

IN THE SUPREME COURT OF FLORIDA

CASE NO: 10-1256

LT CASE NO: 3D07-555

WALTER WIESENBERG

Petitioner

vs.

COSTA CROCIERE S.p.A.

Respondent.

On petition for review from the Third District Court of Appeal

**RESPONDENT'S RESPONSE TO PETITIONER'S
JURISDICTIONAL BRIEF**

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STATEMENT OF THE CASE AND FACTS

On February 24, 2010, the Third District Court of Appeal issued an opinion in this matter regarding the validity of the forum selection clause contained within Costa Crociere S.p.A.'s Contract of Carriage. *Wiesenberg v. Costa Crociere S.p.A.*, 35 So. 3d 910 (Fla. 3d DCA 2010), *reh'g denied and question of great public importance certified*, 2010 Fla. App. LEXIS 7617 (Fla. 3d DCA June 2, 2010). Relying on *Leslie v. Carnival Corporation*, 22 So. 3d 561 (Fla. 3d DCA 2008) and *Spivey-Ferguson v. Carnival Corporation*, 22 So. 3d 566 (Fla. 3d DCA 2008), the Third District Court of Appeal held that Costa's forum selection clause, requiring certain cruise passengers to litigate any suits against Costa in the United States District Court for the Southern District of Florida, Broward Division, under the Court's Admiralty Jurisdiction, is valid. *Wiesenberg v. Costa Crociere S.p.A.*, 35 So. 3d 910 (Fla. 3d DCA 2010); *see also Leslie v. Carnival Corporation*, 22 So. 3d 561 (Fla. 3d DCA 2008) *reh'g denied en banc*, 22 So. 3d 567 (Fla. 3d DCA 2009); *Spivey-Ferguson v. Carnival Corporation*, 22 So. 3d 566 (Fla. 3d DCA 2008), *reh'g denied and question certified*, 22 So. 3d 567 (Fla. 3d DCA 2009).

After the Third District Court of Appeals rendered its decision upholding the validity of Costa's forum selection clause, Petitioner sought a rehearing, or

alternatively, the certification of a question of great public importance.¹ On June 2, 2010, the Third District Court of Appeal, while denying rehearing, certified this matter as an issue of great public importance. *Wiesenberg v. Costa Crociere S.p.A.*, 35 So. 3d 910 (Fla. 3d DCA 2010), *reh'g denied and question of great public importance certified*, 2010 Fla. App. LEXIS 7617 (Fla. 3d DCA June 2, 2010). However, Petitioner seeks an additional basis for review claiming that the *Wiesenberg* opinion, in conjunction with the consolidated *en banc* opinion involving *Leslie*, *Spivey-Ferguson*, *Garcia*, and *Barry*, expressly and directly conflict with decisions of this Court and other district courts of appeal. As discussed below, there exists no express and direct conflict with the decisions of this Court and other district courts of appeal of this State. Thus, this Court does not have jurisdiction to review the *Wiesenberg* opinion based on express and direct conflict as contemplated by Article V, Section 3(b) of the Florida Constitution, and therefore must deny this petition for discretionary jurisdiction. *See also Ansin v. Thurston*, 101 So. 2d 808 (Fla. 1958); Fla. R. App. P. 9.030 (a)(2)(A)(iv).

¹ Respondent notes that while Petitioner's Motion for Rehearing/Certification was filed with the Third District Court of Appeal, Respondent's counsel of record was never served with said Motion. In fact, it was not until the Third District Court of Appeal issued its opinion on Petitioner's Motion for Rehearing/Certification that Respondent's counsel were notified a rehearing and/or certification was ever requested.

SUMMARY OF THE ARGUMENT

Petitioner erroneously seeks review of the Third District Court's opinion in *Wiesenberg v. Costa Crociere S.p.A.*, 35 So. 3d 910 (Fla. 3d DCA 2010), as there exists no express or direct conflict with *Wiesenberg* and the decisions of this Court and other district courts of appeal. In view of the fact that, unlike *Wiesenberg*, none of the cases cited by Petitioner involve a forum selection clause, the *Wiesenberg* opinion does not provide a basis by which this Court may invoke jurisdiction based on express and direct conflict. Thus, this Court does not have jurisdiction to review the *Wiesenberg* opinion based on express and direct conflict as contemplated by Article V, Section 3(b) of the Florida Constitution, and therefore must deny this petition for discretionary jurisdiction. *See also Ansin v. Thurston*, 101 So. 2d 808, 810 (Fla. 1958); Fla. R. App. P. 9.030(a)(2)(A)(iv).

ARGUMENT

I. PETITIONER’S ARGUMENTS IMPROPERLY EXCEED THE FOUR CORNERS OF THE OPINIONS ON REVIEW BY THIS COURT AND STRUGGLE TO PORTRAY AN EXPRESS AND DIRECT CONFLICT WHERE NO SUCH CONFLICT EXISTS.

While Petitioner has espoused various arguments in an attempt to create an express and direct conflict, Petitioner’s arguments are, nevertheless, flawed in several respects. First, “[t]he jurisdiction of this Court extends only to the narrow class of cases enumerated in Article V, Section 3(b) of the Florida Constitution.” *See Gandy v. State*, 846 So. 2d 1141 (Fla. 2003). To be sure, Article V, Section 3(b)(3) of the Florida Constitution enables this Court to review a decision of a district court of appeal that expressly or directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law. Moreover, this Court has required that such a conflict appear within the four corners of the decision brought for review. *See Gandy*, 846 So. 2d at 1144, *citing Persaud v. State*, 838 So. 2d 529 (Fla. 2003); *Reaves v. State*, 485 So. 2d 829 (Fla. 1986); *Ford Motor Co. v. Kikis*, 401 So. 2d 1341 (Fla. 1981).

In this case, while Petitioner asserts conflict jurisdiction based on the *Wiesenberg* opinion, Petitioner also seeks to establish conflict by characterizing the concurring opinion in *Leslie*, as a holding. *See* Petitioner’s Jurisdictional Brief at page 4 *citing Leslie v. Carnival Corporation*, 22 So. 3d 567, 568 (Fla. 3d DCA

2009), *en banc*, (Shepard, J., concurring). Indeed, concurring opinions go beyond the four corners of a controlling opinion and are not a proper basis on which to assert conflict jurisdiction. *See Reaves v. State*, 485 So. 2d 829 (Fla. 1986); *Jenkins v. State*, 385 So. 2d 1356 (Fla. 1980). In other words, conflict jurisdiction cannot be based on a separate, non-binding opinion. *See Reaves v. State*, 489 So. 2d 829 (Fla. 1986); *Dodi Publishing v. Editorial America, S.A.*, 385 So. 2d 1369 (Fla. 1980); *Jenkins v. State*, 385 So. 2d 1356 (Fla. 1980). As such, Petitioner's characterization of a concurring opinion as a holding must be rejected given that no express or direct conflict exists within the four corners of the opinions on review by this Court.

II. THE OPINIONS ON REVIEW BY THIS COURT NEITHER EXPRESSLY NOR DIRECTLY CONFLICT WITH OPINIONS OF THIS COURT OR OTHER DISTRICT COURTS OF APPEAL.

Petitioner argues that in addition to *Wiesenberg*, the *Leslie* and *Spivey-Ferguson*, opinions upon which the Third District Court of Appeal relied to uphold Costa's forum selection clause, conflict with *Carnival Corporation v. Carlisle*, 953 So. 2d 461 (Fla. 2007), *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). However, although the *Wiesenberg* court relied upon *Leslie* and *Spivey-Ferguson*,

these opinions do not directly and expressly conflict with *Carlisle*, *Still*, or *Rountree*. In fact, these opinions are all reconcilable.

Contrary to Petitioner's assertions, neither *Wiesenberg*, *Leslie*, nor *Spivey-Ferguson* conflict with *Carlisle*, *Still*, or *Rountree* as these do not involve the enforceability of a forum selection clause. See *Carnival Corporation v. Carlisle*, 953 So. 2d 461 (Fla. 2007); *Still v. Dixon*, 337 So. 2d 1033 (Fla. 2d DCA 1976); *Rountree v. A.P. Moller Steamship Co.*, 218 So. 2d 771 (Fla. 1st DCA 1969). In fact, neither *Carlisle*, *Still*, nor *Rountree* involve contractual agreements or analyze forum selection clauses in a passenger ticket contract such as the contracts involved in *Wiesenberg*, *Leslie*, and *Spivey-Ferguson*. *Id.* To be precise, the courts in *Carlisle*, *Still*, and *Rountree*, acknowledge the Savings to Suitor's clause and note that the presence of admiralty jurisdiction does not oust state court jurisdiction. *Id.* In effect, *Carlisle*, *Still*, and *Rountree* lack the additional "contractual layer" that is present in *Wiesenberg*, *Leslie*, and *Spivey-Ferguson* and which necessarily changes the outcome of any analysis between the two lines of cases.

Moreover, *Leslie*'s analysis was controlled by federal maritime law which governs the enforceability of a forum selection clause in a passenger cruise ticket contract. 22 So. 3d at 563. What is more, rather than an analysis of cases that generically cite the Savings to Suitor's Clause of 28 U.S.C. § 1331, the district

court of appeal in *Leslie* correctly applied two United States Supreme Court maritime cases that directly addressed the enforceability of forum selection clauses: *M/S Bremen v. Zapata Off-Shore, Co.*, 47 U.S. 1 (1972) and *Carnival Cruise Lines, Inc. v. Shute*, 499 US 585 (1991). *See Leslie*, 22 So. 3d at 564-65. Indeed, the *Wiesenberg*, *Leslie*, and *Spivey-Ferguson* opinions do not directly nor expressly conflict with *Carlisle*, *Still*, and *Rountree*, but rather, harmonize and clarify the understanding of the interaction between federal courts and state courts in matters of admiralty law.

III. THERE EXISTS NO EXPRESS AND DIRECT CONFLICT, NOR VIOLATION OF THE PRINCIPLES OF UNIFORMITY OF MARITIME LAW BETWEEN THIS COURT'S *CARLISLE* OPINION AND THE OPINIONS PRESENTLY ON REVIEW BEFORE THIS COURT.

Petitioner claims a direct and express conflict between the opinions presently before this Court for review and prior decisions of this Court which address uniformity in maritime law. *See Carnival Corporation v. Carlisle*, 953 So. 2d 461 (Fla. 2007). Certainly, the *Leslie* opinion correctly applied and followed federal maritime law and in doing so, highlights uniformity – a well-settled principle of maritime law which was recognized by this Court in *Carlisle*. *Leslie*, 22 So. 3d 561 (Fla. 3d DCA 2008). Accordingly, the district court of appeal in *Wiesenberg* court, relying on *Leslie*, similarly followed and adhered to the uniform

principles of maritime law as expounded in *Carlisle. Wiesenberg*, 35 So. 3d 910 (Fla. 3d DCA 2010). Thus, the opinions in *Leslie*, and in turn, *Wiesenberg*, are reconcilable with *Carlisle*, *Still* and *Rountree*, and are not inconsistent with Florida law as they correctly apply federal maritime law and, specifically, leave intact the principle of uniformity. *See Carlisle*, 953 So. 2d 461 (Fla. 2007); *Still*, 337 So. 2d 1033 (Fla. 2d DCA 1976); *Rountree*, 218 So. 2d 771 (Fla. 1st DCA 1969).

IV. THE OPINIONS ON REVIEW BY THIS COURT DO NOT EXPRESSLY NOR DIRECTLY CONFLICT WITH DECISIONS OF THIS COURT THAT HOLD A WAIVER OF CONSTITUTIONAL RIGHTS, SUCH AS RIGHT TO A JURY, MUST BE KNOWINGLY MADE.

Basing his argument on *Hollywood, Inc. v. City of Hollywood*, 321 So. 2d 65 (Fla. 1975), *Chames v. DeMayo*, 972 So. 2d 850 (Fla. 2007), and *Blair v. State*, 698 So. 2d 1210 (Fla. 1997), Petitioner claims that there exists a direct and express conflict with other decisions of this Court which hold that a waiver of a jury trial must be knowingly made. In fact, Petitioner claims that “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 United States and Florida Constitutions.’” However, despite such a blanket statement, Petitioner fails to show a direct or express conflict. Namely, Petitioner fails to allege facts to authorize the exercise of jurisdiction by this Court. *See Seaboard Air Line Railroad*

Co. v. Branham, 104 So. 2d 356, 358 (Fla. 1958). Nevertheless, assuming arguendo that Petitioner's allegations are sufficient, his claims of direct and express conflict, nevertheless, fail.

Specifically, Petitioner's underlying argument on the merits is that the forum selection clause results in an involuntary waiver of his right to a jury trial because of certain federal limitations in admiralty actions. Based on this argument, Petitioner claims conflict between the *Leslie* opinion and cases that affirm the basic proposition that waivers of constitutional rights, under Florida law, must be knowing and intentional. *Hollywood, Inc. v. City of Hollywood*, 321 So. 2d 65, 71 (Fla. 1975); *Chames v. DeMayo*, 972 So. 2d 850, 860-61 (Fla. 2007); *Blair v. State*, 698 So. 2d 1210 (Fla. 1997).

Notably, the *Leslie* opinion does not address the jury waiver issue raised by Petitioner. See *Leslie*, 22 So. 3d at 56. Moreover, none of the cases cited by Petitioner on this point establish conflict jurisdiction as they are not based on federal maritime law and they do not involve the validity of a contractual forum selection clause. These are significant differences because there is no right to a trial by jury in an admiralty or maritime action. See *Concordia Co. v. Panek*, 115 F. 3d 67, 70 (1st Cir. 1997); *Fitzgerald v. United States Lines Co.*, 374 U.S. 16, 19 (1963); *Manuel v. Hercules Offshore Corp.*, 2005 US Dist LEXIS 936 (E.D. La. 2005); Fed R. Civ. P. 38 (e) ("These rules shall not be construed to create a right to

trial by jury of the issues in an admiralty or maritime claim”.); *Schertzer v. Carnival Corp.*, 2004 AMC 2323 (Fla. 11th Cir. 2004) (enforcing the identical forum selection clause in *Leslie* and holding that there is no constitutional right to a jury trial by parties asserting claims for maritime torts on passenger ships.) Accordingly, there is no express or direct conflict between the *Wiesenberg* opinion, the *Leslie* opinion, and the cases cited by Petitioner.

CONCLUSION

Indeed, the *Wiesenberg* opinion does not conflict, expressly or directly, with the decisions of this Court or other district courts of appeal, and therefore provides no basis by which this Court may invoke express and direct conflict jurisdiction. Having no express and direct conflict jurisdiction to review the *Wiesenberg* opinion, as contemplated by Article V, Section 3(b) of the Florida Constitution, Respondent, Costa Crociere S.p.A. respectfully requests that this Court decline to exercise discretionary conflict jurisdiction in this matter.

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that a true and correct copy of the foregoing was furnished via U.S. Mail and Facsimile on this 16th day of August, 2010 to: Philip D. Parrish, Esquire, PHILIP D. PARRISH. P.A., Appellate Counsel for Petitioner, 7301 S.W. 57th Court, Suite 430, Miami, Florida 33143, and Michael F. Guilford, Esquire, MICHAEL F. GUILFORD, P.A., Trial and Appellate Counsel for Petitioner, 44 West Flagler Street, Suite 750, Miami, FL 33130.

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CERTIFICATE OF COMPLIANCE WITH FONT STANDARD

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

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