

NO. 10-1256

SUPREME COURT OF FLORIDA

WALTER WEISENBERG

Petitioner,

vs.

COSTA CROCIERE, S.p.A.

Respondent.

*On Appeal From the Third District Court of Appeal
LT Case No(s): 3D07-555; 04-23514*

PETITIONER'S JURISDICTIONAL BRIEF

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INTRODUCTION

Petitioner seeks review of *Weisenberg v. Costa Crociere, S.p.A.*, 35 So.3d 910 (Fla. 3d DCA 2010) (rehearing denied and question of great public importance certified).¹ This petition raises the same issues raised in several petitions for review pending before this Court arising out of a series of decisions from the Third District in which panel opinions were left intact by a 5-5 split vote of the Third District Court of Appeals sitting *en banc*. See *Leslie v. Carnival Corp.*, 22 So.3d 561 (Fla. 3d DCA 2008), reh. *en banc* denied, 22 So.3d 567 (Fla. 3d DCA 2009); *Spivey-Ferguson v. Carnival Corp.*, 22 S.3d 566 (Fla. 3d DCA 2008), reh. denied and question certified, 22 So.3d 567 (Fla. 3d DCA 2009); *Garcia v. Carnival Corp.*, 22 So.3d 567 (Fla. 3d DCA February 20, 2008)(SC09-2410); *Barry v. Carnival Corp.*, 22 So.3d 561 (Fla. 3d DCA 2009) (SC09-2409).

STATEMENT OF THE CASE AND FACTS

Accordingly, the facts are taken from the *Weisenberg* panel opinion as well as the *en banc* opinion, into which *Leslie*, *Spivey-Ferguson*, *Garcia* and *Barry* were consolidated.

Walter Weisenberg sustained personal injuries while traveling as a passenger aboard a Costa Crociere vessel. Weisenberg paid his fare for his cruise

and was subsequently issued a ticket of passage, which included a clause which required any suit to be brought in the United States District Court for the Southern District of Florida. 35 S.3d at 911.

The effect of the “federal court only” forum selection clause is to deprive Weisenberg of right to a jury trial because he may only file on the admiralty side of the federal court where no right to a jury trial exists.

SUMMARY OF THE ARGUMENT

The Third District Court of Appeal decisions under review expressly and directly conflict with decisions of this Court or sister district courts of appeal on three points. First, the opinions conflict with *Carlisle*, *Rountree* and *Still* by holding that the Saving to Suitors Clause does not guarantee maritime tort plaintiffs the right to file suit in state court. Second, the decision conflicts directly with *Carlisle* because it violates the principle of uniformity of maritime law. Third, the decision conflicts with decisions from this Court which hold that a waiver of constitutional rights such as right to trial by jury must be knowingly made. Here, that right was taken away from the Plaintiff without notice or consent by virtue of a pre-printed cruise ticket which was provided to Weisenberg after he purchased a non-refundable cruise.

ARGUMENT

I. THE PANEL OPINION DIRECTLY AND EXPRESSLY CONFLICTS WITH DECISIONS OF THIS COURT AS WELL AS THE FIRST AND SECOND DISTRICT COURTS OF APPEAL WHICH HOLD – LIKE EVERY OTHER COURT TO ADDRESS THE ISSUE IN THE NATION – THAT THE SAVING TO SUITORS CLAUSE GUARANTEES MARITIME TORT PLAINTIFFS THE RIGHT TO FILE SUIT IN STATE COURT WHERE THEY ARE ENTITLED TO A JURY TRIAL.

Every single court in the land to address the Saving to Suitors clause in the last two hundred years has acknowledged that it provides a victim of a maritime tort an unquestioned right to file suit in state court to recover for damages. This includes, first and foremost, the United States Supreme Court. *See, e.g., Lewis v. Lewis and Clark Marine, Inc.*, 531 U.S. 438, 454-55, 121 S.Ct. 993, 148 L.Ed.2d 931 (2001) (“trial by jury is an obvious, but not exclusive, example of the remedies available to suitors.”). *Madruga v. Superior Court*, 346 U.S. 556, 560-561, 74 S.Ct. 298, 98 L.Ed.2d 290 (1954); *Langes v. Green*, 282 U.S. 531 (1932); *Red Cross Line v. Atlantic Food Corp.*, 264 U.S. 109 (1924). Indeed, the authors of the leading treatise on federal practice and procedure have acknowledged that the effect of the clause is to give an *in personam* plaintiff “the

choice of proceeding in an ordinary civil action in a state or federal court, rather than bringing a libel in admiralty in federal court.” 14 A. Charles Alan Wright, Arthur R. Miller and Edward H. Cooper, *Federal Practice and Procedure*, Section 3672 (2009).

More to the point for purposes of this jurisdictional brief, are the decisions of this Court in *Carnival Corp. v. Carlisle*, 953 So.2d 461 (Fla. 2007), and the First and Second District Courts of Appeal in *Still v. Dixon*, 337 So.2d 1033 (Fla. 2d DCA 1976) and *Rountree v. A.P. Moller Steamship Co.*, 218 So.2d 771 (Fla. 1st DCA 1969).

In *Carnival Corp. v. Carlisle*, this Court acknowledged that “under the ‘Saving to Suitors Clause’ of the Judiciary Act of 1789 . . . state courts have concurrent jurisdiction with the federal courts as to *in personam* claims based on maritime torts.” 953 So. 2d at 464.

The Third District has now held that “the federal Saving to Suitors Clause confers no enforceable state court ‘right’ to a jury trial or anything else on a maritime plaintiff.” *Leslie v. Carnival Corp.*, 22 So.3d 567, 568 (Fla. 3d DCA November 25, 2009) (*en banc*) (Shepard, J, concurring). The panel opinion herein is based directly upon that holding. This holding expressly and directly conflicts with *Carlisle*, *Rountree*, and *Still*, and with 200 years of uniform

maritime authority.

Still v. Dixon, 337 So.2d 1033 (Fla. 2d DCA 1976) involved a maritime claim for breach of contract and negligence. The trial court dismissed the law suit, citing lack of jurisdiction pursuant to Article III, Section 2, of the Constitution of the United States which provides that “the judicial power shall extend . . . to all cases of admiralty and maritime jurisdiction.” *Id.* On appeal, the Second District reversed on the basis of the “Saving to Suitors” clause of 28 U.S.C. § 1333 which “preserves to a plaintiff the right to institute common law actions in courts of this state seeking *in personam* judgments for damages arising from maritime torts and contracts.” *Id.* at 1035 (citing *Rountree v. A.P. Moller Steamship Co.*, *supra*).

In *Rountree*, as in *Still v. Dixon*, the trial court dismissed the action, finding that jurisdiction lay only in federal court. The First District Court reversed, relying upon Norris, *Maritime Personal Injuries*, 209 2d Edition, Section 84 which says:

The common law courts had concurrent jurisdiction with the courts of admiralty prior to the adoption of the Constitution in causes of action against a shipowner in contract or in tort when he could be reached personally and money damages only were demanded. The constitutional provision gave to the admiralty courts exclusive jurisdiction wherever admiralty had such exclusive jurisdiction prior to the adoption of the

Constitution; and when the jurisdiction was concurrent with the common law courts it remained so.

The common law remedy saved to suitors is the right to proceed *in personam* against the defendant wherever the common law is competent to give a remedy. Stated another way, one who holds an in personam claim enforceable by a libel *in personam* in admiralty, can bring suit at his election in a common law court provided that the jurisdictional requirements of the latter court is met and the remedies sought is one which the common law court had concurrent jurisdiction with admiralty at the time of the adoption of the Constitution.

Id. at 773-774. Accordingly, the First District reinstated Mr. Rountree's maritime tort claim.

The opinion on review here and the various panel opinions left intact by the Third District Court of Appeal's *en banc* decision in *Leslie*, expressly and directly conflict with these two sister court decisions. Indeed, they also conflict with prior decisions of the Third District itself, although that conflict does not create jurisdiction before this Court. *See, e.g., Hallman v. Carnival Cruise Lines, Inc.*, 459 So.2d 378 (Fla. 3d DCA 1984) (noting that "the plaintiffs are clearly entitled to sue in state courts for damages arising from maritime torts occurring on navigable waters in this country. . .") (citing, *inter alia*, *Still v. Dixon*, and *Rountree v. A.P. Moller Steamship Co.*); *Royal Netherlands Steamship Co. v. Garcia*, 489 So.2d 128 (Fla. 3d DCA 1986) (Saving to Suitors Clause permits

plaintiff to file admiralty action in state court).

The *Leslie* panel opinion clearly acknowledges the arguments raised by the petitioners herein, in Section II of its opinion, where it acknowledged *Leslie's* argument that “Carnival’s forum selection . . . operates to deprive maritime passengers of their ‘historic option’ and right under the Saving to Suitors Clause of 28 U.S.C. [section] 1331(1) to initiate their suits in state court and then goes on to “acknowledge the disruption to traditional maritime policy caused by Carnival’s new forum selection clause.”

Accordingly, direct and express conflict exists even though neither *Weisenberg* nor the *Leslie* panel decision nor the *en banc* decision cite to *Carlisle*, *Rountree* or *Still*. See, e.g., *Wallace v. Dean*, 3 So. 3d 1035 (Fla. 2009). As this Court noted in *Wallace v. Dean*, the underlying district court of appeal decision, *Wallace v. Dean*, 970 So.2d 864 (Fla. 5th DCA 2007), clearly acknowledged that the plaintiff/petitioner had repeatedly relied upon the undertaker’s doctrine before the Fifth District, observing that such was “readily apparent from reading the Fifth District’s decision.” 3 So.3d at 1038. Thus, the Fifth District’s decision “announced a rule of law that conflicts with the host of decisions” that were not cited by the District Court. *Id.* at 1939.

Likewise, here, it is readily apparent in reading both the panel decision in

Leslie (upon which the *Weisenberg* decision is based) as well as the *en banc* decision, that the Third District has announced a rule of law that conflicts with *Carlisle, Rountree* and *Still v. Dixon*.

II. THE THIRD DISTRICT'S OPINION ALSO EXPRESSLY AND DIRECTLY CONFLICTS WITH THIS COURT'S OPINION IN *CARNIVAL CORP. V. CARLISLE*, 953 SO. 2D 461 (FLA. 2007) BECAUSE IT VIOLATES THE PRINCIPLE OF UNIFORMITY OF MARITIME LAW.

In *Carlisle*, this Court addressed the following certified question of great public importance:

Whether a cruise line is vicariously liable for the medical malpractice of the shipboard doctor, committed on a ship's passenger?

953 So.2d at 462. This Court acknowledged that federal maritime law is an amalgamation of federal legislation, federal common law, and state maritime law. *Id.* at 464. In order to address the certified question, this Court needed to answer the question of whether there was a uniform federal position on the issue of the liability of cruise ships for the malpractice of physicians upon cruise line passengers. *Id.* at 465.

This Court canvassed the existing authority on the issue, and concluded that despite a long line of precedent reciting that a shipowner may not be held

vicariously liable for the medical negligence of its shipboard doctor, the Third District had followed the sole decision at that time to hold that liability may be imputed to a shipowner under a theory of *respondeat superior*. *Id.* at 469. Notwithstanding that this Court found merit in the plaintiff’s argument and the reasoning of the district court, this Court felt constrained “because this is a maritime case,” to “adhere to the federal principles of harmony and uniformity when applying federal maritime law.” *Id.* at 470.

The Third District Court of Appeal panel decision in *Weisenberg*, violates that same rule of uniformity which this Court acknowledged and adhered to in *Carlisle*. Indeed, the admiralty rule which the Third District now has refused to follow – that the Saving to Suitors Clause vests maritime tort victims with the *right* to file suit in state court – is even *more* uniform than was the maritime authority in *Carlisle*. As the dissenting *en banc* opinion in *Leslie* noted, “there is not a single case in American jurisprudence” which supports the decision below. Accordingly, the opinion on review expressly and directly conflicts with *Carlisle*.

**III. THE THIRD DISTRICT’S OPINION ALSO
CONFLICTS WITH DECISIONS OF THIS
COURT WHICH HOLD THAT A WAIVER
OF CONSTITUTIONAL RIGHTS SUCH AS
THE RIGHT TO TRIAL BY JURY MUST BE
KNOWINGLY MADE.**

The Saving to Suitors Clause establishes a clear right to a jury trial in Florida state courts which was taken away from the plaintiffs in these cases without notice or consent. The Florida Constitution expressly provides for the right to trial by jury. Art. I, Sec. 22, Fla. Const.

The District Court opinions are in conflict with decisions of this Court which hold that “questions as to the right to a jury trial should be resolved if at all possible in favor of the party seeking the jury trial, for that right is fundamentally guaranteed by the U.S. and Florida Constitutions.” *Hollywood, Inc. v. City of Hollywood*, 321 So.2d 65, 71 (Fla. 1975). *See also Chames v. DeMayo*, 972 So.2d 850, 860-61 (Fla. 2007) (“we have also emphasized that such waivers [of constitutional rights] must be made knowingly, voluntarily, and intelligently”); *Blair v. State*, 698 So.2d 1210 (Fla. 1997) (same). The District Court opinion under review conflicts with those authorities issued by this Court.

CONCLUSION

This Court should exercise jurisdiction, quash the Third District decision, and declare Costa Crociere’s federal forum selection clause invalid.

CERTIFICATE OF COMPLIANCE WITH FONT STANDARD

Undersigned counsel hereby certify that the foregoing brief complies with Fla.R.App.P. 9.210, and has been typed in Times New Roman, 14 point font.

PROOF OF SERVICE

I, Philip D. Parrish, do swear or declare that on this date, July 26, 2010 as required by U.S. Supreme Court Rule 29, I have served the enclosed JURISDICTION BRIEF on each party to the above proceeding or that party's counsel and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid, or by delivery to a third-party commercial carrier for deliver within 3 calendar days.

The names and address of those served are as follows: Richard McAlpin, Esq. and Gabriela M. Prado, Esq., McALPIN CONROY, PA, *Attorneys for Respondent*, 80 SW 8th Street, Suite 2805, Miami, Florida 33130-3047 and Michael Guilford, Esquire, MICHAEL F. GUILFORD, PA, *Attorneys for Petitioner*, 44 West Flagler Street, Ste 750, Miami, FL 33130.

I declare under penalty of perjury that the foregoing is true and correct.

Respectfully submitted,

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