federal admiralty law with respect to Plaintiffs' claims, other than to have simply asserted, without more, that cruise ship contracts fall under maritime law. Such a bare assertion, without more, simply cannot be permitted to stand as a basis for federal admiralty jurisdiction in a case as important as this.

Issue 6: Whether a Plaintiff's filing in State court under the Savings to Suitors clause serves to deprive the federal court of admiralty jurisdiction and therefore comply with and satisfy the Defendant's forum selection clause.

²² *Executive Jet, Lauritzen A/S v. Dashwood Shipping Ltd*, 65 F.3d 139, 142, 1995 A.M.C. 2730 (9th Cir. 1995).

Absent a ground for Removal, the Savings to Suitors Deprives the Federal Court of Jurisdiction.

As their final argument, the Oltmans assert that even were the Supreme Court to find that the application of the forum selection clause in this case under these facts is not fundamentally unfair, and instead, was reasonably communicated, and that federal admiralty jurisdiction would exist for each of Plaintiff's claims; even then, under the admiralty statute, 28 U.S.C. s. 1333(1) the Saving to Suitors clause provides the affirmative right to Plaintiffs to choose a state court forum to adjudicate their claims, thereby depriving the federal court of subject matter jurisdiction.

In addition to citing 28 U.S.C. s. 1333(1), the Oltmans' Petition for Review cited *Little et. al.* at 6; and *Auerback v. Tow Boat U.S., et al*, 303 F. Supp. 2d 538 (D.C. NJ 2004) providing that the savings to suitors clause serves to deprive the federal court of subject matter jurisdiction. Since it appears very difficult to appeal the denial of a motion to remand (denying subject matter jurisdiction on the removal attempt) there are few cases which are directly on point. However, the just released case of *Michael C. Pendley, v. Ferguson-Williams Inc., et al.*, No. C-07-141. (S.D. Texas May 1 2007) appears to state this principle exactly on point:

B. The Court Does Not Have Jurisdiction Over This Case

For the reasons set forth below, the Court finds that this case could not be removed on the basis of maritime jurisdiction, and the Court

specifically rejects Defendant[s'] arguments that this Court has federal question and/or diversity jurisdiction over this action. Accordingly, this case must be remanded back to state court.

1. Maritime Jurisdiction

Plaintiff brings this case under "the general maritime law of the United States", and he specifically states in his Original Petition that the case "is being pursued under the savings to suitors clause contained in 28 U.S.C. § 1333." ... 28 U.S.C. § 1333 states that "The district courts shall have original jurisdiction, exclusive of the courts of the States, of ... [a]ny civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled." 28 U.S.C. § 1333(1).

The Court notes that this case could have been originally filed in federal court. However, maritime claims brought under the savings to suitors clause do not form a basis for removal from state to federal court, and this case cannot be removed solely because Plaintiff brings maritime law claims against the Defendants. See *Fields v. Pool Offshore, Inc.*, 182 F.3d 353, 356 (5th Cir.1999) (a general maritime law claim brought in state court "does not of itself furnish a basis for removal even though it could have been filed originally in federal court"); ... *Hufnagel v. Omega Service Industries, Inc.*, 182 F.3d 340, 348 (5th Cir.1999) ("It is settled that ... an admiralty action filed in state court under the savings to suitors clause, 28 U.S.C. § 1333(1), is not removable solely because as an admiralty action it could have initially been filed in federal court").

Accordingly, since Plaintiff brings his claims against the Defendants under the general maritime law of the United States and pursuant to the savings to suitors clause, this case cannot be removed on the basis of federal maritime jurisdiction. If there is no other basis for jurisdiction, then this case must be remanded to state court.

7. CONCLUSION

For these reasons, the Plaintiffs respectfully request that the Court enter an Order REVERSING the Court of Appeals decision which had

affirmed the trial court's dismissal of this action, and REMAND this case to the trial court for further proceedings consistent with the decision of the Court.

DATED this 5th day of October 2007.

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