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IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION I

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COURT OF APPEALS  
STATE OF WASHINGTON  
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**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/Respondents**

**BRIEF OF DEFENDANTS/RESPONDENTS HOLLAND AMERICA  
LINE-USA INC. and HOLLAND AMERICA LINE INC.**

John P. Hayes, WSBA #21009  
Andrew G. Yates, WSBA #34239  
Attorneys for Respondents Holland  
America-Line USA Inc. and Holland  
America Line Inc.

FORSBERG & UMLAUF, P.S.  
900 Fourth Avenue  
Suite 1700  
Seattle, Washington 98164  
(206) 689-8500

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## I. COUNTERSTATEMENT OF THE CASE

### A. Factual Background.

Appellants Jack Oltman and Bernice Oltman<sup>1</sup> allege they contracted a gastrointestinal illness while cruising from Valparaiso, Chile to San Diego, USA aboard the Holland America Line vessel, ms AMSTERDAM. (Clerks' Papers 4-6.) By their own admission, appellants decided to take this cruise on the spur of the moment, booking it through the Vacations to Go travel agency only thirteen days before the cruise sailed from Valparaiso. (CP 231-32). Jack Oltman decided to book this cruise because he was going to be in Chile anyway on business. (CP 231-32.)

For security reasons, and under Holland America's policies and procedures in place at the time appellants Jack and Bernice Oltman embarked on their cruise, they could not have boarded ms AMSTERDAM without presenting their Cruise and Cruisetour Contracts (with their Cruise Tickets). (CP 89.) These same policies and procedures are still in place today. (CP 89.) Jack and Bernice Oltman therefore could not have boarded the cruise without their Cruise and Cruisetour Contracts. (CP 89.)

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<sup>1</sup> Appellant Susan Oltman did not take the cruise, but her only claim, loss of consortium, arises out of the cruise and is derivative of Jack Oltman's claims.

The Travel Documents booklet issued to all Holland America passengers, including appellants Jack and Bernice Oltman, includes a Cruise and Cruisetour Contract. (CP 86.) The Travel Documents booklet also includes a Cruise Ticket, which all passengers must present, along with their Cruise and Cruisetour Contracts, before boarding the vessel. (CP 89.) Although appellants did not produce complete copies of their travel documents, they did produce their Cruise Tickets, proving they received their Travel Documents booklets, including their Cruise and Cruisetour Contracts, before boarding ms AMSTERDAM. (CP 40, 89, 148.)

On the first page of the Cruise and Cruisetour Contract issued to all passengers, the word “**CONTRACT**” appears along the right margin in very large font and bold print. (CP 106.) Page 13 states, “Passenger’s Copy, Terms and Conditions.” (CP 108.) It also states on the same page, “ISSUED SUBJECT TO THE TERMS AND CONDITIONS ON THIS PAGE AND THE FOLLOWING PAGES. READ TERMS AND CONDITIONS CAREFULLY.” (CP 108.) The very next page of the Cruise and Cruisetour Contract confirms to the passenger in large font and all capital letters that “THIS DOCUMENT IS A LEGALLY BINDING CONTRACT,” and directs the passenger’s attention to certain specific clauses, and contains the forum selection

clause requiring the passenger to bring any lawsuit in the U.S. District Court for the Western District of Washington:

**IMPORTANT NOTICE TO PASSENGERS**

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

NOTICE: YOUR ATTENTION IS ESPECIALLY DIRECTED TO CLAUSES A.1, A.3, A.4, A.5, A.6, A.7, A.9, A.10 and C.4 BELOW, WHICH CONTAIN IMPORTANT LIMITATIONS ON YOUR RIGHT TO ASSERT CLAIMS AGAINST US AND CERTAIN THIRD PARTIES.

\* \* \*

**ALL DISPUTES AND MATTERS WHATSOEVER ARISING UNDER, IN CONNECTION WITH OR INCIDENT TO THIS CONTRACT, THE CRUISE, THE CRUISETOUR, 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)<sup>2</sup>

The parties therefore contractually chose the U.S. District Court for the Western District of Washington at Seattle as their forum.<sup>3</sup> The only exception under the forum selection clause would be if the U.S. District Court lacked subject matter jurisdiction. But, as discussed below, there is no doubt that federal subject matter jurisdiction exists.

**B. Procedural History.**

Appellants waited until March 30, 2005, one day before the one-year contractual time limit for bringing suit against respondents would have expired, to file their lawsuit. (CP 3.) Despite waiting all this time, appellants filed suit in King County Superior Court instead of the Western District of Washington, the forum specified for their claim by the Cruise and Cruisetour Contract. (CP 3, 109.) Accordingly, when respondents answered, their expressly pled affirmative defenses included

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<sup>2</sup> In addition, at all times during 2003 and 2004, the complete terms of HAL's Cruise and Cruisetour contract appeared on the Holland America Line website at [www.hollandamerica.com](http://www.hollandamerica.com). (CP 128-35.)

<sup>3</sup> In Goldberg v. Cunard Line Limited, 1992 A.M.C. 1461 (S.D. Fla. 1992), the court specifically held that a passenger who enters into a contract containing a forum selection clause "ha[s] . . . chosen" the forum. In fact, the U.S. District Court for the Western District of Washington has also held in a similar case that the passenger chose the forum by entering into the cruise contract. Karter v. Holland America Line-Westours Inc., 1997 A.M.C. 857, 858 (W.D. WA. 1996).

improper venue and contractual time bars and limitations. (CP 30.)

Although respondents included these affirmative defenses in their original answer, appellants moved to strike their affirmative defenses on the basis that Holland America Line filed its answer 31 days after service of the summons and complaint. (CP 34-38.) The trial court denied this motion on June 15, 2005; appellants never moved to reconsider and did not raise the issue again until oral argument on respondents' summary judgment motion. (CP 84; Verbatim Report of Proceedings 5:10-21.)

On August 12, 2005, the trial court granted respondents' motion for summary judgment based on the forum selection clause in the Cruise and Cruisetour Contracts at issue. (CP 495-96.) During the same hearing, after considering a full round of briefing on the issue, the court denied appellants' motion to strike the declaration of Patrick G. Middleton, one of the attorneys for respondents. (CP 505.) The trial court denied appellants' motion for reconsideration of its summary judgment order on August 22, 2005. (CP 500-04.) This appeal follows.

## II. ARGUMENT

### A. Counterstatement of Standards of Review.

#### 1. Summary Judgment Order.

The Court of Appeals engages in the same inquiry as the trial court when it reviews an order granting summary judgment. First Class Cartage Ltd. v. Fife Service and Towing, 121 Wn. App. 257, 261, 89 P.3d 226 (2004). Once the moving party meets its initial burden of showing the absence of a triable issue of fact, the burden shifts to the non-moving party to identify specific facts that show there is a genuine issue for trial. Seven Gables Corp. v. MGM/UA Entertainment Co., 106 Wn.2d 1, 721 P.2d 1, 12-13 (1986). This Court therefore affirms a trial court's grant of summary judgment if, after viewing the facts in the light most favorable to the non-moving party, it determines that there is no genuine issue for trial and moving party is entitled to judgment as a matter of law. Burg v. Shannon & Wilson, Inc., 110 Wn. App. 798, 43 P.3d 526 (2002).

#### 2. Motions to Strike.

Trial court decisions on motions to strike are reviewed for an abuse of discretion. Idahosa v. King County, 113 Wn. App. 930, 937, 55 P.3d 657 (2002). A trial court abuses its discretion only if its decision is "manifestly unreasonably or is based upon untenable grounds or reasons." King v. Olympic Pipeline, 104 Wn. App. 338, 348, 16 P.3d 45 (2000).

This standard of review applies to the trial court's decisions denying appellants' motion to strike respondents' affirmative defenses, Phillips v. Richmond, 59 Wn.2d 571, 574-75, 369 P.2d 299 (1962), and their motion to strike the declaration of one of respondents' attorney's, Morgan v. PeaceHealth, Inc., 101 Wn. App. 750, 775, 14 P.3d 773 (2000).

**B. The Trial Court Did Not Abuse Its Discretion When It Denied the Motion to Strike Respondents' Affirmative Defenses.**

Affirmative defenses are only waived in the rare circumstance where they are neither affirmatively pled, asserted in a CR 12 motion, nor tried by the express or implied consent of the parties. Bickford v. City of Seattle, 104 Wn. App. 809, 17 P.3d 1240 (2001). It is undisputed that none of these circumstances exist in this case. And because the policy of CR 8(c) is to avoid surprises, "affirmative pleading is not always required." Bickford, 104 Wn. App. at 813.

Appellants cannot and do not argue that respondents failed to include the affirmative defense of improper venue when they filed their answer. (Br. of Appellants at 10-12.) This is because respondents indisputably pled the affirmative defense of improper venue in their answer. (CP 30.) Accordingly, appellants cannot meet the plain language requirements of the rule upon which they rely. CR 12(h)(1) only recognizes waiver of the affirmative defense of improper venue if it is

omitted from a party's CR 12(b) motion "nor included in a responsive pleading."

As a consequence, Appellants are forced to rely on a *sui generis* argument that an answer filed 31 days after service of the complaint which includes the affirmative defense of improper venue is a basis for striking that defense. (See Br. of Appellants at 10-12.) They cannot cite any cases in support of this proposition because none exist. The decision in Davidson v. Hensen, 135 Wn.2d 112, 123, 954 P.2d 1327 (1998) is inapposite because no complaint or answer was ever filed in Superior Court in that case. Rather, Davidson was an arbitration where the homeowners argued that the hearing should have been re-opened to admit evidence that the contractor was unregistered at the time he entered into a contract to remodel homeowners' barn. Davidson, 135 Wn.2d at 123. The Court rejected the argument because the homeowners had ample opportunity to assert non-registration as a defense but did never so. Davidson, 135 Wn.2d at 123. Here, in stark contrast, the respondents asserted improper venue from the moment they filed their answer. (CP 30.)

Finally, appellants appear to argue that they were impermissibly prejudiced because, had respondents answered earlier, they would have re-filed this matter in federal court, presumably before the one-year limit on

filing suit expired.<sup>4</sup> (Br. of Appellants at 12.) However, respondents would have had to answer one day after filing of the state court complaint to allow a federal court filing.

Clearly, the filing of an answer within the permissible 20-day period would have had no effect on the analysis once a single day had passed and the one year time to sue provision applied.

Moreover, this argument is directly contrary this Court's leading decision on forum selection clauses.<sup>5</sup> In Voicelink Data Services, Inc. v. Datapulse, Inc., 86 Wn. App. 937 P.2d 1158 (1997), Datapulse obtained dismissal of Voicelink's King County lawsuit based on a contractual forum selection designating Nevada as the appropriate forum. This Court expressly rejected Voicelink's argument that Datapulse had waived its defense of improper venue by waiting until shortly before trial to move for dismissal. Voicelink, 86 Wn. App. at 627. Here, respondents moved for summary judgment on the forum selection clause three and a half months after appellants filed their complaint. (CP 3, 195.)

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<sup>4</sup> Actually doing so would have been highly unlikely. The King County lawsuit was filed on March 30, 2005, one day until the one year anniversary of the cruise, at which time the case would have been time-barred. See McKinney v. Waterman Steamship Corp., 739 F.Supp. 678 (D.Mass. 1990); Gervais v. United States, 865 F.2d 196, 197 (9th Cir. 1988); CP 306.

<sup>5</sup> As set forth in detail below, the forum selection clause at issue in this appeal is undisputedly governed by the federal general maritime law.

The trial court's decision was not based on untenable grounds or reasons, nor was it manifestly unreasonable. See King, 104 Wn. App. at 348. The court therefore did not abuse its discretion when it denied plaintiffs' motion to strike respondents' affirmative defenses.

**C. The Trial Court Properly Refused to Strike the Declaration of One of the Respondents' Attorneys and Any Error Was Harmless.**

Appellants moved to strike the Middleton declaration because they claimed it contained an attorney's testimony and submitted unpublished decisions as evidence in violations of the rules of professional conduct and evidence. (CP 311-14). As the trial court correctly concluded when plaintiff raised this issue during the summary judgment hearing, "[i]t's an attorney declaration. The motion is denied." (Verbatim Report of Proceedings, 4:23-24.) Like its ruling on the motion to strike affirmative defenses, this decision was not manifestly unreasonable and therefore not an abuse of discretion. See King, 104 Wn. App. at 348.

Appellants still appear to mistakenly assert that Davis v. Wind Song Ltd., 809 F. Supp. 76 (W.D. Wash. 1996) is the only published decision cited in the Declaration of Patrick G. Middleton. (See Br. of Appellants at 13, 14 n.2.) In fact, Karter v. Holland America Line-Westours, Inc. and Wind Surf Ltd., 1997 A.M.C. (E.D. Wa. 1997), is also a reported decision, appearing in American Maritime Cases at 1997

A.M.C. 857. The American Maritime Cases are a compilation of significant maritime decisions widely relied on by courts and attorneys alike. The first page of each AMC volume, including the one in which Karter is published, provides in relevant part:

AMERICAN MARITIME CASES (ISSN 0160-6786) was founded in 1923 by Arnold W. Knauth and Emory H. Niles, edited for almost half a century by the late Theodore Dankmeyer, and from 1976 to 1992 by the late Elliot B. Nixon. It is published monthly, except August, under the auspices of The Maritime Law Association of the United States and of the Association of Average Adjusters of the United States.

Readers are invited to submit for publication copies of significant maritime decisions either via an Associate Editor or directly to the AMC office.

(CP 494.)

Accordingly, this Court can and should rely on Karter. In Karter, the plaintiffs, unlike appellants here, correctly filed their lawsuit in the United States District Court for the Western District of Washington, “[p]ursuant to a forum-selection clause in its contract with HALW.” Karter, 1997 A.M.C. at 857.

Appellants rely on Rule of Professional Conduct (RPC) 3.7 for the proposition that the declaration at issue offers evidence in this case, despite acknowledging the exception in RPC 3.7(a) for testimony that

“relates to an issue that is either uncontested or a formality.” Here, the facts contained in Mr. Middleton’s declaration concerning his prior representation of Holland America defendants are uncontested and mere formalities.

Moreover, RPC 3.7 is designed to prevent attorneys from acting as a witness who attempts to persuade the jury of a certain set of facts and as an advocate for that same set of facts. See State v. Schmitt, 124 Wn. App. 662, 667, 102 P.3d 856 (2004). Here, Patrick G. Middleton is not going to be a witness because there is no risk that he will be called to testify as to any of the ultimate facts at issue in this case.

Appellants’ reliance on ER 401 and ER 403 are also without merit. There is no substantive factual evidence in the attachments to the Middleton declaration, they are merely copies of cases and orders with similar legal issues to those in this case. (CP 154-94.)

For example, in Karter, the Court specifically noted that the parties were litigating the case in the Western District of Washington “[p]ursuant to a forum-selection clause in its contract with HALW.” Karter, 1997 A.M.C. at 857. Wind Song is even more relevant because it discusses how a ticket similar to that issued to plaintiffs in this case passed both prongs of the reasonable communicativeness test in Deiro v. American Airlines, 816 F.2d 1360 (9<sup>th</sup> Cir. 1987). Wind Song, 809 F. Supp. at 78-79. The Wind

Song Court explained that even had it determined that notice of the one-year time limit in the contract was deficient, this notice was cured as of the date plaintiff discovered the term. Wind Song, 809 F. Supp. at 79. And the court enforced the one-year time limit where plaintiff learned of it over a year after her injury and did not file suit until 16 months later. Wind Song, 809 F. Supp. at 79. Here, even if appellants learned of the forum selection clause after the cruise, they had ample time to file their action in the correct court. They had a full year to do so.

As a practical matter, the copies of the decisions included as attachments to the Middleton Declaration should not be stricken because they are cited, without any objection whatsoever, in defendants' summary judgment motion. (CP 202). Respondents have also cited a legion of published decisions, including Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 595-596, 111 S.Ct. 1522, 13 L.Ed.2d 622 (1991), Norwegian Cruise Line Ltd. v. Clark, 841 So.2d 547, 550, 2003 A.M.C. 825, 828 (2003 Fl. Ct. App); and Colby v. Norwegian Cruise Lines, Inc., 921 F. Supp. 86 (D. Conn. 1996), that have enforced forum selection clauses and other provisions of passenger cruise contracts. For these reasons, any error in not striking portions of the Middleton declaration was harmless. Even if the declaration is struck, there is overwhelming published precedent upholding forum selection clauses. See Northington v. Sivo,

102 Wn. App. 545, 551-52, 8 P.3d 1067 (2000) (erroneously admitted settlement evidence harmless where evidence of liability was “overwhelming.”)

**D. The Grant of Summary Judgment Dismissing Susan Oltman’s Loss of Consortium Claim Was Proper.**

There are several flaws in appellants’ argument on this issue. First, the absence of findings of fact or conclusions of law on a summary judgment order is completely irrelevant. Because appellate courts review summary judgment orders *de novo*, a trial court’s findings of fact and conclusions of law following a summary judgment are superfluous. Boes v. Bisiar, 122 Wn. App. 569, 574, 94 P.3d 975 (2004). Second, respondents’ entire summary judgment argument applies to Susan Oltman as much as it does Jack and Bernice Oltman. As set forth in respondents’ summary judgment briefing, the forum selection clause that is ultimately dispositive in this case begins:

**ALL DISPUTES AND MATTERS WHATSOEVER ARISING UNDER, IN CONNECTION WITH OR INCIDENT TO THIS CONTRACT, THE CRUISE...SHALL BE LITIGATED...**

(CP 109.) (emphasis added.)

It is undisputed that Susan Oltman’s sole claim was for loss of consortium and that it was predicated exclusively on respondents’ alleged negligence in connection with the cruise at issue. (CP 9.) Her only claim

arose as a result of and in connection with the cruise. (CP 109.) It therefore is governed by the forum selection clause.

A loss of consortium claim is derivative of the injured party's claim and therefore subject to the same contractual limits. Miller v. Lykes Brothers Steamship Co., 467 F.2d 464, 466-67 (5th Cir. 1972). A loss of consortium claim begins to run on the date the underlying injury occurred. As stated by the court in Lieb v. Royal Caribbean Cruise Line, Inc., 645 F.Supp. 232, 235 (S.D.N.Y. 1986), "as a final matter, Mr. Lieb's claim for loss of consortium is equally barred by the statute of limitations contained in the contract, even though, conceptually his losses may have occurred at a later date." See also, Schenck v. Kloster Cruise Ltd., 800 F. Supp. 120 (S.D.N.J. 1992); Natale v. Regency Maritime Corp., 1995 U.S. Dist. LEXIS 3413 (S.D.N.Y. March 17, 1995) ("Mr. Natale's consortium claim is time-barred for the same reasons as Ms. Natale's claim").

Moreover, as respondents expressly argued in their reply brief<sup>6</sup> in support of their summary judgment motion, a spouse of a passenger injured outside of state territorial waters cannot recover damages on a loss of consortium claim as a matter of law. Chan v. Society Expeditions, 39 F.3d 1398, 1408 (9<sup>th</sup> Cir. 1994). And this Court has recently reaffirmed

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<sup>6</sup> Appellants' claim that respondents have not argued or briefed this issue is without merit for this reason as well. (See CP 481) (footnote 2 of reply brief.)

the longstanding principle that because its review of summary judgment orders is *de novo*, it may affirm a trial court's summary judgment decision on any basis supported by the record. Spectrum Glass Co. Inc. v. Pub. Util. Dist. No. 1, 317, n. 25, 129 Wn. App. 303, 119 P.3d 854 (2005). In other words, this Court is "free to premise [its] holding affirming summary judgment on an issue not decided by the trial court." Int'l Broth. of Elec. Workers, Local Union No. 46 v. TRIG Elec. Constr. Co., 142 Wn.2d 431 P.3d 622 (2000).

Here it is undisputed that Susan Oltman's only claim is for loss of consortium (CP 9.) It is also undisputed that the cruise at issue departed from Valparaiso, Chile, and that appellants allege that Jack and Bernice Oltman knew that they had been exposed to gastrointestinal illness long before ms AMSTERDAM reached San Diego. (CP 4, 5, 292, 294.) Even if this Court were to accept appellants' argument Susan Oltman's claim is not subject to the Cruise and Cruisetour Contract and its forum selection clause, it must still affirm the summary judgment dismissal of her loss of consortium claim as a matter of law.

**E. The Federal Maritime Law Governs Cruise Passenger Ticket Contracts and Their Personal Injury Claims.<sup>7</sup>**

“A cruise line passage contract is a maritime contract governed by general federal maritime law.” Wallis v. Princess Cruises, Inc., 306 F.3d 827 (9th Cir.2002); see also The MOSES TAYLOR v. Hammons, 71 U.S. (4 Wall) 411, 427, 18 L.Ed. 397 (1867); Hodes v. S.N.C. Achille Lauro Ed Altri-Gestione, 858 F.2d 905 (3rd Cir. 1988).<sup>8</sup> This has been established law for more than 135 years. The MOSES TAYLOR, 71 U.S. (4 Wall) at 427. This is true whether the case is brought in state or federal court. See, e.g., Carey v. Bahama Cruise Lines, 864 F.2d 201 (1st Cir. 1988); Berg v. Royal Caribbean Cruises, Ltd., 1994 A.M.C. 806 (D.N.J. 1992).

In fact, the California Court of Appeals has explicitly held, citing Shute, that the enforceability of Holland America’s forum selection clause is governed by the general maritime law of the United States, not state law. Schlessinger v. Holland America N.V., 120 Cal.App.4<sup>th</sup>, 557, 16 Cal.Rptr.3<sup>rd</sup> 5 (2004). In Schlessinger, the Court upheld the enforceability of a forum selection clause that was identical in every respect to the one at issue in this case. Schlessinger, 120 Cal.App.4<sup>th</sup> at 558.

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<sup>7</sup> At page 19 of their opening brief, appellants have again erroneously asserted that the absence of findings of fact and conclusions of law is somehow relevant to this Court’s de novo review of a summary judgment order. See Boes v. Bisiar, 122 Wn. App. 569, 574, 94 P.3d 975 (2004).

<sup>8</sup> Abrogated on other grounds by Lauro Lines S.R.L. v. Chasser, 490 U.S. 495, 109 S.Ct. 1976, 104 L.Ed.2d 548 (1989).

In other words, a cruise line passenger's claim for personal injury is also governed by the general maritime law and fits within the federal courts' admiralty subject matter jurisdiction. See, e.g., Kermarec v. Compagnie Generale Transatlantique, 358 U.S. 625, 79 S.Ct. 406, 3 L.Ed.2d 550 (1959); Wilkinson v. Carnival Cruise Lines, Inc., 920 F.2d 1560 (11th Cir. 1991); Beard v. Norwegian Caribbean Lines, 900 F.2d 71 (6th Cir. 1990); Keefe v. Bahamas Cruise Line, Inc., 867 F.2d 1318 (11th Cir. 1989).

Most tellingly, the U.S. Supreme Court decision that specifically enforces forum selection clauses like the one involved in this case, Carnival Cruise Lines, Inc. v. Shute, begins with the words, "In this admiralty case ..." 499 U.S. at 587. It then states:

We begin by noting the boundaries of our inquiry. First, this is a case in admiralty and federal law governs the enforceability of the forum-selection clause we scrutinize. (Citations omitted.)

Shute, 499 U.S. at 590.

Appellants' arguments for the application of state law are simply contrary to long-established precedent and must be rejected.<sup>9</sup> There can be

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<sup>9</sup> Appellants are also incorrect that the trial court did not consider whether to apply state or federal maritime law. (Br. of Appellants at 20.) At the summary judgment hearing, appellants argued this issue to the Court:

no doubt that this Court should apply the federal maritime law when evaluating the enforceability of the forum selection clause at issue.

**F. Forum Selection Clauses In Passenger Cruise Ticket Contracts Are Prima Facie Valid.**

It was over 30 years ago that the U.S. Supreme Court ruled that forum selection clauses are prima facie valid. The BREMEN v. Zapata Off-Shore Co., 407 U.S. 1, 92 S.Ct. 1907, 32 L.Ed.2d 513 (1972). The Court has affirmed this view most recently in Vimar Seguros y Reaseguros, S.A. v. M/V SKY REEFER, 515 U.S. 528, 115 S.Ct. 2322, 132 L.Ed.2d 462 (1995).

The 1991 U.S. Supreme Court decision in Shute, cited above, controls. Like this case, Shute involved a passenger claiming a personal injury who filed her lawsuit in a court other than the one selected in the cruise contract. The Shutes had filed their lawsuit in Washington, but the forum selection clause required that all suits be filed in Florida.

In a strongly worded decision, the U.S. Supreme Court held that the forum selection clause was “dispositive” of which court “should hear

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Case law suggests that the court may apply state or federal maritime law to the contract formation analysis.

(VRP 12:18-20.)

The trial court responded, [e]xcept when there’s a forum selection clause in a cruise ticket or contract that you find to be in dispute.” (VRP 13:1-3.) But, moreover, appellants’ argument on this point simply ignores the fact that this Court reviews the summary judgment decision de novo. First Class Cartage Ltd., 121 Wn. App. at 261.

[the Shutes’] tort claim...” (Emphasis added.) Shute, 499 U.S. at 589. The court then dismissed the Shutes’ Washington lawsuit despite the Shutes’ claim that pursuing their lawsuit in Florida would cause such extreme inconvenience to them and the witnesses that they would be unable to pursue their claims at all. Shute, 499 U.S. at 595.

By enforcing the forum selection clause, the U.S. Supreme Court intended to “spar[e] litigants the time and expense of pre-trial motions to determine the correct forum, and conserv[e] . . . judicial resources that otherwise would be devoted to deciding those motions.” Shute, 499 U.S. at 594.

In analyzing the enforceability of the forum selection clause, the Court reviewed The BREMEN’s holding that “even where the forum clause establishes a remote forum for resolution of conflicts ‘the party claiming [unfairness] should bear a heavy burden of proof.’ Ibid.” Shute, 499 U.S. at 592.

The Shute Court specifically rejected the conclusion reached by the Ninth Circuit that a non-negotiated forum selection clause in a forum contract is not enforceable. 499 U.S. at 594. It observed that forum selection clauses benefit all parties involved, even though they have not been specifically bargained for. First, they benefit cruise lines by reducing the costs of defending claims in different fora. Second, they

dispel confusion about where suits may be brought, sparing litigants and courts the time and expense of determining the correct forum through pre-trial motions. Third, passengers benefit in the forum of reduced fares reflecting the savings that cruise lines enjoy by limiting the fora in which they may be sued. Shute, 499 U.S. at 594.

The U.S. Supreme Court stated that forum selection clauses in form tickets are subject to judicial scrutiny for fundamental fairness. However, absent evidence that the shipowner selected a forum on the basis that it would discourage passengers from pursuing legitimate claims, as opposed to having legitimate business connections with the forum; or absent fraud or overreaching, the U.S. Supreme Court found that such clauses are fundamentally fair. 499 U.S. at 595.

And most significantly, the Cruise and Cruise Tour Contract involved in this case is essentially the same in all material respects as the contract in Shute. See Appendix to Shute decision and CP 91-125.) Holland America Cruise and Cruisetour Contracts and the terms they contain have been upheld in numerous published decisions. Cummings v. Holland America Line-Westours, Inc., 1999 A.M.C. 2282 (W.D. WA 1999); Silware v. Holland America Line-Westours, Inc., 1998 A.M.C. 2262 (W.D. WA 1998); Davis v. Wind Song Ltd., 809 F. Supp. 76 (W.D. Wash. 1992); Dubret v. Holland America Line-Westours, Inc., 25 F. Supp.

2d 1151 (1998); Geller v. Holland America Line, 298 F.2d 618 (2<sup>nd</sup> Cir. 1962) cert. denied 370 U.S. 909.

Because forum selection clauses are prima facie valid, the party seeking to avoid the enforcement of the clause bears the heavy burden of demonstrating that the clause is unenforceable. Shute, 499 U.S. at 592. Plaintiffs here cannot meet this burden.

**G. The Terms of the Cruise and Cruisetour Contract at Issue, Including the Forum Selection Clause, Are Fundamentally Fair and Therefore Enforceable Because Their Terms Were Reasonably Communicated.**

A cruise contract is subject to scrutiny for fundamental fairness. Carnival Cruise Lines v. Shute, 499 U.S. 585, 598 (1991). This standard requires only that the contractual provision at issue be reasonably communicated to the passenger. Norwegian Cruise Line Ltd. v. Clark, 841 So.2d 547, 2003 A.M.C. 825, 828 (2003 Fl. Ct. App). The 9<sup>th</sup> Circuit's two-pronged "reasonable communicativeness test" answers the question at issue, namely, whether passengers received sufficient notice of the ticket contract's terms. See e.g., Deiro v. Am. Airlines, Inc., 816 F.2d 1360, 1364 (9<sup>th</sup> Cir. 1987); Dempsey v. Norwegian Cruise Line, 972 F.2d 998, 999 (9<sup>th</sup> Cir. 1992).

Published decisions have expressly held that the Cruise and Cruisetour Contracts virtually identical to the one at issue in this case meet both prongs of the reasonable communicativeness test. See, e.g., Davis,

809 F. Supp. 76 (nearly identical contract issued by sister company of respondents and passenger had time and incentive to study contract after injury.); Cummings, 1999 A.M.C. 2282; Silware, 1998 A.M.C. 2262 (nearly identical contract and no actual notice of time limitation term prior to boarding required)<sup>10</sup>.

1. **The Cruise and Cruisetour Contract At Issue Meets the First Prong of the Reasonable Communicativeness Test.**

The first prong of the reasonable communicative test focuses on the ticket's physical characteristics, including size of type, conspicuousness, clarity of notice on the ticket's face, and ease with which a passenger can read the provisions. Wallis v. Princess Cruises Inc., 306 F.3d 827, 835 (9<sup>th</sup> Cir. 2002).

Ticket contract terms far less conspicuous than those here have met the first prong of the reasonable communicativeness test. Compare CP 106-26, 287-90, 304, 306-07, with Wallis, 306 F.3d at 836 (provision "buried" six sentences into paragraph); Marek v. Marpan Two, Inc., 817 F.2d 242 (3<sup>rd</sup> Cir. 1987) (small type underneath piece of carbon paper); Angello v. The M/S QUEEN ELIZABETH II, 1987 A.M.C. 1150 (D. N.J.

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<sup>10</sup> At pages 36-38 of their brief, appellants appear to argue that the presence of a routinely-upheld time limitation provision is somehow relevant to this Court's fundamental fairness analysis. But as Silware and many of the other cases cited by respondents demonstrate, the time limitation provision is just another example of a cruise ticket contract term that may be subject to scrutiny for fundamental fairness and subject to the reasonable communicativeness test, which it routinely passes with flying colors.

1986) (booklet which required opening first on right, then left, then right again and required reference to reverse side or additional sheets);<sup>11</sup> see also Effron v. Sun Line Cruises, Inc., 67 F.3d 7 (2d Cir.1995); Spataro v. Kloster Cruise, Ltd., 894 F.2d 44 (2d Cir.1990); Hodes, 858 F.2d 905; McQuillan v. "Italia" Societa Per Azione Di Navigazione, 386 F.Supp. 462 (S.D.N.Y.1974).

For example, in Wallis, the reference to the liability limitation at issue was "buried six sentences into paragraph 16 in extremely small (1/16 inch) type." Wallis, 306 F.3d at 836. But because the passenger's attention was drawn to the limitations by other features of the ticket contract, the Court found the first prong of the test was met. Wallis, 306 F.3d at 836.

Here, the forum selection clause and other relevant features of the Cruise and Cruisetour Contracts are far more conspicuous. The cruise ticket portion of the contract states that it is a "contract" in large bold capital letters. (CP 287-88). This designation also appears at page 17 of the Cruise and Cruisetour Contracts issued to appellants. (CP 304.) Even more significantly, this page clearly states at the top right corner that it is the "Passenger's Copy," and that it embodies "Terms and Conditions."

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(CP 304.) Finally, immediately below the passenger's cabin number, it states in all capital letters:

ISSUED SUBJECT TO THE TERMS AND CONDITIONS  
ON THIS PAGE AND THE FOLLOWING PAGES.  
READ TERMS AND CONDITIONS CAREFULLY.

(CP 304.)

The terms and conditions on the following pages include, of course, the forum selection clauses at issue. (CP 109). These clauses are set forth in all capital letters on the same page which states at its top in bold, underlined, and capital letters: "**IMPORTANT NOTICE TO PASSENGERS.**" (CP 109.)

The forum selection clause at issue meets the first prong of the reasonable communicative test.

2. **The Cruise and Cruisetour Contract Also Meets the Second Prong of the Reasonable Communicativeness Test.**

The second prong of the test turns on the circumstances surrounding the customer's purchase and subsequent retention of the ticket contract. Wallis, 306 F.3d at 836. The relevant surrounding circumstances include the passenger's familiarity with the ticket, the time and incentive under the circumstances to study the ticket, and any other notice the passenger received outside of the ticket. Wallis, 306 F.3d at 836. Where, as here, passengers are in possession of their ticket contracts

from the time of their injury until they provide the contract to their attorney, the second prong of the reasonable communicativeness test is met. Kendall v. American Hawaiian Cruises, 704 F.Supp. 1010 (D. Haw. 1989). This is because passengers have ample time from the time of injury to familiarize themselves with the terms of the ticket contract. Kendall, 704 F. Supp. at 1016. This principle holds true even when the relevant portions of the ticket contract are missing. Kendall, 704 F. Supp. at 1017; see also Geller, 298 F.2d at 619 (upholding enforcement of one year time limit in Holland America's ticket contract where plaintiffs never opened contract mailed to them by travel agent and it was collected on embarkation.)

Here, through counsel, appellants Jack and Bernice Oltman have produced portions of their Cruise and Cruisetour Contracts. (CP 40, 287-90, 304, 306-07.) And respondents have produced an exemplar ticket identical in all material respects to the Cruise and Cruisetour Contracts issued to Jack and Bernice Oltman. (CP 91-126.) Jack Oltman's Cruise and Cruisetour Contract clearly states that it is "ISSUED SUBJECT TO THE TERMS AND CONDITIONS ON THIS PAGE **AND THE FOLLOWING PAGES. READ TERMS AND CONDITIONS CAREFULLY.**" (CP 304.) The identical language, as well as the forum selection clause at issue, also appears on the exemplar ticket identical in

all material respects to those issued to Jack and Bernice Oltman. (CP 86-87,108-09.)

Appellants' only argument that the second prong of the reasonable communicativeness test is not met is based on circumstances entirely of their own creation. (Br. of Appellants at 27-31.) It is undisputed appellant Jack Oltman unilaterally decided to book a cruise aboard ms AMSTERDAM thirteen days before the cruise was set to depart Chile. (CP 231.) It is also undisputed that he booked the cruise through a travel agency – Vacations to Go. (CP 231.) Even if appellants did not receive their travel documents, including their Cruise and Cruisetour Contracts, until about six days before embarkation or at the time they boarded ms AMSTERDAM, that circumstance is utterly immaterial. (See CP 232.)

The fact that passengers do not receive their tickets until the time they board the vessel does not render a forum selection clause unenforceable for lack of notice. Hodes, 858 F.2d at 911-912. If a passenger's travel agent is in possession of the ticket prior to boarding, the passengers are charged with notice of its terms. Hodes, 858 F.2d at 912.

A passenger's possession of the cruise ticket contract provides him or her with the opportunity to become "meaningfully informed" of the provision at issue; "the fact that the passenger may not have read the

provision is irrelevant.” Mills v. Renaissance Cruises, Inc., 1993 A.M.C. 131, 133 (N.D. Cal. 2002). In Mills, the Court upheld the enforceability of the limitation of liability provision at issue where plaintiffs had the tickets in their possession for only two weeks but had adequate time to read them despite their claims they were “too busy getting ready for their trip.” Mills, 1993 A.M.C. at 133.

A passenger need only receive reasonably adequate notice that a forum selection clause exists and is part of the contract. Miller v. Regency Maritime Corp., 824 F. Supp. 202, (N.D. Fla. 1992) (citing Nash v. Kloster Cruise A/S, 901 F.2d 1565 (11<sup>th</sup> Cir. 1990)). In Miller, the plaintiff admitted receiving the ticket but claimed that she did not remember seeing the forum selection clause. Miller, 824 F. Supp. at 203. Similarly, here, Jack Oltman admits that he received his Cruise and Cruisetour Contracts, looked at it, but did not notice the forum selection clause. (CP 231-32.)

Finally, forum selection clauses in cruise ticket contracts are still enforceable even if the tickets are received during the time period in which they are non-refundable. See, e.g., Mills, 1993 A.M.C. at 133-34 (provision enforced where tickets received within 14-day nonrefundable period before cruise); Miller, 824 F. Supp. at 203 (forum selection clause enforced where tickets received 20 days before departure and plaintiff would have forfeited forty percent of purchase price if ticket rejected.)

Appellants rely solely on Casavant v. Norwegian Cruise Line Ltd., 829 N.E.2d 1171, 1180-81 (2005), but that decision is completely inapposite. The passengers there booked their cruise almost a year before their scheduled cruise and the court's decision turned entirely on the cruise line's failure to provide information on the forum selection clause at issue until just before the departure date. Casavant, 829 N.E.2d at 1174-75. The opposite situation is present here. The plaintiffs, not the cruise line, caused the ticket contracts to be received shortly before the cruise.

When, as here, passengers choose to book only a short time before the cruise, courts enforce forum selection clauses. In Clark, the Court, following what it recognized as the majority view, enforced a forum selection clause where the plaintiffs booked their cruise about a month before departure and received their tickets within the cruise line's cancellation penalty period. Clark, 2003 A.M.C. at 826. And in Colby v. Norwegian Cruise Lines, Inc., the Court enforced the forum selection clause despite plaintiffs' claim that they never read the ticket and surrendered it before embarking. 921 F. Supp. 86, 88 (D. Conn. 1998). Moreover, "notice of important conditions of a passage contract can be imputed to a passenger who has not personally received the ticket or possession thereof." Gomez v. Royal Caribbean Cruise Lines, 964 F. Supp. 47, 50 (D.P.R. 1997). Of equal importance, from the time of

claimed illness, appellants had nearly a year to read the forum selection clause and/or seek the assistance of counsel in doing so, and to file in the appropriate forum.

The second prong of the reasonable communicativeness test is also easily met in this case. There is therefore no obstacle to the enforceability of the forum selection clause which required appellants to file their case in the Western District of Washington.

**H. The Forum Selection Clause At Issue Is Also Enforceable Under Washington Law.**

As set forth above, the enforceability of the forum selection clause at issue here is governed by the federal maritime law, not as plaintiffs appear to claim, by state law. (See Br. of Appellants at 21.) Appellants do not specifically argue for the application of the law of a specific state, perhaps because plaintiffs are residents of California and North Dakota, booked their trip through a travel agent located in Texas, and the underlying events giving rise to this case occurred at sea off the coast of South America. (See CP 39-40, 231, 235, 238.) But plaintiffs imply that this Court should apply Washington law. (Br. of Appellants at 21-24, 37.)

If this Court analyzes the enforceability of the forum selection clause at issue under Washington law, it must apply a more deferential standard of review than it would under federal law. See Dix v. ICT

Group, Inc., 125 Wn. App. 929, 934, 106 P.3d 841 (2005); see also Wilcox v. Lexington Eye Institute, 130 Wn. App. 234, 238-39, 122 P.3d 729 (2005) (party seeking to avoid enforcement of clause specifying Canada as the proper forum could not do so under *de novo* or abuse of discretion standards of review). Abuse of discretion is the proper standard under which to evaluate a trial's decision to enforce a forum selection clause. See, e.g., Dix, 125 Wn. App. at 934 (applying abuse of discretion standard); Schlessinger, 120 Cal.App.4<sup>th</sup> at 557 (applying abuse of discretion standard to uphold enforcement of identical forum selection clause as this case.) A party seeking to avoid enforcement of a forum selection clause must prove that enforcement of the forum selection clause would be unfair or unjust. Wilcox, 130 Wn. App. at 239; Voicelink, 86 Wn. App. at 617. This burden, which appellants never even tried to meet below, is incredibly high:

Absent some evidence submitted by the party opposing enforcement of the clause to establish fraud, undue influence, overweening bargaining power, or such serious inconvenience in litigating in the selected forum so as to deprive that party of a meaningful day in court, the provision should be respected as the expressed intent of the parties.

Voicelink, 86 Wn. App. at 618 (quoting Pelleport Investors, Inc. v. Budco Quality Theatres, Inc., 741 F.2d 273, 280 (9th Cir.1984)).

Appellants could not meet this burden, nor have they even attempted to do so. Their only claim of fraud is, as more fully discussed below, entirely devoid of merit -- vacation activities held out to be safe carry a certain degree of inherent risk. A similar argument on this point has been expressly rejected. In Dubret, plaintiffs injured on a shore excursion alleged that Holland America should be liable for breach of its “contract for transportation.” Dubret, 25 F. Supp. 2d at 1153. In rejecting this argument, the Court found “far from providing a guarantee that the plaintiffs would not suffer harm while enjoying the on-shore services, the contract expressly states that Holland America will not be held liable for harm caused by the negligence of any provider of such services.” Dubret, 25 F. Supp. 2d at 1153. There have been absolutely no allegations of undue influence or overweening bargaining power. And even if there had been, the fact that a cruise line’s forum selection clause is not “the product of negotiation,” has absolutely no effect on the clause’s presumptive validity. Shute U.S. at 590. Finally, appellants cannot claim litigating in the forum would be so inconvenient as to deprive them of their day in court. They filed suit in the same city as the proper forum – the Western District of Washington.

I. **The Rationales Underlying the Shute Decision Are Also Present In This Case.**

Appellants argue that the some of reasons behind the Shute decision are absent in this case. (Br. of Appellants at 31-34.) The reasons at issue are: (1) forum selection clauses benefit cruise lines by reducing the costs of defending claims in different fora stemming from the fact that cruise lines carry passengers from many different locales; (2) they dispel confusion about where suits may be brought, sparing litigants and courts the time and expense of determining the correct forum through pre-trial motions and (3) passengers benefit in the forum of reduced fares reflecting the savings that cruise lines enjoy by limiting the fora in which they may be sued. Shute, 499 U.S. at 593-94.

The validity of the first reason is clear from the facts of this case. Jack and Susan Oltman are residents of North Dakota and Bernice Oltman is a resident of California. (CP 231, 235, 238.) Appellants are Washington and Delaware corporations. The case arises out of an international cruise from Valparaiso, Chile to San Diego, California. As the Shute decision recognized, these scenarios are hardly rare in the cruise ship industry and forum selection clauses therefore of necessity play a crucial role in limiting the fora in which a cruise line may be sued. Shute, 499 U.S. at 593-94.

With respect to the second reason, appellants appear to argue that the forum clause “creates an environment of confusion” so great that plaintiffs are required to first file in federal court and obtain a dismissal before for filing in state court.<sup>12</sup> (Br. of Appellants at 33.) Ironically, had appellants followed this course of action, they would not be in the situation they now face because there is no doubt the Western District of Washington would have had subject matter jurisdiction. Cruise passenger personal injury claims fall within federal admiralty jurisdiction. Kermarec, 358 U.S. 625. And because all plaintiffs were diverse from all defendants, there would also have been diversity jurisdiction, assuming the amount in controversy exceeded \$75,000. 28 U.S.C. § 1332(a); Caterpillar, Inc. v. Lewis, 519 U.S. 61, 68, 117 S.Ct. 467, 136 L.Ed.2d 437 (1996).

Appellants’ removal argument also lacks merit. Removal merely “provides the defendant with an opportunity to substitute his choice of forum for the plaintiff’s original choice.” Baldwin v. Sears, Roebuck &

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<sup>12</sup> Despite the fact that it is undisputed that the clause at issue provides in relevant part:

ALL DISPUTES AND MATTERS WHATSOEVER...SHALL BE LITIGATED...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 COURT OF KING COUNTY, STATE OF WASHINGTON, USA.

(CP 109.)

Co., 667 F.2d 458, 459 (5<sup>th</sup> Cir. 1982). Accepting this argument would of course also mean imposing a burden on defendants to affirmatively assist plaintiffs maintaining suits them. To state this proposition is to rebut it.

With respect to the third reason, appellants claim that the forum selection clause actually increases litigation costs. (Br. of Appellant 33.) In other words, counsel for respondents should have ignored their professional responsibility and fiduciary duty to zealously represent their clients' interests and not have moved for summary judgment after appellants filed their lawsuit in the wrong court. Once again, to state this proposition is to rebut it. Appellants are solely responsible for the litigation costs associated with the summary judgment matter and this appeal.

**J. There Was No Fraud In the Inducement or Breach of the Cruise and Cruisetour Contract.**

Appellants' claim that respondents did not deny they made fraudulent misrepresentations is completely false. Paragraph 6 of appellants' complaint provides in relevant part, "In its advertising, Defendant promises a luxurious, safe, fun and exciting cruise." CP 4. The corresponding paragraph 6 of respondents' answer begins, "Defendant Holland America Line-USA Inc. denies the allegations in paragraph 6." CP 26. The only admission is that respondent Holland America Line Inc.

does promise a safe, fun and exciting and in some cases luxurious cruise. (CP 26.) All allegations with respect to fraud and/or misrepresentation were denied. (CP 30.)

Here, appellants rely wholly on a single inapplicable Washington cases dealing with property transfers -- Pedersen v. Bibioff, 64 Wn. App. 710, 828 P.2d 1113 (1992). And they cannot even meet the requirement in Pedersen that they prove every element of fraud by clear, cogent and convincing evidence. Pedersen, 64 Wn. App. at 722-23.

Moreover, the very forum selection clause at issue put appellants on notice that litigation could result from their voyage. Moreover, it is common knowledge that most leisure and vacation activities, which are held out to be safe and enjoyable, carry a certain degree of inherent risk sufficient to defeat the fraud argument here.

**K. There Is Absolutely No Dispute That Federal Subject Matter Jurisdiction Exists In This Case.**<sup>13</sup>

There is no "burden" to prove the existence of federal subject matter jurisdiction, but respondents carefully set out the bases for federal subject matter jurisdiction in this case in their summary judgment briefing. (See CP 195-204; 480-86.) As previously set forth above, there is federal subject matter jurisdiction in both admiralty and diversity.

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<sup>13</sup> Once again, appellants mistaken assert findings of fact and conclusions of law are required to support a summary judgment order. (Br. of Appellant at 39.)

A cruise line passenger's claim for personal injury falls within federal court admiralty subject matter jurisdiction. Kermarec, 358 U.S. 625. As expressly noted in respondents' reply brief in support of their summary judgment motion, "[t]his is governing precedent. A cruise line's transport of its passengers satisfies the Executive Jet maritime jurisdiction test cited by [appellants]." See Wallis, 306 F.3d at 840-41. (CP 482.) As the Wallis Court explained, citing Executive Jet Aviation, Inc. v. City of Cleveland, 409 U.S. 249, 93 S.Ct. 493, 34 L.Ed.2d 454 (1972):

[T]he relevant activity in this case is not simply the crewmembers' verbal conduct or the omitted legal and psychological assistance, **but a cruise ship's treatment of passengers generally. A cruise line's treatment of paying passengers clearly has potential to disrupt commercial activity, and certainly has substantial relationship to traditional maritime activity.** Hence, the district court did not err in applying general maritime law to plaintiff's claim for intentional infliction of emotional distress.

Wallis, 306 F.3d at 840-41.

Any argument that federal admiralty jurisdiction is not present in this case is frivolous.

Moreover, it is undisputed that the Oltmans, citizens of California and North Dakota, have sued corporate citizens of Washington and Delaware. (CP 231, 235, 238.) Accordingly, the requirement that all plaintiffs be diverse from all defendants is met unless appellants have

conceded that their entire amount in controversy is less than \$75,000. 28 U.S.C. § 1332(a); Caterpillar, Inc. v. Lewis, 519 U.S. 61, 68 (1996).

There is no doubt that federal subject matter jurisdiction exists in this case and appellants' argument to the contrary fails. Appellants had a federal forum available and admiralty law applies.

**L. Appellants' Savings to Suitors Clause Argument Is Entirely Without Merit.**

The savings to suitors clause "does not guarantee [plaintiffs] a nonfederal *forum*." Morris v. T E Marine Corp., 344 F.3d 439, 444 (5<sup>th</sup> Cir. 2003) (quoting Tenn. Gas Pipeline v. Houston Cas. Ins., 87 F.3d 150, 153 (5th Cir.1996) (emphasis in original). Appellants' savings to suitors clause argument is misleading and inaccurate because it does not address the correct issue – whether the forum selection clauses in the Cruise and Cruisetour Contracts should be enforced. The fact that 28 U.S.C. § 1333(1) gives state courts concurrent jurisdiction of in personam maritime actions does not mean that appellants and this Court can ignore the binding and enforceable forum selection clause in the parties' Cruise and Cruisetour Contracts. It is undisputed that appellants Jack and Susan Oltman's Cruise and Cruisetour Contracts provide that all suits "arising under, in connection with, or incident to" the cruise are to be litigated, if at all, in the United States District Court for the Western District of

Washington at Seattle. (CP 109.) King County Superior Court becomes the proper forum only if the Washington federal district court lacks subject matter jurisdiction. (CP 109.) It is indisputable that both admiralty and diversity federal subject matter jurisdiction exist.

Finally, Shute held that enforcement of the forum selection clause does not deprive plaintiffs of a “court of competent jurisdiction.” Shute, U.S. at 595-96. Here, one is provided for in the parties’ forum selection clause -- the Western District of Washington at Seattle. (CP 109.)

**M. There Are No Genuine Issues of Material Fact for Trial.**

In a last-ditch effort to convince this Court not to affirm the summary judgment granted in favor of respondents, appellants argue that there are at least three material facts in dispute – (1) whether the “cruise ticket” portion of the Cruise and Cruisetour Contract contains “issued subject to the terms and conditions...” language, (2) whether the page numbers on the portions of the travel documents produced by appellants and the exemplar ticket are the same, and (3) the existence of federal subject matter jurisdiction.

To avoid summary judgment, the nonmoving party must show the existence of a genuine issue as to material fact, i.e., a fact upon which the outcome of the litigation depends. CPL (Delaware) LLC v. Conley, 110 Wn. App. 786, 790, 40 P.3d 679 (2002). Similarly, a mere scintilla of

evidence is insufficient to defeat summary judgment. Celotex v. Catrett, 477 U.S. 319, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

The first “fact in dispute,” is based on a false assertion by appellants. Nowhere in respondents’ summary judgment briefing did they assert that the Cruise Ticket portion of the Cruise and Cruisetour Contract contained language that it was issued subject to the terms and conditions on that page and the following pages. Rather, what respondents correctly stated in their briefing was that the “issued subject to the terms and conditions...” language appears on page 13 of the exemplar Cruise and Cruisetour Contract. (CP 86, 108, 196-97.) Moreover, it is undisputed that appellants produced and therefore had in their possession the page of their actual Cruise and Cruisetour Contract which contains the very language at issue:

ISSUED SUBJECT TO THE TERMS AND  
CONDITIONS ON THIS PAGE AND THE FOLLOWING  
PAGES. READ TERMS AND CONDITIONS  
CAREFULLY.

CP 304.

The second “fact in dispute,” is really, by appellants’ own admission, whether the page numbers on the exemplar Travel Documents produced by respondents, including the Cruise and Cruisetour Contract, are the same. (VRP 30:14-22.) The only “differences” claimed by

appellants at the summary judgment hearing were the page numbers. (VRP 30:14-22.) There is absolutely no claim (nor could there be) that the forum selection clauses and other features of the Cruise and Cruisetour Contracts were not identical. This is not a genuine factual dispute that defeats summary judgment.

The third "fact in dispute," whether federal subject matter jurisdiction exists, has been comprehensively addressed and there is absolutely no dispute that it does exist. There is both admiralty and diversity jurisdiction in this case.

### III. CONCLUSION

For the above reasons, respondents Holland America Line-USA Inc. and Holland America Line Inc. respectfully request that this Court affirm the orders denying appellants' motions to strike and order granting summary judgment dismissal of their case.

Respectfully submitted this 21<sup>st</sup> day of February, 2006.

FORSBERG & UMLAUF, P.S.  
Attorneys for Respondents Holland  
America-Line USA Inc. and Holland  
America Line Inc.



John P. Hayes, WSBA #21009  
Andrew G. Yates, WSBA #34239

**APPENDIX A**

ALMA ANGELLO AND JOSEPH ANGELLO, *Plaintiffs*

v.

THE M.S. *QUEEN ELIZABETH 2* AND CUNARD LINE LIMITED,  
*Defendants*

United States District Court, District of New Jersey, August 5, 1986  
Civ. No. 85-3876

PASSENGERS—123. Time to Commence Suit—PRACTICE—  
2871. Summary Judgment.

Whether a passenger ticket reasonably communicates the importance of its one-year time for suit provision is an issue of law to be decided by the court. *Held* (granting summary judgment dismissing passenger's personal injury complaint filed 15 months after injury): Although the ticket's format made sequential reading of its terms somewhat difficult, the conspicuous notice on the front cover as to the importance of its provisions validates the time limit clause.

Russell L. Lichtenstein (Cooper, Perskie, April, Niedelman, Wagenheim & Weiss, P.A.) *for Plaintiffs*

Donald L. O'Connor and Robert A. Hulten (Kirlin, Campbell & Keating) *for Defendants*

MITCHELL H. COHEN, Senior D.J.:

This personal injury action, which was filed pursuant to both the maritime and diversity jurisdictions of this Court, is presently before us on a summary judgment motion by the defendants, the Motor Ship *Queen Elizabeth 2* ("QE2") and its operator, Cunard Line Limited ("Cunard Line"). Because we hold that the complaint in this case is barred by operation of the applicable time limitation for such suits, we shall grant defendants' motion.

The underlying cause of action arose on May 12, 1984, when plaintiff, Alma Angello,<sup>1</sup> while a passenger aboard the *QE2*, was struck on the head by a falling bunk bed in her cabin. Thereafter, plaintiff, experiencing pain in her head, shoulder, and neck, visited the ship's doctor. Upon return from her voyage, plaintiff sought both medical assistance and legal counsel. She was successful in retaining an attorney, and, on June 1, 1984, plaintiff's counsel sent a letter to defendant Cunard Line which informed Cunard Line of its representation of plaintiff, outlined the facts of the accident, and suggested that Cunard Line have

<sup>1</sup> Mrs. Angello's husband, Joseph Angello, sues *per quod consortium amisit*.

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its insurance carrier contact plaintiff's counsel. Slightly over one year later, on June 10, 1985, in response to correspondence dated June 6, 1985 from a claims supervisor of plaintiff's counsel's firm which advised of the medical special damages in the case, defendant Cunard Line apprised plaintiff of its view that plaintiff's claim was time barred. Two months thereafter, on August 7, 1985, plaintiff's complaint was filed.

Defendants' motion for summary judgment relies upon a one-year time limitation for filing claims which is set forth in a provision of the "passage contract ticket" issued to plaintiff. This provision, Article 21 in a "passage contract ticket booklet" comprised of 23 articles, reads as follows:

"Art. 21—*TIME LIMIT ON SUITS*

Suits to recover on any claim against the Company shall be instituted: (1) as to claims mentioned in subdivision (a) of Article 20 above,<sup>2</sup> within 1 year from the day when the loss of life or injury occurred, in accordance with Section 4283A of the Revised Statutes of the United States; (2) as to all other claims, including breach of contract, within 6 months from the passenger's arrival at destination or, in the case of non-arrival, from the day on which the passenger and/or the baggage should have arrived."

Because there is no doubt that plaintiff's action was not filed within one year of the date of the accident, the issue presently before us—whether plaintiff's action is time barred—turns upon the enforceability of the one-year limitation provision.<sup>3</sup>

The issue of the enforceability of a time limitation such as the one presented here is not an issue of first impression. A number of different

<sup>2</sup> Article 20(a) provides that "[t]he Company is not liable for any claim for loss of life or injury unless written notice is given it within 6 months from the day when the loss of life or injury occurred in respect to any claim where Section 4283A of the Revised Statutes of the United States shall apply."

<sup>3</sup> The legality of a one-year time limitation for personal injury actions arising aboard a seagoing vessel is not in dispute. Congress has authorized such liability limitations in 46 U.S.C. sec. 183b. This statute, referred to in the passage contract under consideration in this case as "Section 4283A of the Revised Statutes of the United States," provides, in relevant part: "It shall be unlawful for the . . . owner of any seagoing vessel . . . to provide by rule, contract, regulation, or otherwise a shorter period for . . . the institution of suits on [claims for loss of life or bodily injury] than one year, such period . . . to be computed from the day when the death or injury occurred."

courts have addressed this issue, and a body of case law has developed which guides us in reaching our determination. Generally, such time limitation provisions are enforced only if they are properly set forth in the passage contract, a determination which, in turn, involves deciding whether the contract "reasonably communicates" to the passenger that the limiting condition is an important matter.

The question whether the standard has been met by the vessel owner in a particular case has repeatedly been held to be one of law for the court. E.g., *Barbachym v. Costa Line, Inc.*, 1984 AMC 1484, 1487, 713 F.2d 216, 218 (6 Cir. 1983). The leading case articulating a standard to be used in making the requisite determination is *Silvestri v. Italia Societa per Azioni di Navigazione*, 1968 AMC 355, 388 F.2d 11 (2 Cir. 1968). In *Silvestri*, the Second Circuit, per Judge Friendly, stated that: "the thread that runs implicitly through the cases sustaining incorporation [of contractual terms of limitation] is that the steamship line had done all it reasonably could to warn the passenger that the terms and conditions were important matters of contract affecting his legal rights." 1968 AMC at 363, 388 F.2d at 17.

Since the *Silvestri* decision, a number of courts have adopted its analysis and have attempted to isolate factors bearing upon the application of the "reasonable communication" standard. A survey of these cases reveals that the following elements of the ticket contract are to be considered in determining whether the limiting condition was "reasonably communicated" to the passenger: whether the "physical arrangement" of the terms and conditions provide reasonable notice to the passenger of the liability limitation, including whether the cover of the ticket booklet contains a statement that limiting conditions are contained therein and whether that statement, relative to the rest of the cover, is conspicuous in terms of the size and boldness of the type face used; and whether the statement explicitly directs the passenger to read the limiting provisions.

A consideration of these elements with respect to the present case leads us to conclude that the one-year provision is enforceable. The cover of the passage contract booklet issued to plaintiff measures 3½ inches by 7½ inches. It is orange, and it has the words "Passage Contract" printed in the center of its area in large bold black type. In the upper left-hand corner, the word "Cunard" appears in large white block letters. The only remaining print on the cover is the following, which begins at the lower left-hand side of the page:

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**"IMPORTANT PLEASE READ FOLLOWING  
TERMS OF PASSAGE CONTRACT:**

[in large bold black letters, all capitals]

"For valuable consideration, Cunard Line Limited, hereafter referred to as the "Company", agrees to provide (continued on page 3)"

[in normal type face and fine print].

The cover of the booklet thus provides what is clearly conspicuous notice directing the passenger's attention to the contractual terms contained on the inside. Plaintiff has argued that this notice is legally insufficient because it does not specifically identify, by article number or page number, the time limit provision as a term which is important to read. We find this argument unpersuasive. Reasonable notice of the existence of the time limit was provided to the passenger by the direction that the passenger read the entire set of contract terms. We shall not hold that defendants were required to predict, in advance, which provisions of the contract would ultimately become the critical provisions. The conspicuous notice on the cover of this booklet is not rendered inadequate by virtue of the fact that it fails to isolate the time limit provision.

Plaintiff's second and more substantial challenge to the passage contract at issue herein concerns the physical layout or design of the ticket booklet as a whole. The booklet is, in fact, somewhat unusual. The internal pages of the booklet, which contain the terms, are joined together and ordered in a manner which makes a sequential reading of the terms somewhat difficult. An articulate description of the physical arrangement of the ticket, an arrangement characterized by plaintiff as a "veritable 'Chinese puzzle,'" is almost impossible. It should suffice, for present purposes, to note that the booklet opens first on the right, then on the left, and then again on the right. The pages are numbered, at the bottom, with directions indicating how to locate the succeeding page. These directions at times call for turning to the reverse side of that page and at other times require continuing on a sheet located to the left. In all, the design of the booklet does give the reader pause. It does not, however, pose an insurmountable obstacle.

This Court, having examined the booklet, finds that the average reader could, with minimal effort, successfully undertake to read its contents. In attempting to discern whether the physical arrangement of the booklet is so unduly complicated that it undermines the purpose

of the conspicuous notice on the cover, see *Gardner v. Greek Line*, 388 F.Supp. 856, 858 (MD Pa. 1975) (suggesting that adequate notice of a time limit might be insufficient if the terms themselves were illegible or incomprehensible), we have had to indulge the notion that the passenger would actually attempt to read the booklet. Cf. *Silvestri*, 1968 AMC at 363-64, 388 F.2d at 18 (noting that considerations of the "conspicuousness" of the notice may all be legalism, since the passenger might not have read the contract terms no matter what was said by way of notice). Having accepted this notion, we hold that the time limitation provision at issue in this case is not rendered unenforceable by virtue of the physical arrangement of the ticket booklet. Although the booklet issued to plaintiff is not as simple as it could be, the typeface is legible and the instructions for reading sequentially through the terms are understandable. Moreover, even if an accurate *sequential* reading of the contract terms were not accomplished by the reader, the substance of the time limitation provision would still be conveyed. The essence of the time limitation is contained on the face of a single page, "page 10," and it does not depend, for basic comprehension, on a reading of any prior page. Thus, assuming *arguendo* that a passenger sought to discern the contents of the ticket booklet, but was unable to follow the terms sequentially, the reader would nonetheless be informed that there was a one-year time limit on suits. As such, we hold that the time limit is enforceable.<sup>4</sup> Because an enforceable time limit exists, and because the suit was filed outside of this limit, we are constrained to grant summary judgment in favor of defendant against plaintiff.<sup>5</sup> The Court shall enter an appropriate order.

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<sup>4</sup> During oral argument, plaintiff alluded to, but did not further pursue, an assertion, initially made in plaintiff's brief at p.4, that the time limitation does not bar actions *in rem*, even if it is applicable to actions *in personam*. This unsupported assertion cannot provide a basis for denial of summary judgment in light of the unambiguous language of Article 22 of the passage contract, which states that the terms apply to all suits, whether *in personam* or *in rem*.

<sup>5</sup> Plaintiff's counsel has never disputed that he was in possession of the ticket, and has not articulated any explanation for his failure to timely institute suit to protect his client's claim. The fact that the defendants corresponded with plaintiff before the suit was filed provides no basis for estopping defendants from asserting the time limit, e.g., *Michelotti v. Home Line Cruises, Inc.*, 1986 AMC 480, 485 (DNJ 1985), and it gives rise to no duty on defendants' part to remind plaintiff of the time limit. E.g., *Valenti v. Home Line Cruises, Inc.*, 1985 AMC 426, 434, 614 F.Supp. 1. 7 (DNI 1984).



*Inc.*, 1982 AMC 2440, 542 F.Supp. 952 (D. Minn. 1982), which held that civil penalties assessed under §1319(d) of the FWPCA were not subject to the Limitation Act.<sup>3</sup> The court in *CF Industries* based its ruling on what it found to be a strong public policy which overrode the Limitation Act. While this court does not disagree that the Limitation Act may have outlived its original purpose and that the goals of the FWPCA should be superior, it declines to make such a broad ruling. This court will not usurp the function of Congress. Congress expressly made the recovery of cleanup costs exempt from the Limitation Act and conspicuously omitted such favorable treatment for civil penalties all in a single section of the FWPCA.

The United States' motion for summary judgment is denied.

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**MICHAEL A. BERG, ET AL., Plaintiffs**

v.

**ROYAL CARIBBEAN CRUISES, LTD., ET AL., Defendants**

United States District Court, District of New Jersey, February 20, 1992  
Civil No. 91-4957

**PASSENGERS — 123. Time to Commence Suit.**

One-year time limitations in cruise ship passenger tickets are enforceable as long as they have been reasonably communicated in the ticket contract to the passenger. Limitation language in upper case letters, printed in white against a dark background and in larger print than other provisions in contract meets this requirement so as to bar suit against shipowner filed more than one year after accident.

**PASSENGERS — 12. Passage Contract — 17. Injury or Death — 25. Shore Excursions — PERSONAL INJURY — 171. Shore.**

Language in passenger contract defining "passenger" as "traveling under" the contract was broad enough to cover injury to passenger at a private beach at one of cruise ship's ports of call, so as to bar suit against shipowner filed one year after accident. Although tort ashore might be subject to land-based law, to the extent duties are altered by passenger contract they are governed by maritime law.

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3. 33 U.S.C. §1319(d) mandates civil penalties not to exceed \$10,000 per day for violations of §§1311, 1312, 1316, 1317, 1318, 1328, or 1345 of the FWPCA. These sections appear to focus on the discharge of pollutants into the water by sewage treatment facilities.

**CONTRACTS — 11. Law Governing — JURISDICTION — 1121. Applicability of Maritime Law, Common Law and State Statutes — PASSENGERS — 12. Passage Contract.**

Claims for bad faith conduct in negotiating personal injury claims arising out of cruise ship passenger ticket contract are governed by maritime law, not state law.

**LACHES AND LIMITATIONS — 133. Waiver or Estoppel — PASSENGERS — 123. Time to Commence Suit.**

Defendant may be estopped from asserting one-year passenger ticket limitation defense if it is shown defendant's conduct misled the plaintiff into not filing suit within one-year limitation period. Where defendant's claims adjuster and plaintiff's attorney simply held settlement discussions prior to running of one-year limitation and no misleading statements were made by claims adjuster, defendant is not estopped from asserting limitation defense.

David P. Pepe (Ribis, Graham & Curtin) *for Plaintiffs*

George J. Koelzer and John P. Flanagan (Ober, Kaler, Grimes & Shriver) *for Defendants*

ALFRED M. WOLIN, D.J.:

This is a diversity action based on personal injuries sustained by plaintiff Laura Berg during the course of a cruise vacation booked with defendant Royal Caribbean Cruises, Ltd. ("Royal Caribbean"). Before the Court is the motion of Royal Caribbean for summary judgment on all counts of the complaint on the grounds that the contractual limitation of actions period had run before suit was commenced, and that as a matter of law Royal Caribbean is not estopped from asserting the limitation of actions provision. For the reasons that follow, the Court will grant Royal Caribbean's motion.

### **Background**

On October 12, 1990, while on a honeymoon cruise, Laura Berg was injured on the Island of Labadee, a scheduled port of call for the M/V *Song of America*, a vessel owned and operated by Royal Caribbean. Laura and Michael Berg have alleged on information and belief that the private beach facility where the injury occurred was owned, leased, operated or otherwise under the control of Royal Caribbean. Michael Berg has alleged a claim *per quod consortium amisit*.

Laura Berg's cruise passenger ticket contract states prominently on the cover page:

THIS IS YOUR TICKET CONTRACT. IT IS IMPORTANT THAT YOU READ ALL TERMS OF THIS CONTRACT. THIS TICKET IS NOT TRANSFERABLE AND IS NOT SUBJECT TO ALTERATION BY THE PASSENGER.

Paragraph 2(vii) of the ticket contract sets forth a contractual limitation of actions period. That paragraph stands out prominently from other provisions of the contract in that it is printed in upper case letters of a large type size, and is set forth in white print against a dark colored background, unlike the other terms of the contract. The second sentence of that paragraph states, in relevant part:

NO SUIT SHALL BE MAINTAINABLE AGAINST THE CARRIER OR VESSEL FOR . . . PERSONAL INJURY . . . OF THE PASSENGER UNLESS WRITTEN NOTICE OF THE CLAIM, WITH FULL PARTICULARS, SHALL BE DELIVERED TO THE CARRIER OR ITS AGENT AT ITS OFFICE AT THE PORT OF SAILING OR AT THE PORT OF TERMINATION WITHIN SIX (6) MONTHS FROM THE DAY WHEN SUCH . . . PERSONAL INJURY . . . OF THE PASSENGER OCCURRED; AND IN NO EVENT SHALL ANY SUCH SUIT FOR ANY CAUSE AGAINST THE CARRIER OR VESSEL FOR . . . PERSONAL INJURY . . . BE MAINTAINABLE UNLESS SUCH SUIT SHALL BE COMMENCED WITHIN ONE (1) YEAR FROM THE DAY WHEN THE . . . PERSONAL INJURY . . . OF THE PASSENGER OCCURRED, NOTWITHSTANDING ANY PROVISION OF LAW OF ANY STATE OR COUNTRY TO THE CONTRARY.

The Bergs, through retained counsel, notified Royal Caribbean of their injuries and made a demand for payment of \$150,000 in a letter dated September 6, 1991. In the last paragraph of that letter, the Bergs' counsel stated that the offer would remain "open until October 8, 1991, at which time a complaint will be filed."

In response to the September 6, 1991 letter, Henry C. Hentschel, a claims adjuster for Royal Caribbean, wrote a letter dated September 25, 1991 in which he acknowledged that Laura Berg's injury "was an unfortunate incident albeit a very minor one," and stated that "We hope we can agree it is not lawsuit material." Further, Hentschel wrote that Royal Caribbean "would be willing to settle with Michael and Laura Berg for \$1500 plus any out-of-pocket expenses." Significantly, in a clear reference to the one-year limitation period, Hentschel wrote

in the last sentence of the letter: "We look forward to hearing from you before October 12, 1991."

The Bergs' counsel wrote a second letter to Royal Caribbean dated October 10, 1991, in which the settlement demand was reduced to \$75,000. Inexplicably, the letter further states that the "offer remains open until October 28, 1991, at which time a complaint will be filed." Apparently, after the one-year limitation period had run, on October 21, 1991, Hentschel informed the Bergs' counsel in a telephone conversation that the Bergs' claims were time-barred under the ticket contract. In a letter dated October 22, 1991, Hentschel memorialized the telephone conversation and further extended a settlement offer of \$3000, a sum that Hentschel estimated would be expended by Royal Caribbean to answer any complaint filed by the Bergs and to file a motion for summary judgment based on the contractual time bar.

On October 21, 1991, more than one year after Laura Berg sustained injury on Labadee, the Bergs filed suit in state court alleging three counts of negligence. The complaint was amended on October 28, 1991 to add counts of breach of the implied covenant of good faith and fair dealing, and estoppel. Both of these counts are based on the correspondence between Hentschel and the Bergs' counsel. Count Four alleges that Royal Caribbean "lull[ed] plaintiffs into believing that meaningful settlement negotiations were taking place, only to use these negotiations to allow the contractual statute [sic] of limitations to lapse." Count Five alleges that Royal Caribbean "misrepresented its intentions in continuing settlement negotiations" and that "plaintiffs have rightfully relied upon said misrepresentations to their detriment."

Royal Caribbean removed this action from state court on November 13, 1991. It then filed its answer and now moves for summary judgment on all five counts of the complaint.

### Discussion

Summary judgment shall be granted 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." Fed. R. Civ. P. 56(c); see *Hersch v. Allen Products Co.*, 789 F.2d 230, 232 (3 Cir. 1986). In making this determination, a court must draw all reasonable inferences in favor of the non-movant. *Meyer v.*

*Riegel Prods. Corp.*, 720 F.2d 303, 307 n.2 (3 Cir. 1983), *cert. dismissed*, 465 U.S. 1091 (1984).

#### A. *Counts One through Three*

Limitations provisions in passenger ticket contracts are enforceable, so long as they have been reasonably communicated to the passenger. *Marek v. Marpan Two, Inc.*, 1987 AMC 2193, 817 F.2d 242 (3 Cir. 1987). Plaintiffs do not dispute that the limitations provision was "reasonably communicated" to them in the ticket contract. Whether terms of a passenger contract have been reasonably communicated is a question of law to be determined by the Court. *Hodes v. S.N.C. Achille Lauro*, 1988 AMC 2829, 2834, 858 F.2d 905, 908 (3 Cir. 1988).

The Court finds that the limitation of actions provision was adequately displayed in the contract such that it was reasonably communicated to the Bergs. Unlike most of the contract, that provision was set out in upper case letters and was printed in white on a dark background. Additionally, the type size used is larger than is used for other terms of the contract. Last, on the very first page of the contract, the passenger is told, in similarly large upper case print set out on a dark background, that it is important to read all terms of the contract. A similar provision was found reasonably communicative by the late Judge Mitchell H. Cohen of this District in *Williams v. Royal Caribbean Cruise Lines, Inc.*, 1991 AMC 237 (D.N.J. 1990). This Court finds that *Williams* is persuasive authority. Hence, the limitations provision is enforceable against the Bergs to the extent that it is applicable.

The only issue raised by this motion is whether the limitations provision in Laura Berg's ticket contract is broad enough to encompass claims arising from a passenger's activities on land at a scheduled port of call. Royal Caribbean asserts that the contractual provision bars *any* claim against Royal Caribbean that arose during the cruise and that was not filed within one year of the occurrence. Berg asserts that she is suing Royal Caribbean in its capacity as an owner or operator of land, and not "as a ship owner or operator." Therefore, she contends that the contractual provision simply does not apply to this action.

In *Hodes*, the Third Circuit held that

A passenger ticket for an ocean voyage is a maritime contract. Accordingly, whether ticket conditions form part of the passenger's contract and the effect such conditions should be afforded are matters governed by the general maritime, not the local state, law.

*Hodes*, 1988 AMC at 2834, 858 F.2d at 909 (citations omitted). Thus, the breadth of application of the limitations provision of Laura Berg's ticket contract is a question of federal maritime law.<sup>1</sup>

The parties both concede that there is no extant case law authority in which a plaintiff was injured, at a scheduled port of call during the course of a cruise on land owned by the carrier, and precluded from suit by a time limitation contained in a passenger ticket contract. Nevertheless, that plaintiff was injured on land instead of on board the cruise vessel is not a critical distinction *per se*. What is critical is whether the contract, by its terms, properly reaches actions arising on land owned by Royal Caribbean. After closely examining the language of the ticket contract, the Court concludes that, as a matter of law, plaintiffs' claims are time-barred.<sup>2</sup>

"Passenger" is defined in the contract as including "all persons traveling under this ticket and his and their heirs and representatives." (emphasis added). It is significant that "passenger," as that term is used in the contract, is defined as a person "travelling under" the contract. When plaintiff was injured, she had not yet reached her final destination. She had merely stopped over briefly at a port of call scheduled on the cruise itinerary, and disembarked for an activity "scheduled by the Royal Caribbean staff." It was clear that Royal Caribbean's contractual obligations to Laura Berg had not ended and that she would return to the vessel to continue her travels. She was therefore clearly "travelling under" the ticket contract at the time of her injury. Thus, under the plain language of the ticket contract, at the time of her injuries, Laura Berg was a "passenger" within the meaning of the contract, if not within the meaning of the general maritime law.<sup>3</sup>

1. That is not to say that the incident that occurred on land is a maritime tort governed by maritime law. It is likely that the law governing plaintiff's claims is that of either New Jersey or Haiti. To the extent that any common law tort rights and duties have been altered by contract, however, they are governed by maritime law.
2. As a claim dependent on the validity of Laura Berg's claim, Michael Berg's *per quod* claim is also barred by the ticket contract. *Lieb v. Royal Caribbean Cruise Line, Inc.*, 1987 AMC 380, 384, 645 F.Supp. 232, 235 (SDNY 1986).
3. Under general maritime law, the term "passenger" has acquired meaning for purposes of defining the rights of marine travelers vis-a-vis their carrier. Thus, it has been said that "the relationship of passengers and carrier . . . exists from shore to ship and ship to shore." *Chervy v. Peninsular and Oriental Steam Navigation Co.*, 1965 AMC 753, 243 F.Supp. 654 (S.D. Cal. 1964); see also *Lawlor v. Inces Nassau Steamship Line, Inc.*, 1958 AMC 1701, 1705 (D. Mass. 1958).

Further, "Carrier" is defined, in relevant part, as "Royal Caribbean Cruises, Ltd." This definition is plain and unambiguous. It does not, as plaintiffs suggest, limit the meaning of "carrier" to Royal Caribbean acting in its capacity as carrier, as that term is understood under general maritime law. To impose such a construction on the ticket contract would burden that contract with an artificial limitation at variance with its plain import. Thus, as with "passenger", see *supra* note 3, the term "carrier" is defined more broadly under the contract than it is by the general maritime law.

Read together with the definitions, the limitation provision in the ticket contract unambiguously covers Laura Berg's causes of action arising from her injuries sustained on Labadee. Under that provision, *any* claim against Royal Caribbean in any capacity for personal injury sustained by Laura Berg while "travelling under the ticket" must have been commenced within one year from the date of that injury. The Bergs did not comply with this contractual requirement. Therefore, their claims are time-barred.

#### B. Counts Four and Five

Royal Caribbean has also moved for summary judgment on counts four and five of the Bergs' complaint. Those counts, which arise out of communications between Royal Caribbean and the Bergs' counsel, allege that the contractual limitations period should not be enforced due to the bad-faith conduct of Royal Caribbean in leading the Bergs' counsel to delay in filing suit. Although the Bergs set forth a claim sounding in contract as well as under the theory of estoppel, the Court

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Some authorities have construed the passenger-carrier relationship even more broadly, stating that it does not end until "the vessel has reached the port of the passenger's destination and the passenger has left the vessel *and the shipowner's dock or premises.*" 1 Norris, Martin J., *The Law of Maritime Personal Injuries* §3.2 at 61 (4th ed. 1990) (emphasis added); see *Shulman v. Compagnie Generale Transatlantique*, 1957 AMC 2032, 2036, 152 F.Supp. 833, 836 (SDNY 1957) (liability limitation extending "to the period while the passenger and/or his baggage . . . are on board the vessel . . . *and/or the premises of the carrier*" . . . covers . . . the relationship between [plaintiff] and the [defendant] as passenger and carrier." (emphasis added)). Thus, under this line of authority, it is possible that the Bergs might well be considered "passengers" as a matter of law, since they allege that they departed defendant's vessel yet never left the defendant's premises before Laura Berg was injured. Because the Court concludes that the contractual provision is broader than the general maritime interpretations of the passenger-carrier relationship, it need not decide whether, under *Shulman*, plaintiffs were "passengers" as a matter of maritime law.

will consider them together, since the claims are indistinguishable in substance. Under the circumstances clearly presented in the correspondence submitted to the Court, these counts border on the frivolous.

As these claims arise out of the ticket contract, they are governed by federal maritime, not state, law. *Hodes*, 1988 AMC at 2834, 858 F.2d at 909. This is not a novel issue of law. Two other judges in this district have previously rejected similar claims. See *Michelotti v. Home Lines Cruises, Inc.*, 1986 AMC 480, 485 (D.N.J. 1985) (Debevoise, J.), *aff'd mem.*, 786 F.2d 1147 (3 Cir. 1986); *Williams*, 1991 AMC at 247 (Cohen, J.).

Plaintiffs assert that Royal Caribbean "intentionally protracted the settlement negotiations as an attempt to use the one-year statute of limitations [sic] as a shield to the Bergs' claim." For any affirmative misconduct to create an estoppel, plaintiffs must have relied on that conduct to their detriment. *Burke v. Gateway Clipper, Inc.*, 1971 AMC 1623, 1626, 441 F.2d 946, 948 (3 Cir. 1971) (conduct must have "caused a plaintiff to delay filing suit until after running of the statutory period").<sup>4</sup> Further, as an equitable doctrine, estoppel "is a question of law to be determined by the court." *Id.*

Nothing in any of the correspondence contains any representation or promise that can in any way be characterized as misleading, nor has any evidence been presented that Royal Caribbean engaged in conduct that could be construed as misleading. Indeed, in its September 25, 1991 letter to the Bergs' counsel, Hentschel virtually brought the provision directly to the attention of the Bergs' counsel when he made express reference to the limitations period in stating that Royal Caribbean hoped to hear from counsel before October 12, 1991, the last day to file suit under the contract. Wholly absent here is any affirmative conduct intended to deceive plaintiffs into delaying the filing of their complaint. Thus, unlike in *Keefe v. Bahama Cruise Line, Inc.*, 1990 AMC 47, 867 F.2d 1318 (11 Cir. 1989), where the carrier's claims representative had falsely represented to plaintiff's attorney that a full release had already been obtained from plaintiff, *id.*, 1990 AMC at 54, 867 F.2d at 1324, there is no basis in this record for finding that the Bergs' counsel had been led to delay the filing of their complaint.

4. Although *Burke* involved a statutory, as opposed to contractual, limitations period, there is no meaningful difference between the two for purposes of estoppel. *Keefe v. Bahama Cruise Line, Inc.*, 1990 AMC 46, 53, 867 F.2d 1318, 1323 (11 Cir. 1989).

Royal was under no obligation to expressly inform the Bergs' counsel before October 12, 1991 that it intended to invoke the limitations provision. Further, plaintiffs' claim that Royal Caribbean's failure to invoke the six-month notice of claim provision somehow constituted affirmative bad faith conduct is without merit. Any waiver by Royal Caribbean of its rights under the notice provision did not constitute a waiver of its rights under the actions limitation provision, or constitute a misrepresentation as to its intent to waive that provision. Absent an express representation to that effect, there is no basis for finding bad faith. Plaintiffs' further claim that they relied on any conduct by Royal Caribbean in delaying the filing of suit is belied by their concession that "in the instant action [they] rightfully relied upon the [two-year New Jersey] statute of limitations due to the fact that the injury occurred on land." (emphasis added). Thus, plaintiffs have not raised any issue of fact as to the bad faith of Royal Caribbean.

This case does not involve the inaction of a plaintiff not knowledgeable about limitations periods and the law. It involves an attorney retained by plaintiffs to protect their interests. What Judge Debevoise said in *Michelotti* is very appropriate in this case:

There was no reason for plaintiff's attorney to rely on [defendant's] letter as a basis for not filing suit within the time limits set forth in the contract. In his responsibility to his client, plaintiff's attorney should have filed suit to protect her claim, and continued to pursue settlement while suit was pending. Plaintiff's attorney cannot now correct his error by means of a dubious theory of equitable estoppel. *Michelotti*, 1986 AMC at 485.

Accordingly, summary judgment will be granted dismissing counts four and five of plaintiffs' complaint.

### Conclusion

For the reasons set forth above, Royal Caribbean's motion for summary judgment will be granted, and Counts One, Two, Three, Four and Five will be dismissed with prejudice.

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STUART F. CUMMINGS, *ET AL.*

v.

HOLLAND AMERICA LINE WESTOURS, INC., *ET AL.*

United States District Court, Western District of Washington (Seattle), April 21, 1999  
No. C98-1818

**ILLNESS — 181. Mental Disease — PASSENGERS — 121. Limit of Liability —  
17. Injury and Death — STATUTES — Federal — Limitation of Liability Act, 46  
U.S. Code app. §183c(b).**

Passengers' ticket validly exonerated shipowner for liability for negligent infliction of emotional distress, as not prohibited by 46 U.S.C. app. §183c(b). Thus, survivors who witnessed death of their relative in swimming pool have no claim.

C. Steven Fury (Fury Bailey) and Mark S. Davis *for Cummings*  
Patrick C. Middleton (Forsberg & Umlauf) *for Holland America Line Westours*

WILLIAM L. DWYER, D.J.:

This case arises from the tragic death by drowning of Erica Cummings, age nineteen, in a swimming pool aboard the cruise ship *MS Rotterdam*. The plaintiffs are Erica's father, who sues individually and as personal representative of her estate, and Erica's mother and sister. The defendants are the cruise ship owner and operator. The defendants now move for summary judgment dismissing three categories of claims. All materials filed, and the oral arguments of counsel heard in open court on April 19, 1999, have been considered.

Summary judgment under Fed. R. Civ. P. 56 may be granted if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. An issue of material fact is one that affects the outcome of the case and requires a trial to resolve differing versions of the truth. *Admiralty Fund v. Hugh Johnson & Co.*, 677 F.2d 1301, 1305-06 (9 Cir. 1982). In deciding the motion the court views the evidence in the light most favorable to the non-moving party, and draws all reasonable inferences in that party's favor. *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 473 (1962); *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 630-31 (9 Cir. 1987). However, the non-moving party must respond to an adequately supported motion by showing that a genuine issue of material fact exists; if the response falls short of that, summary judgment should be granted. Fed. R. Civ. P. 56(e); *T.W. Elec. Serv., Inc.*, 809 F.2d at 630-31.

The Death on the High Seas Act (DOHSA), 46 U.S.C.app. §761 et seq., provides an exclusive remedy for the death of a person caused by wrongful act, neglect, or default occurring on the high seas. 46 U.S.C.app. §761; *Dooley v. Korean Air Lines Co., Ltd.*, 523 U.S. 1057, 1998 AMC 1940 (1998). The proper party to bring suit is the personal representative of the decedent. 46 U.S.C.app. §761. The exclusive beneficiaries of the action are the decedent's spouse, parent or dependent relative. 46 U.S.C.app. §761. The only recovery is recovery for pecuniary losses. 46 U.S.C.app. §762. Pecuniary losses may include loss of support, loss of services and loss of inheritance. *Saavedra v. Korean Air Lines Co., Ltd.*, 1996 AMC 2113, 2123, 93 F.3d 547, 554 (9 Cir. 1996); *Zicherman v. Korean Air Lines Co., Ltd.*, 92 F.3d 126 (2 Cir. 1996); *Verdin v. C & B Boat Co., Inc.*, 860 F.2d 150 (5 Cir. 1988).

Here, Stuart Cummings sues as personal representative of his late daughter. Defendants move for summary judgment dismissing any claims of the estate except those brought for the beneficiaries designated by DOHSA. Plaintiffs respond that no such claims are asserted; there is no dispute over the legal principle involved. Accordingly, this part of the motion is granted, and insofar as the complaint could be read to assert claims for the estate other than those permitted by statute, such claims are dismissed.

Second, defendants move for summary judgment dismissing any negligence and wrongful death claims of the other plaintiffs except claims for pecuniary damages as allowed under DOHSA. This evokes the same response from plaintiffs — i.e., no such claims are intended, and there is no dispute over the principle of law. Accordingly, insofar as the complaint could be read to assert such claims, they are dismissed.

Finally, defendants seek summary judgment dismissing the family members' claims for negligent infliction of emotional distress. This part of the motion is based upon a provision in the parties' cruise contract which reads as follows:

Limitation on Owner/HALW Liability: . . . In all situations (other than those referred below), whether or not involving negligence or willful fault, neither the owner nor HALW will have any liability to you for infliction of emotional distress, mental suffering or psychological injury; this specific limitation of liability does not apply, however, to those situations in which a limitation of liability of this nature is not allowed under 46 United States Code app. §183c(b).

The statute referred to in the ticket/contract, 46 U.S.C.app. §183c(b), provides:

(b)(1) Subsection (a) shall not prohibit provisions or limitations in contracts, agreements, or ticket conditions of carriage with passengers which relieve a crewmember, manager, agent, master, owner, or operator of a vessel from liability for infliction of emotional distress, mental suffering, or psychological injury so long as such provisions or limitations do not limit such liability if the emotional distress, mental suffering, or psychological injury was —

(A) the result of physical injury to the claimant caused by the negligence or fault of a crewmember or the manager, agent, master, owner, or operator;

(B) the result of the claimant having been at actual risk of physical injury, and such risk was caused by the negligence or fault of a crewmember or the manager, agent, master, owner, or operator; or

(C) intentionally inflicted by a crewmember or the manager, agent, master, owner, or operator.

Thus, defendants were legally entitled to include the limitation of liability provision in the cruise contract. The question, then, is whether the provision is enforceable.

In the Ninth Circuit and elsewhere, that is treated as a question of law for the court. In the present case the record is fully sufficient to make that determination. There is no genuine issue of fact, nor has there been any showing, within the meaning of Rule 56(f), of particular facts that might be turned up in discovery. A two-part test must be used to determine if the terms and conditions of such a contract have been “reasonably communicated” to the passenger. *Deiro v. American Airlines, Inc.*, 816 F.2d 1360 (9 Cir. 1987). The court must first look at the physical characteristics of the contract, especially the font size, conspicuousness, clarity of notice, and ease with which the passenger can read the provisions. *Deiro*, 816 F.2d at 1364. The court must then consider the extrinsic circumstances surrounding the passenger’s purchase and retention of the contract that indicate the passenger’s ability to become meaningfully informed of the contractual terms at stake. *Deiro*, 816 F.2d at 1364.

Here, the contract meets the “reasonably communicated” test. As to its physical characteristics, the first page of the contract states in red capital letters that certain enumerated clauses, including Clause 8, contain important limitations on a passenger’s rights to assert claims against the cruise operators. The contract then states in capital letters that what follows are important terms and conditions and that the passenger should read them

carefully. The next three pages describe all terms and conditions in size six font. Clause 8 is located on page three. The heading is in bold and the text is not unduly burdensome to read.

As to the extrinsic circumstances surrounding the purchase and retention of the contract, the Cummings were experienced travelers and had bought other passage tickets from defendants. They received the ticket/contract several days before the cruise and had the opportunity to read it. Cruise passengers have a contractual duty to inform themselves of their contract terms. *Kendall v. American Hawaii Cruises*, 1989 AMC 2478, 2486, 704 F.Supp. 1010, 1016 (D. Haw. 1989). Although the record shows that plaintiffs' travel agent and others were not familiar with the contractual provision, and that plaintiffs themselves did not read it, the governing law requires a decision that none of these factors, nor all of them together, can suffice to overcome the defendants' showing that the limitation was reasonably communicated.

It follows that the third part of the motion must also be granted, and plaintiffs' claims for negligent infliction of emotional distress are hereby dismissed. This ruling does not affect the claims of Stuart Cummings individually, Elizabeth Cummings, and Monica Cummings for intentional infliction of emotional distress.

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her speed was a factor contributing to the collision. The *Paige 2* is 75% responsible for the loss and the *Fortaleza* 25%.

### Conclusion

Recognizing that the parties presented no evidence with respect to damages, it is hoped that the amount of the loss will not be at issue and that a judgment may be entered upon notice. In the event that an agreement on damages is not reached, the parties are directed to notify the court and reference will be made to a Magistrate Judge to determine damages.

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**DOROTHY GOLDBERG AND JACK GOLDBERG, HUSBAND AND  
WIFE, *Plaintiffs***

v.

**CUNARD LINE LIMITED, *Defendants***

United States District Court, Southern District of Florida, January 24, 1992  
No. 91-6267-CIV-MARCUS

**PASSENGERS — 23. Actions — PRACTICE — 1311. Transfer for Convenience.**

In opposing defendant cruise line's motion to transfer plaintiff passenger's SD Fla. action to N.Y. pursuant to a reasonable forum selection clause in defendant's ticket contract, plaintiff has the burden of proving that the N.Y. forum is inconvenient. On the facts, *held*: Plaintiff's failure to sustain this burden justifies transfer of action for shipboard injury to SDNY under 28 U.S. Code 1404(a).

Jack Vital III (Sheldon J. Schlesinger, P.A.) *for Plaintiff Dorothy Goldberg*  
Jonathan W. Skipp (Fowler, White, Burnett, Banick & Strickroot, P.A.) *for  
Defendant Cunard Line Limited*

STANLEY MARCUS, D.J.:

This cause comes before the Court on the Motion of defendant Cunard Line Limited ("Cunard") to Dismiss or in the Alternative to Transfer. In this action plaintiffs seek damages for injury allegedly sustained by plaintiff Dorothy Goldberg while she was aboard the cruise ship MS *Sagafford*, one of Cunard's ships. Plaintiff Jack Goldberg seeks compensation for loss of services, society and consortium of his wife Dorothy as a result of her injury.

Cunard grounds its motion in the forum-selection clause contained within the ticket.<sup>1</sup> The front of the ticket states in large letters, "Passenger Ticket & Passage Contract," and in clear upper case type contains the following: "Important Please Read Following Terms of Passage Contract:". Article 22 of the contract, located at page 9, states:

"Art. 22 — *PASSAGE CONTRACT APPLIES TO CLAIM, SUITS OR LITIGATION OF ANY KIND.* (a) This Passage Contract applies to claims, suits and litigation of any kind whether against the Company "in personam" or the vessel "in rem", or otherwise. (b) It is agreed by and between the passenger(s) and the Company that any and all disputes and matters whatsoever arising under, in connection with, or incident to this Passage Contract shall be litigated, if at all, in and before any court located in the City and State of New York, U.S.A. to the exclusion of the courts of any other city, state or country."

This case may be transferred to New York pursuant to either 28 U.S.C. §1404(a) or 28 U.S.C. §1406. Section 1404(a) provides:

"For the convenience of the parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

Section 1406(a) provides:

"The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought."

As we believe that justice requires transfer rather than dismissal, due mainly to the expense the parties have incurred in litigating various motions and conducting discovery, we shall focus upon the transfer aspect of defendant's motion.<sup>2</sup>

In a case where no forum-selection clause is implicated, courts traditionally accord great deference to the plaintiff's choice of forum and place the burden upon a movant who maintains that a different forum

1. Though defendant's exhibit is a specimen copy, plaintiffs have not objected to its introduction or contested that the specimen ticket is in fact identical to the ticket obtained by plaintiffs.
2. We note, additionally, that defendant failed to specify the statutory basis for transfer or dismissal.

is more convenient. See *In re Ricoh Corp.*, 870 F.2d 570, 573 (11 Cir. 1989). However, the Eleventh Circuit has reasoned, “[i]n attempting to enforce the contractual venue, the movant is no longer attempting to limit the plaintiff’s right to choose its forum; rather the movant is trying to enforce the forum that the plaintiff had already chosen: the contractual venue.” *Id.* Accordingly, the Eleventh Circuit has held that “when a motion under §1404(a) seeks to enforce a valid, reasonable choice of forum clause, the opponent bears the burden of persuading the court that the contractual forum is sufficiently inconvenient to justify retention of the dispute.” *Id.* The question thus becomes whether the choice of forum clause contained in the contract at issue is valid and reasonable.

The Supreme Court’s April 1991 decision in *Carnival Cruise Lines, Inc. v. Shute* considered the enforceability of a similarly worded forum-selection clause, which appeared in a passenger ticket on a cruise ship.<sup>3</sup> The *Shute* Court overruled the decision of the Court of Appeals for the Ninth Circuit that invalidated a forum-selection clause contained in a form contract: “[W]e do not adopt the Court of Appeals’ determination that a nonnegotiated forum-selection clause in a form ticket contract is never enforceable simply because it is not the subject of bargaining.” 499 U.S. \_\_\_, 1991 AMC at 1703. Rather, the Court held that many valid reasons could justify the inclusion of a forum-selection clause.<sup>4</sup>

We hold that as a matter of law, the forum-selection clause was reasonable and valid, does not violate fundamental fairness, and, under *Shute* and *In re Ricoh*, must be enforced.

3. The forum selection clause in *Shute* provided:

“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.” 499 U.S. \_\_\_, 1991 AMC 1697 at 1698.

Apparently the contract appeared on the last pages of the ticket, and the clause appeared on the first page of the contract portion. The *Shute* ticket, like the ticket at issue in the instant case, contained an admonition that the ticket was subject to the terms of the contract.

4. In *Shute* the district court dismissed the case for lack of personal jurisdiction over the cruise line, based on insufficient contacts with the forum, and never reached the question of the choice of forum provision. The Court of Appeals reversed, finding sufficient minimum contacts to sustain personal jurisdiction over the defendant, and held the forum selection clause unenforceable. See *Shute v. Carnival Cruise Lines*, 1990 AMC 1757, 1769, 897 F.2d 377, 385-86 (9 Cir. 1990).

Plaintiffs do not contest the validity of the contract but rather argue that enforcing the forum-selection clause would violate fundamental fairness. Nonetheless, we consider the clause's validity and conclude that, as a matter of maritime law, the forum-selection clause is valid. "Under maritime law as it has evolved, a notice appearing in the contract must be a reasonable warning to the passenger in order to incorporate into the contract the conditions to which it refers." *Hallman v. Carnival Cruise Lines, Inc.*, 1985 AMC 2019, 2021, 459 So.2d 378, 380 (Fla.3d DCA 1984); see *DiNicola v. Cunard Line, Ltd.*, 1981 AMC 1388, 1392-96, 642 F.2d 5, 8-10 (1 Cir. 1981). "It is not necessary that the passenger have actual knowledge of such conditions or limitations or that his attention be called to them." 80 C.J.S. *Shipping* §182, p. 1098 *et seq.*, quoted in, *Carpenter v. Klosters Rederi A/S*, 1980 AMC 541, 543, 604 F.2d 11, 13 (5 Cir. 1979). Thus, though it is unclear whether the Goldbergs had actual knowledge of the contents of the clause, the ticket's face implores the purchaser to read its contents, and the article of the contract governing litigation is introduced with underlined, capital letters. We are therefore compelled to hold that the contract and the forum-selection clause are valid.

Determining the validity of the contractual provision does not end the Court's inquiry, however, as we are mindful of the Supreme Court's admonition that "[i]t bears emphasis that forum-selection clauses contained in form passage contracts are subject to judicial scrutiny for fundamental fairness."<sup>5</sup> *Id.* We hold that the forum-selection clause is fundamentally fair and must be enforced. We note that the *Shute* Court identified a "special interest" of cruise lines in "limiting the fora in which it potentially could be subject to suit. Because a cruise ship typically carries passengers from many locales, it is not unlikely that a mishap on a cruise could subject the cruise line to litigation in several different fora." 499 U.S. \_\_\_, 1991 AMC at 1703. As in *Shute*, no indication is present that the forum-selection clause specifies New York as the forum in order to discourage legitimate lawsuits. In both *Shute* and the instant case the forum-selection clauses dictate that suits be brought in the ship line's principal place of business. Finally, we observe that there is no indication that Cunard resorted to fraud to deceive the Goldbergs into

5. We observe that *Shute* was decided under the Court's admiralty jurisdiction, whereas Cunard in the instant action removed this case based on this court's original diversity jurisdiction. See Notice of Removal at 3; 28 U.S.C. §§1332, 1441. This distinction does not affect the "fundamental fairness" analysis ordained by the *Shute* Court.

buying a ticket. We observe that the forum-selection clause sends plaintiff to New York, not to "a remote alien forum." *Shute*, 499 U.S. \_\_\_, 1991 AMC at 1704.

Plaintiffs argue that "[t]here are no allegations or facts in the record, either admitted or not admitted, upon which this Court at this time can determine that the transfer of this case to the United States District Court for the Southern District of New York would not impose physical and financial impediments upon the plaintiffs, that it would create upon them great inconvenience. . . ." The absence of this information does not preclude transfer, however. The Supreme Court in *Shute* noted that "the District Court made no finding regarding the physical and financial impediments to the Shute's pursuing their case in Florida" and disregarded the Ninth Circuit's finding that such impediment would occur if the case were dismissed without prejudice. Clearly, we need not find a lack of impediment in order to transfer the case. Rather, as discussed above, "when a motion under §1404(a) seeks to enforce a valid, reasonable choice of forum clause, the opponent bears the burden of persuading the court that the contractual forum is sufficiently inconvenient to justify retention of the dispute." *In re Ricoh Corp.*, 870 F.2d at 573. While, as plaintiffs note, it is undisputed that Dorothy Goldberg has multiple sclerosis, and it may be true that she is wheelchair-bound, it is also true that this was her condition prior to the cruise, and plaintiffs have adduced no evidence to establish that travel to New York will be impossible or so inconvenient as to justify interfering with the contract of the parties. Nor, ultimately, have plaintiffs shown how the enforcement of this forum-selection clause is fundamentally unfair.

Accordingly, defendant's motion to transfer is granted and this cause is ordered transferred to the Southern District of New York.

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**JESSE KARTER, ET AL.**

v.

**HOLLAND AMERICA LINE-WESTOURS INC., ET AL.**

United States District Court, Western District of Washington (Seattle), May 24, 1996  
No. C96-180D

**PASSENGERS — 23. Actions — PRACTICE — 1583. Examination of  
Person — 24. Depositions.**

The general rule requiring parties to make themselves available in the district in which suit is brought is applicable to New York personal injury plaintiffs who were required to bring suit in W.D. Wash. because of forum selection clause in passenger contract. Plaintiffs' motion for protective order requiring that plaintiffs' depositions and passenger's IME be taken in New York or in the alternative that defendant pay plaintiffs' travel costs, *denied*.

Linda S. Karter and David S. Grossman (LeSourd & Patten) for *Jesse Karter, et al.*

Patrick G. Middleton (Forsberg & Umlauf) for *Holland America Line-Westours Inc., et al.*

CAROLYN R. DIMMICK, Ch.J.:

This matter comes before the Court on Plaintiffs' motion for a protective order. The Court, having considered the motions, memoranda, and affidavits submitted by the parties, hereby denies Plaintiffs' motion for a protective order.

I

Plaintiffs Jesse and Ruth Karter ("Karter"), husband and wife, reside in the State of New York. Jesse Karter was injured while on a Caribbean cruise in 1995. Consequently, Karter filed this action.

Jesse Karter's injury allegedly occurred on the MS *Statendam*, owned by defendant Wind Surf, Inc., a Bahamian corporation. Karter's cruise was contracted through defendant Holland America Line-Westours Inc. ("HALW"), a Washington corporation with its principal place of business in Seattle. Pursuant to a forum-selection clause in its contract with HALW, Karter filed the instant action in this forum.

Karter now moves the Court to issue a protective order requiring that (1) the depositions of both Ruth and Jesse Karter be taken in New York rather than in this forum; and (2) the independent medical examination ("IME") of Jesse Karter be conducted in New York rather

than in this forum. In the alternative, Karter moves this Court to require that Defendant pay Karter's expenses if they are required to travel to this forum for the depositions and IME.

## II

Upon motion by a party . . . and for good cause shown, the court in which the action is pending . . . may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: . . . (2) that the discovery may be had only on specified terms and conditions, including a designation of time or place. . . .

Fed. R. Civ. P. 26(c). Plaintiffs are required to make themselves available for examination in the district in which the suit is brought because, in general, plaintiff selects the forum of the action. *See Detweiler Bros., Inc. v. John Graham & Co.*, 412 F.Supp. 416, 422 (E.D. Wash. 1976); 8A C. Wright, A. Miller & Marcus, *Federal Practice & Procedure*, §2112, at 75-80 (1994). However, if a plaintiff has no choice in selecting the forum, there seems very little reason to give weight to the selection of the forum as against facts indicating that another place for examination would be more just. *Federal Practice & Procedure*, §2112, at 75-80.

## III

Karter and HALW entered into a contract containing a forum-selection clause. Hence, both parties exercised some choice in the forum-selection, and this Court holds that the general rule requiring plaintiffs to make themselves available for examination in the district in which the suit is brought is applicable in the instant case. Further, the Court recognized that IMEs are generally conducted in the district wherein the action is filed to assure that the examining doctor is available as a witness.

Accordingly, if HALW and Karter cannot agree on a plan to conduct Karter's depositions and IME in New York, the parties are ordered to schedule the depositions and IME in this district and at the convenience of the Plaintiffs.

IV

In accordance with the foregoing discussion, Plaintiffs' motion for a protective order is denied. Plaintiffs' request for expenses is also denied.





IRVING J. MILLS AND M. JOAN MILLS, *Plaintiffs*

v.

RENAISSANCE CRUISES, INC. AND FEARNLEY & EGER, *Defendants*

United States District Court, Northern District of California, August 17, 1992  
No. C 91-3001 BAC

**PASSENGERS — 121. Limit of Liability — TREATIES AND CONVENTIONS —  
1976 Protocol to Convention Relating to the Carriage of Passengers and Their Luggage  
by Sea.**

In cruise passenger's N.D. Cal. action for injuries sustained aboard foreign passenger vessel during voyage from Spain to Italy, *held*: Defendant cruise line may limit its liability to 46,666 SDRs, as provided in the 1976 Protocol to the Athens Convention which was properly incorporated in the ticket contract and reasonably communicated to the plaintiffs.

Joseph L. Costello *for Plaintiffs*

Elizabeth M. Miller and Edward M. Keech (Walsh, Donovan, Lindh & Keech)  
*for Defendant Renaissance Cruises, Inc.*

BARBARA A. CAULFIELD, D.J.:

This matter comes before the court on plaintiffs' and defendant Renaissance Cruises, Inc.'s cross-motions for summary adjudication. Oral argument was heard on July 24, 1992. After careful consideration of the parties' written and oral arguments, documents submitted in support and the record as a whole, the court hereby grants summary adjudication in defendant's favor.

### I. Background

On October 1, 1990, while Mr. and Mrs. Mills were traveling from Spain to Italy on a cruise vessel owned and operated by defendant Renaissance Cruises, Inc., Mr. Mills fell and broke his leg. The Mills filed this suit against Renaissance Cruises and Fearnley & Eger<sup>1</sup> on September 12, 1991, alleging negligence, negligent infliction of emotional distress, and loss of consortium, and praying for damages in the amount of \$250,000.

Both parties move for summary adjudication of whether plaintiffs' contract of carriage limits plaintiffs' recovery, if any, against defendants for negligence. If so, the parties request summary adjudication as to whether such liability is limited to 46,666 Standard Drawing Rights

1. Default was entered against defendant Fearnley & Eger on April 17, 1992.

("SDRs")<sup>2</sup> under the 1976 Protocol of the Athens Convention or 175,000 SDRs under the 1990 Protocol.

## II. Discussion

Paragraph 5.1(1) of the "Terms and Conditions of Contract of Carriage" of the passenger ticket states that:

"The Carrier shall not be liable for any such . . . injury . . . except the negligence of the Carrier or its employees' action within the scope of their Employment, and if such negligence be proven, the Carrier's liability therefor shall not exceed the following limitations per Passenger in Special Drawing Rights (S.D.R.) as defined in the amendment of 1978 to the Athens Convention, article 9:

Personal Injury or Death S.D.R. 46,666

The first S.D.R. 13 to be borne by the Passenger according to the Athens Convention, article 8."

Plaintiffs contend this provision is unenforceable, based on several theories: (1) that the provision was not reasonably communicated; (2) they had no real option of rejecting the passenger ticket; and (3) that it violates public policy.

### A. Notice of Limitation Provision

A limitation of liability provision is incorporated into a passenger ticket contract where the carrier "reasonably communicated to its passengers that the contractual term affects their legal rights." *Holland v. Norwegian Cruise Lines*, 1991 AMC 877, 878, 765 F.Supp. 1000, 1002 (N.D. Cal. 1990); cf. *The Majestic*, 166 U.S. 375, 385 (1897) (passenger not bound by limitation of liability on back of ticket where front did not refer to such provision). The question of whether such provision was reasonably communicated to the passenger is a question of law for the court, see *Hodes v. S.N.C. Achille Lauro ed Altri-Gestione*, 1988 AMC 2829, 858 F.2d 905 (3 Cir. 1988), and depends on an analysis of the overall circumstances of the case. *Holland*, 1991 AMC at 879, 765 F.Supp. at 1002. The relevant factors for the court to consider are: (1) the physical characteristics of the ticket contract, i.e., the language and

2. SDRs, as determined by the International Monetary Fund, are based on exchange rates for the American Dollar, German Mark, British Pound, French Franc and Japanese Yen, and are reported daily in the *Wall Street Journal*.

placement of the limiting provision; and (2) the circumstances surrounding the passenger's purchase and subsequent retention of the ticket contract, i.e., any factors indicating the passenger's ability to become meaningfully informed of the contractual terms at stake. *Id.* (citations omitted).

Plaintiffs contend that the language on the ticket was neither conspicuous nor large enough to have been reasonably communicated. The court disagrees. In the lower right hand corner of the page 1 of the ticket is stated: "Ticket subject to terms of contract on pages 4 and 5." The liability limitation provision itself was placed on page 4 of the 5-page ticket, and it was set forth under the title (in bold face, capitalized, larger print): "**TERMS AND CONDITIONS OF CONTRACT (INCORPORATED IN AND FORMING PART OF PASSENGER CONTRACT TICKET).**"

The provision itself is printed in small size due to the amount of information which had to be set forth in the section. The specific provision within ¶5.(1)—limiting the liability for "Personal Injury or Death" to "S.D.R. 46,666"—is set forth in an indented, double-spaced paragraph. The court finds that the placement of the provision, with the use of bold face, capitalization, titles, indentation, and double-spacing, made the provision sufficiently noticeable.

Plaintiffs also argue that notice was insufficient because nothing informs the passenger of the origin of the Athens Convention or defines the meaning of SDRs or informs a passenger as to where such information might be obtained. However, the test is whether plaintiffs knew that the contractual term affected their legal rights. Although the monetary limitation is given in the form of an international monetary unit due to the fact that the passengers will be drawn from an international pool, the fact that it is a monetary limitation and that the value of the limitation is "46,666" is clear. The language provided is sufficient to put plaintiffs on notice of the liability limitation.

The court rejects plaintiffs' argument that they did not have an opportunity to read the ticket contract. Possession of a passenger ticket provides a passenger with the ability to "become meaningfully informed" of the limitation of liability provision; the fact that the passenger may not have read the provision is irrelevant. See *Holland*, 1991 AMC at 879, 765 F.Supp. at 1002. Here, the tickets were in plaintiffs' possession for two weeks, from September 15, 1990 through September 29, 1990. Plaintiffs had adequate time to read the tickets despite their claims that they were busy getting ready for the trip. Moreover, plaintiffs had taken

at least five other cruises before, and the trips were arranged by their adult daughter, a travel agent, or by travel agencies with which their daughter was associated or employed. These circumstances indicate an opportunity to become reasonably informed of the limitation provision.

Plaintiffs' argument that they had no real option of rejecting the tickets is also without merit. Plaintiffs have cited no case law in support of this argument and the court has found none. This argument is based on the fact that the tickets were non-refundable within fourteen (14) days of the sailing date and because plaintiffs received their tickets during this non-refundable period. A similar argument was rejected in *Hodes*, where the passengers received their tickets immediately before boarding the ship. They were nonetheless charged with notice due to possession by their agent. Here, plaintiffs had the tickets for 14 days and prior to that the tickets were in possession of their daughter or her travel agency. Thus, regardless of the merits of plaintiffs' argument, they are charged with notice prior to the non-refundable period.

Accordingly, the court finds that the limitation provision is reasonably communicated.

### B. Public Policy

Plaintiff asserts that the liability limitation is contrary to public policy and therefore void. In support of this argument, plaintiff cites to the Limitation of Vessel Owner's Liability Act, 46 U.S.C. App. §183c, which provides that stipulations limiting liability for negligence are invalid.<sup>3</sup> Plaintiffs admit that this statute does not apply here because §183c applies only to "voyages that touch the United States," *Hodes*, 1988 AMC at 2844, 858 F.2d at 914, and the cruise at issue here was entirely foreign. Plaintiffs nonetheless argue that the statute is indicative of a

3. 46 §183c provides:

"It shall be unlawful for the manager, agent, master, or owner of any vessel transporting passengers between port of the United States or between any such ports and a foreign port to insert in any rule, regulation, contract, or agreement any provision or limitation (1) purporting, in the event of loss of life or bodily injury arising from the negligence or fault of such owner or his servants, to relieve such owner, master, or agent from liability, or from liability beyond any stipulated amount, for such loss or injury, or (2) purporting in such event to lessen, weaken, or avoid the right of any claimant to a trial by court of competent jurisdiction on the question of liability for such loss or injury, or the measure of damages therefor. All such provisions or limitations contained in any such rule, regulation, contract, or agreement are declared to be against public policy and shall be null and void and of no effect."

broader public policy which renders the liability limitation provision at issue void.<sup>4</sup>

A similar argument was made in *Hodes*. In that case, the plaintiffs objected to the forum selection clause contained in the cruise ship ticket providing for venue in Italy. They argued, *inter alia*, that such provision violated the public policy as set forth in §183c because, practically speaking, it weakened their ability to bring the case. The plaintiffs in *Hodes* also argued that an Italian court might enforce provisions of the contract of passage that purported to limit the carriers' liability for passenger injury to \$10,000. The court rejected these arguments and "adamantly refuse[d] to wield the trump of American public policy," citing to *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 9, 1972 AMC 1407, 1413 (1972). In so holding, the court stated:

"We simply do not believe American public policy reaches the provisions of a contract of passage for an entirely foreign voyage, even should the contract be entered into within the United States. Congress, in §§183b and 183c, delimited the reach of American public policy to contracts of passage for voyages that touch the United States; we refuse to supplement that Congressional choice with judicial embellishment." *Hodes*, 1988 AMC at 2844, 858 F.2d at 915.

This court agrees with the reasoning set forth in *Hodes* and finds that the liability provision is valid and enforceable.

### C. Amount of Liability

Having concluded that the liability limitation is valid and enforceable, the court turns to the issue of the amount of that limitation. The passenger ticket provides that "the Carrier's liability therefor shall not exceed the following limitations per Passenger in Special Drawing Rights

4. Plaintiffs' reliance on *Barndt v. Det Bergenske Dampskibsselskab*, 1939 AMC 1564, 28 F.Supp. 815 (SDNY 1938) and *Oceanic Steam Nav. Co. v. Corcoran*, 1925 AMC 1086, 9 F.2d 724 (2 Cir. 1925) is misplaced. These cases have been superseded by §183c and in any event are distinguishable. The provision in *Barndt* exempted the carrier from all liability. The provision at issue in *Oceanic* exempted the carrier from all liability unless the passenger gave written notice of her claim within three days. These draconian provisions were found to be in violation of public policy. In contrast, the provision at issue here merely limits the recovery to a certain amount as governed by the Athens Convention, an international treaty.

(S.D.R.) as defined in the amendment of 1978 to the Athens Convention,<sup>5</sup> article 9: Personal injury or Death S.D.R. 46,666.” The “amendment of 1978” is apparently a typographical error meant to refer to the 1976 Protocol.<sup>6</sup> The 1976 Protocol amended the Athens Convention and, among other things, increased the liability limitation to 46,666 SDRs.

Since neither the Athens Convention nor the 1976 Protocol have been ratified by the United States, they carry no force of law. Rather, the definitions in the limitation of liability provision have force solely by virtue of their incorporation into the contract. See *Becantinos v. Cunard Line Ltd.*, (SDNY 1991) (parties to a contract may incorporate by reference any conditions or rules, including rules which carry no force of law).

Plaintiffs contend that, if defendants' liability is limited at all, it is limited to 176,000 SDRs as provided in the 1990 Protocol, rather than 46,000 SDRs, as provided in the 1976 Protocol. In support of this argument, plaintiffs point to contract language stating that the liability is governed by the Athens Convention with *revisions and amendments*. Plaintiffs argue that the 1990 Protocol is a revision or amendment within the meaning of the contract and thus is incorporated therein. The court disagrees.

The 1990 Protocol states that it is not effective until it is ratified by ten countries, and so far only one county has ratified it. Thus, by its own terms this proposed, unratified amendment is not part of the Athens Convention and is not incorporated by reference into the contract.

As a last resort, plaintiffs argue that the provision is ambiguous and should be interpreted against the party who caused the uncertainty to exist, i.e., defendant. Cal. Civ. Code §1654; see also *Victoria v. Superior Court*, 40 Cal. 3d 734, 222 Cal. Rptr. 1 (1985). However, as explained above, the court does not find that the liability limitation provision is ambiguous.<sup>7</sup>

5. The Athens Convention was concluded at Athens, Greece on December 30, 1974. After ratification, acceptance or approval of 10 states, it went into force on April 28, 1987. Although the United States attended the conference, it has not ratified, accepted or approved the Convention. See 6 *Benedict on Admiralty* (6 Ed. 1992) Doc. 2-3, pp. 2-22.3 *et seq.*

6. After its approval in 1976, the 1976 Protocol was ratified by ten states and went into force in 1989.

7. The result might have been different if the 1990 Protocol had been ratified by ten states and actually become part of the Athens Convention.

**Order**

For the reasons stated above, the court grants defendant's motion for summary adjudication that plaintiffs' liability is limited by the contract of carriage, and that the amount of the limitation is 46,666 SDRs. Plaintiff's motion for summary adjudication is denied.

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**IMVENCO PVBA ANTWERP, Plaintiff**

v.

**MAERSK LINE, ET AL., Defendants**

United States District Court, Southern District of Florida, October 16, 1992  
No. 91-1691-CV-DAVIS

**PRACTICE — 1311. Transfer for Convenience.**

Suit for automobile ruined in custody of carrier bound from Miami to Antwerp by explosion and fire on board while loading other cargo in Newark to which port she had deviated, *transferred* from SDFla. to SDNY, where three related claims were pending, in accordance with balance of convenience and B/L forum selection clause.

Robert Lamar Bell *for Plaintiff Imvenco PVBA Antwerp*  
Charles G. Deleo (Fowler, White, Burnett, Banick & Strickroot, P.A.) *for Maersk Line*  
Michael T. Moore (Holland & Knight) *for Defendant Car Shipping International Inc.*

EDWARD B. DAVIS, D.J.:

This matter is before the Court on Motions to Transfer Venue brought by Defendants Car Shipping International, Inc., ("Car Shipping") and Maersk Line, and Car Shipping's related Motion to Dismiss Maersk Line's cross claim.

**I. Background**

As its name reflects, Car Shipping is in the shipping business. Maersk Line and DMK-Romo, K/S, the other defendants, operate the vessel M/V *Marchen Maersk* as common carriers of merchandise by water.

The plaintiff, Imvenco PVBA Antwerp ("Imvenco"), owned a 1981 Rolls Royce automobile it wanted to ship from Miami, Florida to Antwerp, Belgium. Imvenco's agent brought the Rolls to the defendants for



## NORWEGIAN CRUISE LINE, LTD.

v.

MARILYN CLARK, *ET AL.*

Florida, District Court of Appeal, Second District, March 7, 2003

No. 2D02-945

Before: Altenbernd, C.J., Casanueva and Kelly, JJ.

**CONTRACTS — 111. Choice of Law and Forum Provisions — PASSENGERS —  
12. Passage Contract — 23. Actions.**

Although there may be concern for fairness to passengers, the majority rule is that the fact a passenger would forfeit part of the fare is not sufficient to preclude enforcement of a forum selection clause in the ticket, so long as the clause was reasonably communicated to the passenger. Here, Florida trial court is instructed to transfer case from Circuit Court of Pinellas County to Dade County as required by the ticket.

Curtis T. Mase and Beverly D. Eisenstadt (Mase & Gassenheimer, P.A.) *for Norwegian Cruise Line*

Hendrik Uiterwyk (Abrahamson & Uiterwyk) and Raymond T. Elligett, Jr. (Schropp, Buell & Elligett, P.A.) *for Clark*

Appeal from the Circuit Court for Pinellas County, Thomas F. Penick, J. Reversed and remanded.

CASANUEVA, J.:

Norwegian Cruise Line, Ltd., challenges the trial court's nonfinal order denying its motion to dismiss for improper venue, or, in the alternative, to transfer the cause to Dade County in accordance with the forum selection clause in its form cruise ticket contract. We reverse and, in so doing, join the majority of jurisdictions that have decided this matter and hold that the forum selection clause in the form cruise ticket that Marilyn and Richard Clark received shortly before their departure date is enforceable. This conclusion is in accord with *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 1991 AMC 1697 (1991). The Clarks argue that *Shute* is inapposite because the Supreme Court there assumed that the passengers could reject the offer of the cruise line "with impunity," but the Clarks could not do so "with impunity" because they would have forfeited some or all of their ticket price had they decided not to go on the cruise because of any objectionable clause in the form cruise ticket contract, including the venue provision. Given the evolution of business practices in today's world, especially where many contracts are formed electronically or telephonically, and where the offeree receives the complete contract only after paying the

cost, we believe the majority view is the better reasoned statement of law. As we note below, the majority view is tempered by the passenger's ability to refuse to accept the offer under well-established principles of the law of contract formation.

### Factual Background

In mid-December 2000, the Clarks ordered and paid for tickets through their travel agent for a cruise in the Caribbean aboard *Norwegian Star*, a cruise ship owned and operated by Norwegian. The departure date of the cruise was January 10, 2001. The Clarks received their tickets around December 17, 2000.<sup>1</sup> The form ticket, a folded, legal-sized document, had the title "Passenger Ticket Contract" at the top of the first page. Lower down on the first page two warnings or notices were prominently displayed. The first warning stated:

#### IMPORTANT NOTICE

The Passenger's attention is specifically directed to the terms and conditions of this contract set forth below. These terms and conditions affect important legal rights and the passenger is advised to read them carefully.

A bold black line creating a rectangular border around this notice attracted the reader's attention. The text of the warning was in white letters on a brown background, further highlighting it and distinguishing it from the surrounding text. The second warning, similarly highlighted, stated:

Passengers are advised to read the terms and conditions of the Passenger Ticket Contract set forth below. *Acceptance of this Passenger Ticket Contract by Passenger shall constitute the agreement of passenger to these Terms and Conditions.*

1. Norwegian claimed it sent the tickets to the Clarks' travel agent via air express on December 15, 2000, so they would certainly have arrived there by December 17, 2000. The travel agent forwarded the tickets to the Clarks, but Mrs. Clark claimed she received the tickets only twelve days before the sailing date of January 10, 2001. Because both the travel agent and the Clarks received the tickets within the penalty period, our analysis does not change. *Hodes v. S.N.C. Achille Lauro ed Altri-Gestione*, 1988 AMC 2829, 2839-40, 858 F.2d 905, 912 (3 Cir. 1988) ("through their own and their agent's possession of the tickets, the appellees are charged with notice of the ticket provisions"), *abrogated on other grounds, Lauro Lines S.R.L. v. Chasser*, 490 U.S. 495, 1989 AMC 1474 (1989); *Marek v. Marpan Two, Inc.*, 1987 AMC 2193, 2200, 817 F.2d 242, 247 (3 Cir. 1987) (determining that a friend's possession of ticket information is sufficient to charge traveler with notice).

(Emphasis added.) Following this second warning, filling the rest of the first page and all of the reverse, were twenty-eight paragraphs of fine print detailing the contractual terms and conditions. Paragraph 1 stated:

This passenger ticket contract (hereafter "Contract") constitutes a Contract of Passage between the carrier, Norwegian Cruise Line (hereafter referred to as "Carrier"), and the passenger or purchaser (whether or not signed by or on his behalf). All the terms and provisions of all sides of this Contract, including all of the following matter printed below, are a part of this Contract to which the passenger and/or purchaser, both on his/her behalf and on behalf of any other person or persons, including children, for whom this ticket is purchased, acknowledge and *agree to be bound thereby by accepting this Contract or transportation from the Carrier. . . .*

(Emphasis added.) Paragraph 28 stated:

This Contract shall be governed in all respects by the laws of the State of Florida and the laws of the United States of America. It is hereby agreed that any and all claims, disputes or controversies whatsoever arising from or in connection with this Contract and the transportation furnished hereunder shall be commenced, filed and litigated, if at all, before a court of proper jurisdiction located in Dade County, Florida, U.S.A.

The Clarks never objected to any term or condition of the ticket contract before they sailed as scheduled.

Unfortunately, Mrs. Clark slipped and fell on wet decking the first day out during the crush of the mandatory lifeboat drill, injuring her leg and ankle. The Clarks subsequently filed a negligence lawsuit against Norwegian in the Sixth Judicial Circuit in Pinellas County, ignoring the forum selection clause in their ticket contract. Citing the forum selection clause, Norwegian moved to dismiss or, in the alternative, to transfer the cause to the circuit court in Dade County but the trial court denied its motion. Norwegian then filed this appeal.

#### Discussion

A passenger ticket for a cruise and its terms are considered a maritime contract to be analyzed under federal maritime law. *The Moses Taylor*, 71 U.S. (4 Wall.) 411, 427 (1886); *Hodes v. S.N.C. Achille Lauro ed Altri-Gestione*, 1988 AMC 2829, 2834, 858 F.2d 905, 909 (3 Cir. 1988). The United States Supreme Court has held that forum selection clauses are

prima facie valid even though they have not been historically favored, *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 9-10, 1972 AMC 1407, 1413-14 (1972), and they should be “given controlling weight in all but the most exceptional cases.” *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 33 (1988) (Kennedy, J., concurring, citing *The Bremen*, 407 U.S. at 10, 1972 AMC at 1414). A party contesting enforcement of a forum selection provision bears the “heavy burden” of demonstrating why enforcement would be unreasonable. *The Bremen*, 407 U.S. at 17, 1972 AMC at 1419-20; *Hicks v. Carnival Cruise Lines, Inc.*, 1995 AMC 281 (E.D. Pa. 1994). *Shute* directs that these clauses be scrutinized under a fundamental fairness standard. 499 U. S. at 595, 1991 AMC at 1704. *See also Smith v. Doe*, 991 F.Supp. 781 (E.D. La. 1998) (holding that the forum selection clause in the cruise ticket contract did not violate the statutory prohibition against limiting liability for negligence of vessel owners contained in 46 U.S.C. app. §183c, and that such clause is prima facie valid and will be enforced unless the passenger shows insufficient notice of it or that the clause is fundamentally unfair).

This fundamental fairness standard requires that the provision at issue be “reasonably communicated” to the passenger, to ensure that the passenger receives sufficient notice of the conditions that he or she is accepting. *Marek v. Marpan Two, Inc.*, 1987 AMC 2193, 2197-98, 817 F.2d 242, 245 (3 Cir. 1987). The court must gauge the physical characteristics of the contractual terms and the sufficiency of the warnings as to how well they alert the passenger to the terms under which the contract will be performed. *Id.* This two-part test is a question of law. *Hodes*, 1988 AMC at 2834, 858 F.2d at 908.

The Clarks do not, as they cannot, argue that the warnings on their ticket were insufficient to notify them of the contract terms that would apply to them if they took the cruise. Rather, they contend that because they received the tickets within the penalty period and would have forfeited an undetermined amount of the ticket price had they decided to cancel,<sup>2</sup> Norwegian

2. Norwegian and the Clarks dispute just how much money the Clarks would have forfeited had they not accepted the terms of the contract and declined to cruise aboard the *Norwegian Star* after they received their tickets.

In any event, the forfeiture amount is not controlling. The majority view is that forum selection clauses, such as Norwegian’s, are enforceable because the passenger had adequate and reasonable notice of them, despite the cancellation fee. *See, e.g., Ferketich v. Carnival Cruise Lines*, 2002 AMC 2956 (E.D. Pa. 2002) (enforcing similar clause although passenger would have paid a \$350 cancellation fee had she not accepted the contract terms and refused to cruise); *Cross v. Kloster Cruise Lines, Ltd.*, 897 F.Supp. 1304, 1309, 1996 AMC 1215 [DRO] (D. Or. 1995) (\$400 cancellation fee); *Hicks v. Carnival Cruise Lines, Inc.*,

provided them with insufficient notice of the ticket's conditions so as to render the contract fundamentally unfair. We, and the majority of jurisdictions, disagree. *See, e.g., Hicks*, 1995 AMC 281 (E.D. Pa. 1994) (holding that provided the passenger received the ticket prior to boarding, the issue is not when the passenger received the ticket but how the forum selection clause was communicated in the ticket).

The Supreme Court's case of *Shute*, 499 U.S. 585, 1991 AMC 1697, is the seminal authority on venue provisions in form contracts for passage on cruise ships. Mrs. Shute, a resident of Washington State, bought a ticket for a cruise with Carnival, a Florida-based company, for a cruise to Puerto Vallarta, Mexico, that departed from Los Angeles, California. While on board in international waters off the coast of Mexico, she slipped on a deck mat during a tour of the ship's kitchens and injured herself. She filed a negligence action in federal district court in the state of Washington. That court enforced the forum selection clause, *Shute v. Carnival Cruise Lines, Inc.*, 1988 AMC 591 (W.D. Wash. 1987) but was reversed by the Ninth Circuit, *Shute v. Carnival Cruise Lines, Inc.*, 1990 AMC 1757, 897 F.2d 377 (9 Cir. 1990). The Supreme Court, in turn, reversed the Ninth Circuit, and began its discussion by extending its analysis of a case it had decided in 1972 that dealt with the forum selection clause in a contract between two international business entities, *The Bremen*, 407 U.S. at 1, 1972 AMC at 1408. The Court held in *Shute* that, unlike the contract between two business corporations, a forum selection clause in a routine form passenger cruise line ticket, which was not subject to individual negotiation, was nonetheless enforceable and fundamentally fair because, among other reasons, the forum selection clause was not used as a means of discouraging cruise ship passengers from pursuing legitimate claims. 499 U.S. at 594, 1991 AMC at 1704.

The Supreme Court found that the clause was permissible for several reasons: the cruise line had a special interest in limiting the forums in which it could be sued, the clause was beneficial in dispelling any confusion about where suits arising from the contract could be brought and defended, sparing the parties and the court the time and expense of pretrial motions to determine the correct forum, and passengers who purchased tickets containing a forum selection clause benefitted by reduced fares that reflected

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1995 AMC 281 (E.D. Pa. 1994); *Miller v. Regency Maritime Corp.*, 1993 AMC 1103, 1106-7, 824 F.Supp. 200, 203 (N.D. Fla. 1992) (enforcing forum selection clause despite 45% of ticket cost forfeiture provision).

the savings the cruise line enjoyed by limiting the forums in which it may be sued. 499 U.S. at 594, 1991 AMC at 1703-4.

The cruise line in *Shute*, Carnival, had its principal place of business in Florida, so its forum selection clause designated courts in Florida as the jurisdiction in which to resolve disputes with its passengers. 499 U.S. at 588-89, 1991 AMC at 1699. There was also no evidence of fraud or overreaching, despite the contract not being subject to individual negotiation. Mrs. Shute conceded receipt of notice of the forum selection clause, so the Supreme Court “presumed” she retained the option of “rejecting the contract with impunity.” 499 U.S. at 595, 1991 AMC at 1704. It concluded that the forum selection clause should be enforced.

It is the “with impunity” language of *Shute* that divides the parties before us. Justice Stevens, in his lengthy dissent, 499 U. S. at 597-605, 1991 AMC at 1706-12, in which Justice Marshall joined, specifically objected to Mrs. Shute’s predicament, which he considered unfair. He pointed out that many passengers receive actual notice of the forum selection clause long after their ability to obtain a refund had passed:

Of course, many passengers, like the respondents in this case, *see ante*, 499 U.S. at 587, 1991 AMC at 1700 will not have an opportunity to read ¶8 until they have actually purchased their tickets. By this point, the passengers will already have accepted the condition set forth in ¶16(a), which provides that “the Carrier shall not be liable to make any refund to passengers in respect of . . . tickets wholly or partly not used by a passenger.” Not knowing whether or not that provision is legally enforceable, I assume that the average passenger would accept the risk of having to file suit in Florida in the event of an injury, rather than canceling—without a refund—a planned vacation at the last minute. The fact that the cruise line can reduce its litigation costs, and therefore its liability insurance premiums, by forcing this choice on its passengers does not, in my opinion, suffice to render the provision reasonable. *Cf. Steven v. Fidelity & Casualty Co. of New York*, 58 Cal.2d 862, 883, 377 P.2d 284, 298 (1962) (refusing to enforce limitation on liability in insurance policy because insured “must purchase the policy before he even knows its provisions”).

*Shute*, 499 U.S. at 597-98, 1991 AMC at 1706 (Stevens, J., dissenting). We share Justice Stevens’s and Justice Marshall’s concern. However, we do not find that the time frame that remained for the Clarks to reject the offer to cruise, approximately twenty-four days, too short a time that they

could not have cancelled the cruise “with impunity.” *Accord, Thomas v. Costa Cruise Lines N.V.*, 892 S.W.2d 837 (Tenn. Ct. App. 1994).

In *Thomas*, Mr. Thomas stated in his affidavit that he had not seen anything in the promotional literature or on the ticket about a forum selection clause and considered that he had concluded the agreement with the cruise line when he paid their required price and received their assurance that space described by them had been reserved for him. *Id.* at 841. The Tennessee Court of Appeals noted that under similar circumstances the Supreme Court in *Shute* enforced the forum-selection clause. The Tennessee appellate court found that Mr. Thomas’s receipt of the ticket containing the contract terms about a month before embarkation, combined with his subsequent passage on the cruise, was sufficient to ratify the contract. The court noted that while the ticket contract was essentially a contract of adhesion, which may appear unfair to Mr. Thomas, “it would be more unfair — and grossly inefficient — to compel cruise lines and other common carriers to negotiate all contract terms with their many passengers.” *Id.* Had there been different circumstances, such as where tickets with these limiting provisions were not given to passengers until they embarked, the court might have taken a different view. *Id.* at 841-42 (citing *Barbachym v. Costa Line, Inc.*, 1984 AMC 1484, 713 F.2d 216 (6 Cir. 1983) (refusing to enforce a contractual limitations period because the ticket stated that all conditions of transportation were held by the group’s leader)). In Mr. Thomas’s case, he would have suffered a 25% penalty for cancelling the cruise at the time he received his ticket. Mr. Thomas found himself in a similar situation to Mrs. Shute’s. Indeed, Mrs. Shute’s ticket stated that the fare would be considered earned when paid and did not appear refundable at all. 892 S.W.2d at 841-42 n.2. The Tennessee appellate court then assumed, as did the United States Supreme Court, “that such a provision would be unenforceable for a reasonable period of time following receipt of the ticket since it was not called to the passenger’s attention in time to cancel with impunity.”

We also question whether such a penalty could have been legally enforced had the Clarks decided not to take the cruise, but that question is not presently before us. That discussion would entail the principles of contract formation, specifically, the subissues of offer and acceptance. *See Sumerel v. Pinder*, 83 So.2d 692 (Fla. 1955) (holding that to form a contract, it is necessary that there be a meeting of the minds by an acceptance and performance within the terms of the offer); *Bullock v. Harwick*, 30 So.2d 539, 541-42 (Fla. 1947) (holding that a mere offer not assented to does not constitute a contract and so long as the proposal is not acceded to, it is binding on neither party and may be retracted); *Continental Cas. Co. v.*

*City of Ocala*, 127 So. 894 (Fla. 1930) (holding that an insurance policy as issued and accepted is prima facie the contract of parties). *Id.*

The Supreme Court clearly recognized that policy benefits accrued to the cruise lines only when the policy regarding the forum for litigation was uniform. The Supreme Court was well aware that passengers like Mrs. Shute would not necessarily be able to obtain a full refund of the ticket price if they objected to the forum selection clause in the passenger ticket, but it nonetheless rejected the idea that some passengers — though not all passengers — would not be able to avoid the forum selection clause simply because they received their tickets within the penalty period. Weighing the disadvantages to Mrs. Shute against the advantages to the cruise line industry, the Supreme Court nonetheless determined as a matter of law that this same type of passenger ticket with this same type of forum selection clause has public policy benefits, that there are overriding national concerns that mandated enforcement of the contract, and that inconsistent and varying adjudications within the fifty states would have a detrimental impact on federal law. *Shute*, 499 U.S. at 593-94, 1991 AMC at 1703.

We find no factual or legal basis to distinguish this case from *Shute* or the many cases that comprise the majority view. Indeed, the majority of courts following *Shute* have recognized that many (if not most of the passengers, like the Clarks) never read the ticket. *See, e.g., Cross v. Kloster Cruise Lines, Ltd.*, 897 F.Supp. 1304, 1996 AMC 1215 [DRO] (D.Or. 1995); *Lousararian v. Royal Caribbean Corp.*, 1992 AMC 1399, 951 F.2d 7 (1 Cir. 1991); *Kendall v. American Hawaii Cruises*, 1989 AMC 2478, 2487, 704 F.Supp. 1010, 1017 (D. Haw. 1989); *Marek v. Marpan Two*, 1987 AMC 2193, 817 F.2d 242. These courts have determined that the reasonable communication of the ticket, that is, the ability to become informed — and not the timing of its purchase or receipt — controls the issue of whether the forum selection clause, or any other clause for that matter, was reasonably communicated to the passenger. *See also Viney v. Kloster Cruise, Ltd.*, 1997 AMC 544 (N.D. Cal. 1996) (holding that the passenger was bound by the forum selection clause even where she received her ticket only a few days before the cruise and where she could not have canceled her trip without incurring a penalty).

We adopt the majority rule as discussed above and, accordingly, reverse and remand with instructions to transfer this cause to the Eleventh Judicial Circuit Court in Dade County.

Reversed and remanded with instructions. (ALTENBERND, C.J., and KELLY, J., Concur.)





**RALPH A. SILWARE, ET AL.**

v.

**HOLLAND-AMERICA LINE WESTOURS, INC., ET AL.**

United States District Court, Western District of Washington (Seattle), January 6, 1998  
C97-963C (consolidated with 97-1556C)

**LACHES AND LIMITATIONS — 113. Personal Injury, Death and Seamen's  
Wages — PASSENGERS — 123. Time to Commence Suit.**

The husband and daughter of plaintiff/passenger brought separate actions for damages allegedly suffered by them as a result of plaintiff's injuries aboard defendant's cruise ship. *Held*: Granting defendant's motion for summary judgment, both claims are barred by the one-year time for suit provision contained in plaintiff's ticket contract with defendant. The provision is enforceable because it meets both prongs of the Ninth Circuit's "reasonably communicated" test. The daughter's status as a minor does not toll the limitations provision as to her, as her derivative claim is subject to the same contractual limitations as is the plaintiff's claim.

**PASSENGERS — 123. Time to Commence Suit.**

The alleged failure of defendant cruise operator to provide proper medical attention subsequent to plaintiff's accident does not serve to delay the running of a contractual limitations period against plaintiff or anyone else claiming damages as a result of plaintiffs injuries. As limitations are measured from the date of the accident, the derivative claims of plaintiff's husband and daughter are time-barred.

Joseph S. Stacey (Beard, LeDoux, Stacey & Treub) for *Ralph A. Silware*  
Patrick G. Middleton (Forsberg & Umlauf) for *Holland-America Line Westours, Inc.*

JOHN C. COUGHENOUR, D.J.:

This matter is before the Court on defendant Holland-America Line Westours, Inc.'s ("HALW") motion for summary judgment. For the reasons stated below, the motion is hereby granted.

**Background**

This lawsuit arises out of an injury suffered by Rochelle Silware ("Mrs. Silware") aboard defendants' vessel the *M/S Ryndham* on September 24, 1996. Mrs. Silware obtained her ticket-contract ("contract") prior to boarding the vessel. The contract contains a notice in heavy, bold print that the contract contains a statement of the passengers' rights under the contract and that the contract may contain terms limiting passengers' rights to assert claims against the vessel owners. One clause of the contract requires actions

for personal injuries suffered aboard the vessel to be brought within one year of the injury.

Subsequent to Mrs. Silware's injury on September 24, 1996, she brought suit against defendants on July 23, 1997. Ralph A. Silware ("Mr. Silware") and Jessica Ivy Bronson ("Jessica Ivy"), Mrs. Silware's spouse and child respectively, brought a separate suit on September 25, 1997. The Court then consolidated the two lawsuits. Defendant HALW now moves for summary judgment with respect to Mr. Silware's and Jessica Ivy's claims arguing that they are untimely.

### Analysis

Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, and admissions, together with affidavits, show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56(c). Under the Rule, summary judgment must be entered "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 106 S. Ct. 2548, 2552 (1986).

#### *I. Enforceability of the One-Year Limitations Period*

The Ninth Circuit employs a two-pronged "reasonably communicated" test in determining the enforceability of a time limitation provision contained in a ticket-contract. *Diero v. American Airlines, Inc.*, 816 F.2d 1360, 1364 (9 Cir. 1987). The first prong looks to the ticket-contract itself and determines the ease with which a passenger can apprise him or herself of the provisions. The second prong looks to the circumstances surrounding the receipt and retention of the contract in determining whether the passenger should have appraised him or herself of the provisions in the contract. *Diero*, 816 F.2d at 1364.

In the present case, the Court finds that the contract meets the reasonably communicated test and therefore concludes that the one-year limitation is enforceable. The contract states in all capital letters in bold print that the contract contains terms governing the rights of the passengers. It directs particular attention to certain clauses, one of which provides that actions for loss of life or bodily injury must be commenced within one year. Plaintiffs focus on the second prong in arguing that Rochelle did not receive actual notice of the limitations period prior to boarding the vessel.

Plaintiffs' focus on the limited amount of time which elapsed between Mrs. Silware's receipt of the ticket and her boarding of the *Ryndham* is misdirected. Mrs. Silware need not have actually read the provision in order for the provision to be enforceable. *Kendall v. American Hawaii Cruises*, 1989 AMC 2478, 2486, 704 F.Supp. 1010, 1016 (D. Haw. 1989). Plaintiffs do not present any evidence that Mrs. Silware was unable to read the provisions of the contract subsequent to boarding the vessel or subsequent to the accident. Evidence presented by defendants indicates that plaintiffs' counsel was cognizant of the one-year limitation at least by August 19, 1997. Nevertheless Mr. Silware and Jessica Ivy failed to file suit until September 25, 1997. Their claims are, therefore, untimely. Fed. R. Civ. P. 6(a); *McConnell v. Thomson Newspapers, Inc.*, 802 F.Supp. 1484, 1496 (E.D. Tex. 1992) (two-year statute of limitations ran on second year anniversary of event triggering act).

## II. Plaintiff's Remaining Contentions

Plaintiff contends that the limitation period should not be applied against Jessica Ivy because of her status as a minor. Additionally, plaintiff claims that because defendants' negligence continued past September 24, 1996, the limitation period should not bar the claims. Plaintiffs' contentions are not meritorious.

Plaintiff does not present any authority for the proposition that Jessica Ivy's status as a minor excuses her failure to comply with the one year bar. Case law is clear in holding that the time limit applicable to the underlying injury also applies to derivative claims arising from that injury. *Miller v. Lykes Bros. S.S. Co.*, 467 F.2d 464, 466-67 (5 Cir. 1972). Because Mrs. Silware's claims would be barred if brought on September 25, 1997, and because Jessica Ivy's claims are based on Mrs. Silware's claims, Jessica Ivy's claims are barred as well.

Plaintiff also alleges that "[subsequent to the injury] Holland-America failed to provide adequate medical care, further causing injuries." Notwithstanding the fact that such a conclusory allegation is insufficient to create an issue of fact and withstand a motion for summary judgment, Mr. Silware and Jessica Ivy's cause of action accrued on September 24, 1996, the date of Mrs. Silware's alleged injury. While the exacerbation of Mrs. Silware's injury may affect the amount of damages that would have been recoverable by Mr. Silware and Jessica-Ivy, Mr. Silware and Jessica Ivy do not put forth persuasive authority for the proposition that HALW's failure to pro-

vide adequate medical treatment affects the date on which Mr. Silware and Jessica Ivy's cause of action accrued.

### **Conclusion**

In conclusion, the ticket-contract contains an enforceable limitations clause. Because plaintiffs Mr. Silware and Jessica Ivy failed to bring their actions in a timely manner as required by the terms of the contract, HALW's motion for summary judgment is hereby granted. Jessica Ivy and Mr. Silware's claims are hereby dismissed with prejudice.



**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 Brief of Defendants/Respondents Holland America Line-USA Inc. and Holland America Line Inc. on the following individuals in the manner indicated:

Mr. Noah Davis  
In Pacta, PLLC  
705 2nd Avenue, Suite 601  
Seattle, WA 98104  
( x ) Via Hand Delivery

Clerk of the Court  
Court of Appeals Div. I  
One Union Square  
600 University  
Seattle, WA. 98101  
( x ) Via Hand Delivery

SIGNED this 21<sup>st</sup> day of February, 2006, at Seattle,  
Washington.

  
Courtney Baasch

FILED  
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STATE OF WASHINGTON  
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