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No. 56873-6-1

**COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON**

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

v.

HOLLAND AMERICA LINE USA, INC., a Delaware Corporation,
and HOLLAND AMERICA LINE, INC., a Washington Corporation,
Defendants/Appellees

BRIEF OF APPELLANTS/PLAINTIFFS:
JACK OLTMAN, BERNICE OLTMAN, and SUSAN OLTMAN

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A. ASSIGNMENTS OF ERROR

1. The Trial Court erred in entering the Order of 6/15/2005 (CP83-84) denying the Defendants' Motion for Default and/or to Strike Affirmative Defense (filed 6/02/2005; CP34-64);
2. The Trial Court erred in entering an oral Order on 8/12/2005 (VR4, lines 23-24; CP505-507) denying the Defendants' Motion to Strike Declaration of Patrick Middleton (filed 8/03/2005; CP310-314);
3. The Trial Court erred in granting Defendants' Motion for Summary Judgment (filed 7/15/2005, CP195-204) on 8/12/2005 (CP495-497), since there remain genuine issues of material fact (and the court failed to make findings) and since the Court erroneously applied the law;
4. The Trial Court erred in denying Defendants' Motion for Reconsideration of the grant of Summary Judgment on 08/22/2005 (CP509; Motion for Recons. Filed 8/12/2005; CP500-504).

Issues Pertaining to Assignments of Error

- Issue 1: Whether a Defendant should be permitted to assert the affirmative defense of improper venue (to enforce a forum selection clause) when the Defendant's Answer (and affirmative defense) was late and where the delay caused actual prejudice to Plaintiff. (Assignment of Error 1) (Standard of Review for Error of Law: De Novo)
- Issue 2: Whether the trial court's failure to strike the declaration of an attorney, submitted in support of a Motion for Summary Judgment, where it is argued the attorney testifying as a witness, but submitting unpublished cases to the court as evidence/authority is error requiring reversal. (Assignment of Error 2) (Standard of Review for Summary Judgment Related Motion: De Novo)

- Issue 3: Whether a party can be held to a contract and forum selection clause that she did not enter or agree to, and where there are no findings of fact or conclusions of law to support such a holding. (Assignments of Error 3,4) (Standard of Review for Summary Judgment: De Novo)
- 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, and whether summary judgment is proper where no finding of fact or conclusion of law was entered in support of the validity of the contract? (Assignments of Error 3,4) (Standard of Review for Summary Judgment: De Novo)
- Issue 5: Whether the Defendants' fraud in the inducement or subsequent breach of the cruise ship contract nullified the provisions and limitations contained therein, and whether the trial court's failure to address this defense of the Plaintiffs amounts to an error of law, or question of fact for the jury. (Assignments of Error 3,4) (Standard of Review for Summary Judgment: De Novo)
- Issue 6: Whether Summary Judgment is proper (in favor of a forum selection clause) where the Defendants failed to set out a basis for federal subject matter jurisdiction and where the trial court failed to make findings of fact and conclusions of law to support federal subject matter jurisdiction. (Assignments of Error 3,4) (Standard of Review for Summary Judgment: De Novo)
- Issue 7: Whether the Plaintiff's filing in state court under the Savings to Suitors clause serves to strip the federal court of jurisdiction? (Assignments of Error 3-4) (Standard of Review for Summary Judgment: De Novo)
- Issue 8: Whether summary judgment is proper where there remain at least three material facts in dispute and where additional facts inuring to the benefit of the Plaintiff (non-moving party) were not disputed by the Defendants and therefore weigh against entry of summary judgment. (Assignments of Error 3,4) (Standard of Review for Summary Judgment: De Novo)

B. STATEMENT OF THE CASE

Although the underlying theories of the case involve personal injury on a cruise ship, the issues involved in the present appeal relate to a forum selection clause and the Plaintiffs' right to file their action in State Court (over Federal Court, if at all). The Plaintiffs, Jack, Susan and Bernice Oltman are the Appellants. Jack and Susan are husband and wife while Bernice Oltman is Jack's mother. The Defendants are Holland America Line – USA Inc, and Holland America Line Inc. (Collectively referred to as Defendants or "Holland America"). The pertinent facts are set out below.

Having viewed the Defendants' (Holland America) advertising, Jack and Bernice Oltman decided to return home to the United States (from their business trip to South America) aboard the Defendants' luxury cruise ship, the ms Amsterdam. (CP 232 Exhibit A, Jack Oltman Decl, paras. 6-7). Thus, on March 18, 2004, Jack booked his and his mother's tickets for the return travel aboard the Defendants' cruise ship through Vacations To Go travel agency. (CP 253; Exhibit D, Defendants' answer to interrogatory no.4).

The Defendants advertise safe, exciting and luxurious cruises to the American public (CP 275, Exhibit F, Defendants' Answer to

Complaint no.6).¹ Unaware of the history of the Defendants' operation of its cruise lines (and specifically, the ms Amsterdam), Jack and Bernice Oltman boarded the ms Amsterdam on March 31, 2004. (CP 275, Defendants' Answer, par. 7). Not long into the cruise, a severe gastrointestinal disease broke out and infected many passengers. (CP 233, Exhibit A, Declaration of Jack Oltman, paras. 17-18), prompting the vessel's captain to make an announcement (CP 292 Exhibit J, pp 291-292) and issue a health notice (CP 294, Exhibit K, pp 293-294). Since the crew did not quarantine any of the infected passengers, who continued to commingle with the rest of the passengers (CP 264, Exhibit D, CP 240-269; answer to interrogatory no. 25), the virus continued to be transmitted from passenger to passenger (CP 266, Exhibit D, Answer to Interrogatory no. 32). Toward the end of the cruise, both Jack and Bernice were infected with the virus and began to experience severe symptoms. (CP 233, Exhibit A; CP 230-233, Declaration of Jack Oltman).

Due to the length and severity of their illnesses, on March 30, 2005, Jack and Bernice Oltman filed a Complaint in the Superior Court of King County, Washington, against the Defendants for inter alia,

¹ Absent from the Defendants' advertising, and as discussed infra, is any warning of the fact that the Defendants' vessels have had at least 15 major outbreaks of gastrointestinal illness in the last 3 years – outbreaks which have injured many hundreds of passengers.

Negligence, Breach of Contract and Fraud (CP 3-12, Complaint). Susan Oltman, Jack's wife, joined in the Complaint with her separate claim for the loss of consortium. (CP 239, Exhibit C, Declaration of Susan Oltman, par. 8).

Although the Defendants were served a copy of the Complaint on April 1, 2005 (CP 24, Affidavit/Declaration of Service), the Defendants did not file an answer within the requisite 20 days. Instead, the Defendants waited until May 2 to serve their Answer (CP 274, Exhibit F). Because the Defendants' Answer was late (including the Defendants' affirmative defenses), and because the affirmative defenses contained therein were alleged to have prejudiced the Plaintiffs, Plaintiffs moved to strike the Defendants' affirmative defenses. (CP 34-64) The trial court denied this Motion. (CP 297-299).

Then, in reliance on their late filed affirmative defense (and the trial court's allowance of the affirmative defenses), the Defendants moved to dismiss the Plaintiffs Complaint for improper venue, arguing that the Plaintiffs were required to file in Federal Court over State Court due to a forum selection clause contained in the passenger cruise ticket (CP 195-

(CP 281-285; Ex. G) In fact, the ms Amsterdam alone had as many as 863 reported cases of passengers sick from gastrointestinal illness (CP257 Ex. D, answer to inter. no. 10).

204; Defendants' Motion for Summary Judgment), which contains the following passage:

ALL DISPUTES AND MATTERS WHATSOEVER ARISING UNDER, IN CONNECTION WITH OR INCIDENT TO THIS CONTRACT, THE CRUISE, THE CRUISE TOUR, THE HAL LAND TRIP OR THE HAL AIR PACKAGE SHALL BE LITIGATED IF AT ALL, IN AND BEFORE THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON AT SEATTLE, OR AS TO THOSE LAWSUITS AS TO WHICH THE FEDERAL COURTS OF THE UNITED STATES LACK SUBJECT MATTER JURISDICTION, IN THE COURTS OF KING COUNTY, STATE OF WASHINGTON, U.S.A., TO THE EXCLUSION OF ALL OTHER COURTS."

(CP 109) (emphasis added). With relation to the cruise ticket and the above quoted passage, the following facts were not believed to be disputed at the summary judgment hearing.

First, it was undisputed that Jack Oltman and his mother, Bernice, received their travel documents either right before they departed for a flight to Chile, South America, or else, on the very day they boarded the Defendants' vessel in Chile. (CP 232, Exhibit A, Decl. of Jack Oltman, par. 9). In neither case did they have any opportunity to review the fine print in the travel documents. (CP 232, Exhibit A, Declaration of Jack Oltman, par. 10; and CP 236, Exhibit B, Declaration of Bernice Oltman, par. 6) The "travel document" issued by the Defendants is a 30-page document filled with small print text

and ambiguous terms. (CP 90-126; Exhibit A to the Declaration of Susan Lundgren). The itinerary information appears on the front pages of the document, not the reverse side where the small print is. (CP 94, showing itinerary starting on p. 3 and contract – on p. 11).

The summary judgment hearing was set for August 12, 2005. (CP 152-153) Prior to the hearing, Plaintiffs moved to strike the declaration of Patrick G. Middleton (CP 310-314) The Court denied the motion on the day of the hearing (CP 505-507). Immediately following the hearing, the Court entered Summary Judgment in favor of the Defendants. (CP 495-497). Plaintiffs then moved for Reconsideration (CP 500-504), which was denied (CP 509). This Appeal followed.

C. SUMMARY OF ARGUMENT

Plaintiffs present eight (8) grounds for reversal of the trial court's grant of Summary Judgment in favor of the Defendants – a judgment which enforces a cruise ship forum selection clause which Defendants alleged required Plaintiffs to file in federal court and not State – and dismisses the case from State court with prejudice. Plaintiffs defend by arguing that the forum selection clause is not valid (either because the Plaintiffs were not provided time to review the contract or because the forum selection clause and one year limitation are fundamentally unfair),

but even that if the contract is found by the Court to be valid, that the terms of the forum selection clause itself, coupled with the “Savings to Suitors” clause, still absolutely permit the Plaintiff to file in State court, which Plaintiffs did. Therefore, they are in compliance and this case should proceed.

D. ARGUMENT

Pursuant to CR 56, a grant of Summary Judgment is only appropriate where there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. CR 56(c). The 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) Alternatively, under CR 56(f), should it appear from that a party opposing the motion cannot present by affidavits facts essential to justify opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such order as is just. CR 56(f).

All evidence is considered in a light most favorable to the nonmoving party. *Lamon v. McDonnell Douglas Corp.*, 91 Wash. 2d 345, 349, 588 P.2d 1346 (1979) Furthermore, a motion for summary judgment

may be granted only if reasonable people could reach but one conclusion from the evidence. *McKee v. Am. Home Prods.*, 113 Wn. 2d 701, 782 P.2d 1045 (1989). Otherwise, the court must deny a motion for summary judgment if the record shows any reasonable hypothesis that entitles the nonmoving party to the relief sought, i.e., denial of summary judgment. *Mostrom v. Pettibon*, 25 Wn. App. 158, 607 P.2d 864 (1980). Even if the facts are not in dispute, if reasonable minds could draw different conclusions, summary judgment is improper. *Chelan County Deputy Sheriffs' Ass'n v. Chelan County*, 109 Wash.2d 282, 295, 745 P.2d 1 (1987). 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).

Standard of Review. The de novo standard of review is used by an appellate court when reviewing all trial court rulings made in conjunction with a summary judgment motion. *Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998) The question of whether an ambiguity exists in a contract is an issue of law reviewed de novo. *Stranberg v. Lasz*, 115 Wn.App. 396, 402, 63 P.3d 809 (2003). The interpretation of an unambiguous contract is also a question of law, even if the parties dispute the legal effect of an unambiguous provision. *Id.* at 420.

Plaintiffs do not believe that the evidence was considered in the light most favorable to the non-moving party, nor do Plaintiffs believe that

the court considered whether reasonable people could reach a different conclusion. Plaintiffs believe that the Court did not place the appropriate burden on the Defendants under Civil Rule 56, and instead, appeared to reverse the burden and place it on Plaintiffs. As Plaintiffs pray that the Court will see upon review, Summary Judgment was clearly not appropriate in this case.

In addition to the standard of summary judgment not being met, there were a number of procedural errors evident in this case which were materially prejudicial to Plaintiffs. It is these procedural errors which this brief will address first (before then turning to the more substantive arguments in defense of summary judgment).

Issue 1: CR 4: Failure to File a Timely Answer

Whether a Defendant should be permitted to assert the affirmative defense of improper venue (to enforce a forum selection clause) when the Defendant's Answer (and affirmative defense) was late and where the delay caused actual prejudice to Plaintiff. (Assignment of Error 1) (Standard of Review for Error of Law: De Novo)

The Plaintiffs filed their complaint on March 30 and served the Defendants on April 1. (CP 24 – Affidavit/Declaration of Service) Defendants did not serve their Answer until May 2, i.e., 31 days after the service, even though CR 12(a)(1) clearly requires the Defendant to serve an Answer within 20 days of service. (CP 274)

A defendant **shall** serve his answer within the following periods: (1) Within 20 days, exclusive of the day of service, after the service of the summons and complaint upon him pursuant to rule 4.

(emphasis added). While Rule 12(h)(1), Waiver or Preservation of Certain Defenses, provides:

A defense of lack of jurisdiction over the person, **improper venue**, insufficiency of process, or insufficiency of service of process **is waived** . . . (B) if it is neither made by a motion under this rule nor included in a responsive pleading or an amendment thereof permitted by rule 15(a) to be made as a matter of course.

Thus, CR 12(a) mandates that the Defendants SHALL file their answer within 20 days and, taking CR 12(h) together with 12(a), if the responding party does not include the defense of improper venue within those 20 days, then absent some justifiable reason, that defense should also be waived, especially when the failure to answer timely and in accordance with the rules prejudices the rights of the Plaintiff. *See also Davidson v. Hensen*, 135 Wn.2d 112, 123, 954 P2d 1327 (1998)

While the trial court and Court of Appeals have undoubtedly come across much tardier answers, the real key in this case is not that the Answer was filed 1 day or 11 days or 1100 days late, but that by not filing within the 20 days (as required by the “shall” language of CR 12(a)), the Plaintiffs were actually and truly prejudiced by the failure of the Defendants to comply with the Rule. The reasons that the Plaintiffs have

been prejudiced by the Defendants' failure to abide by the Civil Rules is that not only has the trial court dismissed Plaintiffs claim (pursuant to Defendants' late filed affirmative defense) but also because Defendants' cruise ticket includes a one-year limitation provision on bringing any claims against them by their passengers. (CP 305-307, Exhibit P, See also CP205-307 Brief of Plaintiff in Opposition to MSJ, page 6, lines 6-7) Because there is uncertainty as to when exactly the Defendants' tortuous act took effect, the one year period likely would not have expired until late April. Had the Defendants filed their Answer on or before the 20th day after they were served with the Summons and Complaint, as the Rules of Civil procedure demand, the Plaintiffs would have had time to re-file their claim in the Federal District Court. (CP205-307 Brief of Plaintiff in Opposition to MSJ, page 6, lines 7-12). These facts were not disputed by the Defendants and therefore should be taken in the light most favorable to the Plaintiffs, accepting that the Plaintiffs suffered actual prejudice. As a result, Defendants' affirmative defense should be stricken. If the Defendants' affirmative defense is stricken, then the decision of the trial court may be reversed and this case remanded, and the Court's analysis and review may stop here.

Issue 2: Unpublished Decisions and the Offensive Declaration

Whether the trial court's failure to strike the declaration of an attorney, submitted in support of a Motion for Summary Judgment, where it is argued the attorney testifying as a witness, but submitting unpublished cases to the court as evidence/authority is error requiring reversal. (Assignment of Error 2) (Standard of Review for Summary Judgment Related Motion: De Novo)

In support of their Motion for Summary Judgment, the Defendants' submitted a declaration of one of their attorneys, Patrick G. Middleton, which included citation to a number of unpublished cases from the trial court. (CP 154-194, Decl. of P. Middleton) Because the great majority of the cases were not published and none were related to the present case in any way, except by having the same Defendants, Plaintiffs moved to strike the offending document. (CP 310-314, Motion to Strike Declaration of Patrick Middleton) The Court denied this Motion at the beginning of the Summary Judgment hearing. (VR 4, lines 23-24; CP 505-507).

With the exception of one case,² *Davis v. Wind Song Ltd*, Plaintiffs believed that each of the other nine cases cited by the Defendants' attorney in his Declaration (CP 154-194) were unpublished decisions and therefore should not have been cited to the trial court or offered as evidence. These cases were extremely prejudicial to the Plaintiffs' case because they purport to include identical facts and issues as were present in the current

case, and meant to influence the trial court judge to take the same position as her colleagues on the King County Superior Court. But these cases were not the same, and did not have the same facts and served no evidentiary or authority type purpose to assist the trier of fact in assisting it in making its decision.

A party may not cite unpublished cases to the Court. It is well established in this State that a party may not cite unpublished cases to the Court. The Court of Appeals, Division Two, addressed this issue as recently as March 2005,

We agree that [the Defendant] improperly relied on our unpublished opinion and that the trial court also erred in relying on it. See *Skamania County v. Woodall*, 104 Wn.App. 525, 536 n.11, 16 P.3d 701, review denied, 144 Wn.2d 1021 (2001), cert. denied, 535 U.S. 980 (2002); RAP 10.4(h). 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....

* * *

We do not consider unpublished opinions in the Court of Appeals, and they should not be considered in the trial court. *Dwyer*, 103 Wn. App. At 548; *State v. Fitzpatrick*, 5 Wn.App. 661, 668-69, 491 P.2d 262 (1971), review denied, 80 Wn.2d 1003 (1972).

Johnson v. Allstate Insurance Company, 108 P.3d 1273, 126 Wash. App. 510 (Wash.App.Div.2 2005).

In footnote five to its opinion in *St. John Medical Center, Division*

² In their opposition brief, Defendants respond by stating that there were two published cases. (CP71-78, Defendants' Opposition to Motion to Strike, pages 1-2).

Two of the Court of Appeals also recognized that **trial court** decisions that are not published are also prohibited from citation as authority.

DSHS also cites to an ‘Order Denying Motion for Remand’ in a case from the United State District Court of the Eastern District of Washington for support of its argument. As this is an unpublished case, we do not consider it.

St. John Medical Center v. State of Washington, 110 Wash.App. 51, 38 P.3d 383 (Wash.App. Div 2 2002) FN 5.

The fact that the cases submitted by the Defendant were not court of appeals cases should therefore not lessen the egregious nature of their inclusion, nor result in a remedy other than reversal. Since these cases are prohibited from being cited as authority to the Court, the only other way they may potentially be permitted, is as evidence.

A lawyer testifying as a witness. While it is clear that a lawyer may not testify as a witness in the same case in which he/she is the attorney of record, it apparently is not as clear as to what constitutes testifying as a witness in the same case. Rule of Professional Conduct 3.7 provides: “A lawyer shall not act as advocate at a trial in which the lawyer or another lawyer in the same law firm is likely to be a necessary witness.” Exceptions to RPC 3.7 relate to procedural items, or attorney’s fees or uncontested formalities. The problem with the declaration of Mr. Middleton, is that he is testifying as to previous cases in which he has acted as counsel – alleging to the court that the prior cases are just like the

present one, and just as the previous cases were dismissed, so should the present. In this capacity, Mr. Middleton is holding himself out as either a fact witness (i.e., implying that “the facts are the same in all these cases”) or as an expert witness. However, even were the testimony of Mr. Middleton not be precluded by RPC 3.7, the cases that Mr. Middleton cites should still be excluded under the rules of evidence.

The inclusion of the exhibits attached to Mr. Middleton’s declaration, should be stricken as irrelevant and prejudicial under Rules of Evidence 401 (Relevancy) and 403 (Prejudice). Rule of Evidence 403 provides that even if evidence is found to be relevant:

[it] may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Not only has the Declaration of P. Middleton failed to include the entire case history for each of these cases (which would be necessary for the Court to understand what actually transpired in each), but the facts are different and the legal arguments are undoubtedly much different. Thus, these cases have no bearing on the Court’s decision in the present case, and serve only to mislead the Court and prejudice Plaintiffs’ case.

Plaintiffs respectfully request that the Court strike these declarations and because of the taint imposed, reverse the trial court, and remand for the trial court's decision without the use of this authority or evidence. This brief will now turn to the more substantive issues involved in this appeal.

Issue 3: Whether a party can be held to a contract and forum selection clause that she did not enter or agree to, and where there are no findings of fact or conclusions of law to support such a holding. (Assignments of Error 3,4) (Standard of Review for Summary Judgment: De Novo)

There exists no evidence, not a single shred, no testimony, no documents, no contract and no legal theory (advanced by the Defendants) for which the trial court could have held that the forum selection clause in the Defendants' Cruisetour Contract was enforceable against Susan Oltman. Thus, the decision of the trial court was not only surprising but clearly an error of law.

Not only did the Defendants fail in their burden to prove that summary judgment was proper against Susan Oltman, they failed to make any argument to that regard at all – none in their Motion for Summary Judgment, none in their reply and none at the hearing. In fact, Plaintiffs cannot cite to anywhere in the record where the Defendants made any argument with respect to how the Defendants could hold Defendant Susan

Oltman to this contract. The record is replete 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,³ yet, there is no response from the Defendant, and findings of fact or conclusions of law from the trial court on this point. 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).

While viewing the evidence in the light most favorable to the non-moving party and reaching the only conclusion that may be drawn, somehow Plaintiff Susan Oltman was found to have been bound by a contract that she did not enter (CP 238-239, Exhibit C, Decl. of S Oltman, para 4-6) nor had seen or been made aware of (CP 238-239, Exhibit C, Decl. of S Oltman, para 4-6). If Susan Oltman can be held to this contract,

³ 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

without any theory as to why being advanced by the Defendants, then it is conceivable that this forum selection clause is binding as against everyone in the world, entered into or not, and passenger or not.

The purported cruise ship contract simply does not apply to Mrs. Oltman and therefore cannot be enforced against her whether in federal admiralty or under state law.⁴ Plaintiffs therefore respectfully request the Court to reverse the trial court and remand Susan Oltman's case back for further proceedings. Were the Court to do so, then the remainder of the Court's analysis would be in reviewing the trial courts decision with respect to Jack and Bernice Oltman only.

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, and whether summary judgment is proper where no finding of fact or conclusion of law was entered in support of the validity of the contract? (Assignments of Error 3,4) (Standard of Review for Summary Judgment: De Novo)

Validity and Enforceability of Contracts of Adhesion and Forum Selection Clauses

In reaching its decision on summary judgment, the trial court was required, we believe, to at least consider Plaintiffs' arguments regarding

because she did not enter into it, the contract does not bind her and cannot be enforced against her."

⁴ 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").

the defense to enforceability of contracts of adhesion and forum selection clauses (as well the defenses that follow) and to conduct an appropriate level of scrutiny and review for each. Plaintiffs argued below that in addressing the issue of contracts of adhesion, which is clearly the domain in which cruise ship contracts lie, the first determination for the Court is whether to apply state law or federal law to the issue of contract formation (to determine the validity of the passenger contract). (CP 205-229, responsive brief of Plaintiffs). The trial court did not indicate whether it applied state law or federal maritime law to this analysis and instead appeared to not address this issue at all.

State Law Analysis

While disputes concerning cruise ships contracts may fall within the realm of maritime law (as Defendants argued in their summary judgment briefing CP 195-204), there exists no such mandatory rule, and, in fact, it is not so clear that issues concerning the formation of these contracts fall within the purview of federal maritime law at all – especially since the alleged formation of the contract takes place on dry land, before the ships sets sail. Also, there is the possibility that the purchaser of the cruise will not join the voyage, thereby further giving credence to state law only claims, such as misrepresentation and fraud (in advertising). In addition, since this case was filed in Washington state court, and

regardless of whether general maritime law may attach to the substantive personal injury claim, Washington contract law should govern the formation of this contract. This is important as the *Carnival, infra* and *M/S Bremen, infra* decisions were premised on federal maritime law – and not State law. The Supreme Court of Alaska recognized this in its July 12, 2002 decision in *Nunez v. American Seafoods*, 52 P.3d 720 (AK 2002) (hereinafter “*Nunez*”), where it held that the Alaskan trial court’s decision to dismiss, based upon the Defendant sea food company’s argument that the state was an improper forum per the forum selection clause (contained in the contract between the parties), was improper.

We find [Plaintiff’s] arguments to be more persuasive. [While] Carnival Cruise Lines and M/S Bremen undeniably recognize that a strong presumption of validity attaches to forum selection clauses under general maritime law,...**[Plaintiff] filed his complaint under the savings to suitors clause and the Jones Act, not under general maritime law. As we have noted in previous cases, the “saving to suitors” clause generally means that a suitor asserting an in personam admiralty claim may elect to sue in a “common law” state court through an ordinary civil action.** In such actions, the state courts must apply the same substantive law as would be applied had the suit been instituted in admiralty a federal court.

Nunez at 721 (emphasis added). Thus, while the substantive law governing the personal injury claim may be admiralty, Plaintiffs believe that this Court may determine the validity and enforceability of this contract of adhesion under state law.

Under state law, this contract between Jack and Bernice Oltman and the Defendants is unenforceable for a number of reasons. First of all, it is clearly a contract of adhesion. The Supreme Court of Washington has previously determined the existence of adhesion contracts by examining (1) whether the contract is a standard form printed contract, (2) whether it was prepared by one party and submitted to the other on a “take it or leave it” basis, and (3) whether there was no true equality of bargaining power between the parties. *Adler v. Fred Lind Manor*, 103 P.3d 773, 153 Wash.2d 331 (Wash., 2004). Second, this adhesion contract is substantively unconscionable. Substantive unconscionability involves those cases where a clause or term in the contract is alleged to be one-sided or overly harsh. *Zuver v. Airtouch Communications, Inc.*, 103 P.3d 753, 153 Wash.2d 293 (WA 2004). The first unconscionable term in this adhesion contract is the one-year limitation provision together with multiple deadlines for reporting of claims against the Defendants. (CP 305-307, See Exhibit P). The Supreme Court of Washington in *Adler, supra*, criticized time limitations in adhesion contracts noting that 6-month and 1-year limitations have been rendered invalid by other courts as against public policy. The second unconscionable term in the contract is the forum selection clause (CP 109), which apparently either makes it necessary for a plaintiff to obtain a legal conclusion as to the proper venue

based upon the type of claim he/she might file BEFORE he/she files, or else, as the Defendants argue, require the Plaintiff to file in Federal Court first, have their case dismissed and then re-file in state court (all without, hopefully, having waived the right to file in state court under the savings to suitors clause). The forum selection clause and the one-year limitation provision are also both unconscionable, and against public policy, in that these terms can be used together to deny the Plaintiffs their right to a trial by jury⁵ and, in this case, to having their day in court at all. If the Plaintiffs' case is dismissed from state court, not only may they be forced to litigate in a Federal Court, and be deprived of one of the most fundamental rights that our system of justice provides – a trial by an impartial jury – but because of the unfair and, in this case, unconscionable statute of limitations clause, Plaintiffs may be forever barred from litigating at all.

The adhesion contract at issue is also procedurally unconscionable. Under Washington Law, procedural unconscionability is "the lack of a meaningful choice, considering all the circumstances surrounding the transaction including "[t]he manner in which the contract was entered," whether the party had "a reasonable opportunity to understand the terms of

⁵ Generally, there is no common law trial by jury in admiralty cases and thus were this case filed in federal court, the Plaintiffs believe that they would have no right to a jury.

the contract," and whether "the important terms [were] hidden in a maze of fine print. *Adler. Id. Zuver. Id.* Jack and Bernice Oltman received their travel documents when they had very little or no time for review (CP 232-33, Decl. of J. Oltman, Ex. A, par. 8-15; and CP 236, Decl. of B. Otlman, Ex B, par. 6), much less a detailed and thorough one that a 30 page travel document requires..

Not only does this contract of adhesion fail under state law, but under federal maritime law as well. Thus, should the Court apply federal maritime law in its review, the cruise ship contract still does not change the result – that this particular forum selection clause is invalid and unenforceable.⁶

Federal Law Analysis

For a cruise line passenger ticket's terms and conditions to be enforceable against a traveler under federal law, the ticket must **reasonably communicate** the limiting terms to the passenger so that the passenger can become meaningfully informed of its terms.

[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

Craig v. Atlantic Richfield, Co., 19 F.3d 472 (9th Cir., 1994).

⁶ It should be noted here that Plaintiffs are not charging that cruise ship forum selection clauses are generally invalid, but in this case, under these facts, this one is.

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."

We believe the liability limitation at issue fails this second prong.

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).

The contract of adhesion in this case fails both prongs of the **reasonable communicative** test as the warnings were not conspicuous, were hidden in a maze of fine print within 30 pages of form contact, and as the Plaintiffs did not receive the terms and conditions until either six days prior to travel or else at the time of departure. CP 232, Decl. of J.

Oltman, Ex. A, para 9) And, the failure to reasonably communicate the terms of the contract of adhesion (through advance notice or explanatory provisions or, in person through an agent) deprived Plaintiffs of any meaningful opportunity to review the 30 pages of fine print terms and conditions which accompanies the itinerary and ticket. The fact that Plaintiffs did not have an opportunity to review the tickets was not disputed below.

The big question for this Court then is whether the Ninth Circuit's reasonable communicative test impinges or runs counter to the U.S. Supreme Court's decision in *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991) (hereinafter "*Carnival*" or "*Carnival Cruise Lines*"), a case upon which the Defendants place so much reliance? **The answer, as we shall see, is clearly NO.** We begin this analysis by turning to the Ninth Circuit's decision in *Bobbie Jo Wallis* in which the court addressed this very point.

Finally, we note that our holding is not precluded by the Court's decision in *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991). In *Shute*, the Court held that a forum selection clause in a cruise line's passage contract was reasonable and enforceable despite the facts that the clause was not the product of negotiation, and that respondents were physically and financially incapable of litigating in the selected forum. The Court expressly stated in *Shute* that:

(W)e do not address the question whether respondents had sufficient notice of the forum clause before entering the contract for passage. Respondents essentially have conceded that they had notice of the forum-selection provision. . . . *Shute*, 499 U.S. at 590.

As the opinion makes clear, the Court in *Shute* evaluated the enforceability of the forum selection clause under the assumption that it was reasonably communicated to the plaintiffs. We have been asked to decide an antecedent issue: whether the contract term in question was reasonably communicated in the first place.

Bobbie Jo Wallis, 306 F.3d 827, 840-841 (9th Cir. 2002) (the Court then found that the cruise ship contract failed prong two of their analysis).

With respect to prong two of the reasonable communicativeness test, Plaintiffs are asking that the Washington Court of Appeals take the same approach as the Ninth Circuit – in examining the terms of the contract of adhesion at the time of formation (and NOT after the cruise and injury). Were the terms and conditions reasonably communicated to the Plaintiffs in this case? **The answer is no, they were not.** The Plaintiffs had absolutely no notice that the forum selection clause was contained along with the 30 pages of the terms and conditions of their passenger ticket. (CP 232, Decl. of J. Oltman) and even more importantly, did not receive the ticket until either just before they disembarked on the cruise, or on the day that they boarded the cruise ship – and in both cases, without any opportunity to review these small, boilerplate and legalistic terms. (CP 232, par. 8-13, Declaration of Jack Oltman; and CP 236

Exhibit B, Decl. of B. Oltman, para 6). Thus, it would be unreasonable to hold the Plaintiffs to terms that had no opportunity to review. Taking the evidence in the light most favorable to the non-moving party, the Court should consider that the Plaintiffs did not receive their cruise ticket until the time they boarded the ship, which clearly does not pass the *Bobbie Jo Wallis*, 306 F.3d 827, reasonable communicative test.

Importantly, the Massachusetts Court of Appeals, less than one year ago (on June 30, 2005), released a decision which decided nearly the identical issue presented in this case – *Casavant & Another v. Norwegian Cruise Line, LTD.*, 63 Mass.App.Ct. 785 (2005). In *Casavant*, just as in the present case, the Defendant cruise line moved to dismiss the Plaintiff's action in state court due to a forum selection clause on the reverse side of the passenger ticket which required that any suit be brought in the state of Florida (and therefore, not Massachusetts where the Casavants had brought their suit). After considering the facts, as well as the U.S. Supreme Court's decision in *Carnival*, the Massachusetts Court of Appeals applied both federal and state (MA) law to **hold the forum selection clause invalid.**

The record reflects that Norwegian had not provided information concerning the forum selection clause – or for that matter, the contractual terms and conditions, including limitations on Norwegian's liability – until close to one year after the original booking, two months after full

payment of the \$2017.50 cruise price, and **approximately thirteen days before the sail date**. The first time the purported contractual terms were forwarded to the Casavants was in a document entitled “passenger ticket contract”, which document was received by the Casavants in September, 2001. The contractual terms are set forth in two pages of fine print in the ticketing document. A box on the first page states that: “Acceptance of this Passenger Ticket Contract by Passenger shall constitute the agreement of Passenger to these Terms and Conditions.” The forum selection clause appears in par. 28 on the second page of the ticketing contract.

Because the manner and means of the delivery of the terms of the contract for passage did not fairly allow the Casavants ‘the option of rejecting the contract with impunity’, [citing] *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 595 (1991), and because, in the limited time frame allotted, the Casavants did not accept the ticket as a binding contact, under controlling Federal maritime law and Massachusetts contractual law, the Florida-dictated forum selection clause is not enforceable. Suit may therefore proceed in the Massachusetts courts.

Casavant, 63 Mass.App.Ct at 787-789. (emphasis added).

In arriving at this holding, the court discussed the U.S. Supreme Court’s decision in *Carnival* at great length,

Among the judicial refinements crafted by the [US Supreme] Court in the private cruise context was the imposition of a heightened judicial standard of review, with ‘emphasis that forum-selection clauses contained in form passage contracts are subject to judicial scrutiny for fundamental fairness’ (emphasis supplied). *Id.* at 595. In addition. . . in *Carnival Cruise*, the Court weighed whether the cruise ticketing contract, with the embedded forum selection clause, was reasonably and timely communicated to the passenger, so as to yield sufficient notice, giving the passenger the opportunity to ‘reject() the contract with impunity.’ 499 U.S. at 595.

In the wake of *Carnival Cruise*, the Federal courts have decided a number of cases which establish that, for vacation cruise ticketing contracts, in order for the passenger to be bound by the forum selection clause under Federal maritime law, the private ticket cruise buyer must be given reasonable time within which to act and to reject the ticketing contract and forum selection clause, without incurring disproportionately unfair penalties for such rejection.

The ‘refined’ standards in *Carnival Cruise*, applicable to a private cruise ticketing contract, as a matter of Federal maritime law – i.e., timely delivery to yield sufficient notice, with a corresponding opportunity for the passenger to reject the ticketing contract and forum selection clause with impunity – were not met in this case. As previously noted, the record reflects the Casavants received the passenger ticket contract on or about September 3, 2001, some thirteen days before the scheduled departure date of September 16, 2001.

Casavant at 795-798. (emphasis added)

In addition, assuming arguendo that the terms were reasonably communicated to the Plaintiffs (which they were not) even the analysis offered by the Supreme Court in *Carnival Cruise Lines, Inc. v. Shute*, 113 L.Ed. 2d 622, 111 S.Ct. 1522 (1991) favors the Plaintiffs. 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 US Supreme Court **did not hold** that forum selection clauses in all cruise ship passenger adhesion contracts are automatically valid,⁷ instead, the Supreme Court recognized that forum selection clauses must be reviewed

under a standard of reasonableness and fairness. *Carnival Cruise*, 499 U.S. at 595. Through *Carnival*, 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.”** *Carnival* at 633. (emphasis added). But, before together conducting this detailed review, it is also helpful to place into context and examine the reasons behind the Supreme Court’s decision to uphold these types of contracts of adhesion at all, since they been historical disfavored.

- 1) First, the Supreme Court rationalized that cruise lines carry passengers from many locales, thus would be subject to suits in multiple forums if not for the forum selection clause;
- 2) Such clauses have the practical effect of dispelling any confusion about where suits must be brought and defended, thereby sparing time and expense of pre-trial motions on this issue; and
- 3) Passengers who purchase tickets containing these clauses benefit in the form of reduced fares in the savings that cruise lines enjoy by limiting the forums.

Carnival, 499 U.S. at 632.

It is apparent that, in this case, the Defendants have failed the *Carnival* Court’s reasoning behind all three rationales, thereby, weighing

⁷ Quoting *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972), the *Carnival* Court did re-state the forum-selection clauses, although not “‘historically . . . favored,’ are ‘prima facie valid.’” *Carnival* at 589.

against a finding in favor of the forum selection clause in this case. Regarding point rationale one above, the issue in the present case is not multiple state forums at all (as envisaged by the Court in *Carnival*), but two forums in the same State, county and city – forums which are only miles apart. Thus, there is no financial savings to the Defendants at all. If there were, then the Defendants would have limited their forum selection clause to the federal court. Regarding rationale two above, and comparing the forum selection clause in *Carnival* with the one at issue here, it is clear that the Defendants’ forum selection clause is even more onerous, limiting and confusing than the forum selection clause contained in the *Carnival* case, as Defendants here have attempted to limit the Plaintiffs to one area, or even, one county and one city in the State of Washington (Seattle – whether in Federal or State court) (CP 109, Forum Selection Clause) without setting forth how Plaintiffs could ever file in State Court. Now, Defendants appear to argue that their forum selection clause requires Plaintiffs to file FIRST in federal court, and then, if the federal court lacks jurisdiction, to incur additional expense and re-file in state court and hope that somehow, through all of this time and effort, that the one year statute of limitation hasn’t been missed.

As is obvious from this case, the Defendants’ use of two forums, the U.S. District Court for Western Washington and the King County

courts, creates an environment of confusion, that has resulted in the suit being filed in King County Superior Court and the Defendants' moving to dismiss. Because the ticket says nothing about requiring a Plaintiff to first file in Federal Court and obtain a ruling and dismissal that the court lacks subject matter jurisdiction before the Plaintiff re-files in state Court, why can't the Plaintiff file in state court under state causes of action or the savings to suitors clause (as explained below) and if the Defendant believes that there is federal court subject matter jurisdiction to the exclusion of the state courts, then the Defendants remove the case to federal court? Regarding rational number three above, due to the Defendants' (we believe unnecessary and unwarranted) motion for summary judgment, the Defendants are costing Plaintiffs, the Defendants, the judiciary and the public thousands of dollars in litigation fees relating to this motion when the whole purpose behind the Supreme Court's rationale and the forum selection clause was to reduce costs and limit the litigation forums. By filing in Washington State Court, their absolute right under Washington state law, the Savings to Suitors clause, and the VII and XIV amendments to the U.S. Constitution providing Plaintiffs the right to a jury trial, Plaintiffs are keeping the cruise line's costs down by abiding by the contract. Without the Defendants having proffered any reason why it is less costly to litigate in federal court over state court when the forums

are both permitted by the forum selection clause and where they lie some two kilometers apart, the Defendants do not satisfy rationale three behind the Supreme Court's limited approval of forum selection clauses contained in cruise line passenger tickets.

In addition, the present case before the Court is not *Carnival Cruise Lines*. By comparing the two cases, a number of distinctions are revealed, including, a much different forum selection clause. In *Carnival*, the forum selection clause is much broader and more inclusive, permitting suit to be filed anywhere in the State of Florida. Whereas here,⁸ Defendants are attempting to argue that the U.S. Court for the Western District of Washington was the situs where Plaintiffs had to file first).

Or, if the Defendants wish to place so much reliance on *Carnival*, then perhaps the Defendants should be held to the same forum selection clause that was at issue in *Carnival*. There, the passenger contract read,

“8. It is agreed by and between the passenger and the Carrier that all disputes and matters whatsoever arising under, in connection with or incident to this Contract shall be litigated, if at all, in and before a Court located in the State of Florida., U.S.A., to the exclusion of the Courts of any other state or country.”

⁸ What the Defendants are attempting to have their ticket read is: All lawsuits arising out of this contract must be litigated, if at all, by filing first in the Western District of Washington, and if that forum determines that it lacks subject matter jurisdiction, then, and only then, by re-filing in the King County district or superior court.

Carnival at 628. Thus, were the Court here to apply the same standard in *Carnival*, if this is what the Defendant desires, then, the Court would need to reword the forum selection clause to allow suits anywhere in Washington state. Thus, in all aspects of this case, *Carnival* does not favor the Defendants and instead, weighs in favor of the Plaintiffs.

Also, in *Carnival*, the forum selection clause at issue required the Plaintiffs to file suit away from their domicile, in a forum more convenient for the Defendant, whereas here, Plaintiffs have already filed in the Defendants' convenient domicile and the Defendants are attempting to enforce a forum selection clause requiring a forum change to a venue approximately two kilometers away. Finally, in *Carnival*, a change in forum would not have forever barred Plaintiffs' claims, whereas here, the Defendants are seeking to forever bar Plaintiffs' claims through a non-negotiated, non-communicated one year limitation clause contained in the passenger ticket's terms and conditions. Thus, even were the Court to uphold the trial court's dismissal, and the Plaintiffs forced to litigate in federal court (and lose their right under the savings to suitors clause), the Defendants will move to dismiss based upon the one-year limitation.

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 this court.

Contracts of Adhesion and Shortened Statutes of Limitation

In addition to the forum selection clause, the passenger ticket involved in the present case includes a shortening of the statute of limitations to file suit. (CP 306-307, Exhibit P, par. 3) Although this is clearly against the public policy of Washington State, the U.S. Supreme Court has held that such limitations are not presumptively invalid. *Carnival Cruise Lines* 499 U.S. at 593-594. Thus, in examining the present cruise ship contract of adhesion for fundamental fairness, as required by *Carnival Cruise Lines*, the Court must also look at, in addition to the forum selection clause, the Defendants' attempt to shorten of the statute of limitations. This is because fundamental fairness by its very name requires that the Court look at whether the Plaintiffs will ever have their day in court.

This analysis may be viewed from a pre-formation standpoint (for reasonable communication under *Bobbie Jo Wallis, supra* and *Carnival, supra*, but also “after formation” from a *Carnival* fundamental fairness

standpoint. See also, *Dempsey v. Norwegian Cruise Line*, 972 F.2d 998, 999 (9th Cir. 1992) In this case, the strong public policy of this state favors the Plaintiffs having their day in court and not having their claims barred forever due to a one year limitation period which, because notice has now been provided the Defendant cruise line, serves absolutely no further purpose. The State of Washington has a strong public policy interest in, we believe, ensuring that the Defendants' commercial enterprises are safe to not only Washington residents but all persons.

In coming to these conclusions, we examined, among others, *Hoddevik v. Artic Alaska Fisheries Corporation, et al.*, 94 Wash.App. 268, 275, where our Washington Court of Appeals stated:

In the instant case, as in [*Morgan v. Tyson Seafood Group Inc.*], the State of Washington has a great interest in applying its anti-discrimination laws to Artic. Arctic is a corporation organized under the laws of the State of Washington, and hired [Plaintiff] in Seattle. Artic should be subject to liability if it engage in behavior impermissible under RCW 49.60 [the discrimination statute]. Washington has a strong interest in protecting its citizens, like [Plaintiff], from injury.

Undoubtedly, not only does the State of Washington have a strong public policy in ensuring that businesses licensed and operated out of Washington be accountable to Washington citizens and Washington law, but also be accountable to citizens of other states, especially where those citizens are being forced to sue in Washington state due to a forum

selection clause drafted by the Defendant business. Permitting a Plaintiff to have judicial redress, and not being forever barred from suit by a reduced statute of limitations which serves no additional purposes beyond notice, we believe, frustrates and violates the public policy of this state. We must let these, and other, Plaintiffs have their day in court.

Thus, this case should be reversed and remanded to the trial court to make findings of fact and conclusions of law with respect to the validity and enforceability of this contract under state and/or federal law. Or, Plaintiffs ask that the appellate court, based upon the record before it, find that the contract is not enforceable under state or federal law (*Bobbie Jo Wallis*), reverse the trial court and remand this case for trial.

Issue 5: Whether the Defendants' fraud in the inducement or subsequent breach of the cruise ship contract nullified the provisions and limitations contained therein, and whether the trial court's failure to address this defense of the Plaintiffs amounts to an error of law, or question of fact for the jury. (Assignments of Error^{3,4}) (Standard of Review for Summary Judgment: De Novo)

In this case, Plaintiffs ask that the Court find the contract of adhesion and its forum selection clause and shortened statute of limitations void due to the fraudulent misrepresentations of the Defendants in assuring Plaintiff that the voyage was safe and enjoyable. An assertion that the Defendants did not deny. (CP 26, Defendant's Answer, par. 6).

Because, Plaintiffs allege, the Defendants fraudulently induced Plaintiffs to enter into this contract based upon the false misrepresentations and failure to disclose (that there had been at least 863 other cases of gastrointestinal illness aboard the ms. Amsterdam prior to March of 2004 and over a dozen outbreaks (CP 281-285, Exhibit G, CDC report)), the contract is rendered void and the Plaintiffs are excused from performance. *Pedersen v. Bibioff*, 64 Wn. App. 710, 722, 828 P.2d 1113 (1992) (A fraudulent misrepresentation renders a contract void if the assertion induced the other party to enter into the contract; and that party justifiably relied on the assertion.). Plaintiffs went on this voyage because the Defendants held the cruise trips to be safe and enjoyable and because the Defendants had not revealed the extent of the danger that sailing on Defendants ships posed to the passenger. Therefore, the contract and its forum selection clause should not be enforced. And, this case should be reversed and remanded for further proceedings on this issue, including findings of fact and conclusions of law with regard to the Plaintiffs defense of fraud and breach.

Issue 6: Whether Summary Judgment is proper (in favor of a forum selection clause) where the Defendants failed to set out a basis for federal subject matter jurisdiction and where the trial court failed to make findings of fact and conclusions of law to support federal subject matter jurisdiction. (Assignments of Error 3,4) (Standard of Review for Summary Judgment: De Novo)

If the Court finds the contract of adhesion enforceable, including its forum selection clause, then the next issue before the Court is whether or not the King County Superior Court is the appropriate forum. Plaintiffs' response, in this respect, centers on two very crucial and important premises: First, that the Defendants' have failed to lay out the appropriate grounds for federal court subject matter jurisdiction in their Motion for Summary Judgment; and second, that even had the Defendants laid out the appropriate grounds for federal court subject matter jurisdiction, that the savings to suitors clause works to legally or factually deprive the federal court of subject matter jurisdiction.

Clearly it is the Defendants' burden and duty on summary judgment to support their motion and prove to the trial court that there is but one reasonable hypothesis that the trial court could have reached. As the Court will see in the argument that follows, there are at least two reasonable hypotheses, and the one which was not considered by the trial court is the hypothesis that we believe to be the more accurate and lawful reading of the forum selection clause, thereby requiring reversal.

The Admiralty or Maritime Jurisdictional Base.

In beginning this proof, the Defendants produced the terms and conditions that accompany their passenger cruise ticket. These terms and

conditions attempt to limit suits to the State of Washington, either the federal court in Seattle, or the King County courts – if the federal court lacks subject matter jurisdiction. Since the Defendants argue that the federal court did not lack jurisdiction, is it not their burden to first prove that there exists some subject matter jurisdictional ground upon which the federal suit could be based?

In their motion for summary judgment, the Defendants argued that cruise ship contracts and voyages sound in admiralty (CP195-204). However, the mere existence of a cruise line ticket as the basis for admiralty jurisdiction was the prior case law. Unfortunately for the Defendants then, the mere assertion of admiralty due to a cruise ship venture no longer presumptively establishes that the case is one in admiralty. And, without a federal question basis, the U.S. District Court is without jurisdiction. Affirmatively proving such jurisdiction, since this is their motion to dismiss, is absolutely required of the Defendants. **As the Defendants failed to prove that there was such jurisdiction, and as there are no findings of fact to support this conclusion, the Defendants' Motion should have been denied.**⁹

⁹ At oral argument, the Defendants' counsel acknowledged that the two part test cited by Plaintiffs was the correct test for maritime torts (VR27 1-6), and then turned to the forum

Under traditional rules of admiralty jurisdiction, the mere fact that Plaintiffs injuries occurred on navigable waters would have been sufficient to invoke maritime law. However, that traditional approach has now changed, and the analysis to determine admiralty jurisdiction requires application of a two-part test.

[As] the Supreme court stated in *Executive Jet Aviation, Inc. v. City of Cleveland* ... **‘the mere fact that the alleged wrong ‘occurs’ or ‘is located’ on or over navigable waters’** is [no longer] sufficient to create a maritime tort; it is also required that ‘the wrong bear a significant relationship to traditional maritime activity.’ In this circuit, following *Executive Jet*, a claim falls within the federal court’s admiralty jurisdiction if the actions complained of have (1) a maritime ‘situs’ – tort on or over navigable waters, and (2) a maritime ‘nexus’ – a significant relationship to traditional maritime activity.

A. MARITIME SITUS

Under maritime common law, ‘[C]ourts have traditionally defined the locus of the tort as the place where the injury occurred.’ However, situs of a tortious injury depends, inter alia, on the type of tort alleged. Where it is clear that tortious injury occurs solely ashore, the federal courts are generally without admiralty jurisdiction. See, e.g., *Lamontague v. Craig*, 632 F. Supp. 706, 709 (N.D. Ca 1986 (admiralty jurisdiction does not extend to defamatory libel where, although written at sea, publication and corresponding injury occurred on land)). . .

B. MARITIME NEXUS

The Supreme Court has adopted an expansive application of the *Executive Jet* requirement that a significant relationship to traditional maritime activity exist.

selection clause while failing to address to the court how the federal court would have jurisdiction. (VR27, lines 7-17).

The following factors are to be considered to determine whether a significant relationship to traditional maritime activity exists:

- (1) traditional concepts of the role of admiralty law;
- (2) the function and role of the parties;
- (3) the types of vehicles and instrumentalities involved; and
- (4) the causation and nature of injury suffered.

Guidry v. Durkin, 834 F.2d 1465, 1469-1470 (9th Cir. 1987) (internal citations omitted).

The Defendants failed to address any of these legal requirements in their motion for summary judgment, as if the simple fact that a cruise line is involved automatically converts this case to one in admiralty.¹⁰ The Defendants' failure to review, cite, distinguish and apply a single cause of action from Plaintiffs' complaint should have resulted in their motion for summary judgment being deficient supporting a federal court basis for jurisdiction. In addition Plaintiffs' claims actually sound in state law – alleging negligence and fraud (CP 3-12, Complaint) – and arguing that the Defendants' and their agents fraudulently advertised and misrepresented the safety of the vessels to the Plaintiffs (through mailings, brochures and other advertisements) prior to boarding the ship. (CP 232, Declaration of Jack Oltman, par. 7 and CP 26, Defendants' Answer, par. 6). The fact that

¹⁰ Furthermore, the state court's application of federal admiralty law does not make the case one in admiralty, but rather, as the *Nunez* (AK), *supra* court stated, "an ordinary civil action" in which the state court applies federal admiralty law.

these fraudulent misrepresentations were made on land result in these claims not being admiralty based, but instead being entirely state law based. The fact that the deception is unveiled on the high seas does not transform the claim into an admiralty one, as the deception took place through advertisements and communications on land.

If the Defendants were able to prove admiralty, which the bare assertion in their Motion for Summary Judgment does not so prove, then subject matter jurisdiction is still not proper in the United States District Court because the “saving to suitors” clause deprives the federal court of the ability to hear the case.¹¹

Issue 7: Whether the Plaintiff’s filing in state court under the Savings to Suitors clause serves to strip the federal court of jurisdiction? (Assignments of Error 3-4) (Standard of Review for Summary Judgment: De Novo)

Absent a ground for Removal, the Savings to Suitors Deprives the Federal Court of Jurisdiction. Under the admiralty statute, 28 U.S.C. s. 1333(1), the Saving to Suitors clause provides the affirmative right to

¹¹ The Defendants also failed to set out any basis on which to hold Plaintiff Susan Oltman under admiralty jurisdiction as she did not pay for the cruise, did not sail on any waters and had nothing to do with any contract which may try and compel a particular forum (CP238-239, Decl. of Susan Otlman, Ex C, par. 4-6). Instead, her claim of loss of consortium is based solely on state law and stands independent of Jack and Bernice Oltman’s claims.

Plaintiffs to choose a state court forum to adjudicate their claims, even though they may also be admiralty and maritime in nature. The statute provides, “[t]he district courts shall have original jurisdiction, exclusive of the courts of the state, of: (1) Any 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. s. 1333(1). It is this clause that deprives the federal court of jurisdiction and permits Plaintiffs to choose a state court forum for their claims (regardless of whether they reside in state law or admiralty). If the Defendants allege that the federal court had original or exclusive subject matter jurisdiction, as they have, then the proper remedy would have been for the Defendant to remove this case to the Western District of Washington, **as this would have been the only way for the King County Superior Court to definitively know whether the federal court had subject matter jurisdiction.**

“A defendant may remove from state to federal court any civil action over which the district court would have had original jurisdiction. 28 U.S.C. s. 1441(a).” *Little et al. v. RMC Pacific Materials, Inc. et al*, 2005 U.S. Dist. LEXIS 14338, pg 3. The Court may then consider subject matter jurisdiction on its own or upon a motion to remand brought by the Plaintiff. “In order to determine whether remand is proper, the Court must determine if it has subject matter jurisdiction.” *Id.* at 4.

Courts have consistently held that the "saving to suitors" clause prohibits a defendant from removing a case that has been brought in state court absent an alternative jurisdictional basis such as diversity. Additionally, the Supreme Court has made it clear that "state courts [are] competent' to adjudicate maritime causes of action in proceedings in personam,' that is, where the defendant is a person, not a ship or some other instrument of navigation." Moreover, **a purely maritime claim cannot be removed by a defendant alleging that application of federal maritime invokes federal question jurisdiction under § 1331.** *Lewis v. Lewis & Clark Marine, Inc.*, 531 U.S. 438, 148 L. Ed. 2d 931, 121 S. Ct. 993 (2001) ("to define admiralty jurisdiction as federal question jurisdiction would be a destructive oversimplification of the highly intricate interplay of the States and the National Government. . . .")

Here, Defendant claims that Plaintiff's failure to specifically allege the "saving to suitors" clause in her Complaint makes removal proper. Yet, a plaintiff "is not required to state the statutory or constitutional basis for his claim, only the facts underlying it."

Id. at 4-5. (internal citations omitted) Thus, simply asserting that a case involves "maritime and admiralty jurisdiction" is not enough to prove subject matter jurisdiction under the savings to suitors clause. Plus, "the burden to prove that a federal question has been pled [in the complaint] lies with the party seeking removal," *Mangual-Saez, infra*, at 14, and the Defendants have failed to do so.

While there exists judicial references to the concurrent jurisdiction of the state and federal courts with regard to admiralty jurisdiction, the savings to suitors clause provides the right to Plaintiffs to file in the state court in first instance thereby depriving the federal court of subject matter jurisdiction. *Little et al.* at 6. See also *Auerback v. Tow Boat U.S., et al*, 303 F. Supp. 2d 538 (D.C. NJ 2004) ("The saving-to-suitors clause bars the removal of this admiralty action to this Court"). So long as there does

not exist a separate basis for subject matter jurisdiction (such as diversity or federal question), the case must be remanded for lack of subject matter jurisdiction. *See Auerback, supra, and Mangual-Saez v. Brilliant Globe Logistics*, 2004 U.S. Dist. Lexis 27003 at pg 12 (D.C. P.R. 2004).

Since more than 30 days have passed, the Defendant has lost its opportunity to remove this case, and we have lost our opportunity for the official and factual determination as to whether the federal court has subject matter jurisdiction. However, because Plaintiffs pleaded state law causes of action (even if those claims may be founded in admiralty pursuant to the saving to suitors clause), there is absolutely no basis for federal court jurisdiction and this case could not have been removed. Plaintiffs believe that the Defendants did not attempt remove this case to Federal Court because the Defendants knew that this case would be remanded to the state court for lack of subject matter jurisdiction.

We have previously refused to hold that admiralty claims, such as a limitation claim, fall within the scope of federal jurisdiction out of concern that saving to suitors actions in state court would be removed to federal court and undermine the claimant's choice of forum. *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 371-72 (1959). **We explained that to define admiralty jurisdiction as federal question jurisdiction would be a 'destructive oversimplification of the highly intricate interplay of the States and the National Government in their regulation of maritime commerce. Id. at 373.**

Lewis v. Lewis & Clark Marine, Inc., 531 U.S. 438, 121 S.Ct. 993 (2001).

Because the dismissal of a case for lack of subject matter jurisdiction may not be appealed,¹² we must look to District Court cases for guidance on this issue. Although there are dozens and dozens of cases on point, *Mangual-Saez v. Brilliant Globe Logistics, supra*, *Little et al v. RMC Pacific et al, supra*, and *Auerback v. Tow Boat U.S.* are all recent examples of cases that were removed from state to federal court based upon a claim of “admiralty” only to be remanded back to state court for lack of subject matter jurisdiction due to the Plaintiffs’ respective utilizations of the saving to suitors clause (and well pled complaint) which deprived the federal court of jurisdiction.¹³

What these cases make clear is that absent a subsequent additional federal jurisdictional basis for removal (for which one does not exist and the Defendants have not even alleged to exist), the federal court is absolutely deprived of the ability to hear the case – thus the court has no subject matter jurisdiction. And, just as the Defendants’ passenger ticket permits jurisdiction to be proper in the King County Superior Court if the

¹² 28 U.S.C. Section(s) 1447(d).

¹³ “It is clear from reading the complaint [wrote the District Court] that there is no explicit reference to any federal law. Indeed, all references are to Puerto Rico state laws and regulations. It is well-settled that ‘the plaintiff (is) a master of the claim; he or she may avoid federal jurisdiction by exclusive reliance on state law.’ ” *Mangual-Saez* at 14.

federal court lacks jurisdiction, Plaintiffs appropriately filed their action in the King County Superior Court pursuant to the savings to suitors clause.

Issue 8: Whether summary judgment is proper where there remain at least three material facts in dispute and where additional facts inuring to the benefit of the Plaintiff (non-moving party) were not disputed by the Defendants and therefore weigh against entry of summary judgment. (Assignments of Error 3,4) (Standard of Review for Summary Judgment: De Novo)

“Unlike what the Defendants have set out in the motion, the part of the passenger ticket labeled cruise ticket, that is the ticket itself, does not have the warning that the contract is issued subject to the terms and conditions on this page and the following pages. This is fact number one in dispute.” (VR7, lines 4-21) Fact number two in dispute is that the cruise ship contract produced by the Defendants was not exactly the same as that the ticket possessed by the Plaintiffs and therefore the Plaintiffs, until they had more time to review the ticket produced by the Defendants were disputing the validity of the ticket contract which was only a model contract. (VR8-12). At oral argument, counsel for the Defendant avers to the court that the Defendants’ witness, Ms. Lundgren states that she produced an identical ticket to the one produced to Plaintiffs. (VR26, lines 14-17, CP 85-151) Plaintiffs disagreed and addressed the differences.

The third fact in dispute is whether or not the Federal Court would have jurisdiction over this case. The Plaintiffs argue that the Defendants

failed to set out the grounds for subject matter jurisdiction. That first, they did not set out the proper test under admiralty jurisdiction and second they did not establish facts for diversity jurisdiction. (VR17-18). And, even if the Defendants had set out grounds for admiralty jurisdiction that the Plaintiffs utilization of the saving to suitors clause deprives the federal court of subject matter jurisdiction in admiralty cases and expressly permits the Plaintiffs to file in state court. (VR18)

Conclusion

For these reasons, the Plaintiffs respectfully request that the Court enter an Order REVERSING the trial court and remanding this case for further proceedings consistent with the decision of the Court.

DATED this 18th day of January 2006.

IN PACTA, PLLC



Noah Davis, WSBA #30939
Roman Kesselman, WSBA#35595
Attorneys for Plaintiffs/Appellants

APPENDIX

Amendment VII to the U.S. Constitution

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

Amendment XIV to the U.S. Constitution

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

28 U.S.C.A. § 1333 Admiralty, maritime and prize cases

The district courts shall have original jurisdiction, exclusive of the courts of the States, of:

- (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.**
- (2) Any prize brought into the United States and all proceedings for the condemnation of property taken as prize.**

28 U.S.C.A. § 1441 Actions removable generally

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending. For purposes of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded.

28 U.S.C.A. § 1446 Procedure for removal

(b) The notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

28 U.S.C.A. § 1447 Procedure after removal generally

(c) A motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal. A certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court. The State court may thereupon proceed with such case.

(d) An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise.

Civil Rule 12 Defenses and Objections

(a) When Presented. A defendant shall serve his answer within the following periods:

(1) Within 20 days, exclusive of the day of service, after the service of the summons and complaint upon him pursuant to rule 4; * * *

(h) Waiver or Preservation of Certain Defenses.

(1) A defense of lack of jurisdiction over the person, improper venue, insufficiency of process, or insufficiency of service of process is waived (A) if omitted from a motion in the circumstances described in section (g), or (B) if it is neither made by motion under this rule nor included in a responsive pleading or

an amendment thereof permitted by rule 15(a) to be made as a matter of course. * * *

Civil Rule 56 Summary Judgment

(c) Motion and Proceedings. “* * * The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. * * *”

Rule of Evidence 401 Definition of “Relevant Evidence”

“Relevant evidence” means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Rule of Evidence 403 Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time.

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Rule of Professional Conduct 3.7 Lawyer as Witness

A lawyer shall not act as advocate at a trial in which the lawyer or another lawyer in the same law firm is likely to be a necessary witness except where:

(a) The testimony relates to an issue that is either uncontested or a formality;

(b) The testimony relates to the nature and value of legal services rendered in the case; or

(c) The lawyer has been called by the opposing party and the court rules that the lawyer may continue to act as an advocate; or

(d) The trial judge finds that disqualification of the lawyer would work a substantial hardship on the client and that the likelihood of the lawyer being a necessary witness was not reasonably foreseeable before trial.

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**IN THE COURT OF APPEALS, DIVISION I
FOR THE STATE OF WASHINGTON**

JACK OLTMAN and SUSAN OLTMAN,
husband and wife, and BERNICE
OLTMAN,

Plaintiffs

v.

HOLLAND AMERICA LINE and
HOLLAND AMERICA LINE WESTOURS,
INC.

Defendants

No. 56873-6-1

Proof of Service of:

Appellants' Brief

PROOF OF SERVICE

I, Roman Kesselman, do hereby certify that I served a copy of the "Appellants' Brief" upon the following parties:

Defendants Holland America Line and Holland America Line Westours, Inc., through their counsel of record, John P. Hayes. Forsberg Umlauf. 900 4th Ave, Ste 1700. Seattle WA 98164.

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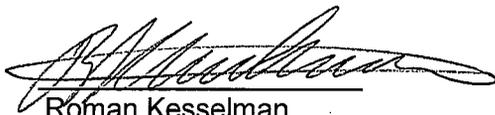
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By personally serving a copy of the same on January 19, 2006, at approximately 5pm.

DATED this 19 day of January 2006.

IN PACTA PLLC by:



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