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STATE OF WASHINGTON

79529-1

NO. 56873-6-I

**SUPREME COURT
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.

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REPLY

ON THE PETITION FOR REVIEW

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REPLY ON THE PETITION FOR REVIEW
(Oltman v. Holland America) //Appellants-Oltmans

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1. Identity of Petitioner

Appellants, Jack Oltman, Bernice Oltman and Susan Oltman

2. New Issues Addressed in this Reply:

New Issue 1: The Respondents have injected new evidence and argument into the Petition for Review in the form of the decisions of the United States District Court for the Western District of Washington dated 8/1/06 and 12/15/06 as they relate to this case as re-filed in that forum.

SubIssue a: The federal court's decision does not at all dispose of the present appeal.

SubIssue b: Holland America can't have its cake and eat it too: the case of Susan Oltman

New Issue 2: The Respondents have raised a New Issue in the form of the complaint filed in federal court (as it relates to this action as it was re-filed) in an attempt to argue estoppel for the first time.

New Issue 3: The Respondents raise a host of new cases in which they assert that their exact forum selection clause has been upheld by other courts in cases such as that presently before this court. These cases were not argued or alleged before.

3. Brief Re-Statement of the Case for This Reply

After Holland America's counsel informed the King County Superior Court on the day of the oral argument for summary judgment that the Plaintiffs could re-file in federal court, (King County Superior Court Transcript, pg 2), the Plaintiffs did just that, they re-filed in federal court.

Although the federal court case proceeded parallel to the state court appeal (for perhaps a variety of reasons including the fear of raising arguments and issues not raised below, fear of prejudicing the state court proceeding, and fear of making procedurally defective comparisons) neither party raised the issue of the federal court case in the state court action – until now.¹

Only now has the issue been raised as Respondents attempt to “save” a court of appeals decision that they know sits on tenuous grounds and stands a great chance of being overturned. Thus, Holland America is doing everything they can to maintain their defense by having this bad law (that Holland America had moved to have published) continue as the law of Washington.

As discussed below, the decisions of the federal court absolutely do not preclude the Washington Supreme Court from accepting review of this matter, nor does the decision of the federal court constrain the future decision of the Supreme Court with respect to those issues that are before this Court.

¹ On page 5 of their brief, at footnote 6, the Respondents begin their new reference to the federal court decisions. Holland America/Respondents appear to mistype here by writing that the “Petitioners” direct the Court to Appendices B & C, where it is actually the “Respondents” directing the court to this new issues/evidence/arguments.

Because the issues raised by Holland America are new, having been raised for the first time in this appeal and because they are patently incorrect, we believe that pursuant to RAP 13.4, this Reply is proper for the sole purpose of rebutting these arguments.

4. ARGUMENT

New Issue 1: The Respondents have injected new evidence and argument into the Petition for Review in the form of the decisions of the United States District Court for the Western District of Washington 8/1/06 and 12/15/06 as they relate to this case in that forum.

SubIssue a: The federal court's decision does not at all dispose of the present appeal.

For the following reasons, the federal court's decisions do not dispose of the present appeal nor constrain the Court's decision on whether to accept the Petition for Review.

First, issues raised in the state court **are not** the same as the issues raised in the companion federal court case as not all of the state court issues were or could be raised in the federal court case. For example, the following issues raised in this appeal played absolutely no role in the federal court case.

i. Whether Holland America's failure to file a timely answer (with its accompanying affirmative defenses) should be stricken, especially where the late filed affirmative defense caused actual prejudice to the Plaintiff;

ii. Whether Holland America's attorney's citation to unpublished trial court opinions, where those opinions are clearly prejudicial to the case before the court, should result in the attorney's declaration being stricken and the case being reversed;

iii. Whether the Plaintiff's filing of a state action by invoking the savings to suitors clause – which gives Plaintiffs the right to file their admiralty claims in state court and under state law causes of action and which thereby deprives the federal court of jurisdiction to hear the case – results in the Plaintiff having complied with the Respondents' forum selection clause;

iv. Whether the fundamental fairness standard (under *Carnival Cruise Lines v. Shute*, 499 U.S. 585 (1991), hereinafter "*Shute*") should apply to the Respondents forum selection clause especially where the clause at issue here is clearly NOT the forum selection clause upheld by the United States Supreme Court in *Shute*.

But if this is the case and these issues were not raised in the federal case then why has Holland America sought to include these new arguments and issues if they do not act to bar the Supreme Court from

accepting review? Although Holland America has not argued collateral estoppel and res judicata, this seems to be implied here, and therefore should be addressed briefly.²

Res Judicata and Collateral Estoppel

In order to prohibit the relitigation of claims under the doctrine of *res judicata*, there must be identity between a prior judgment and a subsequent action as to (1) **persons and parties**, (2) **cause of action**, (3) subject matter, and (4) the quality of persons for or against whom the claim is made. *Pederson v. Potter*, 103 Wash.App. 62, 11 P.3d 833 (2000). *See also, Blonder-Tongue Laboratories v. Univ. of Ill. Found.*, 402 U.S. 313, 323-24, 91 S.Ct. 1434, 1439-40, 28 L.Ed.2d 788 (1971). *Res judicata* also requires a final judgment on the merits. *Id.*

A similar test is behind a claim of collateral estoppel. Collateral Estoppel, or issue preclusion, **bars the relitigation of issues actually adjudicated** in previous litigation between the same parties. *King v. Seattle*, 84 Wn.2d 239, 525 P.2d 228 (1974). For collateral estoppel to bar relitigation of an issue, that issue must have been not only actually litigated but necessarily determined. *See State Farm Mutual Automobile*

² We also address this issue here as we note that the failure of Holland America to assert legal theories has not, in the past (and as the record of this case clearly shows), hurt Holland America from still being able to win those arguments.

Insurance Co. v. Avery, 114 Wn.App. 299, 57 P.3d 300 (2002). In raising these doctrines as defenses, the Respondent would also have to show the particular issues were fully and fairly adjudicated. *See e.g., State Farm*, 114 Wn.App. 299, 57 P.3d 300 (2002); *Nielson v. Spanaway General Medical Clinic, Inc.*, 135 Wn.2d 255, 956 P.2d 312 (1998); *See also, Montana v. United States*, 440 U.S. 147, 155 & 163 n. 11, 99 S.Ct. 970, 974-75 & 979 n. 11, 59 L.Ed.2d 210 (1979).

Thus, in order for collateral estoppel and res judicata to apply, the claims must be the same and court must reach a final judgment on the merits. This did not occur, as none of the above referenced claims/issues were even before the federal court.

Instead, the focus of the Court in its opinion of 8/1/06 was the enforceability of the one-year shortened statute of limitations, as contained in Holland America's Cruisetour Contract. Whereas, the issue in state court related only to the validity and enforceability of the forum selection clause. Respondents/Holland America recognized this in their footnote 6 on page 5 of their Response, where they write: "[The Federal District] Court held that **the one-year time bar term** in the Cruise and Cruisetour Contract was reasonably communicated [and] fundamentally fair." Thus the Respondents readily admit that the federal court was only

deciding the issue before it: whether the time bar limitation was fundamentally fair and reasonably communicated.

However, having said this, it is true that the both the state court of appeals and the federal district court applied some form of the fundamental fairness and reasonably communicated tests to the cruise tour contracts (at least in relation to the issues then before that court – i.e., the federal court considered whether the shortened statute of limitations was fundamentally fair and its terms in the contract reasonably communicated to the Plaintiffs and the state court of appeals was to apply these tests to the forum selection clause). Of course, while the state trial court judge limited her decision to upholding the forum selection clause only, (Transcript of King County Court Hearing, pg 35), the decision of Division 1 appeared to go well beyond this and seemingly sought to uphold the entire Cruisetour Contract even though those issues were not before the Court (and even though the trial court had issued no findings with respect to the fundamental fairness or reasonable communicative tests).³

³ Plaintiffs would also argue that the decision of the Court of Appeals with respect to the overall validity of the cruisetour contract is void as that issue was not properly before the Court of Appeal. A judgment is void when the court lacks jurisdiction over the parties or over the subject matter. *Bresolin v. Morris*, 86 Wn.2d 241, 245, 543 P.2d 325 (1975), supplemented, 88 Wn.2d 167, 558 P.2d 1350 (1977). In this case, by its own ruling that it lacked subject matter jurisdiction due to the forum selection clause, the state courts are deprived of ruling on the substance of any other provision of the cruisetour contract

Finally, with respect to the United State District Court's Order of 12/15, it is clear that the particular Order has **no** preclusive effect against the Supreme Court as that Order (of 12/15) is based entirely upon the decision of Division 1 of the Court of Appeals and the principle of collateral estoppel. This is because the Federal Court believed that it was collaterally estopped from continuing to proceed to trial with the case of Susan Oltman against Holland America after the Washington Court of Appeals handed down its decision which (despite the Federal Court's decision to the contrary) found Susan Oltman to be bound by the cruise tour contract.

Thus, Holland America's inclusion of the District Court's Order of 12/15 serves no basis other than to confuse the issue before the Washington Supreme Court by adeptly proposing that because Division 1 found Susan Oltman to be bound by the cruise tour contract (that she did not sign) and because the federal court reversed its previously well-reasoned and thorough decision because it felt that it must (under the doctrine of collateral estoppel), that somehow this should preclude the Supreme Court's review as if Division 1's decision binds the Supreme

except with respect to the forum selection clause as the other provisions were not before the court.

Court. This circular logic should be given no legs on which to stand; but, it does act as a segue into the next, and very important, issue raised in Holland America's Response.

**SubIssue b: Holland America can't have its cake and eat it too:
the case of Susan Oltman**

Although the Respondents hope that the Supreme Court will in some way defer to the federal court, even though the federal court did not address the issues that are before this Court and therefore there exist no grounds to do so, the irony of Holland America's decision to include the previously unreferenced companion federal court case is that United State District Court Judge Robart's decision of 12/15/05, we believe, helps support Plaintiffs' argument as to the erred reasoning employed in the Court of Appeals decision to hold that Susan Oltman was bound by a contract that she had not signed.

Besides acknowledging that the Federal Court considered this issue in great depth, it is very important to note that, on the state court side, Holland America DID NOT even raise these issues in their motion for summary judgment and yet they were granted an order of dismissal without having offered a single reason in the motion as to how they may be entitled to such relief. This is perhaps the most frustrating part of the

entire state court portion of the case: That despite the Respondent's failure to advance any legal theory regarding privity of contract or the dependent or independent derivative nature of loss of consortium claims (which Holland America did finally raise and argue for the first time on appeal and in the United States District Court)⁴, that Holland America could still be successful in moving for relief. Successful even after failing to set forth any of the grounds in their motion for summary judgment which would be necessary for such relief. Not only is it frustrating, but also, we hope, it will lead the Supreme Court to a full review of record in this case, from top to bottom to ensure that our courts follow the rule of law and to ensure that justice is done.

If the Washington Supreme Court considers any part of the two federal court opinions produced by Holland America, we urge the Court to consider page 9 of the United State District Court's Order of 8/1/06 (Appendix B of Holland America's Response), which reads:

⁴ To further demonstrate the Respondents' failure to argue the appropriate grounds for summary judgment relief in the state court (as they failed to argue any ground with respect to Susan Oltman), we have attached as Appendix B, the brief of Holland America which goes into significant detail on the theory as to how Susan Oltman could be held to the cruise tour contract. This argument (which was absent from the state court proceedings is found at pg 6 of their brief, attached hereto). And while Holland America set forth no basis as to how Susan Oltman could be held to the conflict, Plaintiffs set forth material facts in opposition showing that she did not sign the contract, did not travel, was not a party and could not be held to the contract. Thus, there clearly was not an absence of material fact, unless an alternative legal theory was advanced by Holland America as it was in federal court, but this did not occur.

- 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.

(emphasis added, footnote omitted).

The United States District Court opinion then goes on to discuss, in detail, the viability of Susan Oltman's claim since Maritime law recognizes a loss of consortium claim only if the spouse's injury occurred in state territorial waters.

Despite Holland America's new assertion that it was (as they imply in their footnote 10 on page 8 of their Response), the issue of where Susan Oltman's husband's injuries took place (i.e. on the high seas or within the state's territorial waters) was not raised, advanced, discussed or ruled upon in the state court action. And, in any event, it doesn't matter as Susan brought her state court action under state law, not federal admiralty law. Thus state law would apply to Susan Oltman's loss of consortium claim for her state law cause of action (and not federal admiralty law).

Furthermore, as the Plaintiffs argued in their Petition for Review, at the trial court level, there existed no evidence, no testimony, no documents, no signature, no inference of assent, and not even a single legal theory (advanced by the Respondents) which could have supported the trial court's holding that the forum selection clause in the Holland America's Cruisetour Contract was enforceable against Susan Oltman – the wife of a passenger who did not herself travel on the cruise.⁵

The only argument that Holland America is left to make is that the Plaintiffs didn't raise a legal argument; however, when the moving party fails to set forth a single ground upon which their motion should be granted (as it relates to one or more parties in a case or one or more issues), the non-moving party is not required to disprove or counter something that has never been brought (much less satisfied the requirement of Rule 56 absence of material fact and a party is entitled to judgment as a matter of law). See *Hash v. Childrens' Orthopedic Hosp. & Med. Ctr.*, 110 Wn.2d 912, 757 P.2d 507 (1988). To support these undisputable facts Plaintiffs submit the Motion for Reconsideration, attached hereto as Exhibit A (pp 8-9 arguments N-O), and the record and files of this Appeal.

⁵ Even the passenger contract limits itself to persons traveling under it. (CP 109).

New Issue 2: The Respondents have raised a New Issue in the form of the complaint filed in federal court as it relates to this action in an attempt to argue estoppel for the first time.

In footnote 5, page 4 of their Response, the Respondents argue that the Plaintiffs should be estopped from arguing that federal jurisdiction did not exist. In support, the Respondents cite and attach the complaint Plaintiffs' filed in federal court (as Appendix A thereof) after having their case dismissed from state court. However, as with their other arguments, this new argument of Holland America does not fully and fairly describe the facts and events.

As set forth in the Petition for Review, the savings to suitors clause, 28 U.S.C. s. 1331(1), provides Plaintiffs with the affirmative right to file, what may otherwise be a suit in admiralty, in state court with state law causes of action. This is exactly what occurred in the present case. By proceeding under the savings to suitors clause, the federal court lacked jurisdiction.

If the Respondents believed that federal jurisdiction existed, then they could have removed the case to Federal Court as the federal removal statute provides the Respondents with that right. 28 U.S.C. s. 1441(a). However, because the elements necessary for a diversity claim did not exist (and despite their claim here, there has never been the amount in

controversy to support diversity) Holland America knew that the federal court would remand the case for lack of subject matter jurisdiction – under the savings to suitors clause.

When the Plaintiffs' did file in federal court (after having their case dismissed in state court), because they did not meet the elements necessary for diversity, they were required to affirmatively plead in admiralty. This relinquished their right to file in state court and, Plaintiffs believed, relinquished their right to a jury trial (despite any demand they may make). Thus, Plaintiffs were being required to invoke federal jurisdiction where none had existed at the time the Plaintiffs filed in state court (under the savings to suitors clause).

What is most important to note here is that Holland America's forum selection clause **does not require a plaintiff to try and file first in federal court.** Instead it provides a forum for state law claims where the federal court does not have jurisdiction. It does not require a dismissal in federal court before filing in state court. And, adhesion contracts such as these are construed against the drafter.

As the cases cited in the Petition for Review set forth, the federal court does not have jurisdiction where the savings to suitors clause is properly employed. Holland America could have tried and removed the case to federal court, but chose not to.

New Issue 4: The Respondents impliedly assert that the same forum selection clause involved in this case has been previously upheld.

After reviewing each of the cases cited by Holland America which they argue support the enforceability of the forum selection clause involved in this case (page 11-12 of Response), we did not find a single forum selection clause argument from any of these cases. Thus, we completely disagree with Holland America that these cases support the Supreme Court upholding the enforceability of their forum selection clause.⁶

In *Cummings v. Holland America Line Westours, Inc.*, 1999 A.M.C. 2282 (W.D. WA 1999), the court found that the contract between the plaintiff and cruise line which sought to limit the plaintiff's remedies would be upheld as having been "reasonably communicated." 1999 A.M.C. 2282 at *2, *3. Unlike the present case, however, the contract at issue in *Cummings* was with regard to the cruise line's limitation on liability for negligent infliction of emotional distress. 1999 A.M.C. 2282 at *2. Additionally, in *Cummings*, the Federal forum was proper, not because the contract's forum-selection clause controlled, but because a

⁶ Some of these cases have upheld cruise tour contracts as being reasonably communicated but those cases are facts specific as is the present case.

Federal statute, "Death on the High Seas Act," controlled. See 46 U.S.C. § 761 et seq.; 1999 A.M.C. 2282.

Similarly, in *Wylor v. Holland America Line-USA Inc.*, the court dismissed the plaintiff's claims, not because the contract's forum selection clause was at issue, but because the contract clearly excluded liability for negligent infliction of emotional distress and regardless, the plaintiff's claim did not state an injury which constituted emotional distress as a matter of law. 2003 A.M.C. 408 (W.D. WA 2002). Indeed, at issue in *Wylor* was not the validity of the contract's forum selection clause, but rather the exclusion of liability for negligent infliction of emotional distress, which was found to have been communicated and upheld in prior cases. 2003 A.M.C. 408 at *2.

In *Silware v. Holland-America Line Westours, Inc.*, the court granted summary judgment dismissing the plaintiff's claims for being untimely, as the cruise line's contract required actions for personal injuries suffered aboard the vessel to be brought within one year. 1998 A.M.C. 2262 (W.D. WA 1998). Furthermore, in *Silware*, the plaintiff's claims were barred where no complaint was filed within the one year time limitation. 1998 A.M.C. 2262 at *2.

Similarly, in *Davis v. Wind Song Ltd.*, the plaintiff's cause of action was dismissed as untimely where the court upheld the contractual

provision requiring suit be brought within one year as having passed the “reasonably communicated” test. 809 F. Supp. 76 (W.D. WA 1992). In Davis, more than two years had elapsed before the plaintiff filed suit against the cruise line. 809 F. Supp. at 79.

In *Dubret v. Holland America Line-Westours, Inc.*, the court failed to find the cruise line liable under the principle of respondeat superior for the alleged negligence of a bus company who transported passengers between their Acapulco hotel and the airport at the end of an optional package for a two night stay. 25 F. Supp. 2d 1151, 1153 (W.D. WA 1998). Insofar as the cruise line’s liability waiver was concerned, the court found that waivers of liability for harm cause by the negligence of providers of on-shore services have long been held enforceable. *See Dubret*, 25 F. Supp. 2d at 1153-4. In *Dubret*, reasonable communication of the cruise line’s contract was never at issue, nor was forum selection. See 25. F. Supp. 2d 1153.

Finally, in *Geller v. Holland America Line*, the court dismissed the plaintiff’s action as untimely where the contract printed on the ticket contained a one-year limitation period for bringing personal injury suits against the cruise line, although the ticket was collected at embarkation, and the passenger had no actual knowledge of its terms. 298 F.2d 618 (2nd Cir. 1962) *cert. denied* 370 U.S. 909.

Conclusion

For these reasons, the Plaintiffs respectfully request that the Court GRANT the Petition for Review so that the court may fully and fairly determine some or all of the issues presented on appeal.

DATED this 18th day of January 2007.

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APPENDIX A

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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/Appellants

v.

HOLLAND AMERICA LINE and
HOLLAND AMERICA LINE
WESTOURS, INC.

Defendants

No. 56873-6-1

Motion for Reconsideration

MOTION FOR RECONSIDERATION

1. IDENTITY OF MOVING PARTY

COME NOW the Plaintiffs/Appellants in this, their Motion for Reconsideration.

2. STATEMENT OF RELIEF SOUGHT

Plaintiff/Appellants respectfully request that the Court reconsider some of the assertions and statements contained in its decision of September 11, 2006. While, as can be

Motion for Reconsideration- 1

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1 expected, the Plaintiffs/Appellants fundamentally disagree with the Court's interpretation
2 and application of the law, and of course the ultimate outcome of the case, for the
3 purpose of this Motion for Reconsideration, the arguments for Reconsideration are much
4 more limited in scope than the broader challenge to the Court's decision, which instead
5 will be reserved for the Petition for Review.
6

7 3-4. FACTS RELEVANT TO MOTION AND ARGUMENT RELATING THERETO
8

9 a. Pages 1 and 8 of the Court's opinion appear to summarize, as fact, that the Holland
10 America forum selection clause requires that the case be filed in Federal Court. As this
11 is only an interpretation of the clause and not a verbatim reading, Plaintiffs respectfully
12 request that the Court correct this representation. Instead of reading "a
13 passenger/Plaintiff must file in Federal Court" the forum selection clause actually reads:

14 **ALL DISPUTES AND MATTERS WHATSOEVER ARISING UNDER, IN**
15 **CONNECTION WITH OR INCIDENT TO THIS CONTRACT, THE CRUISE,**
16 **THE CRUISETOUR, THE HAL LAND TRIP OR THE HAL AIR PACKAGE**
17 **SHALL BE LITIGATED IF AT ALL, IN AND BEFORE THE UNITED**
18 **STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF**
19 **WASHINGTON AT SEATTLE, OR AS TO THOSE LAWSUITS AS TO**
20 **WHICH THE FEDERAL COURTS OF THE UNITED STATES LACK**
21 **SUBJECT MATTER JURISDICTION, IN THE COURTS OF KING**
22 **COUNTY, STATE OF WASHINGTON, U.S.A., TO THE EXCLUSION OF**
23 **ALL OTHER COURTS."** (CP 109, CP 70)

24
25 The Court acknowledges this on page 3 of its brief, but this does not correct the
inadvertent and inconsistent assertion on page 1.

1 b. In the Factual section of page 2, third paragraph, of the Court's opinion, the Court
2 states that Plaintiffs/Appellants Bernice and Jack Oltman received the cruise ship
3 contract approximately six days before boarding. This factual rendition clearly does
4 NOT take the facts in the light most favorable to the non-moving party, which instead of
5 having received the tickets six days prior to Boarding, the Court would have its opinion
6 note that it is considering its holding with the notion that the Oltmans received their
7 tickets and contracts at the time of boarding. This is consistent with the testimony and
8 the appropriate standard of review.
9

10 Jack Oltman testified through his declaration that he received the ticket and contract
11 terms either six days before he traveled or right before boarding (i.e. the time he was
12 boarding the ship). (CP 232, Lines 9-12). Bernice Oltman testified that she did not have
13 the opportunity to review the tickets prior to Boarding. (CP 236, Lines 1-2). The
14 Defendants did not dispute the fact that the Oltmans may have received the tickets at the
15 time of boarding. Taking the evidence in the light most favorable to the non-moving
16 Party, the Court must consider notice (or lack thereof) of the terms of the contract in the
17 context of the Oltmans having received no advance notice of the cruise ship terms.
18 (except as Holland America argues, and the Court appears to have accepted, that the
19 tickets were posted on the Defendants' website despite any indication or evidence of
20 notice to the Oltmans.
21

22 The Court recites the "list most favorable" standard in footnote 10, but does not
23 employ it. Plaintiff/Appellants request that the Court correct this very important error.
24

1
2 c. Footnote 3. The Court states that the language of the hollandamerica.com website
3 exactly matches that of the Travel Documents issued to the passengers. Is this also in
4 page numbers and location of contract items? As this information was not provided in
5 the record below, and in fact, no such comparison was ever made below.
6 Plaintiffs/Appellants request that the Court strike this assertion altogether. While there
7 was a reference on summary judgment to terms online, the record is not developed
8 enough on this issue to have the court make such an assertion.
9

10 d. On page 4 of its opinion, the Court apparently accepts the Defendants' counsel's
11 assertion at oral argument that the issue of prejudice wasn't raised by
12 Plaintiffs/Appellants below. However, as Plaintiffs/Appellants' counsel informed the
13 Court during Oral Argument, prejudice was in fact raised below, and can be found in the
14 record as follows:

15 i. In Plaintiffs/Appellants' Motion to Strike Affirmative Defenses (CP 34-38);

16 ii. In Plaintiffs/Appellants' Reply to Defendants' Opposition to Strike
17 Affirmative Defenses (CP 80-82);

18 iii. In Plaintiffs/Appellants' Response and Objection to the Motion for
19 Summary Judgment (CP 209-210, Lines 10-26 on pg 209 and lines 1-22 on pg 210);

20 iv. Argued again during the hearing on Defendants' Motion for Summary
21 Judgment; although it was raised, the Judge refused to consider this
22 issue further (Transcript Page 5, Line 10-15, Aug 12, 2005).
23
24

1 Thus, it is clear that the issue of prejudice was raised over and over again. Frankly,
2 Plaintiffs/Appellants' counsel do not know how they could raise it more frequently or in
3 a different manner than they did without facing sanctions from the trial court.
4

5
6 e. Abuse of discretion versus de novo standard. The Court, on multiple occasions in
7 its opinion, considers its review of the trial court's decisions under an abuse of
8 discretion standard when Plaintiffs'/Appellants' believe that the appropriate standard is
9 De Novo since the Motion to Strike Affirmative Defenses and the Motion to Strike the
10 Declaration of Defendants' attorneys were both raised and considered during the
11 Summary Judgment hearing. The Motion to Strike Affirmative Defenses was a renewal
12 of a previous motion to strike and contained in Plaintiff/Appellants Motion for
13 Summary Judgment which the trial court denied again at Summary Judgment. The
14 Motion to Strike the Declaration of Defendants' counsel was made at the same time as
15 the Motion for Summary Judgment was considered by the Court. Both Motions related
16 directly to and were very much part and parcel of the Defendants' Motion for Summary
17 Judgment and the Plaintiffs/Appellants' defense thereto. Because these Motions were
18 heard together with the Motion for Summary Judgment they must be considered under
19 the summary judgment standard: de novo, and not the much harsher standard of abuse of
20 discretion. The de novo standard of review is used by an appellate court when
21 reviewing all trial court rulings made in conjunction with a summary judgment motion.
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23 *Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998)
24

1
2 f. Plaintiffs/Appellants would respectfully request that the Court delete Footnote 8 of
3 its opinion, as it is clear that the Affirmative Defense assertion of improper forum
4 argued by the Defendants, and submitted in their late filed answer, was clearly
5 prejudicial to the Plaintiffs/Appellants.
6

7
8 g. Page 6, the Court fails to recognize that the Superior Court cases were not
9 “published” opinions.
10

11 h. In Footnote 9 the Court does not attempt to explain why RPC 3.7 is not violated
12 when an attorney, who has represented parties in the very cases the attorney now cites to
13 the court as “evidence” of some type, is not testifying as an expert or fact witness. It
14 would seem that if the attorney is not citing these unpublished cases as authority, then
15 the attorney is citing them as evidence. The Court’s opinion on this point opens the
16 door for attorney testimony of this type all across the courts of Washington State.
17

18
19 i. Plaintiffs/Appellants argued that state law may govern certain elements of this
20 action, such as contract formation, but does not assert that all elements of the case must
21 be governed by state law. In fact, in their brief to this Court (pg 20, “Stat eCourt
22 Analysis”), Plaintiffs recognize that federal maritime law can apply in state courts to
23 cruise ship torts.
24

1
2 j. Page 7. Plaintiffs/Appellants do not rely exclusively on Nunez, but also rely on
3 *Casavant & Another v. Norwegian Cruise Line, LTD.*, 63 Mass.App.Ct. 785 (2005) and
4 *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991).
5

6
7 k. On Page 11 of the Court's opinion, the Court discusses the conspicuous-ness of the
8 Cruise ship contract. However, despite the Court's assertion here, the first page of the
9 cruise ship "Contract" is not the first page of the ticket. Instead the "Contract" comes
10 approximately 14 or 15 Pages in. The Defendants provided a cruise ship ticket attached
11 to the Declaration of Susan C. Lundgren, Manager of Legal Relations at Holland
12 America. (CP 85) This is also not the actual ticket given to the Plaintiffs, as none was
13 ever provided (see Transcript of trial court hearing, August 12, 2005). The "Travel
14 Document Booklet" as referred to by the Defendants, was organized as follows:
15

- 16 i. Cover Page
- 17 ii. A welcome page (no mention of contract)
- 18 iii. Ship Specifications (no mention of contract)
- 19 iv. Table of Contents (lists an item "Contract (please read)")
- 20 v. Arrival Advice – Listed as Page 1
- 21 vi. Itinerary – Listed as Page 3
- 22 vii. The Contract – Listed as Page 11 (17 Pages long)
- 23 viii. Cancellation Info – Listed as Page 27.

1 Thus, the First reference to the Contract is on the Fourth Page (Table on Contents) and the
2 actual contact is 14-15 pages, with the forum selection clause buried within. Thus, the
3 Court's representation is not correct.
4

5
6 1. Page 14, Footnote 15. The Court notes here that tort actions on cruise ships
7 "generally fall under federal maritime law". And thus, the Court acknowledges that
8 there may be exceptions to this rule. However, earlier in its opinion the Court infers that
9 all actions fall under federal law, whereas this may not be the situation in every case. In
10 fact, the one exception that Plaintiff/Appellants assert is the "savings to suitors clause".
11 Plaintiffs/Appellants request that the Court please correct the opinion by stating that this
12 is the very exception argued by the Plaintiffs/Appellants. Which the court could state is
13 explored more in part 3 infra.
14

15 m. Page 15, the Court mentions "abuse of discretion" here as a standard when the
16 standard is clearly de novo.
17

18
19 n. Page 16. Of all, this was clearly the most frustrating part of the Court's opinion for
20 the Appellants/Plaintiffs. To remind the Court, it was the Defendants' who FAILED to
21 raise the issue of loss of consortium being a dependent, derivative claim on summary
22 judgment and not the Plaintiffs/Appellants. It was the Defendants who had the burden of
23 proving that the Plaintiff Susan Oltman's claims somehow fell under a contract she did
24

25 **Motion for Reconsideration- 8**

In Pacta pllc
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1 not enter. But the Defendants failed this burden by not even raising this issue in their
2 Motion for Summary Judgment, instead only including it as a footnote in their reply.
3 Such a failure and omission by the Defendants should not be permitted to be upheld on
4 appeal when it wasn't even properly raised below and clearly the Defendants failed to
5 make an argument as to how Susan Oltman could be held to the Contract. This position
6 was again re-asserted in a Motion for Reconsideration to the Trial Court. It is beyond
7 imagination and any application of the rule of law as to how a party can be permitted to
8 fail to even state the basis of its claim on summary judgment and still win? And yet,
9 despite the Defendants' failure to state how Plaintiff Susan Oltman could be held to a
10 contract she did not sign, the Plaintiffs/Appellants asserted this in their response and
11 Motion for Reconsideration and still the Court believes as if the Plaintiffs/Appellants
12 didn't raise this issue below AND the burden somehow falls on them to disprove
13 something that was never offered or proved in the first place.
14
15

16 o. Page 16. Same issue. Plaintiff/Appellants respectfully assert that the Court has
17 incorrectly analyzed loss of consortium law in order to support its opinion. The
18 language of the cruise ship contract does not (and cannot) take away Susan Oltman's
19 separate claim for loss of consortium. A contract can only bind the parties that are privy
20 to it. The Defendants never showed the court below how Susan could have been privy
21 to this contract and therefore Plaintiffs objected below, and again on appeal. The Court
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has seemingly rewritten basic contract law to support its holding here, and
Plaintiffs/Appellants respectfully request the Court to undo this miscarriage of justice.

Plaintiffs/Appellants respectfully request that the Court consider these particular issues,
correct them and then permit the Plaintiffs to take the case up on appeal to challenge the
Court's legal holdings.

DATED this 2nd day of October 2006.

IN PACTA PLLC by:



Noah Davis
WSBA#30939
In Pacta PLLC
705 2nd Ave Ste 601
Seattle WA 98104
Counsel for Plaintiffs/Appellants

APPENDIX B

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IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

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

Plaintiff,

vs.

HOLLAND AMERICA LINE -- USA INC., a
Delaware corporation, and HOLLAND
AMERICA LINE INC., a Washington
corporation,

Defendant.

Hon. James L. Robart

No. C05-1408

**DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT AND
SUPPORTING MEMORANDUM**

NOTE FOR MOTION DOCKET:

JUNE 23, 2006

MOTION

Defendants, Holland America Line-USA Inc. and Holland America Inc. move for
summary judgment dismissing plaintiffs' claims with prejudice because they are time-barred.

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1
2 **MEMORANDUM**

3 **A. Statement of Facts.**

4 **1. The Cruise at Issue.**

5 Plaintiffs Jack and Bernice Oltman allege they contracted a gastrointestinal illness
6 while cruising from Valparaiso, Chile to San Diego, USA aboard the Holland America Line
7 vessel ms AMSTERDAM. (See Complaint.) The dates of the cruise were March 31, 2004 to
8 April 17, 2004.

9 **2. The Cruise and Cruise Tour Contract Required Plaintiffs' Suit to be**
10 **Brought Within One Year of the Alleged Injury.**

11 Attached as Exhibit A to the Declaration of Susan C. Lundgren is an exemplar copy of
12 Holland America Travel Documents, including a Cruise and Cruisetour Contract, identical in
13 all material respects to the ones issued to the plaintiffs in this case. The contract states in
14 large, bold, capital letters:

15 **IMPORTANT NOTICE TO PASSENGERS**

16 THIS DOCUMENT IS A LEGALLY BINDING CONTRACT
17 BETWEEN YOU AND US. THE WORD "YOU" REFERS TO ALL
18 PERSONS TRAVELING UNDER THIS CONTRACT INCLUDING
19 THEIR HEIRS, SUCCESSORS IN INTEREST AND PERSONAL
20 REPRESENTATIVES. THE WORDS "WE AND "US" REFER TO THE
21 OWNER, HALW AND THE OTHER HAL COMPANIES, ALL OF
22 WHICH ARE DESCRIBED IN CLAUSE A.1 BELOW. CERTAIN
23 OTHER PERSONS AND ENTITIES AS WELL AS THE SHIP ITSELF,
ARE ALSO GRANTED RIGHTS UNDER THIS CONTRACT.

[Ex. A to Lundgren Decl.]

The Cruise and Cruisetour Contract also provides:

1 **B. Discussion.**

2 **1. Plaintiffs' Claims Are Time-Barred.**

3 Congress authorized a one year time-bar in Cruise and Cruise Tour Contracts in 46
4 U.S.C. §183b:

5 It shall be unlawful for the manager, agent, master or owner of any seagoing vessel . . .
6 transporting passengers between ports of the United States and foreign ports to
7 provide by rule, contract, regulation, or otherwise a shorter period for giving notice of,
8 or filing notice for claims for loss of life or bodily injury than six months, and for the
9 institution of suits in such claims, than one year, such a period for the institution of
10 suits to be computed from the date when the death or injury occurred.

11 The one-year limitation permitted under 46 U.S.C. §183b supersedes the three-year
12 limitation for non-passenger personal injury cases in 46 U.S.C. §763(a). Barone v.
13 Scandinavian World Cruises (Bahamas), Ltd., 536 So.2d 1036 (Fla. 3d D.C.A. 1988); Peoples
14 v. Croisieres Paquet dba Paquet French Cruises, 1988 A.M.C 2229 (D.C. Ore. 1988);
15 Catterson v. Paquet Cruises, Inc., 513 F.Supp. 645 (S.D.N.Y. 1981).

16 The case law is well established that a plaintiff's failure to comply with the clause
17 requiring that suits be brought within one year requires dismissal. Bailey v. Carnival Cruise
18 Lines, Inc., 774 F.2d 1577 (11th Cir. 1985) (reversal of district court's denial of cruise line's
19 motion to dismiss); Braun v. Carnival Cruise Lines, Inc., 749 F.2d 732 (11th Cir. 1984)
20 (upheld summary judgment in favor of cruise lines); Carpenter v. Klosters Rederi A/S, 604
21 F.2d 11 (5th Cir. 1979) (reversal of trial court's denial of summary judgment for cruise line);
22 Miller v. Lykes Brothers Steamship Co., 467 F.2d 464 (5th Cir. 1972) (upheld judgment for
23 cruise line); Kendall v. American Hawaii Cruises, 704 F. Supp. 1010 (D. Haw. 1989) (granted
summary judgment for cruise line).

1 As stated by the court in Bouns v. Royal Viking Lines, Inc., 1977 A.M.C. 2159, 2162
2 (S.D.N.Y. 1977):

3 The one year limitation provision in such a contract has been
4 routinely upheld by the courts. (Citations omitted.) It is
5 clear that the failure of the passenger to read the ticket is not
6 a matter of significance. (Citation omitted.) If there is any
area in which summary judgment is still acceptable, it would
appear to be on the ticket limitation periods for suit.
(Citation omitted).

7 Two other cases upholding the one year time limitation are Dempsey v. Norwegian
8 Cruise Line, 972 F.2d 988 (9th Cir. 1992) and Fagan v. Nordic Prince Line, Inc., 1992
9 A.M.C. 2553 (S.D.N.Y. 1992).

10 Moreover, the Honorable Judge John C. Coughenhour enforced the one-year time bar
11 provision in an HALW Cruise and Cruisetour Contract. Silware v. Holland America Line
12 Westours, Inc., 1998 A.M.C. 2262 (W.D.WA 1998). And the Honorable Judge Barbara J.
13 Rothstein has previously enforced the Cruise and Cruisetour Contract of a sister company of
14 HALW, including its one year time limit to bring suit. Davis v. Wind Song Limited, 809
15 F.Supp. 76 (W.D. Wa. 1992). The Cruise and Cruisetour Contract in Davis involved HALW
16 and a sister company and shipowner, and also contained the one-year time bar. Davis, 809 F.
17 Supp. at 78.

18 Federal case law is clear that the applicable time limit involved -- here, a one-year
19 time limit -- expires on the anniversary date of the injury. In this case, that means the
20 expiration occurred between March 31, 2004 and April 17, 2004, the dates of the cruise on
21 which Jack and Bernice Oltman allege they became ill. McKinney v. Waterman Steamship
22 Corp., 739 F.Supp. 678 (D.Mass. 1990) (held the statute of limitations in maritime cases
23

1 under 46 U.S.C. Appendix §763a expires on the third-year anniversary of the injury); Gervais
2 v. United States, 865 F.2d 196, 197 (9th Cir. 1988) (in a case with a six-month statute of
3 limitations, the court held that the final date of the limitation period was the six-month
4 anniversary of the incident giving rise to the claim); Hatchel v. United States, 776 F.2d 244
5 (9th Cir. 1985) (where notice of the denial of a FTC claim was mailed on January 14, 1981--
6 which triggered the applicable statute of limitations -- and the tort action was filed on July 17,
7 1981, it was held to be "three days" beyond the statute of limitations); Vernell v. United
8 States Postal Service, 819 F.2d 108, 111 (5th Cir. 1987) (where denial of the claim was
9 mailed on January 12, the six months' limitation period ended on July 12.) There can be no
10 doubt the one-year time limit here expired at the latest, on April 17, 2005, and that plaintiffs
11 filed their federal action on August 12, 2005. [Court file.]

12 It should also be pointed out that the case law is clear that claims for loss of
13 consortium and other claims deriving from the underlying claim are subject to the same
14 contractual time limit as the injured party's claim. E.g., Miller v. Lykes Brothers Steamship
15 Co., 467 F.2d 464, 466-67 (5th Cir. 1972).

16 Similarly, there can be no doubt that the loss of consortium claim begins to run on the
17 date the underlying injury occurred. As stated by the court in Lieb v. Royal Caribbean Cruise
18 Line, Inc., 645 F.Supp. 232, 235 (S.D.N.Y. 1986), "as a final matter, Mr. Lieb's claim for loss
19 of consortium is equally barred by the statute of limitations contained in the contract, even
20 though, conceptually his losses may have occurred at a later date." See also, Schenck v.
21 Kloster Cruise Ltd., 800 F.Supp. 120 (S.D.N.J. 1992); Natale v. Regency Maritime Corp.,

1 1995 U.S. Dist. LEXIS 3413 (S.D.N.Y. March 17, 1995) (“Mr. Natale’s consortium claim is
2 time-barred for the same reasons as Ms. Natale’s claim”).

3 Plaintiffs had to bring this lawsuit by no later than the one year anniversary of their
4 alleged injuries – March 31-April 17, 2005. Their failure to do so means all of their claims
5 are time-barred.

6 **2. Plaintiff’s Claims Are Also Barred by the Doctrines of Res Judicata and**
7 **Collateral Estoppel.**

8 It is undisputed that the King County Superior Court granted defendants’ motion for
9 summary judgment on August 12, 2005. [Ex. A to Yates Decl.] This motion was predicated
10 on the enforceability of the Cruise and Cruisetour Contract and the forum selection clause it
11 contains. [Ex. B to Yates Decl.] By granting defendants’ summary judgment motion, the
12 Court specifically ruled that the Cruise and Cruisetour Contract, which also contains the time
13 bar provision at issue here, is valid and enforceable.

14 Res judicata bars a subsequent lawsuit when an earlier suit (1) involved the same
15 “claim” or cause of action as the later suit, (2) reached a final judgment on the merits, and (3)
16 involved identical parties or privies. Sidhu v. Flecto Co., 279 F.3d 896, 900 (9th Cir.2002).
17 Here, there is no doubt that this action and the prior state court action involved the same
18 claims and parties. [Ex. C; Court file.] And there is no dispute that the King County Superior
19 Court granted defendants’ summary judgment motion and dismissed plaintiff’s claims with
20 prejudice, which necessitated a finding that the Cruise and Cruisetour Contract at issue,
21 including the time bar provision, was valid and enforceable. Plaintiffs cannot now relitigate
22 the applicability of the Cruise and Cruisetour Contract in this case.
23

1 Finally, as plaintiff's counsel correctly conceded at oral argument:

2 The second problem with what the defendants are arguing to you
3 today is that there's a one year limitation in their contract of
4 adhesion. That one year limitation would bar plaintiffs from
5 refiling in federal court.

6 [Ex D to Yates Decl.]

7 **C. Conclusion.**

8 Based upon the foregoing, defendants respectfully request summary judgment
9 dismissal with prejudice.

10 DATED this 31st day of May, 2006.

11 FORSBERG & UMLAUF, P.S.
12 Attorneys for Defendants, Holland America
13 Line Westours Inc., Wind Surf Limited,
14 HAL Nederland N.V., and Holland America
15 Line N.V.

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17 Patrick G. Middleton, WSBA# 12113
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23

CERTIFICATE OF SERVICE

The undersigned certifies under the penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned, a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On the date given below I caused to be served the foregoing DEFENDANTS' MOTION FOR SUMMARY JUDGMENT on the following individuals in the manner indicated:

Mr. Noah Davis
In Pacta, PLLC
705 2nd Avenue, Suite 601
Seattle, WA 98104
Facsimile: 206-860-0178
 Via U.S. Mail
 Via Facsimile
 Via Hand Delivery
 Via EM/ECF

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2007 JAN 18 PM 4:41

SIGNED this 1st day of June, 2006, at Seattle, Washington.


Courtney M. Baasch